THE PRINCIPLE OF SELF-DETERMINATION
- and the case of Kosovo

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“Standing on the moon, watching the earth from a different perspective, one sees water and land, and, if one would take a closer look, one might see mountains, rivers, forests and deserts. If one would get even closer to the surface of the earth, one would be able to distinguish cities, lakes and roads. One would however search in vain if one would wish to identify a ‘State’.\textsuperscript{1}

One would also search in vain if one would wish to identify a \textit{people}, or \textit{nation}, watching the earth from this perspective. The reason is obvious; a nation is above all a historical construction, created by man, by means of common history and culture.\textsuperscript{2} As regards a state, it is primarily a legal concept, also created by man, for certain purposes.\textsuperscript{3} From the perspective of international law it is of great importance to know what kind of entity it is that qualifies as a state, also \textit{when} an entity possesses the right to become a state.

These questions have been much debated throughout history. Especially since the fall of the Berlin wall in 1989, symbolizing the end of the Cold War as well as the end of the bipolar world-order that had emerged in the wake of World War II. With the fall of the Berlin wall and the passing of the Cold War, a new international order arose. Today peace is less often threatened by conflicts between states than it is by power contest and friction within states. Internal, rather than external, security risks and threats to territorial integrity is the reality many states are facing, with most of the threats coming from nationalist groups seeking to secede and establish new independent states.\textsuperscript{4}

The cause of this upsurge of nationalism within groups, mostly referred to as \textit{peoples} or \textit{nations}, claiming a \textit{right of self-determination}, is discussed among international law

scholars as well as within the field of political science. Some consider it as a response to the process of globalization while others argue that nationalism has its own autonomous history. Independent of the truth, it is evident that a growing number of peoples, or nations, within existing states are attempting to attain the same goal – to legitimize their claim which they refer to the right of self-determination of peoples – and especially to a right of unilateral secession, a right that several groups claim being encompassed by the aforementioned right. Only in the period of 1990-95, more than twenty new states came into existence, compared with the period of 1945-89 when there (outside the colonial context) hardly was any successful break-away from a state, with the only example being Bangladesh (which in fact was a quasi-colonial case of break-away).

The break-ups of, for example, the Soviet Union and Yugoslavia in 1991, along with a large number of on-going and realized claims for self-determination from for example Chechnya, Montenegro and, of particular interest here, Kosovo, together with some of the most celebrated cases such as Palestine, Quebec and Kurdistan each and everyone, successful or not, demonstrate that nationalism and the quest for self-determination represent a major challenge to the current international order, as well as a challenge for international law; challenges that most likely stem from the fact that the

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8 The Union of Soviet Socialist Republics, USSR.
9 The Socialist Federal Republic of Yugoslavia, SFRY.
10 The Chechen Republic, or, informally, Chechnya is a federal subject of Russia located in the Northern Caucasus’ mountains in the Southern Federal District. After the collapse of the Soviet Union in 1991, the Chechen-Ingush ASSR was split into two – the Republic of Ingushetia and Republic of Chechnya. The latter proclaimed the Chechen Republic of Ichkeria, which sought independence. Following the First Chechen War with Russia, Chechnya gained de facto independence as the Chechen Republic of Ichkeria. Russian federal control was restored during the Second Chechen War. Since then there has been a systematic reconstruction and rebuilding process, though sporadic fighting continues in the mountains and southern regions of the republic.
international world order is based on a system of states rather than a system of *nation-states*.\(^{13}\)

Despite the increased number of new states and claims for self-determination, the connotation of *the principle of self-determination*, as a general right, remains uncertain; there is an existing right, *lex lata*, under international law, at the same time, that right appears to be *lex obscura*. Authoritative sources speak of the principle to its existence and numerous groups of peoples rely on it, as a basis for what they claim to be their right to respect or independence. Nevertheless governments of states in general contest the positions of the peoples or nations, especially if the question of secession arises. Consequently we have the repeated assertion of the right of self-determination, at the same time the repeated denial of the same right.\(^{14}\)

As the title enlightens the main focus of this paper is the principle of self-determination in relation to Kosovo,\(^{15}\) an entity that declared itself independent in a historic secession from Serbia on February 17, 2008.\(^{16}\) Until 2008 the international community was reluctant to support an independent Kosovo, most likely out of fear that such support would open a “Pandora’s box” as regards peoples, or nations, with possible claims of self-determination. The Serbian and the Kosovo Albanian sides are also diametrically opposed in regards to the question of Kosovo’s status and the Constitutional Court of the Republic of Serbia immediately deemed the declaration of independence as illegal, arguing it was incompatible with the sovereignty dimension of international law.\(^{17}\)

On April 19, 2013 Serbia and Kosovo signed a historic agreement, providing the first formal basis for normalized relations between the two, defining the conditions for large-


\(^{15}\) Also referred to as Kosovo and Metohija (e.g. by the Serbs) and Kosovë or Kosova (e.g. by the Kosovo Albanians).

\(^{16}\) The Assembly of Kosovo declared Kosovo independent on February 17, 2008, as the Republic of Kosovo (Albanian: Republika e Kosovës). See the Kosovo Declaration of Independence, http://www.assembly-kosova.org/?cid=2,128,1635 (retrieved on 2013-10-06).

\(^{17}\) See Serbian newspaper Blic online, 2013-08-17, Nikolic s Abongom Obamom: Uporni da ne priznamo Kosovo čak i po cenu EU (English: Nikolic to Abong Obama: Persistent not to recognize Kosovo even at the cost of EU), http://www.blic.rs/Vesti/Politika/399675/Nikolic-s-Abongom-Obamom-Uporni-da-ne-priznamo-Kosovo-cak-i-po-cenu-EU (retrieved on 2013-10-06).
scale devolution of northern Kosovo and its Serb population.\textsuperscript{18} As of September 26, 2013 the Republic of Kosovo has received 108 diplomatic recognitions as an independent state; 106 out of 193 United Nations (UN) member states, 23 out of 28 European Union (EU) member states, 24 out of 28 NATO member states, and 35 out of 57 Organization of Islamic Cooperation (OIC) member states have recognized Kosovo. Serbia however refuses to acknowledge Kosovo as an independent sovereign state.\textsuperscript{19}

The question to be answered here is whether Kosovo’s unilateral secession is compatible with the principle of self-determination, as it has evolved under international law. The emphasis made is mainly on the theoretical aspects of the principle and the approach chosen is doctrinal, \textit{lex lata}, i.e. as the principle of self-determination exists under international law. The study is also committed to a contextual approach to law in which \textit{history, politics} and \textit{jurisprudence} all serve the legal clarification of the principle of self-determination. Contemporary international legal aspects such as UN resolutions regarding Kosovo are examined to the extent necessary in this specific case.

The essay is divided into four sections, starting with a summary. The \textit{second} section deals with the principle of self-determination, its historical and theoretical background as well as its current status under international law. This section also operates as the basis for section \textit{three} dealing with the case of Kosovo. The \textit{fourth} section provides one with some conclusions drawn reflections made during the journey of examining, analyzing and writing \textit{The Principle of Self-Determination and the Case of Kosovo}.


I. SUMMARY

The idea of peoples as possessors of an inherent right to decide their own destinies can be traced to both the American and the French Revolutions and the enlightenment ideas of the 18th century, concerning popular sovereignty. At that time self-determination was regarded as a right vested in the individual.

In the middle of the 19th century, as a result of growing nationalism, the concept shifted to the concept of self-determination as a right of peoples, or nations, to independent statehood.

Internationally the principle of self-determination was first recognized as a general principle through Articles 1(2) and 55 of the UN Charter of 1945. Article 1(2) states that one of the raison d’être of the UN is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” (authors italics). Article 55 further states that the UN “shall promote” various policies relating to economic and social conditions and respect for human rights, in favor of achieving the goal set forth in Article 1(2). Through the Charter the principle of self-determination was considerably strengthened.

The two International Human Right Covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), also refer to the principle of self-determination. Phrased with the same wording, Articles 1(1) stipulate that “[a]ll peoples have the right of self-determination”, and [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (authors italics). Due to the adoption of these two covenants the notion of self-determination shifted from a legal obligation, in essentially the area of decolonization, to a universally recognized human right.

The on-going character of the right of self-determination is also reflected in several other important international instruments, such as the Friendly Relations Declaration of 1970 and the Helsinki Final Act of 1975. These instruments, among others, confirm that
the principle of self-determination is part of international law and the law of the United Nations.

The language used to design the principle in the UN Charter is also enriched by international acts, by which self-determination has developed into a principle of customary international law. In the Case Concerning East Timor the International Court of Justice (ICJ), for example, stipulated that self-determination is an elementary principle of contemporary international law. The court further held that the entitlement to respect of self-determination is a right erga omnes.\(^20\)

With these facts given it seems not only possible but also appropriate to conclude that the principle, or right, of self-determination is a legally binding principle under international law.

As mentioned in the introduction, answers to some questions concerning the principle still remain ambiguous; at the same time the right to self-determination appears to be an existing right, lex lata, it appears to be lex obscura. International law scholars speak of the principle to its existence, and numerous groups of peoples rely on it, as a basis for political respect or independence. Nevertheless, governments of states frequently contest the peoples, especially if a unilateral secessionist claim is brought up.\(^21\)

**What does the right of self-determination of peoples mean?**

Does the principle of self-determination mean that a “people” is free to determine only its internal status, i.e. its political, economic, social and cultural development within the framework of an existing state? Or, does it mean that a “people” is entitled to decide over its external political status, e.g. through independence or assimilation with another state? Or does it imply both?

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20 East Timor (Portugal v Australia), Judgement, ICJ Reports, 1995, p. 90, para. 243. Erga omnes obligations have been defined as “obligations of a state towards international community as a whole. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection”; Barcelona Traction, Light & Power Company, Limited, Judgment, ICJ Reports, 1970, p. 3, para. 32.

According to recognized sources of international law, the right to self-determination is generally fulfilled through internal self-determination. This includes a democratic ability of a people to determine its political destiny within a state. The right to external self-determination, on the other hand, includes a right of a people to establish an independent and sovereign state, to freely associate and integrate with an independent state, or to freely emerge into any other political status. Several relevant legal instruments concerning the principle of self-determination however refer to the principle of territorial integrity as well, and it is stated that self-determination is not to be construed as authorizing or encouraging any action that would dismember or impair the territorial integrity of a state.\textsuperscript{22} The right of self-determination may still arm a population with the power to choose its own political destiny.\textsuperscript{23}

To be valid under international law, a unilateral secession will always require a people\textsuperscript{24} subject to historical and persistent state-abuse.\textsuperscript{25} Further, there must be no viable alternative than secession, this meaning that secession can only be used as a last resort.\textsuperscript{26}

The first question to answer is: who are the “people”?

As regards the travaux préparatoires of the San Francisco Conference, underpinning the UN Charter, it points to an inconclusive discussion of “peoples”, and outside the area of decolonization it appears difficult to define the term, and two different possibilities have emerged. One is that “people” means the entire population of a state, the other that “people” means persons comprising a distinctive group on basis of

\textsuperscript{22} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 127-128. In para. 128 the court referred to the Friendly Relations Declaration, the Vienna Declaration and other international documents.
\textsuperscript{23} See Brownlie Ian, Principles of International Law, 6\textsuperscript{th} ed. Oxford University Press, 2003.
\textsuperscript{24} The requirement of a people is found in the text of the principle itself, as stated in international instruments, such as the UN Charter and the Friendly Relations Declaration.
\textsuperscript{25} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126 and 134, “The Vienna Declaration requirement that governments represent “the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.”
\textsuperscript{26} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 134.
ethnicity, language, common history and possibly religion, i.e. a national group, or a nation.\textsuperscript{27}

Other important features taken into account when looking at the notion of a “people” may be territorial or geographical, economic and quantitative. The most essential and indispensable characteristic is however not physical but rather ideological: a people begin to exist only when it becomes aware of its own identity and emphasizes its will to exist.\textsuperscript{28} In the Reference re Secession of Quebec the Canadian Supreme Court confirms that “peoples” could be other groups of individuals than the entire population of a state.\textsuperscript{29} A strong argument for entitling groups other than states the right to secede is that it will prevent, or at least deter, states from discriminatory behavior and human rights violations against such groups.

For a secessionist claim to be considered legal, outside the colonial context, state practice normally emphasizes the consent of the parties involved. In the absence of a constitutional provision secession may occur upon the approval of a parent-state, before or after the declaration of independence.\textsuperscript{30} If a seceding party lacks constitutional provision or approval by its parent-state the question of secession becomes more questionable. State practice suggests a slight support for unilateral declarations of independence where the government of the particular parent-state in question opposes secession.\textsuperscript{31} It has though been held that if a people within a state, i.e. a national group that is linked by ethnicity, language, common history and possibly religion as well as other characteristics, is blocked from exercising its right to internal self-determination,

\textsuperscript{29} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 124. According to Article 38 of the Statute of ICJ decisions of national courts are considered to be sources of international law. See footnote 175.
that people is entitled to exercise its right of *external* self-determination, through secession.\(^{32}\)

According to this so-called *remedial secession doctrine* the right of external self-determination arises only in “the most extreme of cases and, even then, under carefully defined circumstances”\(^{33}\); the claimant must show serious human rights violations by its parent-state. Only then will the right to full sovereignty, including the right to international recognition, come into play. The remedial secession doctrine has become internationally recognized through cases such as the Aaland Island dispute\(^{34}\) and the Reference re Secession of Quebec.\(^{35}\) A unilateral secession can however only be made as a remedy of *last resort*, meaning that all other options must be exhausted before secession can be considered legal under international law.\(^{36}\)

*Applying the principle of self-determination to Kosovo*

In 1990 a state of emergency was declared in Kosovo. In September that year Serbia adopted a constitution revoking Kosovo’s autonomy and providing direct rule from Belgrade. Kosovo’s earlier status, as a province under the 1974 Constitution of the Socialist Federal Republic of Yugoslavia\(^{37}\), was reduced to absolutely nothing.\(^{38}\) The situation escalated into a full-scale war and gross human rights violations were conducted by the Yugoslav (Serbian) military.

The Kosovo war ended in 1999, by the help of a NATO air campaign, launched to halt the humanitarian catastrophe in Kosovo.\(^{39}\) The NATO intervention was followed by an

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\(^{32}\) Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126 and 134, “The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind” adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.”

\(^{33}\) Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126.

\(^{34}\) The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, Commission of Rapporteurs, 1920. Applying these criteria to the facts, the Commission of Rapporteurs found that the Aalanders had no right to secession because they had not been oppressed by Finland.

\(^{35}\) Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126 and 134.

\(^{36}\) Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 134.


\(^{38}\) See the Constitution of The Republic of Serbia, Belgrade, September 28, 1990 (the 1990 Serbian Constitution), Articles 108-112.

international territorial administration, through UN Security Council Resolution 1244 (UNMIK), affirming Serbia’s territorial integrity and calling for political process leading to a settlement of Kosovo’s future status.\(^{40}\)

After almost a decade of failed negotiations between Serbia and Kosovo, and what Kosovo perceived as a dead end, Kosovo’s parliament endorsed a unilateral declaration of independence on February 17, 2008.\(^{41}\) Serbia deemed this declaration illegal, arguing it was not compatible with the UN Charter, the Constitution of Serbia, the Helsinki Final Act, nor the UN Security Council Resolution 1244 (including previous resolutions). Serbia also announced its plan to call on the International Court of Justice (ICJ) to rule on whether the declaration of independence was in breach of international law.\(^{42}\)

In August 2008 Serbia filed its official request at the United Nations, and, in July 2010 ICJ ruled that “the declaration of independence of the 17 February 2008 did not violate general international law because international law contains ‘no prohibition on declarations of independence’”, nor did the declaration of independence violate UN Security Council Resolution 1244, since this resolution did not describe Kosovo’s final status, nor had the Security Council reserved for itself to decide on the final status of Kosovo.\(^{43}\) According to ICJ the issue of recognition was not a legal but a political one, and the judges were determined in that they were not taking a stand on whether Kosovo had a right to secede, nor whether Kosovo was now a state.\(^{44}\)

The question to be answered here is not whether Kosovo’s declaration of independence was made in accordance with international law but whether Kosovo is entitled the right to external self-determination, or rather, independence through unilateral secession.


To be entitled the right of external self-determination, through secession, the Kosovo Albanian population must qualify as a people, subject to historical and persistent state-abuse by its parent-state Serbia. All other remedies of self-determination must further be exhausted.

According to many historians, Kosovo Albanians are descendants from the Illyrians who inhabited the area of what is know as Kosovo today, already in the 2nd century BC. For centuries Kosovo Albanians have preserved and cultivated their characteristics, such as their common language (Albanian), traditions, culture, religion and customs, distinct from characteristics of other groups of peoples inhabiting the area. Since Kosovo’s incorporation with Serbia in 1912-1913, the territory has also been recognized as a distinct geographical region with clear borders. Over time the Kosovo Albanians have developed their distinct identity through events such as Kosovo’s separation from Albania, an extensive struggle for autonomy, the 1974 constitutional arrangements within the Socialist Federal Republic of Yugoslavia (SFRY), and last but far from least, a decade of gross human rights violations conducted by Serbian authorities. Furthermore the Kosovo Albanians make up to the vast majority of 92 percentages of Kosovo’s total population, and in 2008 they had their own political institutions established in Kosovo.

In this view it is rational to conclude that Kosovo Albanians constitute a people for the rights of peoples in international law. This however does not give Kosovo an automatic right to secede. According to the remedial secession doctrine the Kosovo Albanian people must be able to show that Serbia has committed severe human rights violations against the Kosovar people.

In the framework of the Socialist Federal Republic of Yugoslavia (SFRY) Kosovo was granted autonomy and in the 1974 Constitution Kosovo advanced to a province, which was the closest after being a republic. The 1974 Constitution also stipulated that the borders of Kosovo could not be changed without the approval of the Kosovar parliament.\(^{50}\) In 1989 Serbia nevertheless forced the parliament of Kosovo to accept the abolishment of its autonomous status.\(^{51}\) A year later the autonomous status of Kosovo only existed in name, and in the course of 1990 a new law, adopted by the Serbian National Assembly, dissolved the parliament and government of Kosovo and all powers reverted to the Serbian authorities.\(^{52}\) Eventually the 1992 Constitution of the Republic of Yugoslavia no longer contained any reference to any autonomous province.\(^{53}\)

In the wake of the new Serbian constitution the educational system in Kosovo underwent radical changes, as did the police, business and health care systems, with the result of grave discriminations taking place against the Kosovo Albanian population. The use of the Albanian language was prohibited in the public sphere and severe state-abuse took place against the Kosovo Albanian population.\(^{54}\) The outcome of the Serbian measures consisted in an overall worsening of the living conditions for the Kosovo Albanians.\(^{55}\) The Serbian government perpetrated gross human rights violations against the Kosovo Albanian population for more than a decade, including massacres involving also the Racak massacre taking place in 1999, resulting in the NATO intervention and the withdrawal of Serbian military in Kosovo.\(^{56}\)


\(^{52}\) See the Constitution of The Republic of Serbia, Belgrade, September 28, 1990 (the 1990 Serbian Constitution), Articles 108-112.


It is not possible to say whether the state-abuse perpetrated by Serbia would have continued or not if UN forces would have been withdrawn when Serbia withdrew its military from the region. It is though fair to conclude that Kosovo fulfills the requirement of human rights violations that entitles the Kosovo Albanian people the right of external self-determination. But a remedial secessionist claim may only be used as a last resort.

After 1989 Kosovo Albanians have openly been denied internal self-determination. Gross human rights violations have been perpetrated against them – thus making the question of remedial secession reasonable. The situation on Kosovo was however put to an end by a NATO air raid in 1999, followed by the adoption of UN Security Council Resolution 1244, re-establishing self-governing institutions in Kosovo, affirming Serbia’s territorial integrity and calling for a political process leading to a settlement of Kosovo’s future status. Yet, the international community has witnessed years of failed negotiations between Serbia and Kosovo, as well as an unwillingness to negotiate. For the Kosovo Albanian people, it seems rational to say that there have been too much of a turbulent history with Serbia to conceive a realistic political arrangement other than independence, and it appears sensible to conclude that all other options, or attempts, of self-determination than secession have been exhausted by the Kosovo Albanian people.

A reasonable argument against secession could though be that the human rights violations against Kosovo Albanians took place a decade ago, under the leadership of Slobodan Milosevic who no longer is in play. Further, that those responsible for conducting war crimes have been prosecuted. Because of the inflammatory history between Kosovo and Serbia there is however no trust left to conceive an arrangement suitable for the two, other than an independent Kosovo.

Already in December 2007 the Troika, made up of the US, EU and Russia, reported to the UN Security-General that Serbia and Kosovo “were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.” The Troika also stated that further

talks over Kosovo's status would be a waste and that Kosovo could declare independence any time.\(^5\) Any other realistic option than secession has so far failed and in this view the conclusion must be that Kosovo’s declaration of independence and unilateral secession from Serbia, fulfills the requirement of being a remedy of last resort and thus legal under international law.

II. SELF-DETERMINATION

The development of the principle of self-determination has most of all been a historical process. Events have occurred in a particular order, and have been responded to on a case-by-case basis. The law of self-determination has therefore developed much in a contingent and often partial and incomplete way. Thus many questions can be raised regarding the principle of self-determination. For example: to who does the principle of self-determination apply? Is there a general right of self-determination? What does the notion “self-determination” actually mean? Who are the self and what is there for them to determine? To what extent have international law makers accepted the political postulate of the principle? And, perhaps of most importance, what is the status of the principle, or right, of self-determination under international law today?

A. The historical background

A growing number of secessionists within existing states, including Kosovo-Albanians inhabiting Kosovo, are attempting by either pacific or violent means to legitimize their claims, which they refer to the right of self-determination of peoples.

Historically, the principle of self-determination is associated with and has been instrumental in the principal tremors of contemporary international relations. To study the evolution of the principle into its present state is therefore of crucial importance for the understanding of it. Because, “[h]ow could one understand the way the law is today if one does not study its evolution into its current state?”

The American Declaration of 1776 and the French Revolution of 1789

Historically the idea of peoples as possessors of an inherent right to decide over their own destinies, the right of self-determination, has its roots in the late decades of the 18th Century, in the Enlightenment ideas pertaining to popular sovereignty. The modern

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59 Kosovo was declared independent by the Assembly of Kosovo on February 17, 2008, http://www.assembly-kosova.org/?cid=2,128,1635 (retrieved on 2013-10-06).
concept of the principle of self-determination can actually be traced back to the American Declaration of Independence of July 4, 1776, as well as to the French Revolution of 1789 and the thesis of les droits de peuples – Déclaration des droits de l’homme et du citoyen, in English the Declaration of the Rights of Man and the Citizen.\textsuperscript{62}

The American Declaration stated that governments derived “their just powers from the consent of the governed”, and “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it”.\textsuperscript{63} Also for the French revolutionaries self-determination was a democratic ideal valid for all mankind; it was an assertion of the right of man against tyranny, the ancien régime. Sovereignty should be transferred from the ruler to the ruled and government should be based on the will of the people.

In France the overthrow of the absolute monarchy was accompanied by the proclamation of individual rights and freedoms in the Declaration of the Rights of Man and the Citizen of August 26, 1789. The famous words Liberté, Égalité, Fraternité was the motto of the French people and the principle of government was “government of the people, by the people and for the people”. Departments, districts, cantons and communes administered by elected assemblies were established to promote the institutions of representative government. The attachment to the rights of man and the principles of national sovereignty as defined by the Declaration of 1789, to “the free determination of peoples” was proclaimed in the French Constitution.\textsuperscript{64}

Consistently with their ideas France at first renounced all wars of conquest and only agreed to annexations of territory after plebiscites. Soon the French started to misapply the principle of self-determination as it was put down in the Declaration of 1789. In


\textsuperscript{64} Gayim Eyassu, \emph{The Principle of Self-Determination: A Study of its Historical and Contemporary Legal Evolution}, Norwegian Institute of Human Rights, Publication No. 5, Oslo, p. 6-7.
some cases France even used the principle to justify annexation of lands belonging to other sovereigns.65

The influence of bourgeois nationalism

A development in the theoretical and political thinking of the state took place in the early 19th century. It emphasized the link between on one hand the state as a political organization and on the other hand the people as a social and cultural one. Consequently the state no longer perceived solely as a juristic and territorial concept. It now became linked to a people, or nation. As it was assumed that cultural and political communities, so-called “natural” political entities, could be identified, the theory of nationalism put forward the idea of a universal system of nation-states, wherein nationalities should have their own states and the society composing a state should be congruent with the ethnically homogenous “nationality” as far as possible.66

Already in the late 18th Century two political thinkers, Burke and Rousseau, both implicitly referred to a “right” of a “nationality” to determine its own (political) destiny.67 Burke and Rousseau referred to the so-called principle of nationalities, which in the beginning of the 20th Century became the principle of national self-determination; as the conception of individual self-determination shifted to the idea of collective self-determination, as an objective right of nations to independent statehood.68

Many nationalities within existing states started to claim their right to self-determination and the ideology of nationalism became the principal expression of uprising against “artificial multinational empires”. Soon it became evident that a line had to be drawn somewhere.69

67 Raic David, Statehood and the Law of Self-Determination, Kluwer Law International, the Hague, 2002, p. 176-177, see note 25 and 26. Burke and Rousseau referred to a right of a nationality to determine its own destiny as a protest against the sale of Corsica by the Genoese to France. In response to the sale Burke commented that “[t]hus was a nation disposed of without its consent, like trees on an estate”, and Rousseau wrote “[i]t is making fools of people to tell them seriously that one can at one’s pleasure transfer peoples from master to master, like herds of cattle, without consulting their interest of their wishes”.
The criterion for the European liberal thought was support to those claims of self-determination which threatened the Austro-Hungarian and the Russian empires, while at the same time denying support to the lesser nationalities who where considered to be outdated survivals of the past. The result of the nationalist movements in Europe in the 19th Century was the formation of two new European states; Germany and Italy, both based on national characteristics.

**Lenin and the “Leninist interpretation of self-determination”**

Bourgeois nationalism was, however, not the sole nurturer of the principle of self-determination at this time, the principle was espoused also by the Socialist Movement and the Bolshevik Revolution.

In 1913 Stalin wrote a detailed pamphlet, *Marxism and the National Question*, in which he assumed the concept of “nation” as a cultural historical phenomenon, and claimed that the right of self-determination gave every nation a right to decide for itself between for example autonomy and secession from its mother-state. In 1916, Lenin published his thesis *The Socialist Revolution and the Right of Nations to Self-Determination* in which also he claimed a “right of self-determination of nations”.

The term “nation” relied on Stalin’s formulation in *Marxism and the National Question*, which read:

“A nation is a historically produced stable community of people originating on the basis of language, of territory, of economic life, and psychological form of existence which reveals itself in the community

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of culture. Only the existence of all these features together constitutes a nation.”

According to Lenin self-determination meant the right of oppressed nations to political separation from the oppressor and the formation of a new independent national state. Lenin viewed this right as applicable to a collective only. The Bolshevik government affirmed its support for the Leninist assumption of national self-determination. According to Lenin and the Bolsheviks the constitutive factor for the right to self-determination was oppression as a result of bourgeois nationalism. Hence the support for freedom of self-determination should not be equated with encouraging separatism.

Repeatedly Lenin stated that a distinction had to be made between the “right to secession” and the “resort to secession”. A resort to secession would only take place:

“when national oppression and national friction make joint life absolutely intolerable and hinder any and all economic intercourse. In that case, the interest of capitalism development and the freedom of class struggle will be best served by secession.”

Secession should thus only be a remedy of last resort.

The raison d’être and the function of the right of self-determination under Lenin’s conception was however “not the protection or development of the collective identity”, or any other collective interest of the “nation”. The right of self-determination, defined as a right to secession, was proposed solely as a tool for the realization of the integration of all nations in a universal socialist community. Capitalism could only develop

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successfully in separate nation-states, hence Lenin’s interest in secession and the formation of new states.\textsuperscript{78}

In the early period of the 20\textsuperscript{th} century Lenin and other Russian and Soviet leaders primarily envisioned self-determination as having three components: First, self-determination could be invoked by ethnic or national oppressed groups for the determination of their political destiny. Secondly, self-determination was a principle to be applied during the aftermath of military conflicts between sovereign states where it should guarantee that no state frontiers contrary to the will of the population concerned would be established. Finally, self-determination was considered as an anti-colonial postulate, a right by which nations of all colonial countries were entitled to invoke against the imperial powers, designed to lead the liberation of colonies.\textsuperscript{79}

To Lenin self-determination was merely a tool for the purpose of and subject to socialism. The contribution of Lenin’s ideas to the legal theory of self-determination is thus limited. Lenin’s “oppression-secession-theory” should however not be underestimated.\textsuperscript{80} In fact Lenin was the first to insist to the international community that the right of self-determination should be established as one general decisive factor for the liberation of peoples, or nations, as a remedy of last resort.\textsuperscript{81}

Defined and developed by both Lenin and Stalin, the principle of self-determination was now represented as one of international law.\textsuperscript{82}


Woodrow Wilson and the “Wilsonian concept of self-determination”

Contemporaneous with Lenin and Stalin the president of the United States of America, Woodrow Wilson, launched his ideas on the principle of self-determination. In 1916 Wilson publicly declared a statement evidently based on the concept of “consent to the governed”:

“[w]e believe these fundamental things [...] that every people has a right to choose the sovereignty under which they shall live.”

In January 1917, Wilson set out the principles upon which the peace between the belligerents in World War I should stand. One principle in the so-called Peace Without Victory addressed to the US Senate includes the following:

“[n]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive their just power from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty as if they were property.”

In August the same year Wilson declared that:

“[t]he American people [...] believe that peace should rest upon the rights of peoples, not the rights of Governments – the rights of peoples great and small, weak or powerful – their equal rights to freedom and security and self-government.”

In January 1918 President Wilson outlined his famous *Fourteen Points* in a message of *War Aims and Peace Terms* to the US congress, which he ended with the following words:

“An evident principle runs through the whole program I have outlined. It is the principle of justice to all peoples and nationalities, and their right to live on equal terms of liberty and safety with one another, whether they be strong or weak.”

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86. 1. Open covenants of peace must be arrived at, after which there will surely be no private international action or rulings of any kind, but diplomacy will proceed always frankly and in the public view.

2. Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.

3. The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.

4. Adequate guarantees given and taken that national armaments will be reduced to the lowest points consistent with domestic safety.

5. A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of the government whose title is to be determined.

6. The evacuation of all Russian territory and such a settlement of all questions affecting Russia as will secure the best and freest cooperation of the other nations of the world in obtaining for her an unhampered and unembarrassed opportunity for the independent determination of her own political development and national policy, and assure her of a sincere welcome into the society of free nations under institutions of her own choosing; and, more than a welcome, assistance also of every kind that she may need and may herself desire. The treatment accorded Russia by her sister nations in the months to come will be the acid test of their good will, of their comprehension of her needs as distinguished from their own interests, and of their intelligent and unselfish sympathy.

7. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty, which she enjoys in common with all other free nations. No other single act will serve as this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.

8. All French territory should be freed and the invaded portions restored, and the wrong done to France by Prussia in 1871 in the matter of Alsace-Lorraine, which has unsettled the peace of the world for nearly fifty years, should be righted, in order that peace may once more be made secure in the interest of all.

9. A re-adjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.

10. The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous development.

11. Romania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into.

12. The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees.

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

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


Wilson thus spoke of “justice to all peoples and nationalities, and their right to live on equal terms”.

_The Fourteen Points_ never mentioned the term “self-determination” explicitly although it is generally accepted that six out of the fourteen points implicitly address the concept. Only a few weeks after Wilson’s launch of _the Fourteen Points_ he made it explicitly clear that the ideas therein were based upon self-determination. In his address to the congress in February 1918, the president stated that:

“[s]elf-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.”\(^{88}\)

Wilson continued his address by what is known as _the Four Principles_, which followed his famous _Fourteen Points_, and noted:

- That each part of the final settlement must be based upon the essential justice of that particular case and upon such adjustments as are most likely to bring peace that will be permanent;
- That peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in the game, even the great game, now forever discredited, of the balance of power; but that
- Every territorial settlement involved in this war must be made in the interest and for the benefit of the population concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states; and
- That all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be

likely in time to break the peace of Europe and consequently of the world.\textsuperscript{89}

According to Wilson, self-determination was a universal principle suitable for all communities and nations around the world. The ultimate objective of self-determination was the security of human beings through the protection of minority and ethnic groups.\textsuperscript{90}

Wilson’s ideas formed the core of his understanding of the principle well before his famous message of \textit{War Aims and Peace Terms} to the Congress. His conception of self-determination was strongly rooted in the democratic thoughts advocated in both \textit{the American} and \textit{the French Declaration}; for President Wilson, self-determination was “entirely a corollary of democratic theory”.\textsuperscript{91} For Wilson the principle meant that ethnically identifiable groups, peoples or nations should have the right to select their own democratic government. This reflected President Wilson’s initial idea of self-determination, which ought to be implemented within the state.\textsuperscript{92} Wilson however realized that self-determination could be a useful tool in the re-division of the war. In that respect he borrowed the ideology of nationalism and put forward the idea that large artificial multinational empires should be broken down into smaller natural units referred to as “nations” or “nationalities”. In this way Wilson expanded the concept of “consent to the governed” in that he did not only relate to internal relations but to external dimensions as well.

By the end of World War I, it was realized by the allied powers that solutions or at least guidelines had to be formulated for the rearrangement of the boundaries of Europe after the war. President Wilson’s perception of self-determination and his \textit{Fourteen Points} formed the basis of the peace negotiations with the central powers after the war. The peace settlement, known as \textit{the Paris Peace Conference}, imposed a series of peace treaties; the so-called \textit{Peace of Paris Treaties} on the central powers in which the Great

Powers for the first time used the principle of self-determination as a basis for re-drawing the political map of Europe.  

**Self-determination in the aftermath of World War I**

When it was time to apply the principle of self-determination to nationalities integrated into the central empires the difficulties of doing so became evident. As a general principle self-determination was far from fully realized in the Peace of Paris Treaties. The world community only managed to implement self-determination in a political and selective manner, reflected in a number of plebiscites carried out by the Allies in some disputed areas after the war. The principle was reckoned irrelevant where the people’s will was certain to run against the geopolitical, economic and strategic interests of the victors of the war. This policy was also reflected in the watering down of a proposal for a general application of self-determination.

Self-determination was regarded as political and not legal in the transitional inter-war period. A number of states were however forced to guarantee minority rights, with self-determination as a basic component of a series of treaties concluded under the auspices of the League of Nations, for the protection of minorities. A so-called “minority regime” was applied in several states embodying nations with no possibilities of becoming independent states, as well as in some regions were drawing of a boundary

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95 What the Allies did was in fact “to reward faithful Allies, such as the Poles, Czechoslovaks, and Yugoslavs, to show severity to the conquered enemy such as the Turks and Germans, and to try to establish a new balance of power respecting Russian integrity.” See Sureda A Rigo, *The Evolution of the Right of Self-Determination, A Study of United Nations Practice*, Leiden 1973, p. 96.


left groups belonging to one nation recognized as a state. Individuals belonging to a particular nationality were especially protected – individually – vis-à-vis the national state – different from their own nationality – in which they were living, while their fellow nationals, as a group, had been approved the right to form a state.99

In the end the minority regime was marred out, being extremely selective. The minority regime was only applied to the central and eastern European states, not to the Great Powers. In fact, the regime was not applied to any of the western states. The major setback at the time after World War I was however the fact that the principle of self-determination was not incorporated in the Covenant of the League of Nations – there was no general right to be treated as a minority under the Covenant. President Wilson’s ideas of self-determination were only partially and indirectly reflected in the Covenant, through Article 22 on mandates; a system set up as a compromise solution between the ideal of self-determination and the interest of the occupying powers.100 It was evident that self-determination was a political concept rather than a legal principle.

**The Aaland Island dispute**

The view of self-determination being a political concept rather than a legal principle, was confirmed by the League of Nations’ Council and its expert advisors, the Commission of Jurists and the Commission of Rapporteurs, in the Aaland Island dispute in 1920-21.101 The Aalanders, claiming Swedish ethnicity wanted to become part of Sweden. In its reports, the expert advisors stated that in revolutionary situations, such as the dissolution of a state, the principle of national self-determination is an important, although not the sole, principle affecting the creation of a new state.102 Both the Commission of Jurists and the Commission of Rapporteurs envisaged the possible resort

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to self-determination in cases where an alternative solution to its implementation, such as protection of minorities, should be proved to be absolutely unworkable because of the oppressive attitude towards minority groups within that state. While the Commission of Jurists upheld that under positive international law:

“it pertains exclusively to the sovereignty of any definitely constituted state to grant to, or withhold from, a fraction of its population the right of deciding its own political destiny by means of plebiscite, or in any other way” 103

The Commission of Rapporteurs upheld that the Aalanders had a right to cultural autonomy under Finland and that only if Finland denied them that right they could separate from Finland and left open the possibility that secession could be the proper remedy of last report:

“The separation of a minority from the state of which it forms a part and its incorporation in another state can only be considered as an altogether exceptional solution, a last resort when the state lacks either the will or the power to enact and apply just and effective guarantees.” 104

The application of self-determination at this time lacked sufficient consistency to provide a body of practice on which its status as a legal right under international law could be based. Hence only a few treaties on the inhabitants of a small number of territories conferred the right to self-determination, but in the absence of such a treaty there were probably no legal right to self-determination. 105

104 The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, Commission of Rapporteurs, 1920. Applying these criteria to the facts, the Commission of Rapporteurs found that the Aalanders had no right to secession because they had not been oppressed by Finland.
**Self-determination during World War II**

The principle of self-determination was invoked on many occasions during World War II. Already in 1941 the United States of America, as well as the United Kingdom, proclaimed self-determination as one of the objectives to be accomplished and put into practice at the end of the war. The principle was for example proclaimed in the Atlantic Charter of August 14, 1941,\(^{106}\) in which President Roosevelt of the United States of America and Prime Minister Churchill of the United Kingdom, among others, declared that they desired to see “no territorial changes that do not accord with the freely expressed wishes of the people concerned”, and that they respected “the right of all peoples to choose the form of government under which they will live”, and wished to see “sovereign rights and self-determination restored to those who have been forcibly deprived of them” \(^{107}\)

Prime Minister Churchill though proclaimed that the principle of self-determination should *not* apply to colonial peoples (in particular India, Burma, and other parts of the British Empire) but *only* aimed at restoring “the sovereignty, self-government and national life of the states and nations of Europe under Nazi yoke”, besides providing for “any alterations in the territorial boundaries which may have to be made.”\(^{108}\)

The universality of the commitment (of self-determination) however meant that the principle *could* apply also to colonies, both of the Allies and the Axis powers.\(^{109}\) And the provisions of the Atlantic Charter were repeated and more widely accepted in the Declaration by the United Nations, signed in Washington on January 1, 1942, by representatives from 26 allied states that were fighting against the Axis powers.

The provisions in the Atlantic Charter were further restated by the four Great Powers – the United States, the United Kingdom, the Soviet Union and China – in the Moscow Declaration of November 30, 1943, as well as in other important instruments of that

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\(^{106}\) The first commitment to establish a new international organization with the aim of restoring and keeping international peace was made in the Atlantic Charter, August 14, 1941.


time. Ultimately, the provisions of the Atlantic Charter had a considerable impact on the work of the underpinning of the United Nations Charter at the San Francisco Conference in 1945.

B. Development under the aegis of the United Nations

Following through the Moscow Declaration, representatives of the four Great Powers entered into secret negotiations in the fall of 1944, with the aim of setting up the foundations for a new world organization – the United Nations. The objective was to create an organization with greater capacity and power to restore and maintain international peace and security, than its forerunner, the League of Nations, had.

The founders had to agree upon many questions during the drafting of the United Nations Charter. The system was constructed out of the ruins of the inter-war system and the founders of the Charter sought to take what was valuable from the experience of the League of Nations. First it seemed that the Charter, just like the Covenant of the League of Nations, would be silent concerning any “rights of peoples”. Regardless of the fact that the principle of self-determination had been embraced by the Allies in several policy documents adopted between 1941 and 1944, the principle did not emerge anywhere in the Dumbarton Oaks Proposal for the Establishment of a General International Organization. When the four Great Powers finally met at the San Francisco Conference by the end of April 1945, they had reconsidered the matter of “peoples rights” and, instead of a minority system, which was the focus of the League of Nations, the main focus of the United Nations Charter was on the principle of human rights for all. In the end the principle of self-determination was identified as a major objective of the new international organization.

Among several amendments to the Charter one provision stated that one of the aims of the new organization should be “to develop friendly relations among nations based on

112 See previous chapter, Self-Determination during World War II.
the principle of self-determination of peoples, and to strengthen universal peace.” Most states approved this while others were more critical and feared that the provision would foster civil strife and secessionist movement. Eventually the Committee responsible for drafting the Charter came to an agreement on four points regarding the principle of self-determination:

First, “this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter [of the Charter].”

Second, “the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession”.

Third, it was agreed upon that the principle of self-determination “as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely chose”.

And, fourth, it was agreed that “an essential element of the principle [of self-determination] is free and genuine expression of the will of the people, which avoids cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years.”

Eventually the principle of equal rights and self-determination of peoples took shape and was incorporated in a number of places in the final version of the United Nations Charter; explicitly, in Articles 1(2) and 55 and implicitly in Articles 73 and 76(b) dealing with colonies and trust territories. Self-determination as an international principle was now considerably strengthened.

The sole appearance of references to the principle in the Charter widened the concept and gave the impression that the principle was applicable to any people anywhere in the world. During a certain period the principle of self-determination was though only applied to dependent peoples suffering colonial power. It further became clear that the principle of self-determination was subordinated the principle of state sovereignty (at least so it seemed), and it was also argued that the right of self-determination could never be exercised at the expense of any disruption, partial or total, of a national unity and the territorial integrity of an existing state.\footnote{Bring Ove, \textit{Kurdistan and the Principle of Self-Determination}, German Yearbook of International Law, Volume 35, 1992 (GYIL 35, 1992), p. 158.}

The provision laid down in Article 1(2) of the Charter nevertheless states that one of the purposes of the United Nations is:

“to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace”.

Article 55, Chapter IX (International Economic and Social Co-operation) of the Charter, states that one objective for the organization is to create conditions of stability and wellbeing necessary “for peaceful and friendly relations among nations based on respect for the principle of self-determination of peoples”. The article then lists a number of goals in the spheres of economics, education, culture and human rights, stating that the United Nations shall promote these goals.

During the time of the League of Nations, the principle of self-determination was regarded predominantly as a political one and the principle was applied only to certain colonial territories regulated by special instruments, while under the United Nations, through the wording of Articles 1(2) and 55 there are now explicit references to self-determination in a general sense. The two articles also links self-determination and human rights – equal rights and self-determination – openly.
As regards Article 73 under Chapter XI, and Article 76(b) under Chapter XII of the Charter, concerning non-self-governing territories and the international trustee system respectively, they both implicitly refer to self-determination\(^{117}\), and undoubtedly entail binding obligations upon member states of the United Nations, administering such territories, to promote self-determination of peoples under colonial rule. But what is the effect of the reference to self-determination in Articles 1(2) and 55, so far as non-colonial territories are concerned?

With the foundation of the United Nations and the UN Charter there are, as mentioned, explicit references to self-determination in a general sense. Yet the two provisions, Articles 1(2) and 55 are vague and unambiguous in their language. Neither two define the meaning of self-determination in their wordings, the Charter leaves us uninformed on the signification of peoples, nor does the preparatory work say anything regarding the meaning of peoples or self-determination, nor the intention of the notions under the Charter or the legal outcomes of it.

The ingredients necessary for the realization of self-determination are nevertheless adequately stated in Article 55, referring to the need for peaceful and friendly relations among nations based on the principle of equal rights and self-determination of peoples. Article 55 calls on the United Nations to foster human rights for all peoples in order to

\(^{117}\) Article 73 of the UN Charter states that: Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
c. to further international peace and security;
d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
e. to transmit regularly to the Secretary General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 76(b) of the UN Charter states that: The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
reach that goal. The article further uses the notion “shall promote” in its phrasing and thus places an obligation on the United Nations to promote the objectives set forth in Article 55. The obligation to “promote” is valid, not solely for the United Nations as an organization but for all of its member states, through Article 56 which places a duty upon all members to act in co-operation with the organization and the Charter in order to achieve the objectives set forth in Article 55.

Article 6 of the Charter further states that:

“A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendations of the Security Council.”

The initial view of the situation was however that regardless of the fact that self-determination was extended to all colonial peoples, through the provision put down under Chapter XI and XII, it stopped there. The provisions regarding a general right of self-determination was initially considered to be too vague and indefinite in their wordings and the principle of self-determination was therefore viewed upon with skepticism – as an ill-defined concept of policy and morality and not as a legal principle.118 The general perception at this time was hence that a right of self-determination was exclusively reserved for colonial peoples. This view was held largely throughout the 1950s and 60s and was also reinforced by the General Assembly Resolutions 1514 (XV) and 1541 (XV).119

Undeniably it can be argued that it is doubtful whether Article 1(2) and Article 55 provide themselves to establish specific rights and duties under international law. Some have argued and argue that in the absence of any concrete definition of the principle of self-determination, the principle cannot be interpreted, applied or executed, and therefore the principle only possesses a moral and political force in guiding the organs

119 See Development trough UN practice chapter below.
of the United Nations in the exercise of their powers and functions. Skeptic arguments like these can however easily be dismissed and have been so by several scholars. In the early years of the United Nations Professor Lauterpacht, for example, wrote:

“Any such conclusion [that the principle had no legal force] is no more than a facile generalization. For the provisions of the Charter on the subject figure prominently in the statement of the purposes of the United Nations. Members of the United Nations are under legal obligations to act in accordance with these Purposes. It is their legal duty to respect and observe fundamental human rights and freedoms. These provisions are no mere embellishment or an accident of drafting. They were adopted, with the deliberation and after prolonged discussion before and during the San Francisco Conference, as part of the philosophy of the new international system…”

The principle of equal rights and self-determination of peoples has been established as a statutory norm, in both Article 1(2) and Article 55. And, “since it [the principle of self-determination] has been enshrined in a multilateral international treaty of universal scope [the United Nations Charter], and has become a source of definite and universally valid rights and obligations” it can be argued that the principle of self-determination definitely has been transformed from a political to a legal principle. This has been reaffirmed by several member states when the question of the legal status of self-determination has been brought up in the United Nations.

In November 1952, before the fourth Committee of the General Assembly, the representatives of Yugoslavia, for example, stated that:

“The equal rights of peoples and their right to self-determination were principles expressly stated in Articles 1(2) and 55 of the Charter and thus constituted as a source of rights for one group and obligations for another. The obligations were neither moral or political, but legal, since in Article 6 of the Charter expressly provided for sanctions in the case of non-fulfillment.”

Although the principle of self-determination has a political character, it cannot be deprived of its legal content. The principle is one of ideals and goals, or purposes, of the United Nations; a legally constituted organization functioning to achieve its purposes, and thus the principle of self-determination cannot be without a significant legal effect. It should be assumed that the principle has become a legally binding principle of conventional international law just by the fact that it has been incorporated in the United Nations Charter.

**Development through UN practice**

The promotion of respect for the principle of self-determination is proclaimed as one of the purposes of the United Nations, under Article 1(2) of the Charter, and Article 55 further enumerates some of the actions that should be undertaken by the United Nations, for the creation of conditions necessary for the realization of the principle of self-determination proclaimed under Article 1(2). But without clarifying the meaning and aspects of the principle, or demonstrating the ways and means by which the rights and obligations emanating there from are to be effectively put into practice, the realization of the principle cannot be achieved.

In the early days of the United Nations the principle of self-determination was viewed upon as being a right for *colonial peoples* only. The third world majority however regarded the principle as one of the most important concerns of the United Nations and

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in a series of resolutions the third world majority insisted on its generality. At this time, colonial powers started to claim that non-self governing territories were no such territories and faced with such claims the General Assembly started to develop criteria for which territories Article 73 of the UN Charter would apply. In 1952 the General Assembly insisted that the draft on the International Covenant on Human Rights should contain a statement that all peoples have the right of self-determination. Many western states were not prepared to declare the principle as applicable to colonial territories only and consequently they sought to treat the principle of self-determination as a general principle.

Through the passing of a number of resolutions the General Assembly attributed a wider scope to the concept of self-determination. The most essential steps taken this far was the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV), the two International Human Right Covenants; the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV), the FRD.

**Resolution 1514 (XV) of 1960**

One of the most fundamental resolutions passed by the General Assembly, expressing the development of self-determination, is perhaps Resolution 1514 (XV), adopted unanimously on December 14 1960. This resolution, the Declaration on the Granting of

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128 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (XV), December 14, 1960.


131 Declaration on Principles of International Law concerning Friendly Relations among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970.

Independence to Colonial Countries and Peoples, was in fact the first significant contribution by the General Assembly in developing the principle of self-determination further.133 To be precise, Resolution 1514 (XV) called upon the administrative powers to take immediate steps to transfer, without reservation, all powers to the peoples in the trust and non-self-governing territories which had not yet attained independence, “in accordance with their freely expressed will and desire”. The resolution, either indirectly or directly, continually spoke in terms of all peoples subject to colonial rule as being entitled to independence. In effect, Resolution 1514 (XV) represents the political and legal basis for the decolonization policy of the United Nations.

A list of principles which were to guide the United Nations member states in deciding whether or not particular territories qualified as non-self-governing territories to which Article 73 and Chapter XI of the Charter applied, was further elaborated by the General Assembly in Resolution 1541 (XV)134, and it was on this basis that, for example, East Timor was determined to be a non-self-governing territory. By Resolution 1654 (XVI)135, the General Assembly further established an instrument for implementing Resolution 1514 (XV)136, known as the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. With this process the principle of self-determination was extended to all colonial territories.137

The two International Human Rights Covenants of 1966

There was however an unwillingness to accept that the principle of self-determination would be exclusively limited to colonial peoples138 and through the adoption of the two International Human Rights Covenants, the International Covenant on Economic,

134 Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, UN General Assembly Resolution 1541 (XV), December 15, 1960.
136 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (XV), December 14, 1960.
Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), both of December 16 1966, a further step was taken by the General Assembly.

Repeating the language of Paragraph 2 of Resolution 1514 (XV), the ICESCR, and the ICCPR, in their identically worded Articles 1 states that:

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

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

3. The States parties to the present Covenant, including those having responsibility for the administration of non-self-governing and trust territories, *shall promote* the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. (Author’s italics)

By being included under the two International Human Rights Covenants the principle of self-determination as a whole was now given the feature of a fundamental human right, or more precisely, that of a source or essential prerequisite for the existence of individual human rights, “given that these rights cannot be fully exercised without the realization of the [collective] right of self-determination”.

By indicating that self-determination was not restricted to the liberation of colonial peoples only but to *all peoples*, the two International Covenants went beyond the colonial context telling that self-determination is both a civil and political right as well

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as an *economic, social and cultural right*. Its inclusion in the separate untitled Part I of each covenant also suggests that the principle in some sense is special.

At this time no one was though very clear with what the implications of the inclusion of self-determination in the covenants were. In the context of colonies there was reasonable clarity: colonial self-determination meant the right of colonial peoples to independence, integration in the administrating state or some third state, or free association. The people had to be consulted through plebiscites, the process of consultation had to be internationally supervised, and the will of the people had to be genuine.\textsuperscript{140} But what was the consequence of self-determination outside the colonial framework?

As a matter of ordinary treaty interpretation one *cannot* interpret Articles 1 of the two International Human Rights Covenants as restricted to colonial cases only. The two identical articles talk not of some peoples, but explicitly of *all peoples*. The wording must thus be interpreted as *all peoples*, giving the term “peoples” a general connotation. Paragraph 3 of the articles dealing expressly with colonial territories, makes this perfectly clear – the term “peoples” in paragraph 1 is being used in a general sense, as well as in paragraph 2 dealing with permanent sovereignty over natural resources, leaves us with no doubt left – no one has ever suggested that the principle of permanent sovereignty over natural resources is limited to colonial territories.\textsuperscript{141}

*The Friendly Relations Declaration of 1970*

The process of reaffirming and elaborating the principle of self-determination reached another peak by 1970 when the General Assembly adopted several important documents, such as:

i. *the Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter*

\textsuperscript{140} *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, UN General Assembly Resolution 1541 (XV), December 15, 1960, Annex, Principles VI-VIII.


ii. the Declaration on Occasion of the twenty-fifth Anniversary of the United Nations, Resolution 2627 (XXV), which reaffirmed the vital aspects of the principle of self-determination

iii. a plan of action, Resolution 2621 (XXV), for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and

iv. Resolution 2708 (XXV) which requested the special committee to continue seeking suitable means for the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and recommended methods and steps to be taken to enable such peoples to reach their independence.142

The Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV)143, commonly known as the Friendly Relations Declaration, or the FRD, is perhaps the most authoritative document so far, in that it seeks to explain the implications of self-determination in more detail than other any other international document before.144

The wording of the common Articles 1 in the two Human Rights Covenants of 1966 clearly formed the basis for the almost identical wording in the FRD, adopted by consensus by the General Assembly in 1970. The FRD stipulates that the “principle of equal rights and self-determination of peoples” includes the right of all peoples to freely “determine, without external interference, their political status and to pursue their economic, social and cultural development”. The FRD further stipulates the duty of every state to “respect this in accordance with the provisions of the Charter”, and also to

143 *Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations*, UN General Assembly Resolution 2625 (XXV), October 24, 1970.
promote the “realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter”, through joint and separate action.145

Furthermore the FRD stipulates that “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people”, hence stressing the methods of self-determination.146

As a General Assembly resolution the FRD is not in itself a legally binding document. It nevertheless remains indicative of widely held views on the subject that it deals with, and it defines the UN Charter, the highest authority of international law.147 In addition to the general statements made in the FRD, the General Assembly also concerned itself with concrete cases, and specific aspects of the right to self-determination and factors hindering the realization of this right.148

The reference to self-determination in Principle VIII in Helsinki Final Act of 1975 adds further support to the impression that self-determination extends beyond decolonization, since no situations of colonialism existed in Europe or Northern America by that time.149 Self-determination has further been recognized by state practice as a basic principle of international law to which even the status of jus cogens is attributed.150

145 Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970.
149 The Final Act of the Conference on Security and Cooperation in Europe (The Helsinki Final Act of 1975), Aug. 1, 1975, 14 I.L.M. 1292, Principle VIII, para. 2. states: “[b]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development”, http://www.osce.org/mc/39501?download=true (retrieved on 2013-10-06).
150 Malanczuk Peter, Akehurst’s Modern Introduction to International Law, 7th ed., Routledge, London, 2003, p. 327. Jus cogens, or ius cogens, is a fundamental principle of international law, which is accepted by the international community of states as a norm from which no derogation is ever permitted.
In 1980 the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Héctor Gros Espiell, expressed that:

“no one can challenge the fact that, in the light of contemporary international relations, the principle of self-determination necessarily possesses the character of *jus cogens*.”\(^{151}\)

In 1995, in the *Case Concerning East Timor* the International Court of Justice (ICJ) ruled that the right of peoples to self-determination was an essential principle of contemporary international law, i.e. customary international law, and an *erga omnes* obligation, when it affirmed that:

“[T]he principle of self-determination has been recognized by the United Nations Charter and in the jurisprudence of the Court … [and] is one of the essential principles of contemporary international law.”\(^{152}\)

Through the power of state practice, the principle of self-determination has evolved to one of the few peremptory principles of international law that are universal and non-derogable, i.e. a *jus cogens*, the highest branch of law since it supersedes other forms of law.\(^{153}\)

**C. The current status of the principle of self-determination**

The United Nations as well as the majority of international law scholars is of the opinion that the principle of self-determination has become part of modern international law.

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\(^{152}\) *East Timor (Portugal v Australia)*, Judgement, ICJ Reports, 1995, p. 90, para. 243. *Erga omnes* obligations have been defined as “obligations of a state towards international community as a whole. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection”; *Barcelona Traction, Light & Power Company, Limited*, Judgment, ICJ Reports, 1970, p. 3, para. 32.

law.\textsuperscript{154} After the mere inclusion of the principle in the UN Charter, the principle has evolved; it has been confirmed, developed and given a more substantial form by both international legal instruments and a consistent body of state practice. Today the principle of self-determination is a basic principle of international law, to which even the status of \textit{jus cogens} is attributed. The point of issue now seem to be to what extent the principle operates as a legal right in contemporary international law, and what other legal consequences might be attributed to it.

\textbf{Internal and external self-determination}

As addressed, \textit{all people} have an inherent right to self-determination. A distinction must however be made between an \textit{internal} and \textit{external} right of self-determination. This distinction is critical not only at the level of legal principles but from that of the comprehension of the people asserting the right of self-determination. The distinction is however not meant to refer to different rights of self-determination, rather different \textit{modes} of implementation of the right: an internal implementation and an external one.\textsuperscript{155}

The \textit{internal} right of self-determination provides the ability for a people to have a democratic voice \textit{within} the legal system of the state populated by the “people”, further to have control over natural resources, proper ways of preserving and protecting the culture and the way of life of the people and least but not last, the ability to be a visible partner or participant with strong power within the overall political sphere of the state. \textit{External} self-determination, on the other hand, arises as a \textit{last resort} when the internal concept of self-determination is not being accepted.\textsuperscript{156} In such cases the right to full sovereignty, including the right to international recognition of that people, comes into play.

In the Reference re Secession of Quebec case the Supreme Court of Canada used the language of the FRD and stated that:


\textsuperscript{155} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126.

\textsuperscript{156} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126.
“[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”

Thus the court defined methods of how external self-determination can be implemented by a people. The parameters of external self-determination, or secession, and how this right translates into practical terms are however controversial issues. Nevertheless, as developed through UN the right of self-determination of peoples is almost universally relied on as the legal basis for secession.

Statehood and secession

Any territory wishing to gain state recognition has to meet a couple of formal criteria put down in the Montevideo Convention though. The territory of the people needs to have a defined territory, a settled population, effective governance, and the means to enter into relations with other states. The Montevideo Convention provides guidance but is however not a binding framework under international law. Other factors also play a role in the decision of whether to recognize a state or not.

A reluctance to recognize new states however, comes from the principle of territorial integrity, protecting existing borders of states. The difficulty here is that the principle of territorial integrity of states directly confronts the principle of self-determination of peoples.

Self-determination versus territorial integrity

Considering the opinion of the Commission of Rapporteurs in the Aaland Island dispute, it represents an early but careful step towards the recognition of a right to self-

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157 Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126.
determination of peoples. With the state as a territorial and political unity in mind, the Commission was though clear in its denial of an absolute right to secede:

“To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within states and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the state as a territorial and political unity.”160

While the adoption of the FRD contributed to the expansion of the principle of self-determination the majority of states participating in the drafting of the declaration “took strong exception to the notion that peoples might have a right to secession.”161

The relevant language of the FRD, in regards to the right of external self-determination, however reads:

“The establishment of a sovereign and independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”162

The so-called “saving clause” of the FRD nevertheless reaffirms what the Commission of Rapporteurs stated in the Aaland Island dispute, i.e. the principle of territorial integrity:

160 The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, Commission of Rapporteurs. Applying these criteria to the facts, the Commission of Rapporteurs found that the Aalanders had no right to secession because they had not been oppressed by Finland.
162 Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970, para. 4 under The principle of equal rights and self-determination of peoples.
“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of government representing the whole people belonging to the territory without distinction to race, creed or color.”

The text of the FRD does not rule out secession and it is widely recognized that secession is one of the methods for implementing self-determination. If a seceding party lacks constitutional provision or approval by its parent-state the question of secession nevertheless becomes controversial.

State practice implies that there is a slight support for unilateral declarations of independence where the government of the particular state in question opposes secession. Meaning that the principle of territorial integrity under certain circumstances has to stand back in favor of the principle of self-determination (see *The remedial secession doctrine* chapter below).

*The “self” in self-determination: defining “peoples”*

The notion of a right has no meaning unless we can determine the possessors of that right, as well as the persons or entities that are obliged to respect that right.

The UN Charter, the two International Human Rights Covenants of 1966 and the FRD, as well as other international legal instruments, talk about *peoples* being the possessors of the right of self-determination, but who are the “people” to whom this right is applicable?

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163 Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970.

164 Declaration on Principles of International Law Concerning Friendly Relations among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970, para. 4 under The principle of equal rights and self-determination of peoples.
When the right of self-determination was discussed in the organs of the UN, representatives of some states argued that states alone should be the subjects of this right, which without doubt is a collective right, exercisable by peoples.

From the perspective of law the key feature of the phrase “rights of peoples”, isn’t the term “rights” but “peoples”.165 As the British lawyer and academic Sir Ivor W. Jennings put it in 1956:

“Nearly forty years ago a professor of political science who was also the President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.”166

With the UN and the UN Charter coming into force the word “peoples” was for the first time in international law explicitly associated with self-determination. The meaning of “peoples” was however debated at the San Francisco Conference, underpinning the UN Charter, and no consensus was reached.167

Given that situation, the meaning of the word “peoples” has to be determined in accordance with the Vienna Convention on the Law of Treaties Article 31(1), thus by giving it its “ordinary meaning … in … the context and the light of [the UN Charter’s] object and purpose.”168

Subsequent state practice, in the application of the UN Charter is also relevant in ascertaining the meaning of peoples. And the travaux préparatoires underpinning the charter may also be taken into account to determine the meaning of peoples; if interpretation based upon the ordinary meaning of the word in the light of the UN Charter’s object and purpose “leaves the meaning ambiguous or obscure.”

The introductory part of Article 73 of the Charter, concerning non-self-governing territories, speaks of the population of non-self-governing territories as “peoples” and “inhabitants”. In paragraphs (a) and (b) references are made only to “peoples”. “Inhabitants” obviously means the total population of any non-self-governing territory and it is reasonable to assume that “peoples” means the same as “inhabitants” in this article. Nothing in this article however excludes a nation from being a people. This follows from the article, using “peoples” in plural and not singular.

Article 76 of the Charter, concerning the international trustee system, talks only of two ways to achieve self-determination, i.e. through “self-government” or “independence”, although this doesn’t exclude other ways of achieving self-determination. The method of achieving self-determination is for the “peoples” to choose for themselves. The scale is broader and the relation of a group to other groups may result in independence as a state, association with other groups in a federal state, autonomy or assimilation in a unitary (non-federal) state.

Outside the area of decolonization it however appears difficult to define the meaning of “peoples”. Nevertheless, two different possibilities have emerged; one is that “people”

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means the entire population of a state, the other that it means persons comprising a distinctive group. In the Reference re Secession of Quebec the Canadian Supreme Court confirms that “peoples” could be other groups of individuals than the entire population of a state. Although the Canadian Supreme Court did not give the term “peoples” a definition it attempted to determine the meaning of it as follows:

"It is clear that “a people” may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to “nation” and “state”. The juxtaposition of these terms is indicative that the reference to “people” does not necessarily mean the entirety of a state’s population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."

A strong argument for entitling groups other than states the right of external self-determination is that such a right will prevent, or at least discourage, states from discriminatory behavior and human rights violations against such groups. Hence it seems likely that “peoples”, to whom several international legal instruments refer to when defining the principle of self-determination, is not limited to the whole population of a state.


175 Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 124. According to Article 38 of the Statute of ICJ decisions of national courts are considered to be sources of international law.
According to UNESCO, a people for the rights of peoples in international law have the following characteristics:

“(a) A group of individual human beings who enjoy some or all of the following common features: (i) A common historical tradition; (ii) Racial or ethnic identity, (iii) Cultural homogeneity; (iv) Linguistic unity; (v) Religious or ideological affinity; (vi) Territorial connection; (vii) Common economic life.
(b) The group must be of a certain number who need not be large (e.g. the people of microstates) but must be more than a mere association of individuals within a state.
(c) The group as a whole must have the will to be identified as a people or the consciousness of being that people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.
(d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.”\textsuperscript{176}

The last paragraph expresses the most essential and indispensable characteristic: a people begin to exist \textit{when} it becomes conscious of its own identity and asserts its will to exist.\textsuperscript{177} This natural perception of “peoples” indicates a return to the Wilsonian concept of self-determination.\textsuperscript{178}

\textit{The remedial secession doctrine}

Logically secession is admitted in cases where the government does not represent the whole people belonging to the territory without distinction to race, color or religion. This has also been upheld by the Supreme Court of Canada, regarding the legality of a unilateral secession of Quebec from Canada. In its judgment the court affirmed that the saving clause of the FRD includes a right to secession of peoples whose right to internal


\textsuperscript{177} International Commission of Jurists, the Events in East Pakistan, 1972, part V: Right of Self-Determination in International Law, http://nsn1.nsm.iup.edu/sanwar/Bangladesh%20Genocide.htm (retrieved on 2013-10-06)

self-determination has been thoroughly violated by a government that does not represent the people concerned. While international law does not specifically grant parts of sovereign states the legal right to secede unilaterally from parent-states it does not provide an explicit denial of such a right.\textsuperscript{179}

The court further stated that:

\begin{quote}
“The international law right to self-determination generates at best, a right to external self-determination … in situations … where a people is oppressed … or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to the right to external self-determination because they have been denied the ability to exert internally their right to self-determination.”\textsuperscript{180}
\end{quote}

It is thus recognized that if a people within a state is \textit{blocked} from exercising its right of internal self-determination, that people is entitled to exercise its right of \textit{external self-determination} through secession. It’s also stated that in certain circumstances states have an implied duty to recognize the legitimacy of a call for secession.\textsuperscript{181}

According to this so-called \textit{remedial secession doctrine} the right of external self-determination arises only in “the most extreme of cases and, even then, under carefully defined circumstances”\textsuperscript{182}; the claimant must show serious human rights violations by the state which it is formally part of. In cases were that can be shown the right to full sovereignty, including the right to international recognition of that people, comes into play.

\textsuperscript{179} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 112.
\textsuperscript{180} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 138.
\textsuperscript{181} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 111.
\textsuperscript{182} Reference re Secession of Quebec, Judgement of the Supreme Court of Canada, para. 126.
The remedial secession doctrine has thus become internationally recognized through cases as the Aaland Island dispute\textsuperscript{183} and the Reference re Secession of Quebec.\textsuperscript{184} A unilateral secession can however only be made as a remedy of \textit{last resort}. This meaning that all other options must be exhausted before secession can be considered valid under international law.\textsuperscript{185}

\textsuperscript{183} \textit{The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs}, League of Nations Doc. B7/21/68/106, Commission of Rapporteurs, 1920. Applying these criteria to the facts, the Commission of Rapporteurs found that the Aalanders had no right to secession because they had not been oppressed by Finland.

\textsuperscript{184} \textit{Reference re Secession of Quebec}, Judgement of the Supreme Court of Canada, para. 126 and 134.

\textsuperscript{185} \textit{Reference re Secession of Quebec}, Judgement of the Supreme Court of Canada, para. 134.
III. KOSOVO

“Standing on the moon, watching the earth from a different perspective, one sees water and land, and, if one would take a closer look, one might see mountains, rivers, forests and deserts. If one would get even closer to the surface of the earth, one would be able to distinguish cities, lakes and roads. One would however search in vain if one would wish to identify a ‘State’.”

On 17 February 2008, Kosovo’s parliament endorsed a unilateral declaration of independence from Serbia, in a historic session. Serbia however refuses to recognize Kosovo as an independent sovereign state.

The question to be answered is whether Kosovo has a right to secede from Serbia. To be entitled the right of external self-determination the Kosovo Albanian population must qualify as a people that are subject to historical and persistent state-abuse by its formerly parent-state, i.e. Serbia. All other methods of self-determination must be exhausted, meaning that there should be no viable alternative left than external self-determination through secession for secession to come into force.

A. The history of the region

Both Kosovo Albanians and Serbs are historically linked to the territory subject of dispute. Each side argues that early history places them in the region prior to the other side. Generally international law seems to favor claims of self-determination made by indigenous people based on a “first people” entitlement. The lack of credible historical


187 The Kosovo Declaration of Independence, “We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state.” see http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en (retrieved on 2013-10-06).

evidence for either Kosovo Albanians or Serbs however makes this area of self-determination invalid here.\textsuperscript{189}

Just as Serbs and Albanians have been fighting for the territory of Kosovo, historians fight over Kosovo’s true history: Serbs argue that Kosovo is the heart of the Serbian medieval kingdoms, pointing to ancient Serbian monasteries and churches which are widely spread over the region, while Kosovo Albanians claim that they are the original inhabitants, being the descendants of the ancient Illyrians.\textsuperscript{190}

According to many historians, the Kosovo Albanian population consists of descendants from the Illyrians who inhabited the region already in the 2\textsuperscript{nd} century BC.\textsuperscript{191} Around 160 BC the area was conquered by Rome, and in 59 BC it was incorporated into Illyricum. In 87 AD the area became part of Moesia Superior and from the fourth century AD onwards the region was exposed to an increasing number of brutal raids, which culminated in the 6th to 7th centuries, with the so-called Slavic migrations.\textsuperscript{192}

In the 850s the area was absorbed into the Bulgarian Empire, under which Christianity and a Byzantine-Slavic culture became deeply rooted in the region. Kosovo was to remain under Bulgarian or Macedonian rulers until 1018, when the Byzantines re-took the area and controlled it for more than a century after that. Until 1180 when Serbia and the principality of Rascia conquered the region, the territory often switched between Serbian and Bulgarian rule on one hand and Byzantine on the other.\textsuperscript{193}

In the 13\textsuperscript{th} and 14\textsuperscript{th} centuries the territory became a political and spiritual center of the Serbian Kingdom.\textsuperscript{194} Classical Serbian history tells us about the Battle of Kosovo, taking place on June 15, 1389, with Serbian Prince Lazar fighting the invading Ottoman


Turks at Kosovo Polje, loosing the battle. Despite the defeat, the year of 1389 is very central in the Serbian history of Kosovo; the battle has been celebrated as a glorious sacrifice and many Serbs have seen it as a symbol of patriotism. This classical story exercised a powerful grip on the imagination and rebirth of Serbian nationalism during the 19th century, including the so-called “Kosovo Curse”. Its significance for Serbian nationalism became evident during the breakup of Yugoslavia and the Kosovo War, when Serbian president Slobodan Milosevic invoked the curse during a speech on the acclaimed day of the 600th anniversary of the battle, implying and rousing the romanticism and ideological position that characterized the civil wars in the region during the 1990s. In fact little is known of who took part in the battle at Kosovo Polje; the size of the combating armies; why the battle took place or whether it should be characterized as a victory or draw. Only a few things can be said with certainty: the battle was intense and both sides experienced difficult losses, with Prince Lazar on the Serbian side and Sultan Murat I, who led the Ottoman forces, both being killed.

Following the Battle of Kosovo the Serbian army was left with too few men to defend the territory, while the Ottoman Turks had many more troops in the east. In 1455, two years after the Ottoman capture of Constantinople, the Ottomans lead a major offensive against Serbia, in which southern parts of Serbia, including Kosovo, were seized. Subsequently, one by one of the Serbian principalities became Ottoman vassals. In 1459 the region of Kosovo was fully conquered by the Ottoman Empire.

195 Malcolm Noel, Kosovo: A Short History, New York University Press, 1998, chapter 4. Some sources however attempt to give the date as June 28 in the New-Style Gregorian calendar, but that calendar was not adopted for another two centuries. If it had been, the New-Style date in 1389 would though have been only June 23. See http://en.wikipedia.org/wiki/Battle_of_Kosovo (retrieved on 2013-10-06).


197 The Kosovo Curse or Prince’s Curse is a curse said by Serbian Prince Lazar before the Battle of Kosovo. In the text, Lazar curses those Serbs who ignored his call for a defensive war against the Ottoman Empire. The curse reads: Whoever is a Serb and of Serb birth, And of Serb blood and heritage, And comes not to fight at Kosovo, May he never have progeny born from love, Neither son nor daughter! May nothing grow that his hand sows, Neither red wine nor white wheat! And may he be dying in filth as long as his children are alive! See http://en.wikipedia.org/wiki/Kosovo_curse (retrieved on 2013-10-06).


In regards to the population of the region Albanians have had a continuous presence but evidence speaks only of a minority in medieval Kosovo.\textsuperscript{203} Mainstream historiography clarifies that there are no evidence that a people identifiable as "Albanian" formed the \textit{majority} of the population in Kosovo prior to the Ottoman occupation, and from the eight to the mid-nineteenth centuries the region was predominantly inhabited by a Slavic and Orthodox Christian population.\textsuperscript{204}

After the Ottoman conquer the demography started to change in Kosovo as the Serbs started to migrate northwards to Bosnia, at that time the Austrian and Hungarian lands. Following a failed uprising in Kosovo in 1689, the numbers of Serbs leaving the region rose. At this time Muslim Albanians started to migrate from the mountains of Albania to the lands of Kosovo.\textsuperscript{205}

During the Ottoman rule Islam was introduced to the population, and the Vilayet of Kosovo, a political administrative unit within the Empire, was created in 1877, consisting of a much larger territory than modern Kosovo.\textsuperscript{206}

In the 19\textsuperscript{th} century national frictions became part of a larger struggle between Orthodox Serbs and Muslim Albanians. In 1878 the Albanians formed the League of Prizren, a political organization with the aim of unifying all Albanians under the Ottoman Empire in a joint struggle for autonomy and greater cultural rights. Despite its disestablishment only three years later the league marks the birth of modern Albanian nationalism.\textsuperscript{207}

\textbf{Kosovo and the 20\textsuperscript{th} century}

By the early 20\textsuperscript{th} century Serbia and its neighboring countries achieved independence from the Ottomans. The Ottoman Empire was now unable to reform itself, govern satisfactorily, or deal with the rising ethnic nationalism of its diverse peoples. In 1912-


1913 Kosovo was internationally recognized as a part of Serbia and Kosovo’s status within Serbia was finalized the following year, through the Treaty of London.208

For the Serbian population in Kosovo the arrival of the Serbs was considered as a release but for the Kosovo Albanian population it was considered as nothing mere than an occupation. During World War I the Serbian authorities were driven out from the area and in 1915 the Albanians in Kosovo took revenge by challenging reprisals on retreating Serbian troops. The Serbian retaliations didn’t take long: in 1918 the army of what was now the Kingdom of Yugoslavia returned.209

During the inter-war period Serbian settlers were sent to Kosovo, as a try to reverse the population imbalance. Kosovo Albanian rebellions repeatedly troubled the Serbian authorities and the constitutional status of Kosovo within Yugoslavia was unclear. In practice decision-making was centralized and undemocratic.210

After the Axis invasion of Yugoslavia in 1941, most of Kosovo became part of the Italian-controlled Albania while Germans and Bulgarians controlled the rest, driving out tens of thousands of Serbs from Kosovo.211 The Democratic Federal Yugoslavia (DFY) was announced in 1943, by the Partisans resistance movement during World War II. In 1946 it was renamed to the Federal People’s Republic of Yugoslavia (FPRY) and Kosovo became an autonomous district of the Socialist Republic of Serbia, a constituent country of FPRY, under the 1946 Yugoslav Constitution.212

In 1963, the Yugoslav republic was renamed to the Socialist Federal Republic of Yugoslavia (SFRY) and Kosovo was now granted autonomy. Tensions between ethnic Albanians and the Yugoslav government were however significant, due to nationality questions and political ideological concerns, especially regarding relations with Albania.\(^{213}\)

At this time Islam was repressed by Serbia and both Albanians and Muslim Slavs were encouraged to migrate to Turkey while Serbs and Montenegrins dominated the government, security forces, and industrial employment. The Kosovo Albanian population protested against the actions taken by the authorities and demanded Kosovo to be made a republic within SFRY, or declaring support for Albania.\(^{214}\)

In 1974 the Autonomous Province of Kosovo and Metohija was officially changed to the Socialist Autonomous Province of Kosovo and the 1974 Constitution of SFRY granted Kosovo major autonomy, satisfying the Albanian population in Kosovo while many Serbs saw the reforms as concessions to Albanian nationalists.\(^{215}\)

Under the 1974 Constitution Kosovo was allowed to have its own administration, assembly, and judiciary as well as a membership in the collective presidency and the Yugoslav parliament, in which not only the republics but also the autonomous provinces had veto power.\(^{216}\) The constitution did not only give Kosovo the status of a province, the closest after being a republic, but also stipulated that the borders of Kosovo could not be changed without approval of the Kosovar parliament.\(^{217}\)

Throughout the 1980s Kosovo Albanians however expressed their demand for a higher status, much because they felt like second-class citizens within SFRY: Kosovo was an autonomous province and not a republic. Throughout 1961-81, the Kosovo Albanian


population rose from 67% to 78% in Kosovo. Emigration numbers were high all over SFRY, mainly for economic reasons; while Kosovo was stagnating other parts of SFRY were growing economically. The pressures of the 1980s clearly contributed to the tensions between Serbs and Kosovo Albanians and the “national awakening” amongst the two sides.\textsuperscript{218}

On March 23, 1989, Serbia forced the parliament of Kosovo to approve an abolishment of its autonomous status.\textsuperscript{219} In June the same year, on the 600\textsuperscript{th} anniversary of the Battle of Kosovo, Serbia’s president Slobodan Milosevic declared to the people that “Six centuries later, again, we [Serbs and Albanians] are in battles and quarrels. They are not armed battles although such things cannot be excluded”. A year later, in 1990, the autonomous status of Kosovo only existed in name, and in the course of 1990 a new law, adopted by the Serbian National Assembly, dissolved the parliament and government of Kosovo, and all powers in the province reverted to the Serbian authorities.\textsuperscript{220}

A state of emergency was a fact and eventually the 1992 Constitution of the Republic of Yugoslavia no longer contained any reference to Kosovo as an autonomous province.\textsuperscript{221} In fact, the 1989 Serbian constitutional amendments had already reduced the status of all autonomous provinces of the SFRY to nothing.\textsuperscript{222}

Systematically the Serbian regime took control over Kosovo’s educational system, which underwent radical changes, as did the police, business and health care systems with the result of severe human rights violations taking place against the Kosovo Albanian population. The use of the Albanian language was prohibited in the public


\textsuperscript{222} See \textit{the Constitution of The Republic of Serbia}, Belgrade, September 28, 1990 (the 1990 Serbian Constitution), Articles 108-112.
sphere. On a daily basis human rights were severely violated,\textsuperscript{223} and overall the outcome of the Serbian measures consisted in a general worsening of the living conditions for the Kosovo Albanian population.\textsuperscript{224}

In 1990 the Kosovo Albanians started to refer to the province as the “Republic of Kosovo” (Albanian: “Republika e Kosovës) and continuously hereafter Kosovo Albanians referred to self-determination, to uphold their claim for an independent state.\textsuperscript{225}

In the early 1990s parallel Kosovo Albanian institutions were established, engaging in nonviolent resistance against the Serbian repression.\textsuperscript{226} This however changed in 1996 when a small group of armed Kosovo Albanians began to attack police outposts in the province. As the attacks by the armed group, the Kosovo Liberation Army (KLA) continued the Serbian police response intensified, often claiming civilian victims in its anti-insurgency raids. By late 1997, KLA had publicly declared its existence and its intention to fight for an independent Kosovo, resulting in early stages of the Kosovo War.\textsuperscript{227} KLA was proclaimed being a terrorist organization by the Serbian government and numerous cases involving Serbian police mistreatment of Kosovo Albanians, including arbitrary arrest, physical abuse, illegal raids, imprisonment and extra-judicial killing were documented at this time.\textsuperscript{228} Eventually the “fatal spiral of action and reaction, repression and resistance … lead to war.”\textsuperscript{229}

Already in December 1992 the UN Human Rights Committee had called upon the Yugoslav government “to put an end to the repression of the Albanian population in the province of Kosovo and adopt all necessary measures to restore the former local self-


government in the province.” The international community urged the Federal Republic of Yugoslavia (FRY) to grant the population of Kosovo local autonomy rights, typical for internal self-determination, though without any such reference; in March 1997 the UN General Assembly called upon Yugoslavia “to allow the establishment of genuine democratic institutions in Kosovo, including a parliament and the judiciary, and respect the will of its inhabitants.” A year later the Security Council called for a “meaningful dialogue on the political status issue” and showed its “support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.”

Diplomatic efforts were unsuccessful and by early 1999, after a failure to reach a political settlement, NATO began an air raid over FRY with the aim of expelling Serbian and Yugoslav forces from the province of Kosovo. The core idea behind the NATO intervention was that a relatively short bombing campaign would persuade Milosevic to come to an agreement regarding Kosovo. During the NATO air campaign the world however witnessed gross human rights violations against the Kosovo Albanian population in the province, often described as “ethnic cleansing”.

On June 10, 1999, the same day that NATO ceased its air campaign against Yugoslavia, the UN Security Council passed Resolution 1244, which placed Kosovo under transitional UN administration (UNMIK) and authorized KFOR, a NATO-led peacekeeping force. Through Resolution 1244 the Security Council stated that the future political status of Kosovo should be based on a “substantially greater degree of autonomy and meaningful self-administration.” In short, Resolution 1244 established a UN civil administration in Kosovo, assigned with the task to bring Kosovo towards autonomy and self-governance, however within the framework of Yugoslavia.

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233 UN Security Council Resolution 1244, June 10, 1999, Preamble, para. 11 and Raic David, Statehood and the Law of Self-Determination, Kluwer Law International, the Hague, 2002, p. 270. Resolution 1244 used the words “substantial autonomy and meaningful self-administration” which seems to be more to the point that the reference to a “substantially greater degree of autonomy” in the light of the lack of any such status under the 1992 Constitution of the Federal Republic of Yugoslavia, and thus, at the time of the adoptions of the resolutions.
In 2006 international negotiations began, to determine the final status of Kosovo, as envisaged under Resolution 1244. Belgrade and Pristina however remained diametrically opposed on the question and both sides claimed the right to the territory of Kosovo.

**B. The Kosovo Declaration of Independence**

After years of failed negotiations and what Kosovo perceived as a dead end, Kosovo’s parliament endorsed a unilateral declaration of independence on February 17, 2008. It was the second declaration of independence announced by Kosovo’s ethnic Albanian political institutions, the first being proclaimed on September 7, 1990.

On February 17, 2008 celebrations went on into the night after the prime minister of Kosovo, Hashim Thaci, promised a democracy that respected the rights of all ethnic communities. Serbia’s prime minister denounced the US for helping create a “false state” and a split later emerged at the Security Council, when Russia said there was no basis for changing the UN Security Council Resolution 1244, which placed Kosovo under a UN protectorate, also confirming the territorial integrity of the existing state of Serbia. The Constitutional Court of Serbia deemed the declaration of independence illegal, arguing it was not compatible with the UN Charter, the Constitution of Serbia, the Helsinki Final Act, nor UN Security Council Resolution 1244 (including previous resolutions).

**The ICJ’s advisory opinion on Kosovo**

On February 18, 2008 Serbia declared Kosovo’s declaration of independence without legal force and announced its plan to call on the International Court of Justice (ICJ) to

234 The Kosovo Declaration of Independence, “We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state.” see http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en (retrieved on 2013-10-06).
237 See Serbian newspaper Blic online, 2013-08-17, Nikolić s Abongom Obomom: Uporni da ne priznamo Kosovo čak i po cenu EU (English: Nikolic to Abong Obama: Persistent not to recognize Kosovo even at the cost of EU), http://www.blic.rs/Vesti/Politika/399675/Nikolic-s-Abongom-Obomom-Uporni-da-ne-priznamo-Kosovo-cak-i-po-cenu-EU (retrieved on 2013-10-06).
judge whether the declaration was in breach of international law. On August 15, 2008 Serbia filed an official request at the United Nations, seeking ICJ’s opinion.\(^{238}\)

Almost two years later, in July 2010, ICJ ruled that “the declaration of independence of the 17 February 2008 did not violate general international law because international law contains ‘no prohibition on declarations of independence’”, nor did the declaration of independence violate UN Security Council Resolution 1244, since this resolution did not describe Kosovo’s final status, nor had the Security Council reserved for itself the decision on the final status of Kosovo.\(^{239}\)

According to the court the issue of recognition was not a legal but a political one and the judges were firm in that they were not taking a stand on whether Kosovo had a right to secede, or whether Kosovo was now a state.\(^{240}\)

Whether the declaration of independence was an act of Kosovo’s provisional institutions of self-government was unclear. In the end, ICJ decided that the “the authors of the declaration of independence of 17 February 2008 did not act as one of the provisional institutions of self-government within the constitutional framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”\(^{241}\) This was important since the argument by Serbia was that the provisional institutions of self-government had exceeded the authority given to them by the constitutional framework, proclaimed by UN Security Council Resolution 1244 (UNMIK).

The international supervision in Kosovo ended on September 10, 2012\textsuperscript{242}, and since Kosovo’s declaration of independence in 2008, the Republic of Kosovo has received more than 100 diplomatic recognitions as an independent state.\textsuperscript{243} In April 2013 Serbia and Kosovo have moreover entered an important and historic agreement, which indicates a first step towards normalized relations between the two.\textsuperscript{244}

C. Kosovo and the right of self-determination

The question to be answered here is whether Kosovo’s unilateral secession is compatible with the principle of self-determination, as it has evolved under international law.

To be entitled the right to secede through external self-determination the Kosovo Albanian population has to qualify as a \textit{people} subject to historical and persistent \textit{state-abuse} by its formerly parent-state, i.e. Serbia. Furthermore, all other remedies of self-determination must be exhausted, meaning that there should be \textit{no viable alternative left than secession} for a secessionist claim to be valid under international law and come into force.

\textit{Are Kosovo Albanians a “people”}\textsuperscript{?}

According to many historians, Kosovo Albanians are descendants from the Illyrians who inhabited the area already in the 2\textsuperscript{nd} century BC.\textsuperscript{245} For centuries Kosovo Albanians have preserved and cultivated their characteristics, such as their common \textit{language} (Albanian), \textit{traditions, culture, religion} (the majority being Muslims) and \textit{customs}, distinct from the characteristics of other groups of peoples inhabiting the area.\textsuperscript{246}

\textsuperscript{242} The International Steering Group for Kosovo (ISG) was an organization formed pursuant to the Ahtisaari plan concerning the Kosovo status process. It was set up to guide Kosovo’s democratic development and promote good governance, multi-ethnicity and the rule of law. On September 10, 2012 ISG ended its supervision. See Press TV, 2012-09-11, \textit{International Steering Group ends supervised independence of Kosovo}, http://www.persstv.com/detail/2012/09/11/260917/supervised-independence-of-kosovo-ends/ (retrieved on 2013-10-06).


Since Kosovo’s incorporation with Serbia in 1912-1913, the territory of Kosovo has also been recognized as a distinct geographical region with clear borders. More importantly, over time the Kosovo Albanians have developed their distinct identity through events such as Kosovo’s separation from Albania, a struggle for autonomy, the 1974 constitutional arrangements within the SFRY, and a decade of gross human rights violations conducted by Serbian authorities against them. Furthermore the Kosovo Albanians make up to the vast majority of 92 percentages of Kosovo’s total population, and already in the 1990s the Kosovo Albanians started to establish their own ethnic parallel political institutions in Kosovo.

The violent historical background that stretches back centuries ago and the linguistic and cultural gap between the Serb and the Kosovo Albanian population may classify the Kosovo Albanian population as a people. The fact that the Kosovo Albanians are historically linked to the region and view themselves as a people, separate from the Serbian population support such classification. On the other hand one could argue that the Kosovo Albanians are an enclave of Albanians; Kosovo does border Albania, a country populated by an Albanian Muslim majority, speaking the same language as the Kosovo Albanians do. But are Kosovo-Albanians and Albanians the same people?

On the surface Kosovo Albanians and Albanians seem to be of the same ethnicity; they speak the same language (Albanian), despite significant dialect differences; they hold a certain community of values, and the majority share the same religion (Islam). In this sense Kosovo Albanians and Albanians share most of the basic characteristics of what constitutes a people, or a nationality. In the 20th century, and especially in the 1990s, there has nevertheless not been just one Albanian identity, but two, due to the fact that Kosovo Albanians does not share the experience of the Republic of Albania. Kosovo Albanians have instead been living under the special conditions of Serbian authority since 1912-1913, and through several historical events they have developed a special group consciousness and will to exist. The territory which the Kosovo Albanians

occupy, and where they compose the vast majority, also has clear borders. Furthermore, the Kosovo Albanians are distinguishable from other groups living both within and outside of Kosovo.

In this view it is quite rational to conclude that Kosovo Albanians constitute a people for the rights of peoples in international law. This however does not give Kosovo an automatic right to secede from its parent-state. According to the remedial secession doctrine the Kosovo Albanian people must be able to show that severe human rights violations have been committed against them by Serbia.

**Human rights violations against the Kosovo Albanian people**

In the framework of the Socialist Federal Republic of Yugoslavia (SFRY) Kosovo was granted autonomy, and in the 1974 Constitution Kosovo advanced to a province, which was the closest after being a republic. The 1974 Constitution further stipulated that the borders of Kosovo could not be changed without approval of the Kosovar parliament. On March 23, 1989, Serbia nevertheless forced the parliament of Kosovo to approve the abolishment of its autonomous status. A year later the autonomous status of Kosovo only existed in name, and in the course of 1990 a new law, adopted by the Serbian National Assembly, dissolved the parliament and government of Kosovo and all powers reverted to the Serbian authorities. The 1992 Constitution of the Republic of Yugoslavia no longer contained any reference to Kosovo as an autonomous province. In fact, the 1989 Serbian constitutional amendments reduced the status of all autonomous provinces of the SFRY to nothing.

As addressed, the educational system in Kosovo underwent radical changes as did the police, business and health care systems, with the result of grave discriminations taking place against the Kosovo Albanian population. The use of the Albanian language was

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prohibited and severe state-abuse took place against the Kosovo Albanian population on daily basis.\textsuperscript{255} The outcome of the Serbian measures consisted in an overall worsening of the living conditions for the Kosovo Albanians.\textsuperscript{256} Throughout the 1990s UN have called upon the Yugoslav government to put an end to the repression in Kosovo and adopt all necessary measures to restore the former self-government in the province\textsuperscript{257}, though without success.

During more than a decade the Serbian government perpetrated gross human rights violations against the Kosovo Albanian population, including massacres\textsuperscript{258}, involving the Racak massacre taking place in 1999\textsuperscript{259}, resulting in the NATO intervention and the subsequent withdrawal of Serbian military in Kosovo.\textsuperscript{260}

It is not possible to say whether the Serbian state-abuse would have continued or not if foreign forces would have been withdrawn when Serbia removed its army from the region. It is however reasonable to conclude that the Kosovo Albanians fulfill the requirement of human rights violations that entitles them the right of external self-determination. A remedial secession does however only come into play if all other options of self-determination are exhausted. As stated before, secession can only be used as a remedy of last resort.


\textsuperscript{257} Comments of the Human Rights Committee: Federal Republic of Yugoslavia (Serbia and Montenegro), UN Doc. CCPR/C/79/Add.16, December 18, 1992, para. 8.


\textsuperscript{259} On January 15, 1999 a total number of forty-five Kosovo Albanians were killed in Racak, Kosovo, by the Serbian special police. It has been disputed whether the killings were executed by the Serbian special police or members of the KLA. According to Human Rights Watch at least twenty-three of the victims were apparently executed, and eighteen others, including a twelve-year-old boy and two women, were also killed. After the attack Human Rights Watch conducted separate interviews with fourteen witnesses to the attack as well as with foreign journalists and observers who visited Racak on the day after the attack. Together, the testimonies suggest a well planned and executed attack by government forces on civilians in Racak, where the KLA had a sizable presence and had conducted some ambushes on police patrols. See Human Rights Watch, 1999-01-29, \textit{Human Rights Watch investigation finds: Yugoslav Forces Guilty of War Crimes in Racak, Kosovo}, http://www.hrw.org/news/1999/01/29/human-rights-watch-investigation-findsyugoslav-forces-guilty-war-crimes-racak-kosovo (retrieved on 2013-10-06).

\textsuperscript{260} NATO, \textit{The Kosovo Air Campaign}, http://www.nato.int/cps/en/natolive/topics_49602.htm (retrieved on 2013-10-06).
Does Kosovo’s secession fulfill the “last resort” requirement?

After 1989 ethnic Kosovo Albanians was openly denied internal self-determination. Furthermore, gross human rights violations were perpetrated against them – thus making remedial secession rational. The humanitarian catastrophe in Kosovo was however put to an end in 1999, through foreign intervention, followed by the adoption of UN Security Council Resolution 1244, re-establishing self-governing institutions in Kosovo, affirming Serbia’s territorial integrity and calling for a political process leading to a settlement of Kosovo’s future status. Nonetheless, the international community witnessed years of failed negotiations between Serbia and Kosovo, and even a reluctance to negotiate. For the Kosovo Albanians there seem to have been too much of a turbulent and unstable history to conceive a realistic political arrangement other than independence, and it appears convincing that all other options of self-determination than secession have been exhausted.

A reasonable argument against secession could though be that the human rights violations against the Kosovo Albanian people took place more than a decade ago, under the leadership of Slobodan Milosevic who no longer is in play, and furthermore that those responsible for the “ethnic cleansing” and other war crimes have been prosecuted. Here it though seems justifiable to argue that because of the inflammatory history between Kosovo and Serbia there is no trust left to conceive an arrangement suitable for the two, other than an independent Kosovo. In December 2007 the Troika, made up of the US, EU and Russia, in fact reported to the UN Security General that Serbia and Kosovo “were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.” The Troika also said that further talks over Kosovo’s status would be superfluous and that the province could declare independence at any time.

Any other realistic option than secession has so far failed and the conclusion must be that Kosovo’s declaration of independence and unilateral secession fulfills the

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requirement of being a remedy of last resort. The right of self-determination and remedial secession does apply to the Kosovo Albanian people.
IV. CONCLUSION

The analysis above demonstrates that international law constantly evolves and international legal principles are much established through the political will of states and the international community. The principle of equal rights and self-determination of peoples has been developed through a number of General Assembly resolutions and declarations, as well as through state practice. Its application is considered to be crucial for the effective realization of human rights and freedoms, for the development of friendly relations among nations, and, for the maintenance of international peace and security.263

Today the principle of self-determination is widely recognized as a fundamental legal principle generating specific rights and duties, and in contemporary international law the principle has developed to one of the few and peremptory, non-derogable norms.264 To avoid claims of external self-determination and secession states should hence make every effort they can to promote the full respect of the right of peoples to self-determination by national governments, i.e. internal self-determination.

Until 2008 and the declaration of independence the international community has though been reluctant to support an independent Kosovo, most likely out of fear that such support would open a “Pandora’s box” in regards to “peoples” with possible claims of self-determination around the world. Since Kosovo’s declaration of independence, the Republic of Kosovo has received more than 100 diplomatic recognitions as an independent state.265 Most states have however held that Kosovo is a unique case and thus can’t be seen as a precedent for other groups claiming a right to external self-

265 As of September 26, 2013, the Republic of Kosovo has received 108 diplomatic recognitions as an independent state. See http://en.wikipedia.org/wiki/International_recognition_of_Kosovo (retrieved on 2013-10-06).
determination. This makes it clear that the question of external self-determination, through secession, is a political question rather than a legal one.

As regards the UN Security Council resolutions on Kosovo it is significant that the council has avoided the use of the term “self-determination”. The pronouncements of the international community on the Kosovo question nevertheless provide a basis for the claim that Kosovo Albanians constitute a “people”, entitled the right of external self-determination, due to severe human rights violations by its formerly parent-state Serbia. It is evident that the repression in the 1990s, as well as the foreign intervention and subsequent presence played a significant role for the unilateral declaration of independence and creation of the Republic of Kosovo. Eventually the international community will determine if Kosovo will attain the rights of a state. Being recognized by more than half of the world’s countries implies that Kosovo is on a good path.

With the Kosovo case there is, if not a new precedent, at least a much greater awareness of the options available in regards to a people repressed by its parent-state.

As a concluding remark and reminder to all peoples and states, with emphasis on Kosovo and Serbia, I find it suitable to quote Dag Hammarskjöld:

“Don’t look back. And don’t dream of the future: it will not give you back the past, not satisfy other dreams of happiness. Your duty and your rewards – your destiny – are here and now.”\textsuperscript{266}

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