
KOSOVO'S DECLARATION OF INDEPENDENCE: AN INCIDENT ANALYSIS OF LEGALITY, POLICY AND FUTURE IMPLICATIONS

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Possible final destinations include autonomy, partition and independence, and the means of arriving at them range from peaceful negotiation or international imposition to civil disobedience, violent intifada and full-scale war.¹

We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state.²

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¹ NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* xxvii (1998). Malcolm wrote this historical account of Kosovo one year before the NATO bombing campaign began in 1999.

² DECLARATION OF INDEPENDENCE, (KOSOVO 2008), available at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en>.

I. INTRODUCTION

On February 17, 2008, the Kosovo Parliament in its capital, Pristina, unanimously voted in favor of declaring its independence from Serbia.³ While this development does not, by itself, resolve what has been a nearly decade-long impasse over Kosovo's final political status between Belgrade, Pristina, and the international community, Kosovo's parliament, by taking this action, has put immense pressure on itself, Serbia, and the international community to help bring finality to this dispute.

Kosovo's unilateral declaration drew immediate and divided reactions from the international community. The United States and many European countries quickly recognized and gave support for Kosovo's declaration.⁴ Serbia, Russia, Spain, Romania and others denounced the Kosovo Parliament's action as illegal and contrary to norms of international law.⁵

At the core of this international dispute is the extent to which, if at all, Kosovo had, at the time of its declaration, a right to secede from Serbia without Serbia's consent. As various international actors continue to weigh in on Kosovo's controversial action, those aligned against recognizing Kosovo's independence contend that the action was illegal under international law, violating Serbia's territorial integrity and illegally instituting changes to its borders without Serbia's consent.⁶ These opponents add that recognition would set a risky precedent, providing a legal justification for separatist movements around the world to declare independence, a sequence of events which could ultimately lead to global instability.⁷

In response to these assertions, Kosovo and its supporters argue that the particular circumstances and history between Kosovo and Serbia constitute a unique set of facts that distinguish it from other separatist movements that the international community tends not to support.⁸ Implicit in this argument seems to be the contention that Kosovo falls within an exception to otherwise prohibited attempts to secede thus meriting recognition.

Skeptics of international law might argue that commentary on the legality of Kosovo's declaration is irrelevant, asserting that irrespective of the act's legality, international actors are responding and taking measures address the situation. While it is true that Kosovo will not "undeclare" its

³ *Kosovo MPs Proclaim Independence*, BBC NEWS, Feb. 17, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7249034.stm>.

⁴ Paul Reynolds, *Kosovo: To Recognise or not to Recognise?*, BBC NEWS, Feb. 18, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7250764.stm> [hereinafter *To Recognise*].

⁵ Paul Reynolds, *Legal Furore over Kosovo's Recognition*, BBC NEWS, Feb. 16, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7244538.stm>.

⁶ *Id.*

⁷ *To Recognise*, *supra* note 4.

⁸ *Id.*

independence if an international body such as the International Court of Justice ("ICJ") were to find the declaration illegal, Kosovo's actions and the response of international actors merit careful analysis because of their inevitable impact on the development of international norms such as the right to self-determination and its interaction with the principle of territorial integrity. A clearer understanding of the legality of Kosovo's declaration and perceptions of the legality of the declaration will help students, practitioners, and politically relevant actors better understand and predict future behavior in this area.

This note attempts to clarify the state of international law in the area of secession and apply it to the facts and circumstances surrounding Kosovo's recent declaration of independence to determine whether or not the declaration was a legal act under international law. In order to do so, this inquiry requires consideration of past and present state practice and *opinio juris* in the areas of self-determination, territorial integrity and State recognition. Despite the international community's traditional aversion to unilateral secession, Kosovo's declaration of independence fits within an especially narrow range of permissibility.

II. KOSOVO AND SERBIA: A HISTORY OF THE REGION AND CONFLICT

Determining the legality of Kosovo's unilateral declaration requires a careful consideration of the tumultuous history of the region with particular attention to Kosovo and Serbia. Prior to Kosovo's declaration of independence, it was an internationally administered territory that was, pursuant to U.N. Security Council Resolution 1244 ("Resolution 1244"),⁹ an autonomous region within the Federal Republic of Yugoslavia.¹⁰ Kosovo's population makeup is predominantly Muslim Albanian with small minorities of Serbs, Bosniaks, Romas and Turks.¹¹ Varying statistical sources suggest the population breakdown between Albanians and Serbs approaches 92% and 5.3%, respectively.¹²

⁹ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), available at <http://daccess.dds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> [hereinafter S.C. Res. 1244]. This Security Council resolution, along with other international agreements, brought an end to NATO's bombing campaign in Kosovo and set up the guidelines for the United Nations Mission in Kosovo ("UNMIK") and will be discussed in more detail *infra*.

¹⁰ See *id.*

¹¹ See Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP* 19, 23 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

¹² See generally Statistical Office of Kosovo, <http://www.ks-gov.net/esk/> (last visited Oct. 5, 2008) (containing various population reports conducted by the Provisional Institutions for Self-Government under the supervision of UNMIK based on prior censuses and other statistical analyses)[hereinafter Kosovo Statistics].

Kosovo Albanians and Serbs both stake a claim in this region dating back centuries, each side arguing that history places them in the region prior to the other.¹³ Regardless of who arrived first, Albanian and Slavic peoples¹⁴ have cohabitated the territory of Kosovo for hundreds of years.¹⁵ Serbians controlled Kosovo until the late fourteenth century when the Ottoman Empire defeated the Serbs in the historic Battle of Kosovo, a battle which many Serbs view as a symbolic rallying point for Serbian nationalism.¹⁶ Serbia regained control of Kosovo from the Ottoman Empire in 1912¹⁷ and integrated into the newly formed Kingdom of Serbs, Croats, and Slovenes.¹⁸

After World War II, communist dictator Josip Broz Tito (“Tito”) took control of the region, and incorporated Kosovo into Serbia, one of six federal republics within Yugoslavia.¹⁹ This political structure, along with the issuance of Serbia’s 1947 constitution, granted Kosovo autonomous rights with respect to culture and economics.²⁰

The 1974 SFRY constitution was the high water mark for Kosovo Albanian autonomy.²¹ Legally, the region was considered an autonomous

¹³ Calic, *supra* note 11, at 22. International law seems to favor claims of self-determination made by indigenous people based on a “first people” entitlement rationale. See generally Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17 (James Crawford ed., 1988). This area of self-determination law, while potentially favorable, is probably not relevant here because of the lack of credible historical evidence for either side, Albanian or Serb. Both sides’ historical claims have largely been reduced to myth. See Calic, *supra* note 11, at 22-23.

¹⁴ Serbs are considered a Slavic people, whose origins can be traced to medieval states of South Slavic peoples. See MATJAZ KLEMENCIC & MITJA ZAGAR, *THE FORMER YUGOSLAVIA’S DIVERSE PEOPLES* 1-2 (2004).

¹⁵ See generally MALCOLM, *supra* note 1, ch. 2.

¹⁶ KLEMENCIC & ZAGAR, *supra* note 14, at 23.

¹⁷ See Hajredin Kuci, *The Legal and Political Grounds for, and the Influence of the Actual Situation on, the Demand of the Albanians of Kosovo for Independence*, 80 *CHI.-KENT L. REV.* 331, 333 (2005).

¹⁸ See MALCOLM, *supra* note 1, at 264. The Federation, as it more formally developed in 1945, also included the federal republics of Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro. See KLEMENCIC & ZAGAR, *supra* note 14, at 197.

¹⁹ MALCOLM, *supra* note 1, at 315-16. In order to avoid confusion with nomenclature, the Federal People’s Republic of Yugoslavia, as it was named in 1945, became the Socialist Federal Republic of Yugoslavia (“SFRY”) in 1963 after constitutional reform. See KLEMENCIC & ZAGAR, *supra* note 14, at 197, 206. After the SFRY was deemed disintegrated in 1992 (discussed *below*), the remaining federal republics Serbia and Montenegro became the Federal Republic of Yugoslavia (“FRY”), a separate and distinct State from the dissolved SFRY. *Id.* at 333.

²⁰ MALCOLM, *supra* note 1, at 316.

²¹ *Id.* at 327.

province within the Federal Republic of Serbia.²² Kosovo's rights included representation to the Presidency of the SFRY and authority to draft its own constitution.²³ Despite this augmentation of Kosovo's autonomy, the 1974 SFRY constitution was clear in denying Kosovo the right to secede from the SFRY, a right arguably granted to each of the six federal republics.²⁴

Following Tito's death in 1981, a period of political instability commenced in the SFRY.²⁵ In Kosovo, independence movements developed amongst Albanians,²⁶ while Slobodan Milosevic rose to power in Serbia on a nationalist platform.²⁷ Milosevic accused Kosovo Albanians of violating the rights of the Serb minority in Kosovo, and the Serbian parliament began preparing amendments that would strip Kosovo Albanians of the autonomy granted to them in the 1974 SFRY constitution.²⁸ Back-and-forth atrocities ensued; Albanians responded to Serbian oppression with violence against the Serb minority, and Milosevic reacted by ordering 25,000 Serbian police officers into the province.²⁹

Throughout the violent escalation, Kosovo Albanians made efforts to free themselves from Serbian control. In 1990, most Albanian members of the Kosovo Parliament met outside of its building³⁰ and passed a resolution declaring Kosovo independent within the SFRY.³¹ Slightly more than a year later in 1991, Albanians in Kosovo organized a referendum in which 87% of voters took part, and 99% voted in favor of Kosovo as a sovereign and independent republic.³² Additionally, the Kosovo Albanians organized parallel government structures, including a local government assembly, schools, and clinics.³³ Finally, following the declarations

²² *Id.* Technically, Kosovo obtained this status in the Yugoslav Constitution of 1963, but its rights as an autonomous province were more protected under the 1974 Constitution. *Id.* at 323-24, 327.

²³ *Id.* at 327.

²⁴ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 401 (2006).

²⁵ See generally MALCOLM, *supra* note 1, ch. 17.

²⁶ *Id.* at 334-38.

²⁷ KLEMENCIC & ZAGAR, *supra* note 14, at 243.

²⁸ MALCOLM, *supra* note 1, at 343. According to the Constitution, these amendments could not be ratified without support in the Kosovo Parliament. *Id.* In 1989 Serbia coerced the Kosovo Assembly to accept the amendments by surrounding it with tanks and armored vehicles, and some believe Serbian officials took part in the voting as well. *Id.* at 343-44.

²⁹ *Id.* at 345.

³⁰ After the Serbian leadership coerced Kosovo's acceptance of the autonomy-stripping amendments, the Kosovo parliament building was locked up. *Id.* at 346.

³¹ *Id.* at 346.

³² *Id.* at 347.

³³ *Id.* at 349.

of independence of Slovenia and Croatia in 1991, the Democratic League of Kosovo³⁴ asserted claims of full sovereignty and independence.³⁵

Prior to the NATO intervention in 1999, violence continued to increase in frequency and intensity. After the Dayton Accords of 1995, which brought the ongoing war in Bosnia and Herzegovina to an end, failed to address the volatile situation in Kosovo, terrorist organizations like the Kosovo Liberation Army (“KLA”) began to develop.³⁶ Massacres of Albanians ensued, houses and schools were destroyed, and nearly 400,000 Albanians were forced to leave their homes.³⁷ A 1999 ceasefire agreement failed to last, and a massacre of 45 Albanians in Racak led the international community to intervene.³⁸

Contrary to the FRY’s opposition, NATO proceeded with air strikes against the FRY in Kosovo and Serbia.³⁹ Despite expectations that Milosevic would back down⁴⁰ immediately and sign the Rambouillet Agreement,⁴¹ an interim agreement aimed toward bringing finality to the dispute over Kosovo’s political status, the NATO air strike lasted several weeks and did not conclude with Milosevic’s signature.⁴² In the end, Serbian forces committed massacres and rapes, tortured individuals, and forced approximately one million Kosovo Albanians from their homes.⁴³

³⁴ The Democratic League of Kosovo was formed by a group of Albanian intellectuals set up in opposition to Serbia’s revocation of Kosovo’s autonomy and for the realization of Kosovar independence. *Id.* at 348.

³⁵ *Id.* at 350.

³⁶ *Id.* at 353-55.

³⁷ Agon Demjaha, *The Kosovo Conflict: A Perspective from Inside, in Kosovo AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 32, 34 (Albrecht Schnabel & Ramesh Thakur eds., 2000) (referencing several October issues of the Kosovo daily newspaper, *Koha Ditore* (Pristina), and reports from the U.N. Refugee Agency office in Pristina).

³⁸ *Id.* at 35. This action took the form of the Rambouillet Conference in February of 1999, where the Albanian and Serbian delegations failed to agree on settlement terms due to Albanian insistence on a referendum and Serbian opposition to a potential NATO military presence in Kosovo. *Id.*

³⁹ *Id.* at 36.

⁴⁰ Demjaha, *supra* note 37, at 36.

⁴¹ The Rambouillet Peace Agreement was an instrument which members of the international community, particularly under the supervision of the United States, E.U. members, and Russia, drafted hoping to bring a peaceful conclusion to the violent strife in Kosovo prior to NATO’s intervention. The Agreement called for Serbia to concede substantial autonomy to Kosovo and allow for a final political solution based on the will of the people of Kosovo three years after taking effect. *See generally* Rambouillet Peace Agreement: Interim Agreement for Peace and Self-Government in Kosovo, http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (last visited Oct. 6, 2008).

⁴² Demjaha, *supra* note 37, at 36.

⁴³ *Id.*

NATO's intervention concluded in June of 1999 with the Military Technical agreement⁴⁴ between NATO and the FRY as well as Resolution 1244.⁴⁵ Following these agreements, NATO deployed its Kosovo Force ("KFOR"), the international security force responsible for maintaining peace and stability in the region.⁴⁶ The U.N., along with other international organizations such as the European Union ("E.U."), would be responsible for, *inter alia*:

Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;

Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;

The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian organizations;

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA⁴⁷

In sum, the international community would intermediately replace the FRY as the governing body of the Kosovo region until a more final political solution could be reached.⁴⁸

Since Resolution 1244 passed, the United Nations Mission in Kosovo ("UNMIK") has administered the territory, along with the Provisional Institutions of Self-Government⁴⁹ ("PISG") that have developed under

⁴⁴ To consult the document, *see generally* Military Technical Agreement Between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and Serbia, U.N. Doc. S/1999/682/Annex, June 1999, <http://www.un.org/peace/kosovo/s99682.pdf> (last visited Oct. 26, 2008).

⁴⁵ Demjaha, *supra* note 37, at 37.

⁴⁶ *Id.*

⁴⁷ *See generally* S.C. Res. 1244, *supra* note 9.

⁴⁸ *See id.*

⁴⁹ Pursuant to an UNMIK Regulation promulgated by the Special Representative to the Secretary General ("SRSG") based on the framework provided in S.C. Res. 1244, the Provisional Institutions of Self-Government ("PISG") is the branch of the administration in Kosovo controlled by Kosovo rather than the U.N. Int'l Crisis Group, *Kosovo: Landmark Election 1-7* (2001), available at http://www.crisisgroup.org/library/documents/europe/balkans/120__kosovo_landmark_election.pdf. *See also* CRAWFORD, *supra* note 24, at 559.

UNMIK's supervision.⁵⁰ This interim arrangement provides Kosovo with "substantial autonomy within the Federal Republic of Yugoslavia"⁵¹ Because the language of Resolution 1244 is crucial to determining whether Kosovo's declaration of independence is legal, it is important to distill its complex political arrangement and the relevant international actors responsible for maintaining peace and stability in the region. There are five principal groups pursuant to Resolution 1244 with some form of governmental authority and responsibility in Kosovo: (1) the U.N. (UNMIK); (2) Kosovo (PISG); (3) Serbia; (4) NATO (KFOR); and (5) other international organizations (e.g., E.U.).⁵²

UNMIK wields broad power under Resolution 1244 and is responsible for the general supervision of Kosovo's provisional institutions as well as conducting the region's external relations with international organizations and other States.⁵³ The PISG (Kosovo-controlled) is responsible for most of the domestic affairs of the region, almost always subject to UNMIK supervision through the Special Representative of the Secretary General ("SRSG").⁵⁴ Serbia, after agreeing to withdraw its military and police presence in Kosovo, is limited to clearing minefields, maintaining a security presence at Serb patrimonial sites, and maintaining a presence at key border crossings.⁵⁵ NATO is responsible for providing an international military presence to maintain peace and stability in the region,⁵⁶

⁵⁰ Int'l Crisis Group, *Kosovo: No Good Alternatives to the Ahtisaari Plan* 43 (2007), available at http://www.crisisgroup.org/library/documents/europe/balkans/182_kosovo_no_good_alternatives_to_the_ahtisaari_plan.pdf.

⁵¹ See S.C. Res. 1244, *supra* note 9, Annex II ¶ 5. Note that this language is clear in reaffirming the territorial integrity of Serbia; *i.e.*, Kosovo is an autonomous region within Serbia pursuant to the language of S.C. Res. 1244. See CRAWFORD, *supra* note 24, at 558. For purposes of nomenclature, note that at the time Resolution 1244 was drafted and passed, the FRY was made up of Serbia and Montenegro. See KLEMENCIC & ZAGAR, *supra* note 14, at 323. Indeed, "the Federal Republic of Yugoslavia [FRY], which included only Montenegro and Serbia, was formed in 1992 and replaced in 2003 by the State Union of Serbia and Montenegro, which in turn dissolved into its component republics in June 2006 after Montenegro voted in a referendum for independence." Int'l Crisis Group, *Southern Serbia: In Kosovo's Shadow* 1& n.1 (2006), available at http://www.crisisgroup.org/library/documents/europe/balkans/b043_southern_serbia_in_kosovo_s_shadow.pdf.

⁵² See generally S.C. Res. 1244, *supra* note 9.

⁵³ See Constitutional Framework for Provisional Self-Government, ch. 8, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001), http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf [hereinafter Constitutional Framework]; see also S.C. Res. 1244, *supra* note 9, Annex II.

⁵⁴ See *id.*, Preamble. With respect to the SRSG, S.C. Resolution 1244, in its creation of a civil presence (*i.e.*, UNMIK), provided for the appointment of a special representative to control the overall civil presence. See S.C. Res. 1244, *supra* note 9, ¶ 6.

⁵⁵ *Id.* at Annex II ¶ 6.

⁵⁶ *Id.* at Annex II ¶ 4.

and the above mentioned relevant international organizations are responsible for the economic development and stabilization of the region.⁵⁷

III. RELEVANT LAW

Determining whether a unilateral declaration of independence is legal requires an inquiry of various moving parts. Among them include the legal right(s) of the group seeking independence, the legal right(s) of the State from which the group attempts to separate, and the relevance of the international community, *i.e.*, its member states and constituent organizations. Corresponding to each of these components are the legal principles of self-determination, territorial integrity and State sovereignty, and State recognition. Based on the relatively recent emergence of the individual as a legally recognized and protected personality under the customs and norms of international law, along with the related diminution in legal preeminence the State has undergone, it seems plausible to infer a recognized right for a population within a State to secede.

Self-determination is an international legal principle that, if properly invoked, arms a population with the authority to choose its political fate.⁵⁸ If unrestricted and carried out to its logical end, this principle could conceivably give rise to a situation where a collection of people within a State chooses to detach itself and form its own independent country. In theory and in practice, however, a people's right to self-determination is restricted considerably. Concerns over global order and a State's traditional dominion over its inhabitants weigh heavily against a people's wish to establish its own country or merge with another. These underlying policies, juxtaposed against the principle of self-determination, give rise to a conceptual conflict that when reconciled, leaves a very narrow exception to a traditional presumption against a people's right to secede from its original state.

A. *The Evolution of Self-determination and Secession*

Following World War I, the Allies introduced the concept of self-determination as a way to resolve the political status of various contested territories.⁵⁹ At this time, the international community sacrificed the idea of self-determination as a way for populations to determine their political destiny for what were considered superseding interests of peace and stability.⁶⁰ Germany and Austria voiced strong objections to the principle, and their appeasement was seen as paramount to the full employment of

⁵⁷ *Id.* at Annex II ¶ 9.

⁵⁸ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553 (6th ed. 2003).

⁵⁹ See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 23-27 (1995).

⁶⁰ *Id.* at 23-24.

Wilsonian self-determination.⁶¹ In addition to self-determination's subservience to peace and stability, the principle also yielded to the strategic political and economic interests of the victorious nations of World War I.⁶² Thus, "[t]he arbitrary manner in which the Allies decided which populations were entitled to determine their fate defeats any suggestion that a 'right' to self-determination existed."⁶³

During the same era, the Council of the League of Nations appointed a committee of three jurists⁶⁴ to determine whether the inhabitants of the Aaland Islands possessed a right to secede from Finland and join the Kingdom of Sweden.⁶⁵ The jurists conceived of three situations: (1) where a State recognizes a population's claim of self-determination in the form of autonomy within the State;⁶⁶ (2) where the State does not recognize a right to self-determination but instead provides the claimant with sufficient minority protections;⁶⁷ and (3) where the State neither recognizes self-determination nor extends minority protections.⁶⁸ If the third situation emerges, *i.e.*, if the State engages in oppression and persecution of a particular group seeking to recognize a right to self-determination, the Commission of Rapporteurs left open the possibility that secession could be the proper remedy:

⁶¹ *Id.* at 24. President Wilson's brand of self-determination was based on traditional Western democratic theory. "In other words, for Wilson self-determination basically consisted of the right of peoples freely to choose their government." *Id.* at 19.

⁶² *Id.* at 25.

⁶³ *Id.* at 26.

⁶⁴ *Id.* at 27. This committee, which set out to determine whether the Aaland Islands dispute was a domestic or international legal issue, was known as the Committee of Jurists. *Id.* at 28.

⁶⁵ *Id.* at 27; see also Philip Marshall Brown, *The Aaland Islands Question*, 15 AM. J. INT'L L. 268, 268-272 (1921). In fact, the League of Nations issued two reports concerning this dispute. As mentioned *supra* in note 64, the initial opinion, issued by the Committee of Jurists, decided whether or not the League of Nations was competent to determine the fate of the Aalanders. See CASSESE, *supra* note 59, at 28. Once the Committee found the issue to be of an international character, a second decision, issued by another League-appointed commission, the Commission of Rapporteurs, recommended a course of action. *Id.* at 29.

⁶⁶ Today this form of self-determination, because autonomy is granted within the political structures of the existing State, is referred to as internal self-determination. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 273 (5th ed. 2003). See also Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282 (Can.) [hereinafter *Secession of Quebec*].

⁶⁷ Minority protections are a form of legal safeguard that a State grants to its minority constituencies often in the form of laws granting protective rights in language, education, religious practice and culture. See generally SHAW, *supra* note 66, at 273-281.

⁶⁸ See CASSESE, *supra* note 59, at 29-31.

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.⁶⁹

Considering the Commission of Rapporteurs' opinion issued its analysis not long after the Covenant of the League of Nations was established and well before the drafting of the U.N. Charter and the codification of much of today's human rights law, this opinion represents an early step toward recognizing a narrow exception to the traditional presumption against an external means of realizing a group's self-determination claim, *i.e.*, secession.⁷⁰

The principle of self-determination, which drafters excluded from the League Covenant, was included in Article 1(2) of the U.N. Charter.⁷¹ Based on its language and placement within the Charter, the principle of self-determination is more of an aspiration than legal duty imposed on States.⁷² In fact, the "equal rights" to which Articles 1(2) and 55 refer seem to be within a context of protecting people of a State from interference by other States⁷³, rather than protecting people of a State from the State itself as in the case of Kosovo. Given this subtlety within the Charter, "[w]e cannot ignore the coupling of 'self-determination' with 'equal rights' and [sic] it was equal rights of *States* that was being provided for, not of individuals."⁷⁴ Despite its rather weak status in the Charter, the

⁶⁹ *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, at 28 (1921) [hereinafter *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. *Id.*

⁷⁰ That said, the Commission was clear in its rejection 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.

Id.

⁷¹ Article 1(2) reads, "[t]o 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." U.N. Charter art. 1, para. 2. Similar language also appears in U.N. Charter article 55. See U.N. Charter art. 55.

⁷² CASSESE, *supra* note 59, at 65.

⁷³ Judge Rosalyn Higgins, *Self-Determination and Secession*, in *SECESSION AND INTERNATIONAL LAW* 21, 23 (Julie Dahlitz ed., 2003).

⁷⁴ *Id.* For evidence of this intended meaning, see *Belgian Delegation Amendment to Paragraph 2 of Chapter I*, U.N. Doc. 374/I/1/17, 6 U.N.C.I.O. Docs. San Francisco, 300 (1945).

principle quickly progressed into a “legal entitlement to decolonization”⁷⁵ due to the development of State practice, the increase in African and Asian U.N. membership in the 1960’s, and the passage of the 1960 Declaration Granting Independence to Colonial Countries and Peoples⁷⁶ (“1960 Declaration”).⁷⁷

The period of decolonization was followed by a contemporary expansion of self-determination as more of a human right.⁷⁸ The 1966 International Covenants on Human Rights, particularly Article 1, described the principle of self-determination to include the right of an entire people to determine its political status.⁷⁹ Article 25, which demands representative, participatory democracy, seems to be the means by which the drafters and signatory parties believe Article 1 self-determination is to be realized.⁸⁰ Subsequently, the adoption of the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations⁸¹ (“Declaration on Friendly Relations”) contributed to the expansion of

⁷⁵ CASSESE, *supra* note 59 at 65. For a more detailed account of standards concerning colonial peoples, see *id.* at 72-73.

⁷⁶ See generally G.A. Res. 1514, U.N. Doc. A/4684 (Dec. 14, 1960) [hereinafter G.A. Res. 1514]. The relevant language here reads: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” *Id.* at ¶ 2. It is important to note the context of this paragraph: it immediately follows paragraph 1, which deems “subjection of peoples to alien subjugation . . . contrary to the Charter of the United Nations and . . . an impediment to the promotion of world peace and co-operation.” *Id.* at ¶ 1.

⁷⁷ G.A. Res. 1514, *supra* note 76. See also Higgins, *supra* note 73, at 24. The abovementioned State practice was affirmed by the International Court of Justice in its *Namibia* and *Western Sahara* Advisory Opinions, affirming the right of peoples under colonial rule to independence should the people choose such a fate. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31 (June 21) [hereinafter *Namibia*]; see also *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16) [hereinafter *Western Sahara*].

⁷⁸ See Higgins, *supra* note 73, at 26.

⁷⁹ Article 1 reads, “[a]ll 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.” International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm#art25> [hereinafter ICCPR].

⁸⁰ See Higgins, *supra* note 73, at 30.

⁸¹ See generally G.A. Res. 2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) [hereinafter G.A. Res. 2625]. The relevant language 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.” *Id.* Also note the so-called “saving clause,” addressed below, which reaffirms the preeminence of the principle of territorial integrity:

the principle of self-determination and the possibility of a people's right to secede to areas outside of the decolonization context.⁸²

With respect to secession, it is important to note "that the overwhelming majority of States participating in the drafting of the Declaration [on Friendly Relations] took strong exception to the notion that peoples might have a right of secession."⁸³ It should also be noted, however, that the text of the Declaration on Friendly Relations does not rule out secession. The impairment of a State's territorial integrity resulting from secession is logically admitted because it is not totally excluded from the saving clause.⁸⁴ The clause's prohibition of the impairment of a State's territorial integrity is limited to instances where the State in question is conducting itself "in compliance with the principle of equal rights and self-determination of peoples . . . [and] representing the whole people belonging to the territory . . ."⁸⁵ It follows logically that where a State is not in compliance with equal rights, an oppressed people could have a valid claim for impairing the State's territorial integrity through the vehicle of secession.

Beginning with the Commission of Rapporteurs's ruling on the status of the Aaland Islands, there seems to be consistency over time and among the views of the international community with respect to a non-colonized people's right to secede.⁸⁶ Specifically, there is consistency in that the possibility for secession has never been totally foreclosed from the time the Commission of Rapporteurs inked their opinion through the codification of the Declaration on Friendly Relations.⁸⁷ Despite this pos-

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 a government representing the whole people belonging to the territory without distinction as to race, creed or colour. *Id.* [hereinafter Declaration on Friendly Relations Saving Clause].

⁸² CASSESE, *supra* note 59, at 70. Additionally, it is important to note that, while these General Assembly Resolutions do not constitute *opinio juris*, they nonetheless demonstrate legal positions taken and adopted by U.N. Member States. *Id.* at 69-70.

⁸³ *Id.* at 112.

⁸⁴ For the full text of the Declaration on Friendly Relations Saving Clause, see *supra* note 81.

⁸⁵ *Id.*

⁸⁶ In assessing the views of the international community, where South Africa expressed reservations about the saving clause due to its logical outcome of impairing territorial integrity, "the other States did not contest either the specific contention of South Africa, nor its general thrust, namely that the saving clause made allowance for secession." CASSESE, *supra* note 59, at 119.

⁸⁷ Note the language of the saving clause seems to limit any possible entitlement to secede to racial and religious groups (precluding distinction based on "race, creed or colour"). See Declaration on Friendly Relations Saving Clause, *supra* note 81. For a

sibility, the interpretation that self-determination is to be exercised within the territory and political framework of the independent State is more commonly accepted.⁸⁸

As further evidence of the extensive limitations on an external right to self-determination, “[p]ractice does not support a broad interpretation [of the Declaration on Friendly Relations] and further, no mechanism really exists to determine whether a particular State may be the subject of secession on the basis of nonconformity with the proviso [the saving clause].”⁸⁹ Despite this contention, the Canadian Supreme Court’s most recent judicial decision concerning Quebec’s right to secede from Canada reaffirms the Declaration on Friendly Relations’ contention that a right to secession may not be limited to formerly colonized peoples:

[A] right to secession only arises under the principle of self-determination of people at international law where ‘a people’ is governed as part of a colonial empire; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.⁹⁰

That said, “[a] right to external self-determination . . . arises only in the most extreme of cases and, even then, under carefully defined circumstances.”⁹¹ Despite this possibility, it is difficult to establish a standard by which a State’s breach of the saving clause can be determined.

B. *State Practice and Secession*

For a secession claim to be considered legal, State practice tends to emphasize consent of the parties involved as a necessary condition.⁹² In the case of the Baltic States, Lithuania, Estonia and Latvia, after the collapse of the Soviet Union, the U.N. Security Council did not consider applications for recognition and membership until the Soviet Union agreed to recognize the newly declared States.⁹³ With respect to the former SFRY, none of the federal republics was admitted to the U.N. until Serbia-Montenegro adopted a new constitution and renounced territorial claims to the former republics.⁹⁴ Once Serbia-Montenegro adopted its

more detailed discussion of what constitutes a “people” and who holds the power to employ the narrow exception of secession, see *infra* Section IV.A.

⁸⁸ See Malcolm N. Shaw, *The Role of Recognition and Non-recognition with Respect to Secession: Notes on Some Relevant Issues*, in SECESSION AND INTERNATIONAL LAW 243, 248 (Julie Dahlitz ed., 2003).

⁸⁹ *Id.*; see also CASSESE, *supra* note 59, at 122.

⁹⁰ Secession of Quebec, *supra* note 66, at 222.

⁹¹ *Id.* at 282.

⁹² See generally CRAWFORD, *supra* note 24, at 391-415.

⁹³ *Id.* at 394.

⁹⁴ *Id.* at 399. It is interesting to note the general acceptance among the international community that the former SFRY was a case of dissolution. Technically, this finding suggests no continuing State existed, including the newly-formed FRY,

new constitution and most of the former SFRY republics were admitted to the U.N., the Badinter Commission concluded that the dissolution of the SFRY was complete.⁹⁵

This trend in State practice, that consent and international recognition are prerequisites for recognizing a right to secession, raises questions about the role State recognition law plays in situations where the people of a territory like Kosovo declare their independence without consent from the predecessor State.⁹⁶

The facts and circumstances surrounding the unsuccessful attempts at secession since 1945 are also instructive. Indeed, "no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State."⁹⁷ State practice suggests that there is very little, if any, support for unilateral declarations of independence like that of Kosovo, where the government of a particular State demonstrates opposition to secession.⁹⁸ In fact, this contention "has been true even when other humanitarian aspects of the situations have triggered widespread concern and action."⁹⁹

The situation of the Kurdish people in northern Iraq, for example, became a matter of international concern based on oppression by the Iraqi government.¹⁰⁰ The calamity triggered action on the part of the U.N. Security Council as well as individual States. Despite what appeared to be the kind of persecution and violent mistreatment that the Commission of Rapporteurs foresaw as necessary before recognizing secession as a remedy, the Security Council continuously reaffirmed Iraq's territorial integrity each time it took action.¹⁰¹ Either the abuse Iraq perpetrated against the Kurds was insufficiently serious or something more than mere abuse is necessary to satisfy a unilateral claim for secession.

In the situation of Bosnia-Herzegovina, the Serbian population within Bosnia-Herzegovina, which constituted approximately thirty-five percent during the early 1990's,¹⁰² conducted a plebiscite in favor of indepen-

that would have to recognize the other new States prior to obtaining U.N. membership and more broadly accepted international recognition.

⁹⁵ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 8, July 4, 1992, 31 I.L.M. 1488, 1521-23 (1992) [hereinafter Badinter Commissioner].

⁹⁶ This issue is discussed in more detail *infra* Section VI.

⁹⁷ CRAWFORD, *supra* note 24, at 415.

⁹⁸ *See id.* at 403.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 403-04.

¹⁰¹ *See id.* at 404. *See also* S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991); S.C. Res. 949, U.N. Doc. S/RES/949 (Oct. 15, 1994), available at <http://www.un.org/documents/scres.htm>.

¹⁰² *See* CRAWFORD, *supra* note 24, at 406.

dence. In analyzing the validity of this claim, the Badinter Commission found that “the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”¹⁰³ As a remedy, the Serbs of this region were limited to international standards of minority and human rights protection which amounted to autonomy within Bosnia-Herzegovina (internal self-determination) rather than independence (external self-determination). The Commission based its finding on what it viewed as the overriding principles of *uti possidetis* and territorial integrity,¹⁰⁴ which, if applied to Kosovo’s declaration of independence, seems to indicate the action was illegal.

Within the context of an unstable federated State like the former SFRY a strong argument can be waged against extending an international right to secede:

Early recognition of the successor States was based on the conclusion that as a matter of political fact the former Yugoslavia was dissolving, that this process was irreversible and that the so-called ‘federal authorities’ were in fact an emanation of Serbia-Montenegro and had no title to represent the former Yugoslavia as a whole.¹⁰⁵

The Badinter Commission relied more on the breakdown of federal power sharing than it did on self-determination grounds in its finding that the former SFRY had dissolved.¹⁰⁶ The fact that the Commission justified its conclusion on these grounds is significant to the case of Kosovo because no right to secede was ever expressly accepted during the breakup of the SFRY, a political unit of which Kosovo once was a part.¹⁰⁷ This State practice, in addition to international silence on Kosovo’s expressed desire to disassociate from Serbia, cuts strongly against recognizing an international legal right for Kosovo to secede from Serbia.

Perhaps the only instance of State practice providing favorable support for Kosovo is Bangladesh’s secession from Pakistan. In the case of Bangladesh, the U.N. and international community viewed the violence and repression employed by Pakistan’s army as an irreversible roadblock to reunification.¹⁰⁸ Whether the people of East Bengal had a right to self-determination or whether their State arose out of a “remedial secession” or a *fait accompli* is unclear.¹⁰⁹ Regardless of the reason, it is important to note that Bangladesh’s admission to the U.N. followed Pakistan’s re-

¹⁰³ Badinter Commission, *supra* note 95, Opinion No. 2, Jan. 11, 1992, 31 I.L.M. 1497, 1498 (1992).

¹⁰⁴ *Id.*

¹⁰⁵ CRAWFORD, *supra* note 24, at 401.

¹⁰⁶ *See id.* at 397; *see also* Matthew C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 1995 BRIT. Y.B. INT’L L. 333, 389-390 (1995).

¹⁰⁷ *See* CRAWFORD, *supra* note 24, at 400.

¹⁰⁸ *See id.* at 416.

¹⁰⁹ *See id.* at 393.

ognition of Bangladesh.¹¹⁰ Therefore, despite Bangladesh's success in achieving its independence against the will of the predecessor State, it still needed Pakistan's recognition before earning admission to the United Nations.¹¹¹

IV. ESTABLISHING A LEGAL STANDARD FOR UNILATERAL SECESSION AND APPLYING IT TO KOSOVO AND SERBIA

A. *What constitutes a people?*

Perhaps most damaging to Kosovo's case is whether the Kosovo Albanians constitute a "people" entitled to independence from Serbia. The concept of "people," to which the U.N. Charter,¹¹² General Assembly resolutions,¹¹³ and Human Rights treaties¹¹⁴ refer, has been ill-defined and remains unclear. This lack of clarity, like in many areas of international law, allows adverse parties to make equally plausible arguments, which perpetuates the confusion. In the case of Kosovo and Serbia:

Parties affirming an existing disposition of territory [like Serbia] have used the term "people", if at all, as referring to the accepted categories of self-determination unit discussed above ["the majority within a generally accepted political unit"]. Parties seeking revision of some territorial arrangement [like the Kosovo Albanians], in contrast, will take the view that the inhabitants of the territory constitute a separate 'people' if the population favours change¹¹⁵

Throughout international legal history, "the term 'people' has been used to signify citizens of a nation-State, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group."¹¹⁶ If "people" refers to the entire nation, i.e., all inhabitants of Serbia, then the Kosovo Albanians have no valid claim because those seeking independence are severely outnumbered by the majority Serbs. If, on the other hand, the "people" to which much of the relevant treaty law and judicial opinions refer includes an ethnic minority within a particular territory, then the Kosovo Albanians would seem to fit this criterion.

¹¹⁰ *See id.* at 158.

¹¹¹ *See id.* at 393. Kosovo differs from these instances of State creation because the predecessor State, Serbia, has not, and vows it never will, recognize Kosovo as an independent State. *See James Robbins, Serbia Faces Crossroads over Kosovo*, BBC NEWS, Feb. 22, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7258842.stm>.

¹¹² *See generally* U.N. Charter, *supra* note 71.

¹¹³ *See generally* G.A. Res. 1514, *supra* note 76; *see also* G.A. Res. 2625.

¹¹⁴ *See generally* ICCPR, *supra* note 79.

¹¹⁵ CRAWFORD, *supra* note 24, at 125.

¹¹⁶ Christopher J. Borgen, KOSOVO'S DECLARATION OF INDEPENDENCE: SELF-DETERMINATION, SECESSION AND RECOGNITION, ASIL INSIGHTS, Feb. 29, 2008, <http://www.asil.org/insights/080229.cfm>.

In resolving this conceptual inconsistency, it seems difficult to imagine Serbia's conception of "people" as the prevailing standard for secession analysis because it is antithetical to well established legal norms of human rights and minority protections. Without recognizing the smaller, politically weaker collections of a State's population as units entitled to an internationally protected right to self-determination, a State is free to ignore the demands of such groups without the fear of consequences. Recognizing a minority group's right to secede, however limited and remote, is an effective way to deter a State from engaging in discriminatory behavior and human rights abuse against its minorities. Because minority protection and human rights are one of the few concrete, customary norms under international law, it seems likely that the "people" to which various international instruments refer in attempting to define self-determination is not limited to the entire nation. Despite this intuitive notion of "people," practice supports the contrary view that "people" is the entire State.¹¹⁷ Due to the fact that "self-determination units are coming increasingly to be States . . . it is likely that self-determination in the future will be a more conservative principle than has sometimes been feared."¹¹⁸

B. *Human Rights violation*

A claimant seeking to secede must show serious human rights violations by the State of which it was formerly a part. This requirement, as mentioned above, has become fairly well established through the *Aaland Islands*,¹¹⁹ *Badinter*,¹²⁰ and *Secession of Quebec*¹²¹ cases. The more controversial aspect of this requirement is whether the violations must be ongoing and persistent. Construed in the most limiting light, as entitlements to secession are to be granted "in only the most extreme of cases . . . and under carefully defined circumstances,"¹²² it seems plausible to infer that the abuses must be ongoing.

C. *Last Resort*

As the Canadian Supreme Court wrote in its discussion of the possibility of secession, there may be a rule developing under international law such that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, *as a last resort* [emphasis added], to exercise it by secession."¹²³ This criterion is consistent with the notion of secession as permissible only in the most dire situations.

¹¹⁷ See CRAWFORD, *supra* note 24, at 126.

¹¹⁸ *Id.*

¹¹⁹ See generally Commission of Rapporteurs, *supra* note 69.

¹²⁰ See generally Badinter Commission, *supra* note 95.

¹²¹ See generally *Secession of Quebec*, *supra* note 66.

¹²² *Secession of Quebec*, *supra* note 66, at 282.

¹²³ *Id.* at 285.

Realistically, such extreme circumstances like government-sponsored violence against its own citizens leave few, if any, domestic solutions. Under less harsh circumstances, viable remedies falling short of secession are realistic and often workable. For instance, where a government or private institutions actively engage in discriminatory practices against a particular minority, legislative and judicial channels are more likely to be fruitful than in a violent state of affairs. Alternatively, a government may agree to a federal arrangement in which the aggrieved population attains enough autonomy to develop free from oppression without relinquishing all of its control over the region. Due to the traditional presumption against secession, it is reasonable to limit the exception to situations where no other remedy seems feasible.

V. APPLYING THE LAW TO KOSOVO

The aforementioned three prongs of this standard for secession, in reality and in practice, are inseparable. For instance, the Albanians of Kosovo should qualify for “people” status within the law of self-determination largely because of the history of Serbia’s perpetration of human rights abuses against the Albanian minority. The remedies have been exhausted and attempts to return to the political arrangement of the 1974 Constitution are futile because of Serbia’s perpetration of human rights abuses against the Albanian minority. Conceptually, however, it is helpful to separate these three principle components of the analysis.

A. *Are the Kosovo Albanians a “people”?*

While the question of whether the Albanians of Kosovo constitute a people under the current state of the law of self-determination is unclear, the violent historical context and cultural and linguistic divide between Kosovo and Serbia merits classifying Kosovo as a people.

In support of such a classification, the Albanians of Kosovo have inhabited the region for centuries¹²⁴ and view themselves as culturally separate and distinct from the Serbians with whom they share the region. On the other hand, the Kosovo Albanians are generally seen as an ethnic enclave rather than their own nation like Albania.¹²⁵ Indeed, the country of Albania borders the Kosovo region to the southwest and is populated by a significant Albanian Muslim majority, the same ethnic majority constituting roughly 90% of Kosovo.¹²⁶ The international community might find it troubling to recognize a new State of approximately two million Muslim Albanians when an entire State of this nationality exists across its southwestern border.

¹²⁴ IAIN KING & WHIT MASON, *PEACE AT ANY PRICE: HOW THE WORLD FAILED KOSOVO* 25-27 (2006).

¹²⁵ See Borgen, *supra* note 116.

¹²⁶ MALCOLM, *supra* note 1, at 9-10; see also Kosovo Statistics, *supra* note 12.

Given this population arrangement, the Albanians seem to more closely resemble the Swedes residing in the Aaland Islands rather than the Fins seeking separation from Russia. Indeed, Swedish Aalanders were linguistically and historically similar to the inhabitants of Sweden as the Albanian Kosovars are linguistically and historically similar to the citizens of Albania. However, according to the reporters charged with determining whether the Aalanders' attempt to merge with Sweden was a matter outside the domestic jurisdiction of Finland, without "a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State . . .",¹²⁷ the matter is to be characterized as domestic and within Finland's authority to determine the political fate of the Aalanders.

The human rights atrocities that took place throughout the late twentieth century are well documented. The Serbian republic of the former FRY used its military and police forces to intimidate, massacre, and expel Kosovo Albanians.¹²⁸ Therefore, while the Albanians of Kosovo may share qualities with the Swedish Aalanders in their status as a small, ethnic enclave, they did not suffer the same legal shortcoming. Kosovo Albanians suffered sufficiently grievous human rights abuses perpetrated by Serbia, re-characterizing a once domestic issue as an international one.

When considering the principle of self-determination, "[t]his core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives."¹²⁹ Character is made up of various criteria – race, culture, language, religion, group psychology, etc.¹³⁰ Some scholars, like Brownlie, believe "the heterogeneous terminology which has been used over the years—the references to 'nationalities', 'peoples', 'minorities', and 'indigenous populations'—involves essentially the same idea."¹³¹ The notion of a minority is relative, while the question of whether a collectivity constitutes a "people" is qualitative.¹³² Most importantly, the notion of a people depends on context – sometimes it includes only the formerly colonized, sometimes it includes all citizens of a state, and sometimes it includes all self-identifying groups.¹³³ Because the history, language,

¹²⁷ *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations O.J., Special Supp. No. 3 (1920).

¹²⁸ Demjaha, *supra* note 37, at 34-35.

¹²⁹ Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 5 (James Crawford ed., 1988).

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² David Makinson, *A Logician's Point of View*, in *THE RIGHTS OF PEOPLES* 69, 73 (James Crawford ed., 1988).

¹³³ James Crawford, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES* 159, 169 (James Crawford ed., 1988).

religion, and culture of the two main constituent groups of Serbia's population, Serbs and Muslim Albanians, are so clearly distinct, it is sensible to confer the status of "peoples" to the Muslim Albanians in order to allow for their realization of self-determination.

B. *Human Rights violations*

The Serbian government quite clearly perpetrated human rights abuses against the Albanians of Kosovo,¹³⁴ including the Racak Massacre which ultimately inspired the international community to act.¹³⁵ What remains debatable, however, is how to factor in the nearly decade-long period of fairly abuse-free behavior on the part of the Serbian government.

In the balance, Kosovo seems to fulfill this most fundamental legal requirement of unilateral secession. The human rights abuses initially ceased only after several months of a NATO-led bombing campaign. The longevity of this cessation of violence can be directly attributed to NATO's military presence, which has remained in the region as a peace-keeping force since the day Milosevic signed the agreement to withdraw Serbia's military presence in exchange for the end of the bombing campaign. There is no empirical method to surmise what would have happened had NATO withdrawn its forces at the time Serbia withdrew its forces, but the violent nature of the conflict between the Albanians and the Serbs makes it difficult to argue plausibly that the atrocities would have ceased and relative peace and stability would have ensued. It seems fundamentally unfair to find against the Albanians and for the Serbs simply because the international community intervened and put a stop to what otherwise could have resulted in the kinds ongoing human rights abuses necessary to satisfy claims of secession.

C. *Last Resort*

There are strong arguments that Kosovo and Serbia have exhausted the prospect internal remedies. Primarily, the experiment of substantial autonomy within a federated political arrangement failed when Slobodan Milosevic and the SFRY government coercively abolished the autonomy Albanians had previously enjoyed under the 1974 Constitution. Following this revocation of self-government and the development of the Kosovo Liberation Army¹³⁶ ("KLA"), the former SFRY's behavior escalated to physical violence in response to the development of the KLA.¹³⁷ Finally, in order to end the atrocities, then FRY President Milosevic agreed to remove the FRY's military and police presence pursuant to

¹³⁴ Demjaha, *supra* note 37, at 34-35.

¹³⁵ *Id.* at 35.

¹³⁶ The KLA was an armed organization which developed in response to Serbian repression that committed acts of violence against Serbian police and civilians. *Id.* at 34.

¹³⁷ *Id.*

Resolution 1244 and the Military Technical Agreement.¹³⁸ As a result, UNMIK became the dominant government administrator.

Serbia might contend that because the human rights violations took place a decade ago, and because those responsible are being prosecuted in the International Criminal Tribunal of the Former Yugoslavia (“ICCTY”), a peaceful arrangement in which Kosovo remains an autonomous political unit within Serbia can and should be achieved over time. In response, Kosovo’s supporters could argue that this relatively stable interlude would be unsustainable but for UNMIK’s and NATO’s nearly decade-long presence in the region as a buffer. In other words, Kosovo’s final legal status cannot be resolved using domestic political resources because there seems to be too much inflammatory history and political contention between Serbia and Kosovo to conceive of a realistic arrangement other than an independent Kosovo.

In fact, U.N. Special Envoy to Kosovo Martti Ahtisaari supervised talks between Kosovo and Serbian delegations for more than one year, which were unable to reach a settlement.¹³⁹ The Troika, made up of the United States, the E.U., and Russia, reported to the U.N. Secretary General in December 2007 that “the parties 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.”¹⁴⁰ It seems that “most, if not all, realistic options other than separation had failed.”¹⁴¹

VI. POLITICAL REALITIES AND STATE RECOGNITION

Certain inconvenient realities often make it difficult to fully ascertain the state of a particular area of international law and the expected outcomes of its application. For instance, there is no existing legal system under which Kosovo, prior to declaring its independence, could sue Serbia and have a court make an enforceable declaration of its right or lack of a right to secede. After years of failed negotiations and what Kosovo perceived as a dead end, it unilaterally declared its independence, putting the pressure on the rest of the world to react and respond. Critics who view as futile the type of retrospective, theoretical analysis undertaken in this note are right to point out the limits of its on-the-ground impact. While Kosovo’s unilateral attempt to secede will influence the development of the law in this area, ultimately the international community and its member States, through their collective and individual decisions to

¹³⁸ *Id.* at 37.

¹³⁹ Report of the E.U./U.S./Russia Troika on Kosovo, ¶ 2 (Dec 4, 2007), <http://www.ico-kos.org/pdf/Report%20of%20the%20EU-US-Russia%20Troika%20on%20Kosovo.pdf>.

¹⁴⁰ *Id.* at ¶ 3.

¹⁴¹ Borgen, *supra* note 116.

recognize or not recognize Kosovo, may ultimately determine whether or not Kosovo will attain the rights accompanying statehood.

The doctrine of State recognition is crucial to the assessment of Kosovo's declaration of independence because it brings to light the political realities which cannot be separated from the law or from any inquiry aimed at ascertaining the law in a particular area. Does it matter whether entities which view themselves as States have the support of other States and relevant international actors? The two principal notions of State recognition which grapple with this question are the declaratory and constitutive theories. Under the declaratory view, recognition is merely a political act, irrelevant to the determination of whether a political entity constitutes a State.¹⁴² The entity's status is based on objective criteria, which, along with the declaratory view, was codified in the Convention on the Rights and Duties of States ("Montevideo Convention").¹⁴³ The two provisions relevant to this discussion declare:

Article 1

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.

Article 3

The political existence of the state is independent of recognition by the other States¹⁴⁴

Since its codification in 1933, the declaratory theory has been more prevalent, but "to reduce . . . the issues to a choice between the two opposing theories is to greatly oversimplify the legal situation."¹⁴⁵

The countervailing view, the constitutive theory, "maintains that it is the act of recognition by other states that creates a new state . . . and not the process by which it actually obtained independence."¹⁴⁶ Despite the fact that the declaratory view seems to be more consistent with state practice, there is considerable support for the constitutive view. In 1965, after the white-dominated minority government of Southern Rhodesia¹⁴⁷ unilaterally declared its independence from Britain, the U.N. Security Council, despite the clear satisfaction of the Montevideo Convention criteria, condemned what it viewed as a racist regime and deemed the declaration

¹⁴² BROWNLIE, *supra* note 58, at 86-87.

¹⁴³ See generally Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

¹⁴⁴ *Id.* at arts. 1, 3.

¹⁴⁵ BROWNLIE, *supra* note 58, at 88.

¹⁴⁶ SHAW, *supra* note 66, at 368.

¹⁴⁷ Rhodesia is present-day Zimbabwe. JEFFREY HERBST, *STATE POLITICS IN ZIMBABWE* xiii (1990).

illegal.¹⁴⁸ Nearly all States subsequently refused to engage in external relations with Southern Rhodesia, demonstrating that in some circumstances, there is more at play in determining the merits of a claim to statehood than the objective criteria set out in the Montevideo Convention.

In addition to the illustration of Southern Rhodesia, the international response to the former Yugoslav crisis, with respect to Europe at least, suggests a shift away from a declaratory view of State recognition toward a more constitutive view. The Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (“Guidelines on Recognition”) “laid down various preconditions for recognition of new States in Eastern Europe and the Soviet Union, including respect for minority rights and maintenance of existing boundaries.”¹⁴⁹ The practice of the European Community (“EC”), which involved placing preconditions for recognition on the former Yugoslav republics set out in the Guidelines for Recognition, like Security Council Resolution 217 on Southern Rhodesia, went beyond the traditional statehood criteria¹⁵⁰ and based recognition on political considerations.

The Canadian Supreme Court, after denying Quebec the right to secede under Constitutional or international law, understood that “this [denial of the right to secede] does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community”¹⁵¹ This passage, as well as the abovementioned Guidelines on Recognition, are relevant to Kosovo because many countries have made their support clear, and if a critical mass of politically relevant States continues to recognize its Statehood, while State practice in the region seems to have shifted towards a constitutive view of State recognition, then Kosovo’s declaration may have already become a *de facto* secession.¹⁵²

Even if the proper view of State recognition is declaratory, Kosovo seems to objectively satisfy the traditional criteria. With more than two

¹⁴⁸ See S.C. Res. 217, ¶ 3, U.N. Doc. S/RES/217 (Nov. 20, 1965), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/222/88/IMG/NR022288.pdf?OpenElement>. The U.N. has considerable influence over State recognition and whether an entity possesses the rights of States. Indeed, “in practice since the U.N. is only open to States, admission to the U.N. amounts to recognition of statehood.” Shaw, *supra* note 88, at 251.

¹⁴⁹ CRAWFORD, *supra* note 24, at 397.

¹⁵⁰ It is important to consider, though, that despite the imposition of stricter conditions for recognition, these conditions may not be realized in practice. It is likely, for instance, that “in the case of certain Yugoslav successor States, the conditions posited [by the Guidelines] were not fulfilled, or were not at the time of the recognition in question.” Shaw, *supra* note 88, at 253-54.

¹⁵¹ Secession of Quebec, *supra* note 66, at 296.

¹⁵² Of course, “[s]uch a recognition, even if granted, would not, however, provide any retroactive justification for the act of secession.” *Id.*

million inhabitants residing in the region, Kosovo is made up of a permanent population. The boundaries are well-established, as the earlier constitutions of the SFRY and FRY acknowledge Kosovo as an autonomous province within the federated State. With this status came a clear territorial definition over which local government institutions presided. Since UNMIK first took over the civil administration of Kosovo in 1999, uniquely Kosovar institutions of self-government have been in place and have gradually taken on more responsibility throughout UNMIK's presence in the region.¹⁵³ Finally, while UNMIK has remained responsible for entering into relations with other states on behalf of Kosovo, and while the existence of a viable Kosovo military is weak at best, "it is possible for a state to assign some of its foreign relations capacity to another state (such as Liechtenstein has assigned to Switzerland) or to an international organization (such as has occurred in the European Union) without losing its status as a state."¹⁵⁴ Irrespective of this potential deficiency, Kosovo's capacity to carry out its own foreign relations will likely grow as the United States and many of the European States are poised to set up diplomatic institutions within Kosovo.

In its current conflated form, the law of State recognition seems ill-equipped to thwart unlawful secessionist claims validated by widespread international approval. In order to prevent the necessarily narrow exception from swallowing the general rule against unilateral claims of secession, it is advisable for States to base recognition determinations on legal, rather than political considerations.¹⁵⁵ Given the realities of political, economic and military pressure often exerted by more powerful actors, and the lack of crystallized criteria in the area of unilateral secession, this prescription is lofty. As the political status of Kosovo moves closer to finality and the state of the law in this area becomes clearer, States will be more competent to render judgments with respect to claims of unilateral secession where legal, rather than political, considerations will weigh most heavily in the decision.

VII. CONCLUSION

Based on the substantial history of international treaties, opinions, and practice, the door leading to unilateral secession has remained open, albeit slightly. A valid claim requires, at least, (1) a people (2) subject to

¹⁵³ Int'l Crisis Group, *Kosovo Countdown: A Blueprint for Transition* 14 (2007), http://www.crisisgroup.org/library/documents/europe/balkans/188_kosovo_countdown__a_blueprint_for_transition.pdf.

¹⁵⁴ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 33 (2006).

¹⁵⁵ See Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 *EMORY INT'L L. REV.* 107, 110-111 (2002) (arguing failure to distinguish political recognition from legal recognition and civil legitimacy results in ambiguity along with the risk that confusing political recognition with perceptions of legitimacy can result in the perpetuation of injustice).

historical and persistent State-sponsored human rights abuse (3) with no viable alternative recourse within domestic legal channels. Kosovo's overwhelming majority of Muslim Albanians constitutes an ethnic, religious, linguistic and cultural enclave within the larger population of Serbia, separate and distinct from its majority Serbs. Beginning in the 1980's and through the end of the century, the Kosovo Albanian people suffered human rights abuse ranging from publicly and privately sponsored discrimination to State-backed massacre. As a result of this ugly history, failed internationally-led negotiation attempts, and nearly a decade of, effectively, a Serbian-free government, an independent State of Kosovo seems to be not only realistic, but also inevitable.

Serbia and its supporters¹⁵⁶ are correct to cite the language of Security Council Resolution 1244 as an international reaffirmation of its sovereignty and territorial integrity with respect to Kosovo.¹⁵⁷ Additionally, they are justified in their concern over a risky precedent which could result from an internationally legitimized claim of unilateral secession. Indeed, international peace and stability cannot be emphasized enough when considering a claim for secession. With that said, in a close case like that of Kosovo, these arguably paramount values of peace and stability must not be employed dismissively and without careful consideration of the countervailing policies.

Kosovo, in recent years, has been an epicenter of international controversy. In 1999, the international community conducted the experiment of humanitarian intervention in Kosovo, which remains controversial. In 2008, Kosovo and its supporters have commenced the experiment of unilateral secession. Accompanying these experiments has been regrettable violence and loss of life. If the international community seeks to avoid these calamities rather than wait for them to unfurl, a fairly uncontroversial objective, it is crucial to develop widely accepted legal norms that lurk in the background and serve as deterrents. If Kosovo is upheld in the international community as the rare but legitimate paradigm for claims of unilateral secession, then oppressive States will have to think more than twice before engaging in atrocities against defenseless members of its population.

Improving clarity in this area of law, as well as increasing the predictability of the behavior of international actors in future situations of similar character, is equally valuable to reaching the right result. Recognizing Kosovo's declaration of independence as legal would bring a considerable extent of finality to a previously tumultuous and uncertain situation in the Balkans. Globally, acceptance would elucidate, rather than continue to veil, a legitimate, developing principle of international law.

¹⁵⁶ This group consists largely of other States with similar separatist concerns, e.g. Spain, Cyprus, Russia, and China. See *To Recognise*, *supra* note 4.

¹⁵⁷ See S.C. Res. 1244, *supra* note 9, Preamble, Annex I, Annex II ¶ 8.