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Kosovo –
A Territory with a Right to
Self-Determination?

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Summary

Kosovo, the world's 193rd country, will be the sixth state carved from the former Serbian-dominated Yugoslav federation since 1991, after Slovenia, Croatia, Macedonia, Bosnia and Montenegro, which became the world's newest state in 2006. Kosovo's statehood is, however, still disputed. The question if Kosovo is a subject that has a right to external self-determination and thereby hold international status and de jure independence is still not answered. The disputed status of Kosovo contributes to an uncertain political future and the status quo is unacceptable.

Although the sovereignty and territorial integrity of the Republic of Serbia now is challenged by Kosovo's declaration of independence, political actors work towards a peaceful, stable and secure environment, which is essential for the stability in the region. In order to solve the crisis in Kosovo there has to be a balance between the respect for national sovereignty and territorial integrity on the one hand and respect for human rights and fundamental freedoms for national minorities on the other.

The Kosovar Albanians' claim for independence, as manifested in the declaration of independence of 17 February 2008, is subject to the legal rules of self-determination. When Kosovo proclaimed independence from the Republic of Serbia, Serbian representatives reiterated that the solution for Kosovo must fall within the legal frameworks of the republic of Serbia. This implied that all State and public services in the province, including the organs of law and order, should function according to the Constitutions and laws of the Serbian Republic.

International actors involved in the quest for a solution to the crisis in Kosovo, reiterates that there should be a consistent implementation of United Nations Security Council Resolution 1244 (1999) in order to build a multi-ethnic and democratic Kosovo. This also includes self-government

and substantial autonomy with full respect for the territorial integrity and sovereignty of the Republic of Serbia.

Even though the declaration of independence of Kosovo was expected by the international community, the question whether or not to recognize Kosovo has split the world in two; the countries that recognize or plan to recognize Kosovo as a sovereign State, and those who do not plan to do so. Since the question does not only concern Kosovo but also the international public law and world order, this crisis has been shown to be a hard nut to crack.

Sammanfattning

Kosovo, världens 193:e land, blir den sjätte staten som bildats från den serbdominerade jugoslaviska federationen sedan 1991, efter Slovenien, Makedonien, Bosnien och Montenegro som blev världens nyaste stat 2006. Kosovos status som självständig stat är dock fortfarande omstridd. Frågan om Kosovo är ett internationellt subjekt som har en rätt till externt självbestämmande och därmed är ett subjekt som har internationell status och de jure självständighet är fortfarande obesvarad. Den omtvistade frågan kring Kosovos status bidrar till en osäker politisk framtid och status quo är oacceptabelt.

I och med Kosovos självständighetsförklaring ifrågasätts republiken Serbiens suveränitet och territoriella integritet. De internationella aktörer vilka arbetar med frågorna kring Kosovos självständighet verkar för en fredlig, stabil och trygg miljö för alla individer som bor i området – vilket är viktigt för stabiliteten i regionen. För att lösa krisen i Kosovo måste det finnas en balans mellan respekt för den nationella suveräniteten och territoriella integriteten å ena sidan och respekt för de mänskliga rättigheterna och de grundläggande friheterna för nationella minoriteter å den andra.

Kosovoalbanernas krav på självständighet, vilket framgår av självständighetsförklaringen från den 17 februari 2008, är föremål för de internationella bestämmelserna rörande rätten till självbestämmande. När Kosovo nu har utropat självständighet, upprepar serbiska företrädare att lösningen för Kosovo måste ses i ljuset av republiken Serbiens statssuveränitet. Med detta menar man att alla statliga och offentliga tjänster i Kosovo, inklusive organ för lag och ordning, bör fungera i enlighet med konstitutioner och lagar i republiken Serbien.

Internationella aktörer som deltar i sökandet efter en lösning på krisen i Kosovo insisterar på att det bör finnas ett konsekvent genomförande av Förenta Nationernas säkerhetsråds resolution 1244 (1999).

Förutsättningarna för att bygga upp ett multietniskt och demokratiskt Kosovo bör också förbättras, detta omfattar till exempel självstyre och betydande autonomi för Kosovo i ljuset av full respekt för republiken Serbiens territoriella integritet och suveränitet.

Även om Kosovos självständighet var väntad av det internationella samfundet har frågan huruvida man bör erkänna Kosovo delat världen i två delar: 1) de länder som erkänner eller planerar att erkänna Kosovo som en suverän stat, och 2) de som inte planerar att göra det. Eftersom frågan inte bara gäller Kosovo utan även folkrätten och världsordningen som folkrätten vilar på, har denna kris visat sig vara en svår nöt att knäcka.

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Abbreviations

AK	Assembly of Kosovo
Art.	Article
CERD	Committee on the Elimination of Racial Discrimination
EU	European Union
FRD	Friendly Relations Declaration
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
KA	Kosovar Assembly
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organizatoion
NSGT	Non-Self-Governing Territory
OSCE	Organization for Security and Co-operation in Europe
PISG	Provisional Institution of Self-Government
RSD	Right to Self-Determination
SNA	Serbian National Assembly
UN	United Nations
UNGAR	United Nation General Assembly Resolution
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration in Kosovo
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resoultion

1 Introduction

For purposes of this thesis, I have chosen to use the term "*Kosovo*" as the abbreviation for the "*Republic of Kosovo*" without prejudice to its status. This might, prima facie, look subjective for the reader but since my master thesis concerns the de facto Kosovo secession from the Republic of Serbia – and if Kosovo's independence is in line with international law – I believe that I need to separate these two entities in order for the thesis' design and character to succeed.

The question if there is a right for self-determination for the Kosovar Albanians in Serbia has been a subject of debate for many years. The Kosovar Albanians are regarded to be a national minority in the Republic of Serbia (hereafter Serbia). So we ask ourselves if a national minority have a right to self-determination according to international law, or even international customary law? And, if they do so, to what extent do they have this right?

1.1 Theme and purpose

The purpose of this thesis is to investigate the grounds upon which Kosovo Albanians may have a right to self-determination. I will therefore focus on the disputed questions in the right to self-determination of peoples, which are:

- 1) **Do national minorities have a right to self-determination under international law?** And, if they do, to what extent do they have a right to self-determination and what does this right in international law entail? Does a national minority have a right to external self-determination? Does a national minority have the right to proclaim a declaration of independence? And do they have a right to succeed

from the Mother State supported by the right to self-determination – and therefore also seek recognition in the international community?

- 2) **Do national minorities have a right to self-determination under international customary law?** If the national minority cannot find support in international law for the questions above, can they find support in international customary law for the questions above.
- 3) **Are there previous cases in the international community, similar to the Kosovo case, that can support Kosovo's secession from Serbia?**

1.2 Method and sources

With the objective to create a comprehensive overview of the current legal situation regarding the Kosovo case, I have chosen to use the traditional legal (dogmatic) method in this thesis. This method is based on research-and interpretation of legislation, case law, and doctrine in a specific legal question – as in this thesis the assessment of *Kosovo's statehood*.

In order to enrich the topic, interesting arguments from the juridical authors will also be put forward. This together with case law, doctrine, and current international law of interest will form the basis of the deliberation. The discussion will envisage all relevant sources up until the 1 July 2010.

1.3 Disposition

In Chapter 2, I will briefly describe the historical background that exists in Kosovo. This chapter will serve the reader with an understanding of the region, and why Kosovo is of national importance to the Serbs. In the following Chapter, I will focus on the most relevant legal rules, declarations and actual cases that deal with the right to self-determination. This, in order to increase the reader's knowledge of the international rules on the right to self-determination, and how these rules can be applicable in the Kosovo case – which will be the focus of Chapter 4. Chapter 5 sets out the

conclusions of this essay. In my concluding comments, I will also have a discussion concerning de lege ferenda regarding the right to external self-determination for national minorities.

1.4 Delimitations

There is no question that the international community has helped the Croats, Serbs and Bosniacs to achieve international status and legitimacy after the breakdown of the Former Republic of Yugoslavia (hereafter FRY).

However, since the independence of Kosovo is one of a kind and disputed there is no reason to compare their independence with the other States in the region since the other States have been organized and recognized as individual international States even before the formation of the FRY. There are other cases, which are of more interest for Kosovo and focus has been given to these cases in comparison to Kosovo's situation.

The human rights violations in the region, from both Serbia and Kosovo, are grave and massive. It is possible to write a novel on the violations alone but of course, this is not the purpose of this thesis. Instead of compiling a detailed chronology of what happened, I will focus on the actions the governments in the regions did and did not take in order to improve/worsen the human rights violations in the region.

The purpose of the thesis is to focus on the development of the rule of self-determination of peoples and the rights of the national minorities in international law. Therefore, when it comes to the Kosovo case, I will not focus on:

- negotiation talks / peace talks / action plans for settling the crisis in the region
- treaties of minor importance.
- Treaties Serbia has not ratified / signed / bound to / accepted

On the 22 July 2010, the International Court of Justice's advisory opinion regarding Kosovo's declaration of independence was publically and officially given to the international community. Since I already had been working on this thesis since September 2009 I chose not to include this opinion in the thesis, although, I will discuss the Courts opinion in my concluding comments since I cannot ignore the advisory opinion totally.

2 Kosovo – a short historical background

The Kosovo crisis has been lingering for a long time. Discussions concerning the Kosovo conflict often start with the battle of Kosovo Polje (The field of Blackbirds) in 1389 when the Serbs were defeated by the Ottoman Empire. In the early 19th century, national uprisings in Serbia slowly led to the withdrawal of the Ottoman Empire and the territory of Kosovo¹ is therefore of great emotional significance to Serbian nationalists.² That is also why the the legendary battle continues to play an important role in the contemporary politics in Serbia.³

The Constitution of 1974 granted an equal status to all nations and nationalities in Serbia, establishing that people individually and collectively would enjoy sovereign rights. Kosovo's own constitution stressed that people had freely organized themselves in the form of a Socialist Autonomous Province on equal basis with the nations and nationalities of Yugoslavia. The Kosovar Assembly (hereafter KA) had the competence to “*directly and exclusively*” decide on amendments to the Kosovo constitutions, and to approve amendments to the constitution of the Socialist Republic of Serbia.⁴

The first protests by the Kosovar Albanians, due to the Serb oppression, date back to 1981. The Serb oppression of the Kosovar Albanians continued to grow with accelerating decay up until the end of the 1980s. In 1989 Milosevic's regime abolished the Titoist political autonomy for Kosovo which was granted in the 1974 Serbian Constitution.⁵

¹ See Supplement A – map of the region, p. 52.

² Time, *A Kosovo Primer – A backgrounder on the Balkan conflict*.

³ The UK, House of Commons, Foreign Affairs Committee. June 2000. *Report on Kosovo – Kosovo until May 1997*, para. 13. <http://www.parliament.uk>.

⁴ Malcolm. *Kosovo – A Short History*. pp. 328f.

⁵ Krieger. *The Kosovo conflict and international law* p. xxxiii. While the constitution defined Kosovo as autonomous provinces of Serbia, it granted them a status nearly

When the Serbian National Assembly (hereafter SNA) terminated the work of the KA in June and July 1990, the elected representative of Kosovo adopted a declaration of sovereignty in response.⁶ On 7 September 1990, the KA adopted a new constitution for Kosovo and the Kosovar Albanians issued a formal declaration of independence on 22 September 1991.⁷

The Serbian public services pursued a policy whereby the Kosovar Albanians' freedoms and human rights were not acknowledged. There was not only systematic discrimination in public service but also in justice and in administration services, which worsened the relationship between the Kosovar Albanians and the Serb ethnic groups even further. Although ethnic repression had been a daily experience of Kosovar Albanians throughout the Yugoslav conflict, large-scale discrimination and persecution became highly infective in the 1990s. This was the time when the Kosovar Albanians were subject to outright persecution by police forces, which led to hundreds of thousands of people to flee their country, at the same time Belgrade tried to promote the immigration of ethnic Serbs into Kosovo.⁸

Now an often experienced process in situations of a deteriorating group sets in: the discriminated group saw their only possibility to survive in resorting to violence, while the central power interpreted this as a proof justifying their fears and as a legitimation to increase violence in order to regain control of the situation. In February 1998 a civil war broke out. A solution for peace could not be reached until June 1999 after the North Atlantic Treaty Organization (hereafter NATO) conducted an air strike in Serbian territory during 78 days.⁹

What we also have to remember is that UNSCR 1244 (1999) permits Serbia no role in governing Kosovo and since 1999, Serbian laws and institutions

equivalent to that of the republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbian, and Slovenia, however, without the right to secede.

⁶ Malcolm. *Kosovo – A Short History*. p. 346.

⁷ Krieger. *The Kosovo conflict and international law* p. xxxi.

⁸ Bedenko. WNYmedia.net. *Kosovo Declares Independence. Again*. <http://wnymedia.net>.

⁹ Hilpold. *Humanitarian Intervention: Is There a Need for a Legal Reappraisal*, p. 438f.

have not been valid in Kosovo. At the same time, this resolution recognizes Serbia's sovereignty of Kosovo.¹⁰ On February 4, 2003, the FRY was renamed the State Union of Serbia and Montenegro and from this date, the name "Yugoslavia" has officially been abolished. On June 3 and June 5, 2006, respectively Montenegro and Serbia declared independence, thereby ending the Yugoslav state. Following the formation of the two new states, the United Nation Security Council (hereafter UNSC) reaffirmed its continued commitment to the full and effective implementation of the United Nations Security Council Resolution (hereafter UNSCR) 1244 (1999) in the region. The Council also noted the transformation of the FRY into Serbia and Montenegro and, in this context, reaffirmed that resolution 1244 (1999) remained fully valid in all its aspects. Resolution 1244 (1999) continues to be the basis of the international community's policy on Kosovo.¹¹

The former United Nations (hereafter UN) Secretary-General Kofi Annan stated¹² that the root cause of the crisis is clear: "*Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people*".

2.1 Kosovo today

Kosovo has come a long way in a relatively short span of time, from a war-raged inter-ethnic hotbed to a society with cautious optimism for a peaceful future. The task of building a self-governing society from the ruins of war is enormous.¹³ While doing so, the Kosovar government has to respect the minority and human rights of its minorities – about 10% of the population in

¹⁰ UNSCR 1244 (1999).

¹¹ S/PRST/2003/1, p. 1.

¹² In his address to the High-Level Meeting on the crisis in the Balkans, held in Geneva May 14, 1999.

¹³ S/PV.4258, Mr. Chowdhury (Bangladesh), p. 10.

Kosovo are Serbs.¹⁴

The UNSCR 1244 (1999) called for the establishment of an “*interim administration to provide transitional administration while establishing [...] provisional democratic self-governing institutions*”¹⁵ and since 1999, Kosovo has functioned as a UN-protectorate. The administration is governed by the United Nations Mission in Kosovo (hereafter UNMIK), assisted by the European Union (hereafter EU), the Organization for Security and Co-operation in Europe (hereafter OSCE), and the UN Human Rights Commission for Refugees.¹⁶ Although this arrangement did not interfere with Serbia’s official sovereignty over Kosovo, it did effectively curtail Serbia’s ability to govern the province.

There has been three parliamentary elections to the KA since 1999, the latest taking place in November 2007.¹⁷ The Assembly is an institution within the Provisional Institutions of Self-Government (hereafter PISG) established by the UNMIK to provide “*provisional, democratic self-government*” in advance of a decision on the final status of Kosovo.¹⁸ According to some politics, the elections will provide the Kosovars with greater responsibility for self-administration and self-government and inculcate trust and confidence in the democratic process and democratic solutions.¹⁹ Although these elections are significant for the people of Kosovo, others indicate that the Kosovar Albanians might see the elections as a move towards independence for Kosovo, which would be in violation of UNSCR 1244 (1999).²⁰

On 17th of February 2008 the Kosovan Prime Minister Hashim Thaci declared Kosovo independence for the second time in history: “*We, the*

¹⁴ S/PV.4359, Mr. Corr (Ireland), p. 16.

¹⁵ UNSCR 1244 (1999).

¹⁶ Krieger. *The Kosovo Conflict and International Law*, p. xxxii.

¹⁷ OSCE. *OSCE Mission in Kosovo: Elections*, www.osce.org.

¹⁸ UN News Centre. *Global support vital for UN conciliation role in Kosovo, Ban says*, www.un.org.

¹⁹ S/PV.4225, Mr. Mohammed Kamal (Malaysia), p. 16.

²⁰ S/PV.4258, Mr. Shen Guofang’s (China), p.19f.

*democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign State. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal²¹ for the Kosovo Status Settlement”.*²²

²¹ Also known as the Ahtisaari Plan and the plan would in effect grant independence to the Kosovo province.

²² President of the Assembly of Kosova, Mr. Krasniqi, Jakup. *Kosovo Declaration of Independence*, www.assembly-kosova.org.

3 International law

3.1 The definition of a State

According to the Montevideo Convention on rights and duties of States, the state as a person of international law should possess the following qualifications according to its first article:

- a) a permanent population;
- b) a defined territory;
- c) government; and
- d) capacity to enter into relations with other states.

The duty of States not to recognize an act in violation of a general principle of international law also applies to the creation of States, given that any unlawful secession is likely to violate the principles of non-interference and the sovereign equality of existing States.²³

On several occasions, the UN has directed its members not to recognize the independence of claimant States. In UNSCRs 541 (1983) and 550 (1984), the UNSC called on States not to recognize the “*legally invalid*” secession of the Turkish Republic of Northern Cyprus from Cyprus in 1983.²⁴ This call for collective non-recognition was prompted by Turkey’s illegal invasion and continued occupation of Cyprus, which was recognized as a clear violation of the prohibition on the use of force.²⁵

Significantly, there has been no UN resolution calling for the collective non-recognition of Kosovo, or declaring this declaration to be unlawful. This omission lends further credence to the argument that, even though Serbia held sovereignty immediately prior to the declaration, Kosovo’s independence has not been established illegally. The International Court of

²³ Dugard & Raic, *The role of recognition in the law and practise of secession*, p. 100.

²⁴ UNSCR 541 (1983) & UNSCR 550 (1984).

²⁵ Dugard, *Recognition and the United Nations*, p. 110.

Justice's (hereafter ICJ) advisory opinion from the 22 of July 2010 also stated that "*the declaration of independence of the 17 of February 2008 did not violate general international law*".²⁶ However, what one has to remember is that the ICJ only gave an advisory opinion regarding Kosovo's declaration of independence, and not its disputed status of statehood, which still raises questions in the international community.

3.1.1 De facto and de jure Independence

According to the constitutive theory, it is through recognition exclusively that a State becomes an international person and a subject of international law.²⁷ Recognition has a constitutive effect because it is a necessary precondition for the establishment of the State concerned.²⁸ In its extreme form, the constitutive theory maintains that the legal personality of a State depends on the political approval and recognition of other States.²⁹

Although recognition is of great importance to Kosovo attaining statehood, recognition is not in itself a condition of statehood in international law.³⁰

The Montevideo Convention affirms that a State must possess the capacity to enter into relations with other States. However, as Peter Malanczuk observes, the standard is the *capacity* to enter into foreign relations, not the *actuality* of this fact.³¹ With the help and support of both the international community and the 73 UN Member States³² that supports Kosovo's independence and statehood, Kosovo now possesses its own diplomatic machinery throughout the international community. Kosovo therefore has the capacity to enter into foreign relations, and do so, but also to enter into international agreements between states.

²⁶ ICJ. *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, p. 43, point 122. www.icj-cij.org.

²⁷ Harris, *Cases and Materials on International Law*, p. 145.

²⁸ Malanczuk, *Akehurst's modern Introduction to International Law*, p. 83.

²⁹ Brownlie, *Principles of Public International Law*, p. 88.

³⁰ Crawford, *The Creation of States in International Law*, p. 93.

³¹ Malanczuk, *Akehurst's modern Introduction to International Law*, p. 79.

³² As of 4 January 2011. Who Recognized Kosova as an independent State? *The Kosovar people thank you – Who Recognized Kosovo and Who Recognizes Kosovo*, www.kosovothankyou.com.

The acceptance of Kosovo's declaration of independence increases for each year, and the implication by doing so also indicates that states recognize Kosovo's secession and therefore its statehood.

3.2 The development of the international rules on the rights of peoples to self-determination

The Kosovar Albanians' claim for independence as manifested in the declaration of independence of 17 February 2008 is subject to the legal rules of self-determination. The right to self-determination can be considered as one of the essential norms of contemporary international law.³³ It is recognized by the the UN Charter and by the jurisprudence of the International Court of Justice, ICJ. The Court has construed the right of peoples to self-determination, as it has evolved from the Charter and UN practice, to contain both an *erga omnes* character and *jus cogens* status.³⁴

The development of the legal right to self-determination is based on the UN Charter. Article 1(2) of the Charter provides that one of the purposes of the UN is to "*develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*". Article 55 provides that the UN shall promote a number of goals with a view "*to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*".³⁵

The right of peoples to self-determination is an elusive concept. However, the preparatory work indicates that discussions focused on the right of

³³ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

³⁴ East Timor Case (*Portugal v Australia*), p. 102 point 28.

³⁵ Quane, *The United Nations and the evolving right of self-determination*, p. 539. It is also important to remember that these articles (and the rest of the UN Charter) should be interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the Charter according to art. 31 VCLT. Furthermore, reference to the travaux préparatoires as a supplementary means of interpretation can also be made in accordance with art. 32 VCLT.

peoples to determine their internal political status.³⁶ There is no clear definition of “*people*” or of what the right entails. Instead, there are numerous, and at times conflicting, interpretations of self-determination.³⁷ Based on the language, context, object and purpose of Articles 1(2) and 55, there are three recurring interpretations on the term “*peoples*”:

- one is that it refers to States, in which case the principle of self-determination means sovereign equality,
- another is that it refers to the inhabitants of the Non-Self-Governing Territories (hereafter NSGTs). Self-determination in this context means the right to “*self-government*”,
- the third interpretation is that the term “*peoples*” refers to the inhabitants of Trust Territories, in which case self-determination means the right to “*self-government or independence*”.³⁸

Both the text and the drafting of the Charter indicate that the principle of self-determination applies to States. It is doubtful whether it applies only to States. Even on a textual reading, one is left with the question why the vague term “*peoples*” is used rather than the more precise term “*States*” if what was intended was simply to recognize the self-determination of States.³⁹

The manner in which the self-determination principle was applied during the decolonization period provides useful insights into the meaning of the term “*peoples*” and what self-determination entails for these peoples. The trend during this period was for all inhabitants of a colonial territory to exercise the right to self-determination. Even though the traditional interpretation of “*peoples*” is to Kosovo’s disadvantage, the term has to be interpreted in a more modern way instead of the meaning of the term as used in the UN Charter from 1945 and other treaties. According to the Island of Palmas

³⁶ Xanthaki, “Minorities, people, and self-determination”, *The Right to self-Determination: Meaning and Scope*, p. 16.

³⁷ Quane, *The United Nations and the evolving right of self-determination*, p. 537.

³⁸ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii and Quane, *The United Nations and the evolving right of self-determination*, p. 541.

³⁹ Quane, *The United Nations and the evolving right of self-determination*, p. 545.

Case, “a juridical fact must be appreciated in the light of the law contemporaneous with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.⁴⁰ Today it is hardly surprising that when it comes to defining “people” the political principle should, according to Helen Quane, emphasize criteria such as a common history, race, ethnicity, and language⁴¹ – and by doing so, we would have an interpretation that would be of great interest for Kosovo’s claim of statehood.

3.2.1 UNGAR 1514 (XV) 1960

The United Nations General Assembly Resolution (hereafter UNGAR) 1514 (XV) is widely regarded as one of the United Nations’ most important contributions to the development of the legal right to self-determination. The Resolution affirms that “*All peoples have the right to self-determination*”.⁴² It suggests that the right applies universally but this is unlikely. The General Assembly (hereafter GA) interpreted a similar phrase in an earlier resolution as applying only to the inhabitants of NSGTs and Trust Territories.⁴³ A similar interpretation can be attributed to the phrase in UNGAR 1514 (XV).⁴⁴

Under UNGAR 1514 (XV) the decisive factor was whether the territory had attained independence or not. The reference to “*territories which were not yet independent*” amounts to a rejection of the Western thesis that certain territories in Eastern Europe were under a “*new form of colonialism*” and should have their right to self-determination recognized. It is clear that UNGAR 1514(XV) is concerned only with the right to self-determination of colonial peoples. It can be regarded as an attempt to extend the right to self-

⁴⁰ The Island of Palmas Case (*Netherlands v. the USA*), p. 14.

⁴¹ Quane, *The United Nations and the evolving right of self-determination*, p. 538

⁴² UNGAR 1514(XV) Operative para. 2. With the UNGAR 1514 (XV) the international community is no longer talking about a principle to self-determination for peoples, instead they are talking about a right to self-determination for peoples.

⁴³ A/RES/637 (VII) [A-C], p. 1.

⁴⁴ Quane, *The United Nations and the evolving right of self-determination*, p. 548

determination to this particular category of peoples rather than, as is sometimes thought, declaring a right to self-determination for any group claiming to be a “*people*”.⁴⁵ Most scholars stipulates that minorities as a “*people*” do not enjoy a right to secession under contemporary international law. Minorities are restricted to a right to some form of autonomy within a given state.⁴⁶ This conclusion follows from the wording of art. 27 of the International Covenant on Civil and Political Rights (hereafter ICCPR), which grants only limited rights for minorities to “*enjoy their culture, to profess and practice their own religion, or to use their own language*”. Minorities are not, as such, recognized as subjects of public international law.⁴⁷

Whether or not new principles were formally developed from the right of self-determination during this time, there are no questions concerning the development of the rule in itself. It might not be a universal development but the rule itself seemed to get more support of that the term “*peoples*” not only were applicable to NSGTs and inhabitants of Trust Territories. Furthermore, did the tendency to equate the right to self-determination with independence during this time era mean that independence must be offered to a people exercising self-determination even outside a colonial context? This question has never been answered and I believe that might be one of the reasons why Kosovo is such a disputed topic, since Kosovo, with its independence, forces the world community to answer the question – either by supporting their independence or not.

3.2.2 ICCPR’s and ICESCR’s common article 1

Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) are Covenants reflecting the ideas and developments from its era, namely the 1960s. This was the time when the

⁴⁵ Quane, *The United Nations and the evolving right of self-determination*, p. 549.

⁴⁶ Malanczuk, *Akehurst’s Modern Introduction to International Law*, p. 338.

⁴⁷ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

right to self-determination was evolving and the rights of the minorities' started to be a discussed topic.

The ICCPR and the ICESCR were adopted by the GA in 1966. The right to self-determination is set out in the common article 1 where it states that “*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”. Moreover, “*all peoples have a right to freely dispose their natural wealth and resources*”.

3.2.3 The meaning of the right of self-determination

The legal consequences of the right to self-determination vary for each class of recipient. There are basically two aspects of self-determination: the external self-determination directed against other subjects of international law and the internal self-determination aimed at the situation within a state.⁴⁸ In terms of what the right to self-determination entails, article 1(1) ICCPR and ICESCR gives us guidance that peoples can “*freely determine their political status and freely pursue their economic, social and cultural development*”. The reference to “*political status*” is broad enough to encompass the right to independence or any other international status.⁴⁹

The Friendly Relations Declaration (hereafter FRD) states that “*By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development*”.⁵⁰ And “*The establishment of a sovereign and independent State, the free association or integration with an independent State or the mergence into any other political status*

⁴⁸ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

⁴⁹ Quane, “The United Nations and the evolving right of self-determination”, p. 560.

⁵⁰ FRD para. 1.

*freely determined by a people constitute modes of implementing the right of self-determination by that people”.*⁵¹

When you examine the right to self-determination you have to see these regulations in the light of other principles in international law. You also have to respect the sovereign and territorial integrity of a State at the same time you protect the fundamental principles of democracy and protection of human rights and of minorities in order to make the examination of the right to self-determination complete.

3.2.3.1 The internal rights in the RSD

Internal self-determination has a two-fold meaning. On the one hand, it describes the right of people that is organized as a state to decide, without external influence, on a form of government. On the other hand, it can mean that an ethnic minority living in a state is entitled to claim the observance of certain rights granting a special status in the field of language, religion, and education.⁵² The internal right of self-determination was the kind of self-determination Kosovo had a right to according to the 1974 Constitution of Serbia until Milosevic in 1989 abolished it.

3.2.3.2 The external rights in the RSD

External right to self-determination comprises the right to establish an independent state or to unify with an already existing state, especially in cases of decolonization and secession. It is also therefore the external dimension to the right of peoples to self-determination determines the territories' international status.⁵³ However, the prerequisites under which a bearer of the right to self-determination may be entitled to secede are unclear.⁵⁴

⁵¹ FRD para. 4.

⁵² Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

⁵³ Quane, *The United Nations and the evolving right of self-determination*, p. 538.

⁵⁴ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

By referendum, the people can decide the nation's future – if they would like to be a part of the colonist's state, be independent, or to unify with an already existing state. Peoples belonging to a NSGT and a Trusteeship Territory has a right to external self-determination – the question if a national minority within an already existing state has a right to self-determination or not, is still unclear. It is still not accepted among the international community that a national minority has a right to external self-determination and therefore a right to secede from the mother country. Many countries in the international community think that the principle of *uti possidetis* is more solid than the right of external self-determination of national minorities.

3.2.4 The wishes of the people

The principle of self-determination of peoples was first referred to in an amendment to Article 1(2) proposed by the four sponsoring governments, China, the USSR, the UK and the US.⁵⁵ Opinions divided on whether the amendment should be included in the Charter. During discussions in Committee I/1⁵⁶ it was: “*strongly emphasized on the one side that the principle corresponded closely to the will... of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government... and not the right of secession*”.⁵⁷

UNGAR 1514 (XV) defines self-determination as the right of peoples “*to freely determine their political status and freely pursue their economic, social and cultural development*”.⁵⁸ Although there is a strong preference for independence, reflected in the drafting of the resolution and the GA debate, it is evident from the generality of the language used in defining

⁵⁵ There were no reference to the term self-determination in the Dumbarton Oaks Proposals.

⁵⁶ This Committee had the task of drafting the Preamble to and the Purposes and Principles of the Charter.

⁵⁷ Quane, *The United Nations and the evolving right of self-determination*, p. 541.

⁵⁸ UNGAR 1514 (XV) operative para. 2.

self-determination that it did not prevent other self-determination outcomes.⁵⁹ Namely, the UN was prepared to accept other self-determination outcomes. This also indicates that while the UN generally interpreted the term “*peoples*” to refer to the entire inhabitants of a colonial territory it was prepared occasionally to depart from this interpretation to reflect the wishes of the peoples concerned.⁶⁰

The people must be enabled freely to express their will as to the international status of the territory, that is, whether they wish to associate or integrate into an existing sovereign State, or acquire some sort of international status gradually leading to independent statehood. As Judge Dillard puts it in his separate opinion in the Western Sahara case, “*it is for the people to determine the destiny of the territory and not the territory to destiny of the people*”.⁶¹

3.2.5 The right of secession

It is not likely that there is a right to secede for any group of people in national law in Serbia, since Serbia reiterates that their state sovereignty has been violated by Kosovo’s actions. The right to secede, by definition, is exercised by only one segment of the population of a State. Consequently, paragraph 7 FRD opens up the possibility that a group which is not synonymous with the entire population of a State can exercise the right to self-determination and be regarded as a people. Therefore, on the basis of the language, context, and drafting history of the Declaration, the principle of self-determination seems to apply to all peoples.⁶²

The FRD itself does not attempt to define “*peoples*”, but the reader can find some indirect guidance in its paragraph 7. This paragraph affirms the

⁵⁹ UNGAR 1514 (XV) operative para. 5 and the title of the resolution.

⁶⁰ Quane, *The United Nations and the evolving right of self-determination*, p. 552f.

⁶¹ Western Sahara Case, “Separate opinion of Judge Dillard”, p. 114. Cassese, “Self-Determination of Peoples”, *The impacts of self-determination on traditional international law*, p. 189.

⁶² Quane, *The United Nations and the evolving right of self-determination*, p. 562.

territorial integrity of “*States conducting themselves in compliance with the principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*”. Respect for the territorial integrity of a State is dependent on the State possessing a government representing the whole people. It suggests that there is a right to secede if the State fails to comply to this requirement.⁶³

Both resolutions, FRD from 1970 and the UN Declaration on Minorities 47/135 from 1992 give certain rights to minorities. At the same time, the UNGA emphasises the territorial integrity of states. However, public international law does not prohibit minorities from trying to secede. The process of secession is legally neutral. The outcome has to be awaited by other states. Only the laws on internal armed conflict and human rights limit the process.⁶⁴

John Dugard and David Raic argue that “[a] qualified right of secession comes into being [...] when a people forming a numerical minority in a State, but a majority within the particular part of the State, are denied the right of internal self-determination or subjected to serious and systematic suppression of human rights”.⁶⁵ Even authors that initiate the the right of self-determination consists of a right of secession insist on the level of human rights violations that would activate secession: a “*people*” must be persistently and egregiously denied political, and social equality as well as the opportunity to retain their cultural identity. Exploitation or discrimination must be systematic and must constitute in real terms colonial or alien domination. Other conditions that must be fulfilled include that the claimants must inhabit a well-defined territory, which overwhelmingly supports separatism; that secession is a realistic prospect of conflict

⁶³ Quane, *The United Nations and the evolving right of self-determination*, p. 562

⁶⁴ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii

⁶⁵ Dugard & Raic, *The role of recognition in the law and practice of secession*, p. 134

resolution and peace; and that all other political, and diplomatic avenues have been seriously examined.⁶⁶

3.2.6 The right of independence

There are universally two interpretations of the meaning of self-determination in the UN Charter. It can either refer to the sovereign equality of States or to the right of colonial peoples to self-government, including independence.⁶⁷

Since several States support the colonial peoples' claims for independence it is possible to say that there was some support for a right of secession during the draft of the Charter. However, secession can also refer to claims by national groups within the continuous boundaries of independent States to break away from these States. This is the meaning usually attributed to secession today. It is difficult to find any references in the drafting history of the Charter that would support this form of secession.⁶⁸

3.3 The right of self-determination and national minorities

Contemporary international law on the protection of minorities is quite elementary. It rests on the general prohibition on discrimination in customary law together with art. 27 of the ICCPR:⁶⁹

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own

⁶⁶ Xanthaki, “Minorities, Peoples, and self-determination”, *The Right to Self-Determination: Meaning and Scope*, p. 24

⁶⁷ Quane, *The United Nations and the evolving right of self-determination*, p. 545.

⁶⁸ Quane, *The United Nations and the evolving right of self-determination*, p. 547.

⁶⁹ Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 338.

culture, to profess and practise their own religion, or to use their own language.”

The art. 27 ICCPR has been generally seen as individual rights. This view is confirmed by an interpretation of the common art. 1 of the ICCPR and ICESCR which reserves the right of self-determination of peoples. From the plain meaning of the text, a systematic interpretation and the drafting history of these documents, scholars conclude that external self-determination is not a right of minorities in existing states. This interpretation is also supported by later documents, such as the FRD and the 1992 UN Declaration on Minorities 47/135.⁷⁰

3.3.1 The Friendly Relations Declaration, UNGAR 2625 (XXV), from 1970

New proposals in academic literature advocate a re-evaluation of the right to self-determination. The authors who favour a right of minorities to self-determination base their arguments on the FRD. They maintain that discrimination against ethnic minorities could give rise to a right to secede, if the minority is exposed to flagrant violations of fundamental human rights by the state, which is not willing to provide legal remedies or protection by courts. Flagrant violations might consist, inter alia, of murder, unlimited imprisonment without legal protection, of special prohibitions against following religious processions, using one's language and of destroying family relations. Scholars argue that the common art. 1 might include the right to resist such violations as a form of self-defence, and that secession might offer the only possible defensive reaction to brutal oppression.⁷¹

The general legal prescriptions are laid down in the section on the use of force in the FRD. This provides that: *“Every State has the duty to refrain from any forcible action which deprives peoples referred to in the*

⁷⁰ A/RES/47/135.

⁷¹ Krieger, *The Kosovo Conflict and International Law*, p. xxxiii.

*elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence”.*⁷²

The importance of these normative developments should not be underestimated: the international community has gone so far in its protection of self-determination as to prohibit not only the use of military force by the oppressive State but also what could be termed “*institutionalized violence*”, namely all those measures, mechanisms, and devices destined to prevent peoples or racial groups from exercising their right to self-determination.⁷³

Paragraph 7 suggests two criteria for identifying the relevant groups. The reference to the “*whole people belonging to the territory*” suggests a territorial concept of people, but the inclusion of the phrase “*race, creed or colour*” highlights the relevance of personal criteria. The mere existence of groups of different race, creed or colour will therefore be insufficient to enable them to invoke the right to self-determination.⁷⁴

The (1993) Vienna Declaration and Program of Action “*affirmed the right of people to take legitimate action in accordance with the UN Charter to realise their right of self-determination,*”⁷⁵ but excluded the usual restrictions of territorial integrity and political unity. Although the formula used was that of the FRD, the Vienna Declaration expanded the right to self-determination to people whose government does not represent the whole people “*without distinction of any kind*”.⁷⁶ In addition, the language implied exceptions to the principle of territorial integrity. The Committee on the Elimination of Racial Discrimination (hereafter CERD) General Recommendation XXI (48) was clearer on the issue of secession. After

⁷² Cassese, “Self-Determination of Peoples”, *The impacts of self-determination on traditional international law*, p. 195.

⁷³ Cassese, “Self-Determination of Peoples”, *The impacts of self-determination on traditional international law*, p. 197.

⁷⁴ Quane, *The United Nations and the evolving right of self-determination*, p. 562f

⁷⁵ The Vienna Declaration and Programme of Action para. 2.2.

⁷⁶ The Vienna Declaration and Programme of Action para. 2.3.

recognising the right to internal self-determination for minorities, the Committee concluded that:⁷⁷

“...international law has not recognized a general right to peoples unilaterally to declare secession from a State. In this respect, the Committee follows the view expressed in an Agenda for Peace (paras. 17 and following), namely that a fragmentation of States may be detrimental to the protection of human rights, as well as the preservation of peace and security. This does not however, exclude the possibility of arrangements reached by the free arrangements of all parties concerned”.

3.3.2 Three categories where non-colonial people has claimed self-determination and independence from the mother State

The conflicts mentioned in this chapter show the difficulty with the concept of self-determination for minorities. There is a lot of ambiguity surrounding the concept of self-determination and therefore each State or non-State group can resort to the interpretation that best suit their interests. There are at least three broad categories of non-colonial self-determination claims. The first category includes Czechoslovakia, Eritrea and the former Soviet Union.⁷⁸

3.3.2.1 Common ethnicity, language, and/or religion

In each following case, there was a group of people, identified by a common ethnicity, language and/or religion within an independent States, who claimed a right to self-determination.

⁷⁷ CERD, *General Recommendation No. 21: Right to self-determination*, point 6.

⁷⁸ Quane, *The United Nations and the evolving right of self-determination*, p. 564.

3.3.2.1.1 Czechoslovakia

The creation of the Czech Republic and Slovakia in 1993 does not amount to a precedent for secession. Their independence was the result of a straightforward process of consensual dissolution, achieved by parliamentary processes under the Constitution Act of 1992, rather than a secessionist referendum. On 31 December 1992, the State of Czechoslovakia ceased to exist.⁷⁹

3.3.2.1.2 Montenegro

The secession of Montenegro from the Union of Serbia and Montenegro in 2006 occurred after a majority of 55 per cent of the population voted in favour of independence for the territory of Montenegro. Since this referendum was part of the Belgrade Agreement of 14 March 2002, in which Serbia had formally consented to the terms by which Montenegro could seek independence. In 2006, the Union dissolved and the two territories formed two new individual States – Serbia, and Montenegro.⁸⁰

3.3.2.1.3 Eritrea and East Timor

In December 1950, the UNGA established Eritrea as “*an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown*”, with its own “*legislative, executive and judicial powers in the field of domestic affairs*”.⁸¹ The UN involvement in the referendum process in Eritrea was based on the fact that the Eritreans’ right to determine their political status had already been recognized by the Conference on Peace and Democracy, which “*assembled all the political parties and social actors in Ethiopia*”. The implication is that it was by virtue of the wishes of the entire population of Ethiopia that the Eritreans could hold a referendum and become an independent State.⁸²

⁷⁹ Crawford, *The Creation of States in International Law*, p. 106.

⁸⁰ Fawn, “International Affairs”, *The Kosovo – and Montenegro – effect*, pp. 269 & 276.

⁸¹ UNGAR 390 A(V) (1950), paras. 1 and 2.

⁸² Quane, *The United Nations and the evolving right of self-determination*, p. 564f.

Similarly, East Timor's independence from Indonesia occurred only after the Indonesian President, Bacharuddin Habibie, agreed to grant independence if a majority of East Timorese vote for independence in a UN-supervised referendum.⁸³

3.3.2.1.4 The former Soviet Union and Chechnya

Within weeks of the Soviet republics agreeing to the dissolution of the Soviet Union, some of the republics applied for and were admitted to UN Membership.⁸⁴ The United Nations' subsequent rejection of self-determination claims by ethnic groups within the new States⁸⁵ tends to support this view since in each case the self-determination claims were opposed by the majority of the State's population.⁸⁶

The lack of recognition afforded to Chechnya's unilateral declaration of independence from the Soviet Union in 1991 confirms that there is no identifiable precedent for secession. International recognition was not forthcoming, despite clear evidence that the Chechen people had been targets of serious human rights violations committed by Russian forces during the Russian-Chechen wars of 1994 and 1999.⁸⁷ Concerns over the rise of Chechen terrorist groups and Chechnya's inability to establish any viable State institutions during its two-year period of de facto independence after this declaration, prompted the international community to support Russia's right to its territorial integrity.⁸⁸

⁸³ Constitution of the Democratic Republic of East Timor, *Preamble*, <http://etan.org>.

⁸⁴ Quane, *The United Nations and the evolving right of self-determination*, p. 566.

⁸⁵ S/RES/1036 (1996), para. 3.

⁸⁶ Quane, *The United Nations and the evolving right of self-determination*, p. 566.

⁸⁷ Crawford, *The Creation of States in International Law*, p. 409.

⁸⁸ Raic, *Statehood and the Law of Self-Determination*, p. 375.

3.3.2.2 People organized as a State

3.3.2.2.1 The Baltic States

The Baltic Republics; Estonia, Latvia, and Lithuania, were independent States⁸⁹ until 1940 when they were integrated into the Soviet Union. They restored independence in 1990 and 1991. Their second declaration of independence were rejected by the Soviet Union and initially provoked a cautious response from the international community. Once the de facto dissolution of the Soviet Union was under way,⁹⁰ a large number of States recognized the Baltic Republics as independent.⁹¹

The delay in recognizing the Baltic Republics might suggest that their inhabitants did not have a legal right to self-determination. This implies that they were not peoples but simply ethnic groups within the Soviet Union. This would mean that the entire population of the Soviet Union had the right to self-determination and could maintain its territorial integrity by rejecting the declarations of independence. The international community's apparent support for the territorial integrity of the Soviet Union at least until its de facto dissolution may support an interpretation according to which the declarations of independence were secessionist claims resisted by the States. The international response to the declarations suggests that such claims will not be accepted unless the State is dissolving and no longer able or willing to prevent the secessions.⁹²

An alternative interpretation is that, legally, the Baltic Republics did not cease to be States due to the illegality of their integration into the Soviet Union. This would mean that their inhabitants continued to be a people with a right to self-determination although Soviet control over the Republics meant that in practice this right could not be exercised until 1991. The

⁸⁹ The Baltic Republics had been sovereign states for 22 years, since they declared independence from Russia in 1918. These declarations were in general recognized in the international community by 1920.

⁹⁰ This process began with the failure of the coup in Aug. 1991 and concluded with the formal dissolution of the Soviet Union by its constituent republics in Dec. 1991.

⁹¹ Quane, *The United Nations and the evolving right of self-determination*, p. 567.

⁹² Quane, *The United Nations and the evolving right of self-determination*, p. 567.

references in UN documents to their “*restored independence*” may support this interpretation.⁹³ The fact that many States never recognized de jure Soviet control over the Baltic States may also support this interpretation.⁹⁴

3.3.2.3 Secessionist claims

The last category comprises those instances where self-determination claims advanced by ethnic, linguistic or religious groups are rejected by the State.

3.3.2.3.1 Katanga

In 1961, the UNSC reaffirmed the proposition that international law does not explicitly recognize the right of unilateral secession, after it declared Katanga’s secession from the Republic of Congo illegal.⁹⁵ At the time, it was disputed whether this attempt, conducted with the support of foreign mercenaries, actually represented the true wishes of the majority of the Katangese people, especially in the light of the Katangese tribal and regional diversities.⁹⁶

3.3.2.3.2 East Pakistan

The first modern case of a successful exercise of the secessionist self-determination occurred on March 26, 1971, when East Pakistan unilaterally declared independence from Pakistan. There were extraordinary factual circumstances prompting this secession, the first of which was that East Pakistan was geographically separated from its Mother State, West Pakistan, by 1200 miles of Indian Territory.⁹⁷ Adding to this territorial anomaly was the cultural, ethnic, and linguistic distinction between the Bengalis and the West Pakistanis, as well as the extremely marked political and economic disparities between East and West Pakistan.⁹⁸ Yet the immediate trigger for

⁹³ A/RES/48/18 (1993), p. 2.

⁹⁴ Quane, *The United Nations and the evolving right of self-determination*, p. 568.

⁹⁵ S/RES/169 (1961).

⁹⁶ Islam, M. Rafiqul, *Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh* (1985) 22 *Journal of Peace Research* 211, p. 215.

⁹⁷ Raic, *Statehood and the Law of Self-Determination*, p. 335.

⁹⁸ Castellino, *International Law and Self-Determination*, p. 153.

this secession was West Pakistan's large-scale military operation in East Pakistan on the 25-26 March 1971,⁹⁹ during which the Pakistani Army was responsible for widespread violations of human rights and the deaths of over one million Bengalis.¹⁰⁰

On the 26 of March 1971, the independence of Bangladesh was declared and the international support for independence was readily forthcoming, with some 100 States recognising Bangladesh by September 1973. Ultimately, Bangladesh was admitted to the UN in 1974. The reasons for the international community's response are unclear.¹⁰¹

The fact that the international community tends to not support secessionist claims due to people's minority situations, shows that the principle of territorial integrity of States is robust. The ad hoc approach to the Bangladesh case shows that the international community might have seen the case in the light of political and humanitarian considerations rather than to traditional international law. If this ad hoc approach is a development of the legal right of self-determination or not, might itself be arguable, but the actions taken shows that the international community is no longer strangers to these solutions for the crisis there might be in the world.

3.3.2.3.3 Former Socialist Federal Republic of Yugoslavia

The most recent example of successful secession occurred in the former Socialist Federal Republic of Yugoslavia. Yugoslavia rejected declarations of independence by four of its constituent republics and used force to prevent them seceding. The escalation in fighting and the widespread human rights violations led to the involvement of the international community first at a regional level and then at an international level.¹⁰² When negotiation settlements did not work out due to the character of the crisis, the

⁹⁹ Raic, *Statehood and the Law of Self-Determination*, p. 339.

¹⁰⁰ Dugard & Raic, *The role of recognition in the law and practice of secession*, p. 121.

¹⁰¹ Dugard & Raic, *The role of recognition in the law and practice of secession*, p. 121.

¹⁰² Quane, *The United Nations and the evolving right of self-determination*, p. 569.

international community showed its willingness to recognize the seceding states from Yugoslavia. This new State practise, to recognize a seceding state after that negotiation settlements has failed, might contribute to the formation of a new rule of customary law, but this depends on the international response to similar claims in the future.¹⁰³

An alternative interpretation suggested by the Arbitration Commission of the European Commission Conference on Yugoslavia. The Commission expressed the opinion that Yugoslavia was in the process of dissolution and that its internal borders had become external borders. This implies that once Yugoslavia began to dissolve the republics automatically became States and their inhabitants had a right to self-determination by virtue of being organized as States.¹⁰⁴

The Badinter Arbitration Commission flatly denied external self-determination to the Serbian population of Bosnia-Herzegovina, despite the latter's proclamation of independence and the purported creation of the Republika Srpska in January 1992.¹⁰⁵

The failed secession attempts in Chechnya, the Republika Srpska, Biafra, and Katanga are not isolated occurrences. Other unsuccessful unilateral secession attempts include Tibet's attempted secession from China, Bougainville's attempted secession from Papua New Guinea, Kashmir's attempted separation from India, and both Abkhazia's and South Ossetia's unilateral secessionist attempts from Georgia. In all these cases, the international community has favoured the sovereignty and territorial integrity of the mother State, and rejected a legal right to self-determination for ethnic, linguistic, and religious groups within States,¹⁰⁶ even where the

¹⁰³ Quane, *The United Nations and the evolving right of self-determination*, p. 570.

¹⁰⁴ Quane, "The United Nations and the evolving right of self-determination", p. 570.

¹⁰⁵ By January 1992, the Serbian population of Bosnia-Herzegovina, which accounted for approximately thirty four per cent of the total population of Bosnia, had constituted their own parliament and conducted a plebiscite. Nevertheless, their claim to independence was not recognized by any other State. Crawford, *The Creation of States in International Law*, p. 406.

¹⁰⁶ Quane, *The United Nations and the evolving right of self-determination*, p. 570.

secession was triggered by human rights violations by that State.¹⁰⁷ So what makes the East Pakistan case so unique compared to all the other cases and how can the criterias from the East Pakistan case be applicable to the Kosovo case?

The international community has to have an ad hoc approach to the Kosovo case, just as it did in the Bangladesh case. The denial of fundamental human rights and war acts in former East Pakistan led to the acceptance of the new State Bangladesh among the international community, and this is also, what has to happen in Kosovo in order to restore security and stability in the region.

¹⁰⁷ Crawford, *The Creation of States in International Law*, p. 108.

4 The Kosovo case

4.1 Development of the human rights situation in Kosovo

During the late 1980's and 1990's there has been many cases where human rights has been ignored in the Kosovo area. Moreover, according to Noel Malcolm, Kosovo is arguably the area with the worst human rights abuses in the whole of Europe during this time.¹⁰⁸

According to the United Nations High Commissioner for Refugees (hereafter UNHCR) the human rights violations in Kosovo were one of the root causes of the mass displacement, internally or externally, of more than 1 million ethnic Albanians from Kosovo.¹⁰⁹ However, the U.S. Department of State estimates the number to be as high as 1.5 million, which would mean that more than 90 per cent of the Kosovar Albanian population suffered from displacement from their homes.¹¹⁰ As of 1999, immediately after the withdrawal of Serb forces from Kosovo, Kosovo refugees spontaneously and massively started returning to their homes. According to UNHCR figures, more than 761,000 Kosovars returned to Kosovo before the upcoming winter of 1999.¹¹¹ In UNSCR 1199 (1998), the UNSC affirmed that the situation in Kosovo constituted a “*threat to peace and security in the region*”¹¹² and demanded that the FRY should “*cease all action by the security forces affecting the civilian population and order the withdrawal of*

¹⁰⁸ Malcolm. *Kosovo – a short history*, p. xxvii.

¹⁰⁹ The UN Economic and Social Council, “Questions of the violation of human rights and fundamental freedoms in any part of the world”, *Report of the High Commissioner for Human Rights on the situation of human rights in Kosovo, Federal Republic of Yugoslavia*, E/CN.4/2000/10 (27/09/1999), points 7 & 90.

¹¹⁰ U.S. Department of State, “Erasing History: Ethnic Cleansing in Kosovo”, *Executive summary*, p. 1.

¹¹¹ The UN Economic and Social Council, “Questions of the violation of human rights and fundamental freedoms in any part of the world”, *Report of the High Commissioner for Human Rights on the situation of human rights in Kosovo, Federal Republic of Yugoslavia*, E/CN.4/2000/10 (27/09/1999), points 7 & 90.

¹¹² S/RES/1199 (1998), preamble. This enabled the international community to act in the manner in accordance with Chapter VII, UN Charter.

security units used for civilian repression".¹¹³ The President of the Security Council has also stated that "*The Security Council strongly condemns the large-scale inter-ethnic violence in Kosovo (Serbia and Montenegro). [...] Such violence is unacceptable and must stop immediately*".¹¹⁴

Failure to comply with numerous UNSC demands and continued Serbian atrocities prompted the NATO to begin a bombing campaign against military targets in the FRY on the 24 March 1999. However, at the conclusion of the NATO bombings, the SC reaffirmed "*the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,*"¹¹⁵ although not explicitly affirming that the FRY held sovereignty over Kosovo. This seemed to confirm that the FRY (known as Serbia and Montenegro from 2003 and Serbia from 2006) retained its legitimacy over Kosovo.

4.1.1 The Human Rights violations by the Serbian government

After the fact that the second peace talks in Rambouillet had failed, Milosevic and his regime increased the ethnic cleansing¹¹⁶ of the Kosovar Albanians in the region. The Yugoslav army started, on 20 March 2000, a large-scale operation to drive thousands of Kosovar Albanians from their homes.¹¹⁷

The Government's human rights record worsened significantly, and there were problems in many areas. Serbian police committed numerous serious abuses in their dealings with the Albanian population in Kosovo including extrajudicial killings, disappearances, torture, brutal beatings, eviction from

¹¹³ S/RES/1199 (1998), point 4(a).

¹¹⁴ S/PRST/2004/5 (2004), p. 1.

¹¹⁵ S/RES/1244 (1999), p. 2.

¹¹⁶ Generally entails the systematic and forced removal of members of an ethnic group from their communities to change the ethnic composition of a region. U.S. Department of State, *Erasing History: Ethnic Cleansing in Kosovo, Executive summary*, p. 1.

¹¹⁷ Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal*, p. 440f.

apartments in which Albanians lawfully reside, and arbitrary arrests and detentions. The judicial system is not independent¹¹⁸ of the Government, suffers from corruption, and does not ensure fair trials.¹¹⁹

4.1.2 The Human Rights violations by the Kosova Liberation Army

Elements of the Kosovo Liberation Army (hereafter KLA) were also responsible for abuses. They committed killings, were responsible for disappearances, abducted and detained Serbian police, as well as Serb and Albanian civilians (those suspected of loyalty to the Serbian Government), and in a few isolated cases “*tried*” suspects without due process. There are also credible reports of instances of torture by the KLA.¹²⁰

The KLA has also committed a series of violations of international humanitarian law, including the taking of hostages and extrajudicial executions. An estimated 138 ethnic Serbs, and a number of ethnic Albanians and Roma, are missing in circumstances in which KLA involvement is suspected.¹²¹

During the 78-days air strike conducted by NATO it appears that the KLA was actively involved in fighting against Serbian forces in several areas of Kosovo according to the UNHCR. In some instances, civilians allegedly sought KLA protection by resettling close to KLA positions, and KLA soldiers moved to urban areas or fled the country by mingling with crowds

¹¹⁸ Krieger, “The Kosovo Conflict and International Law”, p. 40. *Commission Resolution 1993/7, Situation of Human Rights in the Territory of the Former Yugoslavia, 23 February 1993, point 24(b)*.

¹¹⁹ During the period January to June 1994, more than 2,000 persons were taken to police stations for so-called “*informative talks*”, lasting from hours to several days. A majority of these persons were allegedly subjected to severe ill-treatment and torture while detained by the police. S/1994/1252. Para. 182, E/CN.4/2000/10 (27/09/1999), point 61, E/CN.4/1994/47. para. 195, and U.S. Department of State, “Serbia-Montenegro Country Report on Human Rights Practices for 1998”, *Serbia-Montenegro*, merits.

¹²⁰ U.S. Department of State, “Serbia-Montenegro Country Report on Human Rights Practices for 1998”, *Serbia-Montenegro*, merits.

¹²¹ Krieger, *The Kosovo Conflict and International Law*, p. 92.

of displaced civilians. This circumstance might have negatively affected the attitude of Serbian forces towards civilians.¹²²

4.2 The Ahtisaari Plan

In 2007, the UN Secretary General Special Envoy of Kosovo, Martti Ahtisaari, released the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan), which recommended that Kosovo become a fully sovereign and independent state following a period of supervision by the international community.¹²³ According to Ahtisaari, the return of Serbian rule in Kosovo would have been greeted with violent opposition.¹²⁴

However, in August 2007 negotiations between the Government of Serbia and Kosovar Albanians, regarding the implementation of this Settlement Status proposal, broke down. Consequently, Kosovo's political future was clouded in uncertainty prior to the 2008 declaration of independence. To this day, Serbia continues to demand that Kosovo's autonomy be exercised within Serbia, while the Kosovar Albanian Government insists on nothing short of independence.

4.3 The North Atlantic Treaty Organization

At the conclusion of 78 days of NATO bombings, Kosovo was placed under the interim administration of the UN by UNSCR 1244 (1999), which called for the "*establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo*".¹²⁵

With regard to the Kosovo crisis, it was clear from the very beginning that the Security Council would never explicitly authorize measures, which

¹²² E/CN.4/2000/10 (27/09/1999), point 75.

¹²³ Comprehensive Proposal for the Kosovo Status Settlement, art. 1-15 and annexes.

¹²⁴ UNSC Report on the Special Envoy of the Secretary-General in Kosovo's future status, UN Doc. S/2007/168 (26 March, 2007) , p. 3.

¹²⁵ UNSCR 1244 (1999) p. 3(11)(a).

could be qualified as “*humanitarian intervention*”.¹²⁶

As Resolution 1199 brought no immediate result, NATO Secretary-General Javier Solana proclaimed on 9 October 1998 that NATO saw sufficient factual and legal grounds to threaten the use of force and, if necessary, to use force.¹²⁷ From a legal point of view, the UN Charter did not back these threats but the Charter seemed, at least initially, to provide an important contribution to a peaceful solution of the problem.¹²⁸ On 12 February 1999, the NATO Council decided to send 20.000 to 30.000 troops to ensure any peace settlement in order to secure the international peace and security in the region.¹²⁹

Louis Henkin, known as a convinced opponent of unilateral measures of humanitarian intervention, formulated the arguments NATO could advance for its defence: “*Human rights violations in Kosovo were horrendous; something had to be done*”. The SC was not in fact “*available*” to authorize intervention because of the Veto. Faced with a grave threat to international peace and security within its region, and with rampant crimes reeking of genocide, NATO had to act. NATO intervention was not “*unilateral*”; it was “*collective*”, pursuant to a decision by a responsible body, including three of the five permanent members entrusted by the UN Charter with special responsibility to respond to threats to international peace and security”.¹³⁰

The former UN Secretary-General Kofi Annan has given best expression to the dilemma faced by the international community with regard to the Kosovo intervention: “*It is indeed tragic that diplomacy has failed, but there are times when use of force may be legitimate in the pursuit of peace. In helping to maintain international peace and security, Chapter VIII of the*

¹²⁶ Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal*, p. 447.

¹²⁷ For the full text of this statement which is part of a letter from Solana, addressed to the permanent representatives to the North Atlantic Council, see Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’. 10 EJIL (1999), p. 7.

¹²⁸ These threats amounted to a “*threat of the use of force*” within the meaning of Article 2(4) UN Charter. See Simma 5, at 11: and Currie supra note 5 at 320.

¹²⁹ Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal*, p. 440.

¹³⁰ AJIL (1999), Henkin, *Kosovo and the Law of ‘Humanitarian Intervention’*, p. 824ff.

*United Nations Charter assigned as an important role to regional organizations. However, as UN Secretary-General has pointed out many times, not just in relation to Kosovo, that under the Charter, the Security Council has primary responsibility for maintaining international peace and security – and this is explicitly acknowledged in the North Atlantic Treaty. Therefore the Council should be involved in any decision to resort to the use of force”.*¹³¹

Even though the living conditions of the eleven million citizens of the FRY dramatically changed as a consequence of the NATO actions,¹³² the UNSC chose not to condemn these action. The SC did not vote in favour of the draft resolution stating that the NATO had international responsibility of their actions and that their actions were unlawful and in violation of the UN Charter and international customary law.¹³³

4.4 Serbia’s Objections to Kosovo’s Declaration of Independence

On the 18 February 2008, the SNA declared Kosovo’s independence to be null and void, and contrary to the UN Charter, UNSCR 1244 (1999), the Helsinki Final Act, and the norms of international law on which the world order resides.¹³⁴ For the purposes of outlining Serbia’s objections to Kosovo’s declaration of independence, this chapter will assume that Serbia held sovereignty over the Kosovar territory on the date that Kosovo’s independence was declared.

There is nothing in the UN Charter that anticipates the taking of territory from one State and awarding it to a new one.¹³⁵ On the contrary, art. 2(2)

¹³¹ Youngs, Oakes & Bowers, *Kosovo: Operation ‘Allied Force’*, p. 11.

¹³² Report on Situation of Human Rights in Kosovo, FRY, HC/K224, Geneva, 22 April 1999, point 9.

¹³³ S/1999/328 (1999).

¹³⁴ National Assembly of Serbia, “*First Extraordinary Sitting of the National Assembly of the Republic of Serbia in 2008*”.

¹³⁵ Brown, “*Human Rights, Sovereignty, and the Final Status of Kosovo*”, p. 256.

affirms the “*sovereign equality*” of all UN Members, while art. 2(4) stipulate that “*all members shall refrain [...] from the threat or use of force against the territorial integrity or political independence of any State*”.¹³⁶ Irrespective of the fact that Kosovo has not sought UN membership – if Kosovo is a State – then Kosovo is bound by these principles since they have evolved into absolute norms of customary international law.¹³⁷

The norms of international law are directly relevant to Serbia’s objections. According to the principle of sovereign equality of States, Serbia is entitled to jurisdiction over the territory and permanent population of Kosovo,¹³⁸ and to expect that no other State intrude on this territory, which also is provided for in the non-intervention principle¹³⁹

The fact that the borders change without the consent of Serbia and with the support of military forces has not been an issue in Europe since World War II. This constitute a violation of the international public law, the Helsinki Final Act from 1975, principles in the UN Charter, and the UNSCR 1244 (1999).¹⁴⁰

4.5 Development since 1 July 2010

On 8 October 2010, the International Court of Justice responded to the request by Serbia, among others, to give an advisory opinion regarding if the unilateral declaration of independence, by the PISG of Kosovo, violated international law or not.¹⁴¹ The Court considered the question specific,

¹³⁶ The Charter of the UN (1945), art. 2(4).

¹³⁷ As suggested by the ICJ in the Nicaragua Case, the principle of the prohibition of the use of force expressed in art. 2(4), of the UN Charter and the principle of non-intervention in the affairs of other States, exist at customary international law. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) ICJ Reports 1986, p. 14, at para. 189 and 202.

¹³⁸ Brownlie, “*Principles of Public International Law*”, p. 289.

¹³⁹ UN Charter 2(7), and Cassese, “*International Law*”, p. 89.

¹⁴⁰ Stilhoff Sörensen, “*VD Världspolitikens Dagsfrågor – Kosovo, vägen till oavhängighet*”, p. 3

¹⁴¹ ICJ, 22 July 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, point 5, p. 4f.

narrow and clearly formulated and the Court could therefore give an advisory opinion in the case. The Court also noticed that the question did not concern the legal consequences of that declaration. In particular, the question did not ask whether or not Kosovo had achieved statehood.¹⁴²

According to the Court, during the 18th, 19th, and early 20th centuries there were plenty instances of declarations of independence often strenuously opposed by the State from which independence was being declared from. In some cases, these declarations resulted in the formation of a new State, and in others, it did not. State practice in these cases points to the fact that there contains no prohibition of declarations of independence in international law. The Court also states that during the second half of the twentieth century, international law regarding the right of self-determination has developed in such a way that it now ensures the right of independence for certain peoples, and that a declaration of independence is dependent upon the response of other States and does not violate international law.¹⁴³ This is also shown in this thesis, see chapter 3.

The Court also notes that even though the rights of peoples have developed during the last decades, the question, regarding peoples' rights, is not necessary to solve due to the character of the question presented to the Court – *if the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law.*¹⁴⁴

The Court further noticed that the UNSCR 1244 (1999) does not contain any prohibition against declaring independence for Kosovo, and therefore the declaration did not violate that resolution. The Court also noted that the declaration did not violate the work of the UNMIK, since they were not

¹⁴² ICJ, 22 July 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, point 51, p. 19.

¹⁴³ ICJ, 22 July 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, point 79, p. 29f.

¹⁴⁴ ICJ, 22 July 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, point 80-83, p. 30f.

involved in declaring Kosovo's independence. As for the main question itself, the Court found that Kosovo's declaration of independence did not violate any applicable norm of international law and therefore Kosovo did not act wrongfully by doing so.¹⁴⁵

¹⁴⁵ ICJ, 22 July 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, point 118-122, p. 42.

5 Concluding comments

5.1 Do national minorities have a right to self-determination under international law or international customary law?

To find support for an external right of self-determination in international law for Kosovo, as a national minority, is challenging. Having failed to identify any explicit recognition of this right within international covenants or UN resolutions, the right must therefore constitute either an existing or emerging norm of customary international law. In the North Sea Continental shelf Case, the ICJ stipulated that in order to prove the existence of a norm of customary international law, “[s]tate practice, including those States whose interests are specifically affected, should have been both extensive and virtually uniform [...] and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved” (opinio juris).¹⁴⁶

I have found that, aside from the exceptional case of Bangladesh, there has been no other successful case of non-consensual unilateral secession outside the context of colonialism or State dissolution since 1945. There can hardly be said that only one case can show that there are enough evidence of state practice to show that there is a general recognized international customary principle regarding this matter – neither is there any international customary principle stating the contrary, that national minorities does not entail this right. There are also no prohibitions in international law for peoples to express their own will and wishes in a declaration of independence seeking international status and de jure statehood. Consequently, the Kosovar Albanians, a minority group within the Serbian Republic, did not violate international law or any international customary principle while declaring their declaration of independence for the territory of Kosovo.

¹⁴⁶ North Sea Continental Shelf case, ICJ Reports (1969), para. 74.

5.2 The development of the rule of self-determination in the light of national minorities

I believe that we have come to an era where the international community more often fights for people who cannot fight for themselves as a new form of humanitarian intervention. Therefore I would state that the rights of national minorities have increased throughout the last decades. Now we are, for the second time in world history, tested if these rights are more important to protect than to protect the territorial integrity and sovereignty of a state. If some criteria are met by the national minority, and the situation itself, I believe that the national minority might have a right to external self-determination and therefore also the right to become a state de jure.

In order for a national minority to have a right to external self-determination and thereby to form a new state, I believe that the following criterias has to be met in order to dismember themselves from the territorial integrity and political unity of a sovereign and independent Mother State:

- The situation for the national minorities has to be considered a threat to international peace and security, and
- The group of people must be considered a people which form a national minority in relation to the rest of the population of the Mother State. At the same time, this group of people has to form a significant majority, depended on its ethnical, cultural, and historical background, within an identifiable territory of that State, and
- The minority group in question must have suffered mass violations of human rights by the Mother State from which true wishes to secede consists from
 - o The mass violations has to consist of either a serious violation and/or denial of their internal right of self-determination, and
 - o There has to be serious and widespread violations of their fundamental human rights

- There must be no other realistic and effective solution for a peaceful settlement of the conflict

5.3 Kosovo and the ICJ's advisory opinion

I believe that the question presented to the Court – *if the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law* – in itself is sufficiently clear, narrow, and specifically asked in order for the Court to act in the matter. Although, I can imagine that Serbia and others who wanted an answer to Kosovo's international status, might also have wanted to know the Court's opinion regarding Kosovo's statehood – meaning the actual consequences of that declaration which the Court did not answer.

I believe that the Court did many things correctly regarding the advisory opinion, even though I would have liked them to extend the meaning of a declaration of independence and what its consequences might be. I can understand why the Court did not want to do so, since it is not the Court's position to define and form international customary law – this right is entailed to States, and sometimes in co-operation with the Court. If the States only want the Court to answer certain questions, and not the consequences of that question, the States has succeeded in this case. Although, I had hoped for the international community to be more open for the consequences of their actions and therefore hoped that the Court could point the international community in a certain direction by giving examples of consequences by a declaration of independence. Today we live in a world where human rights and fundamental freedoms have grown stronger and stronger. There are many examples where territorial integrity has been put aside in order to ensure these rights, Bangladesh, East Timor, and the Baltic States are only a few. Therefore, I truly hoped that the Court could, once more, point the world into a more clear position when it comes to declaring

independence and therefore also the right of self-determination, although it chooses not to.

5.4 Is Kosovo a territory with a right to external self-determination?

The international community did not recognize Kosovo's first attempt to secede from Serbia in 1991. Up until the second declaration of independence in 2008, Serbia has shown the international community that they would not end their ethnic cleansing in the region and stop their mass violations of the Kosovar Albanians' human rights. I believe that the states that have recognized Kosovo's second declaration of independence, 73 states, have done so to show their support to the Kosovar Albanians but also to show the world that they do not accept ill treatment and mass violations of fundamental human rights in the international community – no matter where they take place. I believe that this ongoing and intense humanitarian intervention after Kosovo's second declaration of independence is necessary to create a stable and secure environment in the region. The ad hoc approach states now are having to the situation in the FRY is necessary to create a better future for all nationalities and minorities in the region.

I also believe that all the criteria set up above in chapter 5.2 has been met in the Kosovo case. I see no other option for Kosovo than building a future with balance between respect for national sovereignty and territorial integrity on the one hand and respect for fundamental freedoms and human rights on the other. With the independence of Kosovo comes great responsibility for that country to show, not only for the Kosovars that they are ready to rule among themselves, but also responsible membership in the international community.

The wheels to build up a Kosovar state has now been set into motion and the Kosovar statehood will now be challenged to show that they meet international requirements in everything they do.

Supplement A – Map of the region



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