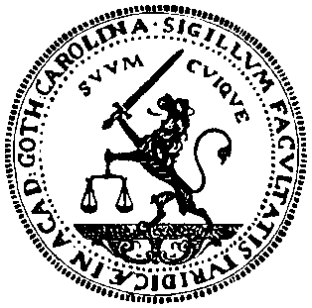

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Exceptionalism in Generic Situations

Should the Kosovo Advisory Opinion be regarded as sui generis?

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Contents

Summary

The right to remedial secession is one of the most divisive issues in international law. An increasing number of legal scholars have argued that such a right exists, but State practise has shown little support for such a right. Following Kosovo's unilateral declaration of independence from Serbia in 2008, the legality of remedial secession was put at the centre of attention once again. While the ICJ ruled that the declaration was not a violation of international law, they chose not to answer whether Kosovo had achieved statehood or not in order to avoid legitimising remedial secession as a part of international law. If the Advisory Opinion is seen to set a precedent on other conflicts, then it could serve as an important steppingstone for numerous separatist movements all around the world, like the Catalan in Spain. This has caused several states like Spain and Russia to not recognise Kosovo and the Advisory Opinion, as it could set "a dangerous precedent for other separatist movements". Other states instead argued that Kosovo did have a right to secession, but that it set no precedent as the case was "exceptionally unique". This argument stems from the fact that the humanitarian catastrophe in Kosovo was remarkably unique, along with the heavy international involvement.

The purpose of this essay is threefold. Firstly, it seeks to clarify whether remedial secession is a part of international law or not. Secondly, it strives to apply the framework of international law to see whether Kosovo had a right to secession or not. Thirdly, it aims to answer if the Advisory Opinion is to be seen as too unique to set a precedent on other conflicts or if it can serve as a framework for future secessionist conflicts.

Sammanfattning

Rätten till “remedial secession” är en av de mest kontroversiella frågorna i internationell rätt. Ett större antal juridiska forskare har hävdat att en sådan rätt finns, men stater har visat sig motvilliga för att stödja en sådan rätt. Efter Kosovos självständighetsförklaring från Serbien 2008 sattes frågan om ”remedial secession” på spetsen igen. Trots att ICJ konstaterade att deras självständighetsförklaring inte strider mot internationell rätt så valde de att inte svara om Kosovo hade uppnått statskap för att undvika att legitimera en rätt till ”remedial secession” inom internationell rätt. Om deras rådgivande yttrande är att betraktas som ett prejudikat för andra conflikter så kan prejudikatet användas som ett viktigt förstasteg för flera andra seperatiströrelser runt om i världen, till exempel katalanerna i Spanien. På grund av detta har flera stater som Spanien och Ryssland valt att inte erkänna Kosovo och det rådgivande yttrandet, då det kan sätta ”ett farligt prejudikat för framtida seperatistkonflikter”. Andra stater har istället hävdat att Kosovo hade en rätt till secession, men att den inte sätter ett prejudikat för att den var ”exceptionellt unik”. Argumentet tar sin grund i att den humanitära katastrofen i Kosovo var anmärkningsvärd unik, samt den stora internationella påverkan.

Syftet med uppsatsen är trefalt. För det första så försöker uppsatsen att klargöra om ”remedial secession” är en del av internationell rätt eller ej. För det andra strävar uppsatsen att applicera ramverket för internationell rätt på Kosovokonflikten för att se om de hade en rätt till secession. För det tredje så söker uppsatsen att svara om det rådgivande yttranden ska betraktas som ”för unik” för att vara prejudicerande eller om det kan användas som ett prejudikat för framtida secessioniströrelser.

Abbreviations

EEC	European Economic Community
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal of the Former Yugoslavia
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo

1 Introduction

1.1 Background

As a response to the humanitarian crisis caused by President Milosevic in Kosovo 1999, NATO launched Operation Allied Force, an aerial war against Serbia to put an end to their human rights abuses. After Serbia's capitulation Security Council passed Resolution 1244, which put the region of Kosovo under UN administration, UNMIK. The goal was for Serbia and Kosovo to reach a peaceful solution to their conflict, but despite all talks and negotiations, they couldn't find a solution. Serbia saw Kosovo as theirs, while Kosovo saw themselves as their own independent country.

This would lead to Kosovo's Unilateral Declaration of Independence 2008. Serbia saw this as a violation of international law and sought international support for their position. On July 22nd 2010, the ICJ delivered the Kosovo Advisory Opinion, which stated that Kosovo's Declaration of Independence did not violate international law. Unfortunately, the Court chose to answer this is a very narrow way, meaning that they didn't answer whether Kosovo had achieved statehood or if their secession is in accordance with international law. The case could be seen to establish a right to secession to people if they're the subject of grave human rights abuses by the state, a doctrine known as remedial secession. If this verdict is seen to support remedial secession, then it could legitimise several separatist movements.

The US and several EU countries lauded the decision and were quick to recognise Kosovo as a state. Despite this, they would not support a general right to remedial secession, stating that Kosovo is such a unique case – *sui generis* – that it doesn't set a precedent for any other conflict. Other countries like Russia have refused to recognise Kosovo and warned that it set a dangerous precedent for separatist movements around the world. They reject the claim that Kosovo is exceptionally unique, which raises the question: Did the Kosovo Advisory Opinion set a precedent on remedial secession or is it *sui generis*, too unique to be applied on any other situation?

1.2 Purpose and Research Question

The purpose of this paper is to answer the following questions:

- Is there a right to remedial secession in international law?
- Did Kosovo have a right to secede from Serbia?
- Is the Kosovo Advisory Opinion to be regarded as *sui generis*?

1.3 Methods and Materials

This paper uses the legal dogmatic method, which seeks to systemise and analyse present law through recognised legal sources.[1] This allows for a critical analysis to propose different ways to law, also known as *de lege ferenda* reasoning. One problem with the method in international law is that the recognised legal sources are a lot less unclear than national law. The vertical system of national law allows for a clear identification and hierarchy between different legal sources such as laws, decrees and precedents. The horizontal nature of international law makes this identification and hierarchical process a lot more ambiguous. Article 38 in the ICJ Statute tries to alleviate some of these problems by pointing out international conventions, international customary law and general principles of law as equally important sources of law. Judicial decision and judicial doctrine act as subsidiary means to determine the rules of law. Since the purpose of this essay is to analyse a judicial decision from the ICJ, judicial doctrine will constitute a large part of the materials used, but international treaties and other judicial decisions will be used as well. The doctrines used come from many different countries and time periods in order to highlight the progression and the different approaches to the legal questions.

[1] Nääv, M. and Zamboni, M (2018) *Juridisk methodlära*, p. 36.

1.4 Previous research

The right to self-determination and remedial secession is a divisive and thoroughly researched area in international law. Some notable names in this area are: Sir Ivor Jennings, James Crawford and Patrick Thornberry. Since secession is a rare occurrence and a Court verdict on that secession is even rarer, the Kosovo situation has been important on research for remedial secession. This essay seeks to present the different arguments set on the Advisory Opinion and evaluate the strengths and weaknesses of those arguments.

1.5 Disposition

Firstly, the essay will explore the legal framework regarding self-determination of peoples, remedial secession and *sui generis*. Secondly, the framework will be applied on the Kosovo conflict to determine whether their secession was lawful or not. Thirdly, the different arguments for the Advisory Opinion being *sui generis* will be analysed. Lastly, a concluding discussion will present the findings of the essay.

1.6 Delimitations

While the purpose of this essay is to determine if the Kosovo Advisory Opinion set a precedent for other conflicts and separatist movements, those conflicts will not be discussed in this essay. Some situations are brought up in passing, but are only used to contextualise and contrast the application of different principles on the Kosovo conflict. The scope of a bachelor's thesis doesn't allow for a comparative study to other conflicts.

Furthermore, the essay will not discuss the legality of NATO:s humanitarian intervention in Serbia, which was not authorised by the Security Council. Even though the question of R2P and humanitarian intervention is heavily interlinked with Kosovo's independence, the jus ad bellum rules must be separated from the rules of secession.

2 Secession and Self-Determination of Peoples

2.1 The Right to Self-determination

The right to self-determination of peoples has been identified by the ICJ as 'one of the essential principles in contemporary international law.[2] The principle gives peoples the right to freely determine their own political status, as well as freely pursue their own economic, social and cultural development.[3] The principle of self-determination is strongly associated with the decolonialisation processes in the 1960s and 70s where over 80 former colonies gained independence[4], but the principle has gained an even larger scope in contemporary law. Some scholars claim that a right to external self-determination exists in cases where a people are the subject of grave human rights abuses, also known as remedial secession. But before we can discuss the issue of unilateral secession, we first need to define who the people are and what the difference is between internal and external self-determination.

2.1.1 What constitutes a people?

Collective identities are hard to define and are prone to change over time. This is because the concept of "a people" is a social construction.[5] Several scholars from different fields have tried to create objective criteria that bind a people together such as language, culture and religion, but all models fail to fully explain who a people are.[6] Ultimately, a large degree of what constitutes a people are stem from a subjective fact: The people's collective will to perceive itself as its own distinct group. A German sees himself as German not only because of objective criteria like the language they speak or a common culture: They are German because they see themselves as German.[7]

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[2] *Case Concerning East Timor (Portugal v Australia)* para 29.
[3] Article 1(1) ICCPR.
[4] Rose, C. et al. (2022) *An Introduction to Public International Law*, p. 51.
[5] Oeter, S. (2015) *The Kosovo Case – An Unfortunate Precedent*, p. 57.
[6] Thornberry, P. (1989) *Self-Determination, Minorities, Human Rights: A review of International Instruments*, p. 867-868.
[7] Ibid, p. 869.

This line of reasoning can lead to problematic consequences however. Before a people can form a collective will to see itself as a people, someone needs to decide who the people are.[8] This leads to a circular argument, which Sir Ivor Jennings elegantly explains as "before 'people' decide on their destiny, someone needs to decide who the people is".[9] This question becomes highly relevant in secessionist attempts. Suppose that in order to form an independent state, the majority of its citizens decide to hold a referendum. In holding the referendum, there is a tacit assumption of who the people are and which borders they belong to. According to Stefan Oeter, "self-determination has always been linked to historically pre-constituted political entities with a specific territory"[10] and concludes that "a certain degree of territoriality is unavoidable if the concept of self-determination shall operate productively".[11] While disagreeing with the conclusion that a territory has to precede a people as the reverse is equally imaginable, Oeter highlights the difficulty in determining who people are if they do not already have a territory or recognised borders, a problem which is highly relevant in secessionist attempts where people do not have a right to effective self-determination.

2.1.2 Internal or external self-determination?

The right to self-determination has two dimensions: An internal and an external. Internal self-determination means that peoples have a right to freely exercise their right to self-determination but remain a part of the territorial sovereign. An example of this are the Kurdish people in Northern Iraq who enjoy a large autonomy to pursue their own economic, social and cultural interests, but remain a part of the Iraqi state. External self-determination means that the peoples create a new and separate state from the former territorial sovereign, also known as secession. State practise has shown that States have been unwilling to legitimise attempts at external self-determination, especially in non-colonial conflicts.[12] This is not surprising, as secession comes at the cost

[8] Oklopcic, Z (2002) *What's in a Name: Five theses on the Self Determination of Peoples*
[9] Jennings, I (1956) *The Approach to Self-Government*, p. 55-56.
[10] Oeter, S. (2015) *The Kosovo Case – An Unfortunate Precedent*, p. 60.
[11] Ibid, p. 61.
[12] Rose, C. et al. (2022) *An Introduction to Public International Law*, p. 54.

of the territorial integrity of already existing States, which means that a balance has to be struck between peoples' right to self-determination and sovereign States' territorial integrity. Since States are the major actors in international law, that territorial integrity often trumps external self-determination.

2.2 Remedial secession

Despite States reluctance to legitimise secessionist movements, an increasingly large number of legal scholars have argued that self-determination can give rights to secession in some non-colonial situations.[13] They claim that if peoples are not allowed to exercise internal self-determination and are the victims of grave human rights abuses from the state sovereign, then such oppression can give peoples the right to secession as an emergency solution.[14] This doctrine is known as remedial secession and is mainly based on an *a contrario* reading of the safeguard clause on the Friendly Relations Declaration, which is also believed to reflect international customary law:

> 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 people belonging to the territory without distinction as to race, creed or colour.[15]

To this day, it remains very unclear whether this doctrine is accepted as a part of international law or not. In the *Reference re Secession of Quebec*-case, the Supreme Court of Canada stated that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession".[16] This acknowledges the doctrine of remedial secession, but they go on to write that it remains "unclear whether

[13] Rose, C. et al. (2022) *An Introduction to Public International Law*, p. 54.
[14] Ibid.
[15] *Declaration on Principles in International Law concerning Friendly Relations,* para 7.
[16] *Reference re Secession of Quebec,* para 134.

this… actually reflects an established international law standard".[17] While court verdicts aren't a legally binding source in international law, it gives us a good indication of what international law is. Ultimately, despite the large number of legal scholars who support remedial secession, it seems that it is not accepted as a part of international law just yet.

2.3 Sui generis

Sui generis is a Latin phrase meaning "of its/their own kind" or "unique".[18] In law, it is used to classify something as independent from other categories due to its singularity. It could be a country like the Vatican State, which holds a unique position as a non-state but still receive international immunities, or it could be an NGO like the Red Cross that can enter and maintain treaties with foreign States despite being a non-state actor. When a court case is denoted as *sui generis* by lawyers or judges, it means that the facts to the case are so unique that it cannot be applied on a broader basis, thus constituting no precedent.

[17] *Reference re Secession of Quebec*, para 134.

[18] *Sui generis definitions and meaning*, Merriam-Webster. Available at https://www.merriam-webster.com/dictionary/sui%20generis.

3 Kosovo and Remedial Secession

Did Kosovo have a right to secede from Serbia? According to the ICJ, their declaration of independence was not a violation of international law. Unfortunately, this is a half-truth at best. The Court proclaimed that "secession is a matter of fact, not a matter of law", implying that secession is neither allowed nor prohibited by international law.[19] The natural follow up question to this is if the recognition of Kosovo from third party States is in accordance with international law. Traditionally, the legal judgement on this has been very clear: The recognition of secessionist, non-colonial entities without the consent of the former territorial sovereign is an intervention in that state's sovereignty.[20] The Court refused to answer this question, along with other important ones like "Have Kosovo achieved statehood?" or "Is remedial secession allowed in international law?" Instead, they wrote that it is "not necessary to resolve these questions in the present case",[21] going on to explicitly state that the question of self-determination and remedial secession "fall beyond the scope of the question".[22] This has not only been criticised by legal scholars, but even by one of the judges themselves, who issued a separate statement criticising the Court for their "unnecessarily limited analysis".[23]

What is left is a verdict that allows for Kosovo's declaration of independence, but refuses to discuss if the recognition of Kosovo is permitted or not. The only way to justify the recognition being permitted is by accepting Kosovo's secession as legal, despite Serbia not consenting to it. There have been two main arguments that justify Kosovo's secession: The constitutional argument and the remedial secession argument.

[19] Oeter, S. (2015) *The Kosovo Case – An Unfortunate Precedent*, p. 56.
[20] Ibid.
[21] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, para 83.
[22] Ibid.
[23] Ibid, p. 79.

3.1 The Constitutional Argument

This argument focuses on the 1974 SFRY Constitution and claims that Kosovo had a legal right to secede from Yugoslavia just like the other republics. This argument was mainly put forth by Croatia and Slovenia who stressed that "Kosovo possessed strong elements of statehood within the SFRY".[24] The core of the argument is that autonomous provinces in Yugoslavia had a significant degree of autonomy that was equal to the republics and were *de facto* constitutive elements of the Federation.[25] Kosovo had their own constitutional, legislative and presidential powers, all of which signify an independent state. But even though Kosovo was largely equal to the other republics in Yugoslavia *de facto,* they were not recognised as equals *de jure*. According to the first article in the 1974 SFRY Constitution:

> The peoples of Yugoslavia, proceeding from the right of every people to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in the conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, together with the nationalities with whom they live, have united in a federal republic of free and equal nations and nationalities and created a socialist federative community of working people.[26]

As we can see, there is a clear difference made between nations (known as *narod*) and nationalities (*narodnost*). The right to secession is explicitly reserved for nations, not nationalities like Kosovo. After Tito's death in 1980, Kosovo worried about the future of their region if Yugoslavia were to collapse. This led to mass protests in Kosovo 1981 under the slogan "Kosovo – Republic", which demanded that Kosovo was to be recognised as a *narod* instead of a *narodnost* under Serbian territory. The protests failed to change

[24] CR 2009/29, p. 56.
[25] Summers J (2011) *Kosovo: A Precedent?,* p. 350.
[26] 1974 SFRY Constitution, Basic Principles, Chapter 1, paragraph 1.

Kosovo's legal status in the SFRY Constitution, giving them no legal right to secession.

This opinion was only reinforced by the Badinter Arbitration Committee, also known as the Badinter Commission. The Badinter Commission was a body set up by the EEC to provide the provinces of Yugoslavia with legal advice following Yugoslavia's dissolution in 1991. They are considered an authoritative source of legal interpretation on the events on former Yugoslavia and dealt with several important legal questions. The Commission confirmed that Kosovo was not to be seen as a *narod* legally and therefore were not granted a right to secession by the SFRY Constitution. The Badinter Commission effectively put the final nail in the coffin for the Constitutional argument for Kosovo's secession.

3.2 The Remedial Secession Argument

According to the remedial secession doctrine, a territory "has the right to exercise self-determination in cases where the population in the territory was subject to serious and protracted human rights abuses by the state".[27] The humanitarian crisis caused by Serbia's Milosevic regime in Kosovo is well documented. Several trials in the ICTY have found several Serbian leaders, one of whom was Milosevic himself, guilty of crimes against humanity such as but not limited to murder, forcible population transfer and persecution on political, racial and religious grounds.[28] The representative of Albania before the Court stated that if there "ever were a case of remedial secession as a last resort", then Kosovo "is such a case".[29] The war crimes committed by Serbia are well documented from several independent sources and have been accepted by the ICTY. As a result of the extreme oppression and genocidal characteristics of the war, the requirement for remedial secession must be seen as fulfilled.

[27] Cvijic, S. (2019) *Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo*, p. 74.
[28] Human Rights Watch (2001) *UNDER ORDERS: War Crimes in Kosovo*, p. 1.
[29] CR 2009/26, p. 23.

The problem is that a secession did not occur in 1999, the year in which the human rights abuses took place. The war ended with NATO forcing Milosevic to capitulate and retract all his forces from the Kosovo region. Kosovo was put under UN administration through UNMIK by Security Council resolution 1244, which would ensure peace until the two parties could negotiate an amiable end to their conflict. The situation had been stabilised and the conflict lost its emergency character.[30] If one were to accept the doctrine of remedial secession, then it is nearly incontestable that Kosovo would have had such a right in 1999, but can they still use that right to secession 9 years after the war? That is a highly questionable conclusion. Remedial secession is fundamentally designed to be an emergency solution to human rights abuses, but after 9 years of peace in the region, it is hard to argue that such a right still exists. This is not to say that there have not been any conflicts in the region. There have been several cases of violence between Kosovo Serbs and Kosovo Albanians, most notably in the '2004 unrest in Kosovo'.[31] After misleading reports from Kosovo Albanian media that falsely claimed that three Kosovo Albanian boys had been chased and drowned by a group of Kosovo Serbs, violence erupted in the town of Mitrovica, leaving hundreds wounded and 14 people dead.[32] This event is called the March Unrest (*Trazirat e marsi*) by Albanians and the March Pogrom (*Мартовски погром*) by Serbians.[33] These events are still however rare occurrences, not supported by either state, which cannot be seen to fulfil the requirement of grave human rights abuses for remedial secession.

Here is also where the question of "what constitutes a people" comes back. The right to remedial secession is given to a people who have suffered grave human rights abuses by the state. We can conclude that 'Kosovo has a right to secession', but trying to establish *who* the Kosovar are is a bit more difficult. Luckily, the region of Kosovo had already existed before the collapse of Yugoslavia, which makes it easier to determine where the Kosovar are. The

[30] Oeter, S. (2015) *The Kosovo Case – An Unfortunate Precedent*, p. 64.
[31] Human Right Watch (2004) *Failure to Protect: Anti-Minority Violence in Kosovo* p. 1.
[32] Ibid.
[33] Government of the Republic of Serbia (2004) *The March Pogrom*

question of who they are is harder to establish however. According to the CIA, Kosovo Albanians make up 92% of the population, while Kosovo Serbs stand for 2% of the population.[34] This figure does however severely underrepresent the actual number of Serbs and other minorities like the Romani. This is because the data is based on a 2011 Kosovo national census, which excludes northern Kosovo, a predominantly Serb-inhabited region, and was boycotted by Serbs and Romani in southern Kosovo.[35] It is also worth to keep in mind that in the 1970s, over 50.000 Serbs left Kosovo. This was due to a change in the Yugoslavian constitution that gave positive discrimination for Albanians in Kosovo, such as requirements on bilingualism in both Albanian and Serbian to work in public service and ethnic quotas.[36] The amount of Kosovo Serbs is significantly larger than the data would indicate.

The sad fact is that every people in the Balkans suffered from grave human rights abuses and ethnic violence. According to a former American ambassador in Yugoslavia, Warren Zimmermann, Ibrahim Rugova, the president of Kosovo, said that "unfortunately, there were many crimes committed against Serbs".[37] The question then becomes: Do the human rights abuses by Kosovo Albanians give a right to Kosovo Serbs to secede from Kosovo? Does it give the Kosovo Serbian majority in northern Kosovo a right to stay with Serbia instead of being a part of the new Kosovar state? Unless you were to give every people in the Balkans their own state and territory, a solution that would leave no one content and lead to even more unrest, some peoples would have to be denied a right to secession on the very same grounds that others were granted that right.

Ultimately, it seems that accepting the doctrine of remedial secession could justify Kosovo's secession, but one has to accept two facts: Firstly, remedial secession would have to expand beyond being an "emergency solution" as

[34] *Countries: Kosovo*, Central Intelligence Agency. Available at: http://www.cia.gov/the-world-factbook/countries/kosovo
[35] Ibid.
[36] Summers J (2011) *Kosovo: A Precedent?*, p. 359.
[37] Zimmermann (1996) *Origins of a Catastrophe: Yugoslavia and Its Destroyers*, p. 80.

their secession came almost a decade after the war. Secondly, one has to accept that some peoples will be denied a right to secession on the same grounds as others, unless one would redraw the entire map of the Balkans and leave every people unhappy with the territorial lines given, creating even more contempt and unrest in the region.

4 An exceptional case?

After the Advisory Opinion declared that Kosovo's independence did not violate international law, many countries in the EU and the US were quick to recognise Kosovo as a state. The fundamental reason for doing so seems to stem out of a moral belief that they deserve it, that the levels of violence and the humanitarian crisis they faced justified their secession.[38] What is interesting to point out however is that almost none of the countries acknowledged a right to remedial secession. It seems that these countries wanted the end result of an independent Kosovo but refused to legitimise their right to secession.[39] This is mirrored by the Advisory Opinion itself, which permits an independent Kosovo but refuses to discuss the issues of self-determination and remedial secession. There are several reasons why this could be the case. One of the reasons could be that by making violence and humanitarian emergency an implicit condition for remedial secession, then it could lead to secessionist groups around the world to provoke violence and civilian suffering to achieve their own statehood.[40] Another reason could be that they worry about their own territorial integrity, as people in their own state could have a right to secede. Unfortunately, it seems that we will never know precisely why the States refused to accept remedial secession as a part of international law just yet. Instead, they argued that the Kosovo Advisory Opinion was *sui generis* – too unique to set a precedent on any other case. This solution would both legitimise Kosovo's secession and not need to recognise remedial secession as a general right in international law. There are two main arguments for why this case would be *sui generis*: The humanitarian argument and the UN involvement argument.

4.1 The Humanitarian argument

The humanitarian argument claims that the unique character of Kosovo stems from their prolonged institutional discrimination and human rights abuses.

[38] Cvijic, S. (2019) *Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo*, p. 66.
[39] Summers J (2011) *Kosovo: A Precedent?*, p. 345.
[40] Ibid, p. 361.

This is strongly in line with the arguments for remedial secession and emphasises the ethnic cleansing and the oppressive nature of the Milosevic regime against the Kosovar. Already here, we face a big problem: If we were to accept this argument as the basis for *sui generis*, you would have to accept that the human rights violations is comparable to no other current, past or future conflict on earth. This is an incredibly bold claim as there have been several cases of similar human rights abuses being committed against ethnic minorities. One does not even have to go into the future to find a similar case: The Rwandan genocide happened in the same decade that the Kosovo conflict took place. Between 7th April and 15th July 1994, members of the Tutsi ethnic minority were killed by armed Hutu militias. Over half a million Tutsis were massacred by the Hutus genocide, not discounting the widespread sexual violence and torture of civilians. Despite being subject to the same human rights abuses, if not even worse, there was barely any intervention by the international community. There was no military involvement on the basis of humanitarian intervention, there was no UN administration set up and there were no calls for a Tutsi state. But let us assume that no other conflict is comparable to the Kosovo conflict for the sake of the argument. What were the human rights abuses that justified the unique categorisation?

Firstly, we have the removal of Kosovo's political autonomy. It was asserted by many States before the Court that "Milosevic engineered the modification of the SFRY and the Serbian Constitution to all but eliminate Kosovo's autonomy as a practical matter".[41] This claim is largely true as Kosovo was stripped of large parts of its previous autonomy through the 1990 Serbian constitution.[42] On the other hand, it is unclear if this violates international law. One could imagine an argument based on Kosovo's right to internal self-determination, and while the right to self-determination is constantly evolving, there is as of yet no international right given to minorities and people to autonomy.[43] If this was the case, then the argument could be extended to the

[41] Written Statement of the USA, p. 8.
[42] Summers J (2011) *Kosovo: A Precedent?*, p. 356.
[43] Ibid.

people of Northern Ireland who were revoked their previous autonomy in 1970. Despite this, no significant scholarly debate has been in place for an Irish right to secession. Additionally, Miodrag Jovanovic, professor of law at University of Belgrade, claims that the Serbian constitution actually left a significant degree of autonomy to the Kosovar. He points out that in the 2006 Serbian constitution, there is a preambulatory clause that gives Kosovo "significant autonomy".[44] This argument is largely unfounded however. The constitution claims to give Kosovo autonomy, but does not specify what this autonomy would look like, nor how it would be protected. According to the Venice Commission, an advisory body for the EU, the autonomy is not guaranteed at all since the constitution delegates every important aspect of their autonomy to the legislature.

Secondly, we have the denial of participation rights. This argument was put forth by Switzerland, who stated that "the people of Kosovo can… exercise a right to self-determination that is different from the population of Serbia".[45] This claim is based on Crawfords thesis that secession is possible when inhabitants are 'arbitrarily excluded' from government.[46] An objection to this claim is that the exclusion was done on the part of the Kosovar, not by the Serbian state. In 1990, nearly all Kosovar representatives freely chose to leave the Serbian parliament to establish their own parallel "Assembly of Kosova".[47] The elections were also boycotted by Kosovar as a form of protest against the Serbian state. The lack of participation in government seems to have been a political strategy rather than an arbitrary exclusion from the government. On the other hand, there were legitimate threats against Kosovar representatives as they were substituted on an ethnic basis to keep them away from government. The decision from the Kosovar to form the Assembly of Kosova and boycott the election must be seen in the background of Milosevic ethnic policy against the Kosovar and to squash their autonomy.

[44] Venice Commission (2007) *Opinion on the Constitution of Serbia*, p. 4.
[45] Written Statement of Switzerland, p. 20.
[46] Crawford 2006, p. 126.
[47] Summers J (2011) *Kosovo: A Precedent?*, p. 357.

4.2 The UN Involvement argument

This argument claims that since Serbia's effective rule over Kosovo had been suspended for an extended period of time, the only sustainable outcome would be for everyone to recognise this 'new reality' and Kosovo's independence. Could one qualify UNMIK as unprecedented? Most probably not. The United Nations Peacekeeping Force in Cyprus (UNFICYP) was a clear predecessor to UNMIK. Established by the UN in 1964, it was an attempt to stop the fights between Greek Cypriots and Turkish Cypriots to maintain law and order until a solution could be found. This UN administration is still active to this day, meaning that it has lasted over 60 years. In 2004, the people of Cyprus held a referendum over whether they should ratify or reject a 5th revision of a UN proposal to settle the conflict, also known as the Annan Plan for Cyprus. This did not go through however, because 75.83% of the Greek Cypriots voted against it. If we were to apply the same logic in Cyprus as in Kosovo, then the Northern Greek part of Cyprus should be recognised as independent, since Turkeys effective rule over Northern Cyprus has been suspended for over 60 years. Instead, Cyprus entered the EU as a completely divided country as no solution could be found. It seems like the political will to find a peaceful solution to the Kosovo conflict was never there like in the case of Cyprus.

Although the purpose of Resolution 1244 was to guarantee peace and security until Serbia and Kosovo could find a solution to their conflict, it seems that it achieved another thing completely. Through UNMIK, Kosovo were granted the first steppingstone to establish their own state, independent from Serbia. The longer the conflict lasted, the longer Serbia's rule over Kosovo was weakened, which could only hamper the prospects of Kosovo re-joining Serbia. By refusing to reach a compromise, the situation withstood, meaning that the Kosovar gained more time to establish their own autonomous state. Serbia correctly pointed out that this could set a very dangerous precedent for future conflicts: If UN administration is understood by States to be the first step to secession, then States would fight tooth and nail from letting the UN interfere,

which would lead to less fruitful negotiations and an abandonment of diplomatic solutions to conflicts.

One cannot help but to point out the double standards in the Kosovo conflict as well. If the Kosovar can gain independence by not finding any solutions during their peace talks, then why has Palestine not acquired the right to unilaterally declare their own state? Palestinians have also been victims of grave human rights abuses by the Israeli state, just like the Kosovar. They have also held several negotiations with Israel to find a solution to the conflict. The Oslo Accords, Camp David Summit, Taba Summit, Road Map for Peace, Arab Peace Initiative: All negotiations ended up in failure. In fact, Israel refused to recognise Kosovo as a state initially as they worried that their independence could help a Palestinian independence movement.[48] It then seems ironic that the same countries that so swiftly recognised Kosovo refuse to recognise Palestine as a state. It seems that labelling Kosovo as a "unique situation" is the result of a political and moral will to grant Kosovo independence. The fact that a humanitarian intervention was taken in Kosovo does not mean that Kosovo was a unique case: It simply proves that humanitarian reasons are used selectively. In the wise words of Chinkin, "selectivity undermines moral authority".[49]

[48] Summers J (2011) *Kosovo: A Precedent?,* p. 352.
[49] Ibid.

5 Concluding remarks

This thesis has tried to answer whether Kosovo had a right to secede from Serbia and if the Advisory Opinion is to be regarded as *sui generis*. Firstly, it is not clear whether a right to remedial secession is a part of international law. While many legal scholars claim it is, state practise show little evidence for this being the case, leaving the status of remedial secession ambiguous. Secondly, Kosovo did not have a right to secede through the 1974 SFRY Constitution. They could possibly have a right to remedial secession, but for this to be the case, three conditions must be true:

1. Remedial secession is a part of international law
2. The right to secession still exists 9 years after the emergency situation
3. The human rights abuses by the Kosovar against the Kosovo Serbs does not remove their right to secession

The decision to regard the Advisory Opinion as *sui generis* is largely unfounded. One either has to claim that the human rights abuses are unparalleled by human history and potential future conflicts, or one has to accept that the international involvement by the UN through UNMIK is unprecedented, which is simply is not due to the Cyprus conflict. Rather than being a coherent legal argument, it seems that many western countries wanted an independent Kosovo on a moral, humanitarian ground, but are too afraid of extending that right to everyone on earth. At the end of the day, it seems that the Kosovo Advisory did open the possibility of remedial secession in. Even though most States are not ready to accept remedial secession as a part of international law, it is impossible to ignore the Kosovo Advisory Opinion as a first step towards a general right for remedial secession.

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