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Self-Determination, Secession, and State Recognition

A Comparative Study of Kosovo, Abkhazia, and South Ossetia

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Contents

Summary

The principle of self-determination has come a long way from its origins as a tool for political rhetoric to its current status as a right of international law valid *erga omnes*. However, the contents of the right to self-determination, as well as its applicability, remain unclear. This holds true especially concerning national minorities, which have not traditionally been considered recipients of this right. This thesis investigates the extent to which national – particularly ethnic – minorities have a legal right to self-determination, both internally within a State and externally, allowing for secession and the formation of a new State. The thesis furthermore analyses the importance of State recognition for these secessionist entities, as well as its possible determinative effects on international law. A comparative analysis between the Serbian province of Kosovo and the Georgian provinces of Abkhazia and South Ossetia, all three of which have *de facto* seceded from their sovereigns, provides an insight into the practical application of the right to self-determination.

From the relevant international legal instruments and practice concerning the principle of self-determination, this thesis concludes that the right to internal self-determination, i.e. representative and indiscriminate government, belongs to all peoples in their entirety, thus including all national minorities. However, concerning the right to external self-determination, the thesis finds that the only two fields in which this right has been consistently upheld without controversy are those relating to non-self governing territories in the process of decolonisation and those relating to territories under unlawful foreign occupation. An alleged remedial right to external self-determination through secession, ostensibly applicable when the internal self-determination of a minority is utterly frustrated, and primarily basing itself in an *e contrario* reading of the so called 'safeguard clause' of the Friendly Relations Declaration of 1970, has little to no support in the international community. Consequently, neither Kosovo nor Abkhazia and South Ossetia are found to have had a right to secede based on self-determination; this conclusion holds true in any event, since none of the entities fulfil the prerequisite for this proposed remedial secession.

This thesis finds that State recognition, while not an explicit criterion for statehood according to the Montevideo Convention of 1933, is virtually indispensable on a practical level concerning the *de facto* ability to enter into relations with other States. The unlimited discretion with which States may recognise other States is found to have an undesirable impact on international law, in that it may legitimise unfounded claims for statehood. Kosovo, Abkhazia, and South Ossetia all demonstrate this problem to various degrees, as the thesis finds that none of them is sufficiently independent to constitute their own State. The case of Kosovo in particular, being presently recognised by nearly half of all UN member States, is found to have a potentially revolutionary impact on future international law.

Sammanfattning

Principen om självbestämmande har färdats långt från sitt ursprung som ett verktyg för politisk retorik till sin nuvarande ställning som en folkrättslig princip gällande *erga omnes*. Såväl innehållet som tillämpligheten av självbestämmanderätten förblir dock oklar. Detta gäller särskilt nationella minoriteter, som traditionellt inte har tillerkänts denna rättighet. Denna avhandling undersöker därför i vilken utsträckning nationella - särskilt etniska - minoriteter har rätt till självbestämmande, både internt inom en stat, och externt med secession och ny statsbildning som följd. Avhandlingen analyserar dessutom betydelsen av statserkännande för dessa utbrytningsenheter samt statserkännandets eventuella inverkan på folkrättens utveckling. En jämförande analys mellan den serbiska provinsen Kosovo och de georgiska provinserna Abchazien och Sydossetien, vilka alla är *de facto* utbrytningsrepubliker, ger en inblick i den praktiska tillämpningen av självbestämmanderätten.

Utifrån relevanta folkrättsliga instrument och internationell praxis rörande principen om självbestämmande, drar denna avhandling slutsatsen att rätten till internt självbestämmande, d.v.s. representativt och icke-diskriminerande styre, tillhör alla folkslag i deras helhet och därmed även alla nationella minoriteter. Vad anbelangar rätten till externt självbestämmande, finner dock avhandlingen att de enda två områden där denna princip konsekvent och okontroversiellt har tillämpats rör icke-självstyrande territorier under avkolonisering samt territorier under olaglig utländsk ockupation. Den påstådda existensen av en avhjälpande rätt till externt självbestämmande genom secession, som förutsätter fullständigt nekande av en minoritets rätt till internt självbestämmande, och som främst grundar sig i en tolkning *e contrario* av den så kallade ’safety clause’ i 1970 års Friendly Relations Declaration, har otillräckligt stöd i det internationella samfundet. Följaktligen menar avhandlingen att varken Kosovo, Abchazien, eller Sydossetien har haft rätt till secession baserad på självbestämmanderätt. Dessutom befinns deras interna självbestämmande hursomhelst inte till den grad ha varit förnekad dem, att de har haft rätt till avhjälpande secession.

Denna avhandling konstaterar vidare att statserkännanden, även om de inte uttryckligen är ett kriterium för statsbildning enligt 1933 års Montevideokonvention, är så gott som nödvändiga på en praktisk nivå för att en stat *de facto* skall ha möjligheten att ingå förbindelser med andra stater. Den obegränsade diskretion med vilka stater tillåts erkänna andra stater befinns ha oönskade effekter på folkrätten, då detta kan legitimera ogrundade anspråk för en självständig stat. Då avhandlingen konstaterar att varken Kosovo, Abchazien, eller Sydossetien är tillräckligt oberoende för att kunna utgöra en egen stat, är de också alla i olika grad exempel på detta problem genom erkännandet av dem. I synnerhet Kosovo, som för närvarande erkänns av nästan hälften av alla FN:s medlemsstater, befinns ha en potentiellt revolutionerande inverkan på framtida internationell rätt.

Abbreviations

CSCE	Conference on Security and Cooperation in Europe
DGICCP	Declaration on the Granting of Independence to Colonial Countries and Peoples
EU	European Union
FRD	Friendly Relations Declaration
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOMIG	United Nations Observer Mission in Georgia
UNSC	United Nations Security Council
US	United States
USSR	Union of Soviet Socialist Republics

1 Introduction

1.1 Aim and Scope

This thesis constitutes an attempt at investigating the controversial topic of the right to self-determination of peoples according to international law. In so doing, the thesis inevitably touches upon such varied topics as State creation, State recognition, the right to secession, and the relationship between international law and international politics. Apart from being an academic study of international law, the investigation grounds itself in the comparison of two contemporary cases of attempts at self-determination: on the one hand the Republic of Kosovo, and on the other the Republics of Abkhazia and South Ossetia.

Since knowing one's limits is the key to success, the aspirations of this thesis do not go beyond seeking answers to the two main questions that follow in bold text below. Being complex in character, these questions in turn prompt several sub-questions, the answers to which form a secondary aim of this thesis.

1. **To what extent do national minorities have a right to self-determination?** This main query leads to the following questions: How does such a right compare to the right of States to territorial integrity? Does the right to self-determination include a right to secession?
2. **What is the importance of State recognition to the creation of new States?** In relation to this conundrum, the following questions may be posed: To what extent may the recognition by other States remedy the lack of a right to statehood? Is it possible for State recognition to clarify and/or create international law?

These questions form the backbone of this thesis and are prevalent throughout the following in-depth analysis. It should be noted that it is the former of the two main questions that reflects the first and foremost purpose of the thesis, moreover illustrated by its chosen subject matter. However, since the latter question, concerning State recognition, is inextricably linked to the study of this matter, especially as concerns Kosovo's claim to statehood, it too is considered a main aim of this thesis – albeit one that is, to some degree, subsidiary to the study of the right to self-determination. This author hopes that, through a thorough investigation of both these questions, this thesis will contribute in some small part to the shedding of light on this controversial issue.

Some of the recurring concepts in this thesis are difficult to define, and hence require a few words as to their application in this context. The concept of national minorities is central to this thesis, since one of the main queries of the thesis concerns their right to self-determination. This thesis applies the common definition of national minorities – problematic though it

is – i.e. one that defines them as national groups of numerical minority, of various kinds and affiliations, depending on whether the minority is one of ethnicity, religion, language, or otherwise. The problem with this definition, as it will surface in the thesis, is one of perspective, where a numerically inferior group may compose a minority in one context, but may be argued to constitute a people in another. The Kosovar Albanians, for instance, are a Serbian minority but a Kosovar majority – or even, as some would argue, a people with a right to self-determination.

Furthermore, the focus of this investigation – as illustrated by the case studies of Kosovo, Abkhazia, and South Ossetia – is one of ethnicity. Thus, while the thesis may refer to different kinds of minorities throughout, and the proposed existence of a right to self-determination of minorities is examined from the viewpoint of all minorities, the reader is asked to bear in mind that the self-determination of ethnic minorities remains the focus of the investigation. Some discussion concerning the relationship between national minorities and peoples, necessary under the circumstances, is also included in the thesis.

As regards secession, the thesis will focus on non-consensual secession. Consensual secession, or voluntary partition of territory, may be used as a comparison but will not be discussed thoroughly.

1.2 Methods and Materials

The methods used in the investigation forming the basis for this thesis follow the traditional pattern of research and interpretation of legislation, case law, and doctrine. In the different chapters of the thesis, the respective foci of which are listed below in chapter 1.3, the currently available standpoints on the right of self-determination and the importance of State recognition, as they manifest themselves in legal documents and doctrine, are accessed and analysed in order to establish what constitutes *lex lata*, i.e. existing modern international law.

The comparative method is used in the study of three secessionist entities claiming self-determination, pertaining to two different regions of the world, which is conducted in chapter 4. The conclusions thitherto reached concerning the right to self-determination and State recognition are applied in that comparative analysis. The entities chosen for the comparative study are Kosovo, Abkhazia, and South Ossetia. The reason for why these three have been chosen is quite simple: they are highly similar in both historical background and timing of secession; nevertheless, their claims for independence have received extremely different responses from the international community.

Various commentators' differing views on *lex ferenda*, i.e. what the law ought to be, also surface throughout the investigation. The support for (and implications of) these opinions are considered and lay the foundation for the conclusions drawn in chapter 5 of this thesis. Due to the many varied

standpoints on the right to self-determination and the controversies surrounding the individual secessions by Kosovo, Abkhazia, and South Ossetia, utmost care has been taken to ensure that this thesis remains objective and the discussions herein non-politicised. Consequently, while the thesis refers to various territorial entities as republics, this is entirely for practical reasons and is not to be interpreted as a statement on the legitimacy of these entities' claim to statehood. Such a statement is instead included in the concluding part of the thesis, following a thorough legal analysis of the source material.

This thesis relies on materials from a varied assortment of sources, chief among which are the international legal instruments and the case law pertaining to the right to self-determination and the creation of States on grounds of this right. The international legal instruments include international conventions and declarations as well as United Nations (UN) resolutions, while the case law focuses on International Court of Justice (ICJ) advisory opinions and judgments. The various authors of doctrine to whom this thesis makes reference in turn comment on this body of international law, attempting to clarify the current legal situation and offering their opinions on the matter. Several online sources are also referred to throughout the thesis, when these have been deemed relevant to the investigation. These include the websites of various international missions to the regions as well as some websites pertaining to the aspiring States.

The choice of materials used in this thesis has been made through an evaluation of different international legal instruments regarding their relevance to the subject matter of the thesis. Particular heed has been taken to the cross-references to, and comments on, these instruments in the various sources of doctrine studied. As is usually the case in public international law, the internal hierarchy of these sources is not entirely clear. The importance of an international legal instrument is measured, as always, by what degree subsequent conventions, declarations, etc. uphold its principles, and by what degree the international community of States chooses to adhere to these.

All of the sources referred to in the investigation are listed in the bibliography at the end of the thesis. Conversely, sources which may have been studied in the course of the writing of this thesis, yet are not referred to in the thesis due to lack of relevance, are not included in the bibliography. An illustrative example are the many resolutions adopted by the United Nations Security Council (UNSC) pertaining to the conflicts under investigation, for practical reasons only the most relevant of which have been included in the bibliography.

1.3 Disposition

The disposition of this thesis follows a simple structure, where the main investigation is divided into three parts. Chapter 2, which follows

immediately after this introduction, discusses the principle of self-determination in general, with particular focus on whether national minorities possess this right. Chapter 2 is subdivided into two parts, where the first part deals with the historical development of the right to self-determination and its contents today, while the second part analyses the relationship between self-determination and territorial integrity and whether or not the right to self-determination entails a right to secede.

Chapter 3 deals with the question of statehood and the role of State recognition in the establishment of new States. In this chapter, the difficult concepts of sovereignty and independence, as well as their history, are discussed, and the factual criteria for statehood are established. In relation to statehood, the importance of State recognition is analysed from the perspectives of the constitutive and declaratory theories.

Chapter 4 constitutes the comparative aspect of this thesis, wherein the recent secessions on grounds of self-determination in Kosovo, Abkhazia, and South Ossetia are analysed from an international legal perspective. The first part of the chapter deals with Kosovo, and the second with Abkhazia and South Ossetia. Both subchapters include a historical account of the conflicts and make running references to the earlier findings of the thesis. They both conclude with a legal analysis of the respective sessions taking into account the relevant body of law as well as the opinions presented in the doctrine.

Chapter 5 follows the main investigation of the thesis and concludes its findings in an attempt to answer the questions initially posed in chapter 1.1. The chapter is divided accordingly, with the first part responding to the queries concerning self-determination of national minorities and the right to secede, and the second part discussing the importance of State recognition. In so doing, both parts focus on the secessions and alleged statehoods of Kosovo, Abkhazia, and South Ossetia and their implications for the international legal order.

2 Self-Determination of National Minorities

"It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity that the phrase was ever uttered! What misery it will cause!"[1]

- Robert Lansing (1864-1928)

2.1 The Principle of Self-Determination

2.1.1 Historical Background

The idea of a right to self-determination is centuries old. Indeed, a case could be made that the American and French Revolutions of the late 18th century, as well as the Latin American wars of independence in the early 19th century, constituted early instances of calls for self-determination.[2] However, the scope and definition of the right to self-determination has undoubtedly varied over the centuries, and if these early events relied in some part on a principle of self-determination, it was without a doubt one of political rhetoric rather than legal norms.

Self-determination's status as a legal norm is certainly less than one century old. The modern history of the principle as we know it today originates in the statements of Soviet leader Vladimir Lenin (1870-1924) in the aftermath of the October Revolution and of American President Woodrow Wilson (1856-1924) during the peace settlements of the First World War.[3] Uttered in a time of revolution, upheaval, and dramatic change, the statements of these two on the nature of self-determination nevertheless differed significantly in scope and definition – perhaps not surprising considering the difference between their respective political values.

Lenin and other Soviet leaders of the time took a quite broad view of the right to self-determination. Apart from being applicable in the allocation of territory after international military conflicts, Lenin saw self-determination as the guiding principle to the eventual abolishment of colonialism, and considered it evocable by national and ethnic minorities in freely determining their destinies. The communist view was thus that national minorities had the right either to autonomy while remaining part of a sovereign State or to outright secede and establish independence.[4] However,

[1] Lansing (1922), p. 57
[2] Hazewinkel (2009), pp. 289 *ff.*; Cassese (1995), p. 11
[3] Crawford (2006), p. 108
[4] Cassese (1995), p. 16

Lenin later betrayed these lofty ideals in concluding the 1918 Brest-Litovsk Treaty when he ceded large tracts of land to his enemies in exchange for peace. Since Lenin justified his actions as prioritising the survival of socialism over the self-determination of the national minorities in these areas, it is safe to say that even in 1918 self-determination was but a political principle easily discarded in times of necessity.[5]

Contrary to Lenin, Wilson never claimed that the principle of self-determination implied a right of national or ethnic minorities to secede from their sovereign States. His definition of self-determination was inspired by liberal ideals and included a right of the people to choose its own form of government. To Wilson, self-determination was the force that was to guide the restructuring of Central Europe after the First World War. It was also a general principle to be applied to territorial change following military conflict. Finally, it should have an influence in colonial matters; in Wilson's realm of thought, however, the interests of the colonial powers should also be considered.[6] Despite this in hindsight rather cautious definition of the right to self-determination, Wilson was heavily criticised by among others Robert Lansing, the legal advisor to the State Department, a statement by whom serves as the introduction to this chapter, above.

The non-existence of a legal right to external self-determination for ethnic and national minorities at this time was corroborated by the outcome of the *Aaland Islands Case* in 1921. The background of the conflict lay in Finland's attainment of independence from the Russian Empire in the aftermath of the First World War. This was followed by a request through plebiscite by the population of the Aaland Islands for reunification with its erstwhile sovereign Sweden on grounds of national self-determination. Finland claimed that this would constitute a breach of their right of sovereignty, and thus the two States looked to the League of Nations for a resolution.

Two reports were issued, and they concurred in the statement that "[t]he recognition of [the principle of self-determination] in a certain number of international Treaties [could not] be considered as sufficient to put it on the same footing as a positive rule of the Law of Nations."[7] As long as the State, in this case Finland, ensured its minority "the preservation of its social, ethnical or religious character", the minority's right to self-determination would be considered upheld. In other words, the population of the Aaland Islands did not have a right to secede from Finland on grounds of self-determination.[8]

After having been abused by Nazi Germany as a means of justifying military intervention in foreign States to protect nationals,[9] self-

[5] Cassese (1995), p. 18
[6] Ibid., p. 20
[7] Aaland Islands Case, Report of International Committee of Jurists
[8] Ibid., Report of International Committee of Rapporteurs
[9] Fabry (2010), p. 12

determination was once again put on the agenda in the 1941 Atlantic Charter. British Prime Minister Winston Churchill (1874-1965) and American President Franklin Roosevelt (1882-1945), in words reminiscent of Wilson, proclaimed that the principle of self-determination should be the guiding principle of territorial changes following the Second World War. Internal self-determination, i.e. free choice of form of government, was also to be guaranteed. Political realities were not ignored, however, as Churchill immediately made clear that the principle of self-determination in this case was to be contained to European nations under the yoke of Nazism, and thus not apply to the British colonies.[10] In summary, it can be concluded that before the establishment of the UN there existed no legal right to self-determination, although the conditions for its development were slowly falling into place.

2.1.2 Self-Determination under the United Nations

2.1.2.1 The UN Charter

Self-determination is mentioned twice in the UN Charter, once in Article 1(2) in the section concerning the organisation's purposes and principles, and once in Article 55 in the section concerning international economic and social cooperation. Both Articles contain the exact same wording, stressing the importance of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[11] In neither case, however, is self-determination positively defined.

It can be deduced from the debate preceding the adopting of Article 1(2), that the right of self-determination according to the Charter did not entail a right to secession, nor a right to political independence for colonial peoples, nor a general right to representative government, nor a right for two nations belonging to different sovereigns to merge into a new State.[12] In other words, in the early days of the UN, the right to self-determination was quite limited and seemed to imply simply the right of peoples to self-government. This right, however, did not allow for any actions disruptive to the delicate balance of the world community, nor guaranteed that the peoples' self-government should entail representative government. The ideas of Lenin and Wilson had thus been effectively dismissed. Hence, the mentioning of self-determination in the UN Charter did not originally grant the right of secession to national minorities. It will be shown, however, that subsequent legal instruments adopted by the UN expanded the concept of self-determination of peoples. Some of these will now be discussed.

[10] Cassese (1995), p. 37
[11] UN Charter, arts. 1(2) and 55
[12] Cassese (1995), pp. 40 *ff.*

2.1.2.2 The Declaration on the Granting of Independence to Colonial Countries and Peoples

While the Declaration on the Granting of Independence to Colonial Countries and Peoples (DGICCP) is not entirely relevant to this investigation, as it deals with decolonisation and the right of self-determination of peoples in non-self-governing territories, it nonetheless bears discussing, since it marks an important step in the evolution of the concept of self-determination under the UN.

The Declaration was adopted by the United Nations General Assembly (UNGA) through its resolution 1514 (XV) of 14 December 1960, and affirmed that non-self-governing peoples had a right to external, and thus political, self-determination.[13] This acknowledgement of non-self-governing peoples' right to external self-determination, in stark contrast to the initially quite limited right of self-determination referred to above, reflects the struggle throughout the 1950s of socialist and developing countries for a complete abolishment of colonialism.[14] It is worth noting that self-determination as a right of peoples, and the DGICCP's importance as a guiding document thereto, may be gleaned from *inter alia* the reference to the Declaration in the ICJ's advisory opinion in the *Western Sahara Case*.[15]

2.1.2.3 The ICCPR and the ICESCR

Further development of the right to self-determination took place with the creation of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were simultaneously adopted for signature by the UNGA on 16 December 1966 through resolution 2200A (XXI). The common Article 1 of the ICCPR and the ICESCR is considered to contain the basic definition of the right to self-determination of peoples, and reads as follows:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[16]

[13] DGICCP, §2; Cassese (1995), pp. 72 *f.*
[14] Cassese (1995), p. 71
[15] Western Sahara Case, §55
[16] ICCPR/ICESCR, art. 1

While the focus of this thesis is on the right of self-determination of national minorities, it is interesting to note that Article 1(3) of the Covenants, in conjunction with the above-mentioned DGICCP, once and for all confirmed that non-self-governing peoples similarly to all 'peoples' have a right to self-determination. The problem lies in defining what constitutes a 'people', a concept which *prima facie* is very general and which throughout international legal history has signified the inhabitants of either nation-states or non-self-governing territories, as well as ethnic groups.[17] However, it is generally agreed that, at least in the 1960s, 'self-determination of peoples' really referred to the right to independence of former colonies, i.e. non-self-governing territories.[18]

Indeed, from the preparatory work of the Covenants, it is clear that 'peoples' in the context of Article 1(1) does not refer to national minorities. It is not national or ethnic minorities that possess a right to internal self-determination in relation to the majority population of a sovereign State; rather, it is that State's population as a whole that has a right to govern itself independently of foreign involvement.[19] This is further supported by the explicit mentioning of rights pertaining to ethnic, religious, and linguistic minorities in Article 27 of the ICCPR, wherein is not included a right to self-determination.[20] In other words, while the right to self-determination as a concept had definitely evolved and increased in scope by 1966, the ICCPR and the ICESCR by themselves do not grant a right of self-determination to national minorities. That right is reserved for the people, as a whole, of a sovereign State or of a colonial entity striving for independence.

2.1.2.4 The Friendly Relations Declaration

The development of the legal principle of self-determination continued with what has become one of the most influential legal instrument concerning self-determination, territorial integrity, and many other aspects of international law. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, more commonly referred to as the Friendly Relations Declaration (FRD), was adopted by the UNGA through its resolution 2625 (XXV) of 24 October 1970.

The FRD consists of a total of seven principles, which summed up some of the most important of the generally accepted rules of international law at the time of its signing. While the main focus of the fifth principle, devoted to self-determination, lies on the right's external dimension concerning peoples,[21] thus confirming the aims and purposes of the DGICCP of 1960, the final paragraph of the principle, sometimes referred to as the 'saving clause' or the 'safeguard clause', contains an important statement concerning the right to internal self-determination. It reads as follows:

[17] Borgen (2009), p. 8
[18] Carley (1996), p. 4
[19] Cassese (1995), p. 61
[20] ICCPR, art. 27
[21] FRD, principle (e), paragraphs 1-2, 4-6

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[22]

While it is evident that the main purpose of the clause is to safeguard the territorial integrity of States, the manner in which it is formulated actually brings to the foreground an exception from this sacred right of sovereign States. As can be gleaned from the latter part of the paragraph, the territorial integrity of a State must be respected to the extent that the said State possesses a government that in turn does not deny governmental representation to racial and religious groups (*cf.* "without distinction as to race, creed or colour"). In other words, if a State does in fact discriminate against said groups, its right to territorial integrity might be compromised. This statement infers a link between the right to internal self-determination, through governmental representation of the people, and the right to external self-determination, through remedial secession, of those groups who are denied this former right.

Important to note, however, is that this right to internal self-determination is in fact conferred only upon racial and religious groups. Neither linguistic minorities nor other national groups may be inferred to hold a right to remedial secession according to the FRD.[23] Despite this seemingly obvious limitation of the inferred exception from the territorial integrity of States, those national minorities who would claim a right to secession often refer to the 'safeguard clause' in their striving towards external self-determination. In fact, the possible application of this inferred right to remedial secession is central to the analysis in chapter 4 of the legality of the secessions by Kosovo, Abkhazia, and South Ossetia. The general implications of the 'safeguard clause' concerning secession will be discussed in chapter 2.2.2.

The importance of the FRD for the status of the principle of self-determination in international law can be seen not least through the repeated references to it by later conferences and declarations, for example the 1993 World Conference on Human Rights, which resulted in the Vienna Declaration and Programme of Action and the following statement:

> In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government

[22] FRD, principle (e), paragraph 7
[23] Cassese (1995), p. 114

> representing the whole people belonging to the territory without distinction of any kind.[24]

Interestingly enough, the absence of the original mentioning of race and religion seems to imply a widened scope of the principle (*cf.* "without distinction of any kind"). In other words, one possible interpretation of the Vienna Declaration is that the right to secession upon denial of internal self-determination through governmental representation, while still very restrictive and somewhat obscure, could be considered applicable to all members of a people of a sovereign State.[25]

In conclusion, it has been shown that the principle of self-determination has come a long way from being a mere political device. Its role in contemporary international law is indisputable. Its evolution has comprised such varied stages as overreaching universality under the early political ideologies of Wilson and Lenin and careful moderation under the League of Nations. Under the guidance of the UN, the principle has gained the legal *erga omnes* character that it retains today.[26] This international legal principle has grown from focusing merely on the realisation of external self-determination of non-self-governing territories, to encompassing a right of internal self-determination for all peoples, to arguably allowing for the possibility of secession upon the denial of that right.

2.1.3 Some Other International Documents

Since the FRD, several other international declarations, treaties, and conferences on the topic of self-determination have been drafted and held, respectively. Some of these will now be dealt with briefly.

In the hopes of easing Cold War tensions in Europe in the early 1970s, European States with the inclusion of the United States (US) and the Union of Soviet Socialist Republics (USSR) held the Conference on Security and Cooperation in Europe (CSCE). Incidentally, this conference was the precursor to today's Organization for Security and Cooperation in Europe (OSCE), a regional organisation under the aegis of the UN. In 1975, the CSCE adopted the Helsinki Final Act, which *inter alia* included the contemporary view of the participant States on self-determination. Similarly to the FRD, the Helsinki Final Act grants the right of self-determination to peoples in accordance with the principles of the UN Charter and other international legal norms, specifically mentioning territorial integrity.[27]

The Act furthermore states that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."[28] Cassese is of

[24] Vienna Declaration, section I, §2
[25] Cassese (1995), p. 306; Crawford (2006), pp. 118 *f.*
[26] *Cf.* East Timor Case, §29
[27] Helsinki Final Act, principle VIII, paragraph 1
[28] Ibid., principle VIII, paragraph 2

the opinion that this statement means that the Act goes further than the FRD in connecting the internal aspect of the principle of self-determination to democratic rule, as well as once and for all confirming that the right to self-determination is continuous.[29] Still, the Act cannot be said to grant external self-determination to national minorities, especially since it explicitly upholds the virtues of territorial integrity.[30] Accordingly, Cassese maintains that the only three instances where the principle entails a right to external self-determination concern colonial peoples, peoples under foreign military occupation and racial groups being denied access to government.[31] This view of the CSCE (and today of the OSCE), that the exercise of the right to self-determination is subordinate to the territorial integrity of States, was confirmed in the 1990 Paris Charter, which may be said to focus even more on territorial integrity than did the Helsinki Final Act.[32]

The opposite stance is taken by the 1976 Algiers Declaration of the Rights of Peoples, which is decidedly different in character from the hitherto mentioned declarations, as it is not drafted by any conference of States, but rather by a group of individuals including academics, politicians, national liberation group representatives, etc. Naturally, this means that the Algiers Declaration does not carry the same weight as the above-mentioned documents; nevertheless, it is an interesting expression of what individuals, not representing sovereign States, believe comprises the right to self-determination. The Algiers Declaration considers the possibility of a people to exercise its right to self-determination inexorably tied to its fundamental human rights, and goes much further in allowing for the secession of minority groups when the survival of its identity is at stake through the denial of these rights.[33]

As should be clear from the investigation thus far, some aspects of the principle of self-determination, especially concerning secession, seem irreconcilable with the principle of territorial integrity. An analysis of the relative importance of these two principles will now be attempted.

2.2 Self-Determination vs. Territorial Integrity

2.2.1 Territorial Integrity

It seems that the realisation of external self-determination, by its very nature, might be considered diametrically opposed to the territorial integrity of existing sovereign States. It is clear that the territorial integrity of States is an important aspect of their sovereignty, and constitutes an important

[29] Cassese (1995), p. 286
[30] Helsinki Final Act, principle VIII, paragraph 1
[31] Cassese (2005), p. 61
[32] Paris Charter, "Friendly Relations among Participating States", paragraph 7; Cassese (1995), p. 293
[33] *Cf.* Algiers Declaration, arts. 5-7, 19-21; Cassese (1995), p. 299

balancing factor in the prevailing Westphalian system. Moreover, as has been shown thus far, the principle of territorial integrity has traditionally been favoured over that of self-determination. In fact, both the DGICCP and the FRD, while advancing the cause of self-determination of peoples, also stressed the virtue of territorial integrity and its importance to the stability of the global community.[34]

Concerning the question of decolonisation, this meant that the newly independent States were to retain the borders of the previous non-self-governing territories in line with the principle of *uti possidetis juris*, which incidentally meant that their ethnic minorities were denied the opportunity to choose their own international status.[35] Only in two cases during the decolonisation era did the UN actively give the principle of self-determination precedence over that of territorial integrity: Ruanda-Urundi, which separated into Rwanda and Burundi;[36] and the British Cameroons, which separated into two parts that later merged with Nigeria and Cameroon, respectively.[37]

The *uti possidetis juris* principle is highly relevant to this thesis, not only as a historical occurrence in the development of the right to self-determination, or rather the circumspection thereof, but also as a guiding principle in the current investigation. As will be discussed in chapter 2.2.2.2, the principle of *uti possidetis juris* was applied following the dissolution of the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), which means that the secessionist aspirations of respectively Kosovo, Abkhazia, and South Ossetia, discussed in chapter 4, would appear to be fundamentally denied on grounds of the principle's support for Serbia's and Georgia's territorial integrity.

An interesting colonial example, where the principle of self-determination was initially thought to prevail over that of territorial integrity, is that of Western Sahara. In its advisory opinion on the matter, the ICJ proclaimed that, while Morocco was found to have ties to the area, the right to self-determination of the West Saharans weighed heavier than Morocco's claims to territorial integrity.[38] Despite this, Morocco took heed only of the Court's mention of territorial ties and took charge of the territory in 1976, with the *de facto* acceptance of the UNGA.[39] The situation of Western Sahara persists to this day. East Timor, on the other hand, was accorded sovereignty in 2002, yet there too self-determination was once pointedly refused on grounds of territorial integrity. Despite the UNGA denouncing the Indonesian 1975 annexation of the territory,[40] when Indonesia persisted in claiming its right to territorial integrity over East Timor, and the UNSC

[34] DGICCP, §6; FRD, principle (e), paragraph 7
[35] Cassese (1995), p. 74
[36] *Cf.* UNGA res. 1746
[37] Cassese (1995), p. 78
[38] Western Sahara Case, §162
[39] Gunter (1978), p. 206
[40] *Cf.* UNGA res. 3485

abstained from issuing any sanctions, self-determination remained denied for many years.[41]

The CSCE – and now the OSCE – also seems to favour the territorial integrity of States, an attitude that is reflected in the Helsinki Final Act as well as in the Paris Charter.[42] This is hardly surprising, since the OSCE is an organisation of States, which international status is reliant on the maintenance of the *status quo*. The Algiers Declaration, on the contrary, does not consider the territorial integrity of States inviolable, and quite clearly allows for secession by minority groups under certain conditions.[43] Having been drafted by individuals not representative of any government, this clearly reflects that State involvement is the deciding factor in supporting territorial integrity.

Moreover, while the territorial integrity of a State may be *de facto* compromised by for example a secessionist sub-territorial entity claiming part of its territory as its own, this does not automatically mean that the *de jure* territorial integrity of that State is to be considered null and void.[44] Indeed, if such were the case, all it would take for a State's territorial integrity to be undone would be for an entity, autonomous or not, to issue a unilateral declaration of independence. The subjects for the case study in chapter 4: Kosovo, Abkhazia, and South Ossetia, have all done so, and a majority of States still consider Serbia and Georgia their respective legal sovereigns.

Another important aspect of the Westphalian system, linked to the territorial integrity of States, is the principle of non-intervention in domestic affairs, as formulated by Article 2(7) of the UN Charter. This would seem to preclude any foreign involvement as regards self-determination of a State's national minorities. Cassese notes that the international community, when assembled at the Vienna Diplomatic Conference on the Law of Treaties in 1968-69, voiced strong support for self-determination, like all principles included in Articles 1 and 2 of the UN Charter, as constituting *jus cogens*, i.e. a peremptory norm of international law.[45] However, since the non-intervention principle is also included in Articles 1 and 2, by the same reasoning it too would constitute *jus cogens*.

It is important to note that, since mostly socialist States supported the idea of self-determination being *jus cogens* at the time, it is difficult to confirm to what extent these principles truly constituted *jus cogens* – in any event, this is not the purpose of this thesis. Nonetheless, this does support the fact that self-determination is a force to be reckoned with even in the face of territorial integrity. Indeed, the above-mentioned, coupled with the

[41] Gunter (1978), p. 208
[42] Helsinki Final Act, principle VIII, paragraph 1; Paris Charter, "Friendly Relations among Participating States", paragraph 7
[43] Algiers Convention, art. 21
[44] *Cf.* Quebec Secession Case, §146
[45] Cassese (1995), p. 171

responsibility of States to promote self-determination,[46] suggests that intervention in the domestic matters of States by other States may be allowed if it purposes to enforce the right of self-determination of peoples.[47] Needless to say, the ban on the use of force in Article 2(4) of the UN Charter still applies, despite having been compromised in the past, for example through the 1971 Indian military intervention in East Pakistan, resulting in the emergence of Bangladesh.[48]

In conclusion, while the territorial integrity of States remains an important principle in modern international law, it does not without exception triumph over that of self-determination. Rather, the two principles should be considered equal in importance, exerting reciprocal limitations.[49] One of these limitations would seem to concern one mode of the realisation of external self-determination, i.e. unilateral secession. This concept will now be examined in greater detail.

2.2.2 Secession

2.2.2.1 The Traditional View of Secession

The international community has traditionally viewed secession unfavourably, it being contrary to the territorial integrity of sovereign States. However, secession cannot be said to be illegal *per se*. While some UNSC resolutions have declared certain acts of secession illegal,[50] the act of secession itself is not regulated by any international legal rules. This is partly due to the dilemma that this would cause – indeed, it is difficult to imagine how a seceding entity could manage to act contrary to international law while not being considered an international legal subject.[51]

Once again returning to the *Aaland Islands Case*, the International Committee of Rapporteurs quite neatly summarised the view of secession at the beginning of the 20th century in the following statement:

> To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of a State as a territorial and political unity.[52]

In other words, it is typically the territorial integrity of the State that must take precedence over a potential right to self-determination of that State's national minorities, in order to ensure the stability of the international

[46] *Cf.* ICCPR/ICESCR, art. 1(3); *Cf.* FRD, principle (e), paragraph 2
[47] Cassese (1995), pp. 175 *f.*
[48] Crawford (2006), p. 141
[49] Raič (2002), p. 395
[50] *Cf.* UNSC res. 169, §1; *Cf.* UNSC res. 216, §1
[51] Crawford (2006), p. 389
[52] Aaland Islands Case, Report of International Committee of Rapporteurs

community. A possible *argumentum e contrario*, stemming from an evolved interpretation of the *Aaland Islands Case* and the FRD's 'safeguard clause', is that remedial secession may be allowed in extraordinary circumstances, when the internal self-determination of a minority is utterly frustrated.

In general, however, for a secession to be successful, the recognition of the seceded unit by the parent State has traditionally been a requirement. This is one explanation for why the secession of Bangladesh from Pakistan in 1971, following its unilateral declaration of independence was ultimately successful; following military defeat at the hands of India, Pakistan recognised the independence of Bangladesh in 1974, enabling its admittance to the UN and its *de jure* establishment as a State. Notably, the UN made no mention of a right to self-determination for the population of Bangladesh,[53] and though the territory fulfilled the criteria set in the DGICCP for being a non-self-governing territory, it was not considered such at the time.[54] Rather, the secession of Bangladesh from Pakistan, a State established through the process of decolonisation, constituted a breach of Pakistan's territorial integrity and of the principle *uti possidetis juris*. Apart from Bangladesh, only Eritrea and now Kosovo have successfully claimed independence from a formerly recognised sovereign following secessionist conflict, and received significant international recognition, in the period since 1945.[55]

The outstanding importance of territorial integrity was once again confirmed in the fifth principle of the FRD in 1970. The final paragraph of the principle, i.e. the 'safeguard clause', does imply the possibility of secession, absent the approval of the parent State, upon the denial of the right to internal self-determination afforded by the clause, but only under very strict conditions. The implied right to secede applies only to racial and religious groups, only if said groups are outright denied governmental representation as well as suffer gross and systematic abuse of their rights, and only if there can be found no local remedy to the problem.[56]

Furthermore, it has been claimed that this implied right of racial and religious minorities to secede has not evolved into customary law, and that the very inclusion of the exception in the paragraph should be accredited a political compromise between the divided camps of Western and socialist States during the Cold War.[57] Indeed, although there is arguably some small room for secession according to the 'safeguard clause', it seems clear that the intent of the drafters of the FRD was not to favour a right to secession over territorial integrity. Sovereign States have incessantly stressed the importance of territorial integrity to the stability of the international community, and the very fact that the appropriately named 'safeguard

[53] *Cf.* UNGA res. 2793
[54] Crawford (2006), p. 393
[55] Borgen (2009), p. 9
[56] Cassese (1995), p. 119
[57] Ibid., pp. 122 *f.*

clause' itself primarily lends itself to the upholding of territorial integrity is indicative of this.

The Vienna Declaration of 1993, while apparently widening the potential right of secession to include all groups, similarly seems to favour territorial integrity over self-determination through secession. As in the case of the FRD, a right to secession may be inferred, but it is to be applied restrictively: only when a people's right to internal self-determination is completely frustrated and it is totally denied governmental representation may secession be considered.[58] This fact manifested itself through the judgement in the *Quebec Secession Case*, where the Supreme Court of Canada dismissed outright the existence of such conditions in the case of Quebec.[59] No attention was accorded the possibility that both a post-secessionist Quebec and a post-secessionist Canada might still effectively govern themselves beyond a separation, as some commentators ineffectively argue.[60] Indeed, such an argument does not pertain to international law.

2.2.2.2 Secession after the Dissolution of the USSR and the SFRY

The evolution of international law is usually a slow-paced gradual affair, owing to the static nature of international law and the interest in the *status quo* of the international community. However, there have been times in history when it may be argued that events have caused international law to evolve by leaps and bounds. Two such events were the dissolutions of the USSR and the SFRY.

The breakdown of the USSR in 1991 prompted the unilateral declarations of independence of fifteen new sovereign States, twelve of whom possessed no right of self-determination, let alone secession, under contemporary international law.[61] The mere fact, that these nevertheless received international recognition and are accepted as sovereign States today, bears witness to the surprising flexibility of international law. Important to note is that the Russian Federation, continuing the legal personality of the USSR, was among the first to recognise the emerging breakaway republics; considering the events following Bangladesh's unilateral declaration of independence in 1971, this move was probably instrumental in blazing the trail for international recognition of the breakaway republics.[62]

The three republics that are generally considered to have retained a right to self-determination ever since their integration with the USSR in 1940 – despite the fact that the legal principle of self-determination had not truly evolved before the 1960s – were the Baltic States. The proclamations of independence by these States were thus less controversial (although initially

[58] *Cf.* Vienna Declaration, section I, §2
[59] Quebec Secession Case, §§134-135
[60] Wellman (1995), pp. 167 *f.*
[61] Cassese (1995), p. 264
[62] Crawford (2006), p. 395

greeted with caution by Western States)[63] than those of the other Soviet republics. This may in part have been due to the fact that the Baltic States never relied on the principle of self-determination for their call for independence; rather, they invoked the illegality of their occupation by the USSR in the first place.[64]

The remarkable aspect of the acts of secession by the remaining twelve Soviet republics consisted in the conditions for recognition, set by the member States of the then European Communities, through their adopted Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union. In order to receive their recognition, the member States of the European Communities demanded that the new States respect democratic values and human rights, and guarantee the protection of national and ethnic minority rights.[65] This meant that the establishment of these secessionist republics, i.e. the realisation of their call for external self-determination, became inextricably linked to their upholding of democratic rule, i.e. internal self-determination.[66]

The same year that saw the collapse of the USSR also witnessed the secession from the SFRY by some of its constituent republics, with the tragic distinction that secession in this case led to devastating war and widespread human rights violations. Similarly to the Soviet republics, the newly independent states of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia had no right to external self-determination at the time of their respective unilateral declaration of independence. Furthermore, as will be discussed later in the thesis, several of the new States did not fulfil all of the Montevideo criteria. Nevertheless, in accordance with the guidelines of the European Communities member States, as explained above, the new States' claim for external self-determination was recognised in exchange for their agreement to uphold internal self-determination.[67] Important to note in this context, however, is that the European Communities considered the SFRY case one of dissolution rather than secession, and consequently focused on the natural emergence of the constituent republics following the failure of the federation, rather than on any right to self-determination.[68]

It is notable that the Arbitration Committee of the Conference on Yugoslavia (hereafter the Badinter Commission) based their view on the colonially appropriate principle of *uti possidetis juris*, meaning that further secession, by sub-territorial entities, would not be contemplated.[69] The prevalence of this principle following the dissolution of the SFRY, and the analogous application of it as concerns the emerging constituent republics of the USSR, naturally has consequences for the subjects of the case study of

[63] Hazewinkel (2007), p. 298
[64] Cassese (1995), p. 260
[65] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', paragraph 4
[66] Cassese (1995), pp. 267 *f.*
[67] Ibid., p. 270
[68] Crawford (2006), pp. 397 *ff.*; Fabry (2010), p. 180
[69] *Cf.* IIFFMCG, Vol. II, p. 143

this thesis, i.e. Kosovo, Abkhazia, and South Ossetia, as discussed in chapter 4. After all, these territorial entities form part of Serbia and Georgia, respectively, the maintained territorial integrity of which are supported by the application of *uti possidetis juris*.

Raič proposes that the manner in which the Croatian case was handled following its unilateral declaration of independence was consistent with previous practice. While maintaining that the right to secession is granted only in exceptional circumstances, i.e. when a people's internal self-determination is utterly frustrated (as was held *inter alia* in the *Quebec Secession Case*)[70] Raič claims that such circumstances were at hand in Croatia in 1991, as well as in Bangladesh in 1971.[71] The manner in which the international community treated these cases were thus in accordance with international law. A key point here is that Raič considers the populations in these areas 'peoples', in the manner provided for in the international legal instruments discussed in chapter 2.1, and not mere minorities.[72] While this is easy to accept in the case of Bangladesh, which while not considered thus did meet the criteria of a non-self-governing territory, a parallel conclusion in the case of Croatia is more controversial.

Indeed, while it is generally accepted that the right of self-determination is reserved to the 'people' as a whole – and the investigation thus far has supported this – there still exists some confusion as to what a 'people' really is. As was briefly mentioned in chapter 2.1.2, the meaning of the concept in the context of self-determination has evolved. While several definitions exist today, in the interest of this investigation, one must note the 1989 Kirby definition of a people with the right to internal self-determination as one that highlights as those of a 'people': a shared historical tradition; racial or ethnic identity; and various other common characteristics. Centrally, this definition is very similar to the well-known 1977 Capotorti definition of a minority, with the obvious exception of numerical inferiority.[73] This comparison might not bring light to the matter, but it highlights the problem area, where circumstances and perspective may determine whether a group of people is defined as a minority or as a people.

In any event, it is fair to suggest that the traditionally strict view of the global community on secession has become somewhat more lenient in the wake of the dissolutions of the USSR and the SFRY. It has been shown that, at least in some cases, calls for secession are met with recognition, under the condition that the secessionist entity agrees to uphold democratic values. Important to note, however, is that both the USSR and the SFRY were federations comprised of republics that were already autonomous to some extent. At any rate, the introduction of conditional recognition of external self-determination, with the prerequisite of upheld internal self-determination, represented a further step in the evolution of the principle

[70] Quebec Secession Case, §§134-135
[71] Raič (2002), pp. 365 *f.*
[72] Ibid., p. 361
[73] Geldenhuys (2009), pp. 34 *f.*

and marked the achievement on the part of Western powers of their traditional calls for greater focus on the right to internal self-determination. The successful calls for secession by the Balkan groups furthermore inspired similar hopes in a multitude of ethnic groups across the globe.[74]

[74] Carley (1996), p. 7

3 The Importance of State Recognition for the Creation of States

”A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.”[75]

- Emerich de Vattel (1714-1767)

3.1 Statehood

3.1.1 Criteria and Characteristics of Statehood

In order to understand the struggle of ethnic minorities for self-determination and eventual statehood, it is important to first examine what actually constitutes statehood, i.e. its criteria and characteristics.

If there can be said to exist objective criteria that must be fulfilled in order for an entity to be recognised as a State, most would agree that those formulated in the 1933 Montevideo Convention on the Rights and Duties of States come the closest. Its Article 1 states that:

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.[76]

These four criteria are the ones most commonly referred to when addressing the question of what constitutes a State. In fact, despite being signed by only a few of the States, the Convention is today considered part of customary international law. It is the major foundation for the declaratory theory concerning the effect of State recognition, as expanded on in chapter 3.2.2.

From these criteria – in particular from the fourth criterion postulating “capacity to enter into relations with the other states” – may be inferred a further prerequisite for statehood, namely independence, without which an entity indeed cannot claim to be a sovereign State. In relation to this, Crawford suggests five principles, or legal characteristics, that define States. They are as follows: firstly, States are sovereign and competent to perform acts in the international sphere; secondly, States are in principle exclusively competent regarding their internal matters; thirdly, a State’s consent is required for international process; fourthly, all States are formally equal; finally, it is presumed that the foregoing principles will prevail.[77]

[75] de Vattel (1758), bk. I, ch. 1, §18
[76] Montevideo Convention, art. 1
[77] Crawford (2006), pp. 40 *f.*

Forming part of the legal doctrine on State creation, Crawford's principles naturally do not carry the same weight as the Montevideo Convention. They do however present an accurate illustration of what generally constitutes a State today, as well as expand on the Convention in relation to other important legal principles bearing on State creation and sovereignty. Nevertheless, the reader is asked to bear in mind that it is the Montevideo Convention that constitutes the legal basis for the criteria on State creation throughout this thesis.

In regard to this investigation, it is important to note that the Montevideo Convention does not list recognition by other States as one of the criteria for statehood. In fact, Article 3 of the Convention confirms that:

> The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.
>
> The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.[78]

Thus, the Montevideo Convention rests on the supposition that statehood is an objective concept, independent of the consent by other States. The factual fulfilment of these criteria leading to the legal establishment of a State is an instance of the principle *ex factis jus oritur*.[79] In accordance with the declaratory theory, recognition is viewed as a political act, which has no legal consequences for the statehood of an aspiring entity.

3.1.2 Exceptions from the Rule

Despite the seeming straightforwardness of the Montevideo criteria, there have occurred notable exceptions from them in the past: instances where States not fulfilling one or several of the criteria have nevertheless been recognised; as well as instances where recognition has been withheld despite the fulfilment of the criteria. A few of these examples will now be dealt with briefly.

In some cases where the Montevideo criteria may be said to have been only marginally fulfilled, if at all, this is remedied by other circumstances or the *de facto* establishment of statehood over time. The Vatican State, for example, possesses but tiny territory and a non-permanent population nominally set at 1,000. It has been described as an appanage of the Papacy, yet this does not mean that it does not constitute a State, primarily due to its influential government and the widespread recognition thereof.[80]

[78] Montevideo Convention, art. 3
[79] Crawford (2006), p. 45
[80] Ibid., p. 223

For obvious reasons, effective government over State territory is a necessary aspect of a State. After all, without governmental control an aspiring State can claim neither sovereignty nor international legal personality. Nevertheless, there have been, and continues to be, instances where States have been accepted as subjects of international law despite a lack of effective government. The so called 'failed States', of which Somalia is the one most often referred to,[81] are obvious examples. Despite the fact that 'failed States', by virtue of this very means of reference, should not be considered sovereign subjects of international law, it is evident that Somalia retains this status in the international community. [82] This is proven not least by withheld international recognition of its secessionist entity Somaliland, which has been *de facto* independent of Somalia ever since its unilateral declaration of independence in 1991.[83]

Moreover, when the European Communities on 15 January 1992 decided to recognise the new States of Slovenia and Croatia, the latter did not possess a stable enough government to control the territory to which it laid claim. This was similarly true for Bosnia-Herzegovina, which received recognition on 7 April later that year.[84] It may furthermore be argued that Bosnia-Herzegovina even today lacks a functional government and is held together primarily thanks to international administration.[85] Despite this obvious breach of the third of the Montevideo criteria, both Croatia and Bosnia-Herzegovina were considered to have international legal personality and have been treated as States from the point of their recognition onward. Thus, not only did the dissolution of the SFRY change the meaning of self-determination, as described in chapter 2.2.2 – it also constituted an event where State recognition seems to have remedied a lack of right to statehood.

A well-known example of an entity that is not recognised as a State despite seemingly fulfilling all of the Montevideo criteria is Taiwan. The nationalist government of the Republic of China, following its defeat in the Chinese Civil War in 1949 by what was to become the government of the People's Republic of China, went into exile to the island of Taiwan (also known as Formosa) and has since maintained governmental control over its territory and populace. While the now marginalised Republic of China has since been replaced by representatives of the People's Republic of China in *inter alia* the UNSC, it still appears to fulfil the criteria for being a State. Yet, the international community does not recognise it as such.[86] The reason for this is decidedly simple, and was nicely expressed in 1956 by O'Connell: "A government is only recognised for what it claims to be, and the Nationalist regime on Formosa claims to be China, not Formosa."[87]

[81] Cockburn (2002), paragraph 1
[82] Geldenhuys (2009), p. 12
[83] Fabry (2010), p. 222
[84] Crawford (2006), pp. 397 *f.*, 528; Ryngaert & Sobrie (2011), p. 476
[85] Fabry (2010), p. 222
[86] Crawford (2006), pp. 210 *f.*
[87] O'Connell (1956), p. 415

As is appropriate in the context, references to 'China' in this thesis hereafter are by definition references to the entity generally recognised as such, i.e. the People's Republic of China. With this in mind, the investigation will now proceed to focus on the role of State recognition in the establishment of States.

3.2 State Recognition

3.2.1 Historical Development

While international law since the establishment of the UN has become more dynamic in the sense that a greater variety of actors has claimed part of the spotlight on the international stage, it is still predominantly State-oriented. Prior to the development of our modern international law, this was even more so. In contrast to the national *ius civile* governing the internal affairs of a State, Hugo Grotius (1583-1645) famously stated in his celebrated *De Iure Belli ac Pacis* that:

> Law in a wider sense is *Jus Gentium*, the Law of Nations, that Law which has received an obligatory force from the will of all nations, or of many.[88]

In other words, in the 17th century international law was simply the channelling of the collective will of nations, or rather States. Grotius' view was later shared by other legal thinkers, such as the renowned Samuel Pufendorf (1632-1694), who in his magnum opus *De Iure Naturae et Gentium Libri Octo* stressed the identical character of natural (or moral) law and the law of nations. He was of the opinion that no legal system regulated the actions of sovereign States, apart from their responsibility to adhere to moral standards, i.e. natural law, in its dealings with other States. Needless to say, since it fell within a State's privilege to determine just what its duties were according to natural law, international law became what the States made it to be.[89]

Expanding on the exclusive privileges of sovereign States, Emerich de Vattel (1714-1767) claimed in his *Le droit des gens, ou principles de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* that a State needs but be independent and sovereign to enjoy equal status to all other sovereign States in the natural order of things.[90] This state of affairs, where international law is determined by the positive actions of nation-states, had become the order of the day by the end of the Thirty Years War (1618-1648), although it had formed part of the European State-system even before then. Through the 1648 Peace of Westphalia, the inviolability of State sovereignty was consolidated at the expense of the idea of the *civitas gentium maxima*, the universal community of peoples

[88] Grotius (1646), bk. I , ch. 1, §xiv
[89] Pufendorf (1672), bk. II, ch. 3, §156
[90] de Vattel (1758), bk. I, ch. 1, §4

previously considered superior to State authority.[91] The principle of State sovereignty is with few exceptions still upheld today.[92]

From the above follows that State recognition did not play a considerable role in the early law of nations, previously considered synonymous with international law. After all, since all that made a State was *de facto* independence and sovereignty, the recognition of those facts was never considered necessary. However, in the 19th century, positivist thinkers gradually came to the realisation that consent by States to the creation of new States and their participation in the international community was a prerequisite for its functionality on a practical level.[93] In the words of Henry Wheaton (1785-1848):

> The external Sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete. […] [I]f it desires to enter into that great society of nations, all the members of which recognise rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition […].[94]

In other words, mutual recognition of States, by States, cannot be dispensed with if a State is to practice what Wheaton refers to as external sovereignty, which includes the power to enter into relations with other States. Eventually, positivist thinkers of the 19th century were to completely abandon the idea that statehood and automatic equal sovereignty was a matter pertaining to each State individually, and not one that depended on the intricate relationships between States. State recognition had gone from being irrelevant to being essential.[95]

The importance of State recognition on a practical level brings to mind an interesting dilemma. As explained in chapter 3.1, the Montevideo Convention of 1933 states that the capacity to enter into relations with other States is a criterion for statehood. The Convention furthermore claims that a State needs not be recognised by other States in order for it to claim statehood.[96] Nevertheless, as Wheaton so expertly explains, recognition by another State is in fact a prerequisite for the aspiring State to be able to enter into relations with said State. A fundamental aspect of modern international politics, this practical matter comprises the main argument supporting the constitutive theory on State recognition, towards which this thesis now turns its attention.

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[91] Crawford (2006), p. 10
[92] *Cf.* UN Charter, art. 2(7)
[93] Crawford (2006), p. 13
[94] Wheaton (1916), p. 37
[95] Crawford (2006), p. 16
[96] Montevideo Convention, art. 3

3.2.2 Modern International Law

3.2.2.1 The Constitutive Theory

The constitutive theory is so named because it claims that recognition by other States constitutes an essential part of a State's international legal personality. Oppenheim, the man usually credited with developing the constitutive theory, declared that:

> The formation of a new State is […] a matter of fact, and not of law. […] As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.[97]

This is the main point of contention between the constitutive and the declaratory theories: the question of whether it is fact or law that should determine the accession of new States to the international community. The constitutive theory claims that while the way in which a State comes into existence is a matter of facts, this is irrelevant to its participation in the international community as an international person. Recognition is required for the new State to attain international personality.

In other words, the constitutive theory does not outright dismiss the existence of non-recognised States; it simply says that the international community will not accept it as a subject of international law until the State has been recognised by other States. In the words of Oppenheim:

> International Law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.[98]

What the constitutive theory denies a non-recognised State is therefore not its existence *per se*, but rather its international personality. A distinction is thus made between a State and an international person.[99] From a modern point of view, this distinction is problematic to say the least, since our legal definition of a State hinges on its ability to enter into relation with other States, as determined in the Montevideo Convention. In fact, allowing for the existence of a State while denying it legal international personality does not make a whole lot of sense, since "[i]ts legal personality is identical with its existence as a state, *i.e.*, as a subject of international law."[100]

Nonetheless, the constitutive theory has many supporters, ostensibly because the mutual recognition of States currently provides the best alternative, in the absence of a better solution where the granting of legal personality to new States may be impartially decided.[101] Furthermore, notwithstanding the problems posed by partial recognition, State recognition

[97] Oppenheim (1920), p. 373
[98] Ibid., p. 135
[99] Raič (2002), pp. 30 *f.*
[100] Kelsen (1941), p. 608
[101] Lauterpacht (1947), p. 55

is doubtless a necessary element of the foundation of the modern international society.[102]

3.2.2.2 The Declaratory Theory

The declaratory theory, in contrast to the constitutive theory, proposes that recognition is a political, rather than a legal, act. The recognition by other States is thus independent in nature from the objective existence of the State and its international personality.[103] This existence is determined by the criteria presented by the Montevideo Convention, as explained in chapter 3.1. Hence, since recognition is a purely political act, the circumstance that withheld recognition may impair the possibility of a State to enter into relations with other States does not mean that the State does not possess the capacity to do so; it should nonetheless be considered a State according to the Montevideo Convention and the declaratory theory.

Proponents of the declaratory theory point out that the idea of recognition by other States being mandatory for the creation of new States (or for the acknowledgement of the new State's international legal personality) presents several problems. First of all, this enables States or groups of States to use recognition as a political weapon against its enemies by refusing to recognise new States simply to spite their political opponents.[104] This in turn reduces the importance of international law while destabilising the international community, allowing States to refuse recognition of newly created States for political reasons.[105] On the other side of the spectrum, if recognition is determinative of definitive statehood, it is difficult to imagine an illegal act of recognition – a concept that indeed has been proven to exist, e.g. in ICJ's advisory opinion on the *Namibia Case* and in the UNSC's resolutions on the Turkish Republic of Northern Cyprus.[106]

Furthermore, on a practical level the constitutive theory has been criticised on the grounds that it seems to presume full recognition. Obvious problems arise in cases of partial recognition, and Kelsen, for one, declared the constitutive theory unacceptable because it implies that the very existence of a State is relative to its recognition by other States.[107] Moreover, a problem central to this investigation arises with the precondition of self-determination being a legitimate means of unilaterally establishing a new State through secession. If such a State is nonetheless refused recognition by the parent State and its sympathisers, this would effectively render the remedial effect of self-determination null.[108] Interestingly enough, though, it is a fact that since 1945 no State created through unilateral secession has been admitted to the UN in face of opposition by its predecessor State.[109]

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[102] Fabry (2010), p. 7
[103] Crawford (2006), p. 22
[104] *Cf.* Ryngaert & Sobrie (2011), p. 470
[105] Crawford (2006), p. 27
[106] Ibid., p. 21; *Cf.* Namibia Case, §123; *Cf.* UNSC res. 541
[107] Kelsen (1941), p. 609
[108] Raič (2002), p. 29
[109] Crawford (2006), pp. 390, 415

This fact alone shows the importance of State recognition in the establishment of new States.

3.2.3 The Remedial Effect of State Recognition

When an entity claims a right to secession based for instance on self-determination, and such a right is not supported by international law, State recognition may indeed have a remedial effect. The declaratory theory of State recognition states that recognition is but the mandatory acceptance by States of a *de jure* situation. It is when States, sometimes prematurely, recognise a *de facto* situation that this may have a legitimising (i.e. constitutive, where emerging States are concerned) effect.

Collective recognition normally takes the form of the admittance of the State to the UN, and in a majority of these cases such admittance follows the establishment of a new State in accordance with international law. In any event, admittance to the UN of a new State does not necessarily entail the individual acceptance by all the other member States, reflecting once again the inherent problem with the constitutive theory.[110]

The post-1945 instances where a State has been universally recognised following a unilateral declaration of independence are few and far in between. One such is Bangladesh. While one may easily argue that the circumstances through which Bangladesh obtained its statehood were dubious due to the military intervention of India, it is clear that no foreign State apart from India recognised the new State prior to the surrender of Pakistani troops in the area.[111] Furthermore, the secession was never claimed to be on grounds of self-determination, nor was it ever recognised as such.[112] It is therefore difficult to argue that the establishment of Bangladesh came about through the remedial effect of premature State recognition; while India's recognition was doubtlessly premature, the admittance of Bangladesh to the UN followed only upon its recognition by – and thus *de jure* independence from – Pakistan.

More interesting in this context are the relatively recent States emerging following the breakdown of the USSR and the SFRY, respectively. In these cases, collective recognition by Western States was made conditionally on the upholding of internal self-determination in the newly independent States.[113] In the former case, the States that broke away from the former USSR were all recognised by the Russian Federation prior to collective recognition, meaning that recognition in those cases was of a *de jure* situation, and not remedial in nature.

[110] Crawford (2006), pp. 544 *f.*
[111] Ibid., p. 393
[112] *Cf.* UNGA res. 2793
[113] *Cf.* Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', paragraph 4

The background to the recognition of the constituent republics of the SFRY, however, was more complex. Not only did several of the new States not fulfil the Montevideo criteria,[114] their recognition by the European Communities member States in January of 1992 came prior to that of the entity later known as Serbia-Montenegro, which aspired to automatic succession of the SFRY.[115] Recognition by the European Communities member States in this instance was thus arguably premature and of a *de facto* situation, although this thesis questions even the factual independence of the States at the time of recognition, based on the non-fulfilment of the Montevideo criteria in the cases of Croatia and Bosnia-Herzegovina.

To be sure, collective recognition through admission to the UN did not occur until after Serbia-Montenegro accepted the independence of the other constituent republics, through the adoption of its new constitution in April of 1992. Nevertheless, State recognition in this case may be argued to have had a remedial effect on the international status of the entities claiming Statehood – at least if one is of the opinion that the constituent republics did not possess a right to secession based on self-determination. In any event, it should be clear that the mere fact that Western States made their recognition of the new States conditional on certain factors, e.g. internal self-determination, without connection to the Montevideo criteria, demonstrates the major influence of the constitutive theory on State recognition on global politics.[116]

Finally, it is worth mentioning another basic tenet of State recognition, which influences its remedial effect. It is an observable fact that the more States that have recognised an entity aspiring to statehood, and the more international organisations that entity has been permitted to join, the more likely other States are to recognise the entity as well.[117] The manner in which this snowball effect may legitimise State secession and State creation is obvious. It is especially prevalent in the case of Kosovo, which will be examined in further detail in chapter 4.1, and which is – four years after its unilateral declaration of independence – still receiving regular State recognition at the pace of about one per month.[118]

[114] Crawford (2006), pp. 397 *f.*, 528; Ryngaert & Sobrie (2011), p. 476
[115] Raič (2002), p. 356; Crawford (2006), pp. 397 *ff.*
[116] *Cf.* Geldenhuys (2009), p. 20
[117] Borgen (2009), p. 15
[118] *Cf.* http://www.kosovothanksyou.com/ (Accessed on 2012-05-09)

4 Comparative Analysis

"If people believe that Kosovo can be granted full independence, why then should we deny it to Abkhazia and South Ossetia?"[119]

- Vladimir Putin (b. 1952)

4.1 Kosovo

The thesis has this far established the evolution and the contents of the right of self-determination, and has moreover attempted to define the necessary elements of statehood and illustrate the importance of international State recognition thereto. The investigation now turns to study how these elements of international law have manifested themselves on a practical level, in a comparison between two kinds of aspiring States of different geographical and historical backgrounds.

4.1.1 Facts of the Matter

4.1.1.1 Historical Background

The territory that comprises Kosovo today has a long and varied history, and throughout the ages has formed part of various empires, such as the Roman, the Bulgarian, the Byzantine, the Serbian and the Ottoman. Consequently, the area has been home to many different ethnic and cultural groups. Today mainly ethnic Albanians and Serbs populate the area. These groups are divided not only by different linguistic and cultural backgrounds but also by religion, as most Kosovar Albanians are Muslim while most Kosovar Serbs belong to the Orthodox Church. Serbian claims to the territory are in part inspired by this fact, since many Orthodox churches remain from medieval times. However, since these buildings precede the Ottoman conquest and subsequent Muslim conversions, this circumstance does not contest the underlying evidence that the territory has historically been, and continues to be, multi-ethnic.[120]

Today, the majority of the international community considers Kosovo part of Serbia, the annexation by which in 1912 was internationally recognised in the 1913 London Conference as well as in the 1919 Pact of Versailles.[121] Albanian calls for Wilsonian self-determination went unanswered then, and again after the 1943 Conference of Bujan some decades later.[122] Kosovo's status in the SFRY, which was established following the end of the Second World War, was that of an autonomous province of Serbia. It was not

[119] *The Economist* (2007-11-29): http://www.economist.com/node/10225052?story_id=10225052&CFID=23834221&CFTOKEN=38924298 (Accessed on 2012-03-28)
[120] Blumi (2006), p. 3
[121] Reka (2003), pp. 39 *f.*
[122] Ibid., p. 42

formally equal in status to the SFRY's constituent republics and had no right to secede according to the 1974 constitution. However, it did possess widespread autonomy, including the right to its own constitution and institutions, and was considered a "constituent element" of the SFRY.[123]

Following the election of nationalist leader Milošević, the nationalist tensions that would subsequently tear the SFRY apart increased, and Kosovo's autonomy was abolished in 1989.[124] As was established in chapter 2.2.2, Serbia was eventually forced to recognise the independence of the other constituent republics of the former SFRY, which these had claimed on basis of self-determination in alignment with the 1974 constitution. Kosovo, however, had not been a constituent republic but merely a province, and could thus under no circumstances claim such a constitutional right.[125] As mentioned, the Badinter Commission's insistence on the principle of *uti possidetis juris* prevailed, and the international community (apart from Albania) collectively ignored an initial unilateral declaration of independence issued by Kosovo following a referendum in 1990.[126] Consequently, present day proponents of Kosovo's independence do not rely on the 1974 constitution, but rather on an alleged remedial right to secede.[127]

During the subsequent decade, Kosovo remained an integral part of Serbia in the eyes of the international community, despite non-compliance with the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (discussed in chapter 2.2.2) on Serbia's part.[128] Following the 1995 Dayton Agreement and what Kosovar Albanians perceived as their abandonment by the international community, the Kosovo Liberation Army commenced insurgent operations against its Serbian sovereign. The Serbs responded in kind, targeting the civilian population in an attempt to root out the resistance while conducting ethnic cleansing, and by 1998 the Kosovo War was a fact.[129] More than one million civilians were displaced by the violence,[130] which had soon escalated to the point that the international community decided something had to be done.

4.1.1.2 Response by the International Community

The international community's response was spearheaded by the UNSC, which issued several resolutions on the situation in Kosovo. In three of its 1998 resolutions: 1160, 1199, and 1203, the UNSC attempted to resolve the conflict through weapon embargoes as well as demilitarisation of both Serbian forces and the Kosovo Liberation Army, and to alleviate the ongoing humanitarian disaster. Calls for negotiations leading to greater

[123] Reka (2003), pp. 49 *ff.*; Muharremi (2008), p. 406
[124] Jaber (2011), p. 927
[125] Fabry (2010), p. 191
[126] Williams (2003), p. 396; Muharremi (2008), p. 407
[127] *Cf.* Reka (2003), p. 50
[128] Ibid., p. 63
[129] Ibid., pp. 73 *ff.*
[130] Muharremi (2008), p. 408

Kosovar autonomy were also made.[131] When these negotiations fell through and Serbian atrocities against Kosovar civilians continued, the North Atlantic Treaty Organization (NATO) unilaterally intervened in early 1999. Following the intervention, the Kosovo Liberation Army initiated retaliatory ethnic cleansing, expelling half of Kosovo's ethnic Serbs from the region.[132]

NATO's intervention, legal or not, was effective. In accordance with UNSC resolution 1244, the Serbian military withdrew from Kosovo in June of 1999.[133] Centrally, the resolution furthermore established the United Nations Interim Administration Mission in Kosovo (UNMIK), which would function as the civil administrative organisation of Kosovo until provisional democratic institutions could be established and substantial Kosovar self-government could be ensured.[134] UNMIK's mandate made no mention of the self-determination of the Kosovar Albanians, nor did it formulate a plan for the establishment of a final status of Kosovo.[135] UNMIK maintains its mandate to this day,[136] which is an indication that the UN still considers the Kosovo problem unsolved. Moreover, the UNSC has consistently reaffirmed the territorial integrity of all the States in the region throughout its resolutions.[137]

In 2007, after eight years of UN administration of Kosovo, the Special Envoy to Kosovo of the UN Secretary-General, Martti Ahtisaari, completed his Comprehensive Proposal for the Kosovo Status Settlement, also known as the Ahtisaari Plan. In it, Ahtisaari claimed that neither reintegration with Serbia nor continued UN administration constituted viable solutions to the conflict, and recommended that the UNSC endorse Kosovo's claim for independence, to be initially enacted under international supervision.[138] The Plan furthermore stressed the uniqueness of the situation and claimed that Kosovo's independence should not be seen as a precedent.[139]

Encouraged by this international endorsement of their cause, members of the Assembly of Kosovo issued a second unilateral declaration of independence on 17 February 2008, in which they agreed to fulfil *inter alia* the obligations concerning democratic institutions and minority protection put forth by the Ahtisaari Plan.[140] In a meeting in the UNSC the following day, Serbia's President Tadić condemned the unilateral declaration of independence as an "illegal violation" and rejected the Ahtisaari Plan as not being a "decision based on compromise."[141] Russia and China expressed

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[131] Reka (2003), pp. 75 *f.*
[132] Hehir (2009), p. 92
[133] Reka (2003), p. 92
[134] UNSC res. 1244, §§10-11
[135] Reka (2003), pp. 323 *f.*
[136] UNMIK: http://www.unmikonline.org/Pages/about.aspx (Accessed on 2012-04-11)
[137] *Cf.* UNSC res. 1244 *et alia*
[138] Ahtisaari Plan, §5
[139] Ibid., §15
[140] Assembly of the Republic of Kosovo: http://www.kuvendikosoves.org/common/docs/Dek_Pav_e.pdf (Accessed on 2012-04-10)
[141] S/PV.5839, p. 21

their support for Serbia's territorial integrity.[142] Yet, while several other States withheld their recognition of Kosovo for the time being, all of the speakers representing NATO as well as EU member States supported the unilateral declaration of independence, with France's representative claiming that recognition by a majority of the EU partners was expected in the weeks to come.[143]

In an attempt to clarify the legality of Kosovo's unilateral declaration of independence, the UNGA asked the ICJ for an advisory opinion on the matter, which it delivered on 22 July 2010. The question posed by the UNGA was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" In response, the ICJ immediately noted that the question does not concern Kosovo's statehood but rather the immediate legality of the unilateral declaration of independence.[144] The ICJ established that there is no general prohibition of unilateral declarations of independence in international law due to e.g. the territorial integrity of a State.[145] The ICJ furthermore stated that resolution 1244 did not pose a hindrance to the unilateral declaration of independence, since it never decided on a final status for Kosovo.[146] Likewise, the Court found that UNMIK's Constitutional Framework did not bind the authors of the unilateral declaration of independence, since at that time they did not act in the capacity of members of the Assembly of Kosovo.[147] While an interesting statement on the nature of unilateral declarations of independence, the advisory opinion says nothing about the statehood of Kosovo, and as such is of limited relevance to this thesis.

4.1.1.3 Current Situation

As explained above, UNMIK's mandate according to UNSC resolution 1244 is active to this day. Kosovo is thus officially still under UN administration, and although the country is partly run by its own institutions, chief of which being the Assembly of Kosovo, the continued presence of UN and EU organisations with substantial administrative power begs the question whether or not Kosovo is effectively independent.[148]

As far as concerns the international community, opinions on Kosovo's *de jure* statehood are split down the middle. Ninety UN member States, i.e. 46.6% of all UN member States, currently recognise Kosovo as a sovereign State. Furthermore, 81% of all EU member States, i.e. twenty-two States, and 86% of all NATO member States, i.e. twenty-four States, have

[142] S/PV.5839, pp. 6 *ff.*
[143] Ibid., p. 19
[144] Kosovo Case, §§49-51
[145] Ibid., §84
[146] Ibid., §119
[147] Ibid., §121
[148] Jaber (2011), p. 942

recognised Kosovo.[149] The latest in the row of UN member States to recognise Kosovo is Brunei, with recognition issued on 25 April 2012.[150]

Kosovo is furthermore a member of several international organisations, most notably the World Bank and the International Monetary Fund.[151] While such membership does attest to the fact that Kosovo has attained statehood in the eyes of many of the international community, Kosovo has yet to be admitted to the UN, generally considered the 'birth certificate' of a State. Such admittance is moreover highly unlikely, due to the continued opposition to Kosovo's independence by Russia and China, both permanent members of the UNSC.

4.1.2 Legal Analysis

As has been shown throughout this thesis, examples of States that have managed to achieve successful secession – through prevailing in military conflict or through the cessation of it being subject to unlawful foreign occupation – as well as general *de jure* recognition are rare. Since the end of the Second World War, only a handful of modern States have been established through such a process. Apart from the hitherto discussed Bangladesh (1971) and the Yugoslav constituent republics (1991-1992), arguably only Eritrea (1993) and East Timor (2002) have managed such a feat.[152] While Kosovo, following its oppression at the hands of its Serbian sovereign, similarly to East Timor was placed under UN administration, there the similarities end. Neither a non-self-governing territory nor a territory with a constitutional right to secede, Kosovo's legal claim to independence is tenuous at best.

To begin with, in the absence of a UNSC resolution endorsing the Ahtisaari Plan and thus legitimising the current 'final status' of Kosovo brought on by its unilateral declaration of independence, resolution 1244 – and UNMIK's mandate – remains in force.[153] Obviously, such a resolution is not to be expected, due to Russia's and China's adamant opposition to Kosovo's independence. This casts doubt on Kosovo's *de facto* independence, now and at the time of its recognition. External sovereignty, or independence, by its very definition means that international organisations require a State's authorisation to operate on its territory. This can be inferred from various authors of doctrine – most prominently from Crawford, as held in chapter 3.1.1 – as well as from major tenets of international law, e.g. the principle of non-intervention. However, State authorisation is evidently not present *inter alia* in the case of UNMIK, which as mentioned bases its mandate in UNSC resolution 1244.[154]

[149] *Cf*. Kosovo Thanks You: http://www.kosovothanksyou.com/ (Accessed on 2012-05-09)
[150] Ibid.: http://www.kosovothanksyou.com/news/?p=699 (Accessed on 2012-05-09)
[151] Ibid.: http://www.kosovothanksyou.com/organizations/ (Accessed on 2012-04-14)
[152] Geldenhuys (2009), p. 38
[153] Muharremi (2008), p. 413
[154] Ibid., p. 430

Hence, while Kosovo may claim to fulfil some of the criteria of the Montevideo Convention, as explained in chapter 3.1, the essential aspect of independent statehood remains absent in this case. In other words, Kosovo lacks State sovereignty, an essential element of an independent government with the capacity to enter into relations with other States. Claims of independence and territorial sovereignty are furthermore challenged by the fact that the Assembly of Kosovo is not in control of the northern part of its purported territory, which is inhabited by a majority of Kosovar Serbs loyal to Belgrade.[155]

Proponents of Kosovo's independence argue that the right to self-determination of a people entails the right of that people to secede from an oppressive sovereign.[156] They claim that continuous Serbian oppression from the 1912 occupation until the establishment of the UNMIK mandate in 1999 constitutes such oppression, and that the UNSC has acted with a mind to restoring "earned sovereignty" to the Kosovar Albanians.[157] While this investigation has shown that a right to remedial secession may exist in extreme circumstances, the above-mentioned interpretation of the right to self-determination clearly goes too far. Furthermore, claiming that resolution 1244 abolished Serbian sovereignty is simply untrue, as evidenced by the preamble of the very same resolution, which "[reaffirmed] the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2 […]."[158]

Another interesting aspect of the problem concerns the question regarding which 'people' has a right to self-determination in this case. Is it the Kosovar people as a whole? Alternatively, is it the Kosovar Albanians, constituting approximately 90% of the population – as has usually been claimed in existing literature?[159] In connection to this investigation, it is interesting to note the emphasis on the Kosovar Albanians as the recipients of such a right, since they, while constituting a majority in the province of Kosovo, are a minority in Serbia. This once more highlights the difficulty in classifying minorities, in contrast to 'peoples': according to one's perspective, the definition may change.

The main argument for Kosovo's independence seems to be that reintegration into Serbia is impossible due to the region's history of ethnic cleansing and mutual antagonism between the two ethnic groups, as held by both the Ahtisaari Plan and proponents of independence speaking during the UNSC meeting following the unilateral declaration of independence.[160] The combination of a right to self-determination of the Kosovar Albanians on one hand, and the effective government of the region on the other, is indeed

[155] Fabry (2010), p. 180
[156] Reka (2003), p. 46
[157] Williams & Ober (2006), p. 110
[158] UNSC res. 1244, preamble
[159] Muharremi (2008), pp. 417 *f.*
[160] Ahtisaari Plan, §7 ; *Cf.* S/PV.5839, p. 13

a compelling one. To be sure, *de facto* Serbian territorial integrity concerning Kosovo was non-existent at the time of Kosovo's unilateral declaration of independence, since the region had been administrated by UNMIK since 1999.[161] On the other hand, today's Serbian government seems willing to grant Kosovo widespread autonomy as well as to safeguard minority protection.[162] In accordance with the proposed remedial right to secession originally inferred by the 'safeguard clause' of the FRD (*cf.* chapter 2.1.2), this would guarantee the Kosovar Albanians' right to internal self-determination and thus preclude any claim to external self-determination

Furthermore, contrary to claims by Ahtisaari and many others, Kosovo cannot be considered *sui generis* (i.e. unique and not to be regarded as a precedent) and the reason is simple: every case of unilateral declaration of independence and subsequent attempt at secession has been unique; this renders moot any claim on Kosovo's part as being regarded as a one-time occurrence.[163] This simple fact means that, contrary to Western insistence, Kosovo does indeed constitute a precedent in international law. This once again brings to mind the prophetic claim by *inter alia* Cassese that indiscriminately granting the right to self-determination to ethnic minorities will fragment existing States and cause widespread instability and threats to the peace.[164]

Western recognition of Kosovo's independence was indeed soon followed by Russian recognition of the Georgian breakaway republics Abkhazia and South Ossetia, which will be discussed in chapter 4.2.[165] It is certainly apparent that the partial recognition of Kosovo and subsequent partial recognition of Abkhazia and South Ossetia has contributed to a lasting confusion concerning State recognition,[166] once more highlighting the problems inherent to the constitutive theory. From the fact that mostly Western States have recognised Kosovo, it is furthermore clear that political expedience is a central factor in the context.[167]

4.2 Abkhazia and South Ossetia

Contrary to Kosovo, which has received widespread international recognition, the Georgian breakaway republics of Abkhazia and South Ossetia, respectively, have not fared as well in establishing their independent States. This section will analyse each of the situations individually and attempt to reach a conclusion as to why these entities have been denied external self-determination.

[161] McCorquodale & Hausler (2010), p. 39
[162] Muharremi (2008), p. 421
[163] McCorquodale & Hausler (2010), p. 39; Stepanova (2008), p. 1
[164] Cassese (2005), p. 63; Jaber (2011), p. 942
[165] Nicoll (2008), p. 1
[166] Fabry (2010), p. 207
[167] Hehir (2009), p. 96

4.2.1 Abkhazia

4.2.1.1 Historical Background

Abkhazia's international status has varied greatly throughout its long history. Historically, the region has gone from forming part of the Byzantium Empire in the 4th to 6th centuries, to establishing the Abkhazian Kingdom in the 780s, to becoming a subject of feudal Georgia in the 10th century, to falling under Turkish dominion in the 16th century, to forming an independent principality in the 17th century. In 1810, the region came under Russian rule, a fate similarly met by Georgia in 1864, once again merging the destinies of the two countries.[168]

It was during this era of common Russian dominion that the seeds to the conflict still raging today were sown. In the wake of the October Revolution in tsarist Russia, the Abkhazian Soviet Republic was established in March of 1921. In December of that year the Abkhazian and Georgian republics entered into a "contract of alliance" proffering their joint entrance into the USSR, with Abkhazia officially retaining the status of union republic. This status was later enshrined in the Abkhazian constitution of April 1925. Under Stalinist rule, Abkhazian status was encroached upon in favour of that of Georgia, and in retrospect the period between March and December of 1921 was to be the hitherto last where Abkhazia constituted a sovereign State.[169] In 1931, the republic was reduced to the status of autonomous Georgian province, followed by massive resettlements of Georgians to the region from 1937 and onwards, with further discrimination against native Abkhaz to follow. The results of this would show in the 1990s, when Abkhaz constituted a mere 18% of the area's population, while Georgians comprised 46%.[170] Abkhaz historians see the deteriorating status of Abkhazia in favour of that of Georgia not as a Soviet, but as a Georgian policy, since Stalin was Georgian by birth.[171]

Throughout the 1970s and 80s, calls for Abkhazian secession from Georgia increased, and in response to Georgian nationalism in the period leading up to the dissolution of the USSR, the Abkhazian Supreme Soviet asserted its independent status on 25 August 1990, a move that was declared illegal by Georgia the following day. Instead, upon the definite collapse of the USSR, Georgia declared its own independence, and on 26 June 1992 reinstated its 1921 constitution, according to which Abkhazia was not afforded any special status. When an Abkhazian draft treaty proffering federative/confederative relations, while maintaining Georgia's territorial integrity, went ignored by the Georgian State Council, Abkhazia reinstated its above-mentioned 1925 constitution on 23 July 1992.[172] This move

[168] Potier (2001), p. 8
[169] Geldenhuys (2009), p. 70
[170] Potier (2001), p. 9; Raič (2002), p. 379
[171] IIFFMCG, Vol. II, p. 67
[172] Potier (2001), pp. 10 *ff.*

essentially constituted a unilateral declaration of independence.[173] The subsequent diplomatic talks broke down when, on 14 August, the Georgian government sent troops to the region, initiating a long-lived military conflict. Notably, in the early days of the conflict, Georgian forces destroyed 95% of Abkhazia's national records and made threats aimed at Abkhaz genocide.[174] On 30 September 1993, Abkhaz separatists and their allies had all but expelled the Georgian military forces from the region. At this point, more than 250,000 people, mostly ethnic Georgians, had fled from Abkhazia,[175] effectively halving its pre-war population.[176]

4.2.1.2 Response by the International Community

In 1993, when it was clear that the conflict between the central Georgian government and the *de facto* independent Abkhazian territory was not going to resolve itself, international efforts to bring the conflict to a close increased.[177] The UNSC took action, and from July 1993 until the present day has passed over forty resolutions on the matter. These resolutions, while encouraging peace talks and urging the return of refugees – or internally displaced persons, if one argues that Georgia remains a territorially intact unit – mainly focus on the United Nations Observer Mission in Georgia (UNOMIG). UNOMIG's mandate was established through UNSC resolution 858, adopted on 24 August 1993.[178] It was prolonged through numerous subsequent resolutions, and ultimately came to an end in June 2009 due to a lack of consensus on the part of the permanent members of the UNSC.[179]

Throughout its resolutions on the matter, the UNSC has maintained its outspoken support for Georgia's territorial integrity and the right of refugees/internally displaced persons to return home.[180] This supports the view of the international community that Abkhazia does not constitute a sovereign State and furthermore possesses no right to establish one on grounds of self-determination.

European States, through the OSCE, contributed from 1994 and onwards to the UN's attempts to resolve the conflict, primarily through humanitarian efforts.[181] Among the European States, Russia is by far the most involved in the conflict. Not only did Russian troops aid UNOMIG in maintaining order in the region throughout the continuation of its mandate; the Russian government furthermore attempted to settle the conflict through mediation. Russia's diplomatic efforts eventually resulted in the Declaration on

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[173] Geldenhuys (2009), p. 72
[174] de Waal (2010), p. 161
[175] Potier (2001), p. 122; Cooley & Mitchell (2010), p. 76
[176] Geldenhuys (2009), p. 73
[177] Raič (2002), pp. 380 *f.*
[178] UNSC res. 858
[179] United Nations Observer Mission in Georgia: http://www.un.org/en/peacekeeping/missions/past/unomig/ (Accessed on 2012-03-23)
[180] Raič (2002), p. 419 ; *Cf.* UNSC res. 993 *et alia*
[181] OSCE Mission to Georgia (Closed): http://www.osce.org/georgia-closed/44629 (Accessed on 2012-03-26)

Measures for a Political Settlement of the Georgian/Abkhaz Conflict, hereafter the Moscow Agreement, signed on 4 April 1994. The Moscow Agreement entailed a commitment by both sides to a formal cease-fire as well as a quadripartite agreement on the return of refugees/internally displaced persons,[182] and was subsequently referred to by the UNSC in many of its following resolutions.

However, for political reasons Russia's stance on the Abkhazian question has shifted over the years. Once supporting the territorial integrity of Georgia due to its concerns regarding secession by the Russian province Chechnya, Russia increasingly strengthened its ties to Abkhazia at the expense of its relations with Georgia. Russian antagonism towards Georgia mounted following Georgian application to NATO, and climaxed after the 2003 Rose Revolution, with the election of Georgian nationalist Saakashvili as President in January of 2004, whose politics alienated non-Georgian ethnic groups and further estranged Abkhazia from its erstwhile sovereign.[183]

Tensions eventually resulted in Russian intervention in the South Ossetia War of August 2008. Concerning Abkhazia, the outcome of this conflict saw Abkhaz forces in control of the entirety of Abkhazia's claimed territory, and marked the end of its already half-hearted attempts at political settlement with Georgia, as well as the beginning of its existence as a fledgling *de facto* sovereign State seeking recognition by other States, with very close ties to Russia.[184]

Following the end of the 2008 war, the Council of the European Union initiated the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), which marked the first time that the EU actively intervened in a serious armed conflict. While ostensibly non-politicised and fact-oriented, the IIFFMCG did provide a rather brazen legal commentary on the case. While objectively fulfilling the Montevideo criteria and thus qualifying as a "state-like entity", the IIFFMCG maintains that the process through which Abkhazia has built its State is illegitimate, primarily due to the many internally displaced persons still estranged from their homes.[185]

Centrally, the IIFFMCG claims that self-determination does not entail a right to secession. Moreover, it maintains that while Abkhazia's internal self-determination was frustrated following Georgia's independence, the extraordinary circumstances where secession nevertheless might be permitted were not present in the case of Abkhazia.[186]

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[182] Moscow Agreement, §§3-4
[183] Nicoll (2008), p. 2; de Waal (2010), pp. 194 *ff.*
[184] The Ministry of Foreign Affairs, Republic of Abkhazia: http://www.mfaabkhazia.net/en/node/346 (Accessed on 2012-03-23)
[185] IIFFMCG, Vol. II, pp. 134 *f.*
[186] Ibid., Vol. II, pp. 146 *f.*

4.2.1.3 Current Situation

Prior to the 2008 conflict, Abkhazia's future appeared very uncertain, but there still seemed to be many ways in which the conflict between the secessionist entity and the internationally recognised State of Georgia might be resolved. For example, in connection with the expected unilateral declaration of independence of Kosovo, Abkhaz officials stated in 2006 that they too were ready to become a protectorate under international administration, i.e. under the EU, and that currently they were better fitted to handle independence than their Balkan counterparts were.[187]

Today Abkhazia is dominated by Russia to a far greater extent than it was before the 2008 conflict. Russian economic, political and military influence in the region is undeniable, and many Abkhaz use Russian passports, out of necessity or otherwise.[188] While Russian intervention in the South Ossetia War alleviated Abkhaz fears of Georgian reconquest, it simultaneously weakened Abkhazia's claim to sovereignty.[189] Indeed, this extreme reliance on Russia is doubtlessly one of the main reasons why the international community refuses to acknowledge Abkhazia's would-be sovereign independence.

Consequently, Abkhazia's main challenge currently consists in enlisting international recognition. To date, a mere six UN member States recognise Abkhazia, namely Russia, Nicaragua, Venezuela, Nauru, Vanuatu, and Tuvalu. Tuvalu, the latest to do so, established diplomatic relations with Abkhazia on 20 September 2011.[190] The West has criticised these recognitions for having been bought through checkbook diplomacy with Russian economic aid to the recognising States, illustrating the problems with indiscriminate State recognition.[191] The latest statement by Western powers on Abkhazian matters concerned the 2012 parliamentary elections, which were criticised by among others NATO, the US Department of State, and the US Embassy in Georgia.[192]

4.2.2 South Ossetia

4.2.2.1 Historical Background

Ossetians originally settled the Caucasus over 5,000 years ago, but their arrival in what is today South Ossetia occurred only following Mongol invasions in the 13th century, prompting a modern debate of ethnogenesis.[193] In any event, due to this, there exist today two Ossetian regions: South

[187] Popescu (2007), p. 18
[188] Cooley & Mitchell (2010), p. 77
[189] de Waal (2010), p. 215
[190] The Ministry of Foreign Affairs, Republic of Abkhazia: http://www.mfaabkhazia.net/en/node/1082 (Accessed on 2012-03-23)
[191] Madsen (2012), paragraph 3
[192] The Ministry of Foreign Affairs, Republic of Abkhazia: http://www.mfaabkhazia.net/en/node/1316 (Accessed on 2012-03-23)
[193] Geldenhuys (2009), p. 79

Ossetia, which is internationally considered a Georgian province; and North Ossetia, which is a federal subject of Russia. Consequently, while Ossetians would generally correspond to the notion of the relevant 'people' in question, South Ossetians may also meet this definition.

Similarly to Abkhazia, South Ossetia was incorporated into the Russian Empire at the turn of the 19th century, earlier than, and independently of, Georgia.[194] Following the October Revolution and the breakdown of the Russian Empire, the Georgian Menshevik government faced opposition by South Ossetian Bolsheviks, who fought for independence from Georgia.[195] Initially outnumbered, the Bolsheviks were ultimately successful when the Georgian Soviet Socialist Republic was formed on 20 April 1922, with South Ossetia as one of its semi-autonomous areas.[196]

As has been discussed, nationalist feeling surged throughout the USSR nearing its collapse. In South Ossetia, these feelings materialised in calls for full autonomy, equal to that of Abkhazia, in 1989. The Georgian government, experiencing a similar surge of nationalism, dismissed this notion. Following further restrictions by the Georgian government, South Ossetia declared its independence from Georgia (while initially remaining part of the USSR) in September of 1990, which prompted Georgia to strip South Ossetia of its autonomy altogether in December that year.[197] This initiated a military conflict, which was finally halted by the signing of the Russian-brokered Sochi Agreement in 1992, according to the conditions of which international peacekeepers were stationed in the region and all further aggression was to be abstained from. When the treaty was signed, some 60,000 people had already fled their homes, and South Ossetians were in *de facto* control of much of the province. [198]

4.2.2.2 Response by the International Community

Georgia's conflict with South Ossetia differs from that with Abkhazia, and the international community's approach differs accordingly. While there is no dearth of resolutions adopted by the UNSC on the situation in Abkhazia, none has been issued on South Ossetia. Accordingly, UNOMIG focused on Abkhazia throughout its mandate.[199] It is probable that the UNSC's passivity concerning South Ossetia was due to the relatively non-violent nature of that conflict in comparison to that of Abkhazia. In any event, South Ossetia's political status became a regional matter, wherein Russia and the OSCE, and later the EU, involved themselves.

The 1992 Sochi Agreement was later supported by the OSCE, which sent observers to monitor the situation on the ground, and from 1995 onwards

[194] IIFFMCG, Vol. II, p. 69
[195] Geldenhuys (2009), p. 80
[196] Potier (2001), pp. 12 *f.*
[197] Ibid., pp. 13 *f.* ; McCorquodale & Hausler (2010), p. 35
[198] Waters (2010), p. 10
[199] *Cf.* United Nations Observer Mission in Georgia: http://unomig.org/glance/role/ (Accessed on 2012-03-28)

partook in negotiations with the goal of finding a final solution to the conflict.[200] Involvement by the EU as an institution has mainly striven towards enabling a lasting political solution, through strengthening democratic values in Georgia, and thus to make reintegration seem like a more viable option to South Ossetians.[201]

After the Sochi Agreement, a decade of relative calm passed without any changes in the *status quo*. South Ossetians, like their Abkhaz counterparts, looked increasingly towards Russia for protection, and popular opinion seemed to favour union with North Ossetia and subsequent absorption into the Russian Federation, over reintegration with Georgia.[202] Indeed, by 2004, Russian citizenship was held by approximately 90% of all South Ossetians.[203] Indications such as this, of Russia's extreme patronage of the region, are regularly presented as evidence that South Ossetia, despite its official claim to State sovereignty, remains little but a Russian pawn.

Mounting tensions between Georgia and Russia culminated in the controversial South Ossetia War in August 2008. Though the conflict lasted only for just over one week and claimed relatively few casualties, it had considerable effects on the attitude towards Georgia, and international status, of both South Ossetia and Abkhazia. The EU-brokered cease-fire aspired to maintain international security, but notably made no reference to the preservation of Georgia's territorial integrity, and was shortly followed by Russian recognition of South Ossetian statehood.[204] South Ossetia, having already declared its independence after a referendum held in 2006, has since the war sought general international recognition of its cause.

The EU-initiated IIFFMCG found that South Ossetia fulfils the Montevideo criteria concerning territory and population, but questioned the existence of an independent, effective government. Illustrated by the fact that a majority of South Ossetians hold Russian citizenship, Russia's influence in the South Ossetian government is extensive and undermines any South Ossetian claim of sovereignty.[205] Indeed, unlike Abkhazia, South Ossetia had not unambiguously claimed statehood in the period leading up to the 2008 conflict, but considered integration into Russia just as viable an option.[206] In conclusion, the IIFFMCG finds that South Ossetia should be considered "an entity short of statehood".[207]

The IIFFMCG furthermore argues that while Ossetians constitute a 'people' according to international law and South Ossetians possess a right to internal self-determination, South Ossetia has never possessed a legal title to

[200] OSCE Mission to Georgia (closed): http://www.osce.org/georgia-closed/44630 (Accessed on 2012-03-28); Potier (2001), p. 133
[201] Popescu (2007), p. 8
[202] Potier (2001), p. 134; Waters (2010), p. 11
[203] Geldenhuys (2009), p. 82
[204] Ibid., p. 84
[205] IIFFMCG, Vol. II, pp. 130 *ff.*
[206] Ibid., Vol. II, p. 129
[207] Ibid., Vol. II, p. 134

secede from Georgia. Although Georgia's abolishment of its autonomous status temporarily restricted its ability to exercise its internal self-determination, this does not qualify South Ossetia for a right to remedial secession.[208]

4.2.2.3 Current Situation

Even before the 2008 conflict, the geopolitical conditions of South Ossetia made it abundantly clear that it has little choice but to be dominated by either Georgia or Russia. Its aversion towards Georgian hegemony means that, while it does not dismiss a move towards the EU, such a move will practically have to involve Russia.[209] Under such conditions, it is questionable whether or not South Ossetia fulfils the underlying independence criterion essential to being a sovereign State.

In other words, South Ossetia is reliant on Russia to an even greater degree than Abkhazia. Its miniscule population, fragmented administration, and weak economy furthermore weaken its case for functional statehood.[210] Like Abkhazia, its greatest challenge is now seeking international recognition. Five UN member States, the latest of which is Tuvalu, currently recognise South Ossetia.[211]

4.2.3 Legal Analysis

From this factual background on the Georgian breakaway republics, the investigation will now turn towards a legal analysis as to why statehood has been denied. Arguably, both the Abkhaz and the South Ossetians, while granted different degrees of autonomy, have since the early days of the USSR been externally identified as distinct peoples, and thus have a right to self-determination according to the UN Charter and subsequent international documents.[212]

Against the right to self-determination of the Abkhaz and the South Ossetians stands the territorial integrity of Georgia. The IIFFMCG and the general international community support the territorial integrity of Georgia, and maintain that in accordance with the principle of *uti possidetis juris* – applied by the Badinter Commission following the dissolution of the SFRY – its territorial sub-units do not have a right to secede.[213] It is worth mentioning that this view has been opposed on the account of *uti possidetis juris* being relevant only in a colonial context, leading one to question the EU's reliance on such a principle in this case.[214] Interestingly, arguing in favour of Georgia's territorial integrity, the IIFFMCG insists that Kosovo's

[208] IIFFMCG, Vol. II, pp. 144 *ff.*
[209] Popescu (2007), p. 19
[210] Geldenhuys (2009), pp. 85 *f.*
[211] Radio Free Europe: http://www.rferl.org/content/tuvalu_recognizes_abkhazia_south_ossetia/24338019.html (Accessed on 2012-04-09)
[212] McCorquodale & Hausler (2010), p. 40
[213] IIFFMCG, Vol. II, p. 143
[214] McCorquodale & Hausler (2010), p. 34

unilateral secession, which *prima facie* opposes their own reasoning, should be considered *sui generis* and not a precedent for other peoples aspiring to statehood to act upon.[215]

Both regions must be said to have been granted extensive internal self-determination up until the early 1990s, which means that they can be allowed external self-determination only under exceptional circumstances. Realisation of such external self-determination, through secession or otherwise, would in any event require the support of the people in question – including those internally displaced persons that would like to return to their former homes.[216] This obviously undermines Abkhazia's aspirations for *de jure* independence, since the return of the displaced ethnic Georgians to the territory would seriously impede the success of any representative referendum. To illustrate this fact, it is interesting to note that both Abkhazia's and South Ossetia's respective referenda for independence, in respectively 1999 and 2006, were boycotted by ethnic Georgians and therefore not internationally recognised.[217]

As in the case of Kosovo, the legitimate secession by Abkhazia and South Ossetia hinges on the condition that minorities may claim external self-determination through remedial secession, as was originally inferred by the 'safeguard clause' of the FRD in chapter 2.1.2 of this thesis. However, even provided that this is so, and even provided this right has somehow evolved to encompass all national minorities and not only racial or religious ones, it would appear that neither Abkhazia nor South Ossetia fulfils the basic prerequisite for the exercise of such a right. That is, neither people have had their internal self-determination continually and utterly frustrated.

Aside from occasional setbacks through military action on both sides, it seems clear that, ever since the 1994 Moscow Agreement, the Georgian government has been prepared to give the Abkhaz separatists numerous concessions in the realm of internal self-determination. Indeed, the Moscow Agreement itself states that Abkhazia shall have the right to its own constitution and legislation, as well as to its own flag and other State symbols.[218] In the absence of a solution, Georgia subsequently went so far as to offer Abkhazia such federal autonomy as to include foreign policy and a guarantee that federal legislation concerning Abkhazia would pass only with Abkhazian consent.[219] Indeed, in March 2008, mere months before the South Ossetia War, Saakashvili offered Abkhazia unlimited autonomy and wide federalism, under international guarantees.[220] Abkhazia's position remains firm, however: it has no intention of returning to Georgian sovereignty.

[215] IIFFMCG, Vol. II, pp. 139 *f.*
[216] McCorquodale & Hausler (2010), pp. 41 *ff.*
[217] Ibid., p. 36
[218] Moscow Agreement, §7
[219] Raič (2002), pp. 114 *ff.*
[220] Geldenhuys (2009), p. 78

Likewise, South Ossetia has received numerous offers of extensive autonomy from the Georgian government, for example in 2005 and 2009, guaranteeing political self-governance and preserved national identity.[221] This would seem to correspond to internal self-determination and would thus render any claims to external self-determination by the South Ossetians doomed to go unrecognised by the international community. On their part, the South Ossetians, jointly with their North Ossetian brethren, call for the right to a common, albeit delayed, expression of their self-determination – through unification. Such unification would almost certainly lead to the region's incorporation into the Russian Federation.[222]

In any event, the factual independence of both Abkhazia and South Ossetia is currently questionable. It has been argued that, regardless of whether or not the aspiring entities have fulfilled the *de facto* Montevideo criteria, as presented in chapter 3.1 of this thesis, they are in fact dominated by Russia and thus cannot be considered sovereign subjects of international law.[223] While one cannot go so far as to suggest that Abkhazia and South Ossetia are puppet States, it is generally agreed that Russia is their patron State, with both entities highly dependent on Russian economic and political policy – despite some recent, interesting but only temporarily effectual, setbacks for electoral candidates supported by Russia.[224] This fact definitely complicates both States' call for recognised sovereignty. After all, how can State sovereignty be recognised when one of its main components, independence, is arguably missing?

Other commentators include Raič, who defines Abkhazia's and South Ossetia's attempts at secession, absent fulfilment of the qualifying criteria, as "an abuse of right and a violation of the law of self-determination..." In his view, this is why these two fledgling States have not been generally recognised.[225] Fabry, on the other hand, makes an interesting point when he argues that it is contrary to international liberal thought to force groups, who have shown that they do not wish to co-exist, to do so. Consequently he proposes that a shift in international practice towards the recognition of *de facto* independent entities, claiming their sovereignty on grounds of self-determination, would be beneficial to the international community.[226]

[221] Geldenhuys (2009), p. 86
[222] Ibid., p. 87
[223] Fabry (2010), p. 180
[224] Geldenhuys (2009), p. 25; Mizrokhi (2012), paragraph 6-10, 12
[225] Raič (2002), p. 450
[226] Fabry (2010), p. 223

5 Conclusion

5.1 The Right to Self-Determination

5.1.1 Do National Minorities Have a Right to Self-Determination?

The main purpose of this thesis has been to investigate whether or not national minorities may be said to have a right to self-determination, and if so, to what extent. In so doing, the thesis has observed the principle of self-determination as it has evolved from a political principle of the late 18th and early 19th centuries into a legal principle valid *erga omnes*, considered by some to be *jus cogens*. As has been shown, the contents of the right to self-determination have evolved according to international law practice, in particular that of the UN. It is clear, however, that there is still much uncertainty as to who should have a right to self-determination and what this right should entail. This uncertainty is illustrated not least by the various commentaries on the recent secessions by the Serbian province of Kosovo and the Georgian provinces of Abkhazia and South Ossetia.

An uncontroversial aspect of the right to self-determination concerns the right of peoples to determine their own political status when suffering under colonialism or foreign occupation, i.e. the realisation of external self-determination through secession. Such a right of oppressed non-self-governing peoples has been established through several UN documents, chiefly the DGICCP of 1960 and the FRD of 1970, and has been confirmed through consistent ICJ practice, *inter alia* in the *Western Sahara Case*.

In cases other than these, however, the realisation of external self-determination has proven exceedingly rare, due to its diametrical opposition to the territorial integrity of States, a principle that has prevailed since the introduction of the Westphalian system. As far as groups not subjected to colonialism or foreign occupation are concerned, these are restricted to internal self-determination, i.e. governmental representation without, at the very least racial, discrimination. Indeed, when such groups have sought to determine their own political status at the expense of the territorial integrity of a State, recognition of the new unit has generally proved to be absent.

The right to self-determination has traditionally been accorded ‘peoples’, which begs the question whether or not minorities possess the right at all. The traditional distinction between the right of self-determination of peoples, and the less extensive minority rights, stems from a reading of Articles 1 and 27 of the ICCPR of 1966. However, as has been discussed throughout this thesis, the distinction between ‘people’ and minority, at least in the context of internal self-determination, is a vague one. This is mainly because all members of a people, i.e. the minority groups as well, possess

the right to non-discriminate governmental representation. International and national legal practice, e.g. in the case of the Quebecois, as well as doctrine, support this fact. This leads to the conclusion that the ICCPR division is obsolete, at least as concerns the internal aspect of the right to self-determination. External self-determination through unilateral secession, on the other hand, has consistently been denied those groups seeking it outside the context of colonialism or hostile occupation – with the noteworthy exceptions of Bangladesh in 1971, Eritrea in 1993, and, as this thesis would argue, the constituent republics of the former SFRY.

Indeed, external self-determination remains a goal that few, if any, minority groups will ever attain. While secession is not illegal *per se*, the legal grounds for a realisation of external self-determination for a minority group hinges on the as of yet uncertain exception of remedial secession, first established *e contrario* through the 'safeguard clause' of the FRD and later expanded by the Vienna Declaration. However, both the UN and the OSCE (through the Helsinki Final Act and the Paris Charter) have consistently upheld the territorial integrity of States while issuing their respective documents; documents that still today are highly influential. It is therefore safe to say that international *lex lata* does not support such a remedial right, despite recent developments. Furthermore, the existence of this remedial right presupposes absolute frustration of internal self-determination, which is hardly ever the case.

In conclusion, national minorities have a right to internal self-determination, but lack a general right to external self-determination. While recent developments, i.e. the Kosovo secession, intimates an increasingly lenient stance of the international community on the external self-determination of minorities, modern international law does not as of yet grant this right.

5.1.2 Did Kosovo, Abkhazia, and South Ossetia Have a Right to Secede?

While it should once again be stressed that secession *per se* is not illegal, it is an obvious fact that a territorial unit that unilaterally secedes from its recognised sovereign stands little or no chance of being accepted into the international community. The right to secede in this context thus refers to the right to secede on grounds of external self-determination, which would render the legitimacy of the previous sovereign null and void.

Since no general right to external self-determination exists for national minorities such as the Kosovar Albanians, the Abkhaz, and the South Ossetians, the short answer to this query would be in the negative. No extent of political rhetoric labelling these groups as 'peoples' rather than minorities will change this fact. The only legal recourse these groups have is to that of an inferred right to remedial secession due to denied internal self-determination. As explained above, however, the existence of this right is highly questionable, due to the international community's continued and consistent support for the principle of territorial integrity.

Furthermore, even if legal recourse to a remedial right to secession could be found under some extreme circumstances, as has been argued for example in the Kosovo case, doubt still remains as to who the recipients of this right would be. Should this right be granted exclusively to the Kosovar Albanians? Would that then not wrong the Kosovar Serbs? In Abkhazia and South Ossetia, this problem becomes even more complex, primarily due to the absence of caucuses representative of the entire populations of these territories – including the ethnic Georgians displaced by the military conflicts. Indeed, in Abkhazia, the return of these ethnic Georgians would render the Abkhaz a minority in their own territory, severely limiting the success of any representative caucus.

In any event, while these three groups have all suffered at the hands of their sovereigns in the past, this investigation has shown that all of these groups were offered substantial autonomy and internal self-determination in the immediate period before their respective secessions, and that they chose to turn down these offers in pursuit of sovereign independence. While this course of action is highly understandable given the historical background of the conflicts, the fact remains that this effectively renders the argument of remedial secession void, since the internal self-determination of these groups has not continuously been utterly frustrated, and since international *lex lata* does not allow for unilateral secession on grounds of self-determination.

Furthermore, one cannot claim that State practice (especially concerning Kosovo) has altered international conventions, decades old, in the short period that has passed since the unilateral declarations of independence discussed. On the other hand, claiming that Kosovo's secession is *sui generis* and therefore does not qualify as a precedent is equally naïve. While there are further complications with Abkhazia's and South Ossetia's claims for independence, such as their extreme reliance on Russia and the lack of representative caucuses, common to all three of these cases is the absence of the complete frustration of internal self-determination necessary for a remedial right to external self-determination through secession. Consequently, this thesis would hold that, according to international *lex lata*, neither Kosovo, nor Abkhazia, nor South Ossetia had a right to secede based on self-determination.

Finally, a few words may be offered on *lex ferenda* in this matter. Should national minorities such as the Kosovar Albanians, the Abkhaz, the South Ossetians, and various others be granted the right to external self-determination in international law? As was claimed by Ahtisaari in the Kosovo context, peaceful co-existence of mutually opposed ethnic groups with common histories filled with exceeding strife and tragedy seems an unlikely option. However, one must be aware of the inherent injustice in granting one ethnic group this right while denying it to countless others by referring to that one case as being *sui generis*. In other words, if Kosovo (or for that matter Abkhazia or South Ossetia) is to be accorded external self-

determination by the international community on grounds of ethnic oppression and the non-viability of co-existence, similar attention must be given to the plethora of other self-determination movements around the globe, e.g. the Chechens, the Kashmiri, the Kurds, the Tibetans, *et alia*. International law cannot, and indeed must not, treat similar cases differently.

5.2 State Recognition

5.2.1 Is State Recognition an Essential Aspect of Statehood?

As a topic related to the realisation of external self-determination of national minorities, this thesis has investigated the importance of State recognition in international law, both as it is mentioned in the fundamental legal instruments and through an analysis of State practice. The position adopted by most commentators is that of the declaratory theory, i.e. that the factual existence of the traditional criteria set by the 1933 Montevideo Convention should be the ones to determine the existence of a State, and that recognition by other States merely constitutes a political action. This mindset ensures a separation of international law and international politics, and allows self-determination units to establish statehood without foreign interference.

However, it is a fact that since the establishment of the UN, no newly established State has been granted membership – today generally considered the birth certificate of a State – prior to its recognition by its parent State, i.e. its former sovereign. This is only natural, seeing how the UN is an organisation comprised of States interested in maintaining good inter-State relations. Proponents of the constitutive theory, advocating the constitutive effect of State recognition on statehood, similarly explains that absence of recognition does not deprive an entity of its aspired statehood, but only of its international legal personality. While this legal philosophical argument is somewhat complex, since statehood and international legal personality would seem to be mutually inclusive, one may conclude that State recognition is not a *de jure* essential aspect of statehood, especially since it is not included amongst the Montevideo criteria, but is regulated separately.

Consequently, while neither Kosovo nor Abkhazia and South Ossetia have received general recognition by the international community, many would consider them *de facto* States. While this thesis questions the independence of any of these entities and hence their ability to constitute sovereign States, it remains a fact that they do not require UN membership to function as such. However, it is also a fact that entities seeking statehood will find it difficult to be accepted into the international community without State recognition. While the declaratory theory and the Montevideo criteria postulate that the sovereignty of a State need not be recognised in order to exist, the ability of one State to enter into relations with another State in practice naturally requires recognition by that other State.

In conclusion, the question of whether State recognition is an essential aspect of statehood may be answered differently depending on the context. The objective existence of a State, i.e. an entity's basic possession of statehood, is not legally dependent on State recognition; however, for the exercise of that statehood in matters pertaining to other States, State recognition is indispensable.

5.2.2 What is the Determinative Effect of State Recognition on International Law?

Finally, this thesis turns to the determinative effect of State recognition on international law. As has been remarked upon, on numerous occasions throughout this investigation, the international community have not always awaited the fulfilment of the Montevideo criteria before granting recognition. This holds true particularly when States have a political interest in the aspiring entity attaining statehood, as when India recognised Bangladesh (prior to the surrender of Pakistani forces) and when Turkey recognised the Turkish Republic of Northern Cyprus. Admittedly, in none of these cases did unilateral State recognition have any effect on the actions taken by the rest of the international community.

Following the dissolution of the SFRY, however, the conditional recognition offered by Western powers to the seceding entities in some cases came prior to the establishment of an effective government in control over the territory to which it laid claim. Indeed, some hold that Bosnia-Herzegovina today still functions mainly thanks to international administration; nevertheless, hardly anyone objects to it being a State part of the international community. Furthermore, so is Somalia, despite it not having had an effective government since 1991. Somaliland, on the other hand, fulfils all of the Montevideo criteria yet remains unrecognised. Hence, one may glean a determinative effect of State recognition on international law, in its remedial effect on entities not fulfilling the legal criteria for statehood still being treated as States.

The case studies for this thesis, Kosovo on the one hand, and Abkhazia with South Ossetia on the other, similarly attest to this effect of State recognition. Though, as this thesis argues, none of the entities had a right to secede on grounds of self-determination, Kosovo has received vastly greater recognition by the international community. Neither Kosovo nor Abkhazia and South Ossetia are likely to be accepted as UN members in the near future, due to opposition by permanent members of the UNSC. Nevertheless, the recognition of Kosovo by almost half of all UN member States has legitimised Kosovo's bid for sovereignty in a way that has been denied Abkhazia and South Ossetia, and has enabled it to join prestigious international organisations.

This great discrepancy in the number of States that have recognised the different entities is made possible by the virtually unlimited discretion States possess in recognising the legal personality of other States. This

discretion stems from State recognition being a political – not a legal – act, and is not bad *per se*. After all, since recognition of new entities is not legally mandatory, sovereign States should be allowed themselves to decide which other States they consider to meet the – admittedly somewhat unclear – standards of the international community. Problems arise when States use their political and economic power, i.e. checkbook diplomacy, to influence other States to recognise new entities that do not meet the legal criteria for self-determination and/or statehood, the legitimacy of which they believe may serve their own political agendas. It is hardly a coincidence that an overwhelming majority of NATO member States recognise Kosovo; nor is it a coincidence that exclusively States, which have received offers of Russian economic aid, i.e. Nauru, Vanuatu, and Tuvalu, recognise Abkhazia and South Ossetia. The spheres of international politics and international law inexorably overlap.

In conclusion, to what extent does State recognition possess the ability to influence international law? In a perfect world, State recognition would be collective and absolute, and follow automatically when States are established on clear, universal legal principles. When international law is uncertain, however, as in the case of self-determination, State recognition may play a formative role. At present, almost half of all UN States recognise Kosovo, which means that State recognition is hardly clarifying on the matter of whether or not Kosovo is to be considered a State in accordance with international law. However, if recognition of Kosovo continues to grow, State recognition might perhaps facilitate the formation of new international legal rules concerning self-determination. If Kosovo's secession is eventually considered justified by all, this may bring about a fundamental change in national minorities' right to self-determination – claims of Kosovo being *sui generis* notwithstanding.

The implications for international law, not to mention the stability of the international community, are staggering. Will the coming years prove Robert Lansing correct? Alternatively, will the international community answer the calls for sovereign independence of those national minorities who claim it, while avoiding fractiousness and global instability? Is such a thing even possible?

Supplement: Regional Maps

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