

A Right to Remedial Secession?

The Case of Kosovo and its Implications for International Law



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1 Introduction

1.1 Background

The inspiration for this thesis is taken from the pending advisory opinion at the International Court of Justice (ICJ) concerning the declaration of independence issued by the authorities of Kosovo on February 17 2008. On 8 October 2008, the United Nations General Assembly (UNGA/GA) requested the Court to answer the following question:

Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

Although the question is narrowly framed, and the question of remedial secession is therefore not the primary focus for the ICJ, it was addressed by a significant number of states in their oral proceedings (OP,) written statements (WS,) and written comments to other statements (WC) before the Court.

1.2 Presentation of the legal question

This thesis addresses two separate questions:

1. If there existed a right to remedial secession in 2008, did the people¹ of Kosovo have this right when they declared independence? In other words, did the people of Kosovo satisfy the criteria for establishing their own state on part Serbia's territory without Serbian consent? This question is addressed in Chapter 3.
2. If there did not exist a right to remedial secession before 2008, has the case of Kosovo, including the proceedings before the ICJ, contributed to the development of such a right in customary international law? This is addressed in Chapter 4.

¹ The question of what constitutes a people is not considered. It will be assumed that the Kosovars constitute a "people."

1.3 What this thesis does *not* concern

This thesis does not attempt to predict the conclusion of ICJs opinion. Most fundamentally, the ICJ was only directly asked about the legality of the declaration of independence issued by the authorities of Kosovo. It is therefore not certain that the Court will address the question of remedial secession at all.

Even if the Court were to address the question, it may decide to do so through arguments not considered in this thesis. This thesis only considers the right to remedial secession in general international law. It therefore does not consider obligations or other legal consequences stemming from United Nations Security Council (UNSC/SC) Resolution 1244, and offers no interpretation of this document.

1.4 The proceedings before the ICJ

43 states, plus the authorities of Kosovo, participated in the proceedings. Of these, 27 supported Kosovo, 16 opposed independence, while the submission of Egypt did not conclude on this question.²

24 states plus Kosovo addressed the question of remedial secession. 14 delegations argued in favour of such a right, while 11 opposed that a right to remedial secession exists in international law.

These numbers will be relied on in the following. They are however based on my own assessment, and are open to judgement. Some of the statements are very unclear, particularly as regards the right to remedial secession. As it is hard to believe that states have not prepared their statements with great care, these unclarities are most likely deliberate, so as not to commit too strongly to any certain position.

² See annex

1.5 Legal significance

The answer to these questions, and in particular to question one above, is of course firstly important for Kosovo. As will become evident however, Kosovo has already been recognised as an independent state by a significant number of states. Their process towards independence is therefore arguably likely to proceed independent of any legal entitlement, instead dependent on de facto recognition and efficiency.

The greatest significance therefore concerns other situations than Kosovo. Many states have “peoples” within their borders wanting to secede, the Basques of Spain and France and the inhabitants of South Ossetia and Abkhazia in Georgia only being two prominent examples. For such groups, and for their parent states, the extent of a right to secession is of vital importance.

It may be asked what significance this thesis may have considering an opinion of the Court will be given within the next few months.

Firstly, the Court's jurisdiction is only advisory. As will be expanded upon below, such advisory opinions have no binding effect in international law. Secondly, the Court was not directly asked about the right to remedial secession. Any remarks on this point will therefore be in the form of an obiter dictum, that at least according to traditional legal theory carry less weight than the ratio decidendi.³ Thirdly, the Court will only have to consider sources up to Kosovo's declaration of independence. They will therefore most likely not consider the arguments of the states before the Court as evidence of customary international law.

Chapter 4 will show that the ICJ case for this reason is important on its own merits. Here states for the first time argued coherently their view of international law, or at least how they want the law to be. Customary international law is created through the practice of states, together with the belief that this practice constitutes the law (*opinio juris*). By

³ In the Norwegian context, see Eckhoff p.171-175

constituting these two components, the proceedings arguably have potential in themselves to change the law.

1.6 Arguments employed

This dual nature of the statements before the Court, being both arguments and determinants of international law, creates a certain challenge of presentation. However, when analyzing whether Kosovo had a right to remedial secession in 2008, the statements of various states in 2009 can naturally not in themselves be considered as having contributed to international law.

For this reason chapter 2, which analyzes the right to remedial secession as it existed in 2008, excludes the arguments of states from consideration. Chapter 3, concerning whether Kosovo had such a right, draws on state arguments as regards Kosovo's factual, but not legal situation. Chapter 4 then presents the legal arguments made before the Court, and examines their significance for international law.

1.7 Structure, priorities and conclusions

The structure of the thesis may appear somewhat confusing. I will therefore use a few words to explain:

Chapter 2 is a presentation of the theoretical background for a right to remedial secession. It is however not an attempt to analyze in detail whether such a right existed in 2008. This has been analyzed many times before, and after the case of Kosovo it is arguably of lesser significance for international law.

Chapter 3 then assumes that a right to remedial secession existed in 2008. From this premise it examines whether the people of Kosovo fulfilled the conditions for creating their own state when they declared independence. It concludes that this is doubtful, but that this most likely will have few implications for the independence of Kosovo.

Chapter 4 works from the opposite premise that a right to remedial secession did not exist before 2008. It then asks whether the recognition by various states of Kosovo, and in particular the proceedings before the Court, have contributed to the emergence of such a rule of customary international law. It is concluded that the combination of fourteen delegations arguing in favour of a right to remedial secession, the recognition of Kosovo by various states, and only eleven states protesting against these developments, significantly strengthens the claim that there is now a right to remedial secession in international law.

As will be seen, question 2 is examined at greater length and detailed than question 1. This is so for several reasons. Firstly, whether Kosovo had a right to remedial secession is largely a factual question. Without having detailed knowledge of the factual situation, it is difficult to make a definite assessment of whether such a right existed. Secondly, as already argued, the answer to question one arguably has few practical consequences, whereas the question of remedial secession after Kosovo is a significant question of international law.

2 Remedial secession in international law – before Kosovo

2.1 Principles regulating a right to secession.

At least since the 1648 Treaty of Westphalia, the international system has been based around the principle of state sovereignty and territorial integrity. Any right to secession, that is, the right for a people to create their own state on part of the territory of the parent state, is therefore an exception to this principle. This exception must be based on another of what Cassese calls “fundamental principles”⁴ – the right to self-determination.

2.1.1 Territorial integrity

The territorial integrity of states is a cornerstone of international relations. It is routinely recited in most international legal documents, but its most cited expression is article 2 (4) of the UN Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Materially, the principle provides that states cannot violate the territorial borders or the internal sovereignty of other member states. Understandably, this principle is fundamental to the functioning of international law, as it provides stability and security within the international system.

2.1.2 Self-determination of peoples

Also this principle can be traced back at least to the Treaty of Westphalia and its principles of minority rights, and later the first modern constitutions of the late 18th century.⁵ At this time, and for early writers such as Rousseau however, the principle was not seen as a

⁴ Cassese p.86

⁵ Depaigne

challenge, but rather as the corollary to territorial integrity. Self-determination was the new legitimating factor for the rulers, substituting the divine or royal rule that had preceded it.⁶

The first modern expression of a right to self-determination as a principle of international law came in Woodrow Wilson's fourteen points. The principle was however not included in the Covenant of the League of Nations, although its influence can be seen in protection that minorities were awarded in this document.⁷ Still at that point however, the principle was seen as a corollary to the idea of the nation-state, the belief that each state was to represent one nation and that this legitimated its existence.

This was also the meaning of Article 1 and 55 of the UN Charter.⁸ Stating merely that “respect for the principle of equal rights and self-determination of peoples” is important for maintaining “stability and well-being” among nations, these provisions were arguably little more than rules against intervention in the internal affairs of other states.

With the advent of decolonization after World War II however, the right to self-determination began taking on another meaning, by giving an explicit right to self-determination for non-state entities. In General Assembly Resolution 1514 it was declared that

[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Resolution 1514 had the title “Declaration on the Granting of Independence to Colonial Countries and Peoples,” and was therefore limited to the colonial context. In 1966 however, the exact same phrase was repeated in Article 1 of both of the new human rights

⁶ Ibid.

⁷ Shaw p.251

⁸ Crawford p.128

conventions. With these documents, the right to self-determination was therefore established as a general principle.

This “unquestionable and inalienable”⁹ right was further developed in General Assembly Resolution 2625 with its Friendly Relations Declaration, stating that

by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine ... their political status.

According to Shaw, this declaration did not merely confirm a right to self-determination in its own right, but was also “specifically intended to act as an elucidation of certain important Charter provisions.”¹⁰ As it was adopted without opposition, it therefore provided an authoritative interpretation, and arguably an expansion of the meaning of the original Charter provisions. In Cassese's terminology, the Friendly Relations Declaration added the principle of self-determination to the list of fundamental principles governing international relations.¹¹

The principle of self-determination has therefore undoubtedly “acquired a status beyond convention and is considered a general principle of international law.”¹² Its importance was further confirmed by the ICJ in the *East Timor* case, where the Court stated that

the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. ... it is one of the essential principles of contemporary international law¹³

⁹ ACHR para.20

¹⁰ Shaw p.254

¹¹ Cassese p.87

¹² Quebec para.114

¹³ East Timor p.16

To sum up, the right to self-determination today gives any group constituting a people the right to determine their own political status and how they will be governed, without any influence by any other force or power. As an erga omnes obligation, all states have an equal responsibility to protect and ensure this right.¹⁴

2.1.3 Resolving the tension between the principles

There exists a much larger number of potential peoples than states in the world. An unrestricted right to self-determination will therefore conflict with the territorial integrity of states. As both principles are fundamental norms of international law, they do not form a hierarchy. Instead, international law must weigh them against each other.

That said, territorial integrity has traditionally been given priority in international law. As will be seen in chapter 2.4.2 there are therefore few, if any examples in modern history of peoples being allowed to secede in the name of self-determination.

This does however not mean that self-determination as a principle is ignored. Instead, international law has made a distinction between internal and external self-determination, where all peoples are only entitled to the former. As the Canadian Supreme Court noted in the *Quebec* case,

international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of territorial integrity of those states.¹⁵

That self-determination is primarily an internal right is also evident in the United Nations Declaration on the Rights of Indigenous Peoples, passed by 143 states¹⁶ in the General Assembly in 2007. In addition to reaffirming the existence of such a right, article 3 and 4 also express the core material content:

¹⁴ Shaw p.124

¹⁵ Quebec para.122

¹⁶ BBC News 13.09.2007

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function.

In other words, a right to internal self-determination is a right to internal autonomy, a right for a people to choose its own political organization and to exercise it without coercion.¹⁷ Again quoting the Canadian Supreme Court, it is a right for a people to pursue “its political, economic, social and cultural development within the framework of an existing state.”¹⁸

The question of remedial secession concerns the consequences if this internal right is not respected by the parent state. In such exceptional circumstances, do the people have the right to break out and create their own state? The remainder of the thesis concerns this question.

2.2 Is the right to secession regulated by international law?

Some argue that the question of a non-state entity's right to secede is not regulated by international law.¹⁹ This is based on international law being viewed exclusively as a law among states, the principle of territorial integrity and other principles and rules of international law not regulating the actions of non-state actors. A people can therefore not

¹⁷ Crawford p.128

¹⁸ Quebec para.126

¹⁹ Kohen p.474

violate international law even if they challenge the territorial integrity of the parent state. Instead, whether the secession is successful or not depends on efficiency and recognition. Secession is under this view seen as “a legal fact, not a legal act.”²⁰

The argument that international law does not regulate secession can however be criticized. Firstly, one can ask whether the traditional view of the actions of non-state actors not being regulated by international law remains valid today. Increasingly not only rights, but also obligations, are extended to non-state entities. Institutions such as the International Criminal Court have shown that individuals can be held responsible under international law. Numerous Security Council resolutions have addressed non-state actors directly, for example Security Council Resolution 1203 on Kosovo itself, where paragraph 4 demanded

also that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo.

Secondly, we remember that both fundamental principles are obligations erga omnes. Although this does not in itself mean that the principle applies to non-state actors,²¹ it does mean that all states have a legal obligation to ensure the right to self-determination for all peoples. If this right is not respected internally, the question of whether this right can be exercised externally must arguably also be a legal question.

Even if one accepts that the principle of territorial integrity does not apply to non-state actors therefore, and that a people can therefore not violate international law by attempting to secede, states will violate international law if they deny a people a right to self-determination. Even if one argues that statehood is largely dependent on recognition therefore, the erga omnes responsibility to ensure self-determination may give states a legal duty to recognise this entity.

²⁰ Ibid p.471

²¹ See Barcelona Traction p.33

Another argument for this is the treatment of past secessionist movements. Almost without exception, the international community has refused to recognize the entity as a state, often at the Security Council's request.²² If there are legal rules preventing entities from becoming states, the question of whether there in certain cases exists a *right* for an entity to secede, and a corresponding *duty* for other states to recognize the seceding entity, must also be regulated by international law.

2.3 Arguments in favour of a right to remedial secession

2.3.1 International legal theory

Substantial international theory has in later years argued that there exists a right to remedial secession in international law.²³ However, according to the ICJ statutes Article 38 (1) (d),²⁴ the “teachings of the most highly qualified publicists of the various nations” are only to be considered as “subsidiary means for the determination of rules of law.”

Teachings of various scholars therefore generally carry little independent weight as sources of international law. In most areas, legal theory instead has a clarifying and structural role, making coherent arguments based on existing legal evidence. In the words of Shaw, textbooks are therefore primarily “used as a method of discovering what the law is on any particular point rather than as the fount or source of actual rules.”²⁵

That international legal theorists argue in favour of a right to remedial secession therefore has little independent value. Instead, we must turn to the arguments that they employ, and ask if these arguments are sufficient to support their claim.

²² See 2.4.2 below

²³ See for example Tomuschat p.42, Cassese (1995) p.118

²⁴ See 2.3.6 below

²⁵ Shaw p.113

2.3.2 The Åland Islands

Among the earliest sources touching upon a right to secession is the process concerning the Åland Islands. The question was whether these islands were allowed under international law to secede from Finland and instead become part of Sweden, with whom they shared their cultural heritage. The League of Nations first appointed a Commission of Jurists to investigate, and then a Commission of Rapporteurs to determine how to solve the matter.

The Rapporteurs firstly concluded that there was no general right to secession in international law. This was based on the assumption that

[t]o 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.²⁶

That there is no general right to secession is not controversial, and follows from the principle of territorial integrity as a fundamental norm.²⁷ It is also confirmed in other international documents, such as the Committee on the Elimination of Racial Discriminations (CERD) General Recommendation XXI paragraph 6 declaring that “international law has not recognized a general right of peoples unilaterally to declare secession from a State.”

Secondly however, the Commission of Rapporteurs concluded that the rights of the citizens of Åland could be satisfied internally through Finland giving them significant autonomy. A right to secession was therefore not granted. Of central importance is however the suggestion that

[t]he separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional

²⁶ Rapporteurs p.22-23

²⁷ See 2.1 above

solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.²⁸

This seems to suggest that in exceptional circumstances, a people may in fact have a right to remedial secession. According to the Commission of Rapporteurs however, such a right can in any case only be exercised as a last resort.

2.3.3 General Assembly Resolution 2625 and other declarations

The most important source for those arguing a right to remedial secession is the Friendly Relations Declaration in General Assembly Resolution 2625 of 1970. This resolution, guaranteeing the self-determination and equal rights of peoples, declares in paragraph 7 that

[n]othing 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.

This paragraph is read by many so that if a state does *not* respect peoples' right to self-determination, the state loses the unconditional right to have its territorial sovereignty respected.²⁹ Instead the other fundamental norm, the right to self-determination, grants the people whose rights have been violated a right to secede from the parent state. The same statement has since been repeated in other human rights documents, such as Article 2 of 1993 Vienna Declaration and CERD General Comment XXI paragraph 6.

²⁸ Rapporteurs p.28

²⁹ Kirgis (1994) p.306

2.3.4 Other international decisions

Several international decisions have investigated the relationship between self-determination and territorial integrity. One such case was the *ICJ Advisory Opinion on Western Sahara*. The background for this opinion was the decolonization of Morocco, where after Spain decided to maintain control over the areas known as Western Sahara. Morocco claimed that these areas belonged to them, while Western Sahara, with the support of Algeria, demanded independence.

The Court's opinion was interpreted differently by the different sides to the conflict, and the conclusion is not important. Of greater significance were parts of the opinion of the Court. According to Crawford, the "*Western Sahara* case strongly affirmed the right of the people of the territory to determine their future political status,"³⁰ even if both Morocco and Mauritania claimed that the area belonged to them. This seems to be based on the penultimate paragraph of the opinion, considering "the principle of self-determination through the free and genuine expression of the will of the peoples of the territory." However, as the Court did not conclude that neither Morocco nor Mauritania had a definite claim to the area, the opinion can not necessarily be taken to mean that self-determination was to take precedence over territorial integrity.³¹

Another notable case is the *Katangese Peoples' Congress vs. Zaire* before the African Commission on Human and People's rights. After Congo had gained independence from Belgium in 1960, Katanga declared their independence from Congo only a few days later. The attempt failed under international pressure however, and under the next decades Katanga remained a dissatisfied member of Congo/Zaire. In 1992 the authorities of Katanga made a complaint to the African Commission, asking them to declare Katanga's right as an independent state.

³⁰ Crawford p.123

³¹ Summers p.315

The Commission however could not agree with this, finding in Zaire's favour. Interestingly however, the Commission came to this result by declaring that

[i]n the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.³²

The Commission therefore does seem to suggest that if these rights had not been respected, the right to self-determination would possibly have to prevail at the expense of Zaire's territorial integrity.

2.3.5 Re. Secession of Quebec

Another important source for the proponents of a right to remedial secession is the 1998 advisory opinion on Quebec by the Supreme Court of Canada. One of the questions asked the Court by the Canadian government included the following:

... is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to affect the secession of Quebec from Canada unilaterally?³³

In the specific case, the Court found that Quebec did not have a right to secession from Canada. For the proponents of a right to remedial secession however, the decision is important as it did not rule out a right to secession where a people are denied the right to internal self-determination.³⁴ According to the Court, the

³² Katanga para.6

³³ Quebec para.2

³⁴ Crawford p.41

right to self-determination ... generates, at best, a right to external self-determination ... where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.³⁵

2.3.6 Evaluating the evidence

Having seen the evidence in support of a right to remedial secession, the question is whether these documents are sufficient to establish a rule of international law.

The starting point must be taken in the ICJ statutes article 38:

The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international convention, whether general or particular, establishing rules expressly recognized by the contesting States;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

Although formally only listing the sources that the ICJ are to consider when determining the existence of international law, this provision is generally acknowledged as representing the general international legal method.³⁶

None of the above documentation falls in under any of the primary sources of international law. The works of distinguished theorists is listed as a subsidiary means, and as noted have

³⁵ Quebec para.138

³⁶ Ulfstein and Ruud p.48

little independent value as a source in international law. As regards Åland, the question was never decided by an international court. While the Commissions consisted of judicial experts, their report arguably constitute little more than judicial theory. In addition, this decision is today almost 90 years old. As have already been seen, international law including the right to self-determination has changed significantly over this time.

Judicial decisions are also listed as a subsidiary means. In this context, only the Western Sahara opinion clearly fits this label. The Katanga opinion of the African Commission is not strictly a judicial decision, and falls somewhere in between Åland and Western Sahara as regards legal significance. As regards Western Sahara, advisory opinions under Chapter IV of the ICJ statutes are indeed advisory, with no binding effect. This is further subject to article 59 of the statutes, which underlines that there is no strict system of precedents in international law. Although the Court is therefore not bound by their earlier opinions however, a lack of consistency would clearly undermine the Court's authority. There is therefore nevertheless a presumption that the Court will follow the same path as in past cases. Interestingly, in the *South West Sahara* case, the Court themselves seemingly signalled this quite strongly, stating that

[t]he absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; ... no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.³⁷

Concerning the opinion of the Supreme Court of Canada, it is somewhat unclear what weight national court decisions carry under international law. A first question is whether the provision of Article 38 (1) (d) also includes national Court decisions. On the one hand, the text itself only refers to “judicial decisions.” A textual interpretation therefore puts

³⁷ Western Sahara p.73

national and international decisions on the same level. Shaw also concludes that “judicial decisions’ also encompasses ... the ruling of national courts.”³⁸

On the other hand, it is hard to accept that national and international decisions carry the same weight. Alternatively, one could therefore see national decisions as state practice, which may contribute to the formation of international customary law.³⁹ Under any circumstance the opinion of the Supreme Court of Canada therefore carries some, albeit limited, weight under international law.

Finally, concerning General Assembly Resolution 2625 and later articulations of the same principle, such resolutions are not among the sources listed in Article 38. It is however commonly accepted today that this list is not exhaustive, and such resolutions are clearly relevant in the determination of international law.⁴⁰ They do however not have any binding force, and are therefore primarily important as evidence of a customary international law reflecting the opinions of states.⁴¹

2.4 A right to remedial secession in customary international law?

2.4.1 Introduction

As seen, none of these sources are binding under international law, and each of them carries significant limits to the weight that can be attached to them. None of these sources can therefore in themselves justify a claim that there exists a right to remedial secession. The question instead becomes whether these sources, together with other state practice, may constitute a customary law to this effect.

³⁸ Shaw p.111

³⁹ See Malanczuk quote in 2.5.2 and 4.2 below

⁴⁰ Shaw p.114

⁴¹ See chapter 2.4.2

2.4.2 State practice and opinio juris?

In the ICJ statutes article 38 (1) (b) customary law, as a primary source of international law, is defined as “evidence of a general practice accepted as law.” For international customary law to exist, two components must therefore be present: state practice, and opinio juris. For the present,⁴² state practice can be defined as how a state is behaving.⁴³ This includes all physical acts, but also written documents and correspondence, as well as oral statements made by states, both nationally and internationally. Opinio juris can be defined as a belief that the practice is carried out due to a perceived legal obligation.

State practice therefore firstly includes the sources accounted for above. For example as regards the Supreme Court of Canada, Malanczuk notes that “the legislature and the judiciary form part of a state just as much as the executive does”⁴⁴ and concludes that the decisions of national courts constitute state practice. As regards the practice of international organizations, the International Law Commission has noted that the “record of cumulative practice of [such] organizations may be regarded as evidence of customary international law...”⁴⁵ In the 1984 *Nicaragua* case the ICJ found that the existence of opinio juris could “though with all due caution, be deduced from ... the attitude of States' towards certain General Assembly resolutions”, in this context particularly referring to Resolution 2625.⁴⁶

In addition to these sources, one must primarily seek evidence for state practice in how states have reacted to other secessionist attempts in the past.

The largest group of examples concerning a right to secession comes from the process of decolonization, where a large number of states gained independence from colonial powers. Decolonization was arguably qualitatively different than secessions outside the colonial

⁴² For a discussion of both state practice and opinio juris, see chapter 4.3 below

⁴³ Shaw p.82

⁴⁴ Malanczuk p.39

⁴⁵ ILC 1950 p.372

⁴⁶ *Nicaragua* p.89-90

context however, as former independent peoples were given back the independence that had previously been taken from them. Importantly, this was largely done with the consent of the colonial powers, and therefore did not challenge the principle of territorial integrity in the way that a right to remedial secession without the consent of the parent state would do. Many of the international sources legitimating this process, such as General Assembly Resolution 1514, were also explicitly limited to the colonial context. The process of decolonization can therefore generally not be considered support for a right to remedial secession.

The most commonly referred example of a successful secession outside the colonial context is the secession of East Pakistan from Pakistan, becoming Bangladesh. While this may seem like a clear example of secession against the wishes of the parent state, this can clearly be questioned. Firstly, no state or international body, including the Security Council and General Assembly, argued in favour of a right to secession for Bangladesh until the Pakistani army had been defeated.⁴⁷ Secondly, independence was only achieved with significant help from the Indian Army.⁴⁸ Thirdly, and perhaps most significantly, Bangladesh was not admitted as a member of the United Nations, arguably the yardstick for whether an entity is considered a state, until Pakistan accepted this in 1974. Finally, as the circumstances surrounding the secession were so particular, several authors refer to Bangladesh as a *sui generis* case, rather than as an example of remedial secession.⁴⁹

A second possible example is the independence of Croatia and Bosnia in the early 1990s. According to Dugard and Raic, “it was the secession of several federal republics that led to the dissolution of the SFRY.”⁵⁰ This however seems like a dubious claim. As is perhaps evident from the quote itself, most scholars accept that Yugoslavia was a process of dissolution rather than secession.⁵¹ When Croatia and Bosnia gained their independence,

⁴⁷ Crawford p.393

⁴⁸ Summers p.345

⁴⁹ For this argument as regards Kosovo, see 4.2.3 below

⁵⁰ Dugard and Raic p.128

⁵¹ Crawford p.401

the Yugoslavian central authority had in effect ceased to exist. There was therefore no central government to protest, and no territorial integrity to violate.⁵² It is illustrating that even in such a situation however, these states were not admitted as UN members until Yugoslavia had reconstituted itself and announced its intention to recognize the new republics.⁵³

There are indeed very few, if any, examples of successful remedial secessions outside the process of decolonization. On the other hand, there have been many cases where a right to secession has been denied. Among the most prominent and widely debated are the cases of Katanga, Biafra, Chechnya, and the Turkish Republic of Northern Cyprus.⁵⁴ In all these cases, the international community rejected a right to secession, and instead confirmed the territorial integrity of the parent states. This was also the fate of the 1991 Kosovo proclamation of independence.⁵⁵

On this basis it is tempting to conclude with Summers that “[r]emedial secession ... suffers from a notable lack of state practice.”⁵⁶ However, and perhaps significantly, these rejections of secessionist movements each seem to have happened because of specific circumstances. For example, the Security Council resolutions urging non-recognition of Rhodesia justified this specifically by referring to the “illegal racist minority regime” that governed the territory.⁵⁷ In the case of the Turkish Republic of Northern Cyprus, the external aggression by Turkey was used as the basis for rejection.⁵⁸ In other cases again, such as Chechnya, the international community has simply addressed the conflict as an internal matter that Russia must rectify as it sees necessary.⁵⁹

⁵² Ibid p.396

⁵³ Ibid p.401

⁵⁴ For more examples, see Crawford p.403

⁵⁵ Weller p.38

⁵⁶ Summers p.345

⁵⁷ SC Res 216

⁵⁸ Crawford p.133

⁵⁹ Ibid p.410

Importantly therefore, when dealing with these cases, no state nor international body has ever argued that a right to remedial secession does not exist. As it makes the easiest and most consistent argument, one would expect states to argue this way if they believed they could. Instead the international community has found it necessary to examine the specific circumstances in each case, and justify the rejection on violations of international law other than the act of secession itself.

The refusal to argue directly against a right to remedial secession arguably qualifies not only as state practice, but also satisfies the requirement of *opinio juris*.⁶⁰ If we accept that *opinio juris* can be determined indirectly through the actions of states,⁶¹ the refusal to argue generally against a right to remedial secession when rejecting secessionist movements show exactly that states did not believe such a rule to exist. Also the requirement of *opinio juris* is thereby arguably satisfied.

Ironically then perhaps, the cases of rejected secessions may provide the strongest state practice and *opinio juris* for the existence of a right to remedial secession under customary international law.⁶² By having to resort to different arguments in different situations, states have arguably acknowledged that peoples' in principle may have a right to remedial secession. Together with GA Resolution 2625 and the international decisions above, it is at least possible to argue that this is sufficient to constitute a customary right to remedial secession.

2.5 Content of a right to remedial secession

Concluding, remedial secession clearly has weak support from any formal sources,⁶³ and there have been few, if any, examples of successful secessions outside the colonial context. On the other hand, most theorists, supported by a selected few documents of international

⁶⁰ See chapter 4.3 below

⁶¹ Malanczuk p.44

⁶² On abstentions as customary law, see 4.3.5 below

⁶³ Summers p.347

and national law, have persistently argued that such a right does in fact exist. In addition, states have proved unable or unwilling to declare remedial secession illegal per se.

On this basis, the legal existence of such a right at this point in time can perhaps only be described as uncertain. Independent of such considerations, the following Chapter 3 assumes that such a right existed. This raises the question of which criteria must be satisfied for a people to have this right. Based on the previous sections, the main criteria seem to be a people's prolonged denial of a right to “freely determine their political status and freely pursue their economic, social and cultural development.”⁶⁴ The violation of other human rights is not a prerequisite for a right to remedial secession to exist, but it may exacerbate the situation and perhaps decrease the amount of time that must have passed for a right to materialise. Finally, as outlined in the Åland report, remedial secession is only legal as a last resort, when no other ways of resolving the problem can be found.

⁶⁴ Indigenous Peoples Declaration article 3

3 A right to remedial secession for the People of Kosovo?

3.1 Short history of Kosovo

Unless otherwise noted, the following facts are taken from Weller's book *Contested Statehood*.

After World War One, the Socialist Federal Republic of Yugoslavia (SFRY) was established. Serbia was made one of six constituent republics, and Kosovo was considered a region of Serbia. After having enjoyed significant autonomy under the 1974 Serbian Constitution, amendments limiting the autonomy of Kosovo were prepared by the Milosevic government of Serbia in 1989. Following Kosovo protests, Serbian armed forces entered Kosovo and lined up around the parliamentary building as the amendments were being debated inside. The Assembly was thereby pressured into accepting the amendments, although not by the 2/3 majority that the Constitution required. Nevertheless, the amendments were considered accepted.

In 1990 the Serb authorities closed down the Kosovo Assembly altogether, and in the early and mid-1990s the authorities continuously took measures to diminish the powers and capabilities of Kosovo. In 1995, the General Assembly took note of the UNCHR Special Rapporteur having reported

- a) Police brutality against ethnic Albanians
- b) Discriminatory and arbitrary dismissals of ethnic Albanian civil servants...
- ...
- e) The dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin
- f) The elimination in practice of the Albanian language, particularly in public administration and services

g) The serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration.⁶⁵

After initial non-violent protests, by 1996 the emergence of the Kosovo Liberation Army meant that violent resistance gained the upper hand. Negotiations by third parties were unsuccessful, and in March 1999 NATO decided to initiate bombing attacks to stop the grave human rights violations.

At the same time as the International Criminal Tribunal for Yugoslavia was preparing indictments against Serbian leaders, the UN prepared and passed Security Council Resolution 1244. This provided for an interim administration for Kosovo, removing all Serbian influence. The document also envisaged a final status process after the situation had stabilized, although the details of such a process were not outlined.

While the two entities were functioning isolated from each other, continuous efforts were made to negotiate a settlement. Serbia could however not agree to Kosovo independence, and Kosovo could not accept remaining under Serbian authority. In 2006 Serbia also passed a new Constitution, continuing to define Kosovo as a province of Serbia. In 2007 the Secretary General's Special Envoy to Kosovo concluded that “no amount of additional talks, whatever the format, will overcome this impasse,” and recommended that “Kosovo's status should be independence, supervised by the international community.”⁶⁶

A draft resolution with this content was proposed but ultimately not passed by the Security Council. Instead, a last round of negotiations with senior officials from Russia, the EU and the USA was conducted, but after four months this Troika in December 2007 also had to concede that

⁶⁵ Resolution 49/204

⁶⁶ Special Envoy

the parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.⁶⁷

Following this, the Assembly of Kosovo declared their independence. As of today, 66 states plus the Republic of China (Taiwan) have recognized Kosovo as an independent state. Kosovo is also a member of the World Bank Institutions, 105 states voting for their membership.

3.2 A right to remedial secession in 1999?

Based on the definition given point 2.2.3, it may seem clear that Serbia in the 1990s violated the people of Kosovo's right to internal self-determination.

However, looking at the developments at the time, one may get a different impression. As one author notes, “[i]t is noticeable that neither the Security Council nor the NATO states ... referred to the right to self-determination ... in Kosovo.”⁶⁸ Instead, throughout the 1990s, the international community repeatedly reaffirmed the territorial integrity of FRY/Serbia. The Badinter Commission, whose task it was to ensure the ordered breakup of Yugoslavia and the fundamental rights of all affected peoples', did not consider the question of Kosovo independence.⁶⁹ The preamble of Resolution 1244 also referred explicitly to the territorial integrity of Serbia.

Neither did international legal theory before 2008 argue in favour of Kosovo independence. Georg Nolte in 2006 grouped Kosovo together with other cases where “the Security Council has insisted on a political solution on the basis of the sovereignty and territorial integrity of the State concerned.”⁷⁰ Crawford similarly held that “Kosovo's legal position remains that of an autonomous area under international administration: the territorial

⁶⁷ Troika Dossier No.209, para.2

⁶⁸ Greenwood p.154

⁶⁹ Weller p.47

⁷⁰ Nolte p.69

integrity of Serbia and Montenegro has so far been preserved and Kosovo is not (or not yet) a State.”⁷¹

One may therefore be tempted to conclude that the people of Kosovo was not found to have a right to remedial secession in 1999. However, as the latest quote by Crawford hints at, this cannot be accepted. In 1999 there had been no attempts to resolve the situation by means other than remedial secession. The requirement of last resort was therefore not satisfied. Instead, the international community attempted to restore respect for self-determination while still respecting FRY's territorial integrity.

Based on the account in chapter 3.1 there can ultimately be no doubt that the denial of a right to self-determination, accompanied by violations of other human rights in Kosovo, satisfied the requirements of a right to remedial secession. However, at this point in time, the requirement of last resort prevented the international community from advocating secession.

3.3 A right to remedial secession in February 2008?

On February 17 the elected officials of Kosovo issued a declaration of independence, thereby attempting to secede from Serbia. The question is whether the people of Kosovo at that point satisfied the requirements for a right to remedial secession.

3.3.1 The 1990s violations as justification for secession

A first set of arguments in favour of Kosovo's independence maintain the 1990s atrocities as the basis for a right to secession in 2008. According to this view, the international community had by 2008 attempted to solve the situation through other means, without success. When Special Envoy Ahtisaari concluded that a negotiated settlement could not be reached, secession emerged as the last resort required by international law.

⁷¹ Crawford p.408

A first counter-argument would be that the time and effort spent trying to find another remedy was not sufficient. Taking an example from the proceedings, Cyprus argued that

the time given to explore such options by Special Envoy Ahtisaari was very short and could not be said to give rise to a claim for any action as a 'last resort'⁷²

Serbia further pointed to the very process before the ICJ as an alternative remedy, in itself meaning that the requirement of last resort was not satisfied.⁷³

This argument is not convincing. Firstly, the international community attempted to facilitate another solution for almost 10 years. Various formats of negotiations were attempted, even after the Special Envoy had concluded that such talks were futile. As for the procedure before the ICJ, this was clearly not a remedy for Kosovo. As a non-state entity, Kosovo could not bring the case before the ICJ, and as an advisory opinion the Court could under no circumstances decide the case under international law.

A stronger counter-argument is that the violations that had taken place in the 1990s undeniably had ended by 2008.⁷⁴ In fact, from 1999 until the time of the Declaration, Kosovo was under international administration. Serbia therefore had no influence on developments in Kosovo. As Kosovo's right to self-determination was not violated by Serbia at this time, the requirement for a right to remedial secession could be argued not to exist.

Before the Court, this argument was strongly opposed by Kosovo's supporters, arguing that the fact that

⁷² Cyprus WS p.38

⁷³ Serbia WC p.144

⁷⁴ Romania WS para.156

... the Kosovars agreed to try to arrive at a consensual solution cannot now serve as the basis for the argument that during this time the Kosovars have lost their right of external self-determination...⁷⁵

In my view, the premise for this quote is not convincing. This becomes evident if we recall the fundamental rule as outlined in 2.1.3 above: territorial integrity is to be maintained unless the state does not respect the people's right to internal self-determination, and the situation cannot be remedied through other means.

This means that a fundamental purpose behind this rule is to maintain territorial integrity if at all possible. The purpose is *not* to find a solution that both parties can agree to, or the best solution all things considered. Such a principle would place the seceding entity on equal terms with the parent state even before secession, contrary to the principle of states as the primary actors with jurisdiction over all internal matters as long as they respect fundamental human rights.

From this it follows that the right to remedial secession will no longer exist if the other remedy has been *good enough* so as to re-establish a satisfactory degree of internal self-determination. The conclusion of Special Envoy Ahtisaari that independence must be granted as “[a] return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo”⁷⁶ is therefore no legal justification for a right to remedial secession. In addition, such a position is also problematic as it would give the seceding entity no incentive to participate in negotiations in good faith, as a breakdown in the negotiations would automatically grant them a right to secession.

The argument that the human rights violations of the 1990s justified a right to remedial secession in 2008 can therefore not be accepted. If the rights of the people of Kosovo were respected at the time of the declaration, it does not matter that the Kosovars would *prefer* to have their own state. Serbia does not need the consent of Kosovo to maintain sovereignty

⁷⁵ Germany WS p.36-37

⁷⁶ Special Envoy para.7

over it, as long as it respects the Kosovars right to internal self-determination. As was stated both in the Åland report and by CERD, there is no general right to secession merely because of a desire to do so.

3.3.2 The situation in 2008 as basis for remedial secession

Serbia is today a very different state than in the 1990s. The violations of fundamental human rights have ceased, and Serbia is a democratic state with an aspiration to join the European Union. Serbia has also shown willingness to cooperate to rectify past wrongs, illustrated by the handovers of former leaders Karadzic and Milosevic to the ICTY, and the Serbian Parliament's recent condemnation of the Srebrenica massacre.⁷⁷ Another element illustrating this is the 2006 Serbian Constitution, who according to the independent Venice Commission

shows that human rights form an integral and an important part of constitutional law and it makes it clear that attention is paid to this element and basic feature of a democratic society...⁷⁸

However, a straightforward conclusion that a right to remedial secession did not exist in 2008 can be met with counter-arguments. Firstly, a new constitution is in itself no guarantee that such violations will not happen again. On the other hand, it is perhaps difficult to see that Serbia could do more in the current environment, as their separation from Kosovo gives no opportunity to prove their intentions in practice.

More problematically, the new constitution “does not at all guarantee substantial autonomy of Kosovo,” this instead being entirely dependent “on the willingness of the National Assembly of the Republic of Serbia...”⁷⁹ Further, Serbia reportedly did not make any efforts to include the people of Kosovo in the development of the constitution, nor to

⁷⁷ BBC News 31.03.2010

⁷⁸ Venice Commission para.21

⁷⁹ Ibid para.8

register them as voters. As a result, only 90 000 people in Kosovo were able to cast their vote.⁸⁰ That this was a violation of the right to self-determination was however strongly contested by Serbia, arguing that Kosovars who had registered for voting did in fact have the chance to vote at ballot stations in Kosovo where “security and other legal requirements for voting were met.”⁸¹

Thirdly, one may point to the reluctance of Serbia to admit the severity of the 1990s violations. Many have claimed that they attempted to downplay the grave human rights violations of the 1990s before the Court,⁸² and in the recent vote the Parliament of Serbia refused to label the Srebrenica massacre as genocide.⁸³ If Serbia cannot accept the horrifying nature of their past policies, their guarantees to act according to human rights in the future suddenly do not seem as significant.

3.4 Conclusion

With these factors in mind it must be decided whether Kosovo had a right to remedial secession in 2008. On the one hand, Serbia is today a stable democratic state. The regime of the 1990s is gone, and a new constitution guaranteeing fundamental human rights is in place. On the other hand, this constitution does not guarantee the self-determination of Kosovo, and Serbia has arguably shown unwillingness to recognise the past. Neither of these factors does however mean that Serbia does not mean to respect Kosovo's rights in the future.

In my view, if we attempt to picture history without past atrocities, these shortcomings would not be significant enough to give Kosovo a right to remedial secession. The underlying question is therefore whether past violations give Serbia a stricter obligation and burden of proof as regards the people of Kosovo. It is difficult to find a legal

⁸⁰ US WS p.27-28

⁸¹ Serbia WC p.63,149

⁸² US WC p.22

⁸³ BBC News 31.03.2010

justification for such a position. At the same time, it seems inherently reasonable that Serbia has to somehow earn the trust of the international community, and prove that they can respect the rights of Kosovo. Past events surely give both Kosovo and the international community reasons to be sceptical.

Although past violations may strengthen the burden of proof for their good faith, it is on the other hand easy to understand Serbia's feeling that giving Kosovo the right to secede would be a punishment for their past wrongs rather than a remedy for the Kosovars. In my view, the most likely conclusion is therefore that the people of Kosovo did not have a legal right to remedial secession in 2008. Only by attaching significant emphasis on the events of the 1990s can one argue that the uncertainty of Serbia's intentions is sufficient to set the principle of territorial integrity aside. If the conclusion in 3.3.2 is to have any meaning, one must however assess Serbia primarily on the situation as it stands in 2008, without looking too much into the past.

3.5 Consequences for Kosovo

From a legal perspective, Kosovo should therefore not be allowed to secede. On the other hand 66 states, including the majority of EU-states and the United States of America, have recognized Kosovo, and it has been accepted as a member of international organizations such as the World Bank. Notably, the ICJ also invited Kosovo to participate in the proceedings before the Court.⁸⁴

Kosovo is therefore already quite far along the path towards independence. Sterio believes that this process is irreversible, and uses Kosovo to argue her claim that the primary determinant for whether an attempted secession will be successful is not legal entitlement, but the support of what she calls the "Great Powers."⁸⁵ Attempting a more legal justification for acknowledging Kosovo independence, an insistence on Kosovo's reintroduction under Serbian rule would according to Special Envoy Ahtisaari provoke

⁸⁴ See 4.5.2 below

⁸⁵ Sterio p.140

“violent opposition” in Kosovo.⁸⁶ With the region's violent history this would arguably run counter to the overall goal of achieving peace and stability in the region, and to the international peace and security that the UN system is meant to protect.

The independence of Kosovo is in my view therefore very likely, although by no means certain. If such a development takes place however, it would not be due to a legal right. As the Supreme Court of Canada noted however, “a distinction must be drawn between the right of a people to act, and their power to do so.”⁸⁷ As was touched upon in section 2.2, the formation of states is sometimes more a question of efficiency and political considerations rather than due to any legal entitlement.

⁸⁶ Special Envoy para.7

⁸⁷ Quebec para.106

4 After Kosovo

4.1 Introduction

So far we have seen that the question of whether there existed a right to remedial secession in 2008 was unclear, and that even if such a right existed it is doubtful whether the people of Kosovo fulfilled the requirements. The question is now what the case of Kosovo will mean for international law. More specifically, we ask whether this case means that a customary right to remedial secession has now definitely emerged. We begin with some details about the proceedings, and some theoretical remarks about customary international law.

4.2 Arguments before the Court

4.2.1 Arguments in favour of a right to remedial secession

The first thing to note about the arguments presented in favour of a right to remedial secession before the Court is that they are not new. Instead, states based their claim largely on the same arguments that international theorists have previously been using.

Secondly, it is noteworthy how little space the proponents of such a right devoted to this question in their submissions to the Court. This can however probably be explained by the fact that making this argument was not necessary in order to support the independence of Kosovo. A significant number of states supporting Kosovo did therefore not even address the question of remedial secession.

The following presentation is therefore brief, both because the arguments before the Court were brief, and because the main arguments in favour of a right to remedial secession were presented in chapter 2 above.

The Friendly Relations Declaration of Resolution 2625, and later articulations of the same principle, remains the primary source that states relied on in the proceedings. Statements such as

[s]upport for the existence of a right to external self-determination – outside the context of non-self governing territories, foreign occupation and consensual agreement – can be found, albeit *a contrario*, in Resolution 2625⁸⁸

can be found in the submissions of most of the states arguing in favour of remedial secession.

As regards the other arguments, they were to various degrees touched upon by the different delegations. The Åland-case was for example utilized by the delegation from Switzerland to argue that

[i]n ... extreme situations, the right of a people to separate itself from a State ... has to be defined as an *ultima ratio* solution.⁸⁹

On the Supreme Court of Canada, Ireland declared that they agreed

with the view expressed by the Canadian Supreme Court that ... [self- determination should be exercised internally but that] 'where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.'⁹⁰

States also to a significant degree referred to the writings of various international legal scholars. In particular, Crawford's book *The Creation of States in International Law* from 2006 was used by a large number of delegations. Interestingly, the book was used by both sides in the proceedings. For example, Cyprus, arguing against a right to remedial secession, quoted this book as evidence of the “extreme reluctance of states to recognize or accept unilateral secession outside the colonial context.”⁹¹ However, Crawford himself

⁸⁸ Netherlands WS para.3.7

⁸⁹ Switzerland WS p.18

⁹⁰ Ireland WS para.30

⁹¹ Cyprus WS p.39

appearing before the Court as counsel for the United Kingdom, explained that his book had “humbly put forward the opinion that a right to remedial secession is emerging.”⁹²

A final argument, that I have not come across in my readings of earlier theory but that was relied on by certain delegations before the Court,⁹³ is based on the illusionary character of any right of self-determination if it does not have an external component. The argument is that without a right to secession when internal self-determination is denied, this right itself becomes illusionary. Without a right to secede, the “people” is left at the mercy of the parent state, and no remedy is available to them if their rights are not respected.

Looking at these arguments in general, a few things are notable. Firstly, all the sources states get their arguments from are regarded as secondary or not even mentioned in the ICJ statutes article 38. This illustrates that the hierarchy of sources is not as strict as article 38 seems to imply. In addition, as will be argued in section 4.5.2 below, it may also signify that such arguments take on a higher significance when used in state argumentation, through states providing interpretations of their content.

Secondly, it is notable which arguments states did not use. Most significantly, very few states referred to the secession of Bangladesh, and no state referred to the fact, as was explained in chapter 2 above, that secessionist attempts have never been declared illegal per se.

This suggests one of two things. Either, states do not consider Bangladesh a case of remedial secession, and do not hold the lack of outright rejection of secessionist movements as significant. In my view, particularly the latter part of this argument is difficult to understand, the case for its significance having been laid out above. It should however be noted that this is an argument that I have neither come across in previous international legal theory.

⁹² UK OP p.54

⁹³ Germany WS p.34

Alternatively, one may be inclined to think that while these states hold a right to remedial secession to exist as a last resort, they do not want to extend this right to a large group of such peoples, or encourage groups to seek secession. Setting the case of Kosovo in direct connection with previous secessionist movements would arguably create the impression that such a right is easily accessible. Instead, by arguing that only Kosovo as a special case fulfil these strict requirements,⁹⁴ one hopes to discourage other peoples to follow the same path unless extreme circumstances require such a solution.

4.2.2 Arguments against a right to remedial secession

The eleven states arguing against a right to remedial secession generally spent more time arguing this point than those in favour of such a right. This must be explained by the fact that whereas “Kosovo need not be an exercise of the right to external self-determination to be consistent with international law,”⁹⁵ the Court would “need to decide it before [they] could answer the question in the negative, against Kosovo.”⁹⁶ In contrast to states supporting Kosovo independence, it was therefore necessary for opponents to disprove the existence of a right to remedial secession, or at least disprove that Kosovo fulfilled the requirements for such a right.

Materially, these states made their case by attacking the various sources relied on by the states in support of such a right. They firstly employed the argument presented in chapter 2.4.6 above concerning the weakness of previous sources, but in addition they also to varying extent specifically criticized each source.

⁹⁴ See 4.2.3 below

⁹⁵ US WC p.21

⁹⁶ UK OP p.54

The Friendly Relations Declaration

Some states argued in the proceedings that Resolution 2625 was meant only to address the process of decolonization.⁹⁷ This argument is of little value however, as the same phrase has been repeated in later documents such as paragraph 2 of the 1993 Vienna Declaration.

Secondly, opponents pointed to the drafting history of paragraph 7. According to for example Serbia, this clause was inserted at the request of Italy so as to emphasize the respect for territorial integrity of states.⁹⁸ It was therefore never the intention of the drafters that this resolution should be read “backwards,” so as to give a right to secession if states did not respect the right to self-determination of its peoples.

This argument raises questions of treaty interpretation. According to the Vienna Convention on the Law of Treaties article 31, reflecting customary international law,⁹⁹ treaties are to be interpreted

in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The emphasis on “ordinary meaning” means that primary emphasis is to be put on the textual content of the provisions.¹⁰⁰ A main reason for this is that states spend a significant amount of time negotiating a text that all states can agree on, every word being deliberate. Although not strictly a treaty, this must clearly also hold true for documents such as General Assembly resolutions. In this case, the text of the treaty being so clear, an interpretation contrary to the textual meaning would at least have required states holding such a view to make this clear immediately. This was never done. Instead the same text has been repeated in later documents.

⁹⁷ Cyprus WS para.142

⁹⁸ Serbia WS p.221

⁹⁹ Shaw p.933

¹⁰⁰ Ulfstein and Ruud p.69

Finally, opponents argued that if a General Assembly resolution were to contain such an important principle, it cannot be based on a mere *a contrario* reading of the terms of the Declaration, but would have to be articulated clearly.¹⁰¹ Again however, one must emphasize that such an interpretation naturally follows from the reading of the text itself. Further, it is well known that resolutions of the UN are often couched in very vague and diplomatic terms so as to gather the support of the required number of states.

Re. Secession of Quebec

In addition to questioning the significance that can be attached to the decision of a domestic court, the opposing states focused on the content of the Supreme Court's verdict. They rightly point to that the Canadian Court did not find that such a right definitely existed.¹⁰² Instead, it found that it “remains unclear whether this proposition actually reflects and established international law standard.”¹⁰³

This argument is clearly correct, and perhaps for this reason quite a few pro-states emphasized that the case is primarily helpful in determining the content of such a right, suggesting that violation of other human rights than self-determination is not required for a right to external self-determination to emerge.¹⁰⁴

Serbia in their written statements also briefly turned to the only other domestic Court that has discussed the question of remedial secession, the Russian Constitutional Court.¹⁰⁵ Addressing the question of Chechnyan independence, this Court according to Serbia concluded against such a right existing, arguing that

¹⁰¹ Cyprus WS para.142

¹⁰² Serbia WC p.143

¹⁰³ Quebec para.135

¹⁰⁴ Switzerland WS p.16

¹⁰⁵ Serbia WS para.636

any unilateral action aimed at breaking up the national unity and the territorial integrity of the Russian Federation would not be in conformity with international rules governing human rights and the rights of people.¹⁰⁶

Without going into detail as regards this case, this clearly carries the same concerns regarding significance as the opinion of the Canadian Supreme Court.

On the lack of state practice

Perhaps most significantly, states opposing a right to remedial secession argued that there does not exist any state practice in favour of a right to external self-determination. As for example Argentina argued,

The so-called theory of “remedial secession” is nothing more than an argument made in doctrine, and which has not received any legal consecration.¹⁰⁷

Again it is notable that few pro-states argued explicitly against this point, by pointing to Bangladesh or that earlier rejections of secessions have happened on a case by case basis.

Potential destabilisation

States arguing against a right to remedial secession also argued that such a right will have destabilising effects on the international system. Cyprus for example claimed that “[t]he weakening of the protection of the principles of territorial integrity and non-intervention could hardly be avoided.”¹⁰⁸ Arguably however, this will not happen as long as the criteria for achieving such a right remain strict. The delegation from Germany in my view rightly argued that

¹⁰⁶ Ibid

¹⁰⁷ Argentina WS para.85

¹⁰⁸ Cyprus WS p.19

[r]emedial secession would not endanger international stability, as it would only come into play under circumstances where the situation inside a State has deteriorated to a point where it might be considered to endanger international peace and security.¹⁰⁹

On the “illusionary” right of self-determination

This argument was not explicitly countered by the states arguing against a right to remedial secession. Counter-arguments can nevertheless be made. Most significantly, as seen, many United Nations documents support the right to self-determination. This organisation therefore also has a responsibility to protect this right.

Even if were to argue that the Security Council can only act when there are threats to “international peace and security,”¹¹⁰ and that denial of self-determination does not fulfil this requirement, the UN Human Rights Council and other bodies have mechanisms for addressing such problems. That these mechanisms arguably are weak cannot legally justify allowing people to act on their own. It is also clearly undesirable to have rules of international law encouraging peoples to take matters into their own hands. Neither can the argument that a right to remedial secession is necessary to provide “a remedy beyond corrective instruments once the evil is done,”¹¹¹ justify this, as a denial of internal self-determination will rarely require the type of urgent response that such an argument presupposes.

On this basis, the conclusion of the opposing states was well captured by the delegation of Cyprus, arguing that

[w]hile the claim that there is a 'right to secession of last resort' has been supported by some writers and by *a contrario* reasoning ... it is without support in State

¹⁰⁹ Germany WS p.34

¹¹⁰ UN Charter Article 24

¹¹¹ Kosovo WC p.80

practice. It has not emerged as a rule of customary law. It is not found in any treaty. And it has no support from the practice of the UN.¹¹²

4.2.3 Kosovo as sui generis

For the complete picture of state arguments before the Court, it is necessary also to present the sui generis character of Kosovo emphasized by a large number of states.

The factors giving Kosovo such status seems to vary slightly from delegation to delegation, but the core of the argument was many of the same points as have previously been addressed in different contexts: The human rights violations of the 1990s, the resentment that this created in Kosovo against Serbian rule, and the interim arrangements that separated Kosovo from Serbia for almost 10 years.¹¹³

For the opponents of a right to secession, the sui generis argument had a subsidiary character, limiting the precedence in case the Court would find Kosovo's secession in accordance with international law. For the supporters of Kosovo, states may be put in two different groups. Some states, such as France and the USA, avoided the question of remedial secession by basing their argument for Kosovo independence on sui generis arguments alone. France for example in this way argued that

Kosovo was placed under international administration for nearly nine years, resulting *de facto* in an irreversible situation¹¹⁴

and later that

[t]he brutal repression – and the international crimes accompanying it – to which the Kosovar population was subject to in 1998-9 could but prevent it from

¹¹² Cyprus WS para.143

¹¹³ For an overview, see Poland WS p.22-24

¹¹⁴ France WS p.30

contemplating a future within the Serbian state... There are crimes which cannot fade from the individual and collective memory.¹¹⁵

According to this view the international community is presented to a *fait accompli*, secession being the unavoidable result of Kosovo's unique situation. Several states in this connection also quote Special Envoy Ahtisaari's final report to the Security Council:

Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.¹¹⁶

This is of course a tempting argument for states, allowing them so support Kosovo without opening the Pandora's Box of giving a right to secession for other suppressed peoples around the world. It is however an argument that is very difficult to contest or evaluate under international law. By arguing that this "unique case ... demands a unique solution," the justification for secession is in a certain sense taken outside the framework of international law itself. Any argument that there does not exist such a right becomes remote, as the world has never before faced such a situation.

If international law is to have any meaning however, actions must be justified within the existing framework. Underlining the special status may limit the consequences that Kosovo may have on the right to secession under international law, but cannot exist as an independent legal justification of a right to remedial secession.

¹¹⁵ France WC para.18

¹¹⁶ Special Envoy para.15

Also a number of the states in favour of a right to remedial secession emphasized the special status of Kosovo. This must again be explained by the fact that even states arguing for a right to remedial secession do not want this right to be available in all but the fewest of cases. By arguing that Kosovo as *sui generis* are the only people currently satisfying the requirements, the criteria are indeed kept narrow. In contrast to the other groups of states however, the *sui generis* argument here only addressed the question of *when*, not *if*, remedial secession is legal.

4.3 On Customary international law

The arguments before the Court were not new. The possible impact that the case of Kosovo will have on international law is therefore not in the arguments made, but instead in the fact that these arguments *were* made. For the first time a number of states openly argued that there exists a right to remedial secession. The question is whether this, together with the recognition of Kosovo by various states, may have contributed to a right to remedial secession as part of customary international law.

4.3.1 Introduction

We recall the definition in the ICJ Statutes article 38 (1) (b) of international customary law as “evidence of a general practice accepted as law.”¹¹⁷ We further recall the basic definitions of state practice and *opinio juris*,¹¹⁸ who must both be present for a customary international law to emerge. While this contained the essentials of a definition, there are several debates concerning the nature and requirements of customary international law. These debates are presented in this chapter 4.3, and the conclusions will then be used in the analysis in 4.4 and 4.5.

¹¹⁷ See 2.3.6 above

¹¹⁸ See 2.4.2 above

4.3.2 State practice

The first question is what exactly may constitute state practice. On the one hand, one may argue that state practice is limited to what states *do*, and therefore do not include what states say. For example, Judge Read in his dissenting opinion in the *Fisheries* case argued that it could not constitute state practice where states

have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty.¹¹⁹

In later judgements the Court has however come to a different conclusion. According to Malanczuk, in the *Fisheries Jurisdiction* case the majority judgement clearly treated claims as state practice, “without considering whether they had been enforced.”¹²⁰

The view that state practice only includes what states do can also be more generally criticized. Firstly, it would mean that in certain areas of law only the most powerful states can contribute to the emergence of custom.¹²¹ Secondly, it may encourage states to act even if they do not desire to do so. If a state wants to contribute to a customary international law prohibiting torture, can one really say that official condemnation of torture is not state practice unless the state engages in physical acts against the perpetrators?

That claims constitute state practice is also supported by the majority of international legal theory. Müllerson notes that “at least in inter-state relations, saying is also doing.”¹²² Shaw finds that

[c]laims and conventions of states in various contexts have been adduced as evidence of state practice and it is logical that this should be so...¹²³

¹¹⁹ ICJ Reports 1951 s.191

¹²⁰ Malanczuk p.43

¹²¹ Müllerson p.342

¹²² Ibid p.344

¹²³ Shaw p.83

Akehurst, in a phrase often quoted with approval, writes that

... state practice covers any act or statements by a state from which views about customary law may be inferred.¹²⁴

On this basis it seems clear that both acts of recognition and non-recognition, as well as statements made before the Court, satisfies the criteria of state practice.

4.3.3 State practice vs. opinio juris

The debate in the previous section may however be of little more than academic interest in the current context, as we turn to the question of the relative significance of state practice and opinio juris in the formation of international customary law.

Traditional legal theory has focused primarily on state practice as the determinant of customary international law. The creation of customary law has been seen as an inductive process, where one through observing states over time may see established patterns of behaviour. Opinio juris is then invoked to distinguish between on the one hand behaviour that is carried out due to a belief that it constitutes the law, and on the other hand acts that are carried out due to tradition, practicalities or other reasons.¹²⁵

Positivists, and the realist tradition that has featured prominent in international theory in the last decades, see this somewhat differently. This theoretical position, that has significantly influenced international law and politics, puts primary emphasis on state sovereignty. Of paramount importance is therefore the principle that states are only bound by what they have consciously consented to.¹²⁶ The psychological element of opinio juris therefore becomes the most importance factor in the creation of customary law. As long as states have expressed a belief that they are bound by a customary law, it matters less whether they have shown state practice to this effect.

¹²⁴ Akehurst p.10

¹²⁵ Roberts p.758

¹²⁶ Shaw p.75

There has therefore been a tendency in international law to shift focus from state practice towards *opinio juris* in the determination of customary international law. This is particularly so as regards human rights norms. This is because the perceived normative value of such norms has led to an increasing push towards establishing customary norms protecting such rights, even if state practice is lacking. In other words, because such norms are seen as desirable, customary norms are understood to exist as long as states express that they believe such rules to exist. As Roberts writes,

[t]he moral content of modern custom explains the strong tendency to discount the importance of state practice in the modern approach. Substantive morality of some customs outweighs defects in their process.¹²⁷

Kirgis has described this relationship between state practice and *opinio juris* as a sliding scale,¹²⁸ where they together have to reach a certain threshold for a customary law to be established. Deficiencies in one of the categories can be compensated by strong evidence of the other. To take torture as an example, many states clearly do not act in accordance with a prohibition on torture. However, few if any state would argue that torture is legal. Because the act of torture is viewed as morally indefensible, and because states will not seek to justify general acts of torture, a customary ban on torture is nevertheless undoubtedly perceived to exist.

4.3.4 Uniformity and duration

In the *Asylum case*, the ICJ held that a customary rule must be “in accordance with a constant and uniform usage practiced by the States in question.”¹²⁹ This indicates a high threshold both as regards time and uniformity in order to establish customary international law.

¹²⁷ Roberts p.765

¹²⁸ Kirgis (1987)

¹²⁹ *Asylum case* p.14

However, it seems to be generally accepted that duration is not the most importance factor when establishing customary norms. As the example of international space law clearly illustrated, customary law can arguably appear almost instantaneously if there are no strong contrary norms already existing, and the *opinio juris* of states is strong and clear.¹³⁰

As regards uniformity, the judgement of the ICJ in the *Nicaragua* case shows that not absolute conformity in practice and *opinio juris* is required for a customary rule to exist. There the Court held that

[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules...¹³¹

As for example Malanczuk notes,

general practice does not require the unanimous practice of all states or other international subjects. This means that a state can be bound by the general practice of other states even against its wishes ...¹³²

Such a view is also implicit in the dissenting opinion of Judge Schwebel in the *Legality of Nuclear Weapons* case, where he noted that the states acting contrary to a proposed customary ban on nuclear weapons was

not a practice of a lone and secondary persistent objector ... [but] the practice of five of the world's major Powers, of the permanent Members of the Security Council, significantly supported ... by their allies and other States ...¹³³

¹³⁰ See Shaw p.78

¹³¹ Nicaragua p.88

¹³² Malanczuk p.42-43

¹³³ Nuclear Weapons p.90

This shows that a customary norm cannot emerge if the major powers act contrary to such a norm. On the other hand, Judge Schwebel implies that if only a few, and perhaps less significant states object, the norm will nevertheless emerge.

In addition, also as regards uniformity does it seem that less is required to form strongly normative customary laws. Again using the words of Roberts,

[t]he international community discounts the importance of dissenting states and contrary state practice because it is not prepared to recognize exceptions to the maintenance of certain fundamental values.¹³⁴

Again using torture as an example, the significant amount of states undoubtedly conducting acts of torture does not weaken the perception that torture is illegal under international customary law.

4.3.5 Abstentions as state practice

Another question is the significance of abstentions in the emergence of international law. More specifically the question concerns situations where State A engages in an activity that State B does not protest against. Can B be said to have accepted the formation of a customary rule in accordance with how A acted?

The traditional case on this topic is the *Lotus* case before the Permanent Court of International Justice in 1928, who held that abstentions can only fulfil the requirement of *opinio juris* “if such abstentions were based on [the states] being conscious of a duty to abstain.”¹³⁵ The situation was here arguably slightly different however, as the question concerned a possible customary obligation to abstain.

Of greater relevance is perhaps the judgment in the *Gulf of Maine* case. The ICJ here found that abstentions could indeed contribute to customary international law, using the term

¹³⁴ Roberts p.766

¹³⁵ Lotus p.23

“acquiescence” and describing it as the “equivalent to tacit recognition, manifested by unilateral conduct which the other party may interpret as consent.”¹³⁶

Based on this, it seems reasonable to claim that if a group of states act in a certain way in the belief that this is the law, the failure of other states to protest may constitute accept of this law if they could be expected to protest in the prevailing circumstances. Using the example from above, this must particularly be so if it is clear for State B that State A is acting out of a belief that their actions constitute the law, or even more so if State A is actively trying to establish a rule of customary law.

That such acquiescence constitutes state practice and *opinio juris* accepting the formation of customary international law is also argued in legal theory. Shaw writes that “[g]enerally, where states are seen to acquiesce in the behaviour of other states, without protesting against them, the assumption must be that such behaviour is accepted as legitimate.”¹³⁷

Mendelson writes that “if a state actually does acquiesce in a practice, this is equivalent to consent and will be sufficient to bind it.”¹³⁸

4.3.6 Kosovo's own arguments

As Kosovo is not a state, it is notable that the Court nevertheless invited Kosovo “to make written contributions to the Court,”¹³⁹ and later also decided to let Kosovo participate in the oral proceedings. This contrasts to the decision in the *South West Africa* case, where South West Africa was not allowed to participate.

Firstly, this may in itself be an indication that the Court at least attaches some “state-like” characteristics to this entity. The question here is however what weight may be attached to their arguments before the Court. One the one hand, the arguments can clearly not

¹³⁶ Gulf of Maine p.63

¹³⁷ Shaw p.89

¹³⁸ Mendelson p.192-193

¹³⁹ ICJ Order 17.08.2008

constitute state practice. On the other hand, the Court has viewed Kosovo's arguments as relevant, treating them as equal participants in the proceedings.

Although perhaps tempting, giving Kosovo's arguments equal standing as other statements neglects the fact that Kosovo is not a state, and not a UN member. It therefore seems correct not to view Kosovo's arguments as evidence of state practice and *opinio juris*, but as representing a form of judicial theory argued by the legal scholars representing Kosovo.

4.4 Recognition of Kosovo independence

4.4.1 States that have recognised Kosovo

66 states have recognised Kosovo as an independent state. This act of recognition clearly falls within the definition of state practice. The same must be the case of voting for Kosovo becoming a member of the World Bank, which almost 40 additional states did.

There is therefore significant state practice supporting Kosovo independence. The question is however whether these acts indicate a belief in a right to remedial secession. The act of recognition clearly suggests that states do not see it as illegal for Kosovo to secede.

However, as has been touched on above, states may extend recognition for a variety of reasons, including reasons of efficiency. Without express statements to the contrary, it is arguably difficult to find in such recognition itself a belief that a right to remedial secession exists.

The *sui generis* arguments presented in chapter 4.3.2 further suggests that not all states have recognised Kosovo due to a right to remedial secession. Notably, the Kosovo Declaration of Independence itself proclaimed that Kosovo independence was “not a precedent for any other situation.” This was clearly an attempt to convince states that they could recognise Kosovo without this having influence on general international law.

Sui generis arguments was therefore one of two reasons why the International Fact-Finding Mission to Georgia found it “more than doubtful that a new rule of customary international

law has been created on the basis of the Kosovo case,”¹⁴⁰ the other being that “precedents do not make new laws in themselves,” as there must be a general practice over a certain amount of time, accompanied by *opinio juris*.¹⁴¹

Each of these claims can be contested however. As regards the second argument, we have already seen that customary law may be created in very short amounts of time if *opinio juris* is strong. If all states recognised Kosovo, at the same time expressing that this was due to a right to remedial secession, such a right could at least be argued to immediately have become customary international law. Further, the recognition of Kosovo does not happen in a previously empty field of law. As seen, there is already significant evidence of state practice and strong support from international law scholars arguing for the existence of such a rule. The recognition of Kosovo by a large number of states, and most likely a successful secession, therefore arguably only has to contribute a certain amount to complete the codification of this principle into customary international law.

As regards *sui generis*-arguments, the label of *sui generis* itself is firstly open to debate. History has shown that neither serious human rights violations nor denial of internal self-determination are unique circumstances. Even if one accepts that a case like Kosovo has not happened before, this does not mean that a similar situation may not arise in the future. Arguably, the apparent success of the Kosovo interim administration as the cornerstone of the *sui generis* claim has even made it more likely that similar arrangements will be attempted in the future.

Further, *sui generis* arguments and a right to remedial secession for Kosovo are not mutually exclusive. This is illustrated by the significant amount of states making both these arguments. As noted, these states make the argument to limit the amount of peoples that will fulfil the criteria for a right to remedial secession. *Sui generis* arguments thereby arguably concerns just as much *when* a right to remedial secession exists, not *if* it exists.

¹⁴⁰ Georgia Mission p.139

¹⁴¹ Ibid p.140

4.4.2 States that have not recognised Kosovo

While it may be questionable whether the recognition of Kosovo constitutes *opinio juris* support of a right to remedial secession, neither can an abstention from recognising Kosovo mean that states do not recognise a right to independence or a right to remedial secession. As the United Kingdom pointed out in their oral presentation,

[i]n all likelihood, the vast majority of States that have not recognized Kosovo have no firm view on the matter, are hesitating in the face of the chilling effect of the present proceedings, or do not engage in formal practices of recognition.¹⁴²

In other words, the abstention from recognition does not in itself carry the necessary *opinio juris* component to contribute to the formation of customary international law. As the examples of Russia and Romania show, it is also clearly possible to support the existence of a right to remedial secession, but still argue that the people of Kosovo do not satisfy the requirements.¹⁴³

4.5 The arguments before the Court

4.5.1 Do the arguments constitute *opinio juris*?

Thirteen states plus Kosovo argued in favour of a right to remedial secession. The question is what significance this has for customary international law.

According to the definition above, claims made by states constitute state practice. Even if this term is interpreted so narrowly that statements before the Court are not included however, strong evidence of *opinio juris* is arguably sufficient to create custom in normative areas of law. The right to self-determination clearly falls in this category.

¹⁴² UK OP p.39

¹⁴³ Russia WS p.37, Romania WS para.15

Do the arguments before the Court constitute *opinio juris*? A counter-argument could be that states before the Court were motivated by various concerns other than strictly legal considerations. Spain and Cyprus for example, having their own internal secessionist movements, could clearly be thought to argue based on domestic rather than strictly legal concerns.

While state practice may lack *opinio juris* however, *opinio juris* cannot itself lack *opinio juris*. When states explicitly argue their view of the law they must simply be believed on their word, states also knowing that their arguments may influence international law in the future. *Opinio juris* in this sense concerns statements of beliefs rather than actual beliefs.¹⁴⁴ In the words of Cassese and Weiler,

when [states] make statements, they do not just speak for the sake of speaking; they should be taken seriously ... if they put forward a legal view concerning a certain type of conduct, this view should be taken seriously as expressing their legal opinion.¹⁴⁵

We therefore conclude that the arguments before the Court are expressions of *opinio juris*, and by most definitions also constitute state practice.

4.5.2 States addressing remedial secession in the proceedings

This section asks to what extent the states that addressed the question of remedial secession before the Court has influenced the existence of such a right. Section 4.5.3 and 4.5.4 then examines the significance of states that did not address the issue, or that did not participate in the proceedings.

¹⁴⁴ Roberts p.757

¹⁴⁵ Cassese & Weiler p.113

The number of states

The most obvious argument against the proceedings as a significant contributor to customary international law is the low number of states that supported a right to remedial secession before the Court. Clearly, thirteen states plus Kosovo does not even satisfy the lower benchmarks for morally strong customs. Further, as the ICJ held in the *North Sea Continental Shelf* case, a customary law requires at the very least that the “states whose interests are specially affected”¹⁴⁶ must have shown such state practice. Arguably, as regards remedial secession, those states that are most affected, having their own secessionist movements, are also the strongest opponents of such a right.

Although the significance of this can hardly be denied, counter-arguments can be made. As regards the last point, arguing that some states are more affected is arguably misguided. As already noted, the right to self-determination is an obligation erga omnes.¹⁴⁷ It is therefore legally speaking an equal concern of all states, no state being more affected than others. As to the more general point, fourteen delegations in favour of a right to remedial secession is arguably more significant than it seems, as it constitutes more than fifty percent of the delegations that addressed the question.

Variation among states

Among opponents of a right to remedial secession, the size, location and statute vary from China to Burundi. Among supporters on the other hand, only Jordan represented the non-European world. This could indicate that the “normative value” that would decrease the requirements of state practice is not global, but regional. Regional state practice will also generally carry less weight under international law than if there was global support.

Although this is again a good argument why the arguments of thirteen states can ultimately not make a customary law on its own, it can be contested. Firstly, one can argue that

¹⁴⁶ *North Sea Continental Shelf* p.44

¹⁴⁷ See 2.1.2 above

regionalism is irrelevant in the context of erga omnes obligations, as such obligations are the equal responsibility of the entire international community. This does however not address the question of the interpretation or content of such rights, which can still clearly be motivated by regional concerns.

The variation of states nevertheless arguably carries limited weight in the current context. This is not because all states have equal influence on the creation of customary law. Judge Schwebel's quote above clearly illustrates that this is not the case. As illustrated there however, states' impact on customary law primarily depends on the influence of the state, not its location. In this case, it cannot be convincingly argued that the states opposing a right to remedial secession are more powerful than its supporters. If anything, states in favour of a right to remedial secession arguably have more international clout, two permanent member of the UN Security Council supporting a right to remedial secession and only one opposing it.

Secondly, closer examination also indicates that participating states have not been motivated by regional concerns. Instead, the primary trend is that states facing domestic secessionist movements argue against a right to remedial secession. The example of Europe illustrates this, Cyprus and Spain arguing against a right to remedial secession, presumably due to their respective conflicts with the Turkish Republic of Northern Cyprus and the Basques. It therefore seems that the influencing factor is domestic rather than regional concerns.

In fact, the domestic motivations of states may be an argument in favour of the emergence of a right to remedial secession. Although we concluded above that domestic considerations do not influence *opinio juris*, this would in any case only strengthen the emergence of a right to remedial secession. This is because states arguing against a right to remedial secession would be concerned with their own domestic peoples, while States in favour would be free of such domestic concerns. The argument would therefore arguably only diminish the value of the arguments presented by states opposing remedial secession, not those arguing in its favour.

Influence on other sources

Lastly, the arguments of states may not only contribute to the right to remedial secession directly as state practice and *opinio juris*. As seen above, states largely relied on traditional evidence when arguing in favour of a right to remedial secession. By citing these however, states offer their interpretation and express a belief that these documents support a right to remedial secession. These sources thereby gain legitimacy as sources of law, and strengthen the overall case for a right to remedial secession. Although clearly not having the same effect on these sources as Resolution 2625 had on the interpretation of the UN Charter,¹⁴⁸ states have nevertheless offered important interpretations, and arguably elevated these sources to a higher status than before these proceedings.

4.5.3 Other states before the Court

Despite these arguments, the arguments of fourteen delegations are clearly not sufficient to establish a customary international law. We therefore turn to those states that participated in the proceedings, but did not address the question of remedial secession. These states favoured the independence of Kosovo by a margin of fourteen to five.

On the one hand, these states did not support a right to remedial secession even if they had the opportunity. In my view however, the silence of these states must be seen as contributing to a right to remedial secession.

This is based on the fact that Kosovo already, by the time of the proceedings, was recognised by a significant number of states, and arguably already well on its way to independence.¹⁴⁹ Other states were naturally aware of this, and also saw that a significant number of states argued in favour of a right to remedial secession in their submissions to the Court. Nevertheless, these states abstained from arguing against a right to remedial secession. In my interpretation, if these states believed such a right not to exist, they would

¹⁴⁸ See 2.1.2 above

¹⁴⁹ See 3.5 above

be inclined to argue this point so as to avoid the consolidation of such a rule as part of international law.

That they did not do so can be interpreted in two ways, but ultimately leading to the same result. Either, they believed such a right to exist and therefore found themselves not able to argue against it. This parallels previous examples where states did not reject secessionist movements outright.¹⁵⁰ Alternatively, states believed, or wanted, such a right to exist, but found that the likely independence of Kosovo in combination with the arguments of fourteen delegations was sufficient to establish such a customary law. They therefore did not find it necessary themselves to address this arguably controversial point before the Court. The requirement that abstentions must be due to *opinio juris* is in both these cases satisfied.

One could perhaps argue that the *sui generis* arguments presented by a number of states as an independent justification for secession is a rejection of the right to remedial secession. This can clearly not be so. No state arguing in favour of Kosovo as *sui generis* expressed any views contrary to a right to remedial secession. And as previously seen, also states arguing in favour of remedial secession highlighted Kosovo's *sui generis* status. Again, *sui generis* under this angle concerns the requirements for remedial secession, rather than a rejection of the existence of such a right.

4.5.4 States not participating in the proceedings

Similar considerations can be made as regards states that decided not to participate in the proceedings. Also these states saw the recognition of Kosovo by various states. If they did not believe Kosovo to have a right to secession, they would have to address the question in public. Instead, they abstained, leading to the conclusion that

[a]part from those 15 to 20 states that have participated in these proceedings and have, for their own very particular reasons, declared their opposition to Kosovo's

¹⁵⁰ See 2.4.2 above

independence, there is no evidence of widespread opposition to Kosovo's independence.¹⁵¹

As regards the proceedings before the Court, one could perhaps argue that the question posed to the ICJ by the General Assembly did not address remedial secession directly. For this reason, states may not have been aware that this question would be addressed, or that arguments supporting this right would be made before the Court. Their abstention from arguing against a right to remedial secession would thereby not be due to any legal consideration.

However, the written statements submitted to the Court were publicly available before the oral proceedings began. As the examples of Saudi Arabia and Jordan show, states were permitted to participate in the oral proceedings before the Court without having submitted written statements. Having seen that a significant number of states argued in favour of a right to remedial secession in their written submissions, states opposing such a right would therefore have the same incentive as participating states to argue against such a right. Nevertheless, they abstained from doing so.

4.6 Conclusion

Summing up the two previous sections, we may look at the question the other way around: only fifteen states out of a possible 192 opposed the attempted secession of Kosovo, a secession that quite clearly found its justification in the denial of self-determination imposed upon Kosovo in the 1990s. Before the Court, where all states had the opportunity to speak against a right to remedial secession, only eleven states found themselves able or willing to do so.

Can this be enough to hinder a customary law from emerging? According to the criteria in section 4.3 above, and in particular in light of the strong normative nature of the right to self-determination, this can in my view not be so. If states opposed that such a right existed,

¹⁵¹ UK OP p.39

they would, in light of Kosovo's move towards independence and the arguments presented before the Court, have to argue against it. Lacking this, they acquiesced in the development of such a norm, fulfilling the requirement articulated in the *Gulf of Maine* case.

4.7 Persistent objectors

If we accept that a customary right to remedial secession exists, a question emerges concerning the states that opposed such a right before the Court. In the *Fisheries* case, the ICJ articulated the persistent objector principle, finding that

in any event the ... rule would appear to be inapplicable as against Norway inasmuch as she had always opposed any attempt to apply it...¹⁵²

In general terms, the principle means that a customary law is not binding for states that have protested against it from its inception.¹⁵³ From this premise, the Independent Mission to Georgia stated without reservation that states “denying Kosovo’s right to secede would have to be considered as persistent objectors” and thereby not bound by the rule.¹⁵⁴

This can however be questioned. Firstly, as seen in chapter 2, a right to remedial secession may have existed before 2008. In that case, a protest before the Court in 2009 could not make states persistent objectors. Even if this was not the case however, there were before this time strong advocates as well as state practice supporting such a view. Nevertheless, no state protested against such a right before in the current proceedings. One may therefore argue that even in such a scenario, states did not protest from the time when they first had a chance to do so, and have therefore consented to such a right.

If one on the other hand finds that the inception of such a right happened in the proceedings before the Court, one must perhaps accept that eleven states become persistent objectors. This is however clearly an unsatisfying result, meaning that Serbia does not have to respect

¹⁵² *Fisheries* p.19

¹⁵³ *Shaw* p.90

¹⁵⁴ *Georgia Mission* p.141

Kosovo's legal right to independence. Some authors therefore suggest that states cannot be persistent objectors to customary norms of strong normative value.¹⁵⁵ Going even further, some argue that such fundamental human rights norms cannot be seen as customary rules at all, and instead must be considered as general principles of international law within the meaning of the ICJ statutes Article 38 (1) (c).¹⁵⁶ As we are running out of words however, a further exploration of this argument must lie outside the scope of this thesis.

¹⁵⁵ See Roberts p.765

¹⁵⁶ Simma & Alston p.104

5 Conclusions

This thesis has argued two primary points. In Chapter 3 it was concluded that even if there existed a right to remedial secession in 2008, the people of Kosovo most likely did not fulfil the criteria for such a right when they declared independence in February 2008. In spite of this, a significant number of states have already recognised Kosovo, and it is perhaps difficult to see that the process towards independence can be reversed.

Chapter 4 argued that if a right to remedial secession did not exist before 2008, the case of Kosovo, and in particular the proceedings before the ICJ, has contributed to such a right emerging as part of customary international law. Thirteen states' clear expressions of a belief in a right to remedial secession constitute state practice and *opinio juris* to this effect. In addition, their arguments also provide interpretations of previous international documents and legal theory supporting a right to remedial secession.

The claim is nevertheless not that the arguments of thirteen states plus Kosovo are sufficient to create customary law. Despite being open to all however, only eleven states, and arguably for domestic reasons, argued against a right to remedial secession. Other states, aware of the arguments before the Court, and aware of Kosovo moving towards independence, nevertheless refrained from arguing against such a right. In abstaining from making such arguments, they acquiesced to such a customary law coming into existence.

Secondly, the recognition by 66 states of Kosovo independence shows that states accept that secessions can take place without consent of the parent state. Although states may have attempted to limit the precedent of Kosovo through *sui generis* arguments, and one may argue that recognition is a matter of efficiency rather than legal right, their acceptance of Kosovo's independence and the denial of internal self-determination in the 1990s can hardly be denied. At the very least, Kosovo will therefore set a strong precedent, and give a strong argument, for other peoples being denied internal self-determination.

Thirdly, the case of Kosovo has not emerged in a previously empty field of law. Rather, the arguments presented before the Court have come in addition to previous arguments made

by various theorists, as well as previous state practice. The required state practice to establish a right to remedial secession as part of customary law is therefore lower than would otherwise be the case.

Lastly, the emergence of a right to remedial secession must be seen in the context of a greater development in recent decades. In this time we have seen an increasing focus on human rights and democracy, with correspondingly less focus on sovereignty and territorial integrity. A right to remedial secession is therefore only the latest development in this direction. This does however not necessarily mean that these ideas and ideals are new. A red line can indeed be drawn from remedial secession and all the way back to the ideas of Rousseau and the social contract, the sovereign only being permitted to rule as long as he respects the peoples' wishes.

The criteria for achieving a right to remedial secession remain strict, the *sui generis* arguments before the Court clearly showing that the people of Kosovo are the only people currently having this right. That the criteria remain narrow is important, and territorial integrity must clearly be maintained as a fundamental principle so as to prevent chaos. The challenge of the future therefore remains to strike a balance between these fundamental principles. After the case of Kosovo however, international law will likely be able to leave behind the question of *if* there is a right to remedial secession, and focus all attention on the question of *when*.

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| ICJ Statutes | Statute of the International Court of Justice, 26 June 1945 |
| ICCPR | International Covenant on Civil and Political Rights, 16 December 1966 |
| ECOSOC | International Covenant on Economic, Social and Cultural Rights, 16 December 1966 |
| VCLT | Vienna Convention on the Law of Treaties, 23 May 1969 |
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7 Annex – States’ positions on Kosovo and remedial secession

| State | Supports Kosovo independence? | Discusses remedial secession? | Right to remedial secession in international law? | If such a right, does it exist for Kosovo? | Comments |
|----------------|--------------------------------------|--------------------------------------|--|---|-----------------|
| Albania | Yes | Yes | Yes | Yes | |
| Argentina | No | Yes | No | - | |
| Austria | Yes | No | - | - | |
| Azerbaijan | No | Yes | No | - | |
| Belarus | No | Yes | Yes | No | |
| Bolivia | No | Yes | No | - | |
| Brazil | No | No | - | - | |
| Bulgaria | Yes | No | - | - | |
| Burundi | Yes | Yes | No | - | |
| China | No | Yes | No | - | |
| Croatia | Yes | No | - | - | |
| Cyprus | No | Yes | No | - | |
| Czech Republic | Yes | No | - | - | |
| Denmark | Yes | No | - | - | |
| Egypt | Unclear | No | - | - | |
| Estonia | Yes | Yes | Yes | Yes | |
| Finland | Yes | Yes | Yes | Yes | |
| France | Yes | No | - | - | |
| Germany | Yes | Yes | Yes | Yes | |
| Ireland | Yes | Yes | Yes | Yes | |
| Iran | No | Yes | No | - | |
| Japan | Yes | No | - | - | |
| Jordan | Yes | Yes | Yes | Yes | |
| Kosovo | Yes | Yes | Yes | Yes | |
| Latvia | Yes | No | - | - | |
| Libya | No | No | - | - | |
| Luxembourg | Yes | No | - | - | |

| State | Supports Kosovo independence? | Discusses remedial secession? | Right to remedial secession in international law? | If such a right, does it exist for Kosovo? | Comments |
|----------------|--------------------------------------|--------------------------------------|--|---|-----------------|
| Maldives | Yes | No | - | - | |
| Netherlands | Yes | Yes | Yes | Yes | |
| Norway | Yes | No | - | - | |
| Poland | Yes | Yes | Yes | Yes | |
| Romania | No | Yes | Yes | No | |
| Russia | No | Yes | Yes | No | |
| Saudi Arabia | Yes | No | - | - | |
| Serbia | No | Yes | No | - | |
| Sierra Leone | Yes | No | - | - | |
| Spain | No | Yes | No | - | Only in OP |
| Slovakia | No | No | - | - | |
| Slovenia | Yes | No | - | - | |
| Switzerland | Yes | Yes | Yes | Yes | |
| United Kingdom | Yes | Yes | Yes | Yes | Only in OP |
| USA | Yes | No | - | - | |
| Venezuela | No | Yes | No | - | |
| Vietnam | No | Yes | No | - | |
| Sum Yes: | 27 | 25 | 14 | 11 | |
| Sum No: | 16 | 19 | 11 | 3 | |
| Total: | 43 | 44 | 25 | 14 | |