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**DO MINORITIES HAVE THE RIGHT TO
SELF-DETERMINATION?**

COMPARATIVE ANALYSIS OF KOSOVO AND CHECHNYA

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Abstract

Kosovo's declaration of independence brought a new phase in the development of the doctrine of self-determination resulting in ongoing traditional debate among international scholars in determination to whom this right applies. A coherent legal scope prescribes that the right to self-determination belongs to all 'peoples' and not to 'minorities'. However, lack of proper definitions of these terms entails a paramount controversy in relation to this concept.

The thesis aims to examine the current status of the notion of self-determination, namely comparing the situations of Kosovo and Chechnya as similar illustrations of secession claims by minority groups which, despite various common elements, found a different path of development under international law. The thesis will argue that the law of self-determination has undergone transformation in relation to the right holders of this doctrine shifting from the classical vision on a beneficiary of this right to the recognition of the fact that in certain circumstances a 'minority' may attain the status of the term 'people' and, therefore, exercise the right to self-determination.

- In Memory of My Grandmother -

Table of Contents

INTRODUCTION	1
CHAPTER I: NOTION OF THE RIGHT TO SELF-DETERMINATION IN THE THEORETICAL CONTEXT	6
A. MEANING AND APPLICATION OF THE RIGHT TO SELF-DETERMINATION	7
1. <i>Right to Self-Determination as a Political Concept</i>	8
2. <i>Right to Self-Determination as a Legal Right</i>	10
B. “TERMINOLOGICAL CHAOS” OF TERMS ‘PEOPLES’ AND ‘MINORITIES’	12
C. CONTROVERSY OVER THE PRINCIPLE OF TERRITORIAL INTEGRITY OF STATES	18
1. <i>The Internal Self-Determination and Principle of Territorial Integrity</i>	19
2. <i>The External Self-Determination and Principle of Territorial Integrity</i>	21
CHAPTER II: HISTORICAL DEVELOPMENTS OF CONFLICTS IN KOSOVO AND CHECHNYA	25
A. HISTORICAL CONTEXT OF KOSOVO	25
B. HISTORICAL CONTEXT OF CHECHNYA	28
CHAPTER III: COMPARATIVE ANALYSIS OF KOSOVO AND CHECHNYA.....	32
A. ARE THEY ‘PEOPLE’?	32
B. HUMAN RIGHTS ABUSES	38
C. ROLE OF INTERNATIONAL COMMUNITY AND EXHAUSTION OF ALL REMEDIES FOR INTERNAL SELF-DETERMINATION.....	41
CONCLUSION.....	45
BIBLIOGRAPHY	48

“The phrase [self-determination] is simply loaded with dynamite. It will raise hopes which can never be realized[...] What a calamity the phrase was ever uttered! What misery it will cause!”

US Secretary of States Robert Lansing (1921)¹

INTRODUCTION

In the 21st century the right to self-determination is still subject to open debate in minds of the international lawyers. On 17th February 2008, Kosovo declared itself an independent and a sovereign state from Serbia, calling on the international community to recognize its legal personality under international law.² The legal basis for such a claim was the right to self-determination.

Although no one argues that the notion of self-determination applies to the context of the decolonization,³ various scholars believed that it did not extend to ‘post-colonial’ situations.⁴ However, later developments confirmed that the right to self-determination has a permanent nature which can be implemented internally and externally.⁵

The incorporation of the principle of self-determination as one of the main purposes and goals of the United Nations Charter⁶ (*hereinafter*: the “UN Charter”) was one step

¹ Robert Lansing, ‘Self-Determination’, *Saturday Evening Post*, 9 April 1921 cited in Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 Am. J. Int'l L. 1, 10 (1976).

² Kosovo Declaration of Independence (February 17, 2008), available at http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf (last visited March 27, 2008) [*hereinafter*: “Kosovo Declaration of Independence 2008”].

³ Robin C.A. White, *Self-Determination: Time For A Re-Assessment?*, 28 International Law Review 147, 149 (1981) [*hereinafter*: R. White]; GAETANO PENTASSUGLIA, MINORITIES IN INTERNATIONAL LAW 161 (Council of Europe Publishing 2002) [*hereinafter*: G. PENTASSUGLIA].

⁴ 43 DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 226 (Kluwer Law International The Hague/London/New York 2002) [*hereinafter*: D. RAIC]; KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION, INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 285 (Martinus Nijhoff Publishers, The Hague/Boston/London, 2000) [*hereinafter*: K. HENRARD].

⁵ D. RAIC, *supra* note 4, at 227; *See also* K. HENRARD, *supra* note 4, at 297.

⁶ UN Charter, art. 1 (2) and 55.

forward to its transformation as a legal right.⁷ Both 1966 Covenants of Human Rights precisely state that:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁸

Both international legal instruments clearly identify that the right to “self-determination is a human right”⁹ and, therefore, is “the imperative right of peoples”.¹⁰ However, there is the greatest misunderstanding among international legal scholars, namely “[w]ho are the ‘peoples’ to whom the right applies?”¹¹ Most of the controversy over this doctrine arises when time comes to define what is meant under the definition of the term ‘people’.¹² On the other hand, it is appropriate to ask who the other groups are who do not enjoy the right to self-determination? These are ‘minorities’.¹³

It is important to note that from the emergence of this right as a legal concept, it was generally accepted that minority groups are not beneficiaries of this doctrine.¹⁴ As Rosalyn

⁷ MALCOLM N. SHAW, *INTERNATIONAL LAW* 253-255 (Cambridge University Press 6th ed., 2008) [hereinafter: M. SHAW].

⁸ International Covenant on Civil and Political Rights, art. 1 (1), Dec. 16, 1966 [hereinafter: the ICCPR] and International Covenant on Economic, Social and Cultural Rights art. 1 (1), Dec. 16, 1966 [hereinafter: the ICESCR]; *See also* Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/Res/1514, XV (Dec.14, 1960) para. 2 [hereinafter: UN Resolution 1514]; Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, UN Doc. A/Res/1541, XV (Dec. 15, 1960), Annex, principles VI and VII [hereinafter: UN Resolution 1541].

⁹ Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 Wash. & Lee L. Rev. 773, 773 (1998) [hereinafter: Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*].

¹⁰ As cited in PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* 9 (Routledge • Taylor & Francis Group 2002) [hereinafter: P. RADAN].

¹¹ As cited in Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 *International and Comparative Law Quarterly* 857, 866 (1994) [hereinafter: R. McCorquodale].

¹² Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, *supra note 9*, at 773-774; P. RADAN, *supra note 10*, at 9.

¹³ Office of the High Commissioner for Human Rights, General Comment No. 23: The rights of minorities (Art. 27): 04/08/1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23, para. 2 [hereinafter: General Comment No. 23]; *See also* HURST HANNUM, *THE CONCEPT AND DEFINITION OF MINORITIES*, in MARK WELLER (ed.), *UNIVERSAL MINORITIES RIGHTS, A COMMENTARY ON THE JURISPRUDENCE OF INTERNATIONAL COURTS AND TREAT BODIES* 53, 71 (Oxford University Press, 2007) [hereinafter: H. HANNUM, *THE CONCEPT AND DEFINITION OF MINORITIES*]; D. RAIC, *supra note 4*, at 268-269.

¹⁴ Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, *supra note 9*, at 774; D. RAIC, *supra note 4*, at 265-266.

Higgins once stated “minorities as such do not have a right to self-determination”.¹⁵ There is a “terminological chaos” between terms ‘people’ and ‘minority’.¹⁶ It is difficult to find a proper difference between these definitions and, therefore, most problems arise when we have to state whether a particular group is a ‘minority’ or ‘people’.

The situations of Kosovo and Chechnya have many parallels. Not only did these conflicts take place after the end of the Cold War but also both cases are identical in terms of minority groups claiming independence from their parent states. In both conflicts, gross human rights violations were perpetrated against distinct ethnic Chechens and Kosovo Albanians by their parent states (the Russian Federation and Serbia).¹⁷ The deprivation of their basic human rights resulted in the proclamation of independence from Russia and Serbia.¹⁸ However, despite similarities in factual circumstances, both cases found a different path of development under international law. On the one hand, various states were able to recognize Kosovo as the independent state¹⁹, while in case of Chechnya none of them made any attempt to recognize it.²⁰

It should be noted that recent developments in Kosovo, which was followed by the recognition of it by several states, indicate that international law has started shifting from the classical vision of this doctrine towards recognition of the fact that a group from being ‘minority’ can become ‘people’. Kosovo’s situation can be considered as a new stage in the

¹⁵ ROSALYN HIGGINS, *PROBLEMS & PROCESS, INTERNATIONAL LAW AND HOW WE USE IT* 124 (Oxford University Press 1994) [hereinafter: R. HIGGINS].

¹⁶ WALKER CONNOR, *ETHNONATIONALISM: THE QUEST FOR UNDERSTANDING* 89-117 (Princeton University Press, 1994) [hereinafter: W. CONNOR].

¹⁷ Please refer to Chapter III, Sub-Chapter “B” (discussing human rights violations against ethnic Albanians in Kosovo and Chechens).

¹⁸ Please refer to Chapter II (discussing historical developments of conflicts).

¹⁹ Written Statement of the Government of the Republic of Albania, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for Advisory Opinion), I.C.J. October 17, 2008 at 23-24, 49, available at <http://www.icj-cij.org/docket/files/141/15618.pdf> (last visited March 27, 2008) [hereinafter: Albanian Submission]; BBC News: EU splits on Kosovo recognition, 18 February 2008, available at <http://news.bbc.co.uk/2/hi/europe/7249909.stm> (last visited March 27, 2011); BBC News: Serbia’s neighbours accept Kosovo, March 19, 2008 available at <http://news.bbc.co.uk/2/hi/7304488.stm> (last visited March 27, 2011).

²⁰ D. RAIC, *supra note 4*, at 375.

development of the right to self-determination. In particular, the advisory opinion of the International Court of Justice (*hereinafter*: the “ICJ”) in relation to the unilateral declaration of independence of Kosovo gave a new direction for the right to self-determination by stating that the declaration of independence “did not violate international law”.²¹ Although, the ICJ did not directly state that Kosovo Albanians are ‘people’ or ‘minority’, a reached decision might lead to the conclusion that Kosovo Albanians, as being minority group within Serbia, might have attained the status of being ‘people’ and, therefore, have the right to self-determination.

I will argue that minority groups from being ‘minorities’ can become ‘people’ under the language of the international human rights covenants and the UN Charter. However, the mentioned transformation will depend on two main conditions: human rights abuses against a particular ethnic group by the parent state and political support from the rest of the international community. Along with this, it should be noted that this paper does not claim that Kosovo Albanians and Chechens should be entitled to the right to external self-determination, leading to a creation of a new sovereign state. Instead, I will argue that not all possible remedies for the internal aspect of self-determination were exhausted for them. The paper aims to show that Kosovo Albanians and Chechens should have possibility to exercise the internal right to self-determination which at the same time ensures the protection of the territorial integrity of Serbia and the Russian Federation.

In this respect, the thesis will proceed in three chapters. Chapter I will explore and analyze the theoretical framework of the notion of self-determination. Special emphasis will be made on the determination of the issue who are ‘people’ and ‘minority’ and interrelation between the right to self-determination with the principle of territorial integrity of states.

²¹ Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion) 22 July 2010 I.C.J, paras. 123, 84 ,119, 121, available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited March 27, 2011) [hereinafter: ICJ’s advisory opinion on Kosovo).

Chapter II aims to discuss the path of historical developments of Kosovo and Chechnya's cases and identifying key elements in factual circumstances of these conflicts. And the last Chapter will be a comparative analysis of Kosovo and Chechnya's situations where I will argue that two main requirements should be fulfilled for the purpose of implementation of the right to self-determination. This part will state that the right to self-determination is a tool of political manipulations since in case of Kosovo, the international community started accepting the theory that 'minority' can become 'people', while in the case of Chechnya, the international community remains silent.

CHAPTER I: NOTION OF THE RIGHT TO SELF-DETERMINATION IN THE THEORETICAL CONTEXT

The right to self-determination has a long history of development emerging as a political concept and leading to crystallization as a legal one. Its evolution traces back to the American and French Revolutions to the period of the end of the 18th century which reflects the idea of a popular sovereignty and democracy.²² All these concepts were equated with the notion of self-determination.

Later, the 20th century witnessed the rapid development of this doctrine. Since that time much work has been conducted on its understanding, however one can still say that the right to self-determination remains one of the most controversial doctrines in the field of human rights and international law, especially in relation to whom it should apply and controversy over the maintenance of the principle of the territorial integrity of states. This doctrine can be classified as having more controversy than clarity in its application.

The situations in Kosovo and Chechnya have long roots related to the scope and application of the right to self-determination. In both conflicts, the notion of the self-determination was proclaimed by Kosovo Albanians and Chechens. In this respect, the present Chapter aims to analyze the theoretical framework of this confusing doctrine in order to evaluate whether or not Kosovo Albanians and Chechens can benefit from it.

This Chapter will be divided into three sub-chapters, the first of which deals with the meaning and application of the right to self-determination from the political aspect to its establishment as a legal right. This part will also clarify the interrelation between the doctrine

²² D. RAIC, *supra note 4*, at 173-175; P. RADAN, *supra note 10*, at 8; JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION, THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY 11 (Martinus Nijhoff Publishers The Hague/Boston/London 2000) [hereinafter: J. CASTELLINO]; G. PENTASSUGLIA, *supra note 3*, at 160; Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int'l L. 1, 3 (1993) (discussing historical development of the "national self-determination") [hereinafter: H. Hannum "Rethinking Self-Determination"]; Bartram S. Brown, *Human Rights, Sovereignty, And The Final Status of Kosovo*, 80 Chi.-Kent L. Rev. 235, 241 (2005) [hereinafter: B. Brown].

of self-determination and minority protection mechanisms. The second sub-chapter will address the issue of the “terminological chaos”²³ between terms ‘people’ and ‘minority’ and the problems with the non-existence of definitions at the international and domestic level. This sub-chapter will analyze overlapping concepts of these terms. And finally, the third sub-chapter will address the issue of clashes between the doctrine of (internal and external) self-determination and the principle of territorial integrity of states.

A. Meaning and Application of the Right to Self-Determination

The notion of self-determination means that people have their own right to “freely determine their political status and freely pursue their economic, social and cultural development”.²⁴ The same wording is applied in the common Article 1 of both 1966 Covenants on Human Rights which shows that the principle of self-determination has attained the status of a well-established universal human right.²⁵

The incorporation of the right to self-determination into the UN Charter as one of the main purposes of the United Nations led to its crystallization as a legal right.²⁶ However, it should be mentioned that from the moment of the emergence of this concept it was generally agreed that the principle of self-determination was a pure political doctrine²⁷ within the philosophical understanding of Woodrow Wilson.²⁸ In this respect, I consider it is necessary

²³ W. CONNOR, *supra note 16*.

²⁴ UN Resolution 1514, *supra note 8*, para. 2; UN Resolution 1541, *supra note 8*, Annex, Principles VI and VII; ICCPR, art. 1 (1) and ICESCR, art. 1 (1); *See also* the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, UN Doc. A/Res/2625, XXV (Oct. 24, 1970) preamble [hereinafter: the “Friendly Relations Declaration” or UN Resolution 2625].

²⁵ Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, *supra note 9*, at 773; *See also* M. SHAW, *supra note 7*, at 253; R. McCorquodale, *supra note 11*, at 871-873.

²⁶ UN Charter, art. 1 (2) and 55.

²⁷ The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs (1921) League Doc. B7.21/68/106, at 27-28 [hereinafter: Aaland Islands case]; Michael K. Addo, *Political Self Determination Within the Context of the African Charter on Human and Peoples' Rights*, 32 *Journal of African Law*, 182, 182-183; M. SHAW, *supra note 7*, at 251; H. Hannum “Rethinking Self-Determination”, *supra note 22*, at 12.

²⁸ M. SHAW, *supra note 7*, at 251.

to discuss a path of development of the notion of self-determination from the political concept to its formation as a legally binding norm of international law.

1. Right to Self-Determination as a Political Concept

The person who we should blame for giving significant substance to the principle of self-determination is the United States President Woodrow Wilson.²⁹ After the First World War, he saw that the incorporation of self-determination into the Covenant of the League of Nations was necessary in order to protect vulnerable groups within particular territories of states who were not allowed to participate in the determination of their own political and economic status.³⁰ On the contrary, at that time the international community did not have the same vision on this philosophical doctrine as President Wilson and, therefore, the Covenant of the League of Nations did not reflect this concept in its text.³¹

The father of self-determination³² described this doctrine in the following manner:

Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. “Self-determination” is not a mere phrase. It is an imperative principle of action which, statesmen will henceforth ignore at their peril.³³

²⁹ H. Hannum “Rethinking Self-Determination”, *supra note 22*, at 3-4; ANTONIO CASSESE, SELF-DETERMINATION: A LEGAL REAPPRAISAL 13 (UK: Cambridge University Press, 1995) (It should be noted that after the Bolshevik Revolution, Lenin was another major supporter in the development of the notion of self-determination) [hereinafter: A. CASSESE].

³⁰ H. Hannum “Rethinking Self-Determination”, *supra note 22*, at 7; *See also* P. THORNBERRY, THE DEMOCRATIC OR INTERNAL ASPECT OF SELF-DETERMINATION 101, in TOMUSCAT, C. (ed.) MODERN LAW OF SELF-DETERMINATION (Martinus Nijhoff Publishers, 1993).

³¹ THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 30 (Oxford University Press, 1997) [hereinafter: T. MUSGRAVE].

³² J. CASTELLINO, *supra note 22*, at 13 (describing that President Wilson was “the father of the modern norm of self-determination”).

³³ Woodrow Wilson, President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances, Delivered in Joint Session (Feb. 11, 1918), reprinted in 1 The Messages and Papers of Woodrow Wilson 472, 475 (Albert Shaw ed. 1924).

The mentioned words are a clear identification of the internal dimension of self-determination.³⁴ Pursuant to it, “ethnically identifiable peoples or nations should have the right to select their own *democratic* government”.³⁵

In line with this, it should be underscored that the principle of self-determination was interrelated with the development of the minority protection mechanism.³⁶ Both principles emerged hand in hand aiming to attain same purposes for the protection of population of a particular State. Nevertheless, even during that period it was apparent that both concepts had a different treatment from the perspective of the international community. Hence, as Kristin Henrard defines “the minority protection measures were a kind of alternative to self-determination”.³⁷

Further clear evidence that self-determination was thought as a political and philosophical concept during the League of Nations is the Aaland Islands case which dealt with the issue of the secession by majority of the ethnic Swedish population residing in Aaland Islands. These islands fell under the jurisdiction of the Grand Duchy of Finland within Russian territory and jurisdiction.³⁸ However, in 1917 after the declaration of independence of Finland from Russia, the Swedish population of Aaland Islands relied on the principle of self-determination and decided to re-unite their territory with Sweden.³⁹ In this case, the International Commission of Jurists, as well as the Committee of Rapporteurs, concluded that the principle of self-determination did not form part of the positive law since there was no indication of this right in the Covenant of the League of Nations.⁴⁰ The mentioned fact leads to the conclusion that at that time the international community did not

³⁴ H. Hannum “Rethinking Self-Determination”, *supra note 22*, at 7.

³⁵ D. RAIC, *supra note 4*, at 178.

³⁶ T. MUSGRAVE, *supra note 31*, at 40; *See e.g.* the Treaty of Versailles with respect to Poland, June 28, 1919, Cmd. 223, 22 U.K.T.S. 8, the Treaty of Trianon with Hungary, June 4, 1920, Cmd. 896, 25 U.K.T.S. 345(indicating that the concept of minority protection mechanism was also discussed during the League of Nations).

³⁷ K. HENRARD, *supra note 4*, at 282.

³⁸ H. Hannum, “Rethinking Self-Determination”, *supra note 22*, at 8-9; J. CASTELLINO, *supra note 22*, at 19-20.

³⁹ *Ibid.*

⁴⁰ M. SHAW, *supra note 7*, at 251; J. CASTELLINO, *supra note 22*, at 19-20.

see the importance of existence of this mere political concept. However, the consequences of the Second World War brought the concept on self-determination into play.

2. Right to Self-Determination as a Legal Right

In 1945, the international community, by virtue of the adoption of the UN Charter, declared that one of its major purposes was “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.⁴¹ Irrespective of the fact that the UN Charter does not explain how the principle of self-determination should apply to people, the mentioned legal instrument does, however, show how for the first time it led to the transformation of this concept into positive law. The ICJ classified the principle of self-determination as “one of the essential principles of contemporary international law”⁴² within the framework of the UN Charter.

After the Second World War, the right to self-determination was used as a tool for decolonization.⁴³ The two resolutions of the General Assembly, namely 1514 and 1541 Resolutions clearly indicate that the principle of self-determination was a means of application of the external aspect of self-determination leading to the creation of a new independent state from the colonial power.⁴⁴ Since that time various scholars argued that this notion could be applied only within the colonial power and, thus, was considered a “temporary right” without further application.⁴⁵

However, later developments in the field of human rights by adoption of both 1966 Covenants on Human Rights put to an end to this controversy over the nature of the

⁴¹ UN Charter, art. 1 (2). See also A. CASSESE, *supra* note 29, at 38.

⁴² East Timor (Portugal v. Australia), 1995 I.C.J. 102 (June 30) [hereinafter: East Timor case], available at <http://www.icj-cij.org/docket/files/84/6949.pdf>; See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (Oxford University Press 4th ed., 1991) (arguing that the right to self-determination has attained the status of *jus cogens*).

⁴³ MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS* 25 (Martinus Nijhoff Publishers, 1982); G. PENTASSUGLIA, *supra* note 3, at 161.

⁴⁴ R. White, *supra* note 3, at 149.

⁴⁵ D. RAIC, *supra* note 4, at 226.

mentioned doctrine. The said legal instrument affirms that the right to “self-determination is a human right”⁴⁶ according to which “all peoples”⁴⁷ have a legal right to define their political status, freely develop and use their own economic or natural resources and maintain their social and cultural form of life without an external intrusion/interference in these values.⁴⁸

Both 1966 Covenants on Human Rights have universal acceptance as the core document in the area of human rights, which in line with this affirms that the right to self-determination is not a temporary right applied only for the purpose of decolonization but a permanent one which has universal application in international law.⁴⁹

It is worth noting that the judicial interpretation of the right to self-determination was given only in a few cases and mainly issued as advisory opinions focusing within the framework of decolonization. In particular, the ICJ in the advisory opinions in cases of *Namibia*⁵⁰ and *Western Sahara*⁵¹ recognized the existence of the right as a positive obligation of states to ensure it for people based on their expressed free will. Later, in its other advisory opinion, the Court made it clear that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”.⁵²

The permanent nature of the principle of self-determination is also enshrined in the Final Act of the Conference on Security and Co-operation in Europe⁵³ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

⁴⁶ Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, *supra note 9*, at 773.

⁴⁷ UN Charter, art. 1(2); ICCPR, art. 1(1) and ICESCR art 1(1); UN Resolution 1514, para. 2; Friendly Relations Declaration, *supra note 24*, Preamble.

⁴⁸ *Ibid.*

⁴⁹ D. RAIC, *supra note 4*, at 284 (discussing that the “self-determination has continuous character”); *See also* the Friendly Relations Declaration, *supra note 24*, Principle V.

⁵⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion), 1971 I.C.J. 16 (June 21), available at <http://www.icj-cij.org/docket/files/53/5595.pdf> (last visited March 27, 2011).

⁵¹ *Western Sahara*, (Advisory Opinion), 1975 I.C.J. 32, para. 55 (October 16), available at <http://www.icj-cij.org/docket/files/61/6195.pdf> (last visited March 27, 2011).

⁵² East Timor case, *supra note 42*, at 102 para. 29; M. SHAW, *supra note 7*, at 255.

⁵³ Conference on Security and Co-Operation in Europe, Final Act Helsinki August 1, 1975, Principle VIII, para. 2 (in relation to “[e]qual rights and self-determination of peoples”) [hereinafter: Final Act of Helsinki].

States in accordance with the Charter of the United Nations.⁵⁴ Textually, both documents accept the idea that the right to self-determination applies to “all people”⁵⁵ who “have the right in full freedom, to determine, when and as they wish, their internal and external political status, without external political interference”.⁵⁶

All the aforementioned indicate that the permanent nature of this concept means that this is a sustainable right which will not merely depend on once reaching its goals and later denying it to the people. This is a clear indication of the existence of the internal and external self-determination.⁵⁷ Once the people cannot exercise the self-determination internally, the doctrine will entail the application of self-determination in the external form after the exhaustion of all forms of the internal self-determination. However, the greatest remaining question still has not been answered. Who benefits from the right to self-determination?

B. “Terminological Chaos”⁵⁸ of Terms ‘Peoples’ and ‘Minorities’

The above sub-chapter was mainly focused on the historical evolution of the right to self-determination and how it gained the status of a universal human right. However, a question that now needs to be addressed is who should be considered as a beneficiary of the mentioned legal right. The discussion of this issue is significant since it is widely accepted that the right to self-determination is the people’s right and not minorities.⁵⁹

Pursuant to the ICCPR and ICESCR, the right to self-determination belongs to “all peoples”.⁶⁰ According to James Crawford “from the perspective of international law, the key

⁵⁴ Friendly Relations Declaration, *supra note 24*, Principle V, para. 1 (“The principle of equal rights and self-determination of peoples”).

⁵⁵ *Ibid.*

⁵⁶ Final Act of Helsinki, *supra note 53*; *See also* African Charter on Human Rights and People’s Rights, art. 20 (June 27, 1981).

⁵⁷ Please refer to Chapter I, Sub-Chapter “C” (discussing the internal and external self-determination).

⁵⁸ W. CONNOR, *supra note 16*.

⁵⁹ General Comment No. 23, *supra note 13*, at para. 2; *See also* H. HANNUM, THE CONCEPT AND DEFINITION OF MINORITIES, *supra note 13*, at 71; D. RAIC, *supra note 4*, at 268-269.

⁶⁰ U.N. Charter art. 1, (2); ICCPR, art. 1(1) and ICESCR, art 1(1).

feature of the phrase “rights of peoples” is not the term ‘rights’, but the term ‘peoples’”.⁶¹ Various scholars agree that this is the most difficult question to answer.⁶² Until now, there is not a precise definition who should be treated as ‘people’ or ‘minority’. International law is silent on this issue.

On the other hand, Rosalyn Higgins, in attempting to find a proper definition for the term ‘people’, defined two types of this term. The first one refers to the “entire people of a state, or that ‘people’ means all the persons comprising distinctive groupings on the basis of race, ethnicity, and perhaps religion”.⁶³ These subjects may be qualified as main right holders of this doctrine.

Undoubtedly, we may agree that the “entire people of a state”⁶⁴ will most probably mean the whole population of the state. However, the majority of states are not composed of ethnically homogenous population and in all of them there are various sub-groups who are different from the rest of the population. If the common Article 1 of both Covenants on Human Rights applied only to the whole population of the state, in this case it could lead to too narrow interpretation of this doctrine and undermine its effective application.⁶⁵

The question of the effective applicability of the self-determination by such sub-groups ethnically different from the majority was addressed in the case of *Katangese People’s Congress v. Zaire* by the African Commission on Human and People’s Rights. The African Commission reached to the conclusion that “[t]he issue in the case is not self-

⁶¹ JAMES CRAWFORD, THE RIGHTS OF PEOPLES: “PEOPLES” OR “GOVERNMENTS”?, in JAMES CRAWFORD (ed.), THE RIGHTS OF PEOPLES 55 (Oxford, Clarendon Press, 1988).

⁶² IAN BROWNLIE, THE RIGHTS OF PEOPLES IN MODERN INTERNAL LAW, in JAMES CRAWFORD (ed.), THE RIGHTS OF PEOPLES 1, 5 (Clarendon Press, Oxford 1992); Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 American Journal of International Law 80, 92 (1988) (discussing whether minority groups can fall under the definition of “people” within the African Charter on Human Rights and Peoples’ Rights); R. White, *supra note 3*, at 163-164.

⁶³ R. HIGGENS, *supra note 15*, at 124; See also D. RAIC, *supra note 4*, at 244-264.

⁶⁴ D. RAIC, *supra note 4*, at 245-246.

⁶⁵ B. Brown, *supra note 22*, at 249.

determination for all Zaireans as a people but specifically for the Katangese”.⁶⁶ In this particular case the Commission mainly focused on the internal aspect of self-determination which could be exercised by various forms.⁶⁷

According to Professor Hurst Hannum, defining “groups” will mostly depend on the “subjective and objective components”.⁶⁸ In particular, there are six characteristics which should be met in order to be considered as the sub-group, namely “(a) a (historical) territorial connection, on which territory the group forms a majority; (b) a common history; (c) a common ethnic identity or origin; (d) a common language; (e) a common culture; (f) a common religion or ideology”.⁶⁹ On the other hand, determining whether or not a particular group fits the above listed criteria is still quite controversial and subject of various discussions.

With respect to the term ‘people’, another significant source which is worth noting is an advisory opinion of the Supreme Court of Canada on the secession of Quebec. Regardless of the fact that the Court failed to provide any definition of the term ‘people’, it did, however, differentiate two types of ‘people’. In particular, the Court interpretation reads as follows:

It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.⁷⁰

⁶⁶ As cited in D. RAIC, *supra* note 4, at 256; *See also* VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM, ITS LAWS, PRACTICE, AND INSTITUTIONS* 144 (Martinus Nijhoff Publishers 2001).

⁶⁷ Please refer to Chapter I, Sub-Chapter “C” (discussing the internal aspect of self-determination).

⁶⁸ H. Hannum “Rethinking Self-Determination”, *supra* note 22, at 35.

⁶⁹ As cited in D. RAIC, *supra* note 1, at 262.

⁷⁰ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 124 (August 20, 1998) available at <http://scc.lexum.org/en/1998/1998scr2-217/1998scr2-217.html> [hereinafter: Advisory Opinion on Secession of Quebec]

The Supreme Court of Canada omitted the possibility to define whether the Quebec population could be recognized as the beneficiaries of self-determination.⁷¹ In its judicial interpretation the Court put more emphasis on the consideration of the issue whether the unilateral right of secession by Quebec's population existed under the constitution of Canada and within the framework of international law. The same line of reasoning was applied by the ICJ dealing with the advisory opinion of Kosovo and its unilateral declaration of independence⁷². Both respectful judicial institutions avoided answering the question what type of characteristics the 'people' have which makes them the only subjects and right holders of the doctrine on self-determination.

With respect to minorities, it is generally agreed in international law that minority groups do not benefit from the right to self-determination.⁷³ It is absolutely true to state that minorities usually try to rely on the right to self-determination in order to secede from a parent state.⁷⁴ As it seems it will be more appropriate to call a group the 'minority' rather than 'people', at least this will ensure that the right to self-determination will not apply to them and will not undermine the territorial integrity of a particular state.⁷⁵ However, most of problems arise due to the non-existence of the proper definitions of the terms 'minority' and 'people'. The mentioned situation leads to a "terminological chaos"⁷⁶ when we have to determine who are the 'minority' and who are the 'people'.

There is no single treaty which specifically deals with concept of the minorities. The ICCPR is the only legal universally binding document which makes reference to the

⁷¹ *Ibid.*, para. 125.

⁷² Please refer to Chapter III, Sub-Chapter "A" (discussing the judicial interpretation of the ICJ in relation to Kosovo's case).

⁷³ General Comment No. 23, *supra note 13*, at para. 2; *See also* H. HANNUM, THE CONCEPT AND DEFINITION OF MINORITIES, *supra note 13*, at 71; D. RAIC, *supra note 4*, at 268-269.

⁷⁴ *E.g.* Separatists movements of Kurds in Turkey; Abkhazians and South Ossetians in Georgia; Chechens in the Russian Federation *etc.*

⁷⁵ *E.g.* H. HANNUM, THE CONCEPT AND DEFINITION OF MINORITIES, *supra note 13*, at 71 (discussing that the status of minority has a "negative consequences", since they do not benefit from the right to self-determination).

⁷⁶ W. CONNOR, *supra note 16*.

recognition of the rights of minority groups. Article 27 of the ICCPR declares that the rights of minorities in relation to preservation of their own religion, culture and language must be respected. In this context, on the one hand the ICCPR does recognize the necessity of the minority system protection, but on the other hand, it does not indicate how minority groups should be distinguished from the rest of the population. There is, therefore, a terminological gap on what is meant under the term ‘minority’. The only reference on this issue is made by phrase “[i]n those States in which ethnic, religious or linguistic minorities exist”.⁷⁷ Thus, it seems that the ambiguous term ‘minority’ will more likely depend on whether or not a government where they reside recognizes them as a minority group.

In line with this, it is worth making reference to the General Comments issued by the Human Rights Committee for the purpose of interpretation of the human rights provisions incorporated in the ICCPR. In particular, the Committee underscored three main aspects. Firstly, in an attempt to give a precise explanation who should be recognized as the ‘minority’, the Committee stated that these are a group of persons “who share in common a culture, a religion and/or a language”.⁷⁸ However, even this type of interpretation is not sufficient in order to clarify whether a particular groups is a ‘minority’.

Another aspect is that the status of being a ‘minority’ is not related with being a citizen of a particular state.⁷⁹ This means that irrespective of citizenship, any person (since minority protection is mainly focused on an individual protection mechanism)⁸⁰ should be respected within preservation of his/her culture, religion and/or language.

And finally, the General Comment draws a clear distinction in relation to application of self-determination between rights of minority groups under Article 27 of the ICCPR and rights of people under Article 1 paragraph 1 of the ICCPR. The General Comment declares

⁷⁷ ICCPR, art. 27.

⁷⁸ General Comment No. 23, *supra note* 13 para. 5.1.

⁷⁹ *Ibid.*, para. 5.2.

⁸⁰ *Ibid.*, para. 3.

that the right to self-determination is not applied to minority groups. However, there is still a gap since textually this document only refers to rights rather than to a definition of the term ‘minority’ which has overriding importance for particular conflict situations.

Finding a proper borderline between the terms ‘people’ and ‘minority’ is essential since it decides who will be entitled to exercise this right. Additionally, it should be noted that it seems that in certain circumstances international law does not disregard the fact that minority groups also can also possibility achieve falling within the definition of the ‘people’.⁸¹ Some scholars argue that minority groups can attain the status of the term ‘people’ if they are subject of human rights abuses.⁸² Moreover, it is becoming increasing common to support such theory since after the vague advisory opinion of the ICJ in relation to Kosovo’s declaration on independence, it could be interpreted that the right to issue declaration of independence does not merely belongs only to ‘people’ but to all groups, including ‘minorities’.⁸³

In this respect, I certainly agree that to some extent the terms “minority” and “people” (especially in relation to “sub-groups within existing States”⁸⁴) are overlapping notions and will mostly depend on how the parent states and international community treats them. As Sir Ivor Jennings, while discussing the notion of self-determination, stated “[o]n the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people”.⁸⁵ From my perspective, even a long passage of time has not changed this approach. The right to exercise self-determination is interlinked with the political support of other states. While somebody does not state that a particular group is a ‘people’ in terms of the UN Charter and other relevant legal documents, the group itself is not allowed to apply for the right to self-determination. Unfortunately, the

⁸¹ See e.g. K. HENRARD, *supra* note 4, at 302.

⁸² *Ibid.*, G. PENTASSUGLIA *supra* note 3, at 165-166.

⁸³ Please refer to Chapter III, Sub-Chapter “C”.

⁸⁴ D. RAIC, *supra* note 4, at 247.

⁸⁵ Sir W. IVOR JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55-6 (Cambridge University Press 1956).

“terminological chaos”⁸⁶ of these two terms seems to be more a solution than a problem since the international community may utilize it as a containment policy against various groups willing to secede from parent states.

C. Controversy over the Principle of Territorial Integrity of States

The Supreme Court of Canada stated that “[t]he international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states”.⁸⁷ However, the doctrine of self-determination as “a general principle of international law”⁸⁸ may be in contradiction with the principle of territorial integrity of states.⁸⁹

It is well-established in international law that the right to self-determination can be exercised as internally as well as externally.⁹⁰ During the decolonization period, the external self-determination (*via* establishment of new independent states) was the dominant form of implementation of this right.⁹¹ However, later developments show that the necessity of protecting the territorial integrity of states and the maintenance of international stability and peace led to a broader recognition of the internal self-determination.⁹²

The collision between these principles is still a subject of ongoing debate which has not yet been solved by any judicial institution. In this respect, the present sub-chapter will address the controversial question of interrelation between the internal and external self-determination with the principle of territorial integrity of states.

⁸⁶ W. CONNOR, *supra* note 16.

⁸⁷ Advisory Opinion on Secession of Quebec, *supra* note 70, para. 127.

⁸⁸ *Ibid.*, para. 114.

⁸⁹ Except the principle of territorial integrity, it can be said that the doctrine of self-determination is in conflict with: principle of non-intervention in the domestic affairs, the principle on prohibition on use of force and principle of *uti possidetis* which are beyond the scope of this thesis.

⁹⁰ Advisory Opinion on Secession of Quebec, *supra* note 70, para. 127; K. HENRARD, *supra* note 4, at 306; Final Act of Helsinki, *supra* note 53.

⁹¹ P. RADAN, *supra* note 10, at 38; H. Hannum “Rethinking Self-Determination”, *supra* note 22, at 12.

⁹² ALLAN ROSAS, INTERNAL SELF-DETERMINATION, in C. TOMUSCHAT (ed.), MODERN LAW OF SELF-DETERMINATION 225, 229 (Dordrecht Martinus Nijhoff, 1993).

1. The Internal Self-Determination and Principle of Territorial Integrity

The existence of the internal aspect of self-determination is confirmed by numerous legal documents.⁹³ For instance, pursuant to the Helsinki Final Act of 1975 people have the right to define “their internal and external political status”⁹⁴ which indicates that the internal aspect of this doctrine is well-defined in international law.

The internal self-determination aims to ensure that all members of society of a particular state have an effective means to participate in the formation of the political structure of the government within an existing state.⁹⁵ The purpose of the internal aspect relates to the preservation of the principle of equality since those groups which are different from the rest will also have the opportunity to participate in the majority’s ruling and to some extent to be equal with them.⁹⁶ The internal aspect can be exercised by various forms, namely by “all kinds...forms of autonomy, like decentralization, regionalization, federalism and even consociational democracy”.⁹⁷

In this respect, it should be noted that the mentioned form of this concept is in compliance with the principle of territorial integrity. In particular, although certain group have the right on their own to define their future destiny and exercise internal self-determination, the territorial integrity of that state is still respected since the aim of this form of doctrine is to maintain the parent state’s ‘limited’ jurisdiction in that territory. The internal self-determination does not raise the same problematic questions in relation to the principle of territorial integrity of states as the external form of this doctrine.

⁹³ *E.g.* ICCPR, art. 1(1) and ICESCR, art. 1(1); UN Resolution 2625, *supra note 24*, para. 1 (“[t]he principle of equal rights and self-determination of people”); *See also* Katangese Peoples’ Congress v. Zaire, the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, para. 27-28 (1994).

⁹⁴ Final Act of Helsinki, *supra note 53*.

⁹⁵ K. HENRARD, *supra note 4*, at 299; Cedric Ryngaert & Christine Griffioen, *The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers*, 8 *Chinese J. Int’l L.* 573, 574 (2009 [hereinafter: Cedric Ryngaert & Christine Griffioen]).

⁹⁶ K. HENRARD, *supra note 4*, at 307.

⁹⁷ *Ibid.*

In line with this, emphasis should be made on the interrelation between the people's right to self-determination and minority groups' rights. If we compare both elements, it will be apparent that the minority protection mechanism has some identical implications as the internal self-determination, however in a limited scope (without external aspect of self-determination). As Thornberry once stated "while external manifestations of self-determination may be denied to minorities ... ["internal" self-determination] is of relevance."⁹⁸

Under contemporary international law it is becoming increasingly common to discuss extending the internal aspect of self-determination to minority groups as well.⁹⁹ In general, it can be said that the minority protection mechanism entails almost the same degree of preservation of their rights and freedoms as the people's right to internal self-determination. For illustration, if we imagine a hypothetical case where members of society are systematically discriminated against and they are considered to be as a 'people', this would mean that the right to external self-determination would apply to them after all possible forms of internal self-determination were exhausted. In contrast, if one particular minority group is systematically discriminated against, in this case what will legal or political consequences be for them? Does it mean that this minority group will gain the status of 'people' and will be able to exercise the right to self-determination? My answer is "yes". However, this will be more a political decision than the legal interpretation of the terms 'minority' and 'people'. Therefore, I consider that the internal dimension of self-determination for minorities will be a relief since it would be an appropriate means of protection of their rights which is in compliance with the principle of territorial integrity of states.

⁹⁸ As cited in K. HENRARD, *supra* note 4, at 315-316.

⁹⁹ *Ibid.*, at 306-308; G. PENTASSUGLIA *supra* note 3, at 172-176.

2. *The External Self-Determination and Principle of Territorial Integrity*

The principle of territorial integrity of states is one of the core norms of international law.¹⁰⁰ The principle was recognized prior to the principle of self-determination, namely pursuant to Article 10 of the Covenant of League of Nations “[t]he Members of the League undertake to respect and preserve ... the territorial integrity “ of existing states. Nevertheless, under contemporary international law the external aspect of self-determination is in conflict with the present principle.

Traditional vision on the external self-determination refers to the existence of the possibility of secession from the parent state only in certain circumstances and, thus, violating the principle of territorial integrity of states.¹⁰¹ The external self-determination or, in other words, secession means that if the internal self-determination is denied to people residing in a particular territory of a state, this can lead to separation of this territory and establishment of an independent state.¹⁰² The creation of the independent state is only one form of external self-determination. The Friendly Relations Declaration prescribes that the external self-determination can be exercised through “the free association or integration with an independent State or the emergence into any other political status”.¹⁰³ In line with this, it should be noted that while international law does not specifically proscribe the secession, some scholars conclude that it can also be valid under international law.¹⁰⁴

It will be relevant to draw a line between the periods of the League of Nations and the UN. In particular, during of the League of Nations, in comparison with the principle of the self-determination, only territorial integrity was recognized as one of the main principles of

¹⁰⁰ UN Charter, art. 2 (4) and Covenant of the League of Nations, art. 10.

¹⁰¹ D. RAIC, *supra note* 4, at 308-309.

¹⁰² *Ibid.* at 308.

¹⁰³ UN Resolution 2625, *supra note* 3, Principle V (“The principle of equal rights and self-determination of people”), para. 4.

¹⁰⁴ H. Hannum “Rethinking Self-Determination”, *supra note* 22, at 41; R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 8 (Manchester University Press, 1963); A. CASSESE, *supra note* 29, at 119.

international law and the doctrine of self-determination was mere political theory.¹⁰⁵ In 1921, the International Commission of Rapporteurs in the Aaland Islands case apparently stated that the secession will be “incompatible with the very idea of the state as a territorial and political unity”.¹⁰⁶ The mentioned statement indicates that there was not an obvious clash between the principle of territorial integrity and principle of self-determination in the League of Nations.

On the other hand, textually the UN Charter stipulates the recognition of both principles as one of the foundation purposes of the UN member states.¹⁰⁷ During the UN period the concept of self-determination had different forms of implication in the decolonization period and beyond its context. As a rule, decolonization was followed by the establishment of a new state which indicates the application of external self-determination.¹⁰⁸ However, later developments after the decolonization period are clear picture of the dominance of the internal form of self-determination.¹⁰⁹ In particular, both Covenant on Human Rights are founded on the idea that people can “freely determine their political status and freely pursue their economic, social and cultural development”¹¹⁰ internally within the existing state without violating the principle of territorial integrity.¹¹¹

The question of collision between the norms of self-determination and territorial integrity is addressed by the Friendly Relations Declaration which after defining that the right to self-determination is the right of “people”, proclaims that the territorial integrity of states which “conducting themselves in compliance with the principle of equal rights and self-determination of peoples” should be respected.¹¹² The mentioned language is known as the

¹⁰⁵ See *supra* note 27.

¹⁰⁶ The Aaland Islands case, *supra* note 27, at 22.

¹⁰⁷ UN Charter, art. 1 (2) (in relation to the recognition of the principle of self-determination as one of its purposes) and art. 2 (4) (in relation of the recognition importance of the protection and respect of the principle of territorial integrity of states).

¹⁰⁸ P. RADAN, *supra* note 10, at 38; H. Hannum “Rethinking Self-Determination”, *supra* note 22, at 12.

¹⁰⁹ G. PENTASSUGLIA *supra* note 3, at 166.

¹¹⁰ ICCPR, art. 1(1) and ICESCR art 1(1).

¹¹¹ Advisory Opinion on Secession of Quebec, *supra* note 70, paras. 128-130.

¹¹² Friendly Relations Declaration, *supra* note 24, Principle V, paragraph 7.

“saving clause”.¹¹³ On the one hand, the Declaration states that the territorial integrity of states will be preserved, but on the other one, the text of Declaration highlights that this principle will be maintained only if that a state respects peoples’ right to self-determination.

Another relevant source which is worth noting is the Supreme Court of Canada’s advisory opinion in relation to Quebec. The Court did not directly state that there was no right to unilateral secession, but purely defined circumstances when it could apply to the Quebec people. In particular, the Court emphasized that the external self-determination will be invoked in:

[...] situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.¹¹⁴

Along with this line of argumentation, the Canadian Supreme Court noted that even if there were grounds for secession, the Quebec people will have to negotiate the process of secession with the rest of the population of Canada within the framework of amending their Constitution.¹¹⁵ All persons concerned will have to define other forms of self-determination and exhaust all remedies of internal self-determination. In this respect, if we follow a logical line of interpretation of the Supreme Court of Canada’s judgment, it indicates that if the secession exists, it will be applied only in the above circumstances (*e.g.* in cases of severe human rights violations) and as the last resort.

In conclusion, it should be mentioned that if a particular group which is qualified as a ‘minority’ is the subject of human rights abuses by the parent state and the status of ‘minority’ is the only obstruction for the purpose of application of the self-determination, in this case there is a possibility of transformation of this group from the term ‘minority’ into

¹¹³ *Ibid.*, See also Cedric Ryngaert & Christine Griffioen, *supra note 70*, at 581.

¹¹⁴ Advisory Opinion on Secession of Quebec, *supra note 70*, para. 138.

¹¹⁵ *Ibid.*, para. 104.

'people'. I do not disregard the fact that mainly it will be a political evaluation rather than legal one. The role of the international community will be decisive. However, the external self-determination should be considered only as the last resort. The possibility of extending the internal aspect of self-determination to minority groups will be an appropriate means for protection and preservation of their rights since this will exclude the request for the application of external self-determination.

CHAPTER II: HISTORICAL DEVELOPMENTS OF CONFLICTS IN KOSOVO AND CHECHNYA

This Chapter will discuss the historical developments of Kosovo and Chechnya's cases and explain what circumstances led to the present conflicts. Both cases have various historical elements in common. Both of them broke out after the dissolution of the Soviet Union and Socialist Federal Republic of Yugoslavia (*hereinafter*: "former Yugoslavia") in the 1990s. Despite the similarity in time, both conflicts are identical in terms of gross human rights violations, which took place as a result of the military resistance by the parent states. The main reason for the struggle was the right to self-determination.

In this respect, the first sub-chapter will demonstrate how Kosovo's first declaration of independence in 1990 did not receive much attention from the international community and what events led to the 2008 declaration of independence. The second sub-chapter will analyze the Chechen conflict. This part will show how Chechens' separatist leaders failed to establish any political institutions and what followed after their proclamation of independence from Russia in 1991.

A. Historical Context of Kosovo

On 17th February 2008, Kosovo declared independence from Serbia proclaiming that it was a new independent and sovereign state.¹¹⁶ However, prior to 1990 Kosovo was a part of the Republic of Serbia within the former Yugoslavia.¹¹⁷ Due to the predominant population of ethnic Albanians in this region, it received a status as an "autonomous province".¹¹⁸

¹¹⁶ Kosovo Declaration of Independence 2008, *supra note 2*.

¹¹⁷ Constitution of the Federative People's Republic of Yugoslavia (1946), adopted by the Presidium of the Constituent Assembly of the Federative People's Republic of Yugoslavia, art. 2, available at http://www.worldstatesmen.org/Yugoslavia_1946.txt (last visited March 27, 2011) [*hereinafter*: 1946 Constitution of Yugoslavia]; Constitution of the Socialist Federal Republic of Yugoslavia, adopted by the Federal People's Assembly, art. 111 (April 7, 1963), available at http://www.worldstatesmen.org/Yugoslavia_1963.doc (last visited March 27, 2011) [*hereinafter*: 1963 Constitution of Yugoslavia].

It should be mentioned that Kosovo's claims for independence arose along with the process of dissolution of the former Yugoslavia.¹¹⁹ The history of the Former Yugoslavia is covered with numerous developments starting as the Kingdom of Serbs, Croats and Slovenes and concluding as the Socialist Federal Republic of Yugoslavia.¹²⁰ The former Yugoslavia was composed of six republics: Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, Montenegro and Serbia.¹²¹ The status of Kosovo was determined as the "autonomous province" of the Republic of Serbia within the former Yugoslavia.¹²² Later, after the collapse of Yugoslavia, Kosovo remained an "autonomous province" as "being the forms of territorial autonomy" of Serbia.¹²³

The tension between ethnic Albanians and Serbs increased after the constitutional amendments in 1989 to the 1974 constitution of the former Yugoslavia.¹²⁴ Pursuant to these amendments, Kosovo's autonomous status within the Republic of Serbia was abolished which resulted in the mitigation of significant civil, political and social rights for ethnic Albanians in that region.¹²⁵ The main reason behind the change of Kosovo's status was Slobodan Milosevic's assessment in relation to the mistreatment of ethnic Serbs residing in

¹¹⁸ P. RADAN, *supra note* 10, at 196.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, at 136-141.

¹²¹ 1946 Constitution of Yugoslavia, art. 2; 1963 Constitution of Yugoslavia, art. 2; Constitution of the Socialist Federal Republic of Yugoslavia, No. 9/1974, art. 2 [hereinafter: 1974 Constitution of Yugoslavia].

¹²² 1946 Constitution of Yugoslavia, *supra note* 117, art. 2 (stating that Kosovo's status was autonomous region); 1963 Constitution of Yugoslavia, *supra note* 177, art. 111 (stating that Kosovo's status was "autonomous province" falling within jurisdiction of the Republic of Serbia); *See also* Written Statement of the Government of the Republic of Serbia, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for an Advisory Opinion), I.C.J. 15 April 2009 at 61-78, available at <http://www.icj-cij.org/docket/files/141/15642.pdf> (last visited March 27, 2010) [hereinafter: Serbian Submission].

¹²³ Constitution of Serbia, art. 6 (September 28, 1990).

¹²⁴ Albanian Submission, *supra note* 19, at 8.

¹²⁵ P. RADAN, *supra note* 10, at 198; Albania Submission, *supra note* 19, at 8-10; STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION, A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD 29 (Ashgate, Dartmouth, Aldershot, Burlington USA, Singapore, Sydney, 2000) (discussing Milosevic's policy in the suppression of political, civil and social rights of ethnic Albanians, namely the dismissal from official positions, removal of Albanian schools, difficulty in the application of the Albanian language *etc*) [hereinafter: S. TERRETT].

Kosovo by the majority ethnic Albanians.¹²⁶ Milosevic promised to take all appropriate actions in order to re-change the dominance of Albanians and the first step was abolishment of the autonomous status of Kosovo.¹²⁷

As a result, along with the secession movements of Slovenia, Croatia, Macedonia and, later that of Bosnia-Herzegovina, the representative provincial Assembly of ethnic Albanians in Kosovo issued the Declaration of Independence from Serbia relying on the notion of the right to self-determination in July 1990.¹²⁸ However, at that time, the international community was reluctant to consider the issue of Kosovo and its status remained unresolved.¹²⁹

The gross violations against ethnic Albanians increased in the following years.¹³⁰ It is worth mentioning that the main reason behind these violations was the Serbian government's aim to suppress reprisals and military force of the Kosovo Liberation Movement (*hereinafter*: the "KLA") which was the separatist movement seeking independence from Serbia using military force against ethnic Serbs in Kosovo.¹³¹ Later, the Serbian military activities increased in Kosovo, followed by the NATO's humanitarian intervention that finally led to the adoption of the UN Security Council Resolution 1244 on "Kosovo's future status" under Chapter VII of the UN Charter.¹³² This resolution established the UN Interim Administration Mission in Kosovo (*hereinafter*: the "UNMIK"), which facilitates conflict resolution and protection of human rights of all persons concerned in that region.¹³³ Additionally, it

¹²⁶ S. TERRETT, *supra note* 125, at 29 (discussing Milosevic's speech given at 'the 600th anniversary of the battle of Kosovo' in relation to discrimination of ethnic Serbs by ethnic Albanians in Kosovo).

¹²⁷ *Ibid.*

¹²⁸ P. RADAN, *supra note* 10, at 198; Albania Submission, *supra note* 19, at 8-9.

¹²⁹ P. RADAN, *supra note* 10, at 200.

¹³⁰ Albania Submission, *supra note* 19, at 8-9

¹³¹ S. TERRETT, *supra note* 125, at 35.

¹³² *Ibid.*

¹³³ UN Security Council Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting on 10 June 1999, para. 11 [*hereinafter*: UN Resolution 1244].

underscores the fact that the territorial integrity of Yugoslavia (present territorial integrity of Serbia) should be respected.¹³⁴

The Kosovo's leadership and representatives of the Serbian government with the participation of various international organizations and stakeholders negotiated the future status of Kosovo.¹³⁵ However, due to contradictory purposes of both sides concerned¹³⁶, an agreement was not reached.¹³⁷ On the one side, the Serbian government guaranteed protection of Albanian's rights in Kosovo and for that reason asked for respect of its territorial integrity, while on the other hand, Albanians demanded full independence from Serbia.¹³⁸ Due to these different goals, the negotiations failed which finally resulted in the proclamation of independence from Serbia in 2008 and recognition of it as the independent state by fifty-seven states at that time.¹³⁹

B. Historical Context of Chechnya

Chechnya's claims seeking independence from the Russian Federation came hand in hand with the collapse of the Soviet Union in the beginning of 1990s.¹⁴⁰ Like Kosovo, Chechnya was one of the autonomous regions of Russia within the Soviet Union.¹⁴¹ From a political and strategic perspective, Chechnya represented a significant region for Russia due to its amount of oil.¹⁴²

¹³⁴ *Ibid.*, Preamble (stating "[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region").

¹³⁵ Albania Submission, *supra note* 19, at 21-23.

¹³⁶ Viola Trebicka, *Lessons From The Kosovo Status Talks: On Humanitarian Intervention and Self-Determination*, 32 *Yale J. Int'l L.* 255, 255 (2007) [hereinafter: V. Trebicka].

¹³⁷ Please refer to Chapter III, Sub-Chapter "C" (in relation to the negotiation process).

¹³⁸ V. Trebicka, *supra note* 135.

¹³⁹ Albania Submission, *supra note* 19, at 23-24.

¹⁴⁰ Nicola Bunick, *Chechnya: Access Denied*, 40 *Geo. J. Int'l L.* 985, 1005 (2009) [hereinafter: N. Bunick].

¹⁴¹ Constitution of the Union of Soviet Socialist Republics, Adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR, Ninth Convocation (October 7, 1977), art. 85, available at <http://www.departments.bucknell.edu/russian/const/1977toc.html> (last visited March 27, 2011) [hereinafter: 1977 Constitution of the Soviet Union].

¹⁴² Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4 *Ind. J. Global Legal Stud.* 435, 441 (1997) (describing main reasons why the Russian Federation did not wish to lose Chechnya. One of the reasons is the oil wealth) [hereinafter: P. DiPaola].

It should be highlighted that the dissolution was a painful process covered with chaos and controversy over territorial arrangements within the republics, including Russia.¹⁴³ In 1991, the Chechen leadership, under President Dzhokar Dudaev, declared independence from Russia without majority's support in Chechnya.¹⁴⁴ The mentioned declaration was denied by the official Moscow as well as other members of the international community who opposed recognition of any measures taken by separatist Chechens for the purpose of unilateral secession from Russia.¹⁴⁵ It was widely accepted that Chechnya represented the threat to the international peace and security and, therefore, its independence only would have more challenged the international stability.¹⁴⁶ In this respect, the international community decided to remain silent on this issue.

In order to restore peace and order in Chechnya, the Russian government made many attempts to negotiate the status of Chechnya proposing to sign the Federation Treaty, which provided autonomy for Chechens within the Russian constitution.¹⁴⁷ However, in 1992 the mentioned document was rejected by President Dudaev, whose the only goal was the independence.¹⁴⁸ The negotiations failed and Russia lost control over the territory for several years.¹⁴⁹

During this time, Chechnya was characterized by a high rate of criminal authority and instability, which instead of development towards the foundation of a democratic independent state, mainly was busy with conducting criminal activities.¹⁵⁰ In 1994, Boris Yeltsin sent military troops in order to bring under control separatist movements in Chechnya (the war is

¹⁴³ D. RAIC, *supra note 4*, at 373.

¹⁴⁴ *Ibid.*, See also P. DiPaola, *supra note 142*, at 440-441; Conor Mulcahy, Pre-Determined: The March 23, 2003 Constitutional Referendum in Chechnya and its Relationship to the Law of Self-Determination, 28 B.C. Int'l & Comp. L. Rev. 179, 182 (2005) [hereinafter: C. Mulcahy].

¹⁴⁵ D. RAIC, *supra note 4*, at 377.

¹⁴⁶ *Ibid.*, at 378.

¹⁴⁷ N. Bunick, *supra note 140*, at 1006.

¹⁴⁸ *Ibid.*

¹⁴⁹ D. RAIC, *supra note 4*, at 373-374.

¹⁵⁰ P. DiPaola, *supra note 142*, at 441.

known as the “first Russian-Chechen war”¹⁵¹). However, due to lack of preparation of the Russian army, Russia again lost control. In 1996-1997, other efforts were made, resulting in the conclusion of a peace agreement and freezing the issue on determination of the final status of Chechnya until 2001.¹⁵² However, the instability in the region continued, entailing another war with Chechnya in 1999.¹⁵³ Russia’s one of the main arguments for the second war was the necessity to conduct counterterrorism activities in Chechnya in order to restore the peace in that region.¹⁵⁴

In comparison with the first war with Chechnya, Russian military troops were better prepared which finally resulted in restoration of the control over the Chechen territory and establishment of a pro-Russian regime, however, with significant violations in human rights.¹⁵⁵

During the first and second wars with Chechnya, severe human rights abuses were witnessed against the Chechen population conducted by the Russian military troops.¹⁵⁶ Although, the international community did not recognize Chechnya as an independent state and respected the territorial integrity of the Russian Federation, they condemned the gross violations.¹⁵⁷

In 2003, a referendum was conducted on the new Constitution of Chechnya, which textually provided wider elements of autonomy for Chechens, albeit within the scope of the Russian territory.¹⁵⁸ However, irrespective of Chechens’ participation in the referendum, in practice Chechens never had the possibility to freely express their will on the future status since most of the territory of Chechnya was militarily controlled by Russia. The referendum’s

¹⁵¹ D. RAIC, *supra note 4*, at 377.

¹⁵² *Ibid.*, at 374.

¹⁵³ *Ibid.*, at 375; *See also* C. Mulcahy, *supra note 144*, at 183.

¹⁵⁴ C. Mulcahy, *supra note 144*, at 184.

¹⁵⁵ *Ibid.* (discussing how “[t]he international community accused the Russian military of terrorizing the civilian population of Chechnya and engaging in numerous human rights abuses, including secret arrests and ‘disappearances’.”)

¹⁵⁶ *Ibid.*, D. RAIC, *supra note 4*, at 377.

¹⁵⁷ D. RAIC, *supra note 4*, at 375.

¹⁵⁸ C. Mulcahy, *supra note 144*, at 185-186.

outcomes can be widely disputed.¹⁵⁹ Nevertheless, it should be noted that the Russian government instead of giving opportunity to Chechens to determine their political and economic status freely, decided to apply a military approach in order to maintain its influence over Chechnya. Since that time, Russia's military presence in Chechnya continues in systematic violations of human rights resulting in discrimination of those people who reside in Chechnya.¹⁶⁰

¹⁵⁹ *Ibid.*, N. Bunick, *supra note* 140, at 1009.

¹⁶⁰ C. Mulcahy, *supra note* 144, at 184.

CHAPTER III: COMPARATIVE ANALYSIS OF KOSOVO AND CHECHNYA

This Chapter is devoted to the comparative analysis of Kosovo and Chechnya's cases. In order to examine similarities and differences of these particular conflicts and see how lessons can be learned, the present Chapter will be divided into three sub-chapters. The first sub-chapter will discuss Kosovo and Chechnya's situation, analyzing how Kosovo Albanians and Chechens might be considered as "people" under the language of the UN Charter and various other international instruments. For that reason, I will rely on the ICJ's advisory opinion in relation to Kosovo's declaration of independence. In the second sub-chapter, I will compare and evaluate gross human rights violations perpetrated against distinct Kosovo Albanians and Chechens by their parent states: Serbia and Russia. And, finally, the last sub-chapter will discuss what the international community's role was in the conflict resolution of these situations. In this part, I will argue that Chechens and Kosovo Albanians do not have the right to external self-determination since not all forms of the internal aspect of self-determination were exhausted by the parties concerned.

A. Are They 'People'?

This sub-chapter aims to analyze the question whether Kosovo Albanians and Chechens are beneficiaries of the right to self-determination. As was mentioned above (*discussed in Chapter I, Sub-Chapter "B"*) only 'people' have the right to self-determination, while 'minorities' are denied the same right.¹⁶¹ However, in the theoretical part I also emphasized that international law is developing in a different direction and a group from being 'minority' can become 'people'.¹⁶²

¹⁶¹ General Comment No. 23, *supra note 13*, at para. 2; *See also* H. HANNUM, THE CONCEPT AND DEFINITION OF MINORITIES, *supra note 13*, at 71; D. RAIC, *supra note 4*, at 268-269.

¹⁶² *See e.g.* K. HENRARD, *supra note 4*, at 302; G. PENTASSUGLIA *supra note 3*, at 165-166 (arguing that "minority" can become "people", if the former group suffers discrimination and oppression).

The advisory opinion of the ICJ in relation to Kosovo raised additional questions concerning the terminological gap between the terms ‘people’ and ‘minority’. Although, the ICJ merely approved the legality of Kosovo’s declaration of independence under contemporary international law¹⁶³, at the same time the ICJ opened the door for possibility that Kosovo Albanians as being ‘minority’ within Serbia have attained that status of being ‘people’ and, therefore, had the right to issue the declaration of independence. Otherwise, in case of recognizing Kosovo Albanians as mere ‘minorities’, the Court would have entailed the indirect recognition of the fact that ‘minority’ also have the right to self-determination as the ‘people’.

In this context, it should be noted that from the historical perspective the right to issue the declaration of independence was always interrelated with the notion of self-determination. And, if we take into account that the right to self-determination belongs only to the ‘people’, the ICJ’s advisory clearly leads the conclusion that ‘minorities’ also can gain the status of the ‘people’. In this respect, the thesis argues that the transformation of these terms will mainly depend on two aspects: mistreatment (oppression) from the parent state and political assessment/support of the international community. As a result, a question that now needs to be addressed is who are Kosovo Albanians and Chechens.

Firstly, the comparative line should be drawn on the fact that Chechens and Kosovo Albanians are the dominant group in the territories where they reside. In particular, according to the 1981 census ethnic Albanians constitute approximately 90 percent of the population, while ethnic Serbs are less than 10 percent of the whole population in Kosovo.¹⁶⁴ The same situation appears in Chechnya, namely the 1989 census provides that 72 percent are ethnic Chechens, 27 percent are ethnic Russians and 2.5 percent are ethnic Ingush.¹⁶⁵ This is a clear

¹⁶³ ICJ’s advisory opinion on Kosovo, *supra note* 21.

¹⁶⁴ Serbian Submission, *supra note* 122, at 52.

¹⁶⁵ D. RAIC, *supra note* 4, at 373.

indication that both groups form a distinct majority in the mentioned territories in comparison with other ethnic groups.

Secondly, pursuant to the constitutions of the former Yugoslavia and Soviet Union, both territories had the status of the autonomous regions and were not recognized as ‘nations’.¹⁶⁶ For instance, pursuant to the 1977 Constitution of the Union of Soviet Socialist Republics only fifteen “Soviet Socialist Republics”¹⁶⁷ were recognized as “nations”¹⁶⁸, while Chechnya-Ingush Republic was considered to form the “Autonomous Soviet Socialist Republic” within the Russian territory.¹⁶⁹ The parallel can be drawn in relation to the former Yugoslavia’s Constitutions which directly stated that only six Republics were thought as the “nations”,¹⁷⁰ while Kosovo, Vojvodina and Metohija were the autonomous territories of Serbia within the former Yugoslavia.¹⁷¹ The right to secession was granted only to the Republics which fell under the definition of the term ‘nations’.¹⁷² Kosovo and Chechnya were never considered to be as ‘nations’ under the text of the relevant Constitutions of the states.

Thirdly, both cases were initially identical in terms of the political assessment of other states. During the dissolution process of the Soviet Union and former Yugoslavia, none of Chechens and Kosovo Albanians’ claims to unilateral secession were discussed by the

¹⁶⁶ 1977 Constitution of the Soviet Union, *supra note* 141, art.85 and 1946 Constitution of Yugoslavia, *supra note* 117, art. 2 (stating that Kosovo ‘s status was autonomous region); 1963 Constitution of Yugoslavia, *supra note* 177, art. 111 (stating that Kosovo’s status was “autonomous province” falling within jurisdiction of the Republic of Serbia).

¹⁶⁷ *Ibid.*, 1977 Constitution of the Soviet Union, art. 71 (stating that fifteen Soviet Socialist Republics were: Russia, Ukraine, Byelorussia, Uzbekistan, Kazakhstan, Georgia, Azerbaijan, Lithuania, Latvia, Moldova, Kirghizstan, Tajikistan, Armenia, Turkmenistan, Estonia).

¹⁶⁸ *Ibid.*, art. 70.

¹⁶⁹ 1977 Constitution of the Soviet Union, *supra note* 141, art.85.

¹⁷⁰ 1946 Constitution of Yugoslavia, *supra note* 117, art. 2; 1963 Constitution of Yugoslavia, *supra note* 177, art.2; *See also* Serbian Submission, *supra note* 122, at 72-73.

¹⁷¹ *See e.g.* 1946 Constitution of Yugoslavia, *supra note* 117, art. 2 (stating that Kosovo ‘s status was autonomous region); 1963 Constitution of Yugoslavia, *supra note* 177, art. 111 (stating that Kosovo’s status was “autonomous province” falling within jurisdiction of the Republic of Serbia); Constitution of the Socialist Federal Republic of Yugoslavia, art. 2 (1974).

¹⁷² 1977 Constitution of the Soviet Union, *supra note* 141, art. 72 (stating that “[e]ach Union Republic shall retain the right freely to secede from the USSR”); Constitution of the Socialist Federal Republic of Yugoslavia (1974), Basic Principle I (stating that “[t]he nations of Yugoslavia proceedings from the right of every nation to self-determination, including the right to secession”).

international community.¹⁷³ These conflicts fell in the scope of domestic affairs of the parent states. To be more precise, it is worth referring to the Arbitration Commission of the Peace Conference on the former Yugoslavia (*hereinafter*: the “Badinter Arbitration Commission”) which was established in 1991 in order to examine arose questions in relation to the dissolution of the former Yugoslavia.¹⁷⁴ The Badinter Arbitration Commission did not discuss the legal consequences of Kosovo’s 1990 declaration of independence from Serbia.¹⁷⁵ On the other hand, the Commission addressed almost an identical situation in its Opinion No. 2 which was raised by the Serbian authorities. The mentioned Opinion dealt with the issue of self-determination and whether ethnic Serbs residing in Bosnia-Herzegovina and Croatia had the right to self-determination and the right to secede from their parent states.¹⁷⁶ Although some commentators consider while evaluating Opinion No. 2 that the Commission failed to explain whether these ethnic Serbs in Bosnia-Herzegovina and Croatia were the ‘people’ or ‘minority’,¹⁷⁷ I strongly believe that the Commission made it clear that ethnic Serbs in these Republics were ‘minorities’ and not ‘people’ when stated that they “must ... be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the [Carrington] Draft Convention ... which had been accepted by these Republics”.¹⁷⁸ In the case of Kosovo and Chechnya, the international community was silent and did not address the issue of the status of Kosovo Albanians or Chechens.

Additionally, it should be mentioned that ethnic differences of Kosovo Albanians and Chechens with the rest of the population have some similarities with the Aaland case, where

¹⁷³ Please refer to Chapter II (discussing the historical development of these conflicts).

¹⁷⁴ S. TERRETT, *supra note* 125, at 120- 136.

¹⁷⁵ P. RADAN, *supra note* 10, at 200.

¹⁷⁶ S. TERRETT, *supra note* 125, at 154-155.

¹⁷⁷ *Ibid.*, at 155; Alain Pellet, *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*, 3 EJIL 178, 179 (1992) [hereinafter: A. Pellet]; Michla Pomerance, *The Badinter Commission: The Use And Misuse of the International Court of Justice’s Jurisprudence*, 20 Mich. J. Int’l L. 31, 51 (1998) (discussing that the Badinter Arbitration Commission was more focused on the principle of *uti possidetis* rather than on determination whether self-determination applies).

¹⁷⁸ Ac cited in A. Pellet, *supra note* 177, at 184.

ethnic Swedes formed a distinct majority from Finns in these islands.¹⁷⁹ In particular, Kosovo Albanians and Chechens have their own language, own culture, have different religious convictions and are ethnically different in comparison with the rest of the population of their parent states.

With respect to the determination who are Kosovo Albanians, we have to look into two aspects. Firstly, Kosovo Albanians as a 'nation' does not exist, only Albanians can be considered as a 'nation' within Albania. In particular, Kosovo Albanians and Albanians share identical characteristics (language, religion and culture). The 1990 declaration of independence of Kosovo proclaimed that Albanians were the 'people'¹⁸⁰. The mentioned fact is a clear recognition of the fact that Kosovo Albanians are the same group as the Albanians in Albania and, thus, leads to the conclusion that Kosovo Albanians are a 'minority' in Serbia.

Along with this, the Badinter Arbitration Commission precisely stated that ethnic Serbs in Bosnia-Herzegovina and Croatia constituted the 'minority'.¹⁸¹ If we follow the logical flow of the Commission's interpretation, it is apparent that Albanians in Kosovo will have the same characteristics as the ethnic Serbs in Bosnia-Herzegovina and Croatia. Thus, initially Kosovo Albanians would be treated as the 'minority'. However, due to gross human rights violations and political support of various states, they have received the status of 'people'.

As a result, as was noted in the theoretical part, international law is developing towards the recognition of the fact that minority groups may be considered as the 'people' based on two conditions. The first of which refers to the mistreatment and denial of basic human rights by the parent state and political support of other states. In the case of Kosovo, the mistreatment of Kosovo Albanians took place after the constitutional amendments of

¹⁷⁹ J. CASTELLINO, *supra note 22*, at 19-20.

¹⁸⁰ P. RADAN, *supra note 10*, at 198.

¹⁸¹ Ac cited in A. Pellet, *supra note 177*, at 184.

1989 which diminished significant rights and freedoms of the ethnic Albanians in that region¹⁸². And as in the Aaland Islands case was stated if the Swedes were denied their basic fundamental rights by Finns, in this case Swedes would have to organize a plebiscite in order to determine their future status.¹⁸³ However, since there were not human rights violations taking place against the Swedish population, the Commission reiterated the necessity to protect and respect the territorial integrity of a newly established Finnish state.¹⁸⁴ The mentioned reasoning resembles the wording of the Friendly Relations Declaration in relation to the “saving clause”¹⁸⁵ and the judgment of the advisory opinion of the Supreme Court of Canada in relation to unilateral secession of Quebec¹⁸⁶ which is further clear evidence of the fact that a ‘minority’ can attain the status of being the ‘people’ due to mistreatment from the parent state. In this respect, it can be concluded that Kosovo Albanians may have the right to self-determination, which will mainly depend on how the international community evaluate the mentioned fact.

With regard to Chechnya, it is worth noting that Chechens are also significantly different from the rest of the population of Russia. In particular, they have their own language, distinct culture and religion.¹⁸⁷ However, the difference between Chechens and Kosovo Albanians is that Chechens share strong historical ties with the territory where they reside. They “have lived in the mountains and plains of Chechnya since the first millennium BC”.¹⁸⁸ And in line with this, Chechens do not have the same characteristics with any other people in the same manner as Kosovo Albanians have with Albanians in Albania.

Consequently, if we refer to Rosalyn Higgins approach in relation to the existence of two types of ‘people’ (“entire people of a state” or “all the persons comprising distinctive

¹⁸² Please refer to Chapter III, Sub-Chapter “B”.

¹⁸³ J. CASTELLINO, *supra note 22*, at 20.

¹⁸⁴ *Ibid.*

¹⁸⁵ Friendly Relations Declaration, *supra note 24*, Principle V, paragraph 7.

¹⁸⁶ Advisory Opinion on Secession of Quebec, *supra note 70*, para. 138.

¹⁸⁷ C. Mulcahy, *supra note 144*, at 180.

¹⁸⁸ P. DiPaola, *supra note 142*, at 438.

groupings on the basis of race, ethnicity, and perhaps religion”¹⁸⁹) and compare the characteristics for the determination of the “ethnic sub-group within a state”,¹⁹⁰ we may reasonably conclude that Chechens have various features that meet the characteristics for the ethnic subgroup. Nevertheless, from the Russian and international practice it will be more reasonable to conclude that Chechens are ‘minority’ who has gained the status of being ‘people’ due to numerous human rights violations perpetrated by the Russian Federation against them.

B. Human Rights Abuses

The determination whether a group falls within the definition of the term ‘people’ for the purpose of application of the right to self-determination is only one side of the coin. The other side relies to the consideration of the issue of human rights violations and treatment provided for them by parent states.

It is absolutely correct to state that in both conflicts severe human rights violations took place against these ethnic groups.¹⁹¹ Chechens and Kosovo Albanians were deprived of their essential political, civil and social rights, which resulted in mistreatment by the parent states.¹⁹² In this respect, the present part of the thesis aims to address three main aspects developed through different periods. These time frames will identify the interrelation between Kosovo and Chechnya’s human rights abuses.

Firstly, one significant difference should be mentioned between conflicts. In the period of 1989-1991, there was not any sufficient evidence which will support that human

¹⁸⁹ R. HIGGENS, *supra* note 15, at 124; *See also* D. RAIC, *supra* note 4, at 244-264.

¹⁹⁰ *Ibid.*, *See also* Advisory Opinion on Secession of Quebec, *supra* note 70, para. 124.

¹⁹¹ Albanian Submission, *supra* note 19, at 8-9; S. TERRETT, *supra* note 125, at 29-30 (in relation to Kosovo Albanians); N. Bunick, *supra* note 140, at 1009; D. RAIC, *supra* note 4, at 376-377 (in relation to Chechnya).

¹⁹² *Ibid.*

rights violation were ongoing in the territory of Chechnya by Russians.¹⁹³ On the contrary, in case of Kosovo various documents confirm significant violations conducted against Albanians after the 1989 constitutional amendments to the 1974 constitution of the former Yugoslavia.¹⁹⁴ In particular, Albanian schools were closed down, teachers, police officers, judges and doctors with ethnic Albanian origin were dismissed from their positions, which resulted on the economic problems for them.¹⁹⁵ Furthermore, arbitrary arrest and detention, and cases of torture were identified against the ethnic Albanians perpetrated by the Serbian authorities.¹⁹⁶

Through 1991-1999 period, both cases show identical situations in relation to human rights abuses. Kosovo was under the military control of the Serbian government and Chechnya was in military conflicts with the Russian Federation during the “first Chechen-Russian war”¹⁹⁷ which resulted in grave consequences for Kosovo Albanians and Chechens. For instance, the Human Rights Watch condemned acts of the Russian military troops in the territory of Chechnya, stating that:

“We call on President Boris Yeltsin to end the indiscriminate bombing and shelling of civilians and civilian property, to publicly condemn these attacks, and to punish, in a manner consistent with international law, those responsible for carrying them out.”¹⁹⁸

The situation in Kosovo has the same elements of human rights violations, namely the Serbian government under Milosevic regime was involved in forcible disappearances, arrests,

¹⁹³ D. RAIC, *supra note 4*, at 377.

¹⁹⁴ Albanian Submission, *supra note 19*, at 8-9.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ D. RAIC, *supra note 4*, at 377.

¹⁹⁸ Human Rights Watch, Russia: Russia’s War in Chechnya: Victims Speak Out (January 1995) Vol. 7, No. 1 (Recommendation), available at <http://www.hrw.org/legacy/reports/1995/Russia.htm> (last visited March 27, 2011).

attacks, arbitrary detentions, restriction on medical personal, utilization of indiscriminate force against ethnic Albanians.¹⁹⁹

However, after 1999 NATO's humanitarian intervention and adoption of the UN Security Council Resolution 1244 in relation to Kosovo, the situation improved which resulted in protection of human rights for Kosovo Albanians. In particular, the UNMIK, which was directly charged with maintaining order and preservation of human rights in Kosovo, ensured the protection for Albanians.²⁰⁰ On the other hand, the situation of Chechnya did not undergo any substantial changes even after the 2003 referendum on the constitution of the Russian Federation and, therefore, human rights violations are still a systematical problem there.²⁰¹

Undoubtedly, one of Russia's main arguments in relation to Chechnya is the fight with terrorism and attempt to maintain order and security in Chechnya.²⁰² Nevertheless, similar explanations could be used by the Serbian government which probably attempted to suppress terrorist acts of the KLA organization operating in Kosovo.²⁰³ Terrorism is a serious problem but it does not authorize disrespect of human rights which does not only refer to Serbia but at the same time to Russia. Therefore, despite differences in time frames when these human rights abuses were perpetrated, we may logically conclude that these ethnic groups from being a 'minority' may become a 'people' under the language of the UN Charter and other legal sources on the right to self-determination since they were a subject of numerous human rights abuses.

¹⁹⁹ Human Rights Watch, Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo (October 1998) Vol. 10, No. 9 (D), available at <http://www.hrw.org/legacy/reports/reports98/kosovo/> (last visited March 27, 2011).

²⁰⁰ UN Resolution 1244, *supra note* 133.

²⁰¹ C. Mulcahy, *supra note* 144, at 184.

²⁰² Stante E. Cornell, *The War Against Terrorism and the Conflict in Chechnya: A case for Distinction*, 167Vol. 27:2 Summer/Fall 2003 at 175.

²⁰³ TERRETT, *supra note* 125, at 35; *See also* Serbian Submission, *supra note* 122, at 113-114.

C. Role of International Community and Exhaustion of All Remedies for Internal Self-Determination

After evaluation of the human rights violations conducted by the parent states, this sub-chapter will analyze why political assessments by other states in relation to Kosovo and Chechnya's cases found a different path of development under international law.

It is widely accepted that negotiation process between representatives from Kosovo and Serbia failed due to a lack of consensus on set goals.²⁰⁴ In particular, on the one hand, the Serbian authorities aimed to protect its territorial integrity through providing all necessary elements for the internal aspect of self-determination to Kosovo Albanians, while Kosovo Albanians' main goal was the independence from Serbia. There is no doubt that these types of negotiations will always fail, since none of parties concerned have anything to put on the table for a dialogue. In this respect, it is appropriate to ask what was the role and response of the international community in regulation of these conflicts.

In the case of Chechnya, the international community was silent. The main justification for this was a fear that Chechnya will harbor criminals and undermine the international stability of the UN member states.²⁰⁵ Nobody disregards the fact that terrorism is a significant problem for all states and Chechnya has some potential threats to the international peace and order. However, the main reason behind this argument is a fear of the Russian Federation. In particular, Russia is a permanent member of the Security Council and a dominant political actor in international relations.²⁰⁶ None of states wish to spoil the relationship with Russia. Therefore, Chechnya did not receive much attention in other states' political agenda.

²⁰⁴ Albanian Submission, *supra note* 19, at 49-50.

²⁰⁵ D. RAIC, *supra note* 4, at 378.

²⁰⁶ *Ibid.*

With respect to Kosovo, it should be highlighted that numerous negotiation process were conducted for the purpose of the determination of the “Kosovo’s future status”.²⁰⁷ The Special Envoy for the Future Status Process for Kosovo, Mr. Martti Ahtisaari was charged with a task to define the “future status of Kosovo”, however, due to different goals of parties concerned, the agreement was not reached.²⁰⁸ Along with this, the Troika negotiations were organized composing from the representatives of the Russian Federation, the EU and the USA but even in this case the consensus was not reached by parties.²⁰⁹ As a result, Mr. Martti Ahtisaari stated, in his prepared Comprehensive Proposal for the Kosovo Status Settlement, that “Kosovo Status should be independence, supervised by the international community”.²¹⁰ The mentioned plan was rejected by the Serbian authorities and was not approved by the UN Security Council.²¹¹

Majority of states who initially recognized the independence of Kosovo relied on the unique (“*sui generis*”) characteristics of Kosovo’s case.²¹² For instance, the UK government holds the position that “Kosovo’s Declaration of Independence [is] indeed unique. There is no parallel or analogy from this situation to other circumstances in other places in which some group or other may wish to assert independence”.²¹³ However, as it was mentioned above there are various identical elements between Kosovo and Chechnya’s conflicts. There is nothing unique in Kosovo’s case. By this interpretation, Chechnya also may fall under the scope of the uniqueness of conflict.

²⁰⁷ UN Resolution 1244, *supra note* 133.

²⁰⁸ Serbian Submission, *supra note* 122, at 142-144.

²⁰⁹ *Ibid.*, at 146

²¹⁰ As cited in Serbian Submission, *supra note* 122, at 144; *See also* Albanian Submission, *supra note* 19, at 23.

²¹¹ Written Statements by the Russian Federation, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), I.C.J. April 16, 2009, at 24, available at <http://www.icj-cij.org/docket/files/141/15628.pdf> (last visited March 27, 2011).

²¹² *E.g.* Albanian Submission, *supra note* 19, at 49: Written Statement of the United Kingdom, Request for an Advisory Opinion of the International Court of Justice on the Question “Is the Unilateral Declaration of Independence by the Provision Institutions of Self-Government of Kosovo in Accordance with International Law?” (April 17, 2009) at 9, available at <http://www.icj-cij.org/docket/files/141/15638.pdf> (last visited March 27, 2011) [hereinafter: the UK’s submission]

²¹³ UK’s submission, *supra note* 212.

There are only two main reasons for not applying the same approach in relation to Chechnya by those states who relied on the “*sui generis*”²¹⁴ feature of Kosovo. The first one refers to the permanent membership of the Russian Federation in the Security Council. And the second one relates to possible political escalations between the official Russia and other states. Undoubtedly, Chechnya would not be able to handle with all military and economic resistance from the Russian Federation without any international support.²¹⁵ Chechnya was left alone, while Kosovo was supervised by the international community since the NATO’s humanitarian intervention in 1999. It is a clear identification of the fact that Kosovo would not be recognized by any states, if it did not fall within the political agenda of the international community.

In this respect, the final question which should be addressed is whether or not all possible remedies for the internal aspect of self-determination were exhausted. I strongly believe that negotiations failed merely because Kosovo Albanians did not try to conduct dialogue with the Serbian authorities. It should be mentioned that after Milosevic regime, Serbia has made various positive developments in the field of human rights. It has adopted a new constitution 2006 which stipulates strong protection for minority groups and individual human rights.²¹⁶ Along with this, in 2001 Serbia (and Montenegro) ratified the Rome Statute²¹⁷ and in 2003, Serbia ratified the Convention for the Protection of Human Rights and Fundamental Freedoms.²¹⁸ This may lead to the conclusion that the Serbian government has expressed a clear political commitment to respect and protect rights of Kosovo Albanians. Therefore, the failed negotiations should not mean that all remedies for the internal self-determination were exhausted. It is a clear recognition of the fact that international

²¹⁴ *Supra note* 212.

²¹⁵ Please refer to Chapter II, Sub-Chapter “B”.

²¹⁶ Serbian submission, *supra note* 122, at 88.

²¹⁷ Official website of the International Criminal Court <http://www.icc-cpi.int/Menus/ASP/states+parties/Eastern+European+States/Serbia.htm> (last visited March 27, 2011).

²¹⁸ Official website of the Council of Europe <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (last visited March 27, 2011).

community plays a double standard in relation to secession movements and at the same time denying it to Chechnya which is identical, if not even worse, in relation to human rights abuses perpetrated by the Russian Federation.²¹⁹

With respect to Chechnya, it should be noted that Chechen people have not yet expressed their free will on how they wish to determine their political or economic status. During the presidency of Dudaev, it will be hard to state that Chechen people actually supported him when he issued the declaration of independence from Russia.²²⁰ While in case of Russia's military oppression, Chechens were deprived of significant human rights. In both situations, Chechens were not allowed to express their free will. Although, officially Chechnya remains as the autonomous region of Russia, the treatment provided to them raises various concerns which should be followed by the response from the international community for the purpose of negotiating the current situation in Chechnya.

I strongly believe that in both cases, the aspects of the internal self-determination are not exhausted and should be a subject of further negotiations among all parties concerned. The internal aspect of self-determination is the most appropriate means for meeting demands of all sides of these conflicts. On the one hand, it ensures the protection of human rights for a group and provides various forms for implementation of this right.²²¹ And on the other hand, it maintains the protection and respect of the territorial integrity of the parent states.

²¹⁹ Please refer to Chapter III, Sub-Chapter "B".

²²⁰ D. RAIC, *supra note 4*, at 376.

²²¹ K. HENRARD, *supra note 4*, at 307.

CONCLUSION

The conclusion developed throughout this paper aims to limit the application of the external self-determination as a last resort rather than open the door for possible secession claims leading to establishment of the new independent state. The paper argued that the notion of the self-determination is still a subject of the political manipulation which in most of the cases depends on two conditions: the political assessment of other states and whether human rights violations have taken place against a particular ethnic group perpetrated by the parent states.

The “terminological chaos”²²² created by the terms ‘people’ and ‘minority’ should not undermine effective implementation of the internal aspect of self-determination. Undoubtedly, at various points the terms ‘people’ and ‘minority’ are overlapping concepts, which have strong ties with the human rights protection mechanism. Denying the internal aspect of self-determination to minorities, merely because they are not ‘people’ will not lead to anything rather than increasing tensions between communities and state institutions what finally results in the transformation of the term ‘minority’ into the term ‘people’.

I argued that international law has been a subject of modification after the advisory opinion of the ICJ in relation to Kosovo’s declaration of independence. In particular, the Court stated that the declaration of independence “did not violate international law”,²²³ I conclude that since the Court did not specify who Kosovo Albanians are, this can be the recognition of the fact that ‘minority’ may become ‘people’. However, it is important to note that this paper demonstrated how “terminological chaos”²²⁴ served as a solution rather than as a serious problem since it is a political instrument in hands of the international community.

²²² W. CONNOR, *supra note* 16.

²²³ Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion) 22 July 2010 I.C.J, paras. 123, 84 ,119, 121, available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 27 March 2011).

²²⁴ W. CONNOR, *supra note* 16.

Both cases of Kosovo and Chechnya have various aspects in common, however, both of them developed in different directions.

Once Lord Palmerston stated that “[n]ations have no permanent friends or allies, they only have permanent interests”. This is absolutely true in relation to Chechnya since nobody dares to damage political relations with Russia, the question of Chechens did not find same amount of appreciation in the political agenda of the international community such as in case of Kosovo. Chechnya is not within the common interests of other states.

I certainly agree with proposed suggestion by Thornberry who stated “while external manifestations of self-determination may be denied to minorities ... [“internal” self-determination] is of relevance.”²²⁵ The lesson that can be learned from here is that ‘minorities’ should be granted the right to internal self-determination initially which will a strong guarantee for the international stability as such groups will not later demand the application of the right to external self-determination.

As regards my final argument, I believe that Kosovo Albanians and Chechen’s right to self-determination should be implemented only internally. The remedies for the internal dimension of this doctrine are not exhausted and it should be a subject of ongoing negotiations. In Kosovo, various international players concluded that negotiations failed and the only solution for them was the external self-determination. However, I strongly disagree with this type of interpretation. Unfortunately, the international community was not involved in determination of the Chechen people’s destiny and, therefore, human rights violations still are ongoing there. The participation of other states in conflict of Chechnya or strong pressure on Russia might change the situation in the field of human rights protection for Chechens. In both cases, the internal self-determination will decrease political misunderstanding between the parent states and distinct ethnic groups which, on the one hand, will preserve the

²²⁵ As cited in K. HENRARD, *supra note* 15, at 315-316.

territorial integrity of states and, on the other, will ensure human rights protections for these ethnic groups.

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