SECESSION AS AN EXPRESSION OF THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW: A CRITICAL ANALYSIS OF THE KOSOVO INDEPENDENCE

By

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Thesis Submitted to the Centre for Graduate Studies, Universiti Utara Malaysia, in Fulfillment of the Requirement for the Degree of Doctor of Philosophy
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ABSTRAK


Kata-kata Kunci
Penentuan diri, Pemisahan, Kosovo, Perisyiharan Kemerdekaan Secara Bersendirian, Tanggungjawab Bukan Pengiktirafan
ABSTRACT

This study examines the twin principles of self-determination and secession in international law, using the Kosovo secession as a case study, with a view to making a finding whether there is an international law right to secession and whether the Kosovo secession was legal in international law. It also examines the concept of “people” as the beneficiaries of self-determination with a view to proposing a functional and acceptable definition of “people”. The study also does a comprehensive analysis of the ICJ Ruling on the Kosovo independence which was delivered in July 2010, while this research was still in its advance stages. The study does a comprehensive factual and legal analysis of previous secession cases in resolving the issues above and has concluded that there is no general international law right to secession. This study is purely a doctrinal legal and library-based research. The only reliable way to do these is by enumerating the established rules and analyzing them in the light of the facts of the case study. It however reveals that in exceptional circumstances, secession will be recognized as a remedial solution to self-determination disputes. Other circumstances in which secession is either supported or opposed in international law are also listed. It also proposes a functional definition of “people” and opined that the Kosovo secession comes within the scope of a remedial secession. Finally, the study has made recommendations towards containing the oft violent crisis engendered by secessionist conflicts. The findings and recommendations will be very useful to policy makers, stakeholders in international law, legal advisors as well as secessionist groups. They will help in putting secessionist claims in their proper perspectives thus, eliminating or at least reducing needless violence and bloodshed associated with such conflicts.

Keywords
Self-determination, Secession, Kosovo, Unilateral Declaration of Independence, Duty of Non-Recognition
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<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>ASIL Insights</td>
<td>American Society of International Law Insights</td>
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<tr>
<td>B.U. Int'l L.J.</td>
<td>Boston University International Law Journal</td>
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<td>Cal. W. Int'l L.J.</td>
<td>California Western International Law Journal</td>
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<td>Chinese J. Int'l L.</td>
<td>Chinese Journal of International Law</td>
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<td>Cornell Int'l L.J.</td>
<td>Cornell International Law Journal</td>
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<td>Denv. J. Int'l L. &amp; Pol'y</td>
<td>Denver Journal of International Law and Policy</td>
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<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>Emory Int'l L. Rev</td>
<td>Emory International Law Review</td>
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<tr>
<td>Hastings Const. L.Q.</td>
<td>Hastings Constitutional Law Quarterly</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ILSA J Int'l &amp; Comp L.</td>
<td>ILSA (International Law Students Association) Journal of International &amp; Comparative Law</td>
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<td>Yale L.J.</td>
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<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<td>AU</td>
<td>African Union</td>
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<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<tr>
<td>COE</td>
<td>Council of Europe</td>
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<tr>
<td>CSCE</td>
<td>Council for Security and Co-operation of Europe</td>
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<tr>
<td>EC</td>
<td>European Council</td>
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<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
<td>European Union</td>
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<td>EULEX</td>
<td>European Union Rule of Law Mission in Kosovo</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>KFOR</td>
<td>Kosovo Force</td>
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<td>KLA</td>
<td>Kosovo Liberation Army</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>OAS</td>
<td>Organization of American States</td>
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<td>OAU</td>
<td>Organization of African Unity</td>
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<td>OSCE</td>
<td>Organization for Security and Co-operation of Europe</td>
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<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>UDI</td>
<td>Unilateral Declaration of Independence</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCFN</td>
<td>United Nations Council for Namibia</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>UNMIK</td>
<td>United Nations Interim Administration Mission in Kosovo</td>
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<tr>
<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
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<tr>
<td>UNTEA</td>
<td>United Nations Temporary Executive Authority</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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LIST OF CASES

Aaland Islands Case (Commission of Jurists), LNOJ, Sp Supp 3 (1920) .... 32, 95, 168
Aaland Islands Case (Commission of Rapporteurs), LN Doc. B7.21/68/106, (1921) .............................................................. 96, 169
Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo ICJ Advisory Opinion, July 22, 2010 .................. 199
Burkina Faso v. Republic of Mali (1986) ICJ Reports 554 .............................. 24
Case Concerning East Timor (Portugal v. Australia), ICJ Reports (1995) 90 ....... 104
Namibian Opinion, ICJ Reports (1971) 16 .................................................... 127
Reference re Secession of Quebec (1998) 2 SCR 217 ..................................... 170
Territorial Dispute (Libya v. Chad) ICJ Reports 1994, p. 6 .............................. 166
Texas v. White (1869) 74 US (7 Wallace) 700 ............................................. 22
Western Sahara Case ICJ Reports (1975) 12 ................................................. 127, 203
CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

Following the intervention of NATO in Kosovo, due to humanitarian concerns arising from ethnic fighting between Serbs and Kosovo-Albanians in 1999, the United Nations set up an interim administration under Security Council Resolution 1244 (1999) to oversee the affairs of Kosovo pending a peaceful resolution to the crisis and the Security Council’s determination of the future status of Kosovo vis a vis Serbia (then Federal Republic of Yugoslavia). Attempts by the UN Secretary General’s envoy, Martti Ahtisaari and the Troika (USA, Russia and the EU) to reach an amicable solution failed.

So, on February 17, 2008, Kosovo declared independence from Serbia. The declaration has been recognized by at least 85 UN member nations,¹ including the U.S. and some EU nations. Serbia, Russia and some other states condemned the declaration as a violation of international norms. But the US and Britain insist that the Kosovo situation is unique, unprecedented and ought to be recognized. With the active support of Russia, Serbia has successfully requested the UN General Assembly to refer the Kosovo independence issue for the advisory opinion of the

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36. Dumberry, P., “Lessons Learned from the Quebec Secession Reference before the Supreme Court of Canada”, in Kohen, M.G., (ed.) *Secession:
41. Farer, T. J., “Panama: Beyond the Charter Paradigm”, 84 AJIL 503 at 507 (1990)
59. Jansen, G.R., “Albanians and Serbs in Kosovo: An Abbreviated History An Opening for the Islamic Jihad in Europe”, Colorado State University,
available at http://lamar.colostate.edu/~grjan/kosovohistory.html last visited October 10, 2010


86. Nanda, V.P., “The Validity of United States Intervention in Panama under International Law”, 84 AJIL 494 (1990)

368
124. van der Vyver, J.D., “Statehood in International Law”, 5 Emory Int'l L. Rev. 9 (1991)
132. Wilde, R., “From Danzig to East Timor and Beyond: The Role of International Territorial Administration” 95 AJIL (2001) 583
134. Wood, H.M., “The Treaty of Paris and Turkey's Status in International Law” 37(2) AJIL (1943) 262