

IMPLICATIONS OF KOSOVO, ABKHAZIA AND SOUTH OSSETIA FOR INTERNATIONAL LAW

The Conduct of the Community of States in Current Secession Conflicts

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Abstract

The objective of this article is to examine whether the current conduct of the community of states in the cases of Kosovo, Abkhazia and South Ossetia has any implications on international law. This question arises particularly in the case of Kosovo, since many states have recognised its separation from Serbia. Can the conduct of the community of states be used as a legal precedent by other groups seeking separation, e.g. in Azerbaijan, China, Georgia, Moldova, Spain or Ukraine? What if more states were to recognise Kosovo in the future? The focus of this paper will be to consider the implications of the conduct of the community of states on the interpretation of international treaties and customary international law. In this respect, the conduct of states in the cases of Abkhazia and South Ossetia in August 2008 will also be taken into account.

Keywords: territorial integrity, self-determination, secession, Kosovo, Abkhazia, South Ossetia, international law

Introduction

In many states, ethnic groups are demanding separation from their “mother state” by invoking the right to self-determination of peoples, which was originally developed within the context of decolonisation. This has led to a general discussion concerning the extent to which ethnic peoples, groups and minorities are entitled to rights to self-determination and, in particular, rights to secession. To date, the community of states has rejected rights to secession for these groups and supported the mother states concerned by upholding the principle of territorial integrity.

Many states seemingly deviated from this strict course in the spring of 2008 by recognising Kosovo and its separation from Serbia. An important question is whether this conduct has any

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implications on international law and whether it can be used as a legal precedent by other groups seeking separation, e.g. in Azerbaijan, China, Georgia, Moldova, Spain or Ukraine. States that recognised Kosovo, including Great Britain, Germany and the United States, have already ruled out the interpretation of the Kosovo case as a precedent. However, does this necessarily mean that the recognition of Kosovo has no influence on international law? Furthermore, Russia recognised the breakaway regions of Abkhazia and South Ossetia as being independent from Georgia. How should the fact that no other state – apart from Nicaragua – has followed this example be interpreted?

The current article will examine these questions in greater detail. The main focus will be to consider the implications of the conduct of the community of states in the case of Kosovo in the spring of 2008 on the interpretation of international treaties and customary international law (part II). In this respect, the conduct of states in the cases of Abkhazia and South Ossetia in August 2008 is worth taking into account. Further conclusions will emerge from this analysis (part III). Subsequently, possible future scenarios will also be discussed in the case of Kosovo and their hypothetical implications on international law (part IV).

I. International Right to Secession – Until Late 2007

First of all, it is necessary to outline how the international right to secession appeared prior to the spring of 2008. The international right to secession refers to the entirety of territorial separation rights which result from international law and which can be exercised by certain groups of the population against their mother states. Such rights to separation and secession are recognised in various constellations. The classic case is represented by former colonies that were able to break free from their colonial states.¹ Secession is also compliant with international law if it is based on a decision made by the entire population of the mother state.² Furthermore, this applies if the secession is anchored in the national law of the mother state and follows the respective secession procedure.³ A case is also regarded as legitimate if a region annexed by another state in circumstances contrary to international law declares its secession from the annexing state.⁴ Within this context, the separation of the Baltic countries from the USSR prior to its collapse is a prime example.

Rights to secession for ethnic peoples, groups or minorities outside the context of decolonisation are generally rejected if they pursue the separation unilaterally, i.e. without consulting the entire population or without any legitimacy through a national secessionist procedure. As shown below, this constellation applies to the case of Kosovo, which is why the present article focuses on this specific scenario.⁵

First and foremost, ethnic peoples, groups or minorities are entitled to human rights and the rights to minorities. They may also invoke the so-called internal (defensive) right to self-

¹ Hans-Joachim Heintze, in *Völkerrecht* [International Law], ed. Knut Ipsen (Munich: 2004), 421 et seq.

² See Antonio Cassese, *Self-Determination of Peoples* (Cambridge: 1995), 144; Frauke Mett, *Das Konzept des Selbstbestimmungsrechts der Völker* [The Concept of the right to self-determination of peoples] (Frankfurt/Main: 2004), 209, 269, 270 et seq., 371.

³ Marcelo G. Köhen, *Secession, International Law Perspectives* (Cambridge: 2006), 20.

⁴ Köhen (op. cit. 3) 19; Cassese (op. cit. 2) 129 (“Peoples under foreign military occupation”).

⁵ See section II. 3. below.

determination.⁶ This affects the free organisation of state order, and in turn the relationship of a people or an ethnic group with the government. However, there is consensus, at least in principle, that the aforementioned groups are not entitled to an external (offensive) right to self-determination. The external right to self-determination is primarily geared towards constructing an independent state of one's own, namely secession. Such a right to secession is rejected by pointing to the territorial integrity of the mother state.

The prevailing view held by international legal scholars does not allow for any exceptions in this respect.⁷ According to a strongly opposing view, mainly espoused in Germany, ethnic groups should be entitled to a right to separation, at least in extreme, exceptional cases.⁸ Accordingly, an ethnic group should be entitled to a right to secession if it undergoes suppression to an unbearable extent, and if separation is the only available means as a last resort. This would need to involve the most severe infringements, namely crimes under international law, cases of systematic discrimination and massive human rights violations.⁹ The state apparatus would need to be exposed as a torturous regime of terror and a tyrannical system¹⁰ in order for the existing duty of loyalty towards the state to be rescinded.¹¹

Some commentators also extend the list of exceptions to forms of extreme political discrimination. According to this viewpoint, ethnic groups should be entitled to a right to secession if they are denied any form of participation in the political system.¹²

Whether a right to secession under international law also exists in strictly defined exceptions for ethnic peoples, groups or minorities, depends upon whether the community of states grants them such a right by treaty or by custom. These groups must therefore be able to invoke either international treaties or customary international law in order to exercise their secessionist ambitions.

⁶ In regard to the Kosovo Albanians see Gerd Seidel, "A new dimension of the right of self-determination in Kosovo?," in *Kosovo and the International Community*, ed. Christian Tomuschat (Dordrecht: 2002), 205 et seq., 212.

⁷ See Emililio J. Cárdenas/ María F. Cañás, "The Limits of Self-Determination" in *The Self-Determination of Peoples*, ed. Wolfgang Danspeckgruber, (London: 2002), 113; Svante E. Cornell, "Undeclared War: The Nagorno-Karabakh Conflict Reconsidered," *Journal of South Asian and Middle Eastern Studies*, vol. XX, no. 4 (1997): 21; Olivier Corten, "Are There Gaps in the International Law of Secession?," in *Secession, International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge: 2006), 231 et seq.; Kohen (op cit. 3), 10; Tim Portier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia* (The Hague: 2001), 36; Gnanapala Welhengama, *Minorities' claims, from autonomy to secession*, (Aldershot: 2000), 313 et seq. cf. also in this respect Christian Tomuschat, "Secession and Self-Determination," in *Secession, International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge: 2006), with further references; Matthias Herdegen, *Völkerrecht [International Law]* (Munich: 2006), 256.

⁸ Cf. Karl Doehring, in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: 2002), Art. 1, Annex: Self-Determination (40); Heintze, in Ipsen (op. cit. 1) 414; Herdegen (op. cit. 7) 257; Stephan Hobe/ Otto Kimminich, *Einführung in das Völkerrecht [Introduction to International Law]* (Tuebingen: 2004), 118; Tomuschat, in: Kohen (op. cit. 7) 38 et seq.; *Ibid.*, *Modern Law of Self-Determination* (Dordrecht: 1993), 9.

⁹ Hobe/Kimminich (op. cit. 8) 118; Herdegen (op. cit. 7) 257; Heintze, in Ipsen (op. cit. 1) 414; Tomuschat, in Kohen (op. cit. 7) 4.

¹⁰ Tomuschat, (op. cit. 8) 9; *Ibid.*, in Kohen (op. cit. 7) 42.

¹¹ Heintze, in Ipsen (op. cit. 1) 414.

¹² Cf. Mett (op. cit. 2) 268, 373; Tomuschat, in Kohen (op. cit. 7) 39.

1. International Treaties

From a treaty perspective, the United Nations Charter and the Covenants of Human Rights (International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights) are taken into consideration.¹³ The right to self-determination is cited in all three sources (Article 1.2 and Article 55 of the United Nations Charter, Article 1 of both Covenants of Human Rights). If the right to secession is to be derived from these sources, the existing right to self-determination must be interpreted in a manner that substantiates a right to secession.

This is impossible solely on the basis of the wording of the texts. Forms of self-determination may also be exercised within an existing state. In this respect, the concept as such does not necessarily entail secession. Regarding the UN Charter, it was already rejected as a basis for pressing secession demands in its drafting stage.¹⁴ Indeed the parties to the Charter would clearly have been able to extend the right to self-determination contained in the UN Charter, as well as that in the Covenants of Human Rights, further into a right to secession (the thinking behind Article 31.3 of the VCLT¹⁵). This would have been the case if the states which were parties to the treaties had been convinced in the past that the right to self-determination included the right to secession. However, no such conviction existed. As shown in part I.2 of the current paper, state practice is characterised as being hostile to secession.¹⁶ This also applies to the practice of the states signed up to the UN Charter and the Covenants of Human Rights. None of the three documents has ever been invoked by the contractual states as a basis for supporting secessionist movements.

A teleological interpretation is also worthy of consideration. Concerning the UN Charter, it could be assumed that secession represents the final resort. From a peace-keeping perspective, the separation of a region may appear to make sense in a region that is permanently subject to violent ethnic disputes. However, it is debatable whether the permanent dismemberment of a state constitutes a particularly effective peace-keeping measure. Secession only serves the interests of the group seeking separation and scarcely allows for compromise solutions on the basis of which a long-term peaceful co-existence might appear possible without international support. Moreover, separatist movements worldwide would be encouraged to use force. In a prolonged violent dispute, groups seeking secession would interpret the UN Charter in their favour and call for secession regardless of the actual circumstances. This would do scant justice to the intentions behind the UN Charter.

In respect to the Covenants of Human Rights, it might appear that the means of secession must be open to groups of populations suffering the most severe forms of discrimination. Beyond any doubt, these groups require effective assistance from the community of states and the United Nations. The community of states should intervene on humanitarian grounds in the

¹³ See also Tomuschat, in Kohen (op. cit. 7) 26 et seq.

¹⁴ UNCIO VI, 296, Document 343, I/1/16; Ruediger Wolfrum, in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: 2002), Art. 1 (21); Oscar Schachter, *United Nations legal order*, vol 1 (Cambridge: 1995), 353.

¹⁵ VCLT = Vienna Convention on the Law of Treaties, 1980.

¹⁶ See also Tomuschat, in Kohen (op. cit. 7) 31; Welhengama (op. cit. 7) 308, 312; Mett (op. cit. 2) 269; Heintze, in Ipsen (op. cit. 1) 423.

mandate of the UN Security Council¹⁷ and, if necessary, set up interim international administrations and take measures to address the problem at its root, namely against the respective suppressive regime. However, on first glance it could be unclear why it should also make sense to permanently split up the mother state.¹⁸ On the one hand, a new state created from secession can hardly survive on its own and is dependent on intensive international support. On the other hand, the Kosovo case shows that human rights will be respected if long-term international engagement is present. The aim of the Covenants of Human Rights can therefore be achieved through other means. If these means are proven to be successful, the Covenants of Human Rights can no longer be referred to as a basis for dismembering the mother state.¹⁹

Consequently, it is highly debatable whether rights to secession can be inferred from the United Nations Charter or the Covenants of Human Rights. Moreover, there are good reasons in favour of rejecting rights to secession, even in exceptional situations. Otherwise there is a danger that ethnic groups might be too quick to interpret exceptional rules in their favour and incite the mother states in question to take discriminatory countermeasures and preventative steps. This does not correspond to the spirit of international treaties which is primarily focused on prevention. As a result, there are strong arguments against the exceptional granting of secession through the UN Charter and Covenants of Human Rights.²⁰

2. Customary International Law

Rights to secession under international law for ethnic peoples, groups or minorities could at best arise from customary international law. The classic requirements of a norm under customary law are an appropriate practice of the states, as well as the firm belief that this practice meets a legal obligation (*opinio juris sive necessitatis*).²¹ Proponents of legal schools of thought espousing natural law only consider the subjective element, namely the *opinio juris*, to be essential.²²

Proving the existence of a norm under customary international law frequently raises difficulties. For this reason, it is often correctly deemed satisfactory for so-called "fundamental principles of international law"²³ to arise from international relations or fundamental treaties (e.g. UN Charter, Treaty of Maastricht on European Union). Here it is not a matter of so-called general legal principles resulting from national legal systems, but of

¹⁷ See Bernd R. Elsner, *Die Bedeutung des Volkes im Völkerrecht* [The Meaning of People in International Law] (Berlin: 2000), 305.

¹⁸ See also Kohen (op. cit. 3) 10 et seq.

¹⁹ See also Andreas Zimmermann and Carsten Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State?" *Nordic Journal of International Law*, vol. 70 (2001): 423, 456; Philipp A. Zygojannis, *Die Staatengemeinschaft und das Kosovo* [The Community of States and Kosovo] (Berlin: 2003), 260.

²⁰ Consequently also Tomuschat, in Kohen (op. cit. 7) 26 et seq. referring to the prevalent view that the Covenants of Human Rights in particular fail to constitute any basis for legitimate secessionist demands.

²¹ Art. 38 Para. 1 lit. b ICJ statute; Hobe/Kimminich (op. cit. 8) 184; Wolff Heintschel von Heinegg, in *Völkerrecht* [International Law], ed. Knut Ipsen (Munich: 2004), 214 et seq.; Malcom E., Shaw, *International Law* (Cambridge: 2003), 68 et seq.

²² Heintschel von Heinegg, in Ipsen (op. cit. 21) 214.

²³ Heintschel von Heinegg, in Ipsen (op. cit. 21) 227; Hermann Mosler, "General Principles of Law," in *The Encyclopedia of Public International Law (EPIL)*, vol. II, ed. Rudolf Bernhardt (Amsterdam: 1995), 511, 513; Tomuschat, in Kohen (op. cit. 7) 39.

norms belonging to customary law. To be precise, determining such principles does not represent any departure from the classic approach of customary international law, but further simplifies the proof of the existence of a customary norm.

It is beyond dispute that no clear state practice, common practice throughout the state and *opinio juris* in favour of ethnic groups seeking secession, was visible up until the end of 2007.²⁴ Moreover, even proponents of an exceptional right to secession agree that state practice was hostile to secession until that juncture.²⁵

Accordingly, states did not even offer any rights to secession to ethnic groups or minorities which were proven to be the victims of severe human rights violations. Acts of violence infringing on human rights may have been broadly censured; nonetheless, the community of states underlined the territorial integrity of the mother states exerting this violence. Pertinent examples are the cases of Eritrea,²⁶ Chechnya²⁷ and Kosovo. Within the UN Security Council resolution 1244 (1999) on Kosovo, this notion was formulated as follows:

“Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party, ... Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2, ...”

Regardless of this rejecting stance of states and the prevailing view, some legal scholars presuppose the existence of rights to secession in exceptional cases, as previously mentioned. This could be dogmatically explained by accepting the premise that an exceptional right to secession constitutes a “fundamental principle of international law”. This principle could arise from fundamental international documents. It is indeed questionable whether this applies, as states are not neutral in regard to secessions, but rather disapprove of them.

Proponents of exceptional secession point first and foremost to a paragraph contained in the *Friendly Relations Declaration*,²⁸ which is not binding per se. This “saving clause” states:

*“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”.*²⁹

²⁴ Cf. in particular the detailed examination of this question in: Mett, *Das Konzept des Selbstbestimmungsrechts der Völker* (op. cit. 2). cf. also James Crawford, “State Practice and International Law in Relation to Secession,” *British Yearbook of International Law*, vol 69 (1998): 114; Christine Gray, *International Law and the Use of Force* (New York: 2004), 58; Heintze, in Ipsen (op. cit. 1) 423; Shaw (op. cit. 21) 444; Welhengama (op. cit. 7) 308, 312.

²⁵ Cf. Tomuschat, in Kohen (op. cit. 7) 27ff.; Karl Doehring, in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: 2002), Article 1, Annex: Self-Determination (36).

²⁶ More details on this in Mett (op. cit. 2) 150 et seq.

²⁷ Cf. also Mett (op. cit. 2) 250 et seq.

²⁸ Cf. for the discussion of the *Friendly Relations Declaration* in this context: Kohen (op. cit. 3) 10 et seq.; see also Seidel (op. cit. 6) 206 et seq.

²⁹ UN, *Friendly Relations Declaration*, The principle of equal rights and self-determination of peoples, sec. 7.

The upshot of this is that the declaration should not constitute any warrant to question the territorial integrity of a state which acts according to the self-determination of peoples and has a government representing all groups of the population. According to this line of reasoning, it does not necessarily follow that ethnic groups should be granted a right to separation in extreme, exceptional cases.

It is already unclear which groups of the population fall under the concept of a “people”, and particularly whether ethnic groups and minorities are also included. It is impossible to provide a conclusive answer to this as the community of states and international institutions do not use any firm criteria to define a “people”.³⁰ In addition, the preamble to the declaration asserts that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state is incompatible with the purposes and principles of the UN Charter³¹ and is in turn incompatible with the spirit of the declaration.³² Accordingly, this calls into question whether the saving clause can be interpreted in favour of groups seeking separation. Furthermore the saving clause does not contain any exact legal conditions justifying a separation. Such an unspecified right to secession would leave the doors wide open to the possibility of abuse, and would be difficult to reconcile with the primary aims of the declaration, namely to preserve security and keep the peace.³³ In order to encounter these risks effectively, it is not sufficient to affirm the existence of a right to secession, but to limit its scope and to make it conditional upon non-regulated, purely academic and inconsistent criteria. Even legal scholars representing the view that the right of secession applies in exceptional cases concede that ultimately, on the basis of the saving clause, it is impossible to formulate clear, definable and universal conditions for an exceptional secession.³⁴

It would ultimately be essential for any perceived interpretation of the saving clause in favour of the exceptional right to secession to reflect a “fundamental principle of international law” (see above³⁵). Only in this case could a legal claim be construed on the basis of the Friendly Relations Declaration, which actually constitutes “soft law”. It would be necessary for such a principle to gain general acknowledgement and to be supported by a far-reaching and clearer combination of documents. Otherwise its character could hardly be approved as a basic norm of customary international law. Due to the lack of clarity and the contentiousness of the saving clause in the Friendly Relations Declaration, the declaration does not in and of itself constitute grounds for asserting the existence of a fundamental principle of exceptional secession.

In the final analysis, other documents may also not be of use in this respect. The CSCE Final Act (Helsinki Final Act) of 1975 and the OSCE Charter of Paris of 1990 are examples of this. Both documents assert the right to self-determination of peoples. The CSCE Final Act even

³⁰ Cf. Elsner (op. cit. 17) 310; Heintze, in Ipsen (op. cit. 1) 407, 410; Thomas D. Musgrave, *Self Determination and National Minorities* (Oxford: 1997), 148.

³¹ UN, *Friendly Relations Declaration*, (1970), Preamble.14.

³² According to the general part of the declaration, the UN Charter sets the authoritative framework for the interpretation.

³³ UN, *Friendly Relations Declaration*, Preamble.1, 2, 3 & 4.

³⁴ Cf. Zygojannis (op. cit. 19) 258.

³⁵ Part I. 2.

mentions the possibility of being able to determine the external political status for oneself.³⁶ However, the documents do not provide any clearer information on who should wield this right – whether that be the peoples of states, colonised peoples or ethnic peoples, groups and minorities. Furthermore, both documents stress that the right to self-determination is only to be respected if it is exercised in accordance with the principle of territorial integrity.³⁷ There is no basis for granting an independent right to secession to override the principle of territorial integrity.

The lack of authoritative documents in favour of a right to secession was not addressed by the declaration of the World Human Rights Conference of 1993, and the declaration to commemorate the 50th anniversary of the United Nations. Both declarations, which took place after the Friendly Relations Declaration, contain a saving clause which is comparable to the Friendly Relations Declaration and is therefore just as imprecise. This means that the community of states, fully aware of the “contestability” of the saving clause in the Friendly Relations Declaration, was not able to confirm the existence of an exceptional right to self-determination by clarifying and enshrining it in the two subsequent declarations.

Nor can the Vienna Convention on the Succession of States – often cited by proponents of the opposing viewpoint – be presented as a convincing argument.³⁸ Although the Vienna Convention establishes “separation” as a form of state succession, this does not necessarily mean that ethnic groups should have rights to secession.

Consequently, it cannot be assumed that international documents go against state practice, which is hostile to secession, and that they reflect the existence of a principle of exceptional secession. This deduction is consistent with the prevailing international view – at least right up to the end of 2007 – that international law did not provide any rights to secession for ethnic peoples, groups and minorities. Moreover, the latter were merely entitled to established human rights and minority rights, and, potentially, internal rights to self-determination such as the right to autonomy.

3. Alternative Approaches to Secession

Alongside the discussion on the right to self-determination of people, other approaches are argued by individual authors. These approaches are based on the premise that the separation of ethnic groups is supposedly legitimate in exceptional cases. This applies to constellations in which the mother state rejects every compromise solution in a conflict situation, or when there is no realistic prospect of a conflict being resolved, especially when the methods of peaceful conflict resolution appear to have been exhausted.³⁹ The arguments are merely the projections of individual authors and have not yet gained any general recognition in theory or in practice.⁴⁰ Even if it is not possible to deal with such approaches in any detail here, there

³⁶ Cf. CSCE Final Act 1975, Questions relating to security in Europe, 1.a.VIII; OSCE Charter of 1990, Friendly Relations among Participating States.

³⁷ CSCE Final Act 1975, Questions relating to security in Europe, 1.a.VIII; OSCE Charter of 1990, Friendly Relations among Participating States.

³⁸ Cf. Seidel (op. cit. 6) 207.

³⁹ Cf. summary in Heintze (op. cit. 1) 424 et seq.

⁴⁰ Cf. Heintze (op. cit. 1) 425.

appears to be grounds for scepticism. In the fairly recent past, the conduct of states in secession conflicts reflected very diverse conflict resolution strategies and political motives.⁴¹ These scarcely allow for any clear general legal conclusions to be reached. As shown below, this was confirmed in the case of Kosovo.⁴² Set against this background, it is difficult to identify convincing rules of customary law.

II. Conduct of the Community of States in the Case of Kosovo in Spring of 2008, and Implications on the International Right to Secession

1. The Kosovo Conflict

Generally speaking, the causes of the Kosovo conflict – like many other ethnic conflicts – can be traced to the fact that an area is claimed by several groups of the population primarily for historical and ethnological reasons. For Serbians, Kosovo represents an essential constituent part of Serbia, particularly due to the Battle of Kosovo in 1389, in which Christian Serbians fought against the troops of the Ottoman Empire. The Kosovo Albanians, who are predominantly Muslim, also lay claim to Kosovo because of the Albanian majority living there.

From 1449 until 1912, Kosovo was part of the Ottoman Empire. After its liberation from the Turks it was split up between Serbia and Montenegro, and after the Second World War it was assigned to the constituent republic of Serbia within Yugoslavia, which had become Communist in the meantime. In light of the hostilities between Serbians and Albanians, the Yugoslav leadership declared Kosovo to be an autonomous territorial entity whose status was continually extended. In fact, Kosovo held similar status to the republics of Yugoslavia, but it never received their formal standing.⁴³

The Kosovo Albanians therefore continued to demand their independence more vehemently. This led to an increase in tensions between the Albanian majority and the Serbian minority, as well as early trouble at the beginning of the 1980s. The migration of tens of thousands of Serbians and Montenegrins over the following period unleashed Serbian fears, which the future Serbian President Slobodan Milosevic used to his advantage in 1986. This subsequently led to a restriction of Kosovo's autonomy and reprisals, breeding further tensions. In 1989 the autonomy of Kosovo was completely suspended. From 1996, the Albanian resistance grew more radical under the Kosovo Liberation Army (KLA/UÇK). The tensions between Serbian special forces and the Albanian UÇK adopted a form resembling war. Kosovo's civilian population was driven into exile, and acts of violence were carried out towards them by the Serbians. After fruitless international attempts to intervene, NATO conducted air strikes that were intended to put an end to the expulsions.

Since the end of the war in 1999, Kosovo has been placed under the UN Interim Administration Mission in Kosovo (UNMIK). Security has been upheld by international

⁴¹ The predominance of political motives could already be seen in previous secession conflicts, e.g. in the case of Eritrea. See Mett (op. cit. 2) 150 et seq.

⁴² Please see section III below.

⁴³ Mett (op. cit. 2) 312.

peace-keeping troops (KFOR) under NATO leadership. Tensions between the Albanian and Serbian populations still persist. The most serious disturbances occurred in the divided city of Mitrovica in 2004, and were mainly directed against Serbians. Right up to the spring of 2008, Serbia and Kosovo were unable to reach an agreement on the status of the breakaway province. Kosovo's own administration declared independence on 17 February 2008. For Serbia, this declaration remains without any legal effect, and Kosovo should still belong to Serbia.

2. Conduct of the Community of States

The community of states did not react to the Kosovo conflict until 1998, when warlike conditions broke out. The Kosovo Contact Group, consisting of France, Germany, Great Britain, Italy, the Russian Federation and the United States, imposed an arms embargo and froze Serbian bank accounts abroad.⁴⁴ Furthermore, the UN Security Council passed resolution 1160 (1998), in which Serbian attacks on Albanian civilians were condemned, as were terrorist acts committed by the Albanian UÇK. At the same time, the resolution stressed that any solution to the Kosovo question would be based on the territorial integrity of former Yugoslavia and would take into account the Albanians' position under international law. The preamble to the resolution emphasised the continuing sovereignty and territorial integrity of Yugoslavia in even clearer terms. The resolution was manifestly not a question of giving a legal or political foundation to the secession attempts of the Albanians, but to put a stop to the violent attacks and expulsions.⁴⁵ The NATO air strikes of 1999 were also indicative of this objective. They were solely aiming to end the violence. On an international level, the solution to this conflict seemed to be extensive autonomy for Kosovo as enshrined in resolution 1244 (1999) of the UN Security Council.⁴⁶ A right to self-determination, which could have led to the territorial separation of Kosovo, was also rejected here.⁴⁷

In 2006, intervention talks began under UN auspices. These did not produce any result as both Serbia and the Kosovo Albanians stuck to their respective positions. In February 2007, the UN special envoy Ahtisaari presented a proposal under which Kosovo was supposed to receive the status of a “supervised independence”. A UN Security Council resolution was drafted, but this was not supported by Russia, which cited the territorial integrity of Serbia, and was therefore rejected. Another attempt to intervene, undertaken by a troika consisting of the European Union, Russia and the USA in August 2007, also failed at the end of 2007. The Kosovar leadership then set its aims to announce breaking away from Serbia in 2008, a step which ultimately occurred in February 2008.

The community of states has not reacted unanimously to the unilateral separation of Kosovo from Serbia.⁴⁸ Several states recognised Kosovo's independence mainly due to the need to

⁴⁴ Mett (op. cit. 2) 335 et seq.

⁴⁵ Ibid.

⁴⁶ Resolution 1244 (1999) Annex 2.5.

⁴⁷ Also Mett (op. cit. 2) 338 et seq.; Seidel (op. cit. 6) 206.

⁴⁸ Cf. the following reports: *Reuters*, “US, EU powers recognise Kosovo: some opposed,” February 18, 2008, <http://www.reuters.com/article/europeCrisis/idUSL18315383> (accessed April 22, 2009); *Euractiv*, “Europe split on Kosovo independence,” February 18, 2008, <http://www.euractiv.com/en/enlargement/europe-split-kosovo-independence/article-170353> (accessed April 22, 2009); *Tagesschau*, “Tiefe Gräben im Sicherheitsrat,” [Deep

resolve the conflict (as detailed below in part II.3 and part IV). These states include Albania, Afghanistan, Australia, Belgium, Denmark, Germany, France, Great Britain, Ireland, Italy, Austria, Peru, Switzerland, Turkey and the USA. Up until now, 58 countries have formally recognised Kosovo's independence.

Other countries have refused to acknowledge Kosovo's secession on the grounds of upholding the territorial integrity of Serbia. These states include Argentina, Azerbaijan, Bolivia, Bosnia-Herzegovina, China, Georgia, Kazakhstan, Romania, Russia, Slovakia, Spain, Sri Lanka, Serbia, Venezuela and Vietnam.

Other states (e.g. Egypt, India, Iran and Iraq) have adopted a neutral position to date. Some – including Brazil, Chile, Greece, Mexico and South Africa – have at least voiced their scepticism concerning Kosovo's independence and suggest further negotiations.

3. Implications on the International Right to Secession

International law recognises various constellations in which the secession of a territorial part of a state may be acknowledged as legitimate. These include the territorial separation within the context of decolonisation, separation based on the decision taken by the entire population of the mother state, secession arising under national law, or independence for an area which was originally unlawfully annexed (see part I).

Kosovo's secessionist endeavours do not fall into these categories. The Kosovo Albanians can neither invoke a decision taken by the entire Serbian population nor an intra-state right to secession. Even if the constitution of former Yugoslavia provided for the possibility of secession, this applied to republics of the union and not to autonomous regions such as Kosovo. Nor can it be assumed that Serbia necessarily annexed Kosovo in unlawful circumstances. The region was split up in 1912 after Serbia and Montenegro defeated the Turks. At that time, the modern prohibitions on the use of force and annexations did not yet apply under the regime of classic international law. In the early 20th century, wars waged by sovereign countries were still regarded as legitimate (*ius ad bellum*)⁴⁹ and, in the case of annexation, were considered to be a legal means of obtaining territory.⁵⁰ In the subsequent course of history, Kosovo was assigned to the republic of Serbia inside Communist Yugoslavia. On this basis and according to the principle of *uti possidetis*,⁵¹ it remained a composite part of Serbia after the break-up of Yugoslavia.⁵²

rift in Security Council] February 19, 2008, <http://www.tagesschau.de/ausland/sicherheitsrat8.html> (accessed April 30, 2009).

⁴⁹ The prohibition under international law of aggressive war began with the ratification of the Kellogg-Briand Pact signed in 1928. It obtained validity under customary international law at the outbreak of the Second World War. See Hobe/Kimminich (op. cit. 8) 36 et seq., 49; Georg Dahm/ Jost Delbrück/ Ruediger Wolfrum, *Völkerrecht* [International Law], vol. I/3 (2002), 821; Knut Ipsen, *Völkerrecht* [International Law] (Munich: 2004), 35; Horst Fischer, in *Völkerrecht* [International Law], ed. Knut Ipsen (Munich: 2004), 1069; Theodor Schweisfurth, *Völkerrecht* [International Law] (Tuebingen 2006), 357.

⁵⁰ Cf. Hobe/Kimminich (op. cit. 8) 39, 85; Tom Hillier, *Sourcebook on Public International Law* (London 1998), 241; Otto Kimminich, „Menschenrechte: Von kollektiven und individuellen Rechten,“ <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>; John O'Brien, *International Law* (London 2001), 212; Schweisfurth (op. cit. 49) 291; Shaw (op. cit. 21) 423.

⁵¹ The principle of *uti possidetis* was originally established within the context of decolonisation, although it can be assumed that it became part of customary international law at the end of the 20th century. Cf. Hillier (op. cit.

The case of Kosovo is therefore a constellation in which an ethnic group unilaterally decided to break away from its legal mother state. The conduct of the community of states in the case of Kosovo in the spring of 2008 might at best have an impact on the assessment of such constellations under customary international law. This issue arises if the widely-held view that Kosovo Albanians have hitherto not been entitled to any right to separation is adopted. On the one hand, commentators rejecting rights to secession for ethnic groups under any circumstances⁵³ have been drawn to this conclusion. On the other hand, this is also the view espoused by some commentators who accept the right to secession in exceptional circumstances as a last resort in the face of severe human rights infringements.⁵⁴ In their opinion, the safeguarding of human rights has already been restored by UNMIK, meaning that no desperate situation existed which may have necessitated secession as a final means of recourse to protect human rights.

However, even for commentators who have already accepted a right to secession for Kosovo Albanians prior to 2008,⁵⁵ the conduct of the community of nations is of interest, as it possibly confirms the legal view they have held.

There are possible normative implications in two respects: first, implications on the interpretation of international treaties, and second, implications on customary international law.

a. Implications on the Law of International Treaties

According to Article 31.3.b of the Vienna Convention on the Law of Treaties (VCLT), the conduct of states in the application of an international treaty should be considered when it is interpreted. State practices may therefore also affect the interpretation of international treaties. One might question whether the conduct of the community of states in the spring of 2008 had an impact on the interpretation of the right to self-determination, as resulting from Article 1.2 and Article 55 of the UN Charter and Article 1 of the Covenants of Human Rights. It is theoretically conceivable that in the case of Kosovo, state practice cemented the right to self-determination as provided for in these articles to become a right to secession for ethnic peoples, groups or minorities under certain conditions. Hitherto this had not been the case.⁵⁶

Article 31.3.b of the VCLT, which by analogy is also applicable to the UN Charter,⁵⁷ requires for such an interpretation that the signatory states establish a common agreement on the meaning of a treaty when applying it.⁵⁸ For this to be the case, the signatory states of the UN

50) 218; Schweisfurth (op. cit. 49) 283; Christiane Simmler, *Das uti-possidetis-Prinzip* [The Uti-Possidetis Principle] (Berlin 1999), 293; ICJ, ICJ Reports 1986, 554 et seq., notes 20 et seq. Regarding the application of the principle in the practice of international law see also Hobe/Kimminich (op. cit. 8) 78 et seq.

⁵² See also Mett (op. cit. 2) 370.

⁵³ On this view and the opposing viewpoint cf. section I above.

⁵⁴ Cf. Zimmermann/Stahn (op. cit. 8) 423, 456; Zygojannis (op. cit. 19) 260; Kerstin Wirth, "Kosovo am Vorabend der Statusentscheidung," *Heidelberg Journal of International Law*, vol. 67 (2007):1065-74 et seq.

⁵⁵ Cf. Seidel (op. cit. 6) 206 et seq.; Katharina Wodarz, *Gewaltverbot, Menschenrechtsschutz und Selbstbestimmungsrecht im Kosovo-Konflikt* [Prohibition of the Use of Force, Human Rights Protection and Right to Self-Determination] (Frankfurt: 2002), 192 et seq.

⁵⁶ On this point cf. section I.1 above.

⁵⁷ Georg Ress, in *The Charter of the United Nations*, ed. Bruno Simma (Oxford: 2002), Interpretation, note 8.

⁵⁸ *Heitschel von Heinegg*, in Ipsen (op. cit. 21) 146 et seq.

Charter and the Covenants of Human Rights would have to have assumed that the separation of Kosovo from Serbia is based on Article 1.2 and Article 55 of the UN Charter and on Article 1 of the Covenants of Human Rights.

However, this is not the case. The signatory states of the UN Charter and the Covenants of Human Rights are as divided as the entire community of states in respect to the legality of Kosovo's separation. Signatory states (e.g. Russia, Serbia, Spain) which did not recognise Kosovo made it clear that Serbia's territorial integrity should be protected. This made indirect reference to the validity of Article 2.1 of the UN Charter (sovereign equality of states) which enshrines respecting a state's territorial integrity as a basic principle of the UN.⁵⁹ Any interpretation of the UN Charter and the Covenants of Human Rights in favour of a right to secession which is able to contravene the principle of territorial integrity was thereby renounced.

Signatory states that acknowledged Kosovo (e.g. France, Germany, USA) have not stated clear legal reasons for Kosovo's separation or their positive reaction to it.⁶⁰ In the first instance they pointed out that only recognition by several states can lead to enduring stability in the region, and also that any solution by means of negotiation seems hopeless.⁶¹ They scarcely referred to the UN Charter or the Covenants of Human Rights. One reference to the UN Charter is made in the Declaration of the Council of the European Union of 18 February 2008:

*“The Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a sui generis case which does not call into question these principles and resolutions.”*⁶²

However, it was not clear whether the Council of the European Union, and with it the Foreign Ministers of the EU Member States, regard the UN Charter as a legal basis for the secession of Kosovo. Moreover, they specifically referred to the extensive and paramount validity of the principle of territorial integrity. In this context, it remains unclear why the separation was regarded as a special case that numerous EU Member States obviously regarded as conforming to international law.⁶³ The mere reference to the events of the 1990s and the period of international administration does not provide any clarity from a legal perspective. In any case, the declaration cannot be used as explicit proof of the legitimacy of Kosovo's separation on the basis of the UN Charter.

⁵⁹ See Elsner (op. cit. 17); Kohen, (op. cit. 3) 6.

⁶⁰ Cf. the official letter of the US President to the President of Kosovo regarding the recognition of Kosovo by the USA, Washington, February 18, 2008; German Federal Press Office, press release no. 51, “Zustimmung des Kabinetts zur völkerrechtlichen Anerkennung des Kosovo” [Consent of the Cabinet to International Recognition of Kosovo], February 20, 2008. Cf. also section III below.

⁶¹ See German Federal Press Office, press release no. 51, “Zustimmung des Kabinetts zur völkerrechtlichen Anerkennung des Kosovo” [Consent of the Cabinet to International Recognition of Kosovo], February 20, 2008. See also section III below.

⁶² Council Conclusions on Kosovo, 2851st External Relations Council meeting, Brussels, February 18, 2008.

⁶³ See also in section III below.

As a result, there is no identifiable overriding conviction on the part of the signatory states that the UN Charter or the Covenants of Human Rights can be interpreted in favour of a right to secession for ethnic peoples, groups or minorities. On the contrary, states that rejected Kosovo's independence referred to the full validity of the principle of territorial integrity. Yet even states that supported Kosovo's independence did not refer to these treaties, thus raising the issue of the legal basis on which the secession was recognised. Accordingly, the conduct of the community of states in the Kosovo question in the spring of 2008 cannot have had any identifiable implications on the interpretation of applicable international treaties.

b. Implications on Customary International Law

The next point examines the possible implications of the conduct of the community of states in the Kosovo case on customary international law. The conduct of states represents the source and the engine of customary international law. To establish a customary norm, a state practice is required in addition to the conviction that the practice corresponds to a legal obligation (*opinio juris*).⁶⁴ Advocates of natural law and consensus-oriented jurisprudence only regard the *opinio juris* as essential. The existence of a customary norm in the form of a “fundamental principle of international law” can already stem from basic international documents.⁶⁵

Since no new basic documents have been enacted in respect to Kosovo, there is no departure from the above conclusion that international documents do not prove the existence of a right to secession for ethnic peoples, groups and minorities in the form of a fundamental principle of international law.⁶⁶ Therefore, it is necessary to consider whether there is any identifiable practice and/or *opinio juris* which documents the creation of a right to secession for ethnic groups in exceptional circumstances.

At least until the end of 2007, this was not the case.⁶⁷ However, this perspective probably changed during the spring of 2008. First of all, this perspective requires sufficient state practice. The conditions for this are highly contentious: at the very least, this must involve a de jure or de facto manner of conduct of states, which is of a certain duration, uniformity and coverage.⁶⁸

Objections cannot be raised to the creation of a customary norm if the manner of conduct is only observed over a short period of time.⁶⁹ As such, the conduct of states in the spring of 2008 would have been more than sufficient to establish a customary norm.

A manner of conduct is seen as being uniform if a representative number of subjects governed by international law tend to conduct themselves in a similar fashion, and if no noteworthy differences can be ascertained.⁷⁰ A manner of conduct is seen as attaining sufficient coverage

⁶⁴ Cf. section I. 2. above.

⁶⁵ Cf. section I. 2. above.

⁶⁶ Cf. section I. 2. above.

⁶⁷ Cf. section I. 2. above.

⁶⁸ See Heintschel von Heinegg, in Ipsen (op. cit. 21) 215 et seq; Shaw (op. cit. 21) 72.

⁶⁹ Heintschel von Heinegg, in Ipsen (op. cit. 21) 215.

⁷⁰ Heintschel von Heinegg, in Ipsen (op. cit. 21) 216.

if it is at least supported by those states whose interests are affected.⁷¹ It is insufficient for only the directly opposing parties to act. Nor does it, on the other hand, depend on all subjects governed by international law.

The key criterion is whether there is a uniform and prevalent manner of conduct to support the existence of a right to secession under certain conditions. As mentioned in part II, the community of states is extremely divided.⁷² In addition to the 58 countries recognising Kosovo, there were also several that rejected its independence. Others adopted a neutral stance, suggested further negotiations or are still awaiting further developments. This means that the majority of countries have not yet recognised Kosovo. Nor has the state practice of the 58 recognising countries been accepted without any opposition. Moreover, their practice has been clearly rejected or sceptically opposed. Therefore, there can be no talk of a uniform manner of conduct on the part of the states.

Furthermore, it should be noted that the countries refusing or opposing the recognition of Kosovo with scepticism were those that are potentially or actually affected by internal separation movements. The creation of a customary norm is conditional on their positive stance towards the secession. Precisely the interest of these nations would have been decisively affected by the creation of a right to secession under customary law. In addition to Serbia, these countries include Azerbaijan, China, Georgia, Moldova, Romania, Russia, Slovakia, Spain, Sri Lanka and Ukraine. As a result, the conduct of states is lacking not just in uniformity, but also in coverage. Consequently, there is insufficient state practice for ethnic groups to be able to legally justify their secession ambitions.

There is also a deficiency concerning the necessary *opinio juris*. This is based on a uniform and prevalent action on behalf of the states and only focuses on their motivation. In the face of disagreement between states in the case of Kosovo, it can not be assumed that the community of states was or is entirely convinced that ethnic groups should be entitled to rights to secession under certain circumstances. It could be implied that such a view is held by the countries that recognised Kosovo, but even this stance is partially unclear (see part IV). However, their sole perspective is not enough to justify the creation of a customary norm. This fact remains equally unchanged when considering that the understanding of the legal position is also partially unclear in the countries refusing to recognise Kosovo. At the very least, this applies to Russia which directly and indirectly supports secession attempts elsewhere, such as the cases of Abkhazia, South Ossetia and Transdniestria.

All things considered, it can not ultimately be assumed that there has been a prevalent conviction on the part of the community of states under which ethnic peoples and groups are entitled to rights to secession under certain circumstances. Accordingly, the conduct of states in the spring of 2008 did not have any documentable implications on customary international law. There was a lack of sufficient state practice as well as the necessary legal conviction. Hence, even the recognition of Kosovo was unjustified and unlawfully in terms of international law due to an insufficient legal basis.

⁷¹ Cf. ICJ in the North Sea Continental Shelf case, ICJ Reports 1969, 42 et seq.; Heintschel von Heinegg, in Ipsen (op. cit. 21) 216; Hobe/Kimminich (op. cit. 8) 184; Shaw (op. cit. 21) 84.

⁷² Cf. section II. 2 above.

III. Conduct of the Community of States in the Cases of Abkhazia and South Ossetia in Summer of 2008, and Implications on the International Right to Secession

Despite all historical, political and social differences, the cases of Abkhazia and South Ossetia reveal strong parallels to the case of Kosovo in view of the right to secession. Like Kosovo, Abkhazia and South Ossetia were subordinate, autonomous areas within a former Socialist multi-ethnic state. When signs of reform and decay began to emerge throughout the entire Eastern Bloc at the end of the 1980s, strong independence movements were also erupting in Abkhazia and South Ossetia. When this occurred, neither region had any more right than Kosovo to claim secession under national or international law. Against this background, the community of states continually refused to recognise the independence of these two breakaway regions from Georgia. These regions were not granted rights to secession, nor were the de facto regimes that were formed in the meantime accepted as states.

In the course of the Russia-Georgia conflict in August 2008, Russia recognised the independence of Abkhazia and South Ossetia. Russian President Medvedev referred to the free will of the Abkhazian and South Ossetian people. He claimed Georgia had failed to bring about a peaceful solution for many years.⁷³ According to Russia, independence was the only way to protect Abkhazia and South Ossetia. The UN Charter, the Friendly Relations Declaration and the CSCE Final Act of 1975 were drawn upon to support this position.⁷⁴

In light of these assertions and the aforementioned documents, the Russian line of argument was not based on the de facto status existing in Abkhazia and South Ossetia in the meantime. It referred to the highly controversial external right to self-determination of peoples, the existence of which Russia had denied in other cases, such as Kosovo. Nicaragua was the only country to follow the Russian example and recognise Abkhazia and South Ossetia. In fact, many countries rallied against the course taken by Moscow. Even countries which had supported Kosovo's independence, such as France, Germany and the USA, vehemently rejected the independence of both regions. They referred to the need to protect the territorial integrity of Georgia.⁷⁵ The conduct of Russia was strongly condemned.

In line with part II's conclusion, the recognition of Kosovo did not change anything regarding the position of the community of states that were hostile to secession. The vehement rejection of the Russian line of argument in the cases of Abkhazia and South Ossetia particularly

⁷³ *BBC*, "West Condemns Russia over Georgia," August 26, 2008, <http://news.bbc.co.uk/2/hi/europe/7583164.stm> (accessed April 22, 2009); Civil Georgia, "Russia Formally Recognises Abkhazia, S. Ossetia," Civil Georgia, August 26, 2008, <http://www.civil.ge/eng/article.php?id=19293> (accessed April 22, 2009).

⁷⁴ Civil Georgia, "Russia Formally Recognises Abkhazia, S. Ossetia," Civil Georgia, August 26, 2008, <http://www.civil.ge/eng/article.php?id=19293> (accessed April 22, 2009).

⁷⁵ Cf. *BBC*, "West Condemns Russia over Georgia," August 26, 2008, <http://news.bbc.co.uk/2/hi/europe/7583164.stm> (accessed April 22, 2009); and Civil Georgia, "Rice Says Russia's Move 'Regrettable,'" Civil Georgia, August 26, 2008, <http://www.civil.ge/eng/article.php?id=19298> (accessed April 22, 2009); Civil Georgia, "Merkel: Russia's Move Unacceptable," Civil Georgia, August 26, 2008, <http://www.civil.ge/eng/article.php?id=19297> (accessed April 22, 2009); Civil Georgia, "OSCE Chair Condemns Russia's Recognition of Abkhazia, S. Ossetia," Civil Georgia, August 26, 2008, <http://www.civil.ge/eng/article.php?id=19296> (accessed April 22, 2009).

highlighted how no legal foundation had been laid for secessionist claims advanced by individual groups within the population. Russia failed to convince with its arguments aimed at affirming the Abkhazians' and South Ossetians' external right to self-determination. What is more, Russia was condemned for recognising the breakaway Caucasus regions.

This underlines to what extent there still remains a lack of uniformity and widespread coverage of practice and a corresponding *opinio juris* on the part of states. Accordingly, there are still no grounds for approving the existence of a right to secession for certain groups within the population.

IV. Scenarios and Conceivable Future Implications of the Case of Kosovo on the International Right to Secession

Developments in the current secessionist conflicts are still ongoing. This does not just apply to Abkhazia and South Ossetia but also to Kosovo. Particularly in the case of Kosovo, it is conceivable that other countries will sooner or later follow the course of the USA and numerous European states, and recognise Kosovo. The crucial question will then be whether a right to secession under certain circumstances is established on this basis.

The recognition of Kosovo by other nations should have no bearing on the interpretation of international treaties. Even states that have already recognised Kosovo did not explain their conduct on the basis of the UN Charter or the Covenants of Human Rights.⁷⁶ It is therefore unlikely that other states will refer to the treaties to support their stance. It seems as if the lack of a firm treaty basis is also currently preventing them from accepting Kosovo's independence.

Apart from this, it is disputable whether a right to secession under customary law will be created within the process of Kosovo's recognition by a broader range of countries. After all, the states' divided opinion on the Kosovo question is currently preventing a corresponding right from developing. However, at present there are grounds for doubt as to whether this schism between states will be overcome in the near future, and whether a uniform, pervasive practice will be observed. For sufficient uniformity to be seen to exist, it would be necessary for Kosovo's independence to be recognised by the very states which are actually or potentially affected by separation movements, as their interests would be particularly compromised by a possible normative validation of the right to secession.⁷⁷ However, these states – among them China, Serbia, Russia, Spain and Ukraine – vehemently denied Kosovo's independence or were particularly critical of its unilateral defection from Serbia. At present, there is no prospect of these stances changing.

Yet even if a scenario, in which states like China, Serbia, Russia, Spain and Ukraine recognized Kosovo, were to be accepted, it remains questionable whether the *opinio juris* needed to justify a norm by international customary law would apply. This would constitute the remaining essential condition for a right to secession to be approved under customary law.⁷⁸ For a corresponding *opinio juris* we would have to assume that in recognising Kosovo,

⁷⁶ Cf. section II. 3. a) above.

⁷⁷ Cf. section II. 3. b) above.

⁷⁸ Cf. section I. 2 above.

the states would be convinced that they were observing a legal obligation or considering this recognition to be appropriate, as it would be legitimate due to specific reasons grounded in the law of secession. Whether this has been the case until now requires closer examination.

As a matter of principle, it may be contended that firm legal convictions underlie the recognition of a region as a state.⁷⁹ Normally, one of the prime objectives behind recognition is the elimination of doubts concerning the legal position of such a region.⁸⁰ Therefore, it could be assumed that recognition contains a juristic element. This applies to so-called *de facto* recognition, but also to *de jure* recognition. Unlike the latter, the former should only have temporary implications.⁸¹

Furthermore, it may be assumed that states generally wish to conduct themselves in accordance with international law and would only confirm the independence of a territory on the assumption that statehood has fully been established or the conviction that secession from the mother state is legitimate. According to general opinion, a region seeking secession may be accepted in principle if it meets all qualitative conditions of statehood, especially if a new effective government emerges.⁸² Prior recognition would constitute interference in the internal affairs of the mother state in question and would therefore be contrary to international law.⁸³ In the case of Kosovo, the existence of its own effective government could not be ascertained. The latter was still supposed to be under construction. Kosovo was still, and effectively continues to be, administered by the international interim administration (UNMIK). In addition, Serbia did not lose its sovereignty because of the international interim administration.⁸⁴ As such, it was essential for at least a right to secession to exist on the basis of which Kosovo could break free from Serbia prior to the construction of its own effective statehood. Accordingly, the conduct of the states recognising Kosovo arguably leads to the deduction that they assumed the existence of such a right to secession. At the very least, it could be presumed that these states were hoping for their conduct to be copied by other states, thereby enabling the creation of a novel right to secession.⁸⁵

Viewed from this perspective, the conduct of states recognising Kosovo genuinely seems to reflect legal convictions. However, the deduction at hand is drawn from a general approach, and this does not automatically allow for any assumptions concerning the creation of a certain right to secession. Processes of secession are extremely complex and multi-faceted. Circumstances normally allow for various interpretations in respect to the legal and political motives of the states. Yet clarity must ultimately prevail in this respect: only concrete, identifiable legal motives enable one to reconstruct the clear structure of a right to secession under customary law and its conditions. Customary law is founded upon specific manners of conduct and reasons for behaving in this way. General arguments may be able to indicate a

⁷⁹ Cf. Shaw (op. cit. 21) 84.

⁸⁰ Cf. Hobe/Kimminich (op. cit. 8) 70; Volker Epping/ Christian Gloria, in *Völkerrecht* [International Law], ed. Knut Ipsen (Munich: 2004), 258, Herdegen (op. cit. 7) 68.

⁸¹ Hobe/Kimminich (op. cit. 8) 72.

⁸² Cf. Epping/Gloria, in Ipsen (op. cit. 80) 266, 271 et seq.; Hobe/Kimminich (op. cit. 8) 71; Anne F. Bayefsky, *Self-Determination in International Law* (2003), 73.

⁸³ Cf. also Mett (op. cit. 2) 160; Epping/Gloria, in Ipsen (op. cit. 80) 271 et seq.; Hobe/Kimminich (op. cit. 8) 71.

⁸⁴ Convincing in this respect Wirth (op. cit. 55), 1065, 1077 et seq.

⁸⁵ Cf. also Shaw (op. cit. 21) 82 et seq.

trend, but they can not be a substitute for a legal and sociological analysis of individual cases, and do not refute the conclusions arising from them.

The motives expressed in the Kosovo case must be more precisely considered. It is significant that the states that have already recognised Kosovo have been reluctant to reveal their reasons for doing so. For instance, in its Declaration on the Independence of Kosovo, the Council of the European Union alluded to the need for the establishment of stable relationships in the western region of the Balkans. Furthermore, it referred to the conflict in the 1990s and the long period of interim administration.⁸⁶ The German government made the following declaration: “After long years of trying, no other intervention attempts had enjoyed any success. Therefore, speedy recognition of the Republic of Kosovo by the greatest possible number of states is the only way to bring enduring stability to the region”.⁸⁷ Referring to two decades of violence and conflict, British Secretary of State for Foreign and Commonwealth Affairs David Miliband said: “There is a very strong head of steam building among a wide range of EU countries that do see this as the piece of the Yugoslav jigsaw and don't see stability in the western Balkans being established without the aspirations of the Kosovar people being respected”.⁸⁸ Swiss President Couchepin regarded Kosovo's independence as a solution preferable to all others.⁸⁹ The Austrian Foreign Ministry expressed itself in similar terms and characterised the status quo of Kosovo as the unsustainable and constant source of instability.⁹⁰

The reasons expressed for the recognition of Kosovo can be summarised as follows:

- the need for regional stability and a solution to the conflict,
- the view that a peaceful solution to the conflict and international intervention have failed,
- the view that Kosovo's independence represents the best solution,
- human rights abuses and expulsions on a massive scale (events in the 1990s),
- continued exclusion of the rightful sovereign by the international interim administration, and
- Kosovo as a piece in the multi-ethnic jigsaw of former Yugoslavia.

The motivation behind the recognition of Kosovo was clearly much more complex than openly expressed.⁹¹ However, there is no need for this discussion to focus on possibly concealed foreign policy motives. Instead, it is essential to gauge whether any legal convictions emerge from these identifiable motives. Otherwise the discussion would encroach upon the realm of political hypotheses which would be far too speculative for legal evaluation.

Matters are complicated by the fact that no exact deduction can be made as to whether any legal importance was attached to one or several of the motives cited. It was not clear whether

⁸⁶ Council Conclusions on Kosovo, 2851st External Relations Council meeting, Brussels, February 18, 2008.

⁸⁷ Press Release by German Federal Government on February 20, 2008, “Deutschland erkennt Kosovo an” [Germany recognizes Kosovo], http://www.bundesregierung.de/nr_1264/Content/DE/Artikel/2008/02/2008-02-20-deutschland-erkennt-kosovo-an.html (accessed April 22, 2009).

⁸⁸ Cf. *USA Today*, “Global rift over Kosovo widens,” February 18, 2008.

⁸⁹ Declaration “Anerkennung von Kosovo und Aufnahme von diplomatischen Beziehungen” [Recognition of Kosovo and establishing diplomatic relations], Berne, February 27, 2008.

⁹⁰ Declaration “Schreiben über Anerkennung des Kosovo unterzeichnet” [Letter of recognition of Kosovo signed], Vienna, February 28, 2008.

⁹¹ For general information on the motives for recognition see Epping/Gloria, in Ipsen (op. cit. 80) 267.

the pertinent legal reason was seen as the Kosovo Albanians' external right to self-determination, the permanent de facto exclusion of Serbian sovereignty by the interim administration, the failure of the status negotiations or a combination of these aspects. In this regard, the states recognising Kosovo deliberately failed to lay their cards on the table. There was no explanation as to whether the reasoning was based purely on external security, economic and social grounds, or if it were also a product of legal convictions.

In particular, the declaration of the Council of the European Union is revelatory, as it hinted that the council envisaged the possibility of Kosovo being recognised in conformity with international law. However, within this context it was not attributed to legal considerations, but to aspects which clearly reflect external security motives. It was a matter of re-establishing stability in the Balkan region.⁹² This failure to adduce clear and more precise legal reasons was symptomatic of the states recognising Kosovo. Any reasoning allowing for generally applicable legal conclusions was avoided outright. In particular, there was no talk of any external right to self-determination for the Kosovo Albanians. Even the reference to human rights violations in the 1990s sheds no light on the question, as these did not give the community of states any cause to grant the Kosovo Albanians their own state in the preceding years.

Closer examination confirms a trend which could also be observed in other secession conflicts.⁹³ The conduct of the states was dominated by political motives, and legal aspects were only given secondary importance. The states in favour of Kosovo's secession were primarily concerned with improving the precarious security and economic situation in Kosovo. They saw the acceptance of an independent Kosovo as the key for enduring peace and stability in the region. The objective lay in dissolving the stalemate situation in which Serbians, Kosovo Albanians and the members of the UN Security Council had become entangled. The decisions to accept Kosovo's independence reflected what was regarded as correct conflict resolution strategies, as well as other considerations which served foreign policy aims. It can not be concluded that the states recognising Kosovo also espoused certain legal convictions.

These findings are confirmed by the fact that the pro-Kosovo states explicitly tried to rule out the lasting binding effect of their supporting stance on customary law. They expressly denied the nature of the Kosovo example as a precedent and characterised it as a case *sui generis*.⁹⁴ Certainly, this casts doubt upon whether such a rejection of the precedent nature can be of any relevance. It must be borne in mind, at least according to the general argumentation presented above, that the states probably considered the recognition of Kosovo – for whatever reasons –

⁹² Council Conclusions on Kosovo, 2851st External Relations Council meeting, Brussels, February 18, 2008.

⁹³ Cf. also Seidel (op. cit. 6) 215.

⁹⁴ In so doing, the US government asserted that the independence of Kosovo “cannot be seen as a precedent for any other situation in the world”, cf. *Times*-online report “US and Britain join rush to recognise Kosovo,” February 19, 2008, <http://www.timesonline.co.uk/tol/news/world/europe/article3392492.ece> (accessed April 30, 2009). The Council of the European Union stated: “...in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case...”, cf. Council Conclusions on Kosovo, 2851st External Relations Council meeting, Brussels, February 18, 2008. cf. also the declaration by the German Federal Press Office, press release no. 51, “Zustimmung des Kabinetts zur völkerrechtlichen Anerkennung des Kosovo” [Consent of the Cabinet to International Recognition of Kosovo], February 20, 2008, as well as the declaration by the Swiss Federal President “Anerkennung von Kosovo und Aufnahme von diplomatischen Beziehungen” [Recognition of Kosovo and establishing diplomatic relations], Berne, February 27, 2008.

to be in accordance with international law, and that a normative right to secession existed or was being established. Such a normative right to secession could then have applied in comparable cases and would have rendered the dismissal of the precedence effect obsolete. Therefore, the assertions of the assenting states were not just unclear, but also ambivalent. On the one hand, it appeared that these states were operating on an international legal basis which they failed to define in any more detailed terms. On the other hand, they rejected its normative character again by defining the Kosovo solution as a non-transferable case *sui generis*.

On the whole, the motives appear unclear and ambivalent from a legal point of view. As shown above, when construing a right to secession and its preconditions, there is a need to support it with concrete and univocal legal convictions. Such a normative right to secession can not be inferred from the conduct of the states. The general approach outlined above (see part IV) is of no further assistance, as any possible conclusions based on it are too speculative. As a result, it can not be expected that the conduct of states in the case of Kosovo will have any clear influence on the international right to secession in the future. On the contrary: even the conduct of states supporting Kosovo's independence confirms their opposition to secession in general. These states were reluctant to recognise general rights to secession for ethnic groups and, in particular, the right to external self-determination. This is substantiated by their vehement rejection of the Russian line of argument in the cases of Abkhazia and South Ossetia – a line which takes the right to external self-determination for granted (see part III).

Finally, the deduction made from the case of Kosovo seemingly accommodates the line of the assenting states in de facto establishing Kosovo as an independent state without creating a legal precedent. However, it should be noted that this is fundamentally based on the demotion, neglect and non-communication of legal considerations, as can be observed in other cases of secession. In this manner, these states are running the risk that secessionist movements elsewhere make their own legal or political deductions from their conduct in the case of Kosovo and, consequently, feel encouraged to pursue secession with the exertion of force.

V. Conclusion

In strictly dogmatic terms, the question raised about the repercussions which the conduct of the community of states in the cases of Kosovo, Abkhazia and South Ossetia could have on the international right to secession must be answered in the negative. No tangible arguments are forwarded in favour of a change in international law. According to the view represented here, which continues to prevail internationally, ethnic peoples, groups and minorities are still not entitled to secede from their mother state if they pursue separation unilaterally or without any justification rooted in national law. At best, these groups may have recourse to human rights, minority rights and internal rights to self-determination. Not even the states that recognised Kosovo's independence deviated from this fundamental stance. Therefore international law is characterised as being hostile to secession which seemingly also applies for the future. That implies that there is no legal basis for a justified recognition of Kosovo, Abkhazia and South Ossetia, meaning the recognising states violated international law.

Despite this dogmatic perspective, the conduct of the community of states bears other legal implications, namely in sociological terms. Due to the violation of legal principles and the focus on political aims in the case of Kosovo and other secessionist conflicts,⁹⁵ international law is practically losing its validity. The contours of the international law which applies in secessionist situations seem to become increasingly blurred due to the priority status accorded to political considerations. Therefore, the international law on secession is represented as being of indefinite shape, even for international bodies dealing with secessionist conflicts. This unclear situation, which the community of states is not resolving with any clarity, is compounded by the debate between experts in international law concerning exceptional rights to secession. As a result, international law does not seem to set a reliable benchmark for affected mother states or for groups of populations seeking self-determination.

The consequences are clear for all to see: secessionist attempts are being stepped up all over the world, breakaway regions are less willing to compromise, status negotiations are proving more difficult, affected mother states are becoming more unsettled, and – at worst – they feel impelled to undertake violent countermeasures. Furthermore, third countries are given more scope for pursuing their own strategic interests, which was particularly demonstrated by the Russia-Georgia conflict in August 2008.

The conduct of Western nations appears inconsistent in this context, as they vehemently insist on maintaining the rule of law and upholding law as a top priority elsewhere. The European Union Rule of Law Mission in Kosovo (EULEX), whose set-up makes sense in principle and serves the aims of establishing the rule of law in Kosovo, is equally exposed against this backdrop. Particularly in light of the legal ambiguities and deficiencies described above, the mission is obviously based on questionable foundations with regard to international law.⁹⁶ Even if the negligence observed at the expense of international law may appear justified in individual cases from a political point of view, from a global and long-term perspective the dangers and disadvantages still outweigh the gains by far, in terms of worldwide security and, also, economic and socio-political aims. Western nations are making a convincing case for upholding the rule of law within emerging states. However, it would be desirable if this attitude were to prevail just as strongly within the framework of external relations.

⁹⁵ For example, in Azerbaijan, Georgia and Moldova.

⁹⁶ The EULEX Mission is primarily based on Security Council resolution 1244, because until now the EU Member States have not agreed as to whether Kosovo came about as a state of its own, and as such, whether Kosovo can consent to this mission as a sovereign state. Whether resolution 1244 forms a sustainable legal basis is also disputed. Doubts are arguably appropriate, as the resolution presupposes an international mission, not one at EU level.