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APPROACH TO SELF-DETERMINATION:
THE CASE OF KOSOVO**

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AN ALTERNATIVE HUMAN-CENTERED APPROACH TO SELF-DETERMINATION: THE CASE OF KOSOVO

QERIM QERIMI

I. INTRODUCTION

This article introduces a conceptual framework of the right to self-determination, as an alternative to more traditional approaches. It draws inspiration from the lack of a set of unified principles and their consistent and principled application in external arenas. Latest failure of United Nations Security Council to adopt a plan of the UN Secretary-General's Special Envoy on Kosovo's status is nothing but a failure of world community's institutions and principal actors to adequately and effectively articulate and apply their written and customary principles and rules to real world problems. Thus, given its value consequences, the proposed framework will be applied to the case of Kosovo.

However, the article goes beyond analyzing the issue of Kosovo's status in itself, in an isolated manner, as it also deals with the notion of self-determination itself. Yet, the ultimate question would be whether Kosovo's claim to self-determination, more specifically, a right to independence and sovereignty can be grounded on contemporary international law as evolved over time, which this article answers positively, using the set of criteria developed by it.

II. DEFINITIONS AND TERMINOLOGY

A. (Re)conceptualizing Self-Determination

The right to self-determination, as conceived here, refers to a process of decision that requires the continuously expressed will of an entity's members through various forms, means or ways, including *inter alia*: consultation, participation and inclusion in decision-making processes characterized by free, open, pluralistic, and regular political processes, fair representation and equal distribution of power. Alternatively, it requires some form of representation of interest that encompasses access to the most important human values, as delimited, defined and described below in this article.

At first, collective self-determination aims to accommodate diverse groups within the borders of an existing body politic, so that it allows individuals who may act either alone or in association with different groups to freely and widely shape and share the values system. However, if a self-perceived or externally viewed distinct group of people is denied access to these processes and values, and once all means to repair and restore a public order that guarantees those processes and values are exhausted, the group should then pursue the course of accommodating itself within a new body politic, where all democratic processes and values will be guaranteed for all.

Given an intrinsic relationship that exists between a state's democratic system of governance and internal right of self-determination, at the global level it is the external form of self-determination which is commonly referred to, or meant by the reference to self-determination. Internationally, thus, the discussion of self-determination most often occurs in cases involving scenarios such as the denial of internal self-determination, annexation, lack of

democratic processes, or human rights abuses. It is in this context that self-determination in the case of Kosovo will be examined.¹

B. An Alternative Approach

The approach outlined in this article is a human-centered and relies empirically on human needs and wants. Although territory is and will likely remain the central component of State sovereignty, the sovereign component can no more be detached from the needs and wants of its people—which remain the sovereign’s foundational and existential resource—and especially not if sovereign power is used as a means to abuse the rights and dignity of “others” within its jurisdiction.²

In any event, neither territorial nor ethnic approaches to self-determination have been applied consistently.³ Nor anyone of them seem to provide a universal-featuring approach which would best take into account various human considerations, while being able to adequately and effectively “survive” current and future trends in decision-making processes, aiming to promote the largest net aggregate of the common global interest. Against this background, as an alternative to theories offered hitherto,⁴ a realistic human-centered

¹ For purposes of clarity, the term self-determination, unless indicated otherwise, will be referring to the right of self-determination in its external sense. The right to external self-determination, as used here, is meant to be an entitlement of a people to decide its international status, usually to form a sovereign and independent entity, and as such “to be free from foreign interference which affects the international status of that state.” Antonio Cassese, *The Self-Determination of Peoples*, in *THE INTERNATIONAL BILL OF RIGHTS* (Louis Henkin ed.) 100 (1981). Unlike external self-determination, internal self-determination entitles the right to internally participate in the decision-making process within a sovereign and independent state, “which affects the political, economic, social, and cultural conditions under which it lives.” Eric Koldner, *The Future of the Right to Self-Determination*, 10 *CONN. J. INT’L L.* 153, 159 (1994). For a thorough discussion on differences and meaning of “internal” and “external” self-determination, see Allan Rosas, *Internal Self-Determination*, in *MODERN LAW OF SELF-DETERMINATION* (Christian Tomuschat ed.) 225-52 (1993).

² See, e.g., Margalit and Raz, arguing that “the shape and boundaries of political units are to be determined by their service to individual well-being.” Avishai Margalit and Joseph Raz, *National Self-Determination*, 87 *J. PHIL.* 439, 457 (1990); Professor Chen states that “the principle of territorial integrity must not serve as a shield for tyrants, dictators, or totalitarian rulers; it must not become a cloak behind which human deprivations are justified, condoned, and perpetuated.” Lung-chu Chen, *Self-Determination as a Human Right*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* (W.M. Reisman and B.H. Weston eds.) 243 (1976). See also Christian Tomuschat, *Self-Determination in a Post-Colonial World*, in *MODERN LAW OF SELF-DETERMINATION* (Ch. Tomuschat ed.) 9 (1993), stating “if a State machinery turns itself into an apparatus of terror which persecutes specific groups of the population, those groups cannot be held obligated to remain loyally under the jurisdiction of that State,” and Matthew Wood Herbert, *Who Deserves Kosovo? An Argument from Social Contract Theory*, 4 *SOUTHEAST EUR. POLITICS* 30 (2005), noting that “a state’s rights are contingent on the state’s fulfilling its constitutive obligations. Simply put, there are no state’s rights if the sovereign power has withdrawn its commitment to the very obligations that underwrite the state’s existence.” As Professor Henkin puts it, “above all, it should be recognized, ‘sovereignty’ is not a right to insist on anarchy; surely, it includes the right to consent to be governed, to seek good international governance.” Louis Henkin, *Human Rights and State ‘Sovereignty’*, 25 *GA. J. INT’L & COMP. L.* 43 (1995/1996).

³ See, among others, Hurst Hannum, *Rethinking Self-Determination*, 34 *VA. J. INT’L L.* 37-38 (1993); Pomerance, ‘The Badinter Commission: The Use and Misuse of the International Court of Justice’s Jurisprudence’, 20 *Michigan J Int’l L* (1998) 57; S. Lalonde, *Determining Boundaries in a Conflicted World* (2002) 237.

⁴ For a number of other theoretical approaches advanced by legal scholars, see Karl Doehring, *Self-Determination*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (Vol. I) (Bruno Simma ed.) (2002); Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 *VAND. J. TTRANS’L L.* 455 (2001); Harry Beran, *A Democratic Theory of Political Self-Determination for a New World Order*, in *THEORIES*

approach seems to provide such holistic solution. This approach is oriented at an optimum order of human existence in dignity and freedom, *i.e.* maximum access by all of all the processes of shaping and sharing all values humans cherish most; a minimum order of human dignity would be characterized by the absence of unauthorized coercion and violence.⁵

This article argues that persistent abuses or consistent failures to guarantee a minimum order of human existence in dignity and freedom would give rise to a well-grounded international law claim to self-determination. A pattern of deliberate and widespread human rights abuses or systematic policies of oppression surely fall below a minimum acceptable order of human dignity. A certain set of criteria will be introduced as a measuring mechanism in appraising the merits of self-determination claims put forward by modern claimants.

This minimum acceptable order will be measured by a combined multi-faceted approach, which employs both (1) a process-based problem-solving non-formalistic fashion of policy-oriented jurisprudence and (2) a rather formalistic approach or a *stricto sensu* legal-text model of interpretation as universally agreed and reflected in pertinent international legal instruments, and applied and interpreted by various judicial forums, as well as (3) a third element born out of previous similar cases or past and current trends in state practice. The position taken by this approach is based on premises that a single “fixed” solution does not cover, as it has not covered, the whole complexities and various context-specific situations arising out of self-determination claims. In fact, either of the components constituting the proposed approach, alone or in aggregate, would suffice to provide an adequate and rational response to any claim concerning self-determination. This approach is also meant to leave certain *margin of appreciation* as far as theoretical preferences are concerned, though ultimately it aims to produce a single answer, a unified result, notwithstanding theoretical approaches or schools of thought. Therefore, it is an attempt towards a unified set of strategies built upon diversified instruments, sources and structures, which can lead towards a peaceful and stable climate that promotes the common global interest. In doing so, this approach will apply the following categories of judgment:

OF SECESSION (Percy B. Lehning ed.) (1998); Frederic L. Kirgis, Jr. *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994) Eric Koldner, *supra* note 1; Thomas Franck, *Post Modern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW (Brolmann et al. eds.) (1993); Lawrence S. Eastwood, Jr. *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299 (1993); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976); Onyeonoro Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. MOD. AFR. STUD. 355 (1974); Michael Eisner, *A Procedural Model for the Resolution of Secessionist Disputes*, 33 HARV. INT'L L. J. 407 (1992); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

⁵ By minimum order, McDougal refers to “a public order which establishes as authoritative, and seeks to make effective, the principle that force, or highly intense coercion, is reserved in community monopoly for support of processes of persuasion and agreement and is not to be used as an instrument of unauthorized change. Such an order is minimum because some measure of conformity to its principle is indispensable to establishing responsible relations between community members and to the stability in expectations necessary to the mutually secure projection of cooperative activities in the production and distribution of all values. The maintenance of such a public order must include community strategies both to prohibit and minimize the destructive effects of coercion and to encourage and facilitate the process of persuasion and agreement.” See MYRES S. MCDUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER xi-xii (1960).

- A) Basic international human rights instruments (as also applied and interpreted in both international and national fora);
- B) Current state practice (carefully and contextually looking at the past successful similar cases in order to determine the claim's success or merit);
- C) Value categories system, aiming at a world public order of human dignity.

The approach is elaborated into further detail in the following points:

(A). In discussing relevant provisions of international legal instruments, this article proposes an assessment of the merits of any self-determination claim through the following principal bases:

1. The right to self-determination of peoples subject to colonial rule, and the oppressed peoples,⁶ which is the peoples subject to subjugation, domination and exploitation by “others”;⁷
2. The right to self-determination of peoples that were denied the right to internal self-determination;⁸
3. The right to self-determination of peoples excluded from public and social life, or peoples lacking a “minimum level of participation”;⁹
4. The right to self-determination of discriminated and non-represented peoples;
5. The right to self-determination of peoples subject to massive human rights violations.

⁶ The right to self-determination of the oppressed people is and should also be applicable to situations other than colonial. For further discussion on the meaning of the “oppressed peoples” and their right to self-determination, see section on “Solutions and Applications.”

⁷ The application of the right of self-determination to all peoples in colonial situations is well established in international law. See G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/Res/1514 (XV) (Dec. 14, 1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/Res/1541 (XV) (Dec. 15, 1960). The I.C.J. in the *Namibia case* upheld the same position. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia case)* I.C.J. Rep. 1971, at 31, where the Court stated that the “development of international law in regard to [colonies] ... made the principle of self-determination applicable to all of them.” Judge Dillard confirmed this in the *Western Sahara case*: “the pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonization of those [colonies] which are under the aegis of the United Nations.” *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975.

⁸ The idea that only the consent of the governed can make a government legitimate originally derives from the American and French Declarations. The Universal Declaration of 1948 also provides that “the will of the people shall be the basis of the authority of government.” The fact that government and its subjects have correlative duties and rights has been consistently maintained in the course of history. It means that government’s authority has to be seen both as a right to rule and a duty to comply and be guided by law. Most recently, this right was reaffirmed by the Supreme Court of Canada in its decision in *Reference Re: Secession of Quebec*, File No. 25506, Aug. 20, 1998, [1998] S.C.R. 217 (stating that “a right to secession only arises under the principle of self-determination of peoples at international law ... where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms part”).

⁹ In all circumstances, as Professor Anaya puts it, a “minimum level of participation” is required. Professor Anaya’s concept of “constitutive” self-determination requires a “minimum level of participation” in the process of “creation, alteration or territorial expansion of governmental authority,” associated with a continuous process of self-determination, giving rise to a “governing order under which individuals and groups are able to make meaningful choices touching upon all spheres of life on a continuous basis.” S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 81-82 (1996). See also the report of Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Asbjørn Aide, stating that “the most basic principle of self-determination is that of the right of popular participation in the government of the State as an entity.” UN doc. E/CN.4/Sub.2/1992/37, at 33, ¶ 165.

(B). Drawing on current state practice of secession (most relevant for the case at hand, Bangladesh and Eritrea), an attempt to unify the claimants' basis should be made, so that a set of consensual criteria upon which the modern secessionist claims are most likely to be supported is established. Such situations can so far be considered: a) illegal annexation of territories,¹⁰ b) gross human rights violations,¹¹ and c) the break-up of the state,¹² peaceful separation,¹³ or with the agreement of the entire population.¹⁴

The rationale behind this criterion is based on premises that international law should employ a similar standard to all similar cases, or treat like cases alike,¹⁵ which would significantly contribute to raising the confidence and put more credibility to the values of a world system of law and order. A careful and rigorous contextual examination is highly recommended.

(C). Drawing on major value processes,¹⁶ of which the most valued being: power, enlightenment, wealth, well-being, skill, affection, respect and rectitude, the article advances a notion—or the fundamental principles—of an order that guarantees a minimum standard of human dignity, whose denial will give rise to the justification of any self-determination claim. These values may also be used in measuring institutional effectiveness (*i.e.*, institutional performance and self-sustainability) judged by access of all to all the values that humans desire, whereby establishing a public order of human dignity.

¹⁰ The Baltic States (Estonia, Latvia, and Lithuania), and Eritrea.

¹¹ The Case of Bangladesh.

¹² The Soviet Union, the Former Yugoslavia.

¹³ Czechoslovakia.

¹⁴ The unification of Germany.

¹⁵ See LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS*, 3 (2nd ed. 1987). See also THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 143-144 (1990) (stating that “consistency requires that ‘likes be treated alike’ while coherence requires that distinctions in the treatment of ‘likes’ be justifiable in principled terms.”). See further THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 38 (1995) [hereinafter FRANCK, *FAIRNESS*]. According to Professor Franck, indicators of legitimacy or the right process are, among others, the coherence of international system of rules, *i.e.* treating like cases alike and relating in a principled fashion to other rules of the same system; Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 *COLUMB. J. TRANSNAT’L L.* 65, 84 (arguing that “in the international legal system, as well as all other legal systems, the treatment of like cases alike through the consistent application of the law enhances the legitimacy of the legal system as well as that of the organ applying the law.”).

¹⁶ These values are: 1. Power (making of decisions important to the social context as a whole and enforceable against challengers when necessary by the use of severe sanctions); 2. Enlightenment (gathering and spreading of information, institutionalized in agencies of research and the information media); 3. Wealth (production and distribution of goods and services, institutionalized in business corporations and partnerships, trade unions and consumers' associations); 4. Well-being (opportunity for safety, health and comfort; relevant institutions include facilities for medical care and disease prevention); 5. Skill (opportunity to acquire and exercise excellence in a particular operation, including schools, artistic, vocational and professional organizations concerned with maintaining and improving standards of performance and taste); 6. Affection (giving and receiving intimacy, friendship and loyalty, including the institutions of family and intimate friends plus associations established to express loyalty); 7. Respect (the recognition and reciprocal honoring of freedom of choice. Distinctive institutions provide recognition of common merit as a human being and particular merit as a member of a group); 8. Rectitude (responsibility for conduct. Its institutions formulate and apply standards of responsibility, and justify and celebrate these norms in religious, metaphysical or ethical terms). For a detailed discussion on the value categories, see Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 *GERMAN YB INT’L L* (2001). See also HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY*, (Vol. I), 30-31 (1992); HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (Vol. II), 727-786 (1992).

These methodological concepts can be used at any stage and for any situation. In particular, this framework should be used in determining the claimant's right to external self-determination, respectively the denial of one's claim over a particular territory. It will also determine whether the new emerging entity is viable to sustain and function as an independent and sovereign state, by conducting itself within a minimum acceptable public order of dignity and freedom, as described in this framework. The entitlement to the claim should be simply given to any self-perceived or externally viewed distinct community,¹⁷ which is subject to gross human rights violations and discrimination in equal dignity and rights for the mere fact that it belongs to that particular community, or because these extreme grievances are inflicted on this community based solely on the fact that it is a distinct group from the one who possesses the sovereign authority and inflicts these violations.

This configuration is without prejudice as to the freely pursued democratic and peaceful processes, where political entities or communities themselves agree to pursue a certain course of action leading up to new political arrangements that may include creation, modification or termination of the body politic. To the extent possible, this should remain the preferred course in addressing self-determination questions. Genuine democratic processes in governance would considerably facilitate finding more acceptable and adequate solutions.

III. SOLUTIONS AND APPLICATIONS

The following alternative solutions are part of the recommended approach by this article, aiming to promote the largest net aggregate of the common global interest:

A. Arguments on the Right to Self-Determination from a Perspective of International Legal Instruments

1. The right to self-determination of peoples subject to colonial rule, and oppressed peoples, which is the peoples subject to subjugation, domination and exploitation by "others"

The right to self-determination of the colonized peoples is firmly established under international law.¹⁸ It is widely accepted as constituting a *jus cogens* norm.¹⁹ Considering the primarily focus of this article, the discussion will be on the right to self-determination of the oppressed people in a non-colonial context. It is argued,²⁰ and it is the submission of this article that, any oppressed people should possess the entitlement to self-determination.

¹⁷ On the meaning of "community," referring to McDougal and Laswell's conception, the reference is empirical, to a certain frequency in the perspectives of the people who constitute a given community. See HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (Vol. I) 26 (1992).

¹⁸ See the *Namibia case*, *supra* note 7.

¹⁹ See among others IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (1998); Antonio Cassese, INTERNATIONAL LAW IN A DIVIDED WORLD 136 (1986); James Crawford, *The Rights of Peoples: Some Conclusions*, in JAMES CRAWFORD ED., THE RIGHTS OF PEOPLES 166 (1988).

²⁰ See, e.g., Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L. Q. 857, 883 (1999) (stating that "the right of self-determination applies to all situations where peoples are subject to oppression by subjugation, domination and exploitation by others. It is applicable to all territories, colonial or not, and to all peoples."); Lawrence S. Eastwood, Jr., *supra* note 4, at 348 (arguing that the primary object of secession should be the oppressed groups that aim to free themselves from the oppressive parent states. He further argues that, "a secession right based on the notion that ethnic or minority groups are automatically

“Oppression” is defined as an “unjust or cruel exercise of authority or power,”²¹ which may be exercised against any people, notwithstanding the context, and which could “include the violation of the fundamental human rights of the individuals making up the group or the discriminatory denial of political power...”²² This is nothing but the same principle advanced by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, which limits State sovereignty and territorial integrity to “a government representing the whole people belonging to the territory without distinction as to race, creed or color.”²³ The Declaration also notes that “subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principles [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.”²⁴ The Declaration—as the two International Human Rights Covenants of 1966 do—refers to “all peoples” as being entitled to this right.

That the right to self-determination belongs to all peoples can be found even in General Assembly Resolution 1514 (XV), despite the fact that its primary goal was to bring to a speedy end all colonial situations.²⁵ The African Charter on Human and Peoples’ Rights makes it clear, stating that either or both “colonized or oppressed peoples” are entitled to “the right to free themselves from the bonds of domination by resorting to any means recognized by the international community,”²⁶ hence making a distinction between colonized and oppressed peoples, the latter not necessarily being under colonial bonds. The Supreme Court of Canada equates “an oppressed people” with a people who is “the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights.”²⁷

entitled to their own territory would threaten to internationalize many domestic group conflicts and create new conflicts. In contrast, a right of secession available only to oppressed groups when a majority of persons within a particular territory favors separation could provide a permanent political remedy to at least some groups without undermining international order or undemocratically ‘encapsulating’ ethnic majorities in newly independent states.”); Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, in YONAH ALEXANDER AND ROBERT A. FRIEDLANDER (ED.), *SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS* 193, 211 (1980): “It seems imperative that at this stage the traditional principle of self-determination which was primarily instrumental for the dramatic transformation of former colonies into independent nation-states be extended in scope to include the right for territorial separation of any people ‘subjugated, dominated and exploited,’ who, because of their group identification, are deprived of the opportunity to participate in the value processes of a body politic.”

²¹ WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2nd ed.) 1710 (1951). See also THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (J. B. Sykes ed.; 7th ed.) 715 (1982) (to “oppress” refers to “[g]overn tyrannically, keep under by coercion, subject to continual cruelty or injustice.”).

²² Lawrence S. Eastwood, Jr., *supra* note 4, at 341-342.

²³ See DECLARATION ON THE PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [*hereinafter* DECLARATION ON PRINCIPLES]

²⁴ *Id.*

²⁵ See, e.g., art. 2 of Resolution 1514 (XV), *supra* note 7, providing that “all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See also CHRISTIAN TOMUSCHAT, *supra* note 2, at 2.

²⁶ African [Banjul] Charter on Human and Peoples’ Rights, art. 20 (2), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

²⁷ Supreme Court of Canada, *Reference re: Secession of Quebec*, File No. 25506, Aug. 20, 1998, [1998] SCR 217.

Moreover, the Commission of Rapporteurs in the *Aaland Island case* suggested that under situations of extreme oppression self-determination by Aaland citizens might be possible.²⁸

The unjust and cruel exercise of the Serbian regime's authority in or against Kosovo Albanians has been manifested in a variety of ways and is a matter of a persistent and deliberate campaign—which as recognized by the ICTY Prosecutor in the *Milosevic et al.* indictment—was undertaken “with the objective of expelling a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian control over the province.”²⁹ Several General Assembly resolutions adopted during the 1990s best testify on massive human rights abuses and large-scale repression committed by the Serbian authorities.³⁰

2. The right to self-determination of peoples that were denied the right to internal self-determination

The denial of the right to internal self-determination—in a timely significant³¹ and substantively meaningful manner—should be one of the causes leading up to the right to exercise external self-determination. If a people are denied the right to internally express its own will and accommodate itself within a State's public order, the exercise of the right to external self-determination is the alternative solution. This alternative has been also affirmed by the Canadian Supreme Court decision in the case of *Quebec*. In the Court's judgment, the international right to self-determination generates a right to self-determination in situations “where a definable groups is denied meaningful access to government to pursue their political, economic, social and cultural development ... 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.”³² This option of resorting to external self-determination, as an alternative to a substantial denial of the right to internal self-determination, is agreed by well-known international law publicists,³³ and is intrinsically linked to the Declaration of Principles' concept of “a government representing the whole people belonging to the territory.”

As regards Kosovo, it is beyond any reasonable doubt that Kosovo was denied its internal right to self-determination, as manifested through, among others, unilateral anti-constitutional actions to abolish Kosovo's autonomous status or otherwise Serbian authorities' consistent

²⁸ See *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106, 28 (1921) (affirming the right to secession as “[a] last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”).

²⁹ *Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, Vljako Stojilkjovic*, Case No. IT-99-37-PT, Indictment, ¶ 54 (Oct. 29, 2001). See also: *Prosecutor v. Nebojsa Pavkovic, Vladimir Lazarevic, Vlastimir Djordjevic, Sreten Lukic*, Indictment (Sept. 22, 2003).

³⁰ See, e.g., Resolution 48/153 of 20 December 1993; Resolution 49/204 of 23 December 1994; Resolution 50/190 of 22 December 1995; Resolution 51/111 of 12 December 1996; Resolution 52/139 of 12 December 1997.

³¹ Although time could be of relative importance, the reference to a timely perspective is rather used to signify the distinction between an intentional denial of internal self-determination from an ad hoc, unintentional or easily reparable denial or violation of such a right.

³² Reference re: *Secession of Quebec*, *supra* note 27.

³³ See Karl Doehring, *Self-Determination in* BRUNO SIMMA (ED.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, at 66 (1994).

failure to consult the will of the majority of those living in Kosovo in any meaningful and substantial manner.³⁴

3. *The right to self-determination of peoples excluded from public and social life, or peoples lacking a “minimum level of participation”*

Common Article 1 (1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provides: “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This provision makes it very clear that a people’s denial to freely determine its political status, or the denial of recourses and means necessary to pursue economic, social and cultural development would lead to the right to self-determination.

In order to pursue economic, social and cultural development, participation by all at all levels of society is of absolute necessity. The deliberate and massive exclusion from social and public life or systematic denial of a “minimum level of participation” should, as an alternative, lead to the right to self-determination.³⁵ Access to government is also addressed by the Canadian Supreme Court in its *Quebec* opinion, indicating that denial of such a right could have arisen to a legitimate claim to self-determination.³⁶

³⁴ See, e.g., Jürgen Friedrich, *UNMIK in Kosovo: Struggling with Uncertainty*, 9 MAX PLANCK Y.B. U.N. L. 225, 248 (2005): “the complete abolition of the status of autonomy which Kosovo enjoyed under the Constitution of the Socialist FRY of 1974 in 1989 and the continuous massive violations of fundamental human rights and brutal oppression of the Albanian ethnicity over the following ten years fulfill even the strictest conditions one might demand to overcome the threshold for an internal right to self-determination to become external, i.e. to include the right to secession.” See also Jonathan I. Charney, *supra* note 4, 460-464, stating: “in the case of Kosovo, the Albanian Kosovar had obtained a degree of autonomy in their province within the Socialist Federal Republic of Yugoslavia (SFRY). After the demise of the SFRY, the FRY took unilateral steps to eliminate that autonomy and took draconian steps against the Albanian Kosovars. For several years, nevertheless, the Albanian Kosovars tried all peaceful means at their disposal to seek an accommodation. These efforts were rewarded only with greater repression by the Serbs in control of the FRY. The nonviolent Kosovar actions during this period also demonstrated that there existed deep and widespread support among the Albanian Kosovars for efforts to preserve their self-determination. This led ultimately to the foundation of the Kosovo Liberation Army (KLA) that only then sought independence from the FRY and used violence to seek that goal. Those efforts were met with violence and greater suppression by the FRY. After efforts by the United Nations and NATO appeared to fail to resolve the crisis, NATO unilaterally took action to protect the Albanian Kosovars. This ultimately resulted in a UN Security Council sanctioned occupation and administration of Kosovo that operated as if Kosovo was de facto independent of the FRY.” He further points out that, “the Albanian Kosovar’s actions assured the international community that all efforts at peaceful settlement of the disputes had been exhausted and that, to the extent possible, the claims of self-determination represented the will of the majority of Albanian Kosovars. Furthermore, independence was sought after all other solutions proved unavailable and armed force was used only as a last resort.”

³⁵ See Ved P. Nanda, *Self-Determination and Secession under International Law*, 29 DENV. J. INT’L L. & POL’Y 305, 325 (2001-2002), stating that there could be exceptional circumstances in accepting a claim to unilateral secession in cases of “undemocratic, authoritarian regimes, which are not ‘representative,’ thus not providing the opportunity for the ‘people’ to participate effectively in the political and economic life of the state, especially when there is a pattern of flagrant violations of human rights.”

³⁶ The Court held in the case of *Secession of Quebec*, *supra* note 28, that “the population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the

Other authorities have agreed that, “the denial of equal participation in the exercise of national rule can constitute a justifiable demand for self-determination,”³⁷ and that, “the exercise of equal rights and self-determination by the people in question and the observance of human rights and democratic freedoms by the State must be real, as must the voluntary nature of any form of integration or association between peoples and States.”³⁸

The following discussion would aim to serve as an application and contextualization of this legal analysis to the case of Kosovo. On June 30, 1990, Serbia approved the law on the action of Republic bodies in special circumstances in Kosovo. Almost 300 Albanian directors were discharged by compulsory imposing measures. On July 5, 1990, Serbia passed the law on abrogation of the activity of the Assembly of Kosovo and its government. On July 26, 1990, Serbia passed the law on labor relations in special circumstances. By that law, 135,000 Albanian workers were expelled from their jobs. In 1990, more than 7 000 Albanian school children were poisoned. In a more drastic enterprise, all activities in Albanian language were banned, starting from education, culture, science, and media, while the Albanian staff, working in sectors such as schools, university, health institutions, media, police and other relevant sectors was fired *en masse*.³⁹ One cannot consider this as anything else other than an exclusion of ethnic Albanian “group” from public and social life in Kosovo.

4. *The right to self-determination of discriminated and non-represented peoples*

A people subjected to systematic discrimination and non-representation by its own government, constitutes another cause leading up to a well-founded claim to self-determination. A people subject to persistent and systematic policies of discrimination, and denied from equal participation and representation can never enjoy equal rights. Nor it is able to express its own concerns and enjoy all the guaranteed rights and freedoms.

International human rights instruments such as the Declaration on Principles opts for the option of self-determination in cases of unequal representation, resulting out of discriminatory motives and where the government does not represent the whole people under its own jurisdiction:

Nothing ... 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 ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.⁴⁰ (Emphasis added).

This right was reiterated and further clarified in *Reference Re: Secession of Quebec*. The Canadian Supreme Court stated that, “a state whose government represents the whole of the people and or peoples resident within its territory, on a basis of equality and without

international documents that address the right to self-determination of peoples, Canada is a ‘sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.’”

³⁷ Thomas Herber, *Tibet and the Chinese Concept of Nationhood*, in PETRA KELLY, GERT BASTIAN AND PAT AIELLO (EDS.), *THE ANGUISH OF TIBET*, at 51 (1991).

³⁸ Tibet Justice Center, *The Right of the Tibetan People to Self-Determination: A Preliminary Report*, at 17 (1991).

³⁹ See, among others, See MIRANDA VICKERS, *BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO* 242-246 (1998).

⁴⁰ DECLARATION ON PRINCIPLES, *supra* note 23.

discrimination, and represents the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have the territorial integrity recognized by other states.”⁴¹ As now indicated—under the context-specific applications above—the people of Kosovo were consistently deprived of its right to participation.⁴²

5. *The right to self-determination of peoples subject to massive human rights violations.*

The principal international human rights instruments, including the UN Charter, call on all States to respect and protect basic human rights and fundamental freedoms. This was reaffirmed and further refined in the jurisprudence of International Court of Justice (ICJ). In its *South West Africa* case, the ICJ stated that, “the law concerning the protection of human rights may be considered to belong to the *jus cogens*.”⁴³

Massive violation of fundamental rights is considered in the *Quebec case* as a basis which may lead to self-determination.⁴⁴ There is also a broad consensus among leading scholars of international law that the option of self-determination should be considered in cases involving human rights violations.⁴⁵ Professor Wiessner argues that, “in cases of serious injustice ... where there is no other remedy available, there should be at least a moral, if not a legal right, to secede.”⁴⁶ Buchanan has also developed a justice-based theory of secession.⁴⁷ In the same line of reasoning, Professor Reisman states: “we would all agree that any changes that now occur ... should be consistent with the basic code of international human rights. Secondly, the procedures by which these changes are accomplished should meet the emerging procedural requirements—what Professor Franck has called the emerging right to democratic consultation—or some approximation thereof. The selection of autonomy, self-governance, integration or independence should be based on a general conviction that the particular

⁴¹ *Secession of Quebec*, *supra* note 27, para. 154. See also Karl Doehring, *supra* note 4, at 66 (noting that “it is ... well arguable that discrimination against ethnic minorities could potentially give rise to a right of secession.”).

⁴² See, among others, Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 396 (2002-2003) (stating that “from 1989, the Kosovar Albanians were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government. They were also denied the ability to participate in the local formal political structures responsible for determining the political fate of Kosovo. In addition, the Kosovar Albanians were subjected to a systematic denial of their basic human rights, which included a policy of arbitrary arrest, police violence, detention incommunicado, torture, summary imprisonment and economic marginalization.”).

⁴³ See *South West Africa* case.

⁴⁴ In reaffirming the *amicus curiae* brief, the Supreme Court stated that “the Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curie*, an oppressed people.” *Quebec case*, *supra* note 28.

⁴⁵ See references in *supra* notes 2 and 3.

⁴⁶ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 120 (1999). See also Allen E. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, 27-85 (1990); Allen E. Buchanan, *The Right to Self-Determination: Analytical and Moral Foundations*, 8 ARIZ. J. INT'L & COMP. L. 41, 48 (1991); Allen E. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 54 (1995).

⁴⁷ ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW, 345 (2004). See also STEPHEN MACEDO & ALLEN BUCHANAN, SECESSION AND SELF-DETERMINATION (2003).

solution selected is the one that will yield the greatest advance in terms of human rights and minimum order for all those concerned.”⁴⁸

As a short way of illustrating the state of human rights in Kosovo, it would suffice to mention in this particular instance that, human rights violations were of such a scale that triggered international military intervention and the deployment of a major United Nations governing mission, excluding the previous Sovereign from exercising any de facto sovereign function.

B. Argument based on Current State Practice of Secession

Concerning the second alternative solution, which is relying on similar successful state practice cases, Kosovo has a claim to independence and sovereignty as compelling as *at least* that of Bangladesh and Eritrea. As a territory that was annexed, arbitrarily and unconstitutionally stripped of its own autonomous status, was denied to determine, in full freedom, both its internal and external political status, was excluded from any form of participation and representation at both local and state-level, and was finally subjected to ethnic cleansing policies, Kosovo is not any different from either Bangladesh or Eritrea.

In short, and in order to provide a comparative observation and a sense of particularities characterizing all these cases:

1. Bangladesh

The independence of Bangladesh thus far seems to be the most pertinent case that may be compared to that of Kosovo.⁴⁹ Both populations were subjected to gross human rights violations,⁵⁰ both cases triggered and received foreign support in the form of military intervention,⁵¹ and both emerged in the post-military intervention phase as somewhat independent entities, in a sense of running their affairs without any direct decision-making involvement of the previous ruling powers.

2. Eritrea

To the extent it was occupied, ruled and annexed by foreign entities and was subject to the lack of timely and proper international response, the case of Kosovo may well be compared to that of Eritrea. The origin of Eritrea’s right to independence is certainly linked to its colonial status. At best, it is a case of denied decolonization.⁵² However, from the point of view that prior to its independence, Eritrea enjoyed an autonomous status until 1962, when the then-

⁴⁸ W. Michael Reisman, 87 AM. SOC’Y INT’L L. PROC. 249 (1993). See also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 867 (1990).

⁴⁹ Bangladesh was previously called East Pakistan, known as well as East Bengal. It was a geographically separate part of the state of Pakistan, created when British India became fully independent in 1947. East Pakistan’s population was around 62 million.

⁵⁰ Generally on human rights abuses and India’s military intervention in Bangladesh, see Barry M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L. J. 120, 133 (1992).

⁵¹ Consider NATO’s operation on Kosovo and India’s use of force on the side of Bengalis.

⁵² See Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian–Eritrean Experience*, 29 COLUMB. HUM. RTS. REV. 91, 119 (1997-1998). Compare Alemante G. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT’L L. 1, 46 (1992).

Emperor of Ethiopia, Haile Selassie arbitrarily dissolved the Ethiopian federation and annexed the “autonomous unit” of Eritrea—just as the Belgrade regime did with Kosovo—this would seem to fall under the “illegal annexation” category.

Professor Cassese provides a succinct summary of the Eritrean claims that rested on the following grounds and that would most certainly be applicable in the case of Kosovo (the only difference being the time-occurrence of acts): “(1) in pre-colonial history there had not been a nation-State with a stable territorial base encompassing both Eritrea and Ethiopia and to which Ethiopia could claim continuity; (2) in 1952 Eritrea was federated with Ethiopia against its will; no plebiscite or referendum was held to establish the will and the wishes of Eritreans, as in accordance with U.N. practice ...; (3) in actual fact, it was Ethiopia that in 1962 unilaterally repealed the federal arrangement and then forcibly annexed Eritrea ...; (4) the forcible annexation of Eritrea by Ethiopia amounted to a grave denial of the right to self-determination.”⁵³

C. The Right to Self-Determination of the Peoples lacking a Minimum Standard of an Order of Human Dignity

In order to measure the level of a minimum acceptable standard of an order of human dignity, equal participation and access to all the major value categories⁵⁴ will be taken as a mechanism of measurement when determining the merit and value of one’s claims to self-determination.

1. Power refers to the making of decisions important to the social context as a whole and enforceable against challengers when necessary by the use of severe sanctions. The access to, and sharing of power is critical in any network of social interaction. It does have essential functions in the process of effectuation of the right to self-determination.⁵⁵

In order to have access to this value, people would need to at least enjoy, as Professor Anaya has described, a “minimum level of participation.”⁵⁶ A sound system of governance is essential in order to create an enabling environment in which to pursue power, while the requirement that democracy validates any governance system, as noted by Professor Franck, is a newly emerging norm in international law.⁵⁷ Such a system was absent for the whole period of 1990s in Kosovo.

2. Enlightenment refers to the process of gathering and spreading of information, institutionalized in agencies of research and the information media. The best way to achieve this value is through freely accessing and spreading information, as well as building research agencies. In the case of Kosovo, all the broadcasting agencies have been closed along with the

⁵³ ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 221-222 (1993).

⁵⁴ For a detailed discussion on the value categories, see Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y B INT’L L (2001); W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2004). HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (Vol. I), 30 - 31 (1992); HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (Vol. II), 727 - 786 (1992).

⁵⁵ As Professor Chen notes, “sharing of power is of paramount importance.” See Chen, *supra* note 2, at 244.

⁵⁶ See ANAYA, *supra* note 9.

⁵⁷ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 47 (1992) (stating that “this newly emerging ‘law’—which requires democracy to validate governance—is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations.”).

closing of Albanian-language high schools and university, as well as the closing of all Albanian cultural and scientific institutions.

3. Wealth is the production and distribution of goods and services, institutionalized in business corporations and partnerships, trade unions and consumers' associations. The creation of a favorable climate to enterprise and the mobilization of local savings for investment would further help a better functioning of the system of wealth. Another important aspect is to foster sound financial management, including efficient tax systems and productive public expenditure. In Kosovo, most of the Albanian workers were massively dismissed from professional, administrative and other skilled positions, hence making the value of wealth an almost impossible notion.

4. Well-being is opportunity for safety, health and comfort; relevant institutions include facilities for medical care and disease prevention.

When it comes to the case of Kosovo, the safety has been far from being guaranteed. In contrary, thousands of people have been subjected to police brutality, and many were killed as a result of such violence, arbitrary searches, seizures and arrests, forced evictions, torture and ill-treatment of detainees and discrimination of justice. Furthermore, the access to medical institutions has not been an easy one; doctors and members of other categories of the medical profession of Albanian origin were dismissed from clinics and hospitals.

5. Skill is opportunity to acquire and exercise excellence in a particular operation, including schools, artistic, vocational and professional organizations concerned with maintaining and improving standards of performance and taste. In a state absent of basic institutions of knowledge, it is hard to believe in an opportunity to acquire and exercise excellence in a particular operation.

6. Affection is giving and receiving intimacy, friendship and loyalty, including the institutions of family and intimate friends plus associations established to express loyalty. In this respect, certain prerequisites are necessary. First of all, man and women have the right to live their lives and raise their children in dignity, free from hunger and from fear of violence, oppression or injustice. In a state where these rights are not guaranteed—as it was in the case of Kosovo under Milošević—the value of affection is far from being a reality.

7. Respect is the recognition and reciprocal honoring of freedom of choice. Distinctive institutions provide recognition of common merit as a human being and particular merit as a member of a group. McDougal, Lasswell and Chen suggest, using this universal principle, it is possible to cover all aspects of life requiring protection by formulations of rights.⁵⁸ According to this view, challenges between or within states and/or societies should be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most. Furthermore, human beings must respect one another, in all their diversity of belief, culture and language. Differences within and between societies need to be understood only as a precious asset of humanity, never as a source of clashes or conflicts.

As with other values, this has not been the case with Kosovo. There were neither a fair distribution of costs and burdens nor were there any sort of respect in terms of culture or language. The policy of firing *en masse* the Albanian-speaking staff from critical sectors of

⁵⁸ See MYRES S. MCDUGAL, HAROLD D. LASSWELL AND LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

society and the elimination in practice of the Albanian language, particularly in public administration and services, is an extreme violation of the value of respect.

8. *Rectitude* is responsibility for conduct. Its institutions formulate and apply standards of responsibility, and justify and celebrate these norms in religious, metaphysical or ethical terms. This value implies respecting and promoting diverse religious and other ethical values in society. This is, again, something which has not been promoted or protected in Kosovo.

IV. CONCLUDING REMARKS

In concluding, this article submits that recognizing the Kosovar request for independence and sovereignty can in no way be considered as a dangerous precedent for the region or the international community as a whole. Indeed, it is the contrary. This would create a good precedent, serving as a deterrent for all those who might use sovereignty as an excuse for discriminating or even exterminating its *own citizens*, and reminding all that sovereignty is about best serving all without any distinction whatsoever within the sovereign's jurisdiction.

Both as a people subjected to ethnic cleansing policies, and as a people that has been forcefully and consistently denied its right to self-determination—which as the World Court held in the *Reservations* case, constitute wrongs that “shock the conscience of mankind” and are generally accepted as prohibited by the superior norm of *jus cogens*⁵⁹—the people of Kosovo is entitled to its right to external self-determination. Alternatively, the access to major values necessary for a minimum existence in dignity and freedom has been persistently denied to the people of Kosovo, while the fundamental international instruments that guarantee the right to self-determination and other basic human rights and fundamental freedoms contained therein have been violated in a gross and systematic manner. In addition, the world community has recognized as independent and sovereign states cases as similar as Kosovo. Moreover, a solution that intends to correct the past wrongdoings and that aims at maximizing the access of all to all the most important human values both in individual and aggregate terms, and by doing so, produces a viable and responsible body politic based on the express and genuine wishes of those to be governed by such a body politic is the solution that contributes most to the maintenance of both minimum and optimum public order of human dignity.

⁵⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports, 1951, 15, at 23 (stating that “genocide, aggression, *apartheid* and forcible denial of self-determination, for example, all of which are generally accepted as prohibited by peremptory norms of general international law, constitute wrongs which ‘shock the conscience of mankind’.”). Further, in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Judge Ammoun reaffirmed that the right of self-determination constitutes a “norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances.” 1971 I.C.J. 16, 89-90 (Ammoun, J., separate opinion). See also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATES RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 38 (2003); ANTONIO CASSESE, *INTERNATIONAL LAW* (2001): “As has been conclusively demonstrated elsewhere, the general principle of self-determination has become a peremptory norm of international law (*jus cogens*)”; Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT’L L. 59, 64 (2005) (stating that “the right of peoples to self-determination is undoubtedly part of *jus cogens*.”).