



**RIGA  
GRADUATE  
SCHOOL OF  
LAW**

# **Right of self-determination – role of referendums in the process of independence**

## **BACHELOR THESIS**

Author: Dāvis Mārtiņš Daugavietis  
LL.B 2017/2018 year student  
student number B015046

SUPERVISOR: *Ieva Miļūna*  
*(LL.M, PhD candidate)*

### **DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

RIGA, 2018

## SUMMARY

This thesis concerns public international law, right of self-determination and the role of the referendums in the process of independence. The primary goal and a research question for this thesis is to determine whether independence referendum is a pre-requisite for the state to get internationally recognized. To find an answer to this issue both – legal and political aspects regarding this issue are analysed. Thesis is divided in to the three parts and each of them will help to answer the research question.

First part of the thesis looks at the scope of two fundamental public international law principles – the principle of territorial integrity and the principle of self-determination. As well in this part of the thesis the relationship between these both principles are analysed. First part discusses, that borderline between these two principles is unclear and that is why this matter is controversial. As well it underlines that public international law leaves a lot of open questions in regard to these two principles and referendums what gives a lot of opportunities to regulate situations regarding self-determination and referendum role in it by politics.

In the second part of thesis the comparative analyse method is used by looking to the four different case studies where territories seek for independence – Montenegro, Catalonia, Scotland and Kosovo. In each of the case studies the scope of the struggle for independence is looked at. Moreover, the role what was played by the independence referendum in specific case study is analysed. In the end of the second part the interaction between constitutional law and international law in regard to the independence referendums is analysed. The political influence in the role of referendums is highlighted through the whole chapter as well as the issue that international law does not have specific laws about independence referendums and that enables a great place for improvisation for states when interpreting the international law in regard to the independence referendums.

In the third and final part, thesis deals with procedural recommendable steps when exercising self-determination in territorial state under international law to get internationally recognized. This chapter explains what is necessary for a territory seeking independence to gain recognition from other states. It analyses all the necessary steps exercising self-determination and it helps in understanding what is the role of independence referendum and whether it is pre-requisite under international law when self-determination is exercised. This part clearly shows that independence referendum same as all other recommendable steps help to gain international recognition, but there is no specific law that would regulate it and none of these recommendable steps guarantee the international recognition from other states, because it is regulated more by politics and not law.

This helps to get to the final conclusions further stating that independence referendum is not a pre-requisite for a state to get internationally recognized because the open space between the constitutional law and international law in regard to independence referendums as well as the uncertain distinction where the principle of territorial integrity ends, and the principle of self-determination starts gives states too much options in how to interpret the law. That leads to, the situation when the role of independence referendum is decided by politics and not the law. That means, that if there at one point will be a situation when state would declare independence without the independence referendum and it would be politically profitable for “big power” states these

states would find a line of argumentation within the framework of international law how to legally base the international recognition of this new state.

This thesis shows uncertainties in public international law in regard to the referendums and outlines how these uncertainties are used by the states to gain political power. It also shows how big role plays politics in regard to the public international law, the principle of self-determination and independence referendums, because there is a lack of scholarly discussion about this issue and how the politics influence it.

## Table of Contents

Summary .....	2
Introduction .....	5
1. Principle of self-determination and principle of territorial integrity in international law and relationship between these principles .....	8
1.1 The scope of the principle of territorial integrity .....	8
1.2 The scope of the principle of self-determination.....	9
1.3 Relationship between the principle of self-determination and the principle of territorial integrity .....	11
2. Comparative studies to determine the role of the independence referendums in the case studies .....	13
2.1 The case of the Catalonia.....	13
2.1.1 The scope of the struggle for the independence in the case of the Catalonia .....	13
2.1.2 Independence referendum announced illegitimate on the constitutional basis.....	15
2.2 The case of the Scotland .....	17
2.2.1 The scope of the struggle for the independence in the case of the Scotland .....	17
2.2.2 Scotland decides to remain as a part of the United Kingdom with the help of the independence referendum.....	19
2.3 The case of the Montenegro.....	20
2.3.1 The scope of the struggle for the independence in the case of the Montenegro ...	20
2.3.2 Independence referendum used as a main instrument to successfully declare the independence and gain international recognition .....	22
2.4 The case of the Kosovo.....	24
2.4.1 The scope of the struggle for the independence in the case of the Kosovo .....	24
2.4.2 ICJ Advisory Opinion on Kosovo and the unilateral Declaration of Independence without organising the independence referendum .....	26
2.5 Interaction between constitutional law and international law in the case studies in regard to independence referendums.....	28
3. Procedural recommendable steps to exercise self-determination in territorial states under international law to get internationally recognized by other states .....	31
3.1 Statehood.....	31
3.2 Exercise external self-determination within the framework of democracy .....	32
3.3 Following the rule of law in the process of self-determination .....	32
3.4 Summary of the procedural recommendable steps to exercise self-determination in territorial states under international law to get internationally recognized by other states.....	33
Conclusions .....	34
Bibliography.....	36
Primary sources.....	36
Secondary sources.....	36

## INTRODUCTION

In the last couple of decades, the process of how the states become independent has become a controversial issue of international law. If before that it was more or less clear, because states based their independence on self-determination in colonial context, then now situation has changed. New states try to exercise external self-determination outside the colonial context and in regard to this issue international law does not have an answer and it leaves a lot of open questions

One of the main question is – what are the role of referendum in the process of independence? This question is important, because in almost all case studies (Kosovo is exception in this matter) where the struggle for implementing external self-determination has occurred, in the last decades, the independence referendums has also taken its place and played a certain role. The issue of the independence referendums and its legitimacy is left to the constitutional law of the state from which the new territory wants to become independent and that creates the situation where a lot of controversial legal decisions are made, because international law does not give a concrete answer on the matters how and under what rules the independence referendum should be organised.

One cannot point to one settled international law on all the procedures required for carrying out a referendum.<sup>1</sup>

That leaves a lot of open questions on this matter – what are the borders for the new territory, which groups are entitled to participate in democratic process of self-determination, the rules regarding independence referendum (what is the exact question of referendum, who set the general terms for this referendum, etc.) as well as the result of referendum, who and how to decide if the referendum was successful and legitimate? <sup>2</sup>

Independence referendums helps to determine the will of the people who are living in the territory which is exercising external self-determination. The will of the people is important, because as the ICJ has ruled in Western Sahara Case, that to exercise self-determination

‘requires a free and genuine expression of the will of the peoples concerned’<sup>3</sup>

The independence referendum is the best instrument to show people’s will, because it gives a chance for everybody living in the self-determining territory to express their opinion about concrete self-determination. That is why the United Nations has supported and given the financial aid for the independence referendums, in order to help them express their will.<sup>4</sup> Nevertheless, together with an independence referendum comes great uncertainties.

The states are using these open questions in the context of independence referendums to fulfil their political interests on a concrete matter. They are interpreting the international law in the way which serves them first and puts the state in the position of power. However, the Council of Europe understands that there is a need to set out at least some guideline which could be followed by the

---

<sup>1</sup> Vanessa J. Jimenez, *Remarks by Vanessa J. Jimenez* (American Society of International Law Proceedings, 2013) p.221

<sup>2</sup> Malcolm MacLaren, ‘Trust the People’? *Democratic Secessionism and Contemporary Practice* (German Law Journal, 2015) p.635

<sup>3</sup> Antonio Cassese, *International Law, Second Edition* (Oxford University Press, 2005) p.62

<sup>4</sup> Supra 2, p.636

territories applying external self-determination by organising the independence referendum. to reduce the role of political interest international law. That is why

the Venice Commission and the Council of Europe's Parliamentary Assembly have established "soft" international standards on referendums as a form of exerting direct democracy, including territorial referendums, e.g. the one in Montenegro (2006).

These procedural requirements can be summarized as follows: Use of force is prohibited, while peaceful and democratic procedures are prescribed.<sup>5</sup>

However, as it is well known, in international law there is not one main legislator who would monitor whether the states are or are not violating international law, that is why these guidelines set out by Venice Commission are often ignored by states to fulfil their political interests. As an example, Spain used force against Catalan independence supporters to stop them from voting in independence referendum. Moreover, what is shocking, is that there was no reaction from international community due to the fact that Spain is a major economic partner to most of the states and it would not be in anyone's political interest to punish them.

In addition, there is a practice for the predecessor state, which do not want the secession to occur (for example Spain in the case of Catalonia), to rule out secessionist movement's independence referendum as illegal on the constitutional basis. In this kind of situations, the international reactions are important and decisive, but that again depends on the politics and the benefits of what other states acquire from concrete scenario. However, there is also a practice when predecessor state is ready to make constitutional amendments to give people seeking external self-determination a chance to choose (for example the case of Scotland). This serves as a valuable example, that secessionist movement and predecessor state can sit at one table and make an agreement which ended without the external self-determination and violent protests.

The main research question of this bachelor thesis is – "Whether independence referendums are a pre-requisite for a new State to be internationally recognised?" To find an answer to this question first of all, there is a need to explain the scope of the principle of territorial integrity and self-determination as well as to explain the relationship between these two principles, because these principles go hand in hand with the self-determination of the new territories and declarations of independence. Afterwards, in this thesis there will be a comparison of four different case studies (Montenegro, Scotland, Catalonia and Kosovo) with one common issue – in each of these case studies there was a territory seeking independence and international recognition. In the start of each case study the thesis will discover the scope of the case study to better understand the context of it. Further on there will be analyse of the role of the independence referendums in these cases. Thesis will explore both – the legal and political context in each case. Moreover, thesis will analyse the interaction between constitutional law and international law in regard to the independence referendums in every one of these case studies to better understand how the constitutional law impacts the international law within the matter of independence referendums. Finally, thesis will outline the procedural recommendable steps to exercise the self-determination in territorial states

---

<sup>5</sup> Anne Peters, *Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia* (ejiltalk.org, 12 October 2017) <https://www.ejiltalk.org/populist-international-law-the-suspended-independence-and-the-normative-value-of-the-referendum-on-catalonia/> (accessed 28 April, 2018); European Commission for Democracy Through Law, *Code of Good Practice in Electoral Matters, Opinion No.190/2002* (22 October, 2002) [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e) (accessed 28 April, 2018)

under international law this will assist in determining the role of independence referendum and whether it is a pre-requisite under international law in a situation when self-determination is exercised. Throughout the whole thesis the decision made by states and courts will be analysed not only from a legal point of view, but also from a political. Thesis will analyse the actions and decision made by the previously named states from the perspective of international relations theory- realism. That will highlight the political influence in the decision making of other states when independence referendums are organised.

The problem whether independence referendum is a pre-requisite for a state to be internationally recognized is controversial issue and international law scholars do not have one common position regards this problem. This thesis will make it clearer by analysing the legal side of the issue as well as by putting in the political perspective from the realist point of view, to show that international law is interpreted, and legal decisions are made based on politics.

# 1. PRINCIPLE OF SELF-DETERMINATION AND PRINCIPLE OF TERRITORIAL INTEGRITY IN INTERNATIONAL LAW AND RELATIONSHIP BETWEEN THESE PRINCIPLES

## 1.1 The scope of the principle of territorial integrity

The principle of territorial integrity is one of the fundamental international law principles, however the interpretation of this principle is often unclear, because the international law does not give an answer on how to correctly apply it. That is why states try to apply this principle in a way that serves their political interests. The history of this principle goes back to 1648 when the Peace Agreement of Westphalia was signed. As stated before the principle of territorial integrity is one of the core principles of international law without whom international relations between states would not be imaginable. This principle promotes that a state should not promote border changes in another state. Moreover, the principle of territorial integrity is one of the most important ones in the matter of maintaining the international peace. Already in 1648 states understood that without the principle of territorial integrity new wars would emerge one after another. The principle of territorial integrity is usually related to another fundamental principle of the international law - the principle of the prohibition of the threat or use of force. Afterwards in 20<sup>th</sup> century the principle of territorial integrity was put down in the Charter of the United Nations. Moreover, it was laid down in to the Helsinki Final Act (adopted on Aug.1, 1975) which is considered an important law instrument which stated the following:

The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any state.<sup>6</sup>

However, the Helsinki Act (adopted on Aug.1, 1975) also stated:

frontiers can be changed, in accordance with international law, by peaceful means and by agreement.<sup>7</sup>

What this means is that the Helsinki Act is not providing that territorial integrity is an absolute right and that is often misinterpreted by states, who often try to stop the secessionist movements by claiming that their right to territorial integrity is violated, but they forget that this right is not an absolute right and can be interpreted differently under different situations and circumstances.

Nowadays there is a dissent between international law scholars, lawyers and politicians about the principle of territorial integrity. One group claims that there should be a more flexible approach to this principle, because it is interfering the development of the modern world and the democratic values, also it is well known that hardly any states who is the member of United Nations has existed without the border change for longer than five generations.<sup>8</sup>

---

<sup>6</sup> Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki* (1 August 1975) available at: <http://www.refworld.org/docid/3dde4f9b4.html> [accessed 20 March 2018]

<sup>7</sup> Ibid.

<sup>8</sup> Prince Hans-Adam II of Liechtenstein, speaking to the International Institute for Strategic Studies on 25 January 2001

On the other hand, the other group argues that without territorial integrity there would be a great number of wars and the anarchy would arise in to the global affairs, which is a serious argument when one is looking back in to the history and seeing what happened when the principal of territorial integrity was violated in the history (World War 1 and World War 2) and even though the International Court of Justice (ICJ) in their Advisory Opinion held that Kosovo's declaration of independence does not violate international law, they also outlined the importance of the principal of territorial integrity:

The principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4” [1] (the prohibition of the use of force), as well as in other important texts, including those on self-determination. The concept includes the inviolability of the territory of the State, including territory under the effective control and possession of a State. The International Court has held that “the scope of the principle of territorial integrity is confined to the sphere of relations between States.<sup>9</sup>

This leaves an open gap on the matter when and in what ways do states correctly interpret the principle of territorial integrity. This gap creates a place for controversy in international law and international relations and that is why the states are often interpreting this principle in favour of their political interests, but this matter will be discussed more in the following parts of this Bachelor thesis. This gap also leaves the question of independence referendum open. There is no clear answer if a part of the territory wishes to secede, there needs to be a referendum in the whole territory of just the seceding territory. It is clear that if the independence referendum takes place in the whole territory the secession will be unsuccessful, but if the independence referendum will take place just in the seceding territory it is more likely that the people will vote in favour of the independence.

## 1.2 The scope of the principle of self-determination

The principle of self-determination is one of the fundamental principles of human rights established in the international law. The principle was firstly formulated in the 18<sup>th</sup> century, but till the moment of adoption of the Charter of United Nations it was only a political principle.<sup>10</sup> The principle of self-determination applies to the groups of people. These groups have the right of self-determination and it is given to the groups of people by international law not by states itself.<sup>11</sup> One of the biggest issues is what groups can apply to this principle to exercise self-determination. As it is a legal principle, not a precise rule, it embraces a high degree of generality and abstraction.<sup>12</sup> Because of that there is a disagreement of the application of the principle between the states in certain cases, because they tend to interpret the principle of self-determination differently.

At the start of the 20<sup>th</sup> century the principle was advocated by United States President Woodrow Wilson. He listed integration of the principle of self-determination as one of the main priorities into the world after the World War 1. That led to the collapse of several empires – Ottoman, Austro-Hungarian as well as from the Russian empire separated several new states. Moreover, several new

---

<sup>9</sup> International Court of Justice, *Accordance with international law of the unilateral Declaration of Independence of Kosovo*, Advisory Opinion, ICJ Reports (2010), para. 80

<sup>10</sup> Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, 1995), p.3

<sup>11</sup> Ibid.

<sup>12</sup> Supra 10, p.129.

states were born in Europe as they separated from colonial powers. In the 21<sup>st</sup> century world, secession does not happen with great ease and is a much more difficult process than ever before, because there is almost no colonial powers and secession wants to take place in democratic states, such as Spain or United Kingdom, and that is why secession and the principle of self-determination is more complicated and controversial as ever. Nowadays, the principle of self-determination is divided in two forms full (external) self-determination and qualified (internal) self-determination.<sup>13</sup> The Canadian Supreme Court during Quebec case formulated this issue and separated external self-determination from the internal one as well as they formulated that self-determination can take place outside the colonial context as well.<sup>14</sup>

This clearly shows that the issue of internal self-determination and remedial secession in nowadays is still an open topic for the interpretation and is also a controversial one.<sup>15</sup> That has been approved by recent cases of Kosovo, Catalonia, Montenegro and Scotland which will be analysed and compared later on in this bachelor thesis to understand the role of the referendums in these secession attempts, because this issue leaves an open gap for the main research question of this Bachelor thesis - role of independence referendums and if they are a pre-requisite to be internationally recognized, because nowadays there is not one common practice by the states which is followed in the situations where the principle of self-determination is used as a tool to declare a new independent state.

All this ambiguity and different interpretation of the principle of self-determination in international law can be explained by the fact, that the Charter of United Nations states that one of the purposes of the United Nations is:

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace<sup>16</sup>

There is no further definition on what the ‘self-determination’ means. There are also no obligations which are forced on to the member states by the United Nations Charter in this area, so the open gap is left by the United Nations themselves, by not defining self-determination in more precise way. Moreover, the principle of self-determination is also described in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), but in these two covenants the principle of self-determination is not explained in more detailed way than in UN Charter:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. The right shall be promoted “in conformity with the provisions of the Charter of the United Nations<sup>17</sup>

---

<sup>13</sup> James Crawford, *Brownlie’s principles of public international law*, (Oxford University Press, 2012), p.141

<sup>14</sup> Supreme Court of Canada, *Reference re Secession of Quebec* (1998)

<sup>15</sup> Supra 13, p.142

<sup>16</sup> United Nations, *Charter of the United Nations*, Article 1, paragraph 2

<sup>17</sup> *International Covenant on Civil and Political Rights (ICCPR)* (declared open for signature and ratification 19 December 1966, entered into force 23 March 1976), 999 UNTS 171, article 1, paragraph 3 Also: *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (declared open for signature and ratification 19 December 1966, entered into force 03 January 1976), 993 UNTS 3, article 1, paragraph 3

As mentioned before this does not define more clearly the application of the principle of self-determination. It only marks out that the principle of self-determination should be used in the situations where it does not violate other articles of the Charter of United Nations.

These two definitions mentioned above make clear that the self-determination applies to the ‘people’. The main sources of international law do not explain or limit what is the ‘people’. That is why each case of self-determination is judged individually and there are no two similar cases, because in each situation there is a need to look at many different criteria to evaluate if certain group of people do apply for the application of the principle of self-determination.

### **1.3 Relationship between the principle of self-determination and the principle of territorial integrity**

The most important aspect of these two principles in regard to this bachelor thesis is what are the relationship between them both. In regards of this thesis it is important because the international recognition of the secessionist state in the most cases depends on how well the interlink between these two principles is managed and argued. When the importance of this interlink is explained it will become much simpler to understand the concrete role of independence referendums in the process of state’s international recognition.

As mentioned before, in this thesis, these two fundamental international law principles are essentially contradicting. While one is stating that all people have a right to self-determination<sup>18</sup> other is claiming that states should not promote any border changes in another state, what basically means that it puts restriction to any new state to emerge. In this situation it is difficult to find any solutions and compromises, yet the secession movements still arise in the modern world and that always arise heated discussions between the secessionist side supporters and the ones who support the predecessor state. One of the most significant mistake for both sides is that they interpret both principles as absolute, while they are not. The secessionist who base their claim to independence on the international principle of self-determination usually argue that the basis for that is their history and discrimination from the predecessor states side. Moreover, they try to prove that the new state meets the criteria to be called a state. These criteria were set out on the Montevideo Convention on the Rights and of the States which was adopted on the 26 December 1933 in Montevideo, Uruguay.<sup>19</sup> Montevideo Convention now is a part of the customary international law and sets out four main criteria to “create” a state – a defined territory, permanent population, a government and a capacity to enter into relations with other states.<sup>20</sup>

At the same time the predecessor state usually argues towards territorial integrity and that the self-determination of secessionist movement would essentially violate it. Furthermore, they bring out the constitutional basis, where often it is written that the state is inseparable, and the secession would completely violate the constitution (good example is the latest case of Catalonia). This is

---

<sup>18</sup> Supra 16.

<sup>19</sup> *Montevideo Convention on the Rights and Duties of States* (signed at Montevideo, 26 December 1933, entered into force, 26 December 1934) <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf> (accessed 25 March, 2018)

<sup>20</sup> Ibid.

done because the international law does not regulate the referendums and the predecessor state uses it to serve its political interest.

This leaves a dilemma to the other states, because they as members of the United Nations need to respect both these fundamental international law principles and which one of these principles the other is not clear. That is why the cases of the secession are more often solved from the political point of view. If the creation of a new state will support other state political interests they will internationally recognize it, if it will not fit the political interests of the other state, then it will find some arguments why to defend their position to not recognize the secessionist state and why the whole process of secession is illegal and violates international law.

Moreover, looking from this point of view it becomes clear that this is a way of how the relationship between the principle of self-determination and the principle of territorial integrity is regulated. Based on their political point of view, states defend one principle which is supporting their policy and in the same time arguing strongly against the other principle that does not fit their political strategy by stating that in this situation it violates international law. This statement is supported by international relations theory realism. Realism emphasizes the constraints on politics imposed by human selfishness and the lack of one international government which would regulate the states so that they follow the law. Because of the lack of this international government, the realists argue that there is anarchic system in the international relations and states can do whatever they want and that there is no one who could punish them for it.<sup>21</sup> As many realist scholars argue that the interest of the state is over any other interests and values and the main goal for any government is to serve to the state it represents.<sup>22</sup>

In the case of the relationship between principle of territorial integrity and the principle of self-determination the realism relates in the way that, as already previously mentioned, states chooses their position which is supporting their political strategy, but every states political strategy is built in regards to increase the state's power and to protect the interests of their citizens, and the realism explains that in international relations there is one central focus after which states seeks – power.<sup>23</sup>

To sum up, one more time, to make it completely clear the relationship between these two fundamental principles is regulated by the states desire for the struggle of power. They will argue in favour of one or another principle, if these will aid them in achieving their political goals and power. This behaviour of the states in regards these two principles can be explained by international relations theory – realism.

---

<sup>21</sup> Jack Donnelly, *Theories of International Relations, fourth edition, realism* (Palgrave Macmillan, 2009), p.32-33.

<sup>22</sup> Ibid, p.51

<sup>23</sup> Supra 22.

## 2. COMPARATIVE STUDIES TO DETERMINE THE ROLE OF THE INDEPENDENCE REFERENDUMS IN THE CASE STUDIES

### 2.1 The case of the Catalonia

#### 2.1.1 The scope of the struggle for the independence in the case of the Catalonia

The Catalanian political leaders have spoken about the independence of Catalonia from Spain for the several years. At the beginning of these talks one could have assumed that these talks about the independence of Catalonia were only to get the votes from the more nationalistic electorate in Catalonia. However, time passed by and first signs appeared that the idea of the independent Catalonia is something more than just some cheap talk and that made the government of the Spain nervous. The most significant turnover point was at December 2012 when Head of the region Artur Mas was re-elected, and the party he represents signed the governing pact with the left-wing party ERC, because both these parties was in favour for the independence referendum.<sup>24</sup>

This re-election and signing of the governing pact meant that all the discussions which before were only talks were now made official in political level. After that, there occurred several non-violent protests, for example people in Catalonia inspired from the Baltic Way which occurred more than 27 years ago did the same thing – they made living human chain which was approximately 400 kilometres long through the whole Catalonia. They protested against the Spain's efforts to block the independence of the Catalonia.<sup>25</sup> However, in the March of 2014 Spanish Constitutional Court ruled that the planned referendum is unconstitutional, because the article 2 of the Spanish constitution 1978 states:

The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.<sup>26</sup>

Moreover, in 1978 more than 90% percent of Catalans voted in support of this constitution, because it gave them wide autonomous power over the region, but in the meantime with that they agreed that Spanish Nation is indissoluble.<sup>27</sup>

After that in the following years the situation in Catalonia got more and more tense. In September 2015 for the first time the separatist parties won a regional election and they stated that it gave them the right to push for independence and only few months after that in November Catalanian parliament adopted a resolution which supported independence.<sup>28</sup>

<sup>24</sup> *Catalonia profile – Timeline*, (bbc.com, 25 December, 2017) <http://www.bbc.com/news/world-europe-20345073> (accessed 27 March, 2018)

<sup>25</sup> *The Catalan Way and the Baltic Way – Historical Parallel or Just Political Hype?* (news.err.ee, 13 September, 2013) <https://news.err.ee/108233/the-catalan-way-and-the-baltic-way-historic-parallel-or-just-political-hype> (accessed 27 March, 2018)

<sup>26</sup> *Spanish Constitution of the 1978 (rev.2011), article 2* [https://www.constituteproject.org/constitution/Spain\\_2011](https://www.constituteproject.org/constitution/Spain_2011) (accessed 27 March, 2018)

<sup>27</sup> *Why the Referendum on Catalan independence is illegal*, (economist.com, 26 September, 2017) <https://www.economist.com/blogs/economist-explains/2017/09/economist-explains-17> (accessed 27 March, 2018)

<sup>28</sup> Supra 27.

The escalation of the whole case of Catalan independence happened in the second half of the year 2017. In the beginning of October, Spanish police got involved and disrupted the planned independence referendum with the violence. More than thousand people got injured and that created a major attention and condemnation from media and people all over the world. It even raised the question – how democratic is Spain really? Spain once again based its actions on constitutional arguments, stating that Catalonians with this referendum are violating the Constitution of Spain. Short time after the referendum Catalan government voted for unilateral declaration of independence from Spain on the basis of the independence referendum which occurred on the 1<sup>st</sup> October. Spain responded immediately by firing the regional president of Catalonia – Carles Puigdemont and stated that there will be a new regional election in Catalonia on 21<sup>st</sup> December 2018. The prime minister of the Spain Mariano Rajoy stated that there will a be new regional elections which will be free, clean and legal as soon as possible and that it will be the way how to restore the autonomy of Catalonia, because he does not want to take it away for a long time.<sup>29</sup>

Moreover, Spain decided to implement a more aggressive measures on Catalonia, because it became clear for Spain that Catalans did not learn from their past mistakes. Spanish government decided to activate the article 155 of the Constitution of Spain which states:

1. If a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet said obligations, or to protect the abovementioned general interest.
2. With a view to implementing the measures provided for in the foregoing paragraph, the Government may issue instructions to all the authorities of the Self- Governing Communities.<sup>30</sup>

Activation of the article 155 of the Constitution of Spain meant that Spain is taking away the autonomy which was given to the region of Catalonia and that they restore the full governance of the Spanish government in the region.

In the following regional elections on 21<sup>st</sup> December the parties who supported secession from Spain celebrated victory once again. This was a big blow out for Spanish government and prime minister Mariano Rajoy whose People Party (PP) got only 4,2 percent of the votes and that meant only 4 out of 135 seats. This was the first time when PP where unable to form its own parliamentary group in Catalan Parliament.<sup>31</sup> Of course, the outcome of elections also meant that Catalonia's struggle for secession from Spain and independence would continue and that the international pressure for Spain would not go away with great ease.

---

<sup>29</sup> *Spain dissolves Catalan parliament and calls fresh elections* (theguardian.com, 28 October,2017)

<https://www.theguardian.com/world/2017/oct/27/spanish-pm-mariano-rajoy-asks-senate-powers-dismiss-catalonia-president> (accessed 27 March, 2018)

<sup>30</sup> *Spanish Constitution of the 1978 (rev.2011), article 155* [https://www.constituteproject.org/constitution/Spain\\_2011](https://www.constituteproject.org/constitution/Spain_2011) (accessed 27 March, 2018)

<sup>31</sup> *Total collapse of the PP in Catalonia leaves Rajoy exposed* (catalanmonitor.com, 22 December, 2017) <http://catalanmonitor.com/2017/12/22/total-collapse-of-the-pp-in-catalonia-leaves-rajoy-exposed/> (accessed 27 March,2018)

The matter of the secession of Catalonia from the Spain is ongoing till this day. There have been arrests for several previous Catalan governments ministers as well as there is an order to arrest the former prime minister of the region Carles Puigdemont.<sup>32</sup> This case as well as the other case which involves the issue of self-determination, territorial integrity and secession is a controversial one. Only time will show how the Catalan struggle for the independence from Spain will end.

### 2.1.2 Independence referendum announced illegitimate on the constitutional basis

It is clear that the last independence referendum which took place in Catalonia on 1<sup>st</sup> October 2017 did not leave anyone indifferent. Moreover, the Spanish government tried violent measures to stop this independence referendum. These violent measures included raiding polling stations and firing rubber bullets to the people to deny the legitimacy of this independence referendum.<sup>33</sup>

This independence referendum was an important cornerstone to the Catalan secession movement, because the Catalan government later on, in the end of the October 2017 voted for the unilateral declaration of independence from Spain. Unilateral declaration of independence means that state declares independence without a formal agreement from the state from which it is seceding.<sup>34</sup> The Catalan government and parliament based this unilateral declaration of independence on the basis of independence referendum, but afterwards they suspended this declaration by arguing that they still need discussions with Madrid, because Puigdemont argued that he wants to lower the tension between the Madrid and Catalonia. He highlighted that they need to move further together, and that Madrid should stop denying the self-determination of Catalonia.<sup>35</sup>

However, as already stated above, Spanish government declared that this referendum is illegitimate, because it violated the constitution of Spain and based on that claim Spanish government were not ready to even consider any kind of independence talks. In this moment the international reaction was crucially important for Catalan secession movement, because if other states would internationally recognize Catalonia on basis of independence referendum it would be a significant step forward in achieving the independence from Spain. In this case unfortunate for Catalonia other states decided to support Spain's territorial integrity and almost all state's leaders and Foreign ministers when they were asked about situation with Catalan independence referendum answered that it is Spain's internal problem and that they do not want to interfere in that, but they also outlined that they fully support Spain's territorial integrity. For example, Angela Merkel said:

“We are taking a very close look at Catalonia and are supporting the position of the Spanish government, which happens to be supported by all major political parties in Spain, we are very concerned and hope there will be solutions based on the Spanish Constitution.”<sup>36</sup>

---

<sup>32</sup> *Spanish judge jails eight members of deposed Catalan government* (theguardian.com, 2 November, 2017) <https://www.theguardian.com/world/2017/nov/02/spanish-court-question-catalonia-separatists-except-puigdemont> (accessed 27 March, 2018)

<sup>33</sup> *Hundreds injured as Spain cracks down on Catalan referendum* (cnn.com, 1 October, 2017) <https://edition.cnn.com/2017/10/01/europe/catalonia-spain-independence-referendum-vote/index.html> (accessed 3 April 2018)

<sup>34</sup> Douglas George Anglin, *Zambian Crisis Behaviour: Confronting Rhodesia's Unilateral Declaration of Independence 1964-1965* (McGill-Queens, 1994)

<sup>35</sup> *Catalonia independence declaration signed and suspended*, (bbc.com, 10 October, 2017) <http://www.bbc.com/news/world-europe-41574172> (accessed, 3 April, 2018)

<sup>36</sup> *Merkel, Macron and May show support for Spain over Catalan crisis* (elpais.com, 20 October 2017) [https://elpais.com/elpais/2017/10/20/inenglish/1508492716\\_965994.html](https://elpais.com/elpais/2017/10/20/inenglish/1508492716_965994.html) (accessed 3 April, 2018)

This position of Merkel can be explained in the way that Merkel and whole Germany is interested in the strong European Union, but division of Spain would be the last thing that the European Union would want only one and a half year after the United Kingdom voted for leaving the European Union. The secession of Catalonia would divide Europe and European Union even more. That is why also, the other leaders from “big power” states in European Union supported Spain and outlined that everything must be done within the framework of the constitution of Spain, because they knew that if this matter will be resolved in this specific way, the referendum will be announced illegitimate on the basis of the Spanish constitutions article two which, as already mentioned, states about indissoluble unity of the Spanish Nation.<sup>37</sup> French president Emmanuel Macron statement proves that:

“this European Council will be marked by a message of unity, unity around our member states in the face of the crises they may experience, unity around Spain.”<sup>38</sup>

But the great highlight and summary about the position of the whole European Union and the chances of Catalonia being internationally recognized by the European Union states was marked out by the President of the European Parliament, Antonio Tajani:

“Nobody in the EU would recognize the independence of Catalonia”<sup>39</sup>

After all, as author of this bachelor thesis pointed out previously, the cases of secession is decided by politics and not by international law and how it is written.

Catalonia does not have a right to independence, and at the same time it is not doing anything illegal internationally when claiming or declaring independence. For better or worse, this is everything that the international law of statehood has to say on the matter. The rest is a political game.<sup>40</sup>

States decide what is politically more suitable for them and then defend their positions by appealing to the law which supports it the best.

What is striking – or perhaps not – is how little international law actually has to say on secession and indeed even on statehood. Statehood is quite simply a politically-created legal status under international law. Catalonia is yet another proof that statehood is a complicated nexus of law and politics which cannot be explained by legal rules alone. International law merely delineates the field for a political game. Just as studying football rules cannot tell us which team is going to win – Barcelona or Real – studying the law of statehood alone cannot tell us how states emerge.<sup>41</sup>

In the case of Catalonia, for the declaration of independence and international recognition the independence referendum did not help, because the Supreme Court of The Spain ruled that independence referendum is illegitimate on the constitutional basis and other states publicly stated, that the case of Catalonia is Spain’s internal issue.<sup>42</sup> To be fair, it is difficult to imagine what would

---

<sup>37</sup> Supra 36; Supra 26.

<sup>38</sup> Supra 36.

<sup>39</sup> Ibid.

<sup>40</sup> Jure Vidmar, *Catalonia: The Way Forward is Comparative Constitutional Rather than International Legal Argument* (ejiltalk.org, 24 October, 2017) <https://www.ejiltalk.org/catalonia-the-way-forward-is-comparative-constitutional-rather-than-international-legal-argument/> (accessed 3 April, 2018)

<sup>41</sup> Ibid.

<sup>42</sup> *"Recurso de inconstitucionalidad no.4334-2017, contra la Ley del Parlamento de Cataluña 19/2017, de 6 de septiembre, del Referéndum de Autodeterminación"* (Agencia Estatal Boletín Oficial del Estado. 6 September 2017) <https://www.boe.es/boe/dias/2017/09/08/pdfs/BOE-A-2017-10287.pdf> (accessed 28 April 2018); Aritz Parra & Ciaran

help in this case, because at the current political situation in to the world and the Europe as such there is no need for Catalonia to divide from the Spain and become independent state. That was showed by the official positions and statements by the other states in the matter of Catalan secession from the Spain. The independence referendum in this case gave great international attention to the Catalonia and even made Catalan parliament to vote in the favour of the unilateral declaration of independence from Spain, but that was it. It did not succeed. To be realistic, in the following years Catalonia will not become independent state for the same reason why it did not become it after independence referendum in 1<sup>st</sup> October 2017 – politics. No independence referendum or any other international instruments will help Catalonia to become independent state till the moment when the independence of Catalonia will be politically profitable for the bigger states.

## 2.2 The case of the Scotland

### 2.2.1 The scope of the struggle for the independence in the case of the Scotland

The Scotland has been part of the United Kingdom in all its forms since the 18<sup>th</sup> century. During these times there has been various disagreements, but in the 2014 was the first time since the unification and creation of United Kingdom when Scotland decided to give the choice of their future in the hands of their citizens – they organized independence referendum where the voters needed to answer to one simple question:

"Should Scotland be an independent country?"<sup>43</sup>

The idea of independence referendum in Scotland came step-by-step. It all started when Scottish National Party (SNP) put out as one of their pre-election promises to hold an independence referendum when they were participating in the race of Scottish Parliament elections in 2007. Mainly because of the promise the independence referendum will be organised the SNP became the largest party in Scottish Parliament. During their term they worked step by step to organize the referendum. In 2010 the Scottish government published ‘‘Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper’’ contained a consultation document and a draft version of the bill.<sup>44</sup> The Bill was composed from four chapters – The Ballot Papers , Mechanics of the Referendum, Regulating the Campaign, but the last chapter explains how the consultation on the draft Bill will work and how comments should be submitted.<sup>45</sup> However, later on in the Scottish Parliament only 50 from 129 Members of the Parliament supported referendum<sup>46</sup> which contained from two questions:

The first question asks whether the Scottish Parliament should have more devolved responsibility.

---

Giles, *Spain: Top court officially rules Catalan referendum illegal* (Chicago Tribune, 17 October, 2017) <http://www.chicagotribune.com/news/nationworld/ct-catalonia-spain-independence-20171017-story.html> (accessed 28 April 2018)

<sup>43</sup> *Scottish independence referendum* (gov.uk) <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about#what-was-the-question> (accessed 6 April, 2018)

<sup>44</sup> Scotland's future: Draft Referendum (Scotland) Bill Consultation Paper (gov.scot) <http://www.gov.scot/Resource/Doc/303348/0095138.pdf> (accessed 6 April, 2018)

<sup>45</sup> Ibid.

<sup>46</sup> *Timeline: Scottish Independence Referendum* (bbc.com, 15 October, 2012) <http://www.bbc.com/news/uk-scotland-scotland-politics-19907675> (accessed 6 april, 2018)

The second question asks whether the Scottish Parliament should also have its powers extended to enable independence to be achieved.<sup>47</sup>

that meant that SNP needed to wait till the next elections to try to get more seats at the parliament to organise the independence referendum, but Scots needed to wait for their chance to vote for their future for several more years. However, the Scottish Parliament elections in 2011 were even more successful than previous ones for the SNP and they in total got 69 from the 129 seats, this meant that they can form a majority government in Scottish Parliament<sup>48</sup> and that kept the dream for independence referendum alive and the leader of SNP party Alex Salmond marked out that:

"I'll govern for all of the ambitions for Scotland and all the people who imagine that we can live in a better land. This party, the Scottish party, the national party, carries your hope. We shall carry it carefully and make the nation proud."<sup>49</sup>

He also pointed out that referendum will be held in 2<sup>nd</sup> part of the term.<sup>50</sup>

One of the most vitally important moments in the whole case of the Scotland is when on the 8<sup>th</sup> January of 2012 British prime minister David Cameron states:

"We owe the Scottish people something that is fair, legal and decisive so in the coming days we will be setting out clearly what the legal situation is."<sup>51</sup>

This David Cameron's statement meant that the United Kingdom is ready to not put any obstacles in the way for the independence referendum. After that, on 15 October 2012 the Prime Minister's words were finally put in the actions when UK and Scottish leaders, David Cameron and Alex Salmond signed legally binding agreement – Edinburgh Agreement. In the agreement both sides agreed that the referendum would contain from one simple yes/no question on Scotland leaving the UK. It also for the first time in the history of the United Kingdom indicated that 16-17-year olds will have a right to vote in this referendum.<sup>52</sup> Moreover, the United Kingdom agreed to turn on a mechanism under the Section 30(2) of the Scotland Act 1998:

"Her majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient."<sup>53</sup>

This was done to make Scotland's independence referendum legal under the United Kingdom laws and Scottish Parliament would have the right to organise the independence referendum and in the end of Scotland's secession there would be greater chance that other states would internationally recognize Scotland as an independent state for the reason that the process of secession was done accordingly within the laws of the United Kingdom.

However, on the 18<sup>th</sup> September 2014, in spite of Scottish government having done everything to put the power in to the hands of people, Scots decided to stay in to the United Kingdom. From the total of 3,623,344 people who voted slightly more than 2 million people voted "No"<sup>54</sup>, which in

<sup>47</sup> Supra 46.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid

<sup>53</sup> *Scotland Act 1998, Section 30(2)* (legislation.gov.uk) <http://www.legislation.gov.uk/ukpga/1998/46/section/30> (accessed 6 April, 2018)

<sup>54</sup> *Scottish Independence Referendum, Results* (scotlandreferendum.info) <http://scotlandreferendum.info> (accessed 6 April, 2018)

this case meant that majority of Scottish citizens did not want that Scotland becomes independent state.

### **2.2.2 Scotland decides to remain as a part of the United Kingdom with the help of the independence referendum**

In the case of Scotland, the independence referendum was chosen as a main instrument to determine the will of Scotland to become an independent state. In this case there is a need to understand that it differs from the most cases where the secession has/is happening in the way that predecessor state did not use their right to territorial integrity as well as the United Kingdom did not put any other obstacles in the way to the Scottish independence. Moreover, the United Kingdom even came forward and activated Section 30(2) of the Scotland Act 1998 to make this independence referendum legal under the laws of the United Kingdom, as already was mentioned before.

However, the biggest discussion in this case in regards of the independence referendum was not the usual one – will other states internationally recognize Scotland after Scotland will declare independence from United Kingdom on the basis of independence referendum (in the situation where people voted for leaving the United Kingdom), because it was more or less clear that they will, due to the fact that United Kingdom stepped down from their right to the territorial integrity. The biggest issue under the international law was if the Scotland would remain as a member of European Union after becoming an independent state. The SNP argued that Scotland would remain members of the European Union and their spokeswoman at that time argued that Scotland will remain as the equal successor state and will maintain the same international treaties and obligations as the United Kingdom.<sup>55</sup>

In the same time the leading international law scholars argued that under the international law Scotland should apply for the new membership to the European Union and they would not automatically become the member state of the European Union:

Scotland's position within the EU will depend on the EU's own legal order. But there are no legal rules within the EU that specially govern whether it can automatically succeed to membership (as distinct from the non-legal considerations that might govern any negotiated outcome – which might be more important in practice).

On the face of the EU treaties and other indications, it seems likely that Scotland would be required to join the EU as a new Member State. We will discuss its position from this perspective. We will then go on to note the possible complications that may arise if the ECJ were to attach some independent significance to EU citizenship in the form of individual rights.<sup>56</sup>

Moreover, this opinion of international law scholars was supported from political side as well, when Spain stated:

---

<sup>55</sup> “Join the queue” for EU membership, Spain tells Alex Salmond, (theguardian.com, 24 October, 2012) <https://www.theguardian.com/politics/2012/oct/24/scotland-eu-membership-spain> (accessed at 10 April, 2018)

<sup>56</sup> J.Crawford, A.Boyle, *Opinion: Referendum on the Independence on Scotland – International Law Aspects* (assets.publishing.service.gov.uk) p.100 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf) (accessed at 10 April, 2018)

"In the hypothetical case of independence, Scotland would have to join the queue and ask to be admitted, needing the unanimous approval of all member states to obtain the status of a candidate country ... and to sign the final treaty [of accession],"<sup>57</sup>

This argument, that Scotland will need to leave the European Union, afterwards was raised as one of the main reasons of why the Scots voted for staying a part of the United Kingdom in the independence referendum. However, after Brexit vote, when United Kingdom voted for leaving the European Union the talks of repeated Scottish independence referendum have occurred again, because separately the Scotland voted for staying in European Union.<sup>58</sup>

To sum up, the independence referendum in the case of Scotland was used as the main instrument which will determine if the Scottish people wants to become independent, it was possible because the United Kingdom made adoption to their Constitution to make this referendum legitimate. However, it should be taken into the account that this independence referendum basically had second meaning – the EU membership of Scottish people and many of them chose it over the independence of Scotland. The independence referendum was the key moment which decided the outcome for the Scottish independence movement.

## 2.3 The case of the Montenegro

### 2.3.1 The scope of the struggle for the independence in the case of the Montenegro

Montenegro since the 1918 was a part of the Kingdom of Yugoslavia which later on was succeeded by the Federal People's/ Socialist Federal Republic of Yugoslavia. After the collapse of the Yugoslavia, Montenegro did not become an independent state but remained together with Serbia in the State Union of Serbia and Montenegro.<sup>59</sup> In the 1992 Montenegrins had a first chance to become an independent state, but in the referendum, which was held in 1992 Montenegrins with huge majority (more than 95% of voters) decided to stay as a part Yugoslavia together with Serbia and they formed a Socialistic Republic of Yugoslavia.<sup>60</sup>

It is necessary to understand that almost all of 20<sup>th</sup> century during which Montenegro was a part of a different states the population of Montenegro has mixed, and the population consisted not only of Montenegrins, but also of a large proportion of Bosnians, Serbs, Croats. Significant number of them supported to be a part of Serbia and was afraid that if Montenegro would like to become independent it would start a war like in 1990's when Slovenia, Croatia and Bosnia wanted the independence of Yugoslavia. This was the reason why it was clear for the independence supporters that this will be a very close race and that every vote can be decisive.

The first major step towards Montenegrin independence was that in year 2003 they together with Serbia ratified the Constitutional Charter of the State Union of Serbia and Montenegro in which

<sup>57</sup> Supra 55.

<sup>58</sup> *EU referendum results* (The Electoral Commission), <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (accessed at 10 April, 2018)

<sup>59</sup> *Montenegro History Part 2*, (visit-montenegro.com) <https://www.visit-montenegro.com/montenegro/history/2/> (accessed 13 April, 2018)

<sup>60</sup> Montenegro Independence (visit-montenegro.com) <https://www.visit-montenegro.com/montenegro/montenegro-independence/> (accessed 13 April, 2018)

the article 60 which was constructed for the situations when one state would want to break away from the State Union of Serbia and Montenegro. Article 60 stated that after three years of being in this union a state can organise an independence referendum:

Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro.

The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum.

The law on referendum shall be passed by a member state bearing in mind the internationally recognized democratic standards.

Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor.

A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state and the newly independent state.

Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia.<sup>61</sup>

Ratification of this constitution was a thought out approach from the side of Montenegrin government, because it meant that the Serbian side will not have a constitutional claim against Montenegrin independence referendum after the three years. If Montenegro had waited extended period of time to gain independence, three more years was a small price for it. Moreover, a great idea from the Montenegrin government's side was to accept the European Commission's suggestion that there is a need to reach at least 55% majority in favour of independence. It was a thought out move because of the two reasons – firstly, by following these rules set out by European Commission Montenegro made sure that European Union would recognize the legitimacy of the independence referendum, secondly by accepting this 55% border they achieved that opposition did not boycott the independence referendum what could had made the independence process illegitimate as well.

"I think the main reason they put it at that was to guarantee that the opposition took part," says Janusz Bugajski, director of the New European Democracies Project at CSIS. "There was a danger that they would have boycotted, and this would have delegitimized the election." Timothy William Waters, a law professor at the University of Mississippi<sup>62</sup>

One more cornerstone for this independence referendum and Montenegrin independence as such was to decide which people will be eligible to vote in the following referendum. With the help of OSCE it was decided that:

---

<sup>61</sup> *Constitutional Charter of the State Union of Serbia and Montenegro, article 60*, [http://www.worldstatesmen.org/SerbMont\\_Const\\_2003.pdf](http://www.worldstatesmen.org/SerbMont_Const_2003.pdf) (accessed 13 April, 2018)

<sup>62</sup> Lee Hudson Teslik, *Montenegro's Referendum On Independence*, (Council on Foreign Relations, 19 May, 2006) <https://www.cfr.org/backgrounder/montenegros-referendum-independence> (accessed 13 April, 2018)

On the day, the electorate, a.k.a. the *pouvoir deconstituant*, comprised anyone who was over eighteen years old and who had been permanently resident in Montenegro for at least twenty-four months.<sup>63</sup>

After all the preparatory legal and political work was done, Montenegro held an independence referendum on 21 May 2006. The referendum was successful and so the needed 55% borderline was reached – in favour for the Montenegrin independence voted 55,5% of participants and against 44,5% with the record high total turnout of 86,49%<sup>64</sup> Already on 23 of May all five-permanent member of United Nations Security Council – China, Russia, United States, France and United Kingdom recognized the Montenegrin independence referendum as legitimate. On 31 May the independence referendum commission officially confirmed the results, but in the same day Serbia issued their official statement that the Republic of Serbia are the successors of the State Union of the Serbia and Montenegro accordingly to the Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro.<sup>65</sup> In the 3 June 2006 Montenegro made a Declaration of Independence on the basis of the independence referendum which was held on 21 May. After that, one after another, states recognized Montenegro and nowadays Montenegro is a completely functioning independent state which is an active member of United Nations and NATO.

### **2.3.2 Independence referendum used as a main instrument to successfully declare the independence and gain international recognition**

Independence referendum in the case of Montenegro similar as in the case of Scotland was chosen as a main instrument to achieve the independence. The most important part was to make this referendum legitimate and gain the international recognition after the referendum and, as already explained before, that was done by following the European Commission's recommendation to reach at least 55% majority in favour of independence. The way how the European Commission came to this exact number – 55% is unclear un disputable, because previous practice in former Yugoslavian states was that there is a need for two-third majority and this practice was also used in the previous Montenegrin independence referendum in 1992.

Nor was the EU in Montenegro averse to looking at constitutional practice elsewhere. The opinion of the Supreme Court of Canada on Quebec [‘the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.’ *Secession Reference* para. 92] was used in Montenegro to put into numbers the Supreme Court's vague reference to a clear majority.<sup>66</sup>

Once again, this disputable decision can be explained by looking at the political interests. It was a long-term interest for the European Union to finally end the last state union which remained from the Yugoslavia and still carried some legacy from this state. That is why the European Union put so much effort into this referendum as it was crucial that it would occur without any complications.

<sup>63</sup> Malcolm Maclaren, ‘*Trust The People*’? *Democratic secessionism and Contemporary Practice* (German Law Journal, 2015)

<sup>64</sup> *Republic of Montenegro, Referendum On State-Status, 21 May 2006, OSCE/ODIHR Referendum Observation Mission Final Report*, (OSCE, 4 August 2006)  
<https://www.osce.org/odihr/elections/montenegro/20099?download=true> (accessed 13 April, 2018)

<sup>65</sup> *Serbia inherits state and legal continuity of Serbia-Montenegro*, (Government of the Republic of Serbia, 31 May, 2006) <http://www.srbija.gov.rs/vesti/vest.php?id=23938> (accessed 13 April, 2018)

<sup>66</sup> Stephen Tierney, *Referendums Today: self-determination as Constituent Power* (ejiltalk.org, 9 February 2011)  
<https://www.ejiltalk.org/sudans-lesson-for-secession-a-comment/> (accessed 15 April, 2018)

Moreover, when it was necessary to decide who will be eligible to vote in the independence referendum the Montenegrin government together with advisors from international organisations decided that the Montenegrins who are living in Serbia will not have a right to vote and this decision considerably increased Montenegro's chances to independence.<sup>67</sup> This again proves that secessions, independences and the outcomes of referendums is more of a political than a legal decision.

“[T]he people cannot decide until someone decides who are the people”<sup>68</sup>

Because for the politicians at all times it has been clear that leaving significant power to the people can be dangerous as Robert Lansing, the realistic Secretary of State of Woodrow Wilson pointed that out<sup>69</sup>:

“Without a definite unit which is practical, application of this principle [of SD] is dangerous to peace and stability.”<sup>70</sup>

That is why already in the next day after the referendum when only the provisional results were published the European Union High Representative for Foreign and Security Policy made official statement about referendum, because it was crucial for their political interests that everything goes without slightest error to give someone a chance to state illegitimacy of the Montenegrin independence referendum:

"We're awaiting still the report of ODIHR [the OSCE Office for Democratic Institutions and Human Rights] but [it] seems that the process was orderly, and we have to congratulate everybody for that," he said in Brussels. "It ran smoothly and without any incident. This is a sign, no doubt, of maturity and responsibility of the Montenegrin people."<sup>71</sup>

But the spokesmen of the European Commission Amadeu Altafaj Tardio in the same day underlined the importance of the legitimacy of the referendum held in the previous day:

"[The European] Commission is pleased to note the preliminary reports that the referendum in Montenegro was carried out in a calm manner and with high turnout, which is important for the legitimacy of the vote,"<sup>72</sup>

These comments from high ranking European Union officials clearly shows that the European Union completely saw this Montenegrin independence referendum as a main tool which will legitimately make Montenegro an independent state.

In this case independence referendum was made as a main instrument to gain the Montenegrin independence, because it was impossible for Serbia to appeal to their right of territorial integrity, due to the fact that first of all Serbia and Montenegro was a state union and in to the Constitution of this state union was a special article which stated that after three years when this Constitution was signed the members of the Union can propose the independence referendum to the parliament

---

<sup>67</sup> Supra 63.

<sup>68</sup> Ivor Jennings, *The Approach to Self Government* (Cambridge University Press, 1956), p.56

<sup>69</sup> Supra 63.

<sup>70</sup> John O'Brian, *International Law* (Taylor & Francis, 2001), p.163

<sup>71</sup> Charles Recknagel, *Montenegro: Independence Referendum Turns Into Cliffhanger*, (rferl.org, 22 May, 2006) <https://www.rferl.org/a/1068564.html> (accessed 15 April, 2018)

<sup>72</sup> Ibid.

and if parliament approves on it than this referendum is legitimate.<sup>73</sup> In this case independence referendum accordingly served the political interests of the European Union.

The final fact which proves, that Montenegro gained independence and was internationally recognized because of the independence referendum which was held on 21 May 2006 is that after the official results of referendum was announced Montenegro made a Declaration of Independence and into this Declaration of Independence there was incorporated the independence referendum as a main basis of independence.

To sum up, the case of Montenegro is an example where the states struggle for independence perfectly came together with the political interests of world's most powerful nations and the international law as well as the Constitutional law of the State Union of Serbia and Montenegro. The independence referendum was used as a main instrument to fulfil these political interests.

## **2.4 The case of the Kosovo**

The case of the Kosovo independence is one of the most controversial ones if not the most controversial one in the history of the cases where the state wants to become independent. In the recent years dozens of the best international law scholars has published their opinions about this case, but still there is no consensus and clear opinion about it. Some scholars clearly state that Kosovo unilateral Declaration of Independence from Serbia was in accordance with international law and that other states should internationally recognize Kosovo as a state:

Supporters of Kosovo's independence point to the international involvement as strengthening its claim for independence, and as reflecting an international position that Kosovo should no longer be governed by Serbia in light of past violence and present stagnation. Moreover, the international involvement in the administration and institution-building in Kosovo may be considered as an important assurance that it will eventually fulfil the classical criteria for statehood.<sup>74</sup>

While in the same time there are as much if not even more scholars who think that this unilateral declaration of independence was clear violation of international law:

On the other hand, the opponents of Kosovo's independence view the international involvement as forbidding Kosovo to declare independence unilaterally. They point to the language of the preamble of Resolution 1244 that explicitly reaffirms the sovereignty and integrity of the Republic of Serbia (then, FRY), suggesting that any solution must be brought before the Council.<sup>75</sup>

Kosovo is also a case where the secessionist state declared independence without the independence referendum and states argue it was possible, because this is a sui generis case, however it is disputable and can be opposed.

### **2.4.1 The scope of the struggle for the independence in the case of the Kosovo**

---

<sup>73</sup> Supra 61.

<sup>74</sup> Zohar Nevo, Tamar Megiddo, *Lessons from Kosovo the Law of Statehood and Palestinian Unilateral Independence* (Journal of International Law & International Relations, 2009), p.104

<sup>75</sup> Ibid.

Firstly, it is important to understand the Kosovo struggle for the independence. Historically Kosovo has been a part of Kingdom of Serbia since 1917, but when Serbia joined Yugoslavia, Kosovo become a part of it. In 1963 Kosovo gained autonomy, this autonomy was extended by the Constitution of Yugoslavia 1974<sup>76</sup>, however Kosovo lost its autonomy in 1990.<sup>77</sup> After that in the following years the tension escalated between two large civilian groups of Kosovo – ethnic Albanians and ethnic Serbs, due to the fact that government of Yugoslavia discriminated Albanians by closing their schools and firing from the job in the public sector.<sup>78</sup> Later on in year 1996 in Kosovo there emerged the Kosovo Liberation Army (KLA) which pursued attacks at Serbian police units and politicians.<sup>79</sup> In 1998 KLA operations were already so powerful that the situation in Kosovo gained the form of armed uprising. Serbian police together with Yugoslavian army tried to restore the order in the region, but it only created a bigger chaos. That created thousands of refugees who tried to escape the conflict territory.<sup>80</sup> The situation in the Kosovo was so serious that the other nations and international organisations could not just stand by and watch. After several unsuccessful diplomatic negotiations and failed OSCE mission when the mission was stopped by Serbian forces<sup>81</sup> the NATO gave the ultimatum for the president of Yugoslavia Milosevic:

US Ambassador Holbrooke then flew to Belgrade, in a final attempt to persuade President Milosevic to stop attacks on the Kosovar Albanians or face imminent NATO air strikes.<sup>82</sup>

President Milosevic did not stop attacks and left NATO no other option as to intervene. After some time, the peace in the region was restored and Kosovo was administered by the United Nations (UN) Interim Administrative Mission in Kosovo.<sup>83</sup> During this period of UN mission in to the Kosovo situation in region changed. Yugoslavia became State Union of Serbia and Montenegro and later on in 2006 this state union separated and became two independent states – Serbia and Montenegro, whose separation process and the role of the independence referendum in it was analysed already in the previous paragraph of this thesis. However, in spite of all these changes Serbia still considered Kosovo as a part of it.<sup>84</sup> Meanwhile, under the international administration Kosovo was able to form its own government and other three criteria which were set out in the Montevideo Convention to classify as a state.<sup>85</sup> Based on that Kosovo made unilateral Declaration of Independence on 17 February 2008, because during the time of international administration in Kosovo little progress was made in the relationship between Kosovo and Serbia.<sup>86</sup>

There were major disagreements within the international community regarding the legality of such a unilateral act. It was finally decided to ask the International Court of Justice (ICJ)

<sup>76</sup> Stevan Pavlowitch, *Serbia: The History Behind the Name* (Hurst & Company, 2002), p.159

<sup>77</sup> Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge University Press, 2001) p.xxi

<sup>78</sup> The Editors of Encyclopedia Britannica, *Kosovo Conflict, Balkan History (1998-1999)* (britannica.com) <https://www.britannica.com/event/Kosovo-conflict> (accessed 17 April, 2018)

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> *NATO's role in relation to the conflict in Kosovo*, (nato.int, 15 July 1999) <https://www.nato.int/kosovo/history.htm> (accessed 17 April 2018)

<sup>82</sup> Ibid.

<sup>83</sup> The Editors of Encyclopedia Britannica, *Kosovo, Self-declared independent country* (britannica.com) <https://www.britannica.com/place/Kosovo> (accessed 17 April, 2018)

<sup>84</sup> Ibid.

<sup>85</sup> Supra 19.

<sup>86</sup> Rene Vark, *The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea* (Polish Yearbook of International Law, 2014), p.116

to clarify the situation. The latter found, in its advisory opinion of July 2010, that Kosovo's unilateral declaration of independence was not in violation of international law.<sup>87 88</sup>

After this ICJ advisory opinion Kosovo has been internationally recognized by 110 states<sup>89</sup>, in the same time there is plenty of the states who do not recognize Kosovo as an independent state, including states such as Spain and Serbia by using as a main argument preamble of Resolution 1244 that explicitly reaffirms the sovereignty and integrity of the Republic of Serbia (then, FRY), suggesting that any solution must be brought before the Council.<sup>90</sup>

#### **2.4.2 ICJ Advisory Opinion on Kosovo and the unilateral Declaration of Independence without organising the independence referendum**

The ICJ Advisory Opinion on Kosovo was one of the most waited court opinions in the last years, because it raised high hopes that it will finally make clear the issues and uncertainties around secession and territorial integrity. However, it arrived with major disappointment, because the court did not answer the questions if Kosovo is a state or whether it is lawful or unlawful for the other states to internationally recognize Kosovo.<sup>91</sup> The court has only answered that the unilateral declaration of independence does not violate international law<sup>92</sup>, because as they explained:

“The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly.”<sup>93</sup>

This is a bad legal job from the side of Serbia which did not formulate the question in the way that ICJ does not have a chance to escape from answering about the legal effects of the recognition of Kosovo and if the Kosovo is a state under international law.

Moreover, the fact that this unilateral Declaration of Independence is based upon the allegations that Kosovo fulfils four criteria set out in Montevideo Convention, which is considered as a part of international customary law, and not on the basis of independence referendum where the people of Kosovo has expressed their will makes this case an even more unique and controversial. Taking into account the fact that there was no independence referendum how does one know if the people of Kosovo wants for Kosovo to become an independent state? It is easy to answer to this question

<sup>87</sup> Supra 86.

<sup>88</sup> International Court of Justice, *Accordance with international law of the unilateral Declaration of Independence of Kosovo*, Advisory Opinion, ICJ Reports (2010)

<sup>89</sup> *Countries that have recognized Kosovo as an independent state* (beinkosovo.com), <http://www.beinkosovo.com/countries-that-have-recognized-kosovo-as-an-independent-state/> (accessed 17 April 2018)

<sup>90</sup> Supra 78.

<sup>91</sup> Dapo Akande, *ICJ finds that Kosovo’s Declaration of Independence not in Violation of International Law* (ejiltalk.org, 23 July,2010) <https://www.ejiltalk.org/icj-finds-that-kosovos-declaration-of-independence-not-in-violation-of-international-law/> (accessed 19 April, 2018)

<sup>92</sup> Supra 88.

<sup>93</sup> Ibid, para. 51

– one cannot know if the people of Kosovo really want to live in the independent state of Kosovo. Actually, the opinion of the people of Kosovo about this specific issue does not matter to the leaders of the big powers, due to the fact that it is all decided by the politics. In the case of Kosovo many great powers (USA, France, Germany, etc.) had already internationally recognized Kosovo in the same week after the unilateral Declaration of independence Kosovo was announced.<sup>94</sup> This recognition can be explained by the fact, that it would be embarrassing for these great powers to give back Kosovo to the Serbia after such a significant time period where the international organisations such as NATO and UN have been involved in the situation in Kosovo. The leaders would be required to explain why there was a need for almost 10 yearlong UN administrating mission which cost millions of Euros if in the end Kosovo still remained a part of Serbia without any improvement in the relationship between Kosovo and Serbia. In other words, the public could assume that money was spent for nothing. That is why all these great powers when questioned why they had recognized Kosovo as independent state, have responded that Kosovo meets all the criteria to be independent, but as they underline that this case should be looked as sui generis case.

“[...]France, too, acknowledged the sui generis character of the Kosovo situation, from which there cannot be drawn conclusions as to other situations in international practice. Germany dedicated to the sui generis argument section V of its written submissions, bringing up a number of arguments why this is such a unique case. The same approach was followed by Japan, which almost exclusively dealt with the sui generis character of Kosovo. The United Kingdom, too, followed essentially the argument of Kosovo being a sui generis case [...]”<sup>95</sup>

The European Council also announced that they see Kosovo as sui generis case only one day after Kosovo declared independence:

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.”<sup>96</sup>

The sui generis argument is used, because it is clear that if these states would recognize Kosovo's independence as a regular case, then in the future it could be used as a precedent in other similar cases, but that is not needed, because in these new situations political interests could demand another scenario and states are not interested to have one common practice in this issue. As well, it would mean that international community sees as a norm to declare independence without organising the independence referendum which allows the people of the territory, who want to become independent, to express their opinion about the independence. Not letting them choose would be a clear violation of democratic values. However, in spite of all argumentation from many involved parties it is clear that in Kosovo's case there is no reason to use sui generis argument. The

<sup>94</sup> Supra 89.

<sup>95</sup> Björn Arp, *The ICJ Opinion on the Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities* (German Law Journal, 2010) p.865

<sup>96</sup> Press Release, 2851st Council meeting, General Affairs and External Relations, External Relations, (Council of the European Union, 18 February 2008) p.7  
[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/gena/98818.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/98818.pdf) (accessed 19 April, 2018)

ICJ in their advisory opinion does not mention that Kosovo is sui generis case as well as they looked to the Kosovo case through international legal norms and principles and that show the case of Kosovo in the framework of international law.

‘[...]because the ICJ applied general international law, it is possible to apply the ICJ's position by analogy to other similar situations, which debunks the argument that the case of Kosovo does not create a “precedent”. In reality it would be very difficult to explain to other peoples who have aspirations for independence, e.g. Kurds, Tibetans, and Western Saharans, that they are not special and therefore they cannot use the case of Kosovo as an example.[...]’<sup>97</sup>

To summarize the case of Kosovo it is important to understand that in this case the political interests again prevailed over the international law. States by arguing that Kosovo is sui generis case did not follow basic international law norms. They mixed law with politics.

In a way, every conflict is unique. But there is a difference whether the uniqueness is used as a political or a legal argument. Kosovo and its supporters attempted to persuade the Court to adopt the latter approach and tried to place Kosovo outside the realm of international law.<sup>98</sup>

This is another, great example of how states operate and interpret international law to serve their own interests. They did not consider that it is necessary to know the opinion of the people who live in the territory of Kosovo by organising the independence referendum what is just absurd, because as the ICJ has outlined in the Western Sahara Case self-determination:

‘requires a free and genuine expression of the will of the peoples concerned’<sup>99</sup>

In this case it is clear that there was no free expression of the will of the peoples concerned, so there was a possibility that majority of people of Kosovo wants to stay as a part of Serbia and at the moment it is already too late to find that out.

## **2.5 Interaction between constitutional law and international law in the case studies in regard to independence referendums**

International law does not provide a clear answer on the role of independence referendums in cases when territory is exercising external self-determination and that is why independence referendum is regulated by constitutional law. It can be seen in all case studies written above (except Kosovo) that states when deciding to internationally recognize the state on the basis of independence referendum looks as if it has been organised accordingly with predecessor states constitutional law and at least officially basis their position on that. However, it is clear that international law needs to be taken into account as well when the independence referendum is organised. International Customary law argues that free and fair independence referendum is a necessity for any territorial change or otherwise these territorial changes are illegal according to the international customary law.<sup>100</sup> In spite of that, independence referendum by itself does not guarantee that territorial

---

<sup>97</sup> Supra 86, p.124

<sup>98</sup> Supra 97.

<sup>99</sup> Supra 3.

<sup>100</sup> Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine and Why the 16 March Referendum in Crimea Does not Justify Crimeas Alteration of Territorial Status under International law* (ejiltalk.org, 16 April, 2014) <https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march->

changes will be lawful under international law – the independence referendum must complete procedural norms in regard to this matter.<sup>101</sup> These norms are set out in the OSCE's 1990 Charter of Paris (hereinafter Charter of Paris) where the requirements for the new state to be internationally recognized is laid down.<sup>102</sup> Moreover, more recently in 2007 The Council of Europe asked the Venice Commission to put down on paper the Code of Good Practice on Referendums that would make clear under what procedure independence referendums would be legitimate under international law. The main things that need to be fulfilled accordingly to Charter of Paris and Code of Good Practice on Referendums are – Freedom of media and neutrality of the authorities, peacefulness, universal, equal, free and secret ballot and international referendum observation.<sup>103</sup>

In the same time the constitutional law of states in certain cases are prohibiting to complete these procedural requirements. In the case of Catalonia, as already mentioned, Spanish Supreme Court ruled that independence referendum is violating article 2 of the Constitution of Spain<sup>104</sup> and Spain was not ready to start any kind of negotiation with Catalan secessionist movement to make constitutional amendments. Catalans still did everything to make the independence referendum to occur. In the day of the independence referendum Spanish police used violence to stop the independence referendum. Here arises the issue of Spain violating the international law by prohibiting to occur peaceful independence referendum without the involvement of authorities and by using the force. In the same time, one can argue that Spain is protecting its territorial integrity on the constitutional basis that Spain is indissoluble nation as it is put down on article 2 of Spanish Constitution.<sup>105</sup> This shows how the international law and constitutional law makes controversy between one and another and gives an arena for politics to play a major role. In this case there was not any sanctions made against Spain even though they breached international law by using the force on the civilians. This also clearly shows that international law often adjusts to the state's constitutional law. By this it is meant that, for example, in this situation other states did not insist that Spain is violating the international law, because international community interpreted it as an inner issue of the Spain and Spain stated that they are protecting indissolubility of Spanish nation as it is put down in to the article 2 of Spanish constitution and not violating any laws.

In spite of that, cases of Montenegro and Scotland shows that there is also states who are ready to adjust their constitutional law to the international law. If in the case of Montenegro the Constitution of Serbia and Montenegro had a point that allowed Montenegro to organise the independence referendum<sup>106</sup> the United Kingdom after the negotiation with leaders of Scotland made amendments to its constitution to make the independence referendum legitimate under United Kingdoms and the international law.<sup>107</sup> Both – Serbia and United Kingdom did not put any obstacles in the way of organising the independence referendum – the authorities did not interfere,

---

[referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/](#) (accessed 30 April, 2018)

<sup>101</sup> Thomas W. White Jr, *Referendum in Crimea: Developing International Law on Territorial Realignment Referendums* (Houston Journal of International Law, Winter 2016) p.859

<sup>102</sup> OSCE, *Charter of Paris For a New Europe* (OSCE, 19-21 November, 1990) p.24-25

<https://www.osce.org/mc/39516?download=true> (Accessed 30 April, 2018)

<sup>103</sup> Supra 101, Supra 102

<sup>104</sup> Supra 26.

<sup>105</sup> Ibid.

<sup>106</sup> Supra 61.

<sup>107</sup> Supra 53.

referendum was fair and equal as well as the observers were not disturbed from doing their job. Moreover, United Kingdom risked starting the constitutional crisis, because the constitution was changed on the basis of political pressure and negotiations instead of the legal basis and that raises the doubts towards the constitution.<sup>108</sup>

In the case of Kosovo independence referendum did not take place and that is why it is not possible to analyse in this case the interaction between constitutional law and international law in regard to independence referendums.

---

<sup>108</sup> Iain Halliday, *The Road to the Referendum on Scottish Independence: the role of law and politics* (Aberdeen Student Law Review, November 2014) p.26

### 3. PROCEDURAL RECOMMENDABLE STEPS TO EXERCISE SELF-DETERMINATION IN TERRITORIAL STATES UNDER INTERNATIONAL LAW TO GET INTERNATIONALLY RECOGNIZED BY OTHER STATES

In the beginning of this part it is important to clarify that there are two means of exercising the right of self-determination in international law<sup>109</sup> -

an external one, which provides the people with the right to determine the international status of the territory; and an internal one ensuring the right of peoples to self-government within the confines of the parent state.<sup>110</sup>

In this particular part of this work there will be analyse of recommendable steps to external exercise of the right of self-determination in territorial states under international law.

First of all, as already stated in previous parts of this thesis, self-determination is controversial and hardly exercisable principle of international law. There is no one common practice on how to apply this principle in real life scenarios. Implementation of the principle of self-determination is being made much more difficult the fact, that the issue is also politicized, and the international law does not clearly answer on how to apply it. This part of the thesis will answer how certain procedural recommendable steps for self-determination affects the outcome of the case and whether there is the one best practice how to exercise self-determination in territorial states under international law to get internationally recognized by other states.

#### 3.1 Statehood

First of all, under the international law to exercise self-determination there is a need for the territory who seeks this self-determination to meet the criteria for statehood, which is set out in Montevideo Convention.<sup>111</sup> These criteria demands that states has clearly defined territory without any border disputes, stable population which do not have doubts about their identity, a completely functioning government which can govern the territory and a capability to enter into a legal relationship with other states. However, to be fair the last criteria can be evaluated only after the declaration of independence has been declared. It is important to understand, that states do not emerge immediately when all these criteria are fulfilled.

In the contemporary world virtually, every territory is an integral part of a sovereign state and, in turn, protected by the principle of territorial integrity. The applicability of this principle does not make the emergence of a new state illegal; its consequence is rather that new states do not emerge automatically upon meeting the statehood criteria. Emergence of a new state in contemporary international law is not a matter of meeting or failing to meet the statehood criteria. It is rather a political process of overcoming a competing claim to territorial integrity.<sup>112</sup>

As pointed out, meeting the statehood criteria set out in Montevideo Convention is needed, but it does not guarantee the self-determined territory the positive outcome, because there still is a

---

<sup>109</sup> Vladyslav Lonovoy, *Self-determination in International Law, A Democratic Phenomenon or an Abuse of right?* (Cambridge Journal of International and Comparative Law, 2015) p.391-392

<sup>110</sup> Ibid ; Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press, 2005) p.5-6

<sup>111</sup> Supra 19.

<sup>112</sup> Jure Vidmar, *Territorial Integrity and the Law of Statehood* (George Washington International Law Review, 2013) p.1 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2159113](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159113) (accessed April 24, 2018)

political factor when the states make a decision and interprets international law based on their political interests. which regulates this situation to overcome the claim to territorial integrity. If it is done there is a great chance that the state will be internationally recognized.

### **3.2 Exercise external self-determination within the framework of democracy**

Moreover, to exercise the external self-determination there is a need do it without the violation of democratic principles. As it is defined in to the Charter of Paris:

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person. Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.<sup>113</sup>

This means that in the case when some group of people will be treated unequal, not given the chance to express themselves or discriminated in any other way the external self-determination will not be recognized by other states. The same applies if the self-determination will take place without the will of the people. There is necessity to prove that the majority of the people in territory exercising external self-determination wants that. The best tool to do this is organising the independence referendum. Self-determination cannot be exercised under the rule of tyrant or dictator, because as it is stated no one is above the law and other states will not tolerate and recognize self-determination exercised that way.

### **3.3 Following the rule of law in the process of self-determination**

Moreover, it is important for the group who seeks to exercise the principle of self-determination to not violate the rule of law. Even though the following rules of law are within the framework of democracy there is a need to elaborate more regarding those. Firstly, the group exercising the self-determination cannot breach human rights or basic principles of international law.

The genuine realization of the right to self-determination implies not only a transparent electoral benchmark, but also respect of the principles of territorial integrity and sovereignty, compliance with and promotion of other human rights, and the implementation of the rule of law.<sup>114</sup>

As well, it is important to exercise the external self-determination without the direct involvement of third states, because, as already explained previously, the ICJ in its advisory opinion of Kosovo case underlined that unilateral declaration of independence is not violating international law, but when the third state is involved in to the process of self-determination it is a clear violation of jus cogens.

“[T]he illegality attached to [some other] declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from the fact that they were,

---

<sup>113</sup> Supra 102

<sup>114</sup> Supra 109, p.393

or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).”<sup>115</sup>

That means if *jus cogens* will be breached at any point when territory is exercising external self-determination, it will fail, and other states will not recognize it. Everything needs to occur peacefully. Good example where this scenario occurred is the case of Northern-Cyprus. In this case the self-determination occurred on basis of discrimination with a clear involvement from Turkey in to the process.<sup>116</sup> This was clear violation of *jus cogens* and due to the that fact the Northern-Cyprus after the external self-determination and declaration of independence are not internationally recognized till this day. Evidently, the only state who has recognized Northern Cyprus is Turkey.

To clarify, if the rule of law is not followed in the process of external self-determination and declaration of independence, then the chances to get internationally recognized by other states are almost equal to zero.

### **3.4 Summary of the procedural recommendable steps to exercise self-determination in territorial states under international law to get internationally recognized by other states**

By meeting the criteria of statehood set out in Montevideo Convention, exercising the self-determination within the framework of democracy and completely following the rule of law the group of people exercising external self-determination have a significant chance to succeed, however it does not necessarily mean that they will succeed by fulfilling these criteria. Succeeding is not guaranteed, because international law does not give an answer to the question – how to exercise self-determination. There are still a great number of open questions on this matter in international law and that enables a space to the “political games”. These three procedural recommendable steps mentioned above if implemented correctly reduces the options for other states to decide the outcome of external self-determination in the way it serves their political interests. However, it is clear that it is impossible to completely isolate politics from the matter of self-determination, because it involves the changes of borders, authorities and governments

---

<sup>115</sup> Supra 88, para.81

<sup>116</sup> Marco Milanovic, *A Footnote on Secession*, (ejiltalk.org, October 26 2017), <https://www.ejiltalk.org/a-footnote-on-secession/> (accessed April 24, 2018)

## CONCLUSIONS

To summarize, this thesis proves that independence referendums need to be looked not only from the legal perspective, but from the political one as well. Even though the independence referendums are regulated by each state's constitutional law within the interaction of international law, the decision made by international community in regard to the legitimacy of independence referendums are made based on what is politically more favourable for other states and what would put them in to the position of power. That can be done, because the relationship between principle of territorial integrity and principle of self-determination is so unclear and is not set out in international law, that states have various options on how to interpret it. The case studies show that independence referendum, if it is politically profitable for other states, can be made as a main argument to internationally recognize new states (case of Montenegro), at the same time if in some way the independence of the new state will threaten the other states position in international politics, the independence referendum will not be enough to internationally recognize the state (the case of Catalonia). It can be so easily manipulated, because the line between the constitutional law and international law in the matter of independence referendums is unclear. There is no clear distinction on how one regulates another when the independence referendum is organised.

The procedural recommendable steps while exercising the self-determination affirms that nothing guarantees the international recognition and there is no certain recipe on how to achieve this, because these are just recommendable and not mandatory steps, but it is clear that independence referendum will clearly help to achieve it, because it is the most effective way to show the will of the people and it is completely clear that self-determination, independence and international recognition

“requires a free and genuine expression of the will of the peoples concerned”<sup>117</sup>

However, the answer to the research question – “ Whether independence referendums are a pre-requisite for a new State to be internationally recognised?” is no, independence referendums are not a pre-requisite for a state to be internationally recognized. The answer is no, because the open space between the constitutional law and international law in regard to independence referendums as well as the uncertain distinction where the principle of territorial integrity ends, and the principle of self-determination starts to give states too much options on how to interpret the law. That leads to the situation when the role of independence referendum is decided by politics not the law. As example, can be made in the case of the Kosovo where such states as France and United Kingdom internationally recognized unilateral declaration of independence of Kosovo, even though the independence referendum was never organised there. Later on they argued that it is a sui generis case, however, as already explained in this bachelor thesis international community interpreted it as a sui generis case only because it was politically favourable for “big states” because they had spent millions of Euros in to the mission at Kosovo since 1999 and by interpreting it as sui generis case they are not making a precedent on which other territories seeking self-determination could relate on in to the future. The international law has so many open questions in regard to the independence referendums that it is completely clear, that if at one point there will again be the situation when state would declare independence without the independence referendum and it would be politically profitable for the “big power” states, these states would find a line of

---

<sup>117</sup> Supra 3.

argumentation within the framework of international law on how to legally base the international recognition of this new state. Even though the independence referendums are recommendable step to achieve independence and international recognition is not a mandatory pre-requisite for a state to organise the independence referendum to gain international recognition, if it will be in the political interests of the other states, they will find arguments between international law and related constitutional law to recognize this new state.

## BIBLIOGRAPHY

### Primary sources

Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki* (1 August 1975)

International Court of Justice, *Accordance with international law of the unilateral Declaration of Independence of Kosovo, Advisory Opinion*, ICJ Reports (2010)

Supreme Court of Canada, *Reference re Secession of Quebec* (1998) 115 ILR 536, 594-5

United Nations, *Charter of the United Nations* (1945)

*International Covenant on Civil and Political Rights (ICCPR)* (declared open for signature and ratification 19 December 1966, entered into force 23 March 1976), 999 UNTS 171, article 1, paragraph 3 Also: *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (declared open for signature and ratification 19 December 1966, entered into force 03 January 1976), 993 UNTS 3

*Montevideo Convention on the Rights and Duties of States* (signed at Montevideo, 26 December 1933, entered into force, 26 December 1934)

*Spanish Constitution of the 1978* (rev.2011)

*"Recurso de inconstitucionalidad no.4334-2017, contra la Ley del Parlamento de Cataluña 19/2017, de 6 de septiembre, del Referéndum de Autodeterminación"*

Parliament of the United Kingdom, *Scotland Act 1998*

*Constitutional Charter of the State Union of Serbia and Montenegro*

OSCE, *Charter of Paris For a New Europe* (OSCE, 19-21 November, 1990)

### Secondary sources

#### Books

Antonio Cassese, *International Law*, Second Edition (Oxford University Press, 2005)

Antonio Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, 1995)

James Crawford, *Brownlie's principles of public international law*, (Oxford University Press, 2012)

Jack Donnelly, *Theories of International Relations, fourth edition, realism* (Palgrave Macmillan, 2009)

Douglas George Anglin, *Zambian Crisis Behaviour: Confronting Rhodesia's Unilateral Declaration of Independence 1964-1965* (McGill-Queens, 1994)

Ivor Jennings, *The Approach to Self Government* (Cambridge University Press, 1956)

John O'Brian, *International Law* (Taylor & Francis, 2001)

Stevan Pavlowitch, *Serbia: The History Behind the Name* (Hurst & Company, 2002)

Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge University Press, 2001)

Steven Wheatley, *Democracy, Minorities and International Law* (Cambridge University Press, 2005)

### **Journals**

Vanessa J. Jimenez, *Remarks by Vanessa J. Jimenez* (American Society of International Law Proceedings, 2013)

Malcolm MacLaren, ‘*Trust the People*’? *Democratic Secessionism and Contemporary Practice* (German Law Journal, 2015)

Anne Peters, *Populist International Law? The Suspended Independence and the Normative Value of the Referendum on Catalonia* (ejiltalk.org, 12 October 2017)

Jure Vidmar, *Catalonia: The Way Forward is Comparative Constitutional Rather than International Legal Argument* (ejiltalk.org, 24 October, 2017)

Stephen Tierney, *Referendums Today: self-determination as Constituent Power* (ejiltalk.org, 9 February 2011)

Zohar Nevo, Tamar Megiddo, *Lessons from Kosovo the Law of Statehood and Palestinian Unilateral Independence* (Journal of International Law & International Relations, 2009)

Rene Vark, *The Advisory Opinion on Kosovo’s Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea* (Polish Yearbook of International Law, 2014)

Dapo Akande, *ICJ finds that Kosovo’s Declaration of Independence not in Violation of International Law* (ejiltalk.org, 23 July, 2010)

Björn Arp, *The ICJ Opinion on the Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities* (German Law Journal, 2010)

Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine and Why the 16 March Referendum in Crimea Does not Justify Crimeas Alteration of Territorial Status under International law* (ejiltalk.org, 16 April, 2014)

Thomas W. White Jr, *Referendum in Crimea: Developing International Law on Territorial Realignment Referendums* (Houston Journal of International Law, Winter 2016)

Iain Halliday, *The Road to the Referendum on Scottish Independence: the role of law and politics* (Aberdeen Student Law Review, November 2014)

Vladyslav Lonovoy, *Self-determination in International Law, A Democratic Phenomenon or an Abuse of right?* (Cambridge Journal of International and Comparative Law, 2015)

Jure Vidmar, *Territorial Integrity and the Law of Statehood* (George Washington International Law Review, 2013)

Marco Milanovic, *A Footnote on Secession*, (ejiltalk.org, October 26 2017)

### **Opinions, press releases and reports**

European Commission for Democracy Through Law, *Code of Good Practice in Electoral Matters, Opinion No.190/2002* (22 October, 2002)

J.Crawford, A.Boyle, *Opinion: Referendum on the Independence on Scotland – International Law Aspects* (assets.publishing.service.gov.uk)

OSCE, *Republic of Montenegro, Referendum On State-Status, 21 May 2006, OSCE/ODIHR Referendum Observation Mission Final Report*, (OSCE, 4 August 2006)

Council of the European Union, *Press Release, 2851st Council meeting, General Affairs and External Relations, External Relations*, (Council of the European Union , 18 February 2008)

### **Internet sources and other**

Prince Hans-Adam II of Liechtenstein, speaking to the International Institute for Strategic Studies on 25 January 2001

*Catalonia profile – Timeline*, (bbc.com, 25 December, 2017) <http://www.bbc.com/news/world-europe-20345073> (accessed 27 March, 2018)

*The Catalan Way and the Baltic Way – Historical Parallel or Just Political Hype?* (news.err.ee, 13 September, 2013) <https://news.err.ee/108233/the-catalan-way-and-the-baltic-way-historic-parallel-or-just-political-hype> (accessed 27 March, 2018)

*Spain dissolves Catalan parliament and calls fresh elections* (theguardian.com, 28 October,2017) <https://www.theguardian.com/world/2017/oct/27/spanish-pm-mariano-rajoy-asks-senate-powers-dismiss-catalonia-president> (accessed 27 March, 2018)

*Why the Referendum on Catalan independence is illegal*, (economist.com, 26 September, 2017) <https://www.economist.com/blogs/economist-explains/2017/09/economist-explains-17> (accessed 27 March, 2018)

*Total collapse of the PP in Catalonia leaves Rajoy exposed* (catalanmonitor.com, 22 December, 2017) <http://catalanmonitor.com/2017/12/22/total-collapse-of-the-pp-in-catalonia-leaves-rajoy-exposed/> (accessed 27 March,2018)

*Spanish judge jails eight members of deposed Catalan government* (theguardian.com, 2 November, 2017) <https://www.theguardian.com/world/2017/nov/02/spanish-court-question-catalonia-separatists-except-puigdemont> (accessed 27 March, 2018)

*Hundreds injured as Spain cracks down on Catalan referendum* (cnn.com, 1 October, 2017) <https://edition.cnn.com/2017/10/01/europe/catalonia-spain-independence-referendum-vote/index.html> (accessed 3 April 2018)

*Catalonia independence declaration signed and suspended*, (bbc.com, 10 October, 2017) <http://www.bbc.com/news/world-europe-41574172> (accessed, 3 April, 2018)

*Merkel, Macron and May show support for Spain over Catalan crisis* (elpais.com, 20 October 2017) [https://elpais.com/elpais/2017/10/20/inenglish/1508492716\\_965994.html](https://elpais.com/elpais/2017/10/20/inenglish/1508492716_965994.html) (accessed 3 April, 2018)

Aritz Parra & Ciaran Giles, *Spain: Top court officially rules Catalan referendum illegal* (Chicago Tribune, 17 October, 2017) <http://www.chicagotribune.com/news/nationworld/ct-catalonia-spain-independence-20171017-story.html> (accessed 28 April 2018)

*Scottish independence referendum* (gov.uk) <https://www.gov.uk/government/topical-events/scottish-independence-referendum/about#what-was-the-question> (accessed 6 April, 2018)

*Scotland's future: Draft Referendum (Scotland) Bill Consultation Paper* (gov.scot) <http://www.gov.scot/Resource/Doc/303348/0095138.pdf> (accessed 6 April, 2018)

*Timeline: Scottish Independence Referendum* (bbc.com, 15 October, 2012) <http://www.bbc.com/news/uk-scotland-scotland-politics-19907675> (accessed 6 April, 2018)

*Scottish Independence Referendum, Results* (scotlandreferendum.info) <http://scotlandreferendum.info> (accessed 6 April, 2018)

*'Join the queue' for EU membership, Spain tells Alex Salmond*, (theguardian.com, 24 October, 2012) <https://www.theguardian.com/politics/2012/oct/24/scotland-eu-membership-spain> (accessed at 10 April, 2018)

*EU referendum results* (The Electoral Commission), <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (accessed at 10 April, 2018)

*Montenegro History Part 2*, (visit-montenegro.com) <https://www.visit-montenegro.com/montenegro/history/2/> (accessed 13 April, 2018)

*Montenegro Independence* (visit-montenegro.com) <https://www.visit-montenegro.com/montenegro/montenegro-independence/> (accessed 13 April, 2018)

Lee Hudson Teslik, *Montenegro's Referendum On Independence*, (Council on Foreign Relations, 19 May, 2006) <https://www.cfr.org/backgrounder/montenegros-referendum-independence> (accessed 13 April, 2018)

*Serbia inherits state and legal continuity of Serbia-Montenegro*, (Government of the Republic of Serbia, 31 May, 2006) <http://www.srbija.gov.rs/vesti/vest.php?id=23938> (accessed 13 April, 2018)

Charles Recknagel, *Montenegro: Independence Referendum Turns Into Cliffhanger*, (rferl.org, 22 May, 2006) <https://www.rferl.org/a/1068564.html> (accessed 15 April, 2018)

The Editors of Encyclopedia Britannica, *Kosovo Conflict, Balkan History* (1998-1999) (britannica.com) <https://www.britannica.com/event/Kosovo-conflict> (accessed 17 April, 2018)

*NATO's role in relation to the conflict in Kosovo*, (nato.int, 15 July 1999) <https://www.nato.int/kosovo/history.htm> (accessed 17 April 2018)

The Editors of Encyclopedia Britannica, *Kosovo, Self-declared independent country* (britannica.com) <https://www.britannica.com/place/Kosovo> (accessed 17 April, 2018)

*Countries that have recognized Kosovo as an independent state* (beinkosovo.com), <http://www.beinkosovo.com/countries-that-have-recognized-kosovo-as-an-independent-state>