

# Sovereignty, statehood and self-determination in international law

## The Kosovo case

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### Abstract

The self-proclamation of Kosovo's independence announced on February 17 invites us to some general considerations that may be linked to the specific event.<sup>1</sup>

The IL principle of Self-determination will be on the focus of this article to considering it as one of the way to archive the creation of new IL entity. Self-determination is a more recent principle then the others but its history, theory and practice is immense.<sup>2</sup> The origin of the term and idea also is in discussion and debating among historian and lawyer. The term have been used simultaneously in the same period (end of WW I) by the US President Wilson and the USSR Premier Lenin referring to the right of the non self-governed territory like colony and occupied regions.<sup>3</sup>

**Keywords:** International Law; Secession; State Succession; Kosovo

### Abbreviations

EU	European Union
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IL	International Law
IHR	International human Rights
IO	International Organization
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organization
Res.	Resolution
RC	Republic of China (Taiwan)
PRC	Peoples Republic of China
UK	United Kingdom

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<sup>1</sup> The full declaartion of Independence at [www.assembly-kosova.org/?cid=2,128,1635](http://www.assembly-kosova.org/?cid=2,128,1635)

<sup>2</sup> Annalisa Zinn, Globalization and Self-Determination

<sup>3</sup> What Is Meant By The Self-Determination of Nations?". Marxists.org. Retrieved 2012-03-04.

UN	United Nations
UNGA /GA	United Nation General Assembly
UNSC/SC	United Nations Security Council
US/ USA	United States of America

## Introduction

The self-proclamation of Kosovo's independence announced on February 17 invites us to some general considerations that may be linked to the specific event.<sup>4</sup>

The first is of a general nature. The independence of this country is inevitably linked to the principle of self-determination, universally recognized in numerous sources of international law, the Charter and in various UN documents. In concrete political history of the United Nations, this principle was explicitly linked to the right of the peoples of the third world countries to free themselves from colonial rule (or the so-called "UN trust") of European countries.<sup>5</sup> In this context, the principle of self-determination has been relatively easy to apply, as was evident, external and unjustified, a situation of foreign oppression.<sup>6</sup>

The statehood is very important in IL considering that is the process of state creation. Many are the examples of statehood in world history. Since the creation of the principle of sovereignty, after the religious war that and with the treaty of Westphalia, the creation of a state has evolved considering three basic conditions.<sup>7</sup> These conditions are the specific territory, a permanent population and a government that exercise power in this territory and over this population. The Montevideo Convention as a document basically of *American continent* states also include in the criteria for statehood the necessity to enter in to relation with other IL party.<sup>8</sup> The Montevideo Convention like we sad is not binding for non member state but considering that is the only written document that list the statehood criteria will also be included in this article.<sup>9</sup>

Self-determination has its maximum application during the decolonisation process in Africa and Asia when using this IL principle the different native population archived independence. The principle was useful also in non colonial situation like the dissolvent of USSR, Yugoslavia and the Czechoslovak Republic.<sup>10</sup>

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<sup>4</sup> The full declaartion of Independence at [www.assembly-kosova.org/?cid=2,128,1635](http://www.assembly-kosova.org/?cid=2,128,1635)

<sup>5</sup> McWhinney, Edward *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building and the Alternative, Federal Option* (2007)

<sup>6</sup> Sebastian Anstis, *The Normative Bases of the Global Territorial Orde*

<sup>7</sup> Steve Smith (eds.). *The Globalization of World Politics: An Introduction to International Relations*

<sup>8</sup> *League of Nations Treaty Series*, vol. 165, pp. 20-43.

<sup>9</sup> "Convention on Rights and Duties of States adopted by the Seventh International Conference of American States"

<sup>10</sup> Innes, Abby (2001), *Czechoslovakia: The Short Goodbye*

Kosovo is an interesting case that can be used to understand the vital interaction that this three IL principle have in the function of IL and International Community. This three principle can be considered like the core of IL.

In many case Kosovo Republic is paragoned to case of secession like South Ossetia, Abkhazia or the Turkish Republic of Cyprus but this "States" haven't more then 2-3 international recognition. The Republic Kosovo not only accomplishes all statehood criteria but also have more then half of the UN member state that recognize its independence.<sup>11</sup>

## **Kosovo Case, the Nature of this Sui Generis Case. The Sovereignty.**

### **A. Historical background. History as *Legal Basis*.**

In this Chapter I will analyses the different legal document, mainly treaties that have influenced the Sovereignty in the territory of Kosovo. The Chapter will be divided in different period in witch the Sovereignty in Kosovo have been changed, contested or questioned, from the Balkan wars to the Declaration of Independence of Kosovo. The importance of this historical chronology is to understand the legal basis for or against the independence of Kosovo.

#### *The Balkan war, The Treaty of London (1913) and the Treaty of Bucharest (1913).*

The Balkan war began in October 1912 between the Balkan League and The Ottoman Empire and finished in July 1913 with the sign of the Treaty of London and the Treaty of Bucharest. After defeating The Ottoman Empire the Balkan League had under its control all the possession of the Empire in Europe and the settlement of borders were leaved to the Great Powers.<sup>12</sup>

In 1913 the Great Powers decided on the borders of the Balkan League with the Ottoman Empire and the borders between the Balkan League members. According to the Treaty of London (1913) the territory of Kosovo was divided between the Kingdom of Serbia and the Kingdom of Montenegro. This treaty transfers the Sovereignty over Kosovo from Ottoman Empire to the two Balkan states.<sup>13</sup>

After some disagreement between the Balkan League, erupted the second Balkan war that see the Kingdom of Bulgaria in war with its precedent ally. The treaty of Bucharest (1913) amended the Treaty of London in some question like the borders of

<sup>11</sup> Stephen, Michael, (2007) Cyprus: Two Nations in One Island

<sup>12</sup> Ernst C. Helmreich, *The diplomacy of the Balkan wars, 1912-1913* (1938)

<sup>13</sup> *Handbook for the Diplomatic History of Europe, Asia, and Africa 1870-1914*. Washington, DC: National Board for Historical Service, Government Printing Office. Anderson, Frank Marby

the Kingdom of Bulgaria with its neighbour but reconfirmed Serbian and Montenegrin sovereignty over Kosovo.<sup>14</sup>

Is important to mention that during the discussion over the borders the Kingdom of Serbia and the Kingdom of Montenegro justify their interest and territorial gain on Kosovo with economic and expansionistic reason without counting ethnic and religious differences with its inhabitants.<sup>15</sup>

*Versailles peace and the creation of the Kingdom of Serbian, Croats and Slovenes/Yugoslavia.*

WWI brings new changes in European map. During the war the territory of Kosovo was invaded by Austro-Hungarian and Bulgarian Army. The sovereignty of Kosovo changed again in July 1917 with the Corfu Declaration and in October 1918 with its application that merge the Kingdom of Montenegro with the Kingdom of Serbia transferring their possession in Kosovo now in a single state. This document marks the annexation of Montenegro from Serbia.<sup>16</sup>

The union of the Kingdom of Montenegro and the Kingdom of Serbia is not the only change after WWI. In 1918 the Slave-speaking regions of Austria and Hungary join the Kingdom of Serbia and created the Kingdom of Serbian, Croats and Slovenes.<sup>17</sup> To this successor state the treaty of Versailles recognize, among others also the sovereignty over Kosovo, that didn't change after the creation of the Kingdom of Yugoslavia.<sup>18</sup>

*World War II, Axis partition of Yugoslavia and Communist Yugoslavia.*

The German and Italian invasion of the Kingdom of Yugoslavia terminated with its division in new small puppet state like Croatia and Montenegro but the region of Kosovo was divided by the Kingdom of Bulgaria and Kingdom of Albania in that period in *person union* with the Kingdom of Italy. The armistice and surrender of Yugoslavia give to the victorious powers the ability to change its border but their legal powers and the validity of the peace treaty with Yugoslavia have been questioned.<sup>19</sup>

With the end of WWII the Sovereignty of Yugoslavia was restored in its *ante bellum* situation and Kosovo was created as an autonomous region of the Republic of Serbia in the Yugoslav federation. This is the first time that Kosovo have defined geo-political position with borders (internal in Yugoslavia) and limited sovereignty (under Yugoslav

<sup>14</sup> Ibid

<sup>15</sup> Report of the International Commission to Inquire into the Causes and Conduct of the Balkan War (1914)

<sup>16</sup> The Corfu Declaration at: [http://sr.wikisource.org/wiki/%D0%9A%D1%80%D1%84%D1%81%D0%BA%D0%B0\\_%D0%B4%D0%B5%D0%BA%D0%BB%D0%B0%D1%80%D0%B0%D1%86%D0%B8%D1%98%D0%B0\\_%281917%29](http://sr.wikisource.org/wiki/%D0%9A%D1%80%D1%84%D1%81%D0%BA%D0%B0_%D0%B4%D0%B5%D0%BA%D0%BB%D0%B0%D1%80%D0%B0%D1%86%D0%B8%D1%98%D0%B0_%281917%29) (English and Serbian version)

<sup>17</sup> Unification of Montenegro and Serbia (1918) - Podgorica's Assembly

<sup>18</sup> Ivo Banac: The National Question in Yugoslavia:Origins, History, Politics" published by Cornell University Press

<sup>19</sup> Jovanovich, Leo M. (1994). "The War in the Balkans in 1941". *East European Quarterly*

sovereignty).<sup>20</sup> The importance of this event will be in the fulfilment of statehood criteria like a defined territory.

*Breakup of Yugoslavia, UN resolution and Kosovo Declaration of Independence.*

In June 1991 Slovenia and later Croatia secede from the Yugoslav federation giving start to what is known as Breakup of Yugoslavia.<sup>21</sup> The secession of Slovenia, Croatia and Macedonia and the rise of the nationalist sentiment and Serbian irredentism in Bosnia and Kosovo lead to a period of war and atrocities in Yugoslavia and created the situation for Kosovo independence.<sup>22</sup>

In July 1990 the Parliament of Kosovo elevated the Autonomous Region of Kosovo in the level of Republic inside the Yugoslav Federation and in this case also the power to secede from the federation like the other republics. In September 1991 Kosovo parliament voted the secession from Yugoslavia declaring independence of the Kosovo Republic. The Republic of Kosovo was recognized only by the Republic of Albania and had no control over the territory it claims to be sovereign. The secession was not accepted by Yugoslav authorities that invaded Kosovo and begin a policy of ethnic cleansing that obligated international community to intervene.<sup>23</sup>

From March to June 1999, NATO intervened by bombing Yugoslavia and obligated their troop to retire from Kosovo. In June 1999 the UNSC passed the resolution 1244 that placed Kosovo under UN administration and theoretically without dividing it from Yugoslavia.<sup>24</sup>

## **B. Serbia Sovereignty VS Kosovo Sovereignty today.**

Many political scientists have tried to give more precise definitions of the concept of the state, trying to enunciate the conditions necessary to ensure that it can be considered as such.

For Max Weber that State is to be understood as:

*“an undertaking institutional character of political environment in which the administrative apparatus successfully advancing a claim to monopoly of coercion of legitimate force in view of the implementation of the regulations.”<sup>25</sup>*

<sup>20</sup> Proclamation of Constitution of the Federative People's Republic of Yugoslavia, 31. 1. 1946. At: [http://web.archive.org/web/\\*/http://www.arhiv.sv.gov.yu/a100008i.htm](http://web.archive.org/web/*/http://www.arhiv.sv.gov.yu/a100008i.htm)

<sup>21</sup> Glenny, Misha, "The Fall of Yugoslavia" (1996)

<sup>22</sup> Magas, Branka, *The Destruction of Yugoslavia: Tracking the Break-up (1993)*

<sup>23</sup> Statement of Albanian PM Sali Berisha during the recognition of the Republic of Kosovo, stating that this is based on an 1991 Albanian law, which recognized the Republic of Kosova at:

[www.keshilliministrave.al/index.php?fq=brenda&m=news&lid=7323&gj=gj2](http://www.keshilliministrave.al/index.php?fq=brenda&m=news&lid=7323&gj=gj2) (Albanian version)

<sup>24</sup> Text of Resolution at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> (English version)

<sup>25</sup> Daniel Warner (1991). An ethic of responsibility in international relations

Another definition is attempted by Charles Tilly:

*“An organization that controls the population that occupy a territory is a state so far as:*

- differs from other organizations that operate on the same territory;
- is autonomous;
- is centralized;
- its component parts are formally coordinate with each other.”<sup>26</sup>

Hobbes:

*“The State is the unitary and sovereign instance of neutralization of the social and religious conflicts through the exercise of a summa potestas, expressed through the abstract form and universality of the law which is legitimate under the mandate of authorization of individuals, which realizes the mechanism of political representation; citizens are in fact in the pre-policy which is defined as the state of nature and the sovereign plays a “representative” uniting in itself the “dispersed multitude””<sup>27</sup>*

Serbia argues that its Sovereignty over Kosovo was guarantee by the UNSC resolution 1244 and that the UN administration of Kosovo in post 1999 operated in Serbian sovereignty. In the other hand Kosovo argue that using internal legislation (Yugoslav constitution) the elevation of Kosovo in 1990 to republic level by its legislative organ allowed the secession like in the case of the Yugoslav republic. Kosovo also use the IL principle of self-determination. The use of military force, the ethnic cleansing and the denial of fundamental human right are legal reason that allows the secession and self-determination.<sup>28</sup>

### **C. International recognition of Sovereignty**

#### *Recognition of Serbia as successor of Yugoslavia*

The transfer of rights, obligations and property can include overseas property (embassies, cash reserves, works of art), participation in the Treaties of membership in international organizations, and debts. Often a state chooses whether to be or not to be regarded as the successor state of the entity that preceded him. The case is different if the Predecessor State was a party to human rights treaties, as the successor state should still comply with the terms of the treaty, whatever its policy.<sup>29</sup>

<sup>26</sup> Axtmann, Roland (2004). "The State of the State: The Model of the Modern State and Its Contemporary Transformations"

<sup>27</sup> Malcolm, Noel. (2007). Reason of State, Propaganda, and the Thirty Years' War: An Unknown Translation by Thomas Hobbes.

<sup>28</sup> Kosovo Autonomus Province constitution: <http://kushtetuta.independentkosova.com/english.htm>

<sup>29</sup> European Journal of International Law – State Succession in Respect of Human Rights Treaties

In an attempt to codify the rules of succession of States in 1978 was drafted to the Vienna Convention on Succession of States with respect to treaties. It entered into force on 6 November 1996.<sup>30</sup>

A recent example of succession occurred with the dissolution of the Union of Soviet Socialist Republics (USSR) in 1991. The Russian Federation was declared the successor state of the USSR and the Russia acquired the seat as a permanent member of the Security Council of the United Nations.<sup>31</sup>

There are several examples in which the succession of States, as described above, was not fully followed. When the Democratic Kampuchea, Pol Pot's regime was militarily crushed by the People's Republic of Cambodia, backed by Vietnam, the seat at the UN continued to be occupied by Kampuchea for many years.<sup>32</sup> The State Taliban in Afghanistan has become the de facto government of most of the country in the mid-nineties, but the United Islamic Front for the Salvation of Afghanistan was still recognized by many countries, therefore retained the UN seat.<sup>33</sup> After four of the six constituent republics of the Socialist Federal Republic of Yugoslavia became separated in 1991 and in 1992, the remaining state, called the Federal Republic of Yugoslavia, claimed to be the legal successor, but was not recognized as such by the United States and, because of their influence, even by the United Nations, on the grounds that the Socialist Federal Republic of Yugoslavia was dissolved. The Federal Republic of Yugoslavia (later renamed Serbia and Montenegro) was admitted to the UN in 2000, and recently, in 2006, by referendum, Montenegro declared its independence and Serbia has inherited the seat.<sup>34</sup> The Republic of China was declared in 1949 as a successor state of the Republic of China (or Taiwan) and exercises sovereignty over China, although the Republic of China held the seat in the Security Council of the United Nations for many years. In 1971 she was admitted to the Security Council the People's Republic, in place of the Republic of China.<sup>35</sup>

The fundament of Serbian claim of Sovereignty over Kosovo consist in the fact that Serbia is the successor state of Serbia and Montenegro (1992-2006) that is the successor state of Yugoslavia (before 1992).<sup>36</sup> The IL concept of state succession give

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<sup>30</sup> Vienna Convention on the Law of Treaties (1969) at:  
[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>31</sup> Buhler, Konrad G. (2001). *State Succession and Membership in International Organizations*

<sup>32</sup> Ben Kiernan: *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975–79* Yale University Press

<sup>33</sup> McGrath, Kevin (2011). *Confronting Al-Qaeda*

<sup>34</sup> Sabrina P. Ramet. *Serbia Since 1989: Politics and Society Under Milošević and After*. University of Washington Press

<sup>35</sup> United Nations General Assembly Resolution 2758 session 26 Restoration of the lawful rights of the People's Republic of China in the United Nations page 1 on 25 October 1971

<sup>36</sup> donia, and the Federal Republic of Yugoslavia (name later changed to Serbia and Montenegro) as new UN members.

to the successor state the obligation and rights of the dissolved state. In this case Serbia considers Kosovo as a integral and indivisible part of its Sovereignty.<sup>37</sup>

### *Recognition of Kosovo Sovereignty by 100+ States*

According to the website of the Foreign Ministry of Kosovo, their independence have been recognized by 104 UN State in the end of July 2013.<sup>38</sup> These numbers that can change in every moment are very important. We now that Kosovo cant be a UN member without not only a the needed majority of the GA but also the majority and non-veto of the SC permanent member.<sup>39</sup> But not being recognised as a state do not make you less a state. Some of the most important state of the world have problem of recognition, like PRC and RC that claim the representation of the people of China or Northern Cyprus that is recognise only by Turkey. The recognition is not a fundamental criterion for being a state.<sup>40</sup>

### **Statehood and the Fulfilment of Criteria in the Case of Kosovo**

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”<sup>41</sup>

In IL the concept of statehood has evolved during time and is more a question of practice and custom then a written list of criteria. The only document in IL that gives a precise list of criteria for statehood is the Montevideo Convention of the Right and Duties of State that consider four criteria to archive statehood. These criteria are the permanent population, a defined territory, a government and the capacity to interact with other states.<sup>42</sup>

The Convention of Montevideo is a document legally binding for its member states but it “is commonly accepted as reflecting, in general terms, the requirements of statehood at customary IL”<sup>43</sup>

“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as

<sup>37</sup> Participation of Former Yugoslav States in the United Nations”. Max Planck Yearbook of United Nations Law. pp. 241–243.

<sup>38</sup> Kosovo government source: <http://www.rks-gov.net/sq-AL/Pages/Fillimi.aspx>

<sup>39</sup> Conditions to be member at <http://www.un.org/>

<sup>40</sup> Thomas D. Grant, The recognition of states: law and practice in debate and evolution

<sup>41</sup> Montevideo Convention Art.1

<sup>42</sup> Prologue of Montevideo Convention <http://www.tamilnation.org/selfdetermination/instruments/33montevideo.htm>

<sup>43</sup> *ibid*



it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”<sup>44</sup>

### **A. Permanent population**

The criteria of population according to Oppenheim consist in the existence of an indefinite number of persons that live as a community though they may belong to different culture, race and creed or even colour.<sup>45</sup>

The criterion of population is not a question of number like it can look. State like Nauru or other pacific island-state has very small population but their being a state is not questioned by this fact.<sup>46</sup>

Kosovo have a population of nearly 2 million individuals and they are contested by Serbia and Kosovo. I believe that the fact that after the independence the majority of population have changed the Serbian passport with a Kosovo passport demonstrate their desire of appurtenance. Important is also the fact that many country that officially do not recognise the Republic of Kosovo have decided to recognise and accept its passport as legal and official.<sup>47</sup>

### **B. Defined territory**

For a State to exist is needed a territory where to exercise its power. The criteria of territory like the criteria of population are not a question of number but criteria of viability.<sup>48</sup>

The requirement of defined territory does not mean that a state with border delimitation problem is not anymore a state. Today many states have territorial disputes but their statehood have not been questioned. The case of P.R. China with Taiwan (R. China) or India and Pakistan over Kashmir are simple examples of territorial dispute that do not influence Statehood.<sup>49</sup>

Kosovo have been recognised as a geographical region since medieval time but its actual borders (with small changes) have been set during communist Yugoslavia. The borders of Kosovo during communist Yugoslavia have been internal borders of Serbian Republic but in the capacity of an autonomous region.<sup>50</sup>

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<sup>44</sup> Ibid

<sup>45</sup> The Postcoloniality of International Law, Harvard International Law Journal, Volume 46, Number 2, Summer 2005

<sup>46</sup> "Republic of Nauru Permanent Mission to the United Nations". United Nations. Retrieved 10 May 2006.

<sup>47</sup> Greek representative to Kosovo declaration on "Greece to recognizes Kosovo passports"

<sup>48</sup> I Brownlie, Principles of Public International Law (OUP 2008)

<sup>49</sup> United Nations General Assembly Resolution 2758 session 26 Restoration of the lawful rights of the People's Republic of China in the United Nations

<sup>50</sup> Benson, Leslie; Yugoslavia: a Concise History; Palgrave Macmillan, 2001

## C. Government

The government is the most important and indispensable criteria for statehood. The criteria of government consist in a government that exercise its power over the specific population and territory of its state.<sup>51</sup> The forms of government are different. By this we understand that the form of government and the way it is selected do not interfere in the criteria of government in Statehood. There are different forms of government from the most common like Republic and Monarchy to government like Theocracy. In some state we can find even merge between the Republic and Monarchy like elective monarchy or republic with live term head of state.<sup>52</sup>

## D. Capacity to enter in relation with other states and International subject

Using as source of the criteria for statehood the Montevideo Convention we have to include the criteria of the capacity to enter in relation with other state and International subject. These criteria have been discussed by scholars and not all agree on its necessity but for the member states of the Montevideo Convention it is binding.<sup>53</sup>

The capacity to enter in relation is colligated to the recognition by other state of the statehood and sovereignty.

## Self-Determination and the Case of Kosovo

### A. Historical background of Self-determination

#### *The Doctrine of Self-determination*

“National aspirations must be respected; people may now be dominated and governed only by their own consent. *Self-determination* is not a mere phrase; it is an imperative principle of action...” - Woodrow Wilson 8 January 1918<sup>54</sup>

The principle of self-determination was solemnly enunciated by Woodrow Wilson at the Versailles Treaty (1919) and was meant as a guideline for the tracing of the new borders, but in reality it was applied in a discontinuous and arbitrary, a factor that would have contributed not a little the gradual destabilization and subversion of the final of Versailles.<sup>55</sup>

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<sup>51</sup> Lauterpacht, Sir Hersch. Recognition in International Law

<sup>52</sup> Krader, Lawrence (1968). Formation of the State, in Foundations of Modern Anthropology Series

<sup>53</sup> Baylis, John, Steve Smith, and Patricia Owens. The Globalization of World Politics: An Introduction to International Relations (2011)

<sup>54</sup> Self-determination speech (11 February 1918) of President Wilson

<sup>55</sup> John Milton Cooper, Jr. Woodrow Wilson: A Biography (2009)

In particular, the principle found application when determining the new borders of the power of the Triple Alliance defeated in the First World War.<sup>56</sup> There were organized plebiscites in Upper Silesia, East Prussia, in Schleswig, in the region of Eupen-Malmedy in Southern Carinthia and Sopron, with results often contested and subsequent source of international tension. Other areas, such as most of the Posen and West Prussia, the territory of Memel and the Alsace-Lorraine, however, were detached from Germany without consulting their populations, often majority-of-the-German language.<sup>57</sup> I passed the Sudetenland to Czechoslovakia together with Hungarian majority of southern Slovakia and South Tyrol became part of Italy despite being a German majority. The inner part of Istria became part of Italy although there was a Slavic majority.<sup>58</sup>

The principle of self-determination of peoples, it is fully developed in the second half of the last century, in 1945 at the end of the Second World War. In particular, it was the United Nations (UN) to promote development within the community of nations.<sup>59</sup>

The Doctrine of Self-determination today is a cardinal principle of IL and by the UN Charter it is binding to all its member state. The principle of Self-determination can be traced back to the Atlantic Charter of 1941 and its eight points.<sup>60</sup>

The Charter of the United Nations, in fact, in Chapter I (dedicated to the purposes and principles of the Organization), Article 1, paragraph 2, identifies as the aim of the United Nations: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."

Another major international convention that enshrines the right of self-determination of peoples is the International Covenant on Civil and Political Rights, signed in the UN in 1966. Italy has converted this Convention by Law 881 of 1977.

Another key step was the "Declaration on the friendly relations and cooperation between states" in 1970 in which decreed the prohibition of resort to any coercive measure liable to deprive peoples of their right to self-determination.<sup>61</sup>

Even more clearly expressed, the "Conference for Security and Cooperation in Europe" (CSCE), the Helsinki Final Act of 1975, which states the right of all peoples to freely determine, when and as they wish, their political regime without external interference, and to pursue as they wish their economic, social and cultural development.<sup>62</sup>

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<sup>56</sup> Sally Marks, "The Myths of Reparations," Central European History

<sup>57</sup> Treaty of Versailles

<sup>58</sup> Treaty of Saint-Germain-en-Laye (1919) with Austria

<sup>59</sup> UN Trust territory list at UN Websit

<sup>60</sup> Borgwardt, Elizabeth (2007). A new deal for the world: America's vision for human rights

<sup>61</sup> At UN online webpage: <http://www.un-documents.net/a25r2625.htm>

<sup>62</sup> Full text of the Final Act, 1975 Conference on Security and Co-operation in Europe  
<http://www1.umn.edu/humanrts/osce/basics/finact75.htm>

In particular, the principle has been instrumental in supporting the decolonization, as it has enabled the states in developing hold free elections, give themselves a constitution of its own, choose the form of government, without any pressure from the more developed countries.<sup>63</sup>

### *The use of Self-determination in the process of decolonization*

On 14 December 1960 the UNGA adopted Resolution 1514 on the Granting of Independence to Colonial country and People as a legal link between Self-determination and the process of Decolonization.<sup>64</sup> This document with the issue of other UN Res. With similar content aim to create the new home-rule state in the colonial territory.<sup>65</sup>

Some of the most important result of self-determination in the decolonisation process is the creation transitional government like the UN Trust territory given in temporary administration to developed country with aim to created the local environment for self-determination and self-government.<sup>66</sup> Considering the difference between any case some colony get independence faster and some slower. The Italian colony of Libya gets independence very soon after the WWII considering the geographical and cultural vicinity to developed Europe.<sup>67</sup> The Colony of Somalia stays 10 years under Italian Trust government before getting independence and merging with British Somaliland.<sup>68</sup>

### *The use of Self-determination in non-colonial cases*

The principle of self-determination haven't been crated and haven't been use only in the colonial case but also with the aim to give a home-government to the many nationality and population that was grouped in diverse circumstance in big empires like the Ottoman Empire<sup>69</sup>, Austro-Hungarian Empire<sup>70</sup> or the German Empire. From this nation in the end of WWI emerged many of the Central Europe state like Czechoslovakia, Poland Hungary and the south slave state of Yugoslavia.<sup>71</sup>

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<sup>63</sup> Understanding Contemporary Africa, April A. Gordon

<sup>64</sup> UN Res.1514 at UN website

<sup>65</sup> Birmingham, David (1995). The Decolonization of Africa

<sup>66</sup> Homepage of the UN Trusteeship Council at: <http://www.un.org/en/mainbodies/trusteeship/>

<sup>67</sup> Vandewalle, Dirk J. (2006), A history of modern Libya, Cambridge University Press

<sup>68</sup> Trusteeship and Protectorate: The Road to Independence of Somalia at UNTC webpage

<sup>69</sup> Treaty of Sèvres with the Ottoman Empire

<sup>70</sup> Treaty of Saint-Germain-en-Laye (1919) with Austria

<sup>71</sup> Tucker, Spencer (2005). World War I: encyclopedia

The principle of self-determination has been used in the above mentioned state also after the fall of communism. The peaceful division of Czechoslovak Republic<sup>72</sup> and the secession of the Baltic state (Latonia, Lithuania and Estonia).<sup>73</sup>

## **B. The concept of Self-determination**

### *The Charter of the United Nations and UN resolution.*

The UN Charter and the Universal Declaration of Human Right put the bases of a free world abolishing globally things like war or slavery but another fundamental document of human right can be considered the UNGA Res. 1514 on "Declaration on the Granting of Independence to Colonial Country and Peoples". This is the first legal and global document that affirmed self-determination as an IL principle.<sup>74</sup>

The Article 55 of the Charter state that "peaceful and friendly relations among nations based on respect for the principle of self-determination are to be developed" to encourage the use of self-determination.<sup>75</sup> This Article is in full agreement with Art.1 of the Charter.

An important part in the UN Charter have the Chapters XI,XII and XIII that deal with the non-self-governing territory and the trusteeship system created after WWII by the loosing power colony. These chapters created the practice of self-determination in the process of decolonisation but no definition of self-determination can be found in the Charter.<sup>76</sup>

### *The Decolonization declaration*

Under the Declaration on decolonization "All peoples have the right to self-determine; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" <sup>77</sup>

The declaration also calls for immediate "transfer all powers to the peoples of Trust and non-self-governing territories or all other territories which have not yet attained independence ... in accordance with their freely expressed will and desire"<sup>78</sup>

Decolonization formally lasted thirty years, since the end of WWII (1945) to the independence of the Portuguese colonies (1974).<sup>79</sup> However, during the 70s and 80s

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<sup>72</sup> Innes, Abby (2001), Czechoslovakia: The Short Goodbye

<sup>73</sup> Beissinger, Mark R. (2009). "The intersection of Ethnic Nationalism and People Power Tactics in the Baltic States"

<sup>74</sup> UN Charter et UN Website

<sup>75</sup> UN Charter Art 55

<sup>76</sup> Declaration on the Granting of Independence of Colonial Countries and People, UNGA. Res.1514, UN

<sup>77</sup> Declaration on Decolonisation, UNGA. Res.1514, UN

<sup>78</sup> Ibid. Para, 5

<sup>79</sup> Corrado, Jacopo (2008). The Creole Elite and the Rise of Angolan Protonationalism: 1870-1920

there were still many other declarations of independence, which went mostly unnoticed and that is not easily considered to be part of the process of decolonization. In many cases, these were the so-called “small piece of empires”, which became microstates, who had no real independence and who came to be integrated into larger systems. There are three distinct areas that saw develop this phenomenon: the Caribbean, the Indian Ocean and the South Pacific.<sup>80</sup>

### *The Declaration on International Law Principles*

The UNGA in support of Res.1514 created the Res.1541, Res.2621 and the Res. 2625 that consist in the declaration of International Law Principles.<sup>81</sup>

The Declaration affirms the principle of self-determination as an inalienable right considering that “by virtue of the principle of .... Self-determination of peoples enshrined in the Charter, all peoples have right freely to determinate, without external influence, their political status and to pursue their economic, social and cultural development”<sup>82</sup>

This entire legal environment created to facilitate the practice of Self-determination was backed by the absence of a clear definition of the terms like “peoples”. Also the 1970 Declaration makes clear that “authorizing or encouraging any action which dismember or impairs the territorial integrity or political unity of a sovereign and independent state will not be allowed.”<sup>83</sup>

### *The instrument of International Human Rights*

The International Human Right also gives importance to the right of self-determination as a basic right on the freedom of people to choose their government type and political belonging.<sup>84</sup> One of the instruments of International Human Right is the R2P and the Humanitarian Intervention principle that also have been used in the Kosovo case.<sup>85</sup>

The principles of IHR being part of “*jus cogens*” are considered above principles like sovereignty making them the superior legal principles that exist.<sup>86</sup>

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<sup>80</sup> J.H.W. Verzijl. 1969. International Law in Historical Perspective

<sup>81</sup> Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2621, U.N. G.A.O.R., 25th Sess., Supp. No.28, at 10, U.N. Doc. A/8086 (1970).

<sup>82</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, G.A. Res. 2625, U.N. G.A.O.R., 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970) [hereinafter International Law Principles Declaration].

<sup>83</sup> Ibid

<sup>84</sup> Morsink, Johannes (1999). The Universal Declaration of Human Rights: origins, drafting, and intention

<sup>85</sup> Hehir, Aidan; Cunliffe, Philip, ed. (2011), "Chapter 7, The responsibility to protect and international law"

<sup>86</sup> M. Cherif Bassiouni. (Autumn 1996) "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'." Law and Contemporary Problems

### C. Self-determination and the forms of achievement

#### *Secession by Constitution (domestic law)*

The secession can be archived in Constitutional way. Many of the secession case in post cold war era have been made by constitution provisions. The successful secession of the former Soviet Union Republic or the secession of some of the Yugoslav republic.<sup>87</sup>

The secession by constitution can be used in the case the constitution provide legal basis for secession. Some state constitution mentioned in the first articles the fact that the state is *Unitary* and *Indivisible* giving the idea that secession is not allowed and other constitution like the Soviet one give the possibility for secession to all Republics that border with a foreign state or the sea.<sup>88</sup>

This domestic legalization of secession can be considered a peaceful and well now form for archiving secession. The constitution of Australia<sup>89</sup> and Canada<sup>90</sup> recognize the right of self-determination too but with some condition and with the obligation of a referendum.

#### *By compromise of the Parent State.*

A well now form of secession is the secession by compromise of the parent state. Good example of secession by parent state compromise is the secession of Slovakia from Czechoslovak Republic. In all IL history this is the only case of peaceful and equal secession. Not only in this case we see the parent state supporting this secession but also the economic and political right of the parent state where divided in equal part between the successor states.<sup>91</sup>

In some case the parent state make an agreement on the secession of its province like the case of South Sudan that gets independence according to the agreement between Sudan and south Sudan rebel but only after some years and after the sue of a referendum.<sup>92</sup>

A type of self-determination by agreement and by parent state approval can be considered the Trust territory too. The case former Japanese islands in the Pacific

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<sup>87</sup> Constitution of Yugoslavia and Soviet Union

<sup>88</sup> Federalism and the Dictatorship of Power in Russia By Mikhail Stoliarov

<sup>89</sup> "Western Australia and Federation". Retrieved 2006-04-20.

<sup>90</sup> Rowley, Storer H. "Quebec Crisis Creates Talk About 4 Canadian Provinces Joining U.S.

<sup>91</sup> Paal Sigurd Hilde, "Slovak Nationalism and the Break-Up of Czechoslovakia."

<sup>92</sup> Southern Sudan Referendum Results website (SSRC and SSRB) <http://southernsudan2011.com/>

under US<sup>93</sup> Trust or the Belgian Trust<sup>94</sup> over German colony. There are some cases where the Trust territory had problems with the country they have been trusted like the case of Namibia trusted to South Africa. In that case the International community needed to pressure South Africa government to give independence to Namibia.<sup>95</sup>

### *Unilateral Secession.*

In world history we can find many cases of unilateral secession. From the US to Belgium and Greece that in no possibility to get an agreement with their parent state declared unilaterally the independence.<sup>96</sup> These secessions happened before we had a precise concept of self-determination but we can consider that some factors can allow secession in these cases. Factors like abuse by the parent state and mass atrocities or "broke of jus cogens principles" can justify a unilateral secession.<sup>97</sup>

### **D. The secession of Kosovo and its legality according to ICJ.<sup>98</sup>**

According to the International Court of Justice's unilateral declaration of independence by Kosovo on 17 February 2008 did not violate general international law.

The Court's reasoning is straightforward: not only the declarations of independence have never been prohibited by international law but by examining the context of the second half of the twentieth century, you can see how the concept of self-determination has evolved to become a real right to independence "au bénéfice des des peuples territoires non autonomes et de ceux here étaient soumis à la subjugation, domination à la ou à l'exploitation étrangères",<sup>99</sup> as well as by the exercise of this right that allow the emergence of new states. However, considering that some declarations of independence have also been received outside of this context, it must be inferred that there is no rule prohibiting unilateral declarations of independence.

Such a ban - according to the Court - could not be derived from the principle of territorial integrity of states, given that this principle (specifically recognized by the UN Charter) applies only to relations between States (prohibiting substantially that a state can attempt the integrity of another) and not to the people.

Nor - as called for by some members - the prohibition to declare independence unilaterally can be inferred from the previous cases in which the UN Security Council

<sup>93</sup> United States Code: CHAPTER 14 - TRUST TERRITORY OF THE PACIFIC ISLANDS  
<http://uscode.house.gov/docnotfound.xhtml?omitHeader=true>

<sup>94</sup> Peter Langford, "The Rwandan Path to Genocide: The Genesis of the Capacity of the Rwandan Post-colonial State to Organise and Unleash a project of Extermination"

<sup>95</sup> Cedric Thornberry (2004). A Nation Is Born: The Inside Story of Namibia's Independence.

<sup>96</sup> Finlay, George (1861). History of the Greek Revolution

<sup>97</sup> Fishman, J. S. "The London Conference of 1830,"

<sup>98</sup> Using French version of the ICJ

<sup>99</sup> Paragraph 79 of the opinion



has condemned similar statements (and reference is made to the cases of Northern Cyprus, of Rhodesia, South America and the Republic of Srpska, )<sup>100</sup>, since in these cases the illegality would be derived not from the unilateral character of the statement but the use of force or violation of mandatory rules of general international law (*jus cogens*). In this case, the Court concludes, the Security Council did not take similar measures and their condemnation of the exceptional nature of these resolutions would seem to confirm the non-existence of a general prohibition to declare independence unilaterally.

The Court of Justice considers that even the *lex specialis*, namely the Res. 1244 of the UN Security Council adopted on 10 June 1999 and subsequent Regulations of the UN Mission in Kosovo (UNMIK - UNMIK United Nations Interim Administration Mission in Kosovo) may be inferred a specific prohibition to declare independence.

## Conclusion

The secession of Kosovo from Serbia, solemnly proclaimed by the Parliamentary Assembly of Pristina February 17, puts the observer of international politics three problems. The first dilemma is legal, the second is historical and the third question is political-strategic. Given the complex diplomatic game played between the UN and the southern Balkans in the last nine years, should be made clear from the beginning the terms of the legal confrontation in place at this time, reserving the right to deepen the analysis at a later time on the historical and political controversy.

The principle of self-determination, as enshrined in Article. 1, par. 2, and Art. 55 and 56 of the UN Charter, the two UN Covenants of 1966, the Declaration of the General Assembly (AG) on the independence of the colonial peoples of 1960, from the friendly relations between States in 1970, by the opinions rendered by the International Court of Justice in the case of Namibia (1971) and Western Sahara (1975) and from its judgment in the case of East Timor (1995) and finally by the unanimity of doctrine, is configured as internal self-determination, and not external.

Has the right freely to determine its international status that people subjected to colonial domination or racist or whose territory is conquered and occupied by force, not that, then, what aims the establishment of an internal system of democratic type. It goes without saying that this type of claim, although, as we have seen, is based in legal terms, would have been justified in the time of the policy and regime of Slobodan Milosevic and the Federal Republic of Yugoslavia (FRY).

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<sup>100</sup> Paragraph 81 of the opinion

However, self-determination in the principle of territorial integrity of states is an important exception, which is enshrined in par. 7 of the Declaration of the GA in 1960. By virtue of this rule, self-determination must be coordinated with the historical and geographical ties of the territory than in the dominant state. Interpreted in this way, the principle of territorial integrity is a powerful brake to legal secessionist claims of a people. The Charter of Paris of 1990, drawn up in the OSCE and a significant tendency of international law to consider with today's growing awareness of the issue of internal self-determination to pronounce also do so. Even on a domestic case things do not change. The Russian Supreme Court, in cases of Tatarstan and Chechnya, he starred as the two principles just set out to deny the possibility of a unilateral secession from the Federation. Even the Supreme Court of Canada, in the case of Quebec, has denied that a province or a region, even when ethnically differentiated from the rest of the state, the right to secede outside of the three scenarios typical of the principle of self-determination of peoples.

In the light of this analysis I conclude that the Sovereignty and Statehood of Kosovo in the focus of self-determination is and will remain a *siu generis* case considering all the above reflection.

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