

PRINCIPLES OF STATE-BUILDING: THE CASE OF KOSOVO

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Abstract

This study intends to analyze and discuss the principles on the bases of which Kosovo declared its independence on 17 February 2008. Kosovo was a particular case in terms of this principles and the claims between Albanian and Serbian over its territory. The paper puts emphasis on, the anti-constitutional removal of Kosovo's autonomy in 1989, the repression exercised over the civilian population in Kosovo as well as the arguments for the right to self-determination of Kosovo as the last breakaway territory after the disintegration of Yugoslavia. In addition, arguments takes into account the ethnic principle and the principle of *Uti Possidetis* based on which all other Republics of former Yugoslavia (except Kosovo) gained their independence through Badinter Commission. Furthermore, paper analyzes the relevance of these principles in the case of Kosovo, and how they were used by other countries in their statehood stories. Finally, the paper relies on the opinion given by the International Court of Justice over Kosovo declaration of independence by the leaders of Kosovo institutions.

Keywords: Self-determination, *uti-possidetis* principle, Yugoslavia, resolution 1244, independence, international law.

Introduction

Throughout history, changes of borders have occurred as a result of the Great Powers' interests. The population that remained outside the borders of the mother state have been considered as an unresolved problem which was to be resolved according to the interests of the occupying state. Many border changes have occurred in the areas of the Western Balkans based on ethnic composition, in fact, "the right to self-determination has been violated in most of the cases, where unjustly-created ethnic borders have further created minority problems."¹²⁴ The same case could be used to explain the situation with the Kosovo Albanian population up until 1999, as they never agreed with the annexation of Kosovo from Serbia. Kosovo's autonomy was revoked in 1989, at the very beginning of the disintegration of Yugoslavia. The revocation of the autonomy initiated by Slobodan Milosevic, the president of then Yugoslavia, was in fact contradictory to the SFRY Constitution.¹²⁵ The Serbian politics in an attempt to create the Great Serbia were not only against Kosovo but against all peoples living in Yugoslavia, which led to armed conflicts. Consequently, all the former Republics forming Yugoslavia declared their own independence as a result of Milosevic's destructive politics. The very same fundamental right of self-determination was requested by Kosovo

¹²⁴ Georg Brunner, *Nationalitätenprobleme und Minderheitenkonflikte in Osteuropa* (Nationality problems and minority conflicts in Eastern Europe) (Gütersloh 1996), 104.

¹²⁵ See Article 5 of the Yugoslav Constitution of Socialist Federal Republic of Yugoslavia 1974.

Albanians. However, this was refused by the Serbian government and parliament, as they took measures (including the military intervention to prevent Kosovo's breakaway).¹²⁶

Unrestrained actions of Serbia against the majority Albanian population in Kosovo led to NATO intervention which forced all Yugoslav armed forces to withdraw from Kosovo. UN Security Council approved the Resolution 1244 assuring the establishment of an interim UN administration. Yugoslavia/Serbia's sovereignty over Kosovo was revoked upon the deployment of KFOR¹²⁷ troops under the NATO lead and upon the installation of UN administration (UNMIK¹²⁸) in Kosovo. Thus, Kosovo came under UN protectorate until finally declaring its independence almost ten years later in 2008. The declaration of independence of Kosovo opened a controversial debate to the highest level in international politics. On the one hand, the independence of Kosovo is being viewed as an action in accordance with the international law, and on the other hand as an action violating the international law. Therefore, the main aim of this study is to analyze the principles on the bases of which Kosovo declared its independence, how these principles were relevant in the case of Kosovo, and how they are used by other countries in their statehood stories. Claims made by the state of Serbia over Kosovo are based on church heritage whereas our evidence shows that there are hundreds of such cases in many countries worldwide. These claims that now belong to the past could not impede Kosovo from declaring its own independence. On the contrary, the exercise of a continuous repression against the Albanian population in Kosovo by the Serbian state apparatus created an intense mistrust leading to Kosovo's breakaway.

Albanian and Serbian claims over Kosovo - *The two-century rivals for Kosovo*

The source of the conflict for Kosovo amid Albanians and Serbs dates since medieval times. For centuries, both sides have fought for Kosovo. Even nowadays, Serbs claim that their culture is rooted in the Battle of Kosovo and that their predecessors were the first inhabitants of Kosovo. According to Noel Malcolm, a British historian, Serbs were first settled in Rashka¹²⁹ territory and not in Kosovo as the Serbs claim. According to him, the territory of Kosovo was not within the territory of the Serbs of Rashka. Serbian expansion in Kosovo started at the end of the XII¹³⁰ century. Quite to the contrary, Kosovo Albanians consider the Kosovo territory¹³¹ as their own ancient territory founded by their Thracio-Illyrian descent and origin.¹³² "Mindful historians with reasonable grounds claim that Albanians are descendants of ancient Illyrians and this fact tells us that Kosovo was their home before the arrival of Serbs in Kosovo."¹³³ Kosovo remained under the Ottoman rule for five hundred years after the loss of the Christian Peoples' Alliance of the Balkans in Fushë Kosovë in 1389. Serbs mythicized the loss of this battle and considered it as their own victory. This myth has been used as an instrument supporting the Serbian political expansion.¹³⁴

The end of the Ottoman Empire and the Kosovo issue

¹²⁶ Schmitt, Oliver Jens Schmitt, *Kosovo Kurze Geschichte einer zentralbalkanischen Landschaft* (Kosovo, a short history of central Balkan territory) (Wien 2008), p.307.

¹²⁷ Kosovo Force

¹²⁸ United Nation Interim Administration Mission in Kosovo

¹²⁹ Rashka is small town in southwest Serbia

¹³⁰ Noel Malcolm, *Kosova, një histori e shkurter* (Kosovo, a brief history), (Prishtinë 2001), 26.

¹³¹ Calic, Marie-Janine, *Ein Mythos bringt Tod und Zerstörung* (A myth brings death and destruction) [database on-line]; available at <http://www.vhs.ahlen.eu/forum-bruederlichkeit/kosovo/mythos.shtml>, accessed on 06 May 2013.

¹³² Noel Malcolm, *Kosova, një histori e shkurter* (Kosovo, a brief history), (Prishtinë 2001), 28.

¹³³ Calic, Marie-Janine, *Ein Mythos bringt Tod und Zerstörung* (A myth brings death and destruction) [database on-line]; available at <http://www.vhs.ahlen.eu/forum-bruederlichkeit/kosovo/mythos.shtml>, accessed on 06 May 2013.

¹³⁴ Gazimestan Speech by Slobodan Milosevic on 28 June 1989.

National movements of the Balkan peoples started upon the weakening of the Ottoman Empire in the XIX century.¹³⁵ The aims of these peoples were to fight against the Ottoman Empire on the one hand, and on the other hand gradually expand their territories at the expense of their own neighbours. Great Powers supported various peoples of the Balkans based on their interests. During the time period between 1912 and 1914 the majority of the Balkan countries were highly influenced and directed by Russian politics. On behalf of brotherhood and pan-Slavism, Serbs were fully supported by Russia, specifically in terms of expansion of their territories in the areas inhabited by the Albanian population. The Russian sphere of influence was strengthened significantly after the consecutive losses of the Ottoman Empire. From the ethnographic point of view, it could be said that the rights and interests of the native population were not taken into account.

In June 1878 the Congress of Berlin was held to prevent this. Albania and Albanians did not have a worthy representation to defend their own interests and aspirations nor did they enjoy the support of the Great Powers and their allies. Albania's neighbouring countries in cooperation with European Great Powers played an important role in territorial issues. Albania was partially split among its neighbours. Thus, the Albanian-speaking population was divided in many surrounding countries where it was exposed to harsh repression and discrimination. A resistance and a countrywide uprising were organized against the separation of the Albanian lands. This paved the way to the establishment of the Prizren League in 1878¹³⁶, but this resistance was unsuccessful in achieving its goals in joining the annexed territory back to Albania. In 1878, Serbia became an independent country and a conqueror of some of the territories in the region. During the Balkan Wars (1912-1913), it conquered Kosovo and Macedonia. The rights of Albanians and Macedonians to decide their own future were violated after this conquest.¹³⁷ Serbia expanded its own territory by extending on Vardar - Macedonia, Kosovo and Sanjak by around 81%¹³⁸, which resulted in new internal problems that Serbia still faces even today. A portion of the Albanian population remained within the Serbian state extended (usurped) territory apart from their resistance.

In 1913, through the London Treaty, the Great Powers had decided to divide Albania among Serbia, Montenegro and Greece. These anti-Albanian plans failed because the then US President Woodrow Wilson did not agree with a plan which he strongly opposed.¹³⁹ The following Albanian uprising occurred after the re-conquest of Kosovo by Serbia in 1918. The Albanians were against the inclusion of Kosovo within Serbia or Yugoslavia.¹⁴⁰

The Serbian legal claim

Serbia tried to justify the conquest of Kosovo by their "historic right" on the current territory of Kosovo through their "glorious" medieval history. The right of a state over a region or province, which is based on the tombs, churches, temples, battles and architecture cannot be considered relevant to our time we live in. In addition to this, Serbs consider Kosovo as the cradle of their culture using historic proofs such as churches, medieval monasteries and the battle of Kosovo in 1398. "Serbian Churches and their past in Kosovo have the same status as the Arabic mosques in Spain or Greek churches in Istanbul."¹⁴¹ With

¹³⁵ Zejnullah Gruda, "Historia e Kosovës"(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

¹³⁶ Zejnullah Gruda, "Historia e Kosovës"(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

¹³⁷ Attila Hoare, Marko "Kunder Tiranëve dhe spastruesve etnik" (Against the tyrants and ethnic cleansers), *Express Magazine*, 3 August 2010, 3.

¹³⁸ Calic, Marie-Janine, *Geschichte Jugoslawiens im 20. Jahrhundert* (Yugoslavia's history in the 20th century) (Munich 2010), 68.

¹³⁹ Zejnullah Gruda, "Historia e Kosovës"(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

¹⁴⁰ Zejnullah Gruda, "Historia e Kosovës"(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

¹⁴¹ Kastriot Zeka, *Self-determination History of Kosovo*, [database on-line]; available at http://kosova-aktuell.de/index.php?option=com_content&task=view&id=172&Itemid=40, accessed on 15 November 2013.

this Serbian proof therefore one could argue that even the Greeks have the rights over Istanbul; Arabs have the right over Spain or maybe Italians living in the north of Alps up to Lima.

Albanians find support for their Illyrian ancestry in this region, in the Province of Dardania where after the division that followed in the Christian religion, they remained Catholics. Therefore, churches in Kosovo were rebuilt and enlarged from the very foundations of the Albanian catholic churches and turned into Serbian ones by the Serb rulers of the 14 century.¹⁴² The Battle of Kosovo in 1389 has been mythicized and politicized in order to internationalize Kosovo as the cradle of the Serbian culture and therefore make Kosovo an undivided part of the Serbian state. But it was not only the Serbs who fought against the Ottomans in this battle, but all Christians including Albanian Christians, Bulgarians, Macedonians and others. “This means that Christians fought against the Ottomans in Kosovo, the Albanian land.”¹⁴³ This myth has been serving the Serbs even today to support their claim over Kosovo. Between the periods of 1909-1918 Serbs popularized the idea that the borders were to be based on ethnic principles. According to them, Albanians in fact were Serbs who were Albanianized and assimilated by their Albanian neighbours during the reign of the Ottoman Empire and thus changed the structure of the ethnic province of Kosovo by converting to Islam.”¹⁴⁴ “Whole libraries and pseudo-scientists have attempted to reason that “arnauts”,¹⁴⁵ in reality are Albanized Serbs”.¹⁴⁶ The above argument is heavily criticized by the Albanians living in Kosovo but also it is eliminated by historical events and truths as the native Albanians lived in many neighbouring countries.

During the 1980s and 1990s of the twentieth century, the Serbian claim over the majority of the regions of Yugoslavia led to the disintegration of Yugoslavia during the wars in Croatia, Bosnia and Herzegovina and Kosovo. Brutal wars were fought between the Serbs on one side, and Croats, Bosnians and later Albanians on the other during the early 90s, and then late 90s. On 12 June 1999, Kosovo came under UN administration. After the approval of the Resolution 1244 by the UN Security Council, the mission of the interim administration exercised a security presence (KFOR) and an interim administration (UNMIK). The international mission aimed in helping to establish an interim government in order to achieve “a substantial autonomy and self-governance”¹⁴⁷

The right to self-determination

Six years ago, on 17 February 2008 at an extraordinary session at the Assembly of Kosovo, The Prime Minister of Kosovo, Mr. Hashim Thaçi declared: “We, the democratically-elected leaders of our people, with this declaration, hereby declare Kosovo to be an independent and sovereign state”.¹⁴⁸ Kosovo declared its independence unilaterally based on the right of self-determination of peoples.¹⁴⁹

The development of the right to self-determination

¹⁴² According to Schmitt, Jens Oliver, *Kosovo*, (Vienna 2008), 29-34.

¹⁴³ Fabian Schmidt, *Im Griff der großen Mächte* (Schmid: In the grip of the great powers) *Thomas, Krieg im Kosovo* (Thomas War in Kosovo) (Hamburg 1999), 82.

¹⁴⁴ Zejnullah Gruda, “Historia e Kosovës“(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

¹⁴⁵ The Serbs, the Albanians called „Arnauts“ or „Shiptari“, with the intention to weaken their identity.

¹⁴⁶ Calic, Marie-Janine, *Geschichte Jugoslawiens im 20. Jahrhundert* (Yugoslavia's history in the 20th century) (Munich 2010), 90.

¹⁴⁷ Negotiating framework 15 May. 2001.

¹⁴⁸ Prime Minister of Kosovo, Hashim Thaci, 2008.

¹⁴⁹ Mc Whinney, Edward (2007). *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-Building and the Alternative, Federal Option*. Martinus Nijhoff Publishers. p. 8.

Various factors have played a key role in the state-building, including the policies of the great powers that have supported, or on the contrary, have prevented the creation of new states. For example, the state-building process in the Balkans has been greatly exposed to the impact of the great powers. “Foreign impact of the Great Powers has played a determinant and arbitrary role in the creation and status of the Balkans states.”¹⁵⁰ Based on the fact that all people have the right to self-determination, as a natural right, even today various peoples make efforts to free themselves from the rule of others and decide their own fate. Throughout history, the right to self-determination has been denied in most of the cases. This opposition has often led to various wars and conflicts. The right to self-determination is not viewed as a new concept by the scientists. This phenomenon has its roots in antiquity.

“Ever since the antique philosophy, what has been noticed is the effort of the human to be independent and separate from the impacts of nature, divine powers and determined only by his thinking.”¹⁵¹ The right to self-determination as an idea was empowered back in the 18th century Bourgeoisie Enlightenment. But the idea of freedom and self-determination rights for the entire nation was first formulated with the independence of the United States in 1775. The revolution organized by the American people to search for their freedom and liberty from the British invader has led to the Independence of the USA. Later on, the self-determination principle was convincingly confirmed after the French Revolution due to the fact that the French people were liberated from their rulers.¹⁵²

At the end of the First World War, in the arena of international politics, the American President Woodrow Wilson came with his Fourteen Points plan. His goal was to create a new world order and serve peace in this way. The right to self-determination as well as the guarantee of minority rights was also included within these points. It was based on Lenin’s formulation.¹⁵³ Since then, the right of self-determination was enhanced in terms of importance. On 26 June 1945 it was included in the United Nations Charter in Article 1, Paragraph 2 and Article 55¹⁵⁴. In these Articles, the right of self-determination is valued as one of the preconditions for peace and stability. From now and onwards, it is recognized as a norm (*jus cogens*)¹⁵⁵ of the international community. In the International Convention on Civil and Political Rights of 19 December 1966 that came into force in 1976, the right of self-determination was codified including the human rights of all peoples. Pursuant to Article 1 of this Convention, “*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.*”¹⁵⁶

The Declaration of Rights of Endogenous Peoples was presented by their representatives on 13 September 2007.¹⁵⁷ According to this declaration, the rights of peoples to self-determination are guaranteed. But the term “peoples” has not been defined respectively

¹⁵⁰ Jörg Fisch, *Das Selbstbestimmungsrecht der Völker* (The self-determination of peoples) (München 2010), 132.

¹⁵¹ Fisch, *Das Selbstbestimmungsrecht der Völker*, 30.

¹⁵² Norman Paech, *Selbstbestimmungsrecht und Minderheitenschutz* (Self-determination and the protection of minorities) [database on-line]; available at http://www.norman-paech.de/uploads/media/Gutachten_Kurdistan.pdf, Accessed on 02 September 2012.

¹⁵³ 14-point program of United States President Woodrow Wilson [database on-line]; available at <http://www.dhm.de/lemo/html/dokumente/14punkte/>, accessed on 15 May 2013.

¹⁵⁴ Charter of the United Nations of 26 June 1945 (San Francisco), [database on-line]; available at <http://www.forost.ungarischesinstitut.de/pdf/19450626-4.pdf>, accessed on 29 May 2013.

¹⁵⁵ Irresistible Law

¹⁵⁶ International Convention on Civil and Political Rights of 19 December 1966 [database on-line]; available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/360794/publicationFile/3613/IntZivilpakt.pdf>, accessed on 29 May 2013.

¹⁵⁷ See General Assembly resolution 61/295, available [database on-line]; available at: [Http://www.un.org/esa/socdev/unpfii/documents/Declaration \(German\) pdf](Http://www.un.org/esa/socdev/unpfii/documents/Declaration%20(German).pdf), accessed on 22 May 2013.

nor has it been explained in the United Nations Charter or on the 1966 Convention of Human Rights. For this reason, the term is still contradictory and disputed in the literature of international law. Thus, the principle of the right to self-determination has been shifted from a political principle to a judicial one and has had a wide support by the United Nations.¹⁵⁸ Also in the Resolution 2625 of the General Assembly of the United Nations of 24 October 1970 “equal and self-determination rights of peoples” were added.”¹⁵⁹ The right to equal justice and self-determination was used by colonized territories in order to gain their full independence. The process of decolonization occurred as a result and based on this right of nations, and it was valued as an important step towards achieving justice for all.¹⁶⁰ At this time, this principle is of significant importance for the process of creating new states.

Internal and external self-determination

Within the framework of the international law, the right to self-determination contains two important aspects: the internal and external principle. The first aspect assures that all people enjoy freedom in order to determine their internal domestic matters of their state. The second aspect explicitly states that people have the right to self-determination, whether they want to live with other people or want to be independent.¹⁶¹ The internal right of the states for self-determination deters any interference of foreign rule. This means that the internal right to self-determination “(...) is the right of people to determine its own constitution, in order to govern itself, and to determine on the use of its wealth and resources.”¹⁶² The interference in the domestic matters of a state is also forbidden by the UN Charter.¹⁶³ But UN member states are obliged to guarantee equal rights to their citizens, namely their own people. Even the International Pact on Civil and Political Rights requires the respect for the minority rights. Article 26 of the Convention prohibits “(...) every discrimination irrespective of their race, skin colour, sex, language, religion, political inclination or other, national origin and wealth, birth or any other status, (...)”¹⁶⁴ By assuring human rights for minorities, the right to internal self-determination and stability of a state is also guaranteed.

According to Stephan Hobe (2008), only in extraordinary circumstances, when it comes to the violation of human rights, the “external” right can be followed by the “internal” right to self-determination and then, it results on the right to breakup from the state equally shared previously.¹⁶⁵ This means that the external right to self-determination or breakup belongs to a minority or an ethnic group exceptionally in cases of grave and long-term violations of human rights. A permanent repression of a minority or ethnic group by the mother state could lead to an external self-determination where self-defence may follow as a result. According to Landy, self-determination implies the right of the oppressed minority to

¹⁵⁸ Zejnullah Gruda, *E Drejta Nderkombetare Publike* (The International Public Law) (Pristina, 2003), 63.

¹⁵⁹ UN General Assembly, A/RES/2625 (XXV), 24 October 1970, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, accessed on 29 May 2013.

¹⁶⁰ Jörg Fisch, *Das Selbstbestimmungsrecht der Völker* (The self-determination of peoples) (München 2010), 18.

¹⁶¹ Zejnullah Gruda, *E Drejta Nderkombetare Publike* (The International Public Law) (Pristina, 2003), 62.

¹⁶² Robert Muharremi, *Treuhandverwaltung zwischen Friedenswahrung, Souveränität und Selbstbestimmungsrecht* (Trusteeship between the maintenance of peace, sovereignty and self-determination) (Baden-Baden 2005), 111.

¹⁶³ United Nations Charter and Statute of the International Court of Justice, [database on-line]; available at: http://www.un.org/depts/german/un_charta/charta.pdf, accessed on 29 May 2013.

¹⁶⁴ International Convention on Civil and Political Rights, at: <http://www.auswaertiges-amt.de/cae/servlet/contentblob/360794/publicationFile/3613/IntZivilpakt.pdf>, accessed on 29 05th, 2013.

¹⁶⁵ Stephan Hobe, *Einführung in das Völkerrecht* (Introduction to International Law) (Köln 2008), 118.

breakup from the ruling state, or the right to establish its own state or to join another nation state.¹⁶⁶

Fiedler describes that the right to external self-determination of all peoples guarantees them the right to decide freely and without any foreign interference from abroad on their political status, (...) every country is obliged to respect these rights.¹⁶⁷ Moreover, the establishment of independent states is prescribed in Paragraph 4. It is restricted from the sovereignty and territorial integrity of states. Bearing in mind the new events that occurred in Kosovo, the question arises to what extent they allow Kosovo to declare its independence and breakup from Serbia. Facts and figures show that the Serbs have continuously oppressed Kosovo Albanians.

“Throughout history, Serbia has continuously oppressed Kosovo Albanians since the time of the Balkan Wars of 1912-1913 when the Great Powers granted the majority Albanian-populated Kosovo to the Serbian Kingdom instead of ceding it to Albania.”¹⁶⁸ Inequality and discrimination exercised by Serbia towards Kosovo Albanians in Former Yugoslavia is best described by Branko Horvat, a Croatian academic, in his book “The Kosovo Question” (Croatian: *Kosovsko Pitanje*).¹⁶⁹ It is about the grave violation of human rights in Kosovo by Serbian authorities. These facts confirm “The Declaration of Principles of the International Law regarding friendly relations (...) among states”¹⁷⁰, because if the self-determination and sovereignty subjects are dissolved, then the internal self-determination right is valid. The issue as to what extent is this valid regarding Kosovo has been widely discussed in various judicial-political debates.

Implementation of the self-determination

From a historical perspective, the western and international democratic order as a whole is rooted in national separatism. Various factors have played a role in the creation of new states. These factors include: obvious repression and discrimination towards minority groups. As a result, these repressed people were forced to resist or fight until they created their own state and governed themselves. Even the strongest democratic country (the USA) was created out of a separatist revolt. The declaration of independence of the United States of America from Great Britain was a unilateral act by the Americans. The causes of these separatist revolts were imposed by the high taxes demanded from the United Kingdom.¹⁷¹

If we analyze the separatist revolt of the Americans to that of Kosovo Albanians, we come to the conclusion that the majority of people in Kosovo had a strong reason to their claim and efforts to gain the right of self-determination. There were also a great number of European countries that were part of a larger entity; however, they still gained their independence in a number of historical periods of time. With respect to the above, the following countries gained their independence from a larger sovereignty: Switzerland, Sweden, Netherlands, Portugal, Greece, Luxemburg, Serbia, Montenegro, Romania, Norway, Bulgaria, Albania, Poland, Finland, Czech Republic, Slovakia, Ireland, Iceland, Cyprus,

¹⁶⁶ Sy Landy, *Self-determination and "military defense" the Marxist method*, [database on- line]; available at: http://www.lrp-cofi.org/KOVI_BRD/Dokument/Selbstbestimmung.html, accessed on 25 November 2012.

¹⁶⁷ Wilfried Fiedler [database on- line]; available at: <http://archiv.jura.unisaarland.de/FB/LS/Fiedler/Fiedler/Aufsaeetze/Selbstbestimmungsrecht-21-06-01.htm#G.%20GRENZEN%20DES>, accessed on 10 April 2013.

¹⁶⁸ Sy Landy, *Self-determination and "military defense" the Marxist method*, [database on- line]; available at: http://www.lrp-cofi.org/KOVI_BRD/Dokument/Selbstbestimmung.html, accessed on 25 November 2012.

¹⁶⁹ Branko Horvat: *Kosovsko Pitanje* (Kosovo issue), (Zagreb 1987).

¹⁷⁰ Wilfried Fiedler [database on- line]; available at: <http://archiv.jura.unisaarland.de/FB/LS/Fiedler/Fiedler/Aufsaeetze/Selbstbestimmungsrecht-21-06-01.htm#G.%20GRENZEN%20DES>, accessed on 10 April 2013.

¹⁷¹ Attila Hoare, Marko “*Kunder Tiranëve dhe spastruesve etnik*“ (Against the tyrants and ethnic cleansers), *Express Magazine*, 3 August 2010, 3.

Malta, Lithuania Latvia, Estonia, Georgia, Armenia, Azerbaijan, Ukraine, Belarus, Slovenia, Croatia, Macedonia, Bosnia and Herzegovina, (...)¹⁷² Upon the fall of the Soviet Union, there were a certain number of other countries that managed to apply the self-determination right. “Disintegration of the Soviet Union and the reunion of Germany as well as the developments in the Balkan region were significant events that confirmed the right of people for self-determination.”¹⁷³

Uti Possidetis principle and its implementation

The Uti Possidetis principle has played an important role in the decolonization process and creation of new states by accepting the borders drawn by colonialist powers between states and partially within the states and recognizing them as being the borders of independent states.”¹⁷⁴ Uti Possidetis principles have been discussed in various contradicting ways. This principle was first applied in 1810 and 1821 during the decolonization process of South America with particular emphasis on the countries of Central America.¹⁷⁵ It was taken by most African countries and then implemented in 1884-1885.¹⁷⁶ The so-called Badinter Committee was established upon the raising of tensions amid the peoples in former Yugoslavia. It was composed of the European Court for the Constitutional Right. Its task was to decompose judicial matters within Yugoslavia.¹⁷⁷ This committee confirmed that all people have the right for self-determination.¹⁷⁸ This meant that the constituent parts of Yugoslavia could declare their independence by applying the Uti Possidetis principle and the opinion of this Committee.

After the Second World War, borderlines were drawn on historic and national principles. Kosovo and its borders were created based on national principles.¹⁷⁹ Border integrity and Kosovo autonomy were guaranteed by the Yugoslav Constitution of 1974. Pursuant to Article 5 of the Constitution of 1974, Kosovo borders could not be changed without its consent.¹⁸⁰ “Based on that, Kosovo Albanians prove that Kosovo has been a constituent part of former SFRY.¹⁸¹ Not only did this Constitution guarantee the autonomy, but it also guaranteed an equal representation as other Yugoslav¹⁸² Republics and the right to use its veto in the institutions of Socialist Federative Republic of Yugoslavia. A consensus of all constituent parts of Yugoslavia was required on all decisions made at the Federal Assembly with regard to the changing of laws. In fact, two socialist- autonomous provinces within the federation (Kosovo and Vojvodina) had to make decisions jointly with other Republics regarding the future of Yugoslavia.¹⁸³

The constitution of 1974 guaranteed Kosovo the following rights:

The right to approve its Constitution and the right to approve or change laws, the right to a functional Constitutional Court, the right to an autonomous judiciary and a Senior Court, the right to defend its interests, the right to sign Conventions and agreements with institutions

¹⁷² Hoare, Marko “*Kunder Tiranëve dhe spastruesve etnik*“, 3.

¹⁷³ Karl Doehring, *Völkerrecht*, (International Law) (Heidelberg 2004), 340.

¹⁷⁴ Jörg Fisch, *Das Selbstbestimmungsrecht der Völker* (The self-determination of peoples) (München 2010), 66.

¹⁷⁵ Zejnullah Gruda, *Parimi uti possidetis - Kufijtë brendshëm* (The principle of uti possidetis - inner boundaries) *Koha Ditore Magazine*, 28 September 2006.

¹⁷⁶ Roland Schäfer, *Die uti possidetis und ihre Anwendung* (The uti possidetis and his application) (Norderstedt Germany 2008), 4.

¹⁷⁷ Schäfer, *Die uti possidetis und ihre Anwendung*, 6.

¹⁷⁸ Schäfer, *Die uti possidetis und ihre Anwendung*, 6.

¹⁷⁹ Zejnullah Gruda, *Parimi uti possidetis - Kufijtë brendshëm* (The principle of uti possidetis - inner boundaries) *Koha Ditore Magazine*, 28 September 2006.

¹⁸⁰ See Article 5 of the Yugoslav constitution of 1974

¹⁸¹ Wichard Woyke (Hrsg.), *Handwörterbuch internationale Politik* (Directory of international politics) (UTB Opladen 2008), 22.

¹⁸² The Socialist Federal Republic of Yugoslavia consisted of six republics (Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, Serbia, and two autonomous provinces (Kosovo and Vojvodina).

¹⁸³ Branko Horvat, *Kosovsko Pitanje* (Kosovo issue) (Zagreb, 1987), 91-94.

of other countries or international organizations, the right to have independent institutions such as the Assembly, Presidency, Executive governance, Ministry of Defence, Ministry of Justice and Ministry of Internal Affairs).¹⁸⁴

Based on all the above-mentioned facts, the question arises; had not Kosovo fulfilled the preconditions of the *Uti Possidetis* principle to declare its independence? According to Fisch, autonomy means self-governance (...) if somebody has the right of self-determination, under specific circumstances, has also the right to create a sovereign state.¹⁸⁵

Ethnic principle as an attribute of an independent state

Demographic Structure

In order to create the independent state of Kosovo, the basic ethnic principle should be taken into account. Even though only 8% of the countries in the world are homogenous, ethnic principle has been one of the key criteria in the state- building process.¹⁸⁶ In the nineteenth century, “the national principle according to which, any nation as a society, having a joint language, religion, economy, culture, skin colour, tradition, history, race, origin, sex, etc, may create an independent country. In 1870, Italy was united through this process, as well as Romania, and Serbia and Montenegro were established as independent states”.¹⁸⁷ The latter have expanded in terms of territory.¹⁸⁸ Recognizing the fact that Kosovo has a compact demographic structure, composed of 92% of Kosovo Albanians, the ethnic principle was mentioned as one of the reasons for independence.

The impact of Serbian politics on the demographic structure of Kosovo

From a historical dimension, the Albanian demographic structure in Kosovo was a serious concern for Serbia because Albanians were a majority and had a greater birth-rate in the entirety of Yugoslavia. Serbian history is based on the developments of 1690 - a great displacement (*Serbian: Velika Seoba*) of Serbs from Kosovo heading to Serbia. As a consequence, Serbs remained a minority in Kosovo. But “in reality, there has neither been any depopulation of Kosovo by the Serbs (...) nor has any massive flux of Albanians towards Kosovo ever occurred.”¹⁸⁹ This view of the Serbian historiography was also present throughout the nineteenth century.¹⁹⁰ For this very reason, Serbian politicians and academics were forced to establish various programs that would change the demographic structure in Kosovo. During the Balkan Wars of 1912/13, Serbian politics aimed at “(...) correcting the ethnographic statistics in their favour...”¹⁹¹ in an attempt to change the ethnic character of the regions populated mostly by Albanians.¹⁹²

On 7 March 1937, Serbian Academy of Arts and Sciences issued a program entitled: the displacement of Albanians (in Serbian, *Iseljavanje Arnauta*). It marked the beginning of the implementation of this project. Serbian academic, Vasa Çubrilović represented the view that Serbian colonization did not lead to any decrease in the Albanian population”.¹⁹³

¹⁸⁴ Zejnullah Gruda, *Parimi uti possidetis - Kufijtë brendshëm* (The principle of uti possidetis - inner boundaries) *Koha Ditore Magazine*, 28 September 2006.

¹⁸⁵ Jörg Fisch, *Das Selbstbestimmungsrecht der Völker* (The self-determination of peoples) (München 2010), 132.

¹⁸⁶ Zejnullah Gruda, *Parimi etnik* (The ethnic principle), *Koha Ditore Magazine*, 09 September 2006.

¹⁸⁷ Zejnullah Gruda, *Parimi etnik* (The ethnic principle), *Koha Ditore Magazine*, 09 September 2006.

¹⁸⁸ Calic, Marie-Janine, *Geschichte Jugoslawiens im 20. Jahrhundert* (Yugoslavia's history in the 20th century) (Munich 2010), 42.

¹⁸⁹ Schmitt, Oliver Jens Schmitt, *Kosovo* (Kosovo) (Wien 2008), 147.

¹⁹⁰ Zejnullah Gruda, *Parimi etnik* (The ethnic principle), *Koha Ditore Magazine*, 09 September 2006.

¹⁹¹ Calic, Marie-Janine, *Geschichte Jugoslawiens im 20. Jahrhundert* (Yugoslavia's history in the 20th century) (Munich 2010), 67.

¹⁹² Calic, *Geschichte Jugoslawiens im 20. Jahrhundert*, 67.

¹⁹³ Hivzi Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve* (Ethnic cleansing, "Serbian genocidal policies towards the Albanians) (Peja 2003), 36.

According to him, only the brutal force could (...) retain Serbian control over Kosovo.”¹⁹⁴ The same point of view was supported by Ivo Andric, a Serbian writer and Nobel Prize winner,¹⁹⁵ who had prepared a special program where he developed the idea of the enlargement of Serbia or the so-called Great Serbia.¹⁹⁶ In order to strengthen its claims on Kosovo’s territory, Serbian politics were forced to do more to enable the Serbs to become a majority population in Kosovo. Serbia tried to change the demographic structure through colonization programs and the increase the number of the Serb population in Kosovo. When it comes to figures, 15,594 Serb families were settled in Kosovo until 1936. A total of 11,289 houses were built for those families.¹⁹⁷ In addition, in 1938 the Serbian Government signed an agreement with Turkey where 40,000 Albanian families were to be expelled to Turkey.¹⁹⁸ It is estimated that between 1945-1966, around 50,000 Serbs and Montenegrins were settled in Kosovo. According to the Serbian point of view, in order to defend Serb interests, any responsibility granted by Josip Broz Tito (Yugoslavian President, 14 January 1953 – 4 May 1980) to Kosovo Albanians had to be revoked. “The very same ‘rule’ was applied to ban the Albanians from the state-controlled economy, state institutions, as well as the application of police measures against Albanian terrorists”.¹⁹⁹ Apart from expelling Albanians from their homeland, the use of massive police force, “firing employees from the civil service, prohibition of handicrafts, trade, and other survival activities (...) were also part of the agenda of Cubrilovic’s Memorandum. These were followed by humiliation and systematic degradation of the Albanian majority population.”²⁰⁰ Between 1980- 1996, it is thought that around 800,000 Kosovo Albanians were interrogated, tortured, persecuted and maltreated in various ways by the Serbian state apparatus.²⁰¹

During the 1990s, Kosovo Albanians were exposed to violence and discrimination. “Kosovan civilians were victims of systematic attacks, expels, lootings and massive killings”.²⁰² During 1998, about 1,500 Kosovo Albanians were murdered in the offensives by the Yugoslav Military and Serb special police forces, whereas around 300,000 others were expelled abroad.” In 1999 “about 10,000 Kosovo Albanians were murdered and more than a million were displaced from their homes.”²⁰³ All these measures were used by Milosevic after 1989. For the last time, Serbia tried to impact in terms of changing the demographic structure of Kosovo through wars of the 90s of the twentieth century and consequently it managed to bring to Kosovo hundreds of Serb refugees who fled from the wars in Croatia and Bosnia. Until the end of 1995, the number of Serbian refugees in Kosovo increased up to 13,000 “.²⁰⁴ In the meantime, some 600,000 Kosovo Albanians abandoned Kosovo. Only in 1998/99 over a million Albanians were expelled.²⁰⁵

However, it was the Kosovo Albanians who still were the majority of the population in Kosovo. This was also confirmed by the then-Minister of Foreign Affairs of Serbia and

¹⁹⁴ Schmitt, Oliver Jens Schmitt, *Kosovo* (Kosovo) (Wien 2008), 207.

¹⁹⁵ Hivzi Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve* (Ethnic cleansing, "Serbian genocidal policies towards the Albanians) (Peja 2003), 41.

¹⁹⁶ Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve*, 40.

¹⁹⁷ Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve*, 39.

¹⁹⁸ Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve*, 39.

¹⁹⁹ Schmitt, Oliver Jens Schmitt, *Kosovo* (Kosovo) (Wien 2008), 31.

²⁰⁰ Schmitt, Oliver Jens Schmitt, *Kosovo* (Kosovo) (Wien 2008), 208.

²⁰¹ Fejzullah Berisha, *Mohimi i lirive dhe të të Drejtave njëriut në Kosovë në periudhën 1990-1996* (The Denial of freedoms and human rights in Kosovo during the period 1990-1996) (Pristina, 2000), 141.

²⁰² Julia Nitsch, *Kosovo*, [database on- line]; available: http://www.bpb.de/popup/popup_druckversion.html?guid=FP4DAK, Accessed on 03 February 2013

²⁰³ *Kosovo independence lawful* [database on- line]; available at: http://www.bpb.de/popup/popup_druckversion.html?guid=BE2GGD&page=0, Accessed on 03 February 2013.

²⁰⁴ Hivzi Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve* (Ethnic cleansing, "Serbian genocidal policies towards the Albanians) (Peja 2003), 81.

²⁰⁵ Hivzi Islami, *Spastrimet Etnike, "politika gjenocidale Serbe ndaj Shqiptareve* (Ethnic cleansing, "Serbian genocidal policies towards the Albanians) (Peja 2003), 81.

Montenegro, Vuk Draskovic during a lecture in 2005 in Austria. He also pointed to the fact that in 1912 when the Serb military were marching in Kosovo, 80% of Albanians were living in Kosovo”.²⁰⁶ Based on the abovementioned facts, it could be argued that the Serbian politics have failed to change the demographic structure of Kosovo apart from the continuous repression exercised towards Kosovo Albanians. Thus, Kosovo continues to be a multi-ethnic state composed of 92% of Albanian population, 5.3% Serbs and 2.7% other minorities.²⁰⁷

Resolution 1244 as a pre-stage (as a preliminary phase towards independence)

On 10 June 1999 UN Security Council approved the Resolution 1244²⁰⁸. According to this Resolution a military force (KFOR) and a civilian presence (UNMIK) were established. The Resolution placed Kosovo under the UN protectorate within Yugoslavia. This meant that a part of the sovereignty of Yugoslavia was transferred under the UN supervision. Therefore, the international community undertook the functions of an interim administration for an indefinite period of time.

The Resolution 1244 contains three main aspects:

The installation of an international civilian and military presence having a political authority and responsibility to administer Kosovo.

The implementation of requirements of the international administration in order to achieve stability for Kosovo.

The Resolution clearly defined an interim Regulation for a definite period of time which would then be part of permanent elections.²⁰⁹

The above items laid the foundations for the creation of an interim administration and establishment of independent institutions in Kosovo. Through this establishment of the interim administration, legal system of Yugoslavia and Serbia were partly annulled. In fact, by these acts and according to *nudum ius*, the sovereignty of Yugoslavia over Kosovo was reduced. However, the sovereignty of Yugoslavia over Kosovo continued to be assured through Resolution 1244.²¹⁰ The international community lacked a clear working strategy that would regulate the political and judicial system for a final status foreseen by Kosovo. A final settlement was not foreseen by the Resolution.

Anti-constitutional removal of Kosovo’s autonomy in 1989, the tragic events of the 1990s in Kosovo and the subsequent 8 years of UN administration led to a situation where the return of Kosovo under Yugoslavia and Serbian rule was impossible. This would have been unacceptable for the 92% of the population of Kosovo. “Facts reveal the truth that Serbia took unmerciful measures (military actions) in order to deny the right of self-determination to the majority of population in Kosovo”²¹¹. The refusal of the right to self-determination principle by Serbia led to a bloody conflict amid peoples in Yugoslavia.”²¹² “Nowadays, this use of force by the dominant powers to obstruct the right to self-determination is impermissible”.²¹³ Even though, according to the Resolution, Yugoslav sovereignty over Kosovo was guaranteed, this Resolution did not define the final political and judicial status of Kosovo, while on the other hand Kosovans continuously (excluding the Serbs) made efforts to gain independence. Kosovo’s concern was the establishment of institutions that would remain such even after the independence because the return under the Serbian administration would be unacceptable for the Kosovo Albanians formed the absolute majority of the population in Kosovo. Kosovo Albanians and other peoples in former Yugoslavia should have had the right

²⁰⁶ Zejnullah Gruda, “Historia e Kosovës“(The Kosovo history), *Koha Ditore Magazine*, 28 September 2006.

²⁰⁷ Kosovo Agency of Statistics, *Ethnic composition in Kosovo* (2013), <http://esk.rks-gov.net/zyra-e-shtypit/67-perberja-etinke>, accessed on 27.12.1013

²⁰⁸ Security Council: Resolution 1244 Adopted by the security council at its 4011th meeting, on 10 June 1999.

²⁰⁹ Security Council: Resolution 1244.

²¹⁰ Security Council: Resolution 1244.

²¹¹ Zejnullah Gruda, *E Drejta Nderkombetare Publike* (The International Public Law) (Pristina, 2003), 64.

²¹² Gruda, *E Drejta Nderkombetare Publike*, 64.

²¹³ Stephan Hope, *Einführung in das Völkerrecht* (Introduction to International Law) (Köln 2008), 329.

to self-determination. Yugoslav state was no longer mentioned because it ceased to exist upon the independence of Montenegro in 2006. From this follows the argument that neither was the declaration of Kosovo's independence a violation of Yugoslavia's sovereignty (as it ceased to exist), nor was it an act violating the Resolution 1244.

Independence and the international law

The internationalization of Kosovo's issue resulted in its declaration of independence on 17 February 2008. This act has been commented differently by various international interlocutors. Most of the EU countries including the US have recognized Kosovo's independence and its sovereignty, by considering it as a specific case. On the other hand, countries such as Serbia, Russia, China, Slovakia, Spain, Romania, were against this declaration of independence, reasoning such an act violates the international law. They viewed this act as a potentially dangerous move, which could negatively impact other countries, in terms of it potentially being used as a precedent for other disputed regions or territories in the world for declaring their own independence. Serbia called the declaration of independence of Kosovo as illegal and asked that the Independence of Kosovo should be tried at the International Court of Justice (ICJ), aiming at preventing further recognitions. On 22 July 2010, the ICJ announced its final verdict on the declaration of independence as follows: the international right for peoples does not obstruct the breakup the general international right for the peoples does not have any provision obstructing the declaration of independence

The Authors of the Declaration of Independence did not violate any of the international laws the Resolution 2144 does not obstruct the declaration of independence the independence is not in violation of Constitutional Framework of Kosovo

Based on these items, ICJ concluded that the international law was not violated by the Declaration of Independence.²¹⁴ In Kosovo's case the subject of the right for self-determination (or the holder of the self- determination right) was divided from the sovereignty subject (or the holder of sovereignty right).

Conclusion

In conclusion it can be said that the lack of preparedness of the Serbia side to include Kosovo's minority as an important and respected element of political, social, cultural, and economic sphere remained within Yugoslavia led to the degradation of Kosovo Albanians considering them as second class citizens and as a result between ethnic Albanians and the Serbian state the deep gap was created. This tension peaked in the 1999 war when the Serbian state besides killing expelled over 1 million ethnic Albanians from Kosovo that prompted Kosovo Albanians to categorically refuse the return of sovereignty of the state of Serbia in Kosovo, and subsequently they declared independence. Serbia claims that Kosovo is the heart of Serbia taking into account the monasteries and churches cannot be justified.

From what we have said above, the history of mankind, different countries were exposed to various civilizations and cultures from different Emperor and rulers. But this does not mean that those countries should have repeatedly claims on those territories.

However, the state-building process in the Balkans has been greatly exposed to the impact of the great powers. "Foreign impact of the Great Powers has played a determinant and arbitrary role in the creation and status of the Balkans states.

The constant repression exercised by Serbia towards Kosovo Albanians was one of the key reasons that the latter categorically refused the return to the sovereignty of Yugoslavia or more specifically Serbia's sovereignty. In conclusion, Kosovo had fulfilled all the preconditions of the right to self-determination prior to declaring its independence: the preconditions of the *Uti Possidetis* and ethnic principles. Majority of the people of Kosovo

²¹⁴ See the opinion of the ICJ regarding the Kosovo declaration of independence.

were in favour of independence for their land. They accept their new state and its democratic institutions. The independence of Kosovo is recognized by majority of United Nations countries. Based on what is stated in this paper we conclude that any other solution would be unjust and in violation with the will of its people.

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