

THE LEGAL AND POLITICAL GROUNDS FOR, AND THE
INFLUENCE OF THE ACTUAL SITUATION ON, THE DEMAND OF
THE ALBANIANS OF KOSOVO FOR INDEPENDENCE

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INTRODUCTION

The dissolution of the former Yugoslavia was one of the greatest and most difficult processes in Europe after the Cold War. One part of the process of dissolution concluded with the Dayton Peace Accords, but the other, more difficult part, Kosovo, has long remained unresolved. Kosovo was the main problem in the former Yugoslavia, and yet it was ignored for a long time. The situation in Kosovo, particularly in recent years, was not merely a large Albanian-Serbian problem but also an international one. Kosovo, in 1999, was the greatest problem in the international arena, one of the greatest problems since the Second World War, and a test of the international community's problem-solving ability after the Cold War.

The purpose of this paper is to give a brief reflection on Kosovo, her people, and the roots of this problem. In particular, it attempts to elaborate on the right of the Albanian people of Kosovo to self-determination according to international standards viewed from legal, political, and security perspectives. In Part I, I shall present briefly Kosovo and her people from a historical, geographical, and geostrategic perspective. The reason for this presentation is to document the historical, demographic, and strategic interests of Albanians, who have a natural right to self-determination and independence. In Part II, I examine the position of Kosovo on the disintegration of the Former Yugoslavia. Yugoslavia's dissolution was the most appropriate moment for the Albanians of Kosovo to realize their historical aspirations and to reorient according to a Western perspective. In Part III, I argue for the right of Kosovar Albanians to self-determination under international law. International theory and practice concerning the right of peoples to self-determination in the time after the Cold War have special application to the case of Kosovo. In Part IV, I argue that there are legal and political bases for independence from the standpoint of regional security. In contrast to typical thinking on the matter, based on the history of Kosovo, nonrec-

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ognition of Kosovar independence would in fact destabilize the region, and has historically proven dangerous. In Part V, I examine what influence the actual situation should have on the final status of Kosovo.

I. A BRIEF OVERVIEW OF KOSOVO

Kosovo is situated in the southwestern part of the Balkans. It is one of the smallest countries of Europe, both territorially and population-wise. Kosovo occupies a central geographical position on the Balkan Peninsula. Kosovo's territory, albeit relatively small, has always been of great geographical significance and geostrategic importance. Kosovo borders Albania and always played a central role in historical efforts to safeguard and integrate the entire national territory in the Balkans. The border between Kosovo and Albania runs through the highest mountain regions and is a nonethnic boundary, with territories inhabited by similar populations on each side. Kosovo's present borders are the product of political history and topography.¹ Kosovo's homogeneous ethnic structure comprises an overwhelming majority of Albanians, with the remainder being, *inter alia*, Serbs, Turks, Bosnians, and Romanians.

The ancient history of Kosovo and Kosovar Albanians cannot be viewed in isolation from Albania's history. The Albanian people of Kosovo constitute one of Europe's oldest ethnic populations. No other people are more "connected" to the history of the Balkans. The history of the Balkans cannot be understood completely without considering the history of the Albanians of Kosovo.²

Ethnic Albanians are descendants of the Illyrians, who lived in what now are the territories of Albania, Kosovo, and a large part of the former Yugoslavia. Kosovo is a part of the land once populated by the Dardans, an Illyrian tribe.³

For the greater part of the twentieth century, the Albanians of Kosovo spoke their own unique Albanian language, which used a Latin alphabet modified in November 1908 at the pan-Albanian Conference in Manastir (now the Former Yugoslav Republic of Macedonia). Today, Albanians in both Kosovo and Albania use the version of the alphabet that was standardized and unified in 1972. Social scientists have confirmed the Illyrian origins of the Albanians and their language. For example, author Radoslav Katičić of the former Yugoslavia, referring to the territory in which the

1. See NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* xxxv (1998).

2. *Id.* at xxxvi.

3. Aleksander Stipevcic, *The Question of Illyrian-Albanian Continuity and its Political Topicality Today*, 4 *KOSOVA* 11, 13 (1994).

Albanian language developed from Illyria, wrote, “[t]his area coincides roughly with the modern state of Albania and extends over the border into Yugoslav and Greek territory.”⁴

At the crossroads of the Balkan Wars, the Albanian state included only half of the Albanian people and included less than half of lands comprising an Albanian majority. Since that point, Albanians living in neighboring states have faced military police regimes and policies of genocide, expropriation, and expulsion. Unfortunately, some of the major regional powers justified these actions more than once. By the end of the Balkan Wars, the position of the Albanians was described by the author Castellan as follows: “Once again the [Albanian] people was left to anarchy and foreign interventions.”⁵

Many native and foreign authors have described the regrettable fate that Albanians and Kosovars have met through the centuries. Even Serbian academics have empathized. For example, Dedijer wrote, “[i]t would seem that never has any country, and the interests of any people, been dealt with so shamefully in peace conference as is the case with the people of Kosovo.”⁶

From an Albanian perspective, the Serbs have been seen as occupiers and colonizers. Following the Serbian occupation in 1912, Kosovo became a land of terrible suffering for the Albanian people, whose very existence was threatened.⁷ Kosovo and its Albanian population were pillars of national resistance in the former Yugoslavia.

Most of the Albanians of Kosovo practice one of two dominant religions—Islam (the majority) and Catholicism (the minority). Additionally, a very small number practices Greek Orthodoxy. No Albanian political movement ever has been defined by religion. If we survey the past, we can find many instances of mixed religious life. In recent years, Kosovar Albanians have been politically mobilized in many directions, but religion has never played a role.⁸

For hundreds of years, many battles and wars have taken place in Kosovo. During the last century, a lot of these have been ethnic conflicts

4. RADOSLAV KATIČIĆ, *ANCIENT LANGUAGES OF THE BALKANS* 185 (1976).

5. GEORGES CASTELLAN, *HISTORY OF THE BALKANS: FROM MOHAMMED THE CONQUEROR TO STALIN* 385 (Nicholas Bradley trans., 1992).

6. VLADIMIR DEDIJER, *JUGOSLAVIJA OD VERSALJA DO PARIZA* [YUGOSLAVIA FROM VERSAILLES TO PARIS] 24 (Belgrade 1947).

7. Zejnullah Gruda, *E drejta e vetevendosjes se popujve* [The Right of Peoples to Self-Determination], *E DREJTA* [LAW: J. JURIDICAL & SOC. ISSUES], at 14 (Univ. Kosovo L. Sch. publish., Apr.–June 1996).

8. MALCOLM, *supra* note 1, at xxviii.

between Albanians and Serbs. The history of relations between Albanians and Serbs in Kosovo is marked by conflict.⁹

The dissolution of the former Yugoslavia was an opportune moment for the people of Kosovo to realize their legitimate aspirations for self-determination. Interethnic tensions rose even further, and mistrust between Serbs and Albanians deepened. The roots of this conflict are deep and date from the time Serbia occupied Kosovo.¹⁰

II. THE DISINTEGRATION OF FORMER YUGOSLAVIA AND THE POSITION OF KOSOVO

The creation and dissolution of Yugoslavia resulted from major geopolitical changes.¹¹ Yugoslavia was a country created by the international community.¹² After the death of the former Yugoslav leader Tito, the federal center began to fall, gradually at first, but rapidly after 1987.¹³

Problematic relations among the nations were always present in the former Yugoslavia.¹⁴ A principal cause of this was the official equal status of Croats and Serbs, which caused each group always to vie for dominance in the federation.¹⁵ The Serbs were more successful at this game, and Serbian hegemony dominated as a result.¹⁶ Even so, because of the absence of a single unifying factor among the nations incorporated into the Socialist Federal Republic of Yugoslavia ("SFRY"), the SFRY could survive only if Serbian domination was successful and Serbian hegemony held sway.¹⁷ The political slogan of "brotherhood and unity," which became enshrined in Yugoslavia's Constitution,¹⁸ came to define relations across the supranational Federation. But this idea also characterized *national* identity in the final phase of socialism.¹⁹

9. *Id.* at xxix.

10. SABRINA P. RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991, at 193 (1992).

11. Dusko Sekulic, *The Creation and Dissolution of the Multinational State: The Case of Yugoslavia*, 3 NATIONS & NATIONALISM 165, 169 (1997).

12. Lord David Owen, *The Break-up of Yugoslavia: Its International Aspects*, 3 INT'L PEACEKEEPING 34, 34 (1996).

13. RAMET, *supra* note 10, at 34.

14. Vesna V. Godina, *The Outbreak of Nationalism on Former Yugoslav Territory: A Historical Perspective on the Problem of Supranational Identity*, 4 NATIONS & NATIONALISM 409, 411 (1998).

15. *Id.*

16. *Id.*

17. *Id.* at 412.

18. *Id.* at 413.

19. *Id.* at 413-17.

The conflicts throughout the 1990s in former Yugoslavia resulted from the rise of nationalist identity and the fall of supranational identity.²⁰ The explosion of nationalism in the former Yugoslavia was a provocative phenomenon with political consequences (the war) and also raised various theoretical and analytical issues.

The former Yugoslavia entered the final phase of her dissolution in the middle of 1991 when Slovenia and Croatia empowered their Declaration of Independence and the Yugoslav Peoples Army intervened to defend the country's territorial integrity.²¹

The Albanian-Serbian conflict, although not a decisive factor in the unraveling of the multinational federation of Yugoslavia, was nevertheless the initial and structural factor in that unraveling.²² April 25, 1987, was the date of self-destruction for the former Yugoslavia and the date when war preparations formally were made.²³ The first psychological preparation and promotion of the war happened in Kosovo Field, where hysteria resulted in the dream of creating a Greater Serbia. On this date, Milosevic gave Serbs the great promise that "no one will defeat you."²⁴

When the dissolution of former Yugoslavia began, it was plain that Serbia intended to implement its nationalist program for a Greater Serbia (especially after 1989), and its centralist tendencies became more visible than ever before.²⁵ Former U.S. Secretary of State James Baker held a similar view. Addressing the U.N. Security Council on behalf of the United States on September 25, 1991, the date of passage of the U.N. arms embargo against former Yugoslavia,²⁶ Mr. Baker declared:

The apparent objective of the Serbian leadership and the Yugoslav military working in tandem is to create a "small Yugoslavia" or a "greater Serbia", which would exclude Slovenia and a rump Croatia. This new entity would be based on the kind of repression which Serbian authorities have exercised in Kosovo for several years.²⁷

Since the collapse of the former Yugoslavia, all the parties have tended to rewrite history, placing themselves in the finest light and their

20. *Id.* at 420.

21. Snezana Trifunovska, *Preventive Peacekeeping and the Case of the Former Yugoslav Republic of Macedonia*, 4 INT'L PEACEKEEPING 2, 2 (1997).

22. I GAZMEND ZAJMI, COLLECTED WORKS 121 (AASHK, Pristina 1997).

23. MARK ALMOND, EUROPE'S BACKYARD WAR: THE WAR IN THE BALKANS 9 (1994).

24. DARKO HUDELIST, KOSOVO: BITKA BEZ ILUZIJA 34-37 (1989).

25. See JANUSZ BUGAJSKI, NATIONS IN TURMOIL: CONFLICT AND COOPERATION IN EASTERN EUROPE 125-36 (1993).

26. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991).

27. U.N. SCOR, 46th Sess., 3009th mtg. at 59, U.N. Doc. S/PV.3009 (1991).

opponents in the worst.²⁸ Personalities, as always, played an important role, and certain players who exploited the communist climate and lack of democracy emerged. In 1990, Serbia, led by Milosevic, regained control over Kosovo, Montenegro, and Vojvodina, making them her satellites and thus controlling the votes of four out of the former Yugoslavia's eight presidents. Milosevic and Serbia's ability to block the work of this Presidency was a symptom of the former Yugoslavia's disintegration. In May 1991, Milosevic and Serbia blocked the rotation of the Presidency, which marked the conclusion of the former Yugoslavia's institutional destruction.²⁹

The unilateral changes in the constitutional status of Kosovo and Vojvodina marked the start of a violent breakup of the former Yugoslavia. The balance of forces among the federal units of the former Yugoslavia changed radically, and Serbia pressed forth its hegemony.³⁰

The final act of preparing Serbia for war occurred in December 1990, when the Milosevic regime, without the knowledge of the Central Bank, took two billion dollars' worth of Yugoslav dinars. Thus, all the resources of the Central Bank, including foreign currency, gold, and other valuables, were used to finance the war.³¹

When open war began in Croatia (September 1991) and Bosnia and Herzegovina (March–April 1992), the former Yugoslav army came out openly on the side of the Serbs, supporting the creation of a Greater Serbia.³²

Tihomir Loza observed that “[f]rom the beginning of the 1980s, the Kosovo Serb movement used a wide range of racist arguments to fuel anti-Albanian sentiment.”³³ The myth of Kosovo has always been a principal part of the Serbian psyche. It has represented a historical, quasi-historical, and poetic consciousness of the medieval Serbian state, which stood opposed to the imperial Ottoman Empire. Serbia has raised the myth of the Battle of Kosovo every time it has gone to war. Serbs, in Kosovo, saw their history and their present as heroic and missionary—a matter of pride, demonization, and victimization.³⁴

The efforts of Slovenia and Croatia to gain independence (March–June 1991), of Macedonia and Kosovo (September 1991), and of Bosnia

28. David E. Goodlett, *History and Nationality Among Former Yugoslavs*, 6 EUR. SECURITY 53, 53 (1997).

29. EDWARD R. RICCIUTI, WAR IN YUGOSLAVIA: THE BREAKUP OF A NATION 26–27 (1993).

30. Tihomir Loza, *Kosovo Albanians Closing the Ranks*, 5 TRANSITIONS 16, 25 (1998).

31. ALMOND, *supra* note 23, at 15.

32. JAMES GOW, LEGITIMACY AND THE MILITARY: THE YUGOSLAV CRISIS 142 (1992).

33. Loza, *supra* note 30, at 23.

34. Warren Zimmermann, *The Demons of Kosovo*, NAT'L INT., Summer 1998, at 3, 3.

and Herzegovina (March–April 1992) all were made in response to aggressive behavior by Serbia. The Slovenes and Croats wished to leave the federation and thus evade Serbian influence. Neither Bosnia nor Macedonia had a clear strategy at that time. In contrast, Serbia wished to protect her political and economic control of a strong federation and her dominant role in Yugoslav society.³⁵

The international community did not understand Serbia and Milosevic's intention in time. The United States, the European Union, and the Organization for Security and Cooperation in Europe ("OSCE") initially supported keeping federation territory in tact, which doubtless strengthened Milosevic's policy. The international community failed to demand negotiations. Eventually, international support for the independence of Slovenia and Croatia did materialize.³⁶

On September 19, 1992, the U.N. Security Council passed Resolution 777, which provided:

[T]he state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist . . . [T]he Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore [the Security Council] recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations.³⁷

Likewise, the International Monetary Fund, in its Declaration of December 15, 1992, stressed that "[Yugoslavia] has ceased to exist and has therefore ceased to be a member of the IMF."³⁸ At the same time, the executive directors of the World Bank said that Yugoslavia had ceased to exist.³⁹ The Arbitration Commission of the Peace Conference on Yugoslavia ("Badinter Commission") also concluded that the dissolution that began in November 1991 was complete and that the SFRY no longer existed.⁴⁰

All the evils that occurred during or after the dissolution of former Yugoslavia—civilian massacres, the destruction of whole cities and dwell-

35. See BUGAJSKI, *supra* note 25, at 101–09.

36. ALAN F. FOGELQUIST, HANDBOOK OF FACTS ON THE BREAK-UP OF YUGOSLAVIA: INTERNATIONAL POLICY AND THE WAR IN BOSNIA-HERCEGOVINA 12–13 (1993).

37. S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg., U.N. Doc. S/RES/777 (1992).

38. Malcolm N. Shaw, *State Succession Revisited*, in 5 FINNISH Y.B. INT'L L. 34, 53 (1994) (citing Press Release No. 92/92, International Monetary Fund (Dec. 23, 1992)).

39. *Id.* (citing Press Release No. 93/S43, World Bank (Feb. 26, 1993)).

40. See Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia (July 4, 1992) [hereinafter Badinter Opinion No. 8], reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 634, 636 (SNEŽANA TRIFUNOVSKA ed., 1994).

ing places, and the great manipulation of the media—were also present in the Balkan wars.⁴¹

When even the Slav peoples themselves exited the former Yugoslavia, the Albanians of Kosovo no longer had any reason to remain inside the newly created Serbia and Montenegro. Albanians were not thankful for and did not value the leadership of Belgrade. Interethnic tensions had been high in Kosovo over the years but deepened further after the former Yugoslavia's dissolution.⁴² The University of Pristina's own Gazmend Zajmi stressed that "[t]he Albanian people in former Yugoslavia have the least reason to mourn the dissolution of the former Yugoslav federation or to be satisfied with the manner of the dissolution of this federation."⁴³

The dissolution of the former Yugoslavia and the creation of new circumstances in that territory created an opportune moment for a political movement aimed at realizing the historic, legitimate rights of the Albanians of Kosovo.

III. THE RIGHT OF KOSOVAR ALBANIANS TO SELF-DETERMINATION

A. *Treatment of Kosovo's Right to Self-Determination at the Time of the Dissolution of the FSRY*

The right to national self-determination is very attractive because it represents values of democracy and the right of a people to live according to their culture.⁴⁴ The principle of self-determination is one of the most important principles of modern international law. It is also one of the most difficult principles to apply, as is evident by the great individual and national efforts that have been made. It is a cause of wars and of peace in many regions and for many countries and peoples. Self-determination was dreamed of for centuries, became a reality after the Second World War, and has since undergone several phases. Until 1989–1990, this right was quite restricted and it was thought to belong only to countries under colonialism. But this interpretation of the Declaration of 1970⁴⁵ was not based on practical or theoretical considerations because even outside the context of colo-

41. Tim Judah, *The Serbs and Their Myth*, 4 TRANSITIONS 84 (1998).

42. RAMEY, *supra* note 10, at 34.

43. ZAJMI, *supra* note 22, at 83.

44. See Michael Freeman, *National Self-Determination, Peace and Human Rights*, 10 PEACE REV. 157, 162 (1998).

45. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/5217 (1970).

nial countries, opportunities and demands for the realization of this fundamental right existed.

The failure of communism opened the possibility of extending this international principle via new approaches and methods of implementation. Countries previously united, whether by free will or by force, now sought independence. Even those countries whose constitutions did not envisage such a right were enabled to realize it. However, this right was not realized in a uniform manner according to international standards, but rather depended on the country, circumstances, and interethnic tension. Thus, several states achieved the right to self-determination in a calm and stable way, as was the case with the former Czechoslovakia. Other states did so with terrible violence, as was the case with the former Soviet Union and especially the former Yugoslavia.

After the end of the Cold War, the international community attempted to give some structure to the conditions and manner of realizing the right to self-determination. The international community saw the principle of self-determination as a response to the dissolution of communist states. Thus, the EU (then the European Community) was the first to involve itself in this context. The right to self-determination (the expression of free will), according to the European Union, was considered to belong only to those who had lived inside one of the federal-type republics. Other ethnicities were denied the right to expression of free will and the creation of their own state. The EU's stance was sanctioned by the Badinter Commission⁴⁶ and the U.N. Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union.⁴⁷

Thus, the right to self-determination and possible secession was recognized for those ethnicities that enjoyed this right expressly according to their constitutions (as in the Soviet Union and Czechoslovakia) or those who enjoyed an "advanced status" (a type of republic) within communist federations. "Constitutional dissolution" was legitimized in this way, based

46. See Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (Nov. 29, 1991) [hereinafter Badinter Opinion No. 1], reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 415; Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia (Jan. 11, 1992) [hereinafter Badinter Opinion No. 2], reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 474; Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia (Jan. 11, 1992), reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 479; Badinter Opinion No. 8, *supra* note 40; Opinion No. 11 of the Arbitration Commission of the Peace Conference on Yugoslavia (July 16, 1993), reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 1017.

47. European Community: Declaration on Yugoslavia and on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," 31 I.L.M. 1485, 1486 (1992).

entirely on the communist interpretation or recognition of the principle of self-determination.⁴⁸

Even though in its initial opinion of November 1991 the Badinter Commission found that “[t]he constitutional provisions are mere facts,”⁴⁹ in practice the EU accepted the facts as laid down by the communist model in those constitutions.

Based on this, certain legal, political, and dogmatic constitutional concepts were legitimized simply by reference to whatever form or manner of solution the communists had chosen to determine national questions. These concepts were adopted despite the fact that in those systems, the communist party had decided arbitrarily what would be a republic, autonomous republic, or federal ethnicity, and what would be a nation, nationality, or national minority. It is well known that the ideas of Stalin and Lenin regarding the “type of classes” to whom the right to self-determination belongs has predominated in the communist systems.⁵⁰

Unfortunately, Kosovo, before the Cold War, had the framework of a communist state. Consequently, even though on the former Yugoslavia’s dissolution Kosovo desired to win the right to self-determination, the communist measures that had been laid down years previously and far from the actual situation and will of the Kosovars were applied. From these policies, the nonrecognition of the right of the Albanians of Kosovo to self-determination and independence resulted. These policies of the EU were also the basis for evaluating other states and organizations.

Documents of the EU from that time show that it viewed this principle of technical constitutional interpretation as being in complete accord with principles of justice, democracy, human rights, and the rights of minorities. Thus, the EU proposed that a special status should be accorded to those ethnicities to whom the right of independence did not belong.⁵¹ This was the proposal for Kosovo.

B. The Legal and Political Basis for the Self-Determination of Kosovo

After the division of the Albanian nation in 1912–1913, at least half of the Albanian nation and half of the autochthonous territories populated overwhelmingly by Albanians were forced to live outside the new Albanian

48. Antonio Cassese, *Self-Determination of Peoples and the Recent Break-Up of USSR and Yugoslavia*, in *ESSAYS IN HONOUR OF WANG TIEYA* 131, 134–41 (Ronald St. John MacDonald ed., 1994).

49. See Badinter Opinion No. 1, *supra* note 46, at 416.

50. Vladimir Ibler, *Pravo naroda na samoodredjenje i zloupotreba tog prava* [*The Right of People to Self-Determination and the Abuse of this Right*], 29 *POLITIECKA MISAO* 53–55 (1992).

51. See Badinter Opinion No. 2, *supra* note 46, at 474–75.

state. The Albanians of Kosovo have existed in a separated nation since that time.

From the time of the geopolitical division of Kosovo from Albania, the people of Kosovo have aspired to have their own identity, equality, and national unity.

During the whole time that the Albanians lived under the former Yugoslavia, their treatment was as a national minority, even though, since the founding of the Serbo-Croat-Slovene Kingdom, they were numerically greater than any one of the founders of this kingdom.

In the aftermath of the Second World War, under the communist system of former Yugoslavia, the legal and political status of Kosovo changed several times. Kosovo proceeded through various forms of political and territorial autonomy in 1946, 1963, and 1974. In 1974, a wide-ranging autonomy from Belgrade was secured with broad powers similar to those of the former socialist republics. However, the right of secession was not guaranteed, just as it was not guaranteed to other federal units. In the 1974 Constitution, the SFRY was considered as a joint state comprised of equal nations, nationalities, republics, and the autonomous regions of Kosovo and Vojvodina.⁵²

In the 1974 Constitution, Kosovo had its own identity and territory⁵³ and was acknowledged in the field of international relations.⁵⁴ Kosovo was authorized to establish the National Bank⁵⁵ and to raise taxes.⁵⁶ In addition to these powers, Kosovo had an equal right to be present in all the organs of the Federation, including the former Federal Presidency.⁵⁷

At the time of the fall of communism and dissolution of the FSRY, Kosovo began to build its own new identity. On the legal and political side, this started on July 2, 1990, when the Kosovar Parliament issued a Constitutional Declaration, which demanded that Kosovo and its majority population be treated equally with others in the former Yugoslavia.⁵⁸ Following

52. See SOCIALIST FED. REPUBLIC OF YUGOSLAVIA CONST. pmbl., arts. 1, 5 (1974), reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 224–26.

53. *Id.* at art. 5, reprinted in YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 226.

54. *Id.* at art. 271, reprinted in THE CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA 217 (Dragoljub Đurović ed., Marko Pavičić trans., 1974) [hereinafter CONSTITUTION OF THE SFRY]. The texts of these agreements and accompanying acts were published in the Official Newspaper of Kosovo, No. 12/72, 3/77 and 34/78.

55. SOCIALIST FED. REPUBLIC OF YUGOSLAVIA CONST. art. 262, reprinted in CONSTITUTION OF THE SFRY, *supra* note 54, at 212.

56. *Id.* at art. 265, reprinted in CONSTITUTION OF THE SFRY, *supra* note 54, at 214.

57. *Id.* at art. 321, reprinted in CONSTITUTION OF THE SFRY, *supra* note 54, at 260.

58. PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 198 (2002); see also Constitutional Declaration, RILINDJE [RENAISSANCE], July 3, 1990, at 1.

this, on September 7, 1990, the Constitution of the Republic of Kosovo, which was based on the principle of self-determination and sovereign equality, was approved.⁵⁹ One year later, between September 26, 1991, and September 30, 1991, the majority population of Kosovo, the Albanians, by referendum took their greatest step to that date toward self-determination and expression of free will.⁶⁰

At that time, in addition to these formal judicial acts, which were recognized by no country except Albania, the legal representatives of Kosovo undertook certain other actions toward building an independent life and international recognition of their will. Thus, there was Kosovo's request for international recognition on December 21, 1991, a few days after the European Union formally recognized that the former Yugoslavia had ceased to exist and that the new states should apply for membership. These requests and others of the Kosovars for independence at the start of the 1990s were not met with a positive response. Some argue that this nonrecognition occurred as a result of the failure to fulfill the basic international criterion for independence—namely, the effective control of the territory of Kosovo by the majority population and its government at the time of the dissolution of the former Yugoslavia.⁶¹ The international community's position on the dissolution of the former Yugoslavia legitimized this criterion of effective control or inability to control. This position was based not so much on legal and moral arguments as on geostrategic and political ones—specifically, the need to stop the violence and the explosion of the conflict into neighboring states.⁶²

The international community would have to take into account the rise and fall of the former Yugoslavia, her structure, and her constituent parts. Yet, the former Yugoslavia had ceased to exist and no republic recognized her continuation, not even the so-called Yugoslavia formed in 1992. As mentioned already, the U.N., EU, and World Bank all accepted this fact. In fact, no one expressed their free will by referendum for union with or entry into this new state. The Kosovar Albanians have not taken part, by any legal or political act, in the structures and institutions of the remnant Yugoslavia. They plainly have severed their lives, institutions, and future from it.

59. RADAN, *supra* note 58, at 199; *see also* REPUBLIC OF KOSOVO CONST., Sept. 7, 1990, DIELLI [THE SUN], Zagreb 1990.

60. Bujar Bukoshi, *Serbia's Next Victim*, WASH. POST, Nov. 28, 1992, at A23 (referring to the referendum); *see also* Results of the Referendum of September 26–30, 1991, BUKU [THE FARMER], Pristina Oct. 1, 1991, at 1–3.

61. *Recognition of States*, 41 INT'L & COMP. L.Q. 473, 480 (A.V. Lowe & Colin Warbrick eds., 1992).

62. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 586–89 (1992).

Kosovo and her majority population historically have represented a special ethnic and linguistic collection. They also inhabited a compact territory. Thus, they had a clear and visible national identity. The national identity, territorial compactness, and absolute majority in Kosovo were historic features of the Albanians in this land. From legal and constitutional points of view, Kosovo's independence after the dissolution of the former Yugoslavia does not represent the creation, alteration, or elimination of borders, because Kosovo had its own unviolated borders that were accepted according to the former Yugoslavia.⁶³

Additionally, after the Balkan wars in 1912, Serbia violently annexed Kosovo by occupation. In Kosovo during the last eighty-seven years, Serbia's treatment of the Albanian people was oppressive and genocidal. This was especially notable during the final war of 1998–1999. All of this gives Kosovo and the Albanian people the right to and the desire for independence. Furthermore, according to a well-known international principle, Serbia, by the violent treatment it used, loses the right to govern that territory and people.⁶⁴ Describing this Albanian-Serbian reality in both a historical and present context, international law scholar Professor Zejnullah Gruda wrote:

Lenin claims that nations separate only when national oppression and friction make joint life absolutely unbearable. According to him denial of the right to self-determination and separation of nations is nothing other than an attempt to protect the privileges of the ruling nation and police methods of government instead of democratic ones.⁶⁵

Kosovo and her people were forcibly kept under Yugoslav rule, in particular under Serbian jurisdiction, while lacking the strength to achieve liberation. Moreover, the international community was not ready to support them. The moment Kosovo gathered the strength to break away and the will of the international community to support her rose, she left the Serbian jurisdiction.

The right to self-determination for a compact territory such as Kosovo, where over 90% of the population desires independence, is not only a natural right on ethnic grounds, but also a democratic right supported by posi-

63. SOCIALIST FED. REPUBLIC OF YUGOSLAVIA CONST. art. 5, *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS, *supra* note 40, at 226; SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO CONST. art. 3, *translated in* HELSINKI COMM. FOR HUMAN RIGHTS IN SERBIA, KOSOVA: LAW AND POLITICS, KOSOVO IN NORMATIVE ACTS BEFORE AND AFTER 1974, at 41 (1998).

64. See 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE Ch. 25, § 8 (A.C. Campbell trans., 1901) (1625) (rulers who “provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.”); Gruda, *supra* note 7, at 33.

65. Gruda, *supra* note 7, at 8.

tive international acts. The Kosovar Albanians' insistence on independence is based on the democratic principle of the majority and on the fact that Albanians have been in that land for over a millennium.⁶⁶

The Albanian people of Kosovo have shown in numerous ways that their will is to separate from Serbia and to be independent. They have expressed this most strongly via the armed struggle where they proved their desire for independence, despite possible sacrifices, because they consider that life in Serbia would be the greatest sacrifice of all. The national, demographic, and territorial reality of the Albanian people of Kosovo; their historical and geographical individuality; and their national structures based on strong democratic will, the principles of equality, and the right to express free will, are all reasonable grounds for the right of the people of Kosovo to self-determination, freedom, and independence. Above all, there is the shared history of a river of blood between these two peoples, and no moral or democratic right could demand that Kosovo and the Albanians should repeat a savage and bloody history. Sound reasoning, in harmony with the principles of modern democracy and the will of the people of Kosovo, underlies the position that there must not be a return to the suffering, tragedies, massacres, and hatred that already have occurred several times in history. A return to Serbian jurisdiction not only would accompany a return to the horrors touched on above, but also would be accompanied by the culpability of those who turned their backs. Finally, as Beyamin Neuberger writes, "[a] major argument for secession is based on the notion that a people who did not consent to be included in a particular state has the moral right to decide by itself and for itself whether it wants to stay within the imposed boundaries."⁶⁷

IV. THE LEGAL AND POLITICAL BASES FOR INDEPENDENCE FROM THE STANDPOINT OF REGIONAL SECURITY

In their struggle for self-determination and independence, the Kosovars also must bear in mind the interests of the international community in safeguarding peace and security, as well as any rights issuing from acts of the U.N. Today it is well known that the question of Kosovo is a matter of great tension, which could determine whether there is peace or war in the Balkans and elsewhere. After several years of the status quo, during the last two years the Kosovo crisis has entered the most critical stage—that of war. This is the result of many factors. Kosovo in recent years has become

66. Zimmermann, *supra* note 34, at 5.

67. Benyamin Neuberger, *National Self-Determination: Dilemmas of a Concept*, 1 *NATIONS & NATIONALISM* 297, 313 (1995).

an important matter for the security and stability of the Southern Balkans, as well as an important matter for the credibility of European security, as there is always a possibility for the spread of this type of conflict in South Eastern Europe.⁶⁸

The importance of Kosovo for peace and stability in the region is evident from her geostrategic position. This has been true practically throughout history. At the end of the last century, Serbian geographer and ethnologist Jovan Cvijic concluded from observing a map of the Balkan Peninsula: “[w]hoever controls Kosovo controls not only Serbia but also the whole central region of the Balkans.”⁶⁹ Cvijic’s opinions on the importance of Kosovo for Serbia’s geopolitics decisively influenced the Serbian national programmes during the last part of the nineteenth century and later.

The Kosovo crisis in the 1990s assumed international dimensions for several reasons. This was observed by native and foreign authors, as well as by Serbian ones. According to Serbian author Ljubivoje Acimovic, this happened for human rights reasons and the need to safeguard peace and international security.⁷⁰

The international consensus since the end of the Cold War has been that independence for Kosovo would endanger peace and security in the region. The many arguments for not recognizing Kosovo’s right to self-determination were bolstered by the need to maintain stability in the region, especially in view of the danger to the Former Yugoslav Republic of Macedonia. Viewed from a formal legal angle, a decision by the Kosovar Albanians to establish an independent sovereign state, based on the results of the 1991 referendum, does not allow any individual or subject to decide or demand any other solution. The same also applies to smaller demands. Even the Kosovo people’s liberation war itself showed that they were aiming for Kosovo as an independent state—nothing more, nothing less. The war showed more clearly than anything else that Kosovo endangers peace and security if it remains under occupation, while it does not endanger peace and security if it becomes independent.

The late academic Gazmend Zajmi, referring to the claim that Kosovar independence would be a destabilizing factor, astutely observed:

68. Jansuz Bugajski, *Kosova Between War and Independence: Implications for International Security*, BALKAN ANALYST, Jan.–Mar. 1999, at 5–6.

69. Jorgo Samakos, *Athens Discovers the Secrets of the Kosovo War*, FAKTI [THE FACT], Skopje Dec. 24, 1998, at 10.

70. LJUBIVOJE ACIMOVIC, PRINCIP SAMOOPREDELJENJA NARODA I PROBLEM KOSOVA 6 (Belgrade 1998).

[U]nder cover of safeguarding regional stability, full independence of Kosovo may be postponed for a while, but it would be hard for the Kosovo question to be eliminated in this regard, as an essentially democratic and balanced solution in the Balkans. Its prolongation implies the continuation of conflict and interethnic tensions in the Balkans.⁷¹

A long-term and stable solution to the Kosovo question cannot be linked only to its definition as an “oasis of peace”; it also must be linked to justice. Peace has no meaning without justice, for such an imposed peace is fragile.

The Albanian people of Kosovo now seek only the right to take possession of their own country in the Balkans and to live free and in harmony with their neighbors. It is essential that this matter penetrates the consciousness of the Serbian people as well. As many authors stress, the separation of Kosovo from Serbia would also help Serbia to prosper and democratize. As Noel Malcolm wrote: “[w]hen ordinary Serbs learn to think more rationally and humanely about Kosovo, and more critically about some of their national myths, all the people of Kosovo and Serbia will benefit—not least the Serbs themselves.”⁷²

At the time of the Hundred Years’ War between France and England, Jean d’Arc said, “[a]s to Peace with the English . . . the only way possible is that they go back to their country in England.”⁷³ Regarding the Kosovar Albanians’ right to self-determination, this legal maxim is relevant: *qui iure suo utitur nemin facit iniuram* (he who uses his own right does harm to no one).

The recent events in Kosovo—the fierce struggle for independence; the sufferings, massacres, and tragedies; and indeed the intervention of NATO—all favor the argument that Kosovo’s independence would increase stability. The achievement of full independence in Kosovo would promote peace in the region, without violence or tragedy. The NATO humanitarian mission itself would be accomplished and upheld as an example of the international community focusing on achieving permanent stability, uninfluenced by politics and history.

On the importance of achieving the right to self-determination amid regional stability, the Serbian academic Dobrica Cosic, who is regarded as the father of the Serbian nation, said, “[s]elf-determination is the first principle of any democratic solution.”⁷⁴

71. ZAJMI, *supra* note 22, at 180.

72. MALCOLM, *supra* note 1, at 356.

73. BERNARD JOSEPH, NATIONALITY: ITS NATURE AND PROBLEMS 190 (1929).

74. Gruda, *supra* note 7, at 20 (this statement of Cosic is taken from BORBA [Belgrade daily newspaper] Mar. 20–21, 1993).

V. THE INFLUENCE OF THE ACTUAL SITUATION ON THE FINAL STATUS OF KOSOVO

Justice demands that the international community view Kosovo from a factual standpoint and not just from a legal standpoint. Kosovo, as do many other countries, holds a unique status in international law. The effective exercise of power in Kosovo depends on the U.N. and on the Provisional Institutions of Self-Government. It does not at all depend on the state that formally retained sovereignty over this territory and people. Such internal power is exercised because, on an international level, achieving legal status and legal rights is often pursued by taking the first tangible steps down that road. From this viewpoint, effective self-governance demonstrates the ability to possess that right and to meet legal obligations.

The efficient exercise of power in a territory over a population influences international theory and practice. Several authors, since the creation of the first modern states, have attributed great importance to efficiency, often demanding as an essential condition that it precede the legal side of things. According to Groci, efficiency plays an important role as a common thread among international law subjects.⁷⁵ Groci maintained that suitability is decided by efficiency; the reverse would mean endless disputes.⁷⁶

In this case this approach is positive for Kosovo, because efficient self-governance already exists. The path Kosovo chose was not without risk in the sense that when actual changes precede statutory ones, possibly in opposition to international law, the international community may not support such a *fait accompli*. In fact, a change in the actual situation that under international law is a violation of legal statutory rights may prompt and justify international involvement and the use of force, bringing instability. Therefore, statutory rights should be respected before accounting for the actual situation.⁷⁷ Changes to the actual situation must be made only based on a legitimate right to an independent sovereign state according to the criteria of international law.

In Kosovo, the right to an independent sovereign state exists under international law, and the actual situation involves the exercise of effective power according to international criteria. International approval of the actual situation would bridge the gap between reality and formal justice, in service to international theory and practice.⁷⁸

75. Zajmi, *supra* note 22, at 182.

76. *Id.*

77. See HUDELIST, *supra* note 24, at 53.

78. *See id.* at 54.

Examining more closely whether approving the actual situation in Kosovo was achieved according to international standards, in international theory some argue that efficiency must satisfy two conditions: efficiency must be created with rights and obligations according to international law, and efficiency must extend to international relations. Rights and obligations are part of the structure of leadership in Kosovo. The U.N. exercises supreme authority in Kosovo; it is the international mechanism that seeks the fulfillment of these conditions. Thus, the U.N. holds a unique mandate by possessing the authority to evaluate conditions in Kosovo that the U.N. itself helped satisfy.

It is debatable whether statehood should be gained only when full efficiency is achieved. Traditionally, there could be statutory rights even if this precondition is not satisfied. However, in the case of Kosovo, her efficiency created an opportunity for her to be competent in the field of international relations, which is a second condition of statehood in modern times.

Kosovo fulfils all the traditional criteria for being a state. It is well known that the traditional criteria for being a state are: the possession of a permanent population and territory, the exercise of sovereignty,⁷⁹ and the ability to form international relations. There is no question Kosovo comprises a unique population in a specific territory. But two specific conditions are required to satisfy this criterion: first, an intention to live permanently in that territory, and second, the territory sought must be habitable. There is no question the citizens of Kosovo wish to live permanently where they are and that the territory is habitable.

Statehood logically requires a definition of external borders. During her history under Serbia and the former Yugoslavia, Kosovo's territory was defined by the 1974 Constitution of the FSRY.⁸⁰ According to international theory and practice, those borders need not be uncontested by neighboring states. So it was with many states after the First World War, as well as with Albania during the declaration and recognition of her own independence. But Kosovo still must make clear the external borders of the territory it intends to claim.⁸¹ It is quite clear that Kosovo requested a defined territory and, in a symbolic sense, has represented that territory in postwar institutions, where the map of Kosovo may be seen.

79. I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 118 (H. Lauterpacht ed., 8th ed. 1955).

80. See SOCIALIST FED. REPUBLIC OF YUGOSLAVIA CONST. arts. 1-5, *reprinted in YUGOSLAVIA THROUGH DOCUMENTS*, *supra* note 40, at 225-26.

81. Malcolm N. Shaw, *Territory in International Law*, 13 NETH. Y.B. INT'L LAW 61 (1982).

The exercise of sovereignty is one of the conditions for being a state. To put it differently, a state must have a government. Although the requisite form of government is not precisely defined by international theory and practice, it must include the people's right to self-determination. The government also must fulfill two criteria: first, it must be politically institutionalized as an executive and administrative operation aimed at regulating relations in society, and second, it must effectively exercise state authority over the territory and people.⁸² Kosovo has a democratic government that was chosen by her citizens via elections organized and supervised by the OSCE, U.N., EU and other international bodies. The government functions through legal acts based on a constitutional framework and through laws passed by the legislative organs, which have been approved by the Special Representative of the U.N. Secretary-General. NATO enforces laws relating to international security, and U.N. police forces enforce laws relating to internal law and order. The judicial system operates under the control of UNMIK, utilizing international judges and prosecutors. Every institution of Kosovo has an international component.

The Government of Kosovo is still under the tutelage of the U.N. There are many powers it does not itself exercise, which are assumed by the international community. This is a good basis for creating a state structure. Kosovo is building its government according to international standards. The gradual transfer of powers will help ensure success. The process has the advantage that a government with a coherent political structure based on a legitimate title to exercise authority over its territory and populace already satisfies contemporary international law criteria for statehood, even before a more sophisticated administration exists to exercise full authority.⁸³

Kosovo has not yet created international relations and has not undertaken diplomatic missions. According to existing laws, the representatives of the U.N. have the right to create international relations for Kosovo, thus hindering Kosovo's own attempts in this area. However, the prevailing opinion in the field of international law suggests Kosovo's entry into international relations on its own is not so indispensable as to require tabling its request for statehood. There will need to be machinery in place so that Kosovo is able and legally authorized to form agreements and to represent itself.⁸⁴ Given the structural progress Kosovo already has made with the assistance of the international community, there is no dilemma concerning

82. See 1 OPPENHEIM, *supra* note 79, at 118.

83. See Shaw, *supra* note 81.

84. *Id.*

whether Kosovo is ready to create its own competent diplomatic machinery.

Recognizing Kosovo at this stage would be normal procedure according to international theory and practice. There are countries not meeting these criteria, especially that of efficiency, which nevertheless have been recognized—for example, Croatia and Georgia. The very act of international recognition has enabled those states to exercise effective control in their territory. Kosovo could have done this had it been recognized earlier than 1998 (the time of formal declarations that it was an independent sovereign state). Instead, NATO forces had to intervene in Kosovo to sever Serbia's control, at which point control passed to the international community and representatives from Kosovo.

The case of Kosovo comports with the opinion of some theoreticians that formal and actual independence should be bilateral.⁸⁵ But according to constitutionalists and declarationists, the formation of states happens first as a matter of fact and second as a matter of international law.⁸⁶ Under this view, the recognition of Kosovo is a subsequent legal act that must follow the formation that already clearly has happened as a matter of fact. The international community's direct aid to Kosovo accomplished that fact.

Formal recognition of Kosovo's independence should now follow its declaration of independence in order to guarantee universal acceptance of Kosovo's existence. A state without legal effect is not a state in the context of international law, which context is indispensable in a time of interdependence and globalism.⁸⁷ Kosovo satisfies both the traditional criteria for statehood, which stem from efficiency, and the modern criteria for statehood, which stem from legal status.

At the time of the dissolution of the former Yugoslavia, and in particular the fall of communism in general, one of the international community's conditions for recognition of new states was respect for the rights of minorities. The rights of minorities in modern times are seen as *norma jus cogens*. Such rights were not respected in the FSRY, but they are respected in Kosovo now. Under legal acts in Kosovo, minorities possess rights often as extensive as those of the majority, including, *inter alia*, language, representation, culture, and schooling. This is seen in the laws approved by the organs of Kosovo, in part due to the demands of the international commu-

85. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 65–71 (1979).

86. See 1 OPPENHEIM, *supra* note 79, at 544; TI-CHIANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 38 (1951).

87. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 147 (1987).

nity because the SRSG holds the exclusive right to protect minorities.⁸⁸ In addition, Kosovo's Constitutional Framework incorporated many international conventions regarding minority rights.⁸⁹

Recognition of the right of self-determination is legally connected to the right to statehood. Political self-determination in all situations is a *sine qua non* for the effective exercise of power, defense, and development and for the enjoyment of economic, social, and cultural self-determination.⁹⁰ Full recognition of the right to self-determination can compensate for a lack of full efficiency toward affecting statehood in international law.

CONCLUSION

Great legal, political, strategic, and security arguments weigh in favor of self-determination for the Albanians and Kosovo. The right to self-determination of Albanians and Kosovo is in general accord with the free will of the majority people, is in agreement with democratic principles, and would work to the advantage of peace and stability in the region. This right is particularly rooted in the moral claim of the people of Kosovo and was never held by the Serbian regime, especially after all the violence unleashed during its years of occupation of Kosovo, which grew especially savage toward the end. Self-determination for the people of Kosovo would be the fulfillment of a natural, historic, demographic, legal, and democratic right, and above all would answer the centuries-long sufferings of this country and this people at the same time as it would build new prospects for them and the region as a whole.

88. Constitutional Framework for Provisional Self-Government, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2001/9 ch. 8 (May 15, 2001), available at <http://www.unmikonline.org/constframework.htm>.

89. *Id.* at pmb1, ch. 3.

90. Jan Klabbbers & René Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 37–42 (Catherine Brölmann et al. eds., 1993).