

Principle of the Right of People and Nations on Self-determination in International Law and its Implementation in Modern World

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ABSTRACT – The idea of self-determination is often traced to the American and French revolutions and the principles of individual liberty and freedom that they embodied. By the beginning of the twentieth century, self-determination was a widely accepted concept throughout Europe and the United States. It is evident in the writings of Wilson and Stalin early in the twentieth century, and was enshrined in the United Nations at its founding. However, self-determination had evolved to mean something quite different in Central and Eastern Europe than in Western Europe and the U.S. In Western Europe, it was based in the notion of popular sovereignty giving rise to representative government. In an ideal sense, individuals primarily exercised their right to self-determination by electing representatives to act on their constituents' interests. In Central and Eastern Europe, by contrast, it was rooted in an exclusive nationalism that led ethnic groups to seek their own country. As such, national minorities were more of a problem in the latter region. The aftermath of World War I brought these issues to the forefront. Wilson's Fourteen Points outlined a number of principles of self-determination, but applied only to Europeans. Lenin's rhetoric, by contrast, was much more universal though ultimately less influential. Initially, the Wilsonian idea that the principle of self-determination did not apply to colonies was sustained. A number of 'peoples' were granted self-determination as a result of the Paris Peace Conference. This process, however, only created more subgroups that were not granted their own states. Instead, they were labeled national minorities, which formally entitled them to guarantees of being able to maintain their cultures. The victors of World War I required the new states in Central and Eastern Europe to accept these conditions in order to be recognized, but did not accept the obligations themselves.

Introduction

These ideas were built upon after World War II, principally through the United Nations. The U.N. Charter, Article 1, reflects a compromise between normative sympathies and the desire of European countries to retain their colonies by saying, "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." An increasingly expansive view of self-determination emerged in subsequent decades for a number of reasons. Economic and political strains reduced the will of European powers to retain colonies. The Cold War rhetorical battle laid bare the contradictions between the West's claims to being defenders of freedom while at the same time maintaining their colonial dominions. What is more, the work of activists brought human rights to greater attention internationally.

Finally, the rise of nationalism made self-determination attractive. This culminated in the 1960 U.N. Declaration on the Granting of Independence to Colonial Peoples, which has had the effect of shifting the conception of self-determination from a principle to a right. We realize that it is not enough just to remember the initial list of human rights established in 1948, or the successive additions by later declarations and by international conventions in matters of human rights.

on a particularly delicate and complex issue, in the conviction that, if we clarify a few points and study the way to make implementation of the right of self-determination of peoples viable, we shall be contributing to the prevention or solution of many present and future conflicts.

So many of today's conflicts take place within states where communities are aspiring to greater recognition of their cultural and political identity. We must study these situations in detail and decide to what extent international texts on the right to self-determination are really suited to today's circumstances and are able to prevent this sort of conflict. One of UNESCO's missions is to further research on the culture of peace.

Other organizations in the United Nations system will have to take care of the operative aspects of the right to self-determination. Our contribution must centre on improving the moral and juridical definition of this right. The right to self-determination, it examines how this right can be implemented. In my opinion there are three things to keep in mind. First of all, the full development of democratic processes.

I see around me a universal desire by individuals and communities for greater political participation. This makes me optimistic about our ability to shake off old models of politics by domination. A process has begun whereby new international authorities are being created and old sovereignties challenged. There is a growing wish to reform the United Nations and make it into a global authority able to respond to global challenges: unequal distribution of wealth, unsustainable development and denial of cultural identities, amongst others.

But democratic aspirations are also manifested in the gradual awakening of many human communities and their determination to participate in decision making. Democracy is firmly established only when individual citizens can freely constitute groups and can enjoy full participation in every aspect of society.

UNESCO wants to help devise new ways of exercising political power. In today's global world, the official borders between states have been relativized. New and more suitable political structures must be developed. Everything possible must be done to ensure that the immediate political interests of states do not compromise the aspirations of all peoples for freedom and other legitimate rights. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions found. We must open the way to multi-community states, establishing a universal human family where special privileges and exclusion are unknown.

Secondly, we must bear in mind the need to ensure the unimpeded development of community identities within the context of a global economy and communication network.

Although globalization opens up exciting new prospects for all societies and cultures, it also poses threats for those that are small or weak.

We at UNESCO feel that science, technology and education must be used in favor of cultural diversity. We also feel that each of the world's religious and cultural systems must be free to determine its own priorities with respect to those common human values expressed in the Universal Declaration of Human Rights, we are celebrating this year.

Whatever the case, we need to design a future which will allow all human communities to live without fear and to develop in peace. The right to self-determination must include cultural, linguistic and communication rights alongside of social, economic and political rights. One depends on the other. If we want to preserve the wealth of our diversity, we must have ethical principles and juridical instruments capable of advancing both the cultural rights and the political rights of all communities. We must be bold enough to seize the positive aspects of globalization without renouncing our marvelous cultural diversity.

The third idea I think we should keep in mind is the notion that the right to self-determination is a specific contribution to building a culture of peace. The world is tired of violence and wars. There is growing recognition that war is a poor means indeed of resolving conflicts.

We aspire to something better. Therefore it is not utopian to believe that in a few decades we might abolish war, in the same way that at other moments of human history we have rejected slavery, fascism and totalitarianism. Concepts of security must change. Until now we thought that investment in arms was the key to security. Now we know that our real enemies are poverty, ignorance, the destruction of the environment - that is, the violation of human rights.

In line with this thinking it is appropriate to speak of the security of peoples who identify with a particular cultural community and wish to be accepted in their own right as actors on the international stage. Cultural repression, the denial of the rights of peoples and the political marginalization of many communities are causes of insecurity. If we want political stability and peace in all parts of the world, we must progress in our respect for the cultural and political identities of all peoples. We need moral criteria and legal frameworks to help us.

We must understand how implementation of the principles of self-determination can take place in different ways, but that a degree of self-government is necessary to prevent conflict.

Sometimes the right to self-determination is viewed too simplistically as a rigid choice between all or nothing - between the forming of an independent state or complete denial of a cultural and political identity. I think we must seek those processes and paths that are suited to diversity and we must begin some imaginative experiments in different forms of self-administration. We have already managed to recognize the legitimacy of international intercession and mediation under humanitarian law. Now is time to reflect on ways of ensuring human rights and cultural rights.

CHAPTER I

1.1 The Principle of Self-Determination international law

Essentially, the right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice. In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. Nevertheless, the right to self-determination is recognized in international law as a right of process (not of outcome) belonging to peoples and not to states or governments.¹

¹ Violence, Identity, and Self-Determination page 23

The preferred outcome of an exercise of the right to self-determination varies greatly among the members of the UNPO. For some, the only acceptable outcome is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the essential aim of a struggle for self-determination. Self-determination in International Law The principle of self-determination is prominently embodied in Article I of the Charter of the United Nations. Earlier it was explicitly embraced by US President Woodrow Wilson, by Lenin and others, and became the guiding principle for the reconstruction of Europe following World War I. The principle was incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals which evolved into the United Nations Charter. Its inclusion in the UN Charter marks the universal recognition of the principle as fundamental to the maintenance of friendly relations and peace among states. It is recognized as a right of all peoples in the first article common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which both entered into force in 1976. 1 Paragraph 1 of this Article provides: All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. The right to self-determination of peoples is recognized in many other international and regional instruments, including the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States adopted by the UN General Assembly in 1970, 2, the Helsinki Final Act adopted by the Conference on Security and Co-operation in Europe (CSCE) in 1975, 3, the African Charter of Human and Peoples' Rights of 1981, 4, the CSCE Charter of Paris for a New Europe adopted in 1990, 5, and the Vienna Declaration and Programmed of Action of 1993. 6, It has been affirmed by the International Court of Justice in the Namibia case 7, the Western Sahara case 8, and the East Timor case 9, in which its erga omnes character was confirmed. Furthermore, the scope and content of the right to self-determination has been elaborated upon by the UN Human Rights Committee 10, and the Committee on the Elimination of Racial Discrimination 11, and numerous leading international jurists. That the right to self-determination is part of so called hard law has been affirmed also by the International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples brought together by UNESCO from 1985 to 1991, 12, it came to the conclusion that (1) peoples' rights are recognized in international law; (2) the list of such rights is not very clear, but also that (3) hard law does in any event include the right to self-determination and the right to existence, in the sense of the Genocide Convention. The object of the exercise of the right to self-determination was formulated in terms of human needs. Peoples and communities strive to gain control over the means to satisfy the human needs of their members. The most important of these are the needs for human security and welfare. By security, in this view, is included economic, health, environmental, and food security as well as security of the person from physical violence, communal security (for example in terms of cultural integrity), and political security, meaning respect for human rights and freedoms. ² Thus, a variety of means, political structures and arrangements can be conceived which would satisfy the human needs of communities and their members. out that such security exists when the people and its individual members have both verifiable legal and political guarantees for the implementation of their fundamental rights and freedoms, and have the feeling of security as well. This subjective element is particularly important at the collective level in the context of self-determination. Especially for peoples who have been disfranchised, oppressed or subjected to deportations, forced assimilation, religious persecutions etc. the need for security can be a prime objective in the struggle for self-determination. Care must, however be taken in the use of the term security so that it does not serve as a pretext for the military to take on unwanted roles in the "provision of security."

1.2 Concept of Self-Determination

At present, a tension exists between the right of self-determination and the principle of territorial integrity of the sovereign state. Self-determination in international law takes two primary forms. One part is the developing human rights law, which is predicated on the notion of giving individuals more control of their lives. The other part, which is more contentious, involves groups that make claims to establish independent sovereign states. This conflicts with the long-standing understanding that international borders are inviolable. Legally, self-determination has generally been confined to the level of the state. Empirically, those movements that utilize violence and succeed tend to be recognized, thereby spreading the message that violence pays. ³ Some argue that all separatist claims are tied to territory and rooted in historical grievances and, therefore, any resolution requires addressing territorial needs. Simply being a distinct people is not enough in Bilayer's view. Norms of international law, however, do not root themselves in a territorial claim, but rather whether the aggrieved group constitutes a distinct people. Ideas of democratic participation have been confused with self-determination. Self-determination has also been viewed in terms of human rights, which requires recognition that this right is limited by the necessity of protecting the rights of others and of the general community as with any other human right. International law does not provide clear standards with respect to this view. Any effort to construct standards must take account of human rights standards and the ability of an appropriate body to enforce those standards. Self-determination does not necessarily entail statehood, but a number of other

² Deanne C. Siemer and Howard P. Willens National Security and Self-Determination: page 56

³ Iris Marion Young Global Challenges: War, Self-Determination and Responsibility for Justice 2006
Page 122

mechanisms exist such as membership in regional organizations and international fore . Parallel or multiple representation for substrate actors, such as Taiwan's participation in the WTO, provides another means to minimize secessionist pressures. There are currently several hundred secessionist movements that are active in the group-conscious communities of the world. The secessionists almost invariably claim legitimacy for their cause on the basis of the international law principle proclaiming the right to self-determination of peoples. They have it all wrong. This article will show that the right to self-determination over the years has acquired different shades of meaning, determined by the contingencies that prompted emphasis of that right at a given time and particularly, by the nature of the "peoples" claiming the right. The right to self-determination has thus been invoked to sanction the competence of national states within the world empires of yesteryear in their demand for sovereignty as independent states, to legitimize the political independence of nations subject to colonial rule or foreign domination, and to affirm the right of peoples subject to racist regimes to participate in the political structures of their countries. Currently, the emphasis has shifted to the entitlement of national, ethnic, religious, or linguistic societies within a political community to live according to the customs and traditions of their kind. The right to self-determination does not authorize the secession of sections of a nation from an existing state. After all, the right to self-determination is almost always proclaimed in conjunction with the territorial integrity of states. The right to self-determination furthermore belongs to a people whereas secession attaches to a territorial region. International law does, in exceptional circumstances, sanction the redrafting of national borders. State practice indicates that those exceptional circumstances are exclusively confined to general support of a political society, and secondly, to the redrafting of national frontiers as a condition of peace following an armed conflict. It should be emphasized at the outset that "general support" in this context denotes the support of a cross-section of the entire political community and not only of inhabitants of the region to be afforded separate statehood. The "right" to secession in these limited circumstances - it would perhaps be better to speak of international acquiescence in the emergence of a new state - is not a component of the right to self-determination but instead constitutes a distinct norm of international law. This in turn raises the question as to the essential a of statehood in international law. In this regard, it will be argued that statehood for the purposes of international law does not always coincide with statehood as a matter of (internal) constitutional reality; and secondly, that the theories of statehood subscribed to by the leading publicists — the declaratory theory and the constitutive theory — do not adequately account for the de facto exercise of sovereignty by the maverick states of the world. It will be argued that, within the confines of the constitutive theory, state practice has shifted the emphasis from recognition as a sine qua none of statehood in international law to collective non-recognition as the death knell of a newly established political entity claiming to be a state in international relations. Moreover, a distinction should be drawn between the two kinds of relationships which a political entity⁴ might seek to establish with other states. In its inter-individual relations, a political entity might be recognized and treated as a state for certain purposes (for example, for the purpose of liability in tort) but not for others, or a political entity not generally recognized as a state might nevertheless establish inter-individual relations (for example, diplomatic exchanges or treaty arrangements) with a limited number of other states. On this inter-individual level, the conduct of the maverick state is governed by rules of international law and it does, therefore, within those limited confines, function as a state. But to become a member of the international community of states and therefore be eligible for membership in an international organization and to be counted when the emergence of a rule of customary international law is at issue (here, one could speak of community relations of a state) — is another cup of tea. Here, collective non-recognition, signified mostly by refusal of United Nations membership, would be fatal. Given the limited opportunities for international recognition that exist for most groups threatening secession, alternative solutions have been sought that allow groups a greater degree of self-determination within existing state borders. Academic solutions to ethnic conflict have tended to revolve around two different solutions to ensuring that democratic institutions do not produce permanent minorities: the convocational and integrative, or pluralist, models of democracy. Consociationism focuses on bringing political elites together by structuring government to promote cooperation and prevent any group from becoming a permanent minority. Federal or confederal arrangements that are based on internal borders corresponding to group divisions are favored, which grant some measure of autonomy for each group. Control over cultural and educational policy is also placed at this lower level to correspond with group wishes. Highly proportional electoral systems also are important in ensuring that even relatively small groups have a voice in national government. This would be further enhanced by proportional representation and consensus decision rules in executive, legislative, and administrative decision-making. The integrative or pluralistic approach stands in contrast to convocationalism, in its approach to promoting self-determination within existing international borders. It shares with convocationalism a preference for federalism and proportionality. However, whereas convocationalism seeks to limit extremist politics, integrative approaches seek to create incentives for integration across communal divides. As a result, federal structures are designed which cut across group lines, resulting in mixed constituencies. Majoritarian decision-making and electoral rules are favored which necessitate appeals across social divisions, while at the same time preserving some mechanisms for integration. Ethnicity-blind public policy is also important in this regard. These two ideal types are not necessarily as distinct as some make them out to be. Some have delineated four different approaches: convocationalism, centripetalism, integrative consensualism, and explicit recognition of communal groups. Sisk goes further to argue that convocationalism and integrative approaches should not be seen as either/or propositions. On the contrary, from both can be derived a "menu of options from which policymakers might choose as they confront the complexities of any given ethnic conflict.

In the broader context of self-determination, separation or secession from the state of which a people forms a part should be regarded as a right of last resort. Thus, if the state and its successive governments have repeatedly and for a long period oppressed a people, violated the human rights and fundamental freedoms of its members, excluded its representatives from decision making especially on matters affecting the well-being and security of the people, suppressed their culture, religion, language and other attributes of the identity valued by the members, and if other means of achieving a sufficient degree of self-government have been tried and have clearly failed, then the question of secession can arise as a means for the restoration of fundamental rights and freedoms and the promotion of the well being of the people. This right could be regarded as analogous to the right of last resort of rebellion against tyranny and oppression referred to in the Preamble to the Universal Declaration of Human Rights⁵. Peoples and communities may attempt to secede because independent statehood appears to them to form the only means of obtaining the level of freedom and security which they aspire to. In part, this is because the international legal and political system does not provide adequate forms of protection and guarantees to communities that are within the borders of independent states, regardless of their status within that state. Concepts of minority rights, indigenous peoples right, and human rights have many a time proved insufficient to protect communities against collective persecution, exploitation and suppression. Even genocide, such as that in Rwanda, and massive armed attacks, such as that in Chechnya, have taken place without effective action being taken by the international community. But the desire for independent statehood also exists because insufficient attention has been drawn to the positive experiences resulting from the implementation of other forms of self-determination

The more it can be demonstrated that individual and collective human needs of⁶Communities, especially those for survival and development within a secure environment, but also for dignity and international acceptance, can be adequately guaranteed through arrangements that do not amount to secession, the more attractive these other options will become. The above analysis results in a concept of self-determination which is much broader and more flexible and complex than a definition which limits self-determination to separation. Understood this way, self-determination need not threaten the territorial integrity of states and can be quite compatible with its preservation. The major obstacles to an understanding and acceptance of this concept of self-determination are attachment to the dogmatic concept of the nation state, the extreme notion of sovereignty as an exclusive attribute of independent statehood, and territorial fixation⁷. Application of the broad concept of self-determination can lead to numerous arrangements in relations between states and population groups within those states tailored to the precise needs of the parties concerned. These arrangements can have territorial dimensions but also non-territorial functional ones. They can have internal but also external components. In developing appropriate arrangements, the most important attributes are creativity and flexibility and a profound understanding of what the people claiming self-determination seek to achieve in concrete terms, and what the vital legitimate interests of other parties concerned are. It is helpful not to be limited by traditional concepts of statehood in developing solutions appropriate to each specific case. It is also essential to develop forms of self-determination which provide sufficient guarantees for the long term effective implementation of agreements that are arrived at. division of jurisdiction between the Ukrainian state and the Crimean autonomous republic. Instead of exploring what could fall within the jurisdiction of the Crimean authorities, the High Commissioner chose to work backwards from what would reasonably not be within their jurisdiction. He found "only four subject-matters: national defense, monetary policy, maintenance of national frontiers, and certain aspects (not all) of international diplomacy (including notably the capacity to be held responsible at international law)." ²⁴ Other creative examples include the Philippines Indigenous Peoples Rights Act (1997); provisions of the Finnish Constitution relating to the territorial and functional autonomy of the Sami people; Greenland home rule, which has far reaching internal and external aspects; the Nunavut arrangement in Canada with respect to the Inuit people, who now have a separate government, including a representative assembly, an executive branch, a court and a civil service and a limited capacity to engage in international diplomacy; the territorially based autonomy of the Kuna Yale in Panama, which recognizes and incorporates indigenous institutions of leadership and provides for protection of the virgin forests which form the basis for the Kuna way of life; and the Chittagong Hill Tracts accords which, if implemented properly, could provide a considerable degree of self-government to the indigenous peoples of this region of Bangladesh. Johan Galtung suggested models of confederation of autonomies of peoples of the same nation (e.g. Kurds or Mayans) across the boundaries of the different states in which they find themselves, in ways that would not affect the territorial integrity of the respective states. Northern Ireland provides a recent very creative example which allows for multiple identities that have been delinked from the limiting concept of territory and exclusive jurisdiction. Although, as stated above, the Conference reached full agreement on the incorporation of the right to self-determination in international law, there was considerable discussion among participants on whether the broad interpretation of the right to self-determination is also recognized in international law. ⁸ One view articulated was that international law today only recognizes the right to self-determination of a narrow category of peoples, namely those under colonial or alien domination and subjugation or racist regimes. This form of self-determination, it was argued, entails the right to form a separate state. Other arrangements, such as regional or functional autonomy do not fall within the legal concept of self-determination and should therefore be handled under other rubrics. Such arrangements fall within the exclusive jurisdiction of the state, and are therefore not a matter of international law.

⁵ *Self-Determination and National Minorities (Oxford Monographs in International Law)* by Thomas D. Musgrave (Jun 8, 2000), page 133-134

⁷ *National Self-Determination and Secession* by Margaret Moore (Dec 17, 1998) page 155

⁸ *No More States?: Globalization, National Self-determination, and Terrorism* by Richard N. Rosecrance, Arthur A. Stein, Alan Alexandroff and Graham Allison (Aug 4, 2006) page 34

It is for the authorities of the state alone, without external interference, to define the form of self-government or other arrangements. The other view presented was that the broad concept of self-determination is accepted under international law and that its implementation does not fall exclusively within the domestic jurisdiction of the state but, on the contrary, is very much the concern of the international community. In the first place, it is argued, international instruments, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, state that the modes of implementation of the right to self-determination extend to be and the right of secession. The Declaration states: the establishment of a sovereign and independent State, the free association or integration with an independent State or emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people ... (emphasis added). This language clearly covers autonomy, self-government and any other arrangements whether within the framework of the state or not. Since self-determination is part of the human rights law, as was stated earlier, it is by definition not a matter that falls exclusively within the domestic jurisdiction of states, but is very much a matter of international responsibility and concern. In the second place, international law is constantly evolving, and state practice as well as the opinion of international law publicists and scholars (which are also considered valid sources of international law) increasingly interpret self-determination to include forms of self-government, autonomy and other arrangements within the framework of the state. The many self-government and autonomy arrangements implemented with states, such as those relating to Greenland, the Inuit, the Kuna Yale and other cases described elsewhere in this publication, attest to an evolving state practice which views self-determination as including these arrangements. This view is supported by the current language of the draft Declaration of Rights of Indigenous Peoples, which has been adopted by the Working Group on Indigenous Populations and by the UN Sub-commission on Prevention of Discrimination and Protection of Minorities. Article 31 of this draft declaration states that: Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions. Article 31 is not regarded as a qualification of the right to self-determination (as recognized in Article 3 of the same draft Declaration) but as a particular way of implementing it with regard to indigenous peoples. In order to promote acceptance and application of the broad concept of self-determination -- which all participants felt to be an important step in preventing the outbreak of armed conflict -- it was stressed by some that it is important to highlight the emerging customary law in this regard.⁹ Most sovereign states do not recognize the right to self-determination through secession in their constitutions. Many expressly forbid it. However, there are several existing models of self-determination through greater autonomy and through secession. In liberal constitutional democracies the principle of majority rule has dictated whether a minority can secede. In the United States Abraham Lincoln acknowledged that secession might be possible through amending the United States Constitution. The Supreme Court in Texas v White, held secession could occur through revolution, or through consent of the States. The British Parliament in 1933 held that Western Australia only could secede from Australia upon vote of a majority of the country as a whole; the previous two-thirds majority vote for secession via referendum in Western Australia was insufficient. The Chinese Communist Party followed the Soviet Union in including the right of secession in its 1931 constitution in order to entice ethnic nationalities and Tibet into joining. However, the Party eliminated the right to secession in later years, and had anti-secession clause written into the Constitution before and after the founding the People's Republic of China. The 1947 Constitution of the Union of Burma contained an express state right to secede from the union under a number of procedural conditions. It was eliminated in the 1974 constitution of the Socialist Republic of the Union of Burma (officially the "Union of Myanmar"). Burma still allows "local autonomy under central leadership. As of 1996 the constitutions of Austria, Ethiopia, France, Singapore,^[citation needed] Saint Kitts and Nevis Republics have express or implied rights to secession. Switzerland allows for the secession from current and the creation of new cantons. In the case of proposed Quebec separation from Canada the Supreme Court of Canada in 1998 ruled that only both a clear majority of the province and a constitutional amendment confirmed by all participants in the Canadian federation could allow secession. The 2003 draft of the European Union Constitution allowed for the voluntary withdrawal of member states from the union, although the State wanted to leave could not be involved in the vote deciding whether or not they can leave the Union. There was much discussion about such self-determination by minorities before the final document underwent the unsuccessful ratification process in 2005.

1.3 The Types of definition of Recognition

The Self-determination can bring to creating the new states, *De jure* or *De facto*. *De facto* recognition is the formal act of one state recognizing another via a statement most often voted on by the assembly or congress, while a *de facto* recognition is a recognition of one state of another via conduct such as opening an embassy, the head of state of the first country visiting the country being recognized (official delegation), making formal contracts and agreements but not through drafting a resolution in which the recognition is announced. It is best for students. The *de facto* state is a secessionist entity that receives popular support and has achieved sufficient capacity to provide governmental services to a given population in a defined territorial area, over which it maintains effective control for an extended period of time. This paper examines the impact that *de facto* states have on international society and international law and assesses how they are dealt with by those two bodies through a focus on four case studies: Eritrea before it won its independence from Ethiopia; the Republic of Somaliland; Tamil Eelam and the Turkish Republic of Northern Cyprus. A fifth *de facto* state, Taiwan, is also considered in some detail to help illustrate potential alternatives to the

⁹ Elections in Puerto Rico statistics of these plebiscites, 2001 [page 45](#)

three conventional means of dealing with these entities. The de facto state's position under international law is also evaluated. In contrast to the generally negative attitudes surrounding secessionist entities, concludes that the de facto state may indeed offer some positive benefits to international society.

1.4 Real-World Examples

In practice, conflict-torn states have tried a number of innovative ways to address self-determination demands. This subsection will briefly review recent institutional innovations in South Africa, Northern Ireland, and Bosnia-Herzegovina. The self-determination mechanisms in South Africa were generally intended to be transitional in nature, with the understanding that integrative, majoritarian practices would eventually become the norm.¹⁰ In the case of South Africa, self-determination issues were solved by turning them into process issues through interim safeguards such as the Government of National Unity. The transitional arrangements contained a number of power-sharing mechanisms including a power-sharing executive and proportionality measures. The Constitutional Assembly was also governed by weighted voting. The final constitution contained provision for a Volstead Council, which would serve as a mechanism to create an Afrikaner state should they choose to pursue that course. Weighted voting was also used at both the federal and provincial level as well as governing the ability of each level of government to legislate in each other's realm.¹¹ In Northern Ireland, the self-determination language in the Belfast Agreement is ambiguous to the extent that both sides can read it as reaffirming their positions. A close reading of the agreement leads one observer to the conclusion that "while the language of self-determination appears to support Irish Republican analysis, the mechanism of implementation appears to entrench unionist analysis." convocational mechanisms of proportionality, executive power-sharing, and mutual vetoes are part of the agreement. A number of cross-border and supranational arrangements have also been created:

The North-South Ministerial Council brings the island of Ireland together;

The British-Irish Inter-Governmental Conference provides a mechanism for cooperation between the British and Republic of Ireland governments;

The British-Irish Council is envisioned as a venue for discussion between the Irish and British governments, as well as areas with regional autonomy within the United Kingdom such as Wales and Scotland.

In Bosnia-Herzegovina, the new system of government was the central element addressing self-determination. The constitution sets out in great detail appropriate powers for the federal level and the regional areas. The central government is relatively weak, centered on a three-person presidency representing the Bosnia's, Serbs, and Croats. The parliament is filled by a proportional system and utilizes a mutual veto.

CHAPTER II

2.1 The principle of self-determination and the right of territorial integrity: legal and political issue

In the preamble of the 1945 United Nations (UN) Charter, its Peoples declared their intention to establish, inter alia, conditions under which justice and respect for international law can be maintained.¹² The main question about discussing the lawfulness of secession without the consent of the territorial state rests on the conflict of two principles of international law:¹³ the right of self-determination applied to such secession and the territorial integrity of a state. Such strife can be better analysed when applied into two recent events: the secessions of Kosovo (from the Republic of Serbia) and of South Ossetia (from the Republic of Georgia). As we shall see, such discussion reflects a vestige of the Cold War era. The most important issue is to define the importance of the consent of the territorial state to determine if a de facto country can be considered a de jure one, and even if (according to the international law) an independent state can be born from a unilateral secession. The milestone of the development of the relations between a state and its sovereignty is the Treaty of Westphalia (1648). Nowadays, according to the international law, here exemplified by the Montevideo Convention on the Rights and Duties of States (1933), there are four qualifications that entitle an entity to be recognized as a sovereign state: permanent population; delimited territory; a legitimated Government; and the capacity to enter into relations with other states. The international costume has developed a fifth qualification: the recognition of the international sovereignty by other states. Even though Kosovo and South Ossetia have the first four qualifications, the fifth one is contested by an important part of the international community, especially by the respective territorial states. Kosovo and South Ossetia declared their independency unilaterally, i.e., their respective territorial countries did not consent on such declaration, manifesting that such regions are still under their legitimate sovereignty. Concerning the international community's point of view, it is possible to compare these unilateral secessions to an important independency event which happened with the territorial state's consent. East Timor's recognition of sovereignty by the international community only occurred after several

¹⁰ George Pierre Castile *Taking Charge: Native American Self-Determination and Federal Indian Policy, 1975–1993* (2006) page 15

¹¹ Geoff Eley and Ronald Grigor Suny *Becoming National: A Reader* (1996) page 12

¹² *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Barrows Lectures) page 270

¹³ Martin Griffiths, *Self-determination, International Society And World Order*, *Macquarie University Law Journal*, page 12

decades of negotiation (and UN intervention) between Portugal (its former controlling state, which granted its independency in 1975) and Indonesia (state that, after the granting of the mentioned independency, invaded and occupied East Timor), with UN's supervision. Both Portugal and Indonesia consented in East Timor's independency, followed by the whole international community. Kosovo, on the contrary, has been recognized as an independent country only by 75 out of 192 UN state members (39%), being recognized by 24 out of 28 NATO states (85.7%), and by three of the five Security Council members (USA, UK and France) whilst its territorial country (Serbia) has not consented. South Ossetia has been recognized as a newborn country only by few states like Russia, Nauru, Nicaragua and Venezuela (both last two countries' decision reflects their Government's proximity with Moscow and, specially, disagreement with Washington's policies). According to Timothy McLellan, all the new states created during the UN Charter period "have either maintained pre-existing colonial borders or gained independence by mutual agreement with their parent states" (Crawford, 2006 apud McLellan, 2009). Such agreement has happened on East Timor case. It has not on Kosovo and South Ossetia ones.¹⁴ One of the arguments in favour of the right of a unilateral secession is the theory of just-case (Moore, 2004), which underlies the remedial right to secede for groups that have suffered injustices, e.g., violation of human rights, as claimed by the peoples of Kosovo and South Ossetia. In both regions there were a lot of human suffering due to wars, and in Kosovo's case there was even a massive displacement of population (around one million people). Another argument pro-unilateral secession would be the "choice theory of justified secession" (Moore, 2004), which requires a territorially concentrated majority to express its intention to secede in a referendum or plebiscite for the secession to be considered legitimate, as it recently happened in South Sudan referendum, when 98% of its population voted for independency from Sudan. Such procedure happened in Kosovo, where the respective parliament declared independence from Serbia on 17 February 2008, whilst it was under UN administration. The UN Declaration of Friendly Relations (1970) and the UN Vienna Declaration (1993) are examples of pronouncements that endorse the right of self-determination of peoples. Nevertheless, such right is not intended to authorize actions in order to dismember or impair the territorial integrity or political unity of a sovereign state. Besides, such international documents are declarations, and not treaties or conventions, what makes them non-binding to the signing states, according to the international law. Both these UN Declarations actually condemn any action aimed at the partial or total disruption of the territorial integrity of any country. In fact, although there is not one single international law that supports specifically "unilateral secessions", there are some important legal bases that back up the territorial integrity of a sovereign state, such as Article 2(4) of the UN Charter; Article 3(b) of the African Union Charter; Article 3 of the Montevideo Convention (1933). The main principle against the recognition of both secessions is that borders of a sovereign state should be changed only by agreement between the parties involved, and as it does not exist in the cases of Kosovo and South Ossetia, there should be no recognition of both secessions, in respect to the territorial integrity of Georgia and Serbia. The admission of a new country into the international community is crowned by its acceptance in the UN, as it was argued in 1970 by the UN Secretary General U Thant: "the recognition of a state by the international community and its acceptance into the UN implied acceptance of its territorial integrity and sovereignty" (Emerson, 1971 apud Moore, 2004).¹⁵ Nevertheless, the procedure concerning such acceptance is withheld by the UN Security Council, controlled (veto power) by its permanent-members (USA; UK; France; China and Russia). From the five mentioned qualifications for a de facto country to become a de jure one, the acceptance in the UN is a political question that concerns the five permanent-members of the Security Council, since the Article 4(2) of the UN Charter states that the admission of a new state to the membership in such Organization depends on the decision of the General Assembly upon the recommendation of the Security Council. Here we have a clear situation: On the one side, Kosovo's secession is supported by USA and other Western Countries, without the consent of Serbia, which is backed up by Russia. On the other side, we have South Ossetia's secession, supported by Russia, without the consent of Georgia, a Western ally. Although such quasi-countries are not UN members, they may enjoy some relative international sovereignty in bilateral relations with the states which have recognized such secessions. It is worth mentioning that China has not recognized Kosovo's and South Ossetia's independence due to its concern about independency movements inside its own territory (mainly Tibet, Taiwan and Xinjiang). As, under the International Law, there is no specific procedure for the constitution of a new state, its recognition is a political liberty act, oriented mainly by the country's own political goals. The fact that some countries deny to recognize the newborn state means only that such countries do not want to maintain relations with the new state (Moon, 2004), i.e., it is an internal policy issue. In South Ossetia's case, no judicial discussion in international courts have arisen. Nevertheless, regarding Kosovo's case, Serbia has requested the International Court of Justice's opinion on the legality of such region's independence. Serbia argues, inter alia, that the unilateral secession made by the temporary Kosovo Government was in violation of the UN Resolution 1244, which guaranteed Serbia's (formerly Yugoslavia) territorial integrity. The Court's decision should be based on international law, and not be influenced by historical international rivalry, neither between the interested parties, nor between the forces derived from the Cold War Era. On July 2010, the International Court decided that the declaration of independence of Kosovo did not violate general international law, basically because the international law contains no prohibition on declarations of independence. Serbia still does not recognize the Kosovar independency. One of the main issues is if such decision sets precedent of endorsing secessions in other countries. A de facto country is born, usually, as an expression of its people's own intention to be recognized as an independent country, which would be considered the sublime appliance of the principle of self-determination. Nevertheless, although self-determination has been recognized as an international human right principle, it should not threaten the territorial integrity of a sovereign state. For the international legal order to be respected, the recognition of a newborn state should only

¹⁴ *Becoming National: A Reader* by Geoff Eley and Ronald Grigor Suny (Apr 18, 1996)

¹⁵ Henry Cloud *Integrity: The Courage to Meet the Demands of Reality* (2009) page 13

occur with the consent of its territorial state, as it happened in East Timor and South Sudan cases. The unilateral secession is not included on the right of self-determination due to the internationally recognized principle of the territorial integrity. A pacific and negotiated secession is an example to be followed. The international law must not support separatist movements against a legitimately established Government. National self-determination appears to challenge the principle of territorial integrity (or sovereignty) of states as it is the will of the people that makes a state legitimate. This implies a people should be free to choose their own state and its territorial boundaries. However, there are far more self-identified nations than there are existing states and there is no legal process to redraw state boundaries according to the will of these peoples. According to the Helsinki Final Act of 1975, the UN, ICJ and international law experts, there is no contradiction between the principles of self-determination and territorial integrity, with the latter taking precedence.¹⁶

Pavkovic and Radan describe three theories of international relations relevant to self-determination.

- The realist theory of international relations insists that territorial sovereignty is more important than national self-determination. This policy was pursued by the major powers during the Cold War.
- Liberal internationalism has become an alternative since that time. It promotes the abolition of war among states as well as increased individual liberty within states, and holds the expansion of global markets and cross-border cooperation diminishes the significance of territorial integrity, allowing for somewhat greater recognition of greater self-determination of peoples.
- Cosmopolitan liberalism calls for political power to shift to a world government which would make secession and change of boundaries a relatively easy administrative matter. However, also would mean the de facto end of self-determination of national groups.

Allen Buchanan, author of seven books on self-determination and secession, supports territorial integrity as a moral and legal aspect of constitutional democracy. However, he also advances a "Remedial Rights Only Theory" where a group has "a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort." He also would recognize secession if the state grants, or the constitution includes, a right to secede.

Vita Gudeleviciute holds that in cases of non-self-governing peoples and foreign military occupation the principle of self-determination trumps that of territorial integrity. In cases where people lack representation by a state's government, they also may be considered a separate people, but under current law cannot claim the right to self-determination. On the other hand, she finds that secession within a single state is a domestic matter not covered by international law. Thus there are no on what groups may constitute a seceding people.

A number of states have laid claim to territories, which they allege were removed from them as a result of colonialism. This is justified by reference to Paragraph 6 of UN Resolution 1514(XV), which states that any attempt "aimed at partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter". This, it is claimed, applies to situations where the territorial integrity of a state had been disrupted by colonisation, so that the people of a territory subject to a historic territorial claim are prevented from exercising a right to self-determination. This interpretation is rejected by many states, who argue that Paragraph 2 of UN Resolution 1514(XV) states that "all peoples have the right to self-determination" and Paragraph 6 cannot be used to justify territorial claims.

The original purpose of Paragraph 6 was "to ensure that acts of self-determination occur within the established boundaries of colonies, rather than within sub-regions". Further, the use of the word *attempt* in Paragraph 6 denotes future action and cannot be construed to justify territorial redress for past action. An attempt sponsored by Spain and Argentina to qualify the right to self-determination in cases where there was a territorial dispute was rejected by the UN General Assembly, which re-iterated the right to self-determination was a universal right.

In order to accommodate demands for minority rights and avoid secession and the creation of a separate new state, many states decentralize or devolve greater decision-making power to new or existing subunits or even autonomous areas.

More limited measures might include restricting demands to the maintenance of national cultures or granting non-territorial autonomy in the form of national associations which would assume control over cultural matters. This would be available only to groups that abandoned secessionist demands and the territorial state would retain political and judicial control, but only if would remain with the territorially organized state¹⁷.

Pavković explores how national self-determination, in the form of creation of a new state through secession, could override the principles of majority rule and of equal rights, which are primary liberal principles. This includes the question of how an unwanted state can be imposed upon a minority. He explores five contemporary theories of secession. In "anarcho-capitalist" theory only landowners have the right to secede. In communitarian theory, only those groups that desire direct or greater political participation have the right, including groups deprived of rights, per Allen Buchanan. In two nationalist theories, only national cultural groups have a right to secede. Australian professor Harry Beran's democratic theory endorses the equality of the right of

¹⁶ "What Is Meant By The Self-Determination of Nations". www.self-determination.com

¹⁷ United Nations Treaty Registered No. 8029, Manila Accord between Philippines, Federation of Malaya and Indonesia) page 12

secession to all types of groups. Unilateral secession against majority rule is justified if the group allows secession of any other group within its territory.¹⁸ Once groups exercise self-determination through secession, the issue of the proposed borders may prove more controversial than the fact of secession. The bloody Yugoslav wars in the 1990s were related mostly to borders issues because the international community applied a version of *uti possidetis juris* in transforming existing internal borders of the various Yugoslav republics into international borders, despite the conflicts of ethnic groups within those boundaries. In the 1990s indigenous populations of the northern two-thirds of Quebec state opposed to being incorporated into a Quebec nation and even stated a determination to resist it by force.¹⁹ The border between Northern Ireland and the Irish Free State was based on the borders of existing counties and did not include all of historic Ulster. A Boundary Commission was established to consider re-drawing it. Its proposals, which amounted to a small net transfer to Northern Ireland, were leaked to the press and then not acted upon. In December 1925, the governments of the Irish Free State, Northern Ireland, and the United Kingdom agreed to accept the existing border. Most Irish Nationalists and Irish Republicans claim all of Northern Ireland and are not particularly interested in new borders. Self-determination – characterized by the International Court of Justice as “the need to pay regard to the freely expressed will of peoples” – is unquestionably a self-evident truth based on, and consistent with, basic human rights and fundamental freedoms. It can be understood in terms of four aspects: principle, right, process and outcome.²⁰ Principle: The principle of self-determination as applied to a people began to be formalized in 1919 after the League of Nations - precursor to the United Nations - was established. Simply stated, it is the proposition that a people should be able to freely choose its own system of politics and its own form of economic, cultural and social development. Right: During the years following the United Nations’ founding in 1945, the principle evolved into a right under international law and even *jus cogens* – a peremptory norm – and was codified in various United Nations declarations and international covenants. The right in particular of the Tibetan people to self-determination has been recognized by the United Nations and other international bodies. The right to self-determination is essentially a process right rather than a right to a pre-defined outcome. It does not dictate a particular process or a particular outcome. The exercise of the right entails a process of dialogue between the participants on equal terms and an outcome that is consented to by the people. Process: The self-determination process can take many forms including direct negotiation by representatives of the participants, mediation via a trusted third party, the findings of an agreed-upon independent tribunal, or the ruling of a recognized international court. The process ends with the people's consent to a proposed outcome through a referendum, plebiscite or some other means. Outcome: The outcome of self-determination could be independence, genuine autonomy, federation, devolution of power (regional self-government), voluntary integration within a state, or some other acceptable political status. It may also involve different resolutions for different areas such as the economic, cultural and social spheres. The post-World War II map was gradually delineated by the self-determination of the people who had been living under colonial rule; but the post-Cold War period is characterized by the fragmentation of previously constituted states into a diversified mosaic of independent states, as in the former Yugoslavia and Soviet Union. Indeed, among the bloodiest conflicts in recent years those related to the former Yugoslavia, and the application of the right of self-determination within it, emerge as the most prominent. The principle of self-determination is deemed to be a right under international law. Peoples under colonial rule or foreign occupation are granted a right to determine for themselves the sovereignty under which they wish to live. A region within an already existing sovereign state is not granted the same right. The secession of a certain area from the independent state to which it belongs is legal only so long as there is a mutual consent by the people inhabiting the area concerned and the central government of the state. An example that springs to mind is the agreed separation of the Czech and Slovak people into two separate states. To be sure, international law does conceive the possibility of a region seceding from the sovereign state to which it belongs even if the central government is opposed to such a move, in extreme circumstances. The application of the right of self-determination in the case of Kosovo is a contentious example of that. While international practice faced “Kosovo Precedent”, that at first stunned international community, through the following course of events and their analysis, it clearly showed where leads the deviation from the legal course of solution of territorial conflicts and ignorance of international law regulations accepted by the international community as well as predominance of “law of power” over the “power of law” (situation in Tibet, escalation of situation in Abkhazia and South Ossetia, and about Republic of Armenia). In that sense arises strong necessity for all the adequate forces to ensure that Kosovo will not be a precedent for anyone and that in the international relations only the norms of international law, that are built by the members of the international community themselves, will be accepted as precedents. Today the international community faces serious goal, the price of which is a peace on Earth: to avoid the danger of red vision of the world, red vision of its borders. Beginning of the first stage of such process is closely related with the escalation of Nagorno-Karabakh Conflict, beginning of aggression the Azerbaijan Republic to the Republic of Armenia against. Whereas the beginning of the second stage – is the process of recognition of the independence of Kosovo. Solving this situation is only possible by returning to the legal course of solution of territorial conflicts, restoring actual respect to the norms of international law that were developed by the international community. Baku declaration of GUAM of 19 June 2007 called for such action in light of possibility of aforementioned events. It reinforced “necessity of continuation of active unified actions to resolve prolonged conflicts in GUAM region, based on the principles of state sovereignty, territorial integrity and inviolability of internationally recognized borders and in accordance with regulations of Joint Declaration of Heads of the States of GUAM on conflict solution as well as importance of mobilization of support of international community in the solution of such conflicts”. Our modest attempt to shed light on several state-law problems that arise in the process of infamous territorial conflict is carried out with the aim to attract attention of certain powers, capable of resolving it, to the variety of obvious facts. Certainly, the right of self-

¹⁸ Aleksandar Pavković, Peter Radan, *Creating New States: Theory and Practice of Secession*, page 34

¹⁹ Alex Mayer, *Secession: still a popular idea?*, *St. Louis Post-Dispatch*, page 65

²⁰ Vijay Sappani, *The crisis in Sri Lanka: Canada's role*, *National Post*, Page 93

determination may be applied in such a manner that does not necessarily manifest itself in the form of an independent state, but rather of an autonomous area, such as Catalonia in Spain and Quebec in Canada²¹. The question we wish to raise is as follows: should the right of self-determination be implemented in the same manner for a people having no state of their own as for a people having already such a state? Should the implementation of that right be exclusively territorial in nature or embrace the notion of nationhood in a broader sense? For instance, should the right of self-determination of the Albanians in Kosovo bear the same legal weight as that of the Slovenians, bearing in mind that the Albanian people have already a state of their own whilst the Slovenian people did not? Indeed, in the case of Kosovo, the Albanian population sees itself as being ethnically part of the Albanian people living within the sovereign territory of Albania. There is no distinct sense of identity. To claim that the Albanian nation has no sovereign state of its own would be incorrect. Indeed, in the case of Kosovo, the Albanian population sees itself as being ethnically part of the Albanian people living within the sovereign territory of Albania. There is no distinct sense of identity. To claim that the Albanian nation has no sovereign state of its own would be incorrect. Thus, considering the aforementioned, the answer to the question we pose would be: The Albanian people have already a state of their own. The future of Kosovo's Albanian population would have to be settled not merely on the basis of the application of the right of self-determination as it is construed at present, but rather following the principle that such a right, in this case, does not have to be fulfilled necessarily through the establishment of an independent state. The principle we propose adds a further dimension to the right of self-determination. We do not wish to argue against the right as such, but in favor of a further principle underpinning that right. A collective might be both a community and a nation, in which case the regional and the national versions of self-determination would converge when a culture is "preserved" through the exercise of popular sovereignty by a population consisting of members of a single national group. But convergence is the exception. Typically, not every regionally identifiable population is a single people, and not every national group is a regionally identifiable population. Moreover, just as state preservation of a culture can occur without popular sovereignty of its population, the converse is equally true. Failure to distinguish these two distinct interpretations of beneficiaries is partly due to the common perception that while the principle of self-determination calls for national autonomy, the terms 'nation', 'national' and 'people' are ambiguous between a purely political or a cultural interpretation. In the former sense, rights of self-determination are nothing beyond what is accorded to states and their citizenries, while in the latter sense, autonomy is mandated for culturally defined groups. Are there, then, two further rights of self-determination, one calling for popular sovereignty within any region, the other for self-governance for any nation or national group? Admitting this would generate conflicts of rights, especially since a "nation" cannot be self-determining except in a "region." A national group's bid for self-determination in a territory might be insensitive to the interests of the established majority of that territory or a larger territory of which it is a part, just as a demand for regional autonomy might be oblivious to the cultural diversities and rivalries that prevail within a given region. Rather than speaking of two conflicting principles under the same title, it is better to avoid contradiction by adjudicating between rival interpretations of a single principle. Before attempting that, however, it must be observed that neither the notion of a community or of a national group, as such, suffices to demarcate the remaining class of beneficiaries. Granting a right of self-determination to every people, under either interpretation, would generate the problems of conflict and fragmentation noted above. Plainly, not every regionally-defined population merits self-determination, and not every national group, or sub-group, can claim a privileged connection to territory that would warrant being self-determining qua that group. Regardless of which interpretation we take, we still need a specification of the precise conditions under which a non-standard collective is deserving of self-determination. This is the problem of demarcating exceptional beneficiaries.

2.2 Analyze

Conclusion is about self-determination very significant. set the ground for a constructive and proactive use as an integral part of conflict prevention and resolution addressed self-determination as a process for the prevention and resolution of conflicts as well as a core principle for the substantive resolution and prevention of conflicts. a clear consensus that the principle and fundamental right of self-determination is firmly established in international law. that it can contribute significantly to the prevention and resolution of conflicts if the right is understood and used in its broad sense and need to apply it extensively. But also recognized the which the notion of self-determination causes among the governments of states and intergovernmental organizations. These institutions fear the application of this principle because its may it threatens the sovereignty and territorial integrity of existing states and, thereby, has the potential to cause tensions, conflicts and instability rather than prevent or resolve them. The Conference further acknowledged the power of the notion of self-determination in creating often unrealistic or unhelpful expectations among communities, especially those that feel deprived or oppressed. Many of the armed conflicts that have raged in the world this century, and the vast majority of those that have taken place since the end of the Cold War and continue today center around peoples' drive to self-determination, whether explicitly stated as such or not. Precisely for this reason, the UN felt it imperative to explore ways to transform the perception of self-determination as a contributing factor or even cause of conflict into the notion of self-determination as a foundation and instrument for the effective prevention and resolution of conflicts. Of essence to this transformation is the development of a clearer understanding of the meaning of self-determination and its possible applications. As long as self-determination means everything to everyone, the concept will continue to evoke passions, expectations and fears that are, for the greatest part, unnecessary, unhelpful and unjustified. so for challenge this we should focus very exactly

²¹ John F. MacArthur *The Power of Integrity: Building a Life Without Compromise* by (1997) page 47

Chapter III

3.1 Implementation of self-determination principle in Reality on case of Kosovo

Serbs and other Slavic tribes migrated into the Balkans, including Kosovo, in the 6th century AD. Serb historians assert that few if any ancestors of the Albanians lived in Kosovo at this time. Albanian historians say that Albanians are descended from the ancient Dardanian and Illyrian inhabitants of the region. The latter are mentioned in texts by ancient Greek historians as early as the 3rd century BC. The region saw a variety of ethnic groups vying for control in the waning centuries of the Roman Empire. In the late 12th century, King Nemanja of Serbia took advantage of the weakness of the Byzantine empire to seize what is now Kosovo, and other territories. Kosovo became the center of the Serbian state. Nemanja and his successors built many churches and monasteries, some of which remain key Serb holy sites today. They made Pec the seat of the Serbian Orthodox Church. Medieval Serbia reached the zenith of its power under King Stefan Dusan from 1331-1355. His kingdom included all of Kosovo, northern Albania, Macedonia, and much of Greece. He established his capital at Prizren. However, Serbia's strength soon declined due to squabbling among Stefan Dusan's successors, and the increasing power of the Turkish-led Ottoman Empire. In the Battle of Kosovo Polje on June 28, 1389, forces of Serbian Prince Lazar were defeated by a Turkish-led army. Many details of the battle remain obscure, but some historians say that it is quite possible that there were Serbs and Albanians fighting on each side. While the historical reality of the battle may have been more complicated than has sometimes been suggested, the conflict has nevertheless passed into Serb historical legend as the decisive battle that ushered in over 400 years of Turkish domination, celebrated in an epic passed on by Serbian bards for hundreds of years. In 1689, Austrian forces temporarily seized Kosovo from the Ottomans. Local Serbs joined forces with them to fight the Turks. The Austrians were routed near Kacanik on January 2, 1690. Serbian Orthodox Patriarch Arsenije and more than 40,000 refugees fled Kosovo for Hungary. Another Austrian expedition into Kosovo in 1737 was also forced to retreat, touching off another wave of Serb refugees. Serb historians claim that the shift from a predominately Serbian population to a mainly ethnic Albanian one began at this time, as Albanians migrated from the poor, mountainous regions of northern Albania onto the more fertile plains of Kosovo. Other historians say the shift started much earlier, and occurred more gradually. Most ethnic Albanians in Kosovo converted from Christianity to Islam (although a largely Roman Catholic minority continues to exist today). Many conversions were undertaken not due to religious fervor, but in order to avoid higher taxes and other discrimination that non-Muslims in the Ottoman Empire faced.²²

After uprisings from 1804 to 1815, parts of Serbia near Belgrade became a semiautonomous principality within the Ottoman Empire. By 1833, Serbia received full autonomy and more territory as a result of an agreement reached with the Ottomans under Russian pressure. Kosovo remained in Ottoman hands. In 1877-1878, Serbia and Montenegro seized parts of Kosovo during the Russian-Turkish War. Russia won a crushing victory and imposed the Treaty of San Stefano in March 1878, which created a greater Bulgaria and assigned parts of what is now Kosovo to Serbia and Montenegro. Outraged ethnic Albanian leaders formed the League of Prizren in June 1878, with the aim of consolidating Albanian-inhabited lands into one province within the Ottoman Empire. At the Congress of Berlin in July 1878, other Great Powers, alarmed at Russia's gains in the region, forced a reduction in the size of Bulgaria and took Albanian-inhabited lands away from Serbia and Montenegro and gave them back to the Turks. However, Serbia and Montenegro were permitted to keep other territories they had seized.²³ Serbia received formal independence from the Ottoman Empire. The demands of the League of Prizren to group all Albanian-inhabited lands in one state are still advanced today by ethnic Albanian nationalists in Albania, Kosovo and Macedonia. In October 1912, Serbia, Montenegro, Greece, and Bulgaria attacked the Turks, setting off the First Balkan War. Turkish forces were decisively defeated and virtually the entire Balkan peninsula was liberated from Ottoman control. Serbian and Montenegrin forces seized Kosovo and part of what is now Albania. On June 28, 1913, Bulgaria, angry at its meager territorial gains in the conflict, attacked Greece and Serbia in the Second Balkan War and was defeated by late July. After pressure by several Great Powers, Serbia and Montenegro were forced to disgorge some territory, and an independent Albania was created. In part at Russia's urging, Kosovo remained in Serb hands. Serbia nearly doubled in size as a result of its gains in the Balkan Wars. On June 28, 1914, Austro-Hungarian Archduke Franz Ferdinand was assassinated by Serb nationalist Gavrilo Princip in Sarajevo. Austria-Hungary declared war on Serbia in July, touching off World War I. After offering stubborn and effective resistance for over a year, the Serbian army was defeated when Bulgaria joined the war in September 1915 in hopes of avenging its losses in the Second Balkan War. The Serbian army made a last stand in Kosovo, and the army and many Serb civilians retreated across the mountains of northern Albania to the Adriatic Sea under conditions of extreme hardship. Remnants of the army were evacuated to Allied warships to the Greek island of Corfu.

After the victory of the Allies in World War I and the collapse of the Austro-Hungarian Empire in 1918, Kosovo became part of the new Kingdom of Serbs, Croats and Slovenes, ruled by a Serbian king. As one of the victors in the war, and the only people in the Kingdom to have had a state of its own before the conflict, Serbia felt it had a right to dominate the new country, sparking the resentment of other nationalities. Serbia began a large-scale effort to settle Serbs in Kosovo in an effort to dilute the ethnic Albanian majority in the region. King Aleksandr declared a dictatorship in 1929 and renamed the country Yugoslavia. He was assassinated in 1934 by Macedonian terrorists.²⁴

²² Kosovo (Bradt Travel Guide) by Gail Warrander and Verena Knaus (Jan 1, 2008) page 56

²³ Under The Blue Flag: My Mission in Kosovo by Philip Kearney (Mar 30, 2010) page 67

²⁴ The New Military Humanism: Lessons From Kosovo by Noam Chomsky (Jul 1, 2002) page 12

Italy occupied Albania in April 1939, shortly before the outbreak of World War II. Germany invaded Yugoslavia on April 6, 1941. Yugoslav Army resistance collapsed within ten days. Most of Kosovo was included in a Greater Albanian puppet state. Part of the rest went to Bulgaria, while areas with valuable mineral resources remained in German-occupied Serbia. Some Kosovars rejoiced at their union with Albania and supported the new state. Like many areas of Yugoslavia, Kosovo became the site of bloody fighting among Serbian royalist Chetniks, Communist Partisans, German and Italian occupation forces, and ethnic Albanian armed groups often allied with the Germans and Italians. Atrocities against both Serbian and ethnic Albanian civilians were common. In 1944, the Partisans seized Kosovo. They soon had to crush an uprising from ethnic Albanian rebels, who did not want Kosovo incorporated in what they saw as a Serb-dominated Communist Yugoslavia. In 1945, the victorious Communist government, under Josip Broz Tito, gave Kosovo its current borders, and made it one of two autonomous provinces within Serbia, the largest republic of the new, six-republic Socialist Federal Republic of Yugoslavia. Despite its new nominal autonomy, Kosovo remained under Serb domination until 1966, when secret police chief Aleksandr Rankovic, a Serb and the key architect of repression in Kosovo, was removed from office by Tito. Tito then began to shift his policy toward ethnic Albanians in Kosovo from repression to conciliation. However, the process did not move quickly enough for some ethnic Albanians. In 1968, in demonstrations throughout Kosovo, ethnic Albanian protesters called for Kosovo to be given the status of a republic within Yugoslavia, and thus full equality with Serbia. Some demonstrations turned violent and police and army troops were called in to quell them, resulting in several deaths. In 1974, Yugoslavia adopted a new constitution. Capping efforts since 1966 to increase Kosovo's rights within Yugoslavia, the new constitution gave Kosovo in many respects *de facto* republic status and therefore equal footing within the Yugoslav federation with Serbia. Ethnic Albanians took over leading posts in the local government and economy. Kosovo received large subsidies as part of a federal plan to equalize the sharp difference in levels of development between rich and poor areas of Yugoslavia. More Kosovar voices demanded secession from Serbia and status as a full republic within Yugoslavia. In addition to achieving greater representation in federal bodies and formal equality with Serbia, republic status would have given Kosovo the right, at least in theory, to secede from Yugoslavia. A few even proposed union with Albania, although most Kosovars recognized that they were freer and economically better off than their compatriots in Albania, who suffered abject poverty under the exceptionally rigid Communist regime there. While nationalism rose among ethnic Albanians, the resentment of the Serb minority in Kosovo at the "Albanianization" of Kosovo increased. Serbs charge that ethnic Albanians used discrimination, intimidation, and violence to drive Serbs out of the area in hopes of creating an "ethnically pure" Kosovo. Ethnic Albanians say Serbs left because of the area's poor economic outlook and the Serbs' discomfort at the shift in power from the Serbian minority to the ethnic Albanian majority. Rapid population growth among rural Kosovars also contributed to the population shift. While estimates of the extent of the emigration vary, there is little doubt that it was significant. In 1961, Serbs made up 23.6 percent of Kosovo's population; on the eve of the present conflict, they were under 10 percent.²⁵ In all regions of the world conflicts turn violent over the desire for full control by state governments, on the one hand, and claims to self-determination (in a broad sense) by peoples, minorities or other communities, on the other. Where governments recognize and respect the right to self-determination, a people can effectuate it in a peaceful manner. Where governments choose to use force to crush or prevent the movement, or where they attempt to impose assimilationist policies against the wishes of a people, this polarizes demands and generally results in armed conflict. The Tamils, for example, were not seeking independence and were not using violence in the 1970's. The government response to further deny the Tamil people equal expression of their distinct identity led to armed confrontation and a war of secession. The tendency of the international community to accept self-determination primarily when presented with a *fait accompli*, and to give attention to conflicts only when they turn violent, encourages violence and penalizes those who attempt to use peaceful and democratic means. In many cases self-determination struggles turn into armed conflicts. A case in point is the thirty year struggle of Eritrea. The inaction of the United Nations and its members left Eritreans no choice. The Albanians of Kosovo, under the inspired leadership of Ibrahim Rugova, have tried for a decade to obtain the necessary international support in keeping their movement non-violent. The issue was taken seriously abroad only once armed conflict finally did break out. The conflicts in Abkhazia (which was not triggered, as often assumed, by a claim to secession) and in Chechnya (initiated by a massive Russian military attack) received serious attention only when the horrors of war were displayed on television screens world wide. Despite the attention, however, the issues at the base of these conflicts remain unresolved. At the same time, it should be recognized that some armed struggles, such as that of the Gagauz of Moldova and of the Jumna's in the Chittagong Hill Tracts, have led to agreements for a considerable measure of autonomy.²⁶ Many commentators have described Kosovo's independence as 'the last act' in the protracted dissolution of the former Yugoslavia. Like other entities that emerged from the dissolution of the Yugoslav federation, the secession of Kosovo is a rich resource for a normative and jurisprudential investigation of the phenomenon of secession. However, in comparison with the secessions of Slovenia, Croatia and Bosnia and Herzegovina, Kosovo's unilateral declaration of independence (UDI) is different. In 1992, the recognition of the former Yugoslav republics was swift and unequivocal, and all commentators agreed that self-determination of peoples, as both a normative and legal principle 'applies', irrespective of sharp differences about who is its bearer: the citizenry of an administrative unit or an ethnolinguistic group. While in 1992 the European Community sought an expert interpretation of international law before recognizing the Yugoslav republics, in 2008 the western members of the 'Contact Group' imposed an overarching constitutional settlement without seeking refuge in the

²⁵ : Kosovo (Bradt Travel Guide) page 34

²⁶ Under The Blue Flag: My Mission in Kosovo by Philip Kearney (Mar 30, 2010) page 37

principle of self-determination. While the independence of Slovenia, Croatia, and Bosnia served as a springboard for the development of then nascent normative approaches to secession, the unilateral independence of Kosovo can be examined from the vantage point of three well-developed bodies of thought: remedial, nationalist and choice theories of secession. And judging by the states' written submissions in the advisory proceedings regarding Kosovo's UDI before the International Court of Justice, remedial theories seem to be winning. Most of the states which argue that self-determination still applies after decolonization, anchor their argument in a remedial conception of secession. This is to a large extent understandable; Kosovo Albanians were victims of oppression of the Milosevic's regime. Equally, states are unlikely to subscribe to a permissive theory of secession and self-determination that may, one day, endanger their own existence. While my position leans toward the position of choice theories, I will not defend or argue against any of the normative assumptions that inform the three dominant theories of secession. Rather, I will use the UDI of Kosovo as a springboard, first, to highlight the new vocabulary of state-building that shuns self-determination as an overarching principle (section 1), and then inquire into two questions that theories of secession have until recently left under-theorized. The first is the question of territorial rights. Recent contributions to theories of secession argue that it is not enough that a group has a moral right to secede, but that in addition to this *prima facie* right, must also have a right to secede on a particular piece of land. In section 2, I will argue against the idea of territorial rights as a relevant concern in theories of secession. In its place, I will try to unearth two dominant normative principles concealed beneath claims to a territorial right: maximization of political allegiance and minimization of political coercion. Following that, in section 3, I will address an additional principle functionality which normative theorists of secession use to optimize the degree of political allegiance over a reconstituted territory. I will ask what appears to be an important question when judging the legitimacy of a political settlement for Kosovo: what do we mean by functionality, and who should assess it? Unless normative theorists have more say in the matter, in 'hard cases' different political settlements will appear equally legitimate, thus leaving the final say about what is functional in the hands of dominant third parties. I argue that Iris Marion Young's theoretical account of self-determination is a helpful rejoinder to choice theories, which, while mindful of political context, doesn't take for granted pre-fabricated worries about functionality. In its own words, Kosovo's Declaration of Independence is an act of the Kosovo National Assembly "responding to the call of its people" to declare Kosovo an independent state. In reality, the UDI is the culmination of a set of events including military action, political fiat and diplomatic maneuvers by the Great Powers that determined the fate and identity of Kosovo's constitutional subject: 'the people of Kosovo'. One of the most significant milestones in this process was the Contact Group's April 2005 statement, which effectively determined who will count as 'the people of Kosovo'. By prescribing that the final status of Kosovo will not entail Kosovo joining another country or a part of another country; that there will be no return to the constitutional arrangements from before 1999; and that Kosovo will not be partitioned, the great powers vindicated Jennings' quip that somebody needs to decide who is the people, before this people can decide its political destiny. Even as Russia supported Serbia in its rejection of Kosovo's independence, the Western members of the Contact Group stood behind the so-called Ahtisaari Plan, which further constrained the range of constitutional options available to 'the people of Kosovo' by prescribing in advance the constitutional power-sharing structures that should operate in Kosovo once it achieves its independence.²⁷ While I highlight the hegemonic role of the Great Powers who set the basic parameters of conflict resolution, I do not wish to suggest that such behavior is historically unprecedented. Actually, the opposite is true. As Gerry Simpson observed, the role of Great Powers was always critical in constitutional reconstruction of smaller, 'outlaw' states. And in fact, Serbia obtained its independence in a manner not unlike that of Kosovo. At the meeting of the Contact Group of the day the Berlin Congress of 1878 the principality of Serbia, until then formally part of the Ottoman Empire, was granted full independence. But the reason why the explicit involvement of external powers is striking today, is that it is situated against a backdrop of a historical period 1945-1989 where naked power politics was tamed by normative consensus on the applicability of self-determination. The fact that African and Asian nationalist elites generally agreed on respecting inherited colonial boundaries, the fact that decolonization for the most part took place under the umbrella of the United Nations, and finally, the consensus between the United States and the Soviet Union about the desirability and contours of self-determination as decolonization; all that must have muted questions about dominant external constitutive influence. Between 1999 and 2008, the Great Powers were careful not to mention the principle of self-determination as an overarching justification for the final status of Kosovo. For example, the UN Security Council Resolution 1244 endorsed meaningful "self-administration" for Kosovo but carefully avoided mentioning self-determination as a governing principle.² Equally the will of the "people of Kosovo" or the "population in Kosovo" while featuring as factors in determining the political destiny of Kosovo, were never linked to the exercise of self-determination as a general legal principle. Instead, international actors used the will of the people as a proxy for the size of the majority demanding independence. According to one American diplomat, the "United States and its allies have already committed to an outcome that takes account of the wishes of a *vast* majority of Kosovo's population".³ Similarly, a British diplomat stated that "[t]he outcome of the future status will need to be acceptable to the *great* majority of people in Kosovo ... and we know that the majority of people in Kosovo *aspire* to independence «What mattered normatively in addition to Milosevic's oppression was not the existence of either an 'ethnic' (Kosovo Albanian), or a 'civic' (the People of Kosovo) collective subject with a right to self-determination, but rather the size of the aspiration for independence in a designated territory. In addition to emphasizing the requirement of a (vast) majority, western members of the Contact Group began to insist that Kosovo is a "unique" case that cannot set a precedent for future cases of creating new independent states. According to

²⁷ *Elegy for Kosovo: A Novel* by Ismail Kadare (Jan 1, 2013) page 23

Rosemary Di Carlo, then US Assistant Deputy Secretary of State, until recently, it was hard to ascertain whether the rise of the uniqueness argument, and the fall of self-determination, was an inconsequential omission on behalf of proponents of Kosovo's independence, or part of a legal strategy that sought to deny relevance to self-determination in the post-Cold War period. Written statements submitted by the United States, United Kingdom and France to the ICJ in April 2009 suggest that the latter is true. The British written opinion, while mentioning in passing Canadian jurisprudence on self-determination, ultimately made no use of it. Instead, it criticized Serbia for exaggerating the dangers that the independence of Kosovo may pose to the international order. The United States, in their written statement also made no mention of self-determination. Instead, they argued that the UDI is not prohibited by international law; more specifically, that the Declaration of Independence doesn't violate Resolution 1244. According to the Americans, the text of the Resolution makes only tentative reference to the territorial integrity of Yugoslavia, and only during the 'interim' period. This interim period was to be superseded by the 'future status' for which the Resolution doesn't require 'agreement' of the opposed parties. The closest that the United States got to self-determination in their written statement is the argument that the Resolution incorporates a reference to the Rambouillet Accords, which themselves speak not of self-determination, but of 'the will of the people' as one of the parameters for deciding the status of Kosovo. Several months later, during the public hearings stage of the ICJ proceedings, the American position became explicit: "the Court may opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination." The supporters of Kosovo's independence did not invoke the territorial rights of Kosovo Albanians as a part of the justification for the independence of Kosovo. While one may disagree with the merits of the approach of the Contact Group, and question the motivations of the great powers, I believe that circumventing the vocabulary of rights is appropriate. It is, of course, wrong to assume that the rhetorical silence of commentators and diplomats signals a lack of support for territorial rights. I would think, however, that their silence on the issue ought to be commended and encouraged.²⁸ The purpose of this section is to commend that approach by engaging in a very preliminary discussion about the vocabulary of territorial rights at a theoretical plane and to argue that the concept of territorial rights is problematic in justifying secession. In this section, I will argue against the vocabulary of territorial rights in all of its incarnations: as territorial rights of nations (TRN), territorial rights of states (TRS), pre-political property rights (PPPR), and prepolitical habitation rights (PPHR). What should emerge as a result of this discussion are the two principles that ought to animate legitimate boundary drawing: maximization of political allegiances and minimization of coercion. While these principles sometimes intersect with the various conceptions of territorial rights, there are I think good reasons to abandon the idea of territorial rights as a purportedly inescapable component in normative arguments about justifying secession. *Against Territorial Rights of Nations (TRN)* and irrigation systems, and as a result, acquire territorial rights over those lands. These acts give the 'ethical force' that informs the TRN. While the thrust of my argument against TRN is not directed against the practical difficulties that accompany ascertaining TRN, several things are worth remembering when we speak about TRN in certain regions of the world. First, in many regions it is difficult to establish a clear line of inheritance between different historical groups because of the discontinuities in the various systems of territorial governance. Are Kosovo Albanians rightful descendants of ancient Illyrians or Dardanians? Can Bosniaks of today claim historical rights over medieval Bosnia, which was a Christian country? Would medieval Bosnian rulers and a Christian population approve of the claims of inheritance by a group of people so radically different today in their cultural markers? Second, many acts of symbolic and material investment are the result of the labour of the local population and the capital and know-how of the administering powers of the time. Who has a right to claim these as a part of their heritage? The descendants of the local population, arguing that these are the result of the exploitation they were exposed to, or the descendants of the administering state at the time, which organized the work, and provided the capital and expertise? The reason why I am not pursuing these objections further is because a number of theorists who endorse the idea of TRN themselves agree that establishing who is the bearer of TRN, or over which land exactly does the TRN extend may pose almost insuperable practical difficulties. Therefore, for the purposes of this paper, I will leave these practical issues of ascertaining historical truth aside. Here however I would like to point to two *conceptual* problems which undermine the idea of TRN. The first is what we could call the territorial integrity objection. Even if we accept the historical contiguity of a nation, the aggregate of symbolic and material acts does not necessarily create a contiguous territory. It is true that, over time, especially in modern industrialized countries, an aggregate of symbolic and material acts may come to approximate the territory of contemporary independent states. However, we can easily imagine states where this aggregate will yield a pockmarked territory. Even if nations adorn the land with monuments, bridges and roads, there will probably be swaths of land uncultivated, or unsung by any nation. That would certainly leave some deserts, rainforests or wastelands open to habitation by non-members of a nation. Ironically, this conception would also fail to extend territorial rights to uncultivated lands immediately beyond the border. Since a border creates discontinuity in social interaction between communities on the different sides of it, governments generally don't care to cultivate these narrow strips of land immediately following the borderlines. As a result, there is nothing in the theory of TRN that would stop immigrants from settling uninhabited swaths of land, and over time to demand autonomous or separate political institutions to govern them. A way out of this bizarre implication for the proponents of TRN is to argue that the administration of justice requires 'smooth' territorial jurisdictions. Thwarting human traffickers and drug smugglers, fighting epidemics, and establishing an efficient judiciary are easier if a territory is integral and not pockmarked. An amended conception of TRN would recognize that initial symbolic and material investment might establish the rough contours of a territory, but that its final shape is determined only after the

²⁸From *Kosovo to Kabul and Beyond: Human Rights and International Intervention* by David Chandler (Dec 20, 2005) page 32

requirements of the administration of justice and viability are taken into account. Two things follow from this amended conception of TRN. First, an amended version of TRN can only be legitimately invoked to defend the *status quo*. It could be conclusively invoked to, say, deny residence to those who would, in virtue of their settlement disrupt the administration of justice within a particular territorial jurisdiction, or deprive a nation the enjoyment of symbolically and materially valuable localities. Second, TRN is far less conclusive when invoked to justify the re-drawing of political boundaries. One could, in abstracto, construct an argument in favour of TRN that would yield integral territories, but nationalist politicians generally invoke TRN in the context of boundary-drawing among antagonistic national groups. Invoking TRN is conclusive only insofar as it tells us where boundaries ought not to be drawn in any event. While this conception of TRN may or may not justify Albanian claims to Prizren or Gracanica in Kosovo, or to Preševo Valley in Serbia proper, it cannot give us a definitive answer about how to redraw the boundaries in contentious areas, nor can it vouchsafe that the territory in this case would be integral. Can we then still speak of nations having territorial rights in the context of boundary drawing? Until a process of boundary drawing is completed, we cannot know who is the bearer of such a right. What nations appear to have is a claim to a process of boundary reconfiguration. They also have a right to have their claim of territorial jurisdiction over symbolically and materially important territories be seriously considered. But until that process is complete we cannot know whether they will get control over all such localities, or some of them, or none. We can speak of TRN in the amended sense, then, as an integral territorial jurisdiction but only trivially, as the legitimate result of a political and/or legal process that impartially sorted out conflicting claims.

But even invoking TRN in this trivial sense as a right to see the legitimate result of a political process be brought to reality is conceptually problematic. This leads us to a second conceptual problem with TRN, which I will provisionally call the *transubstantiation objection*. The problem inherent in talking about TRN is that the bearer of the territorial right magically disappears at the moment when its wishes come true. Why? Territorial polities are by definition under and over inclusive. No matter how we draw the boundaries there will always be unwilling minorities trapped within them (Kosovo Serbs), and minorities willing to be included in a nascent polity but who were excluded from it (Albanians from the Preševo Valley in Serbia proper). Both the members of a national majority, (the initial claimant of TRN), as well as a national minority must be included in a new polity on equal terms. Therefore, instead of a transgenerational pre-political (cultural/ethnic) people, modern liberal-democratic states rely on the territorial people that includes all citizens 'captured' under the same constitutional order. As a result the claimant of the TRN and the recipient of a TR are two qualitatively different subjects. A formulaic way to express this is: over-inclusivity + the need to represent citizens' political equality a qualitative change in collective political subjectivity.

There are rhetorically interesting but conceptually inconsequential ways of squaring the circle of territorial rights between those who demand, and those that receive them. For example, the constitutions of several Eastern European countries mention historical struggles of the majority nation for statehood; they mention important formative moments where statehood was established, defended, illegitimately lost or restored, but then go on to define the people, in the normative part of the constitution, as a union of all citizens. Kosovo's constitution-makers opted for a slightly different rhetorical strategy.

In the Preamble to the Constitution, nowhere is there mention of the ethnic majority, Kosovo Albanians, as a collective entity whose struggles ought to be remembered and honoured. However, in the normative part of the Constitution, 'the Albanian community' (not the people!) appears in Article 3, which prescribes equality under the law. In section 1 of this article, the Constitution defines Kosovo as "a multi ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions." While Kosovo Albanians are singled out in section 1, nothing really follows from that: in s. 2 of the same article the Constitution guarantees that "the exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members." The transubstantiation problem questions the logic behind the invocation of TRN. But a proponent of TRN may bite the bullet and ask, 'so what?' if liberal democratic states are *ultimately* phantom ethnocracies. Proponents of TRN could phlegmatically point out that behind every inclusive democracy there are always ghostly TRN which can be legitimately invoked in a situation of civil strife, where a secessionist minority would demand a portion of territory for itself. However, the presence of the national majority's domination through its ultimate dominion over the territory is felt even in stable political situations, and in turn poses the problem from the perspective of ethnocultural justice.

Ethnocultural justice maintains that minorities within nation-states are at a disadvantage because unlike the national majorities they lack the tools of their own nation-building. As a matter of both group and individual equality they deserve their own nation-building tools, depending on the circumstances, from more modest minority rights, to territorial autonomy, or full-blown federalization of the country. According to conception of ethnocultural justice, the minority citizen is still co-equal; and the political arrangement, say, of their territorial autonomy, is a result of the demands of justice constrained by political realities. Under the conception of liberal democracy as spectral ethnocracy any minority arrangement is a result of the license of the majority nation. While ethnocultural justice preserves the account of coequal citizens, the conception of TRN produces 'phantom ethnocracies' that in turn produce the landlord-tenant problem. Political autonomy of a minority is a matter of license, an exercise of goodwill, and not a result of the demands of justice. From what I have said so far, it doesn't follow that there are no good, prudential reasons not to invoke TRN. First, TRN is powerful rhetorical shorthand in situations where a state is existentially threatened by aggressive settlers. The good thing about being able to say 'we have a right' to such-and-such territory is that it provides immediate moral clarity, and arguably amplifies the fighting potential of those who are subject to incursion, and, raises the profile of the case among the international public. Another reason to speak of TRN is perhaps even more important. Invoking TRN will have a soothing effect on what we can call 'grassroots neurosis' about less sinister forms of immigration. Anxieties about future political consequences of spontaneous changes in local demographics, such as an influx of immigrants, would be

alleviated if the national majority knew that the newcomers' possible political demands are normatively inconsequential. Irrespective of the tendency among immigrant communities to cluster together, the dominant nation would be assured that these patterns of inhabitation are politically inconsequential in that they cannot create grounds for territorial autonomy or secession at some point in the future. But even if we agree that there are prudential benefits to the rhetoric of TRN, these need to be weighed against the detrimental effects that inadvertently follow the vocabulary of rights, such as obtuseness in following one's political objectives, inattentiveness to the interests of others, and so on. The ultimate decision whether or not to commend the vocabulary of rights (irrespective of the conceptual problems that undermine it) is a prudential, and not a moral one. *Against Territorial Rights of States (TRS)* The second account of territorial rights I'd like to question in the context of boundary drawing are territorial rights of states (TRS). One could immediately object, arguing that a discussion of TRS in the context of state-building makes no sense: TRS presuppose a state, yet we are concerned with drawing boundaries of new states. TRS, at first, appear only as a conservative principle; they seem to speak only about preserving the boundaries of existing states that protect justice. But TRS do merit investigation in the context of state-formation. If the criterion is the administration of justice, then the boundaries ought to be conducive to that ideal. One could, following Jeremy Waldron, argue that proximity generates conflict, and that the potential for conflict gives rise to the need for ongoing structures that administer justice, and that the territorial state is the political structure best positioned to do that. Therefore, the re-constructive implication of otherwise conservative TRS is that boundaries ought to be drawn around densely inhabited areas, leaving out portions of land that are only occasionally in contact with axes of social interaction. While that may be the principled implication of TRS, I suspect that a proponent of TRS would opt for a different tack. To map out the patterns of interaction would take time and would itself be divisive, so one needs to leave the state of nature as soon as possible, and join with others in the civil state. There is no time for dilly-dallying as we are leaving the state of nature. As a result, proponents of TRS would probably support the elevation of existing territorial units to the level of an independent state, judging, rightly or wrongly, that their previous existence as autonomous units can be taken as a reliable presumption about the ongoing patterns of social proximity that warrant the existence of a state. Many scholars have questioned the suitability of administrative boundaries of previously sub-state units, to that of independent states, so in this paper I will not question whether that presumption is warranted or not. What is more important is that even if we accept the presumption of functionality of the preexisting unit, that in itself is not enough to create an independent state. Great powers cannot elevate just any administrative unit to the level of an independent state, presuming it is well suited for administering justice and then tell the local population: now go and self-govern yourself. A majority vote is needed to decide for the decision about the status of a territory presumed suitable for administration of justice. Which leads us to the critical question: why do we need a majority vote, instead of a minority vote, or no vote at all? Why do we care to test the will of the people? One answer would be: because it is the will of the people. A majority in a referendum is an *indicator* of the will of a collective body the people. I think that this answer is deceptive, sometimes disingenuous, and a bit naïve in the context of creating new states. To posit 'the will of the people of Kosovo' in the situation where 'the people' of Kosovo is constructed through the arbitrary delineation of the boundaries of Kosovo, is question begging. An illuminating question for proponents of TRS would be: how would you justify a majority vote if you couldn't rely on the concept of 'the people', or collective political agency? Let me answer this question indirectly, by engaging the so-called annexation objection that proponents of TRS, such as Anna Stilz (and I think Jeremy Waldron) tackle. The annexation objection asks why we should respect the autonomy and territorial integrity of states if the annexing state upholds human rights, administers justice (and probably enlarges the range of meaningful individual choices) for the population of the annexed state. Stilz's immediate response is to argue that a state is a moral person because it protects citizens' collective autonomy. For Stilz, the reason why, for example, the United States should not annex Canada is because Canada ought to be considered as a moral person. "In other words, in a well-ordered republican state, citizens participate (via their representatives) in making their laws and shaping their institutions. They cooperate in legislating these laws, and through their deference to state authority, in imposing them on persons in their territory." Since Stilz didn't qualify her description with a modal 'ought' we are right to treat her justification for moral personhood as relying on some objective quality of political life. So let us for the sake of argument imagine a situation where citizens mostly mind their own business, generally see politicians as 'them', political life as the bickering between distant political elites, and don't perceive themselves as represented by their representatives. However, those same citizens root for their national soccer team (very often they care more about that than politics), and are emotionally attached to their state. It is revealing to raise the annexation objection again in this context: What would be wrong with annexing a relatively docile, but politically attached population into an adjacent, and equally just state? If there is anything wrong with that it is because political allegiances count *as such*. What is ultimately wrong with annexation is that it reduces the degree of political allegiance over the reconstituted territory (i.e., USA-Canada). If the United States annexed Canada, the degree of political allegiance would be reduced in comparison to status quo ante. The same principle is visible in the case of Kosovo. The Western advocates of Kosovo's independence invoked the will of the 'great'/vast majority of Kosovo's population for secession as one of the normatively relevant arguments for its secession. The implication of this argument is that the level of political allegiance over the whole of the territory of 'Serbia pre-1999' would improve if Kosovo seceded. While the Serbs would not approve of the secession of Kosovo, and would see their first-order preferences violated (to keep Serbia territorially intact), in the new political constellation, both the Serbs in Serbia and Albanians in Kosovo would have political allegiance to the entities emerging out of boundary reconfiguration independent Kosovo and Serbia minus Kosovo. *Against pre-political property rights and its kissing cousin pre-political habitation rights* paper I won't delve deeply into the problem of pre-political property rights. The idea derives from Locke, but was used by Rousseau as well. Under this conception, the territory of the state is created as an aggregate of individual pre-political property rights when individuals come together to form the social contract. The idea of PPPR has been extensively critiqued. Commentators argue that 'meta-jurisdictional authority' is chronologically and logically prior to property

rights as the property rights regime can only be established by the state. Equally, the purposes of territory and property are different: territory serves to establish and maintain justice, while property serves to enable individuals to pursue their own conceptions of the good. While I believe that the idea of PPPR is problematic, its application would, in certain cases, correspond with the application of the principle emerging from the discussion in the previous section: the maximization of political allegiance. In more urbanized areas this link is less obvious: tenants and squatters would have no say, under the neo-Lockean conception, in determining the fate of the territory. The same goes for the owners of condos whose PPPR would be meaningless. But we can imagine a situation where the link is immediately obvious: a more or less agrarian society where individuals live on their plots of land and covenant together to form a new state. Political space reconstituted along the lines of real estate would improve political allegiance in comparison to the status quo ante. A more attractive variant of pre-political rights, similar to PPPR, is Harry Beran's account of pre-political habitation rights (PPHR), the aggregate of which creates the territory of the state. For Beran, territorial communities possess pre-political habitation rights because they have a right to maintain themselves. This raises an immediate question: why shouldn't they maintain themselves somewhere else if they wanted to secede? For Beran that would be problematic, because, unlike families (which are also communities, but not suitable for political self-determination), the survival of territorial communities is sensitive to geographical location. For Beran, "it is possible (logically and even practically) for a community to maintain itself if moved to a new location against its will such forced relocation creates a very high risk of disintegration. While Beran is probably empirically right, his suggestion is morally counterintuitive. Would he suggest *a contrario*, that it is morally permissible to relocate families non-territorial communities against their will? Or, would it be morally justifiable to relocate territorial communities if we provided comparable amenities, geographical location and so on, so that we are assured of their perpetuation? If we did so, we would improve political allegiances over the referent territory not by redrawing boundaries, but by relocating those who want to secede. Beran's insistence on the negative effect of coercion on the reproduction of communities conceals what I take to be the simple reason behind the argument against relocation, namely that it is coercive. The only way in which a political environment can impose its will over a secessionist village for instance, is to use violence either to physically assert control over the people and the land, or to use less drastic means to break the will of politically mobilized individuals. [I am realizing now that I may owe a separate account of what would be justifiable coercion in the context of boundary-drawing. I am not sure, but I think I am making a comparative point. Can I say that the reason why boundary drawing along the lines of PPHR would require less coercion than keeping the territorial integrity of the state through intimidation, violation of basic rights, or possibly worse? If the preceding discussions of TRS and PPHR raised the profile of two salient principles of boundary drawing maximization of political allegiance and minimization of political coercion, and if the application of these two principles in tandem generally corresponds to the application of PPHR, why don't we embrace PPHR, at least as shorthand? There are two problems with this proposition. The first is similar to the conceptual problem I identified with respect to TRN. When a representative of a territorial political community (say, a village) invokes PPHR in the context of secession he or she doesn't know the exact boundaries of his or her territory. Beran speaks of villages as one of the smallest imaginable territorial communities possessing PPHR, but, before the boundaries are agreed upon with the other side, we cannot know their location. That poses a problem for the vocabulary of rights, because the bearers of rights cannot invoke them approximately. The representative of our secessionist village cannot say, 'we have a right to *roughly* 100 acres of land surrounding our village, with the boundary following *more or less* the edge of the forest that we need to keep our independent village functional'. Beran is aware of this, so he stipulates that in order to exist, PPHR must yield functional territorial communities. The alternative is to grant that the representative of the secessionist village has a right to claim a distinct, delineated territory. The final outcome would depend on the balancing of other considerations, such as what secession would mean for the administration of justice, viability of the territory, regional stability, and so on. If adopted, this position would still be unclear on what is gained by the vocabulary of right. The second problem with the vocabulary of PPHR is that it arbitrarily stops with the smallest territorial unit, a village, or at least a 'habitat' consisting of numerous families.¹⁴ For many theorists, it is problematic enough to posit such a small territorial community as the basic unit of self-determination. To question even those basic units of self-determination under the guise of maximization of allegiance, may lead to anarchy. But real life puts these fears in perspective. We can start from an individual, who decides to secede from the state, and declares an independent state in his apartment. These individuals are often a source of amusement, and are regularly ignored by authorities. If they are prosecuted, they are not prosecuted for high treason, but for more mundane crimes, such as not paying taxes, or violating city bylaws. Let us now imagine a larger community, say a city quarter, or a village. In this case, most often, even if autonomy or statehood is declared unilaterally, the larger state is most likely not to intervene. In Copenhagen, the Free City of Christiania was established several decades ago on the territory of deserted army barracks, and has until relatively recently led an autonomous existence, unfettered by Danish authorities. In Italy, the ancient Principality of Seborga was re-established in the early 1960s, when a local florist Giorgio Carbone, later known as *Sua Tremendità* Giorgio I, persuaded his fellow citizens of an unbroken Seborgan historical title to independent statehood. In a 1994 referendum, the citizens of Seborga nearly unanimously voted for their independence. Italy never reacted to this secession because the citizens of Seborga never challenged Italian territorial authority over the municipality, and continued to participate in Italian political life. These vignettes are of course no substitute for a normative argument, but they are illustrative of the common sense that generally prevails both among smaller groups asserting their political subjectivity, as well as the larger state that knows not to overreact with coercion when its authority is only symbolically challenged. A more serious problem arises when smaller groups of people assert their sovereignty, not only symbolically, but also by excluding the larger state from the land they claim as theirs. To say in this situation that the state has a right to protect its territory is of course question begging. There is no territory as long as the question of the challenges to it is not

adequately addressed. Ideally, neither the opposing side, nor third parties can justifiably invoke the desired territory to pre-empt any discussion about the scope of the territory.

We saw in the previous section that the great powers simply asserted the territory of Kosovo as a given. But we have also seen how they invoked the 'great majority' of 'the people' to justify its independence. But if it is the great majority of people that justifies the independence of Kosovo, what prevents us from pushing that number even higher, and increasing the degree of political allegiance, without physically coercing people to relocate, or to accept the state they don't prefer to live in? The answer is that any political and territorial reconfiguration ultimately must be functional. The independence of Kosovo has, therefore, been justified by its proponents as a realistic compromise, ensuring the functionality of Kosovo, [while] at the same time, catering to the need of the Kosovo Serb community and other minority communities.¹⁵ If my reconstruction of the rhetoric of great powers is correct nobody *deserved* the territory of Kosovo. Instead, the territory of Kosovo is a result of a prudential calculation between maximization of political allegiance, minimization of political violence and the demands of functionality. But, what do we mean by 'functionality'?

Theorists of secession generally demand that the secessionist group cumulatively fulfill three conditions for independent statehood: that they are willing to perform political functions, that their desire for an independent state is reasonably stable, and that they are capable of maintaining a secure and just political environment. When confronted with the demands of functionality, as Christopher Wellman noted, the best we can reasonably hope for, then, must be the more modest goal of giving citizens maximal say in drawing political borders consistent with maintaining viable, territorially defined states.¹⁹ But theorists of secession have yet to confront the question of what would constitute functionality. In part, their reluctance is understandable. Given great differences in morphology of terrain and patterns of demographic distribution, it is impossible to offer in advance any detailed prescriptions applicable to each and every territorial conflict. However, I am assuming that normative theorists have something to say about functionality. A start would be to ask what do we generally mean by functionality of a nascent political entity. Provisionally, we can break functionality into two aspects: external and internal. From an external point of view, the shape, size, and integrity (and in some cases access to critical resources such as a coastline) of a territory are critical in making it defensible against outside attacks. For instance, after the First World War President Wilson justified granting to Czechoslovakia the administrative boundaries of Bohemia in order to contribute to its security from external attacks. According to him, to maximize preferences along Czechoslovakian Western borders, thus leaving the Sudetenland in Germany, would have "left Czechoslovakia so entirely defenseless as to be really incapable of independent life. But historical examples show that to judge a unit to be 'really incapable' of independent existence solely based on appearances is an unreliable indicator of functionality. For example, seventy years on, Croatia, with its apparently defenseless, croissant-shaped boundaries, won the war over the secessionist region of Krajina and emerged as one of the more prosperous Yugoslav successor states, in good part because it was able to garner international support in favor of its secessionist project. From an internal point of view, one could argue that meandering boundaries of an independent state would be problematic because local criminals could transgress them easily and with impunity. A territory pockmarked with independent enclaves would provide havens for criminals on both sides, complicating the administration of criminal justice. Finally, in small republics the democratic process is easily hijacked by a strongman, or the most powerful 'faction', sidelining democracy and the protection of basic human rights.¹⁸ These are important arguments in favor of large and contiguous territorial units even if we gelatinized their conclusiveness by pointing to a number of orderly micro-states, or functioning enclaves on the one hand, and a number of 'failed' large multi-national states on the other. But a pivotal question for a normative theorist clarifying the notion of functionality should rather be how to confront a demand from a small secessionist group, or a minority within such a group, that is credibly willing to attempt to "maintain a secure and just political environment." Should they be encouraged, or even coerced, to modify their political will in order to conform to the will of their political environment? Placing this issue in context, we should ask what would a normative theorist prescribe, if Serb enclaves in Kosovo desire to remain part of Serbia, and are meanwhile willing to negotiate ongoing arrangements with the surrounding state of Kosovo. Should we consider such a solution dysfunctional from the outset? In my view, what is 'functional' is less a matter of objective fact¹⁹, and more our judgment of the subjective animus of the political surroundings towards the nascent unit. What undermines functionality are not meandering boundaries per se, or the existence of a unit as an enclave, or a pockmarked territory, but the obstructionism, chicanery and hostility of its political environment. As a result, what on its face appears as a technical issue of functionality, will turn out to be a normative question. To declare something (dis)functional is to already have implicit answers to questions such as: Is the noncooperative attitude of the political environment normatively justifiable? If it is, what amount of hostility of that environment is tolerable? If it's not, what demands, if any, can we make on powerful third parties to stop hostilities, and for how long? These questions have immediate policy implications. For example, is the decision by the Kosovo government to withhold the distribution of electricity to Serbian enclaves justifiable because Serbs living in the enclaves do not recognize the authority of the independent Kosovo state? Or is the decision of the Kosovo government to shut down Serbian Telecom communications towers because they are not licensed according to Kosovo legislation justifiable or not? Do these count as justifiable means of encouragement to join a territorially integral, 'functional' Kosovo? If not, then what are the obligations, if any, of dominant third parties to the conflict, such as the United States or United Kingdom? Should KFOR forces, in which those countries contribute, have prevented the Kosovo police force from dismantling Serbian Telecom's equipment? Should KFOR military forces continue to protect Serbian government convoys bringing power aggregates, medicines and drinking water to the enclaves? In other words, is it normatively justifiable to ask the Great Powers to

¹⁹ *Elegy for Kosovo: A Novel* by Ismail Kadare (Jan 1, 2013)

spend money, and expend the lives of their soldiers in order to engage in what would look like a perpetual micro-humanitarian intervention, the effect of which would be to protect the political choices of the besieged Serbian, or some other minority?

The judgment of what entity is 'functional' and thus deserving of independent statehood could come in two variants. We may argue that temporary ghettoization of enclaves is, for one reason or another, normatively justifiable.²⁰ From there, it would be reasonable to conclude that without electricity, telephone signals, and running water, Kosovo's Serbian enclaves would be unable to create a 'just and secure political environment', and thus could not maintain their claim to remain a part of Serbia. On the other hand, even if we conclude that the hostility coming from the enclaves' hinterland is normatively unjustified, we might still conclude that recognizing Kosovo *cum* enclaves is ultimately justifiable because it is within the sovereign prerogative of dominant third parties to decide how to expend their military, political and economic resources in the process of external state-building. In other words, the perpetual protection of the political choices of the enclave Serbs would, for them, be supererogatory. In that case, we may reach a consequentialist conclusion that given the disposition of the Great Powers it is, all things considered, best to support an integral Kosovo, and encourage the local Serbs to participate, rather than expose them to slow political and economic degradation. Contemporary theories of secession assume that early modern political theories have little to teach us about how to draw the boundaries of new states.²¹ But Rousseau's *Social Contract* surprisingly offers a clear solution to the enclave problem similar to the one described above. For him, "lands of private persons when they are *united and contiguous* become public property. When the State is instituted", Rousseau continues, "residence constitutes consent; to dwell within its territory is to submit to the Sovereign".²³ But it is important to realize that we don't need pre-political property rights of Kosovo Albanians to achieve a solution identical to Rousseau's.²⁴ The enclave-free solution is justified as a result of the triangulation between the demand for a 'vast' degree of consent (recall Dobbins and Sawyers), and the implicit assumption that a modicum of external hostility is tolerable, and/or that the Great Powers cannot be asked to intervene to protect enclaves. Both for Rousseau, and present-day state-building engineers, the "pursuit of unanimity is a luxury a would-be state cannot afford". In light of that, it is possible to remain faithful to choice theories without submitting to the implicit calculus of violence that would nudge us toward a *Rousseauvian /functionalist* solution? The most compelling normative argument to the contrary, consistent with choice theories yet sensitive to real life context, comes from Iris Marion Young's engagement with self-determination in the context of the Israeli/Palestine conflict and First Nation claims. The theoretical traditions on which Young draws are different from the standard arguments of choice theories. Drawing on feminist accounts of relational autonomy and republican ideals of non-domination, Young argues against the singleminded application of the idea of 'self-determination as noninterference' implicit in most theories of self-determination. While both 'relational autonomy' and 'non-domination' preserve the aspiration shared by choice theories of secession "maximal pursuit of individual ends" their application would reject the ideal of a territory as "large, homogenous, contiguous and bounded." For Young, "it is possible to conceive a unit jurisdictionally constituting a self-determining people as itself not a contiguous territory but rather a set of discontinuous locales in between which lie locales that belong to other self-determining jurisdictions. Both theoretical traditions upon which Young draws convey this simple message: secessionist projects don't arise in a vacuum and will very often have negative externalities to the would-be independent state's political surroundings. The constitutive part of the concept of self-determination ought to be cooperation between the self-determination units in solving these problems within an overarching framework. Institutionally, Young suggests a multinational federal framework consisting of the discontinuous territorial constituent self-determining units. Inspired by Young, a modified plan could provide an alternative to both the Ahtisaari and the Serbian government plans for Kosovo. The main contours of this alternative would consist of four components. First, the populations of the enclaves should not be pressured to abandon their political desire to remain a part of the parent state. By the same token, the parent state should not be allowed to use coercive power to maintain sovereignty over new enclaves. The population of the enclaves should be allowed to test their preliminary choice, to see whether they 'like' being enclaves. Even in the best of circumstances, it is likely that the everyday life of 'enclaved' individuals would be marred by hardship. What is important, however, is that no politically mobilized enclave is asked to sacrifice its political choice at the altar of someone else's functionality. Second, the government of the surrounding secessionist territory would be under the duty to enable free movement of people and goods in and out of the enclave. At this point, the 'primary' secessionists (Kosovo Albanians, in this case) would not be under a duty to provide positive support for the secessionists such as electricity or running water. But they would be under duty to allow the parent state to provide for basic needs, through import of electrical aggregates, water purifiers, medicine, etc. Third, the secessionist entity would be recognized as an independent state if it proves willing to enter into agreements that would alleviate negative externalities arising out of the existence of the enclaves. At a minimum, an agreement on policing between the Serbian and Kosovo Albanian police forces would need to be made, which would prevent criminals taking refuge either in the enclaves or in the surrounding territory. Equally, as smuggling would be an obvious problem, a customs union between "Serbia with the enclaves" and independent Kosovo would likely be required. Finally, in order to avoid treating every private law dispute as a matter of conflict of laws, a solution ought to be found that would create a common civil law framework, symbolically acknowledging the existence of two separate states. Fourth, and least controversially, the external boundary of the seceding entity would be adjusted according to the political preferences of the populations from both sides of the border. In the case of Kosovo, this would mean that the area north of the Ibar river would remain in Serbia, while the portions of Presevo Valley which are currently in Serbia proper would join newly independent Kosovo. These four elements sketch a solution that is in tune with the precepts of maximization of political allegiances. In addition, such a solution would be face-saving for Serbia, in that it would give it partial physical control of Kosovo (enclaves including the Serbian monasteries) and would provide a principled reason to its public as to why it ought not control more. It would save face for Kosovo Albanians, because it enables them to achieve independent statehood. Second, this solution could serve as a resource for the evolution of political aspirations both among Serbs and Albanians in Kosovo. While the suggested precepts are consistent with choice

theories, nothing in choice theories prevents either the secessionist groups, or the home state to rethink their preferences, abandon their initial plans, and settle for second-best, because it ultimately enables groups a more meaningful choice. Such second-guessing could go in different directions, and doesn't necessarily have to stop at the equilibrium point of multinational federalism, as Young seems to suggest. Serbs in the enclaves could reconsider their wish to remain in Serbia, and join independent Kosovo itself, in exchange for special status and economic benefits. Equally, Kosovo Albanians may accept nominal Serbian sovereignty in exchange for the Serbian government's support for an enclave-free, territorially integral Kosovo. Finally, Serbia proper may accept independent Kosovo, in its administrative boundaries, in exchange for a fully federalized Kosovo, which would symbolically recognize the constituent status of Serbs in Kosovo's identity. While all legitimate, these solutions should come about as a result of a political calculus of the Serbs and the Albanians, and not as a result of a Great Power fiat, just because the great powers are in a hurry to withdraw. Such political arrangements would probably need protracted international support. The states that intervened in Kosovo, as well as other Great Powers would need to commit resources to uphold the solution that doesn't fully satisfy the locally dominant ethnic group. Such international presence is already envisaged under the current Ahtisaari plan, but would probably need to happen to an even larger extent. I recognize that to ask that of the Great Powers would require an additional, controversial conceptual shift, which I won't elaborate on here. The armed forces and the diplomatic apparatus of the Great powers should not be seen as tools at the discretion of external popular sovereigns but rather be conceptualized as true *pouvoirs constituants* such that they are. As such they should be subject first to normative, and then hopefully to legal prescriptions on their behavior.³⁰ Last February 17th, 2011, Kosovo celebrated the third anniversary of its proclamation of independence (2008). Since then, Kosovo has won the recognition of 75 countries including the US, and 22 EU member States out of the current 27 (with the exception of Spain, Greece, Romania, Slovakia and Bulgaria), as well as 53 other UN member countries. Kosovo's intention is to legitimize its status as a nation State and become the 193th UN member. Nevertheless, the current panorama points to a worrisome future situation for this young State. Kosovo is still considered an "autonomous province" by Serbia, and has not yet been officially recognized by countries with a major influence in the international arena, such as China, Russia, Brazil, India, Iran, Mexico, or Argentina. At the same time, foreign concerns - specially those of the UN and the EU- grow, both regarding the complex Kosovar political stability and the countless accusations of corruption and organized crime in collusion with highest political circles -which obviously also imply Prime Minister Hashim Thaçi's performance. The Council of Europe Rapporteur, Swiss magistrate Dicky Marty, made public a devastating report in December 2010, that had a profound impact in both Kosovo's and international public opinion. This report accused the former guerrilla group Kosovo Liberation Army (UÇK in Gheg Albanian), led by Prime Minister Thaçi since 1988, of cooperation with drug trafficking and a network that extracted organs from Serbian prisoners which operated from Albania. This report also informed of high corruption levels within the Kosovar Government, permeated by several mafia organizations that are turning Kosovo into a "failed State", as US Ambassador in Pristina, Christopher Dell had pointed out.

Marty's report depicts Thaçi as a "key actor" within mafia and organized crime in Kosovo, characterizing him as the "*most powerful among UÇK's crime Godfathers*". He also stated this "*was already known by the NATO and other governments*". The accusations caused both Council of Europe Parliamentary Assembly and the EU's Rule of Law Mission in Kosovo, EULEX, to request proofs of the truth of his accusations on Kosovo Government's implication with crime and corruption. Even Serbian President, Boris Tadić, initially asked for an investigation and, eventually, for Thaçi's appearance before international courts. Apart from the scandal unleashed by this report, Kosovo's political scene shows an unstable situation and certain doses of anarchy. The collapse in September 2010 of the coalition between the two main political parties, Thaçi's Democratic Party (PDK) and the Democratic League caused the resignation of Fatmir Sejdiu, the first President of independent Kosovo. From then on, the presidency was held by UN-appointed Japuk Krasniqi, Chairman of the Assembly of Kosovo, the only existing Parliament in the country.

Later, last December 12th, 2010, the first legislative elections since its independence were denounced for alleged irregularities and electoral fraud. In these elections, the PDK obtained 34 of the 120 parliamentary seats. Prime Minister Thaçi and the PDK tried to speed up negotiations in order to form a new Government together with the New Kosovo Alliance's leader, Behgjet Pacolli, -reputed to be the richest person in the country- in order to find a way out for this political crisis.

Nevertheless, and in spite of the fact of being the only Kosovar politician that ran for Presidency to take Sejdiu's seat, he was facing accusations of corruption and dealing with the mafia. The AAK obtained 12 seats in the last legislative elections, which led the PDK to begin negotiations to set up a Government. Other parties, such as the Democratic League of Kosovo (27 seats) and the Self-determination Party (14 seats) had already publicly stated their refusal to negotiate any political agreements to form a new Government with Thaçi. Last February 22nd 2011, Kosovo Parliament's appointment of Behgjet Pacolli as the new acting President gave rise to strong protests within the opposition parties, which eventually led to his own resignation on March 30th. On April 4th, Japuk Krasniqi took again the chair as acting President, but just three days after (April 7th), Atifete Jahjaga (the announced consensual candidate for the presidency by the Democratic League of Kosovo, the Democratic Party of Kosovo and the New Kosovo Alliance) was elected President of Kosovo.³¹ Whilst the political crisis pushes Kosovo towards instability, the perspective of the country's independence still constitutes a source for strong controversy. Nevertheless, eight new countries recognized Kosovo's independence in 2010, most probably due to US diplomatic efforts to gain international credit for the

³⁰ Kosovo by Andrej Ban (Nov 1, 2009)page 58

³¹: M. Weller *Contested Statehood: Kosovo's Struggle for Independence* (2009)page 23

newly-formed State. Kosovo is currently recognized by 75 UN members -only 39% of its members. Many countries keep waiting for a UN Security Council's pronouncement to take their stance on Kosovo's status. Nevertheless, Russia's and China's alleged vetoes are said to be stopping Kosovo's aspirations of becoming a UN member.

The EU, in turn, is urging Kosovo authorities to resume dialogues and negotiations with Serbia in order to achieve an agreement on specific aspects of the current Kosovo status. For Brussels this is an essential condition to consolidate negotiations concerning Serbia's accession to the EU. Nevertheless, the lack of a new Kosovar Government after ex-President Sejdiu's resignation brought opportunities of negotiation with Belgrad to a standstill. In view of this situation, the EU hasn't sped up the visa liberalization process yet, with Kosovo being the only Balkan region that has not been granted this European recognition.

A valid reason for such a fact could be that the liberalization of visas would encourage even more the traffic of Kosovar mafias towards Europe. Regarding communications, Kosovo still uses Serbian, Slovenian, and Monaco's phone dialing codes, while Kosovar athletes continue to be banned from any participation in international competitions. But the main focus of attention is still the controversy surrounding Kosovo's unilateral declaration of independence in February 2008, specially regarding the legality of international agreements. At the UN General Assembly's request, the International Court of Justice (ICJ) issued an advisory opinion on July 22nd, 2010. In it, the Court confirmed the legality of this declaration of independence, since "*it doesn't violate International Law*" and represents an "*unusual case*".

This announcement, supported by the US, was rejected by Serbia and other countries contrary to Kosovo's independence.

Conclusion

The concept of self-determination has been the subject of considerable criticism. Self-determination is an imprecise and ill-defined concept. The message from historical examples seems to be, that achieving self-determination through peaceful means is acceptable, but disrupting territorial integrity is not. At the same time, when self-determination has been achieved militarily, the international community has generally been reluctant to reverse the gain. The claim is also made that too much focus on self-determination can be dangerous. An over-generous acceptance of self-determination could lead to fragmentation and the rise of intolerance, because it would no longer be necessary to coexist peacefully. Despite these problems, however, it is clear that claims to the right of "self-determination" are not abating, and the international community needs to develop better ways of addressing these demands that avoid destructive conflict and violence. While there is no universally accepted definition of a "people" in international law, international bodies and scholars have developed criteria for identifying the holders of the right to self-determination. A generally accepted description was developed in 1989 by the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. This description identifies a people as a group of individual human beings who enjoy some or all of the following common features. And one of the ways that they can be separated from the following:

1. • a common historical tradition
2. • racial or ethnic identity
3. • cultural homogeneity
4. • linguistic unity
5. • religious or ideological affinity
6. • territorial connection
7. • common economic life

The UNESCO description further states that "the group as a whole must have the will to be identified as a people or the consciousness of being a people" and that the group may have institutions or other means of expressing its common characteristics and will for identity. Thus, the notion of a "people" combines objective characteristics describing a group's common historical, ethnic, cultural, religious or other background, with the subjective component of a common awareness as a people. In general terms, self-determination is an entity's autonomy, managing its own affairs as it sees fit independently of external interference. While individuals almost never gain complete self-rule, societies can achieve significant measures of autonomy within limited areas. In the strict sense usually intended, self-determination is a matter of statehood, that is, of a political community's possessing and exercising sovereignty over its territory. There are lesser degrees of autonomy that fall short of full sovereignty, however, and these might take various forms of restricted localized self-rule, e.g., at the level of provinces, municipalities, neighborhoods, or of culturally or economically defined minorities. Whether collective self-determination is best conceived as a legal right, a moral ideal, or a political maxim is a more difficult matter. "an imperative principle of action which statesmen will ignore at their own peril" in which case the principle is envisioned as a political maxim binding upon those who possessed de facto control over "unsettled territories," namely, to let the people "immediately concerned" determine their own future. Yet, this norm is difficult to separate from the claim that such peoples are entitled to be self-determining, and, in the development of international law since World War II, the language of a 'right' to self-determination has increasingly appeared in documents codifying international law. These facts have not ended the debate, however, and some argue that a call for self-determination is not so much a single principle as a "placeholder for a range of possible principles specifying various forms and degrees of independence." Restricting ourselves to the strict political meaning of 'self-determination,' different entitlements jump to the fore. Perhaps the most obvious holders of a right of self-determination are states, and the simplest description of a right of self-determination is the following: Self-determination of States: Each state-an organized political community already possessing control over its territory-has a right to exercise rule in that territory through the operations of governmental institutions without external intervention. This is a claim-right placing a demand upon all other states,

groups, and individuals-including its own citizens-for recognition of its sovereignty over its territory and non-intervention in its internal affairs. It is limited in two ways. First, it can be overridden whenever intervention by external agents is called for, e.g., against a state engaging in rampant human rights abuses. For this reason, some would confine the right of self-determination to legitimate states, viz., those with effective institutional safeguards of human rights, thus, not engaged in systematic social, economic, legal, or political discrimination over a segment of its population, and not pursuing a campaign of belligerent aggression against external populations. But even a legitimacy restriction does not overcome the second limitation stemming from a citizenry's right to reconstitute the political institutions under which it exists, whether by replacing the existing constitution or basic laws, dissolving the state into separate sovereignties, or merging with a larger political entity. In fact, this limitation stems from a more general right of self-determination: Self-Determination of Citizens: The citizenry of each state has a right to establish, maintain, and alter the political institutions under which it is to live and be governed. Arguably, a state's right of self-determination derives from this more basic right, implying that when an external agent violates a legitimate state's sovereign right it thereby violates the right of the citizenry-a people-to constitute and maintain itself as a self-governing political entity in that territory. One source is the fact that a collective's self-determination is the best means for protecting the human rights of its members and, thereby, improving the quality of their lives. Also, if a collective's right over its members derives from the latter's consent, then an individual's right to self-governance provides a further basis for the collective's right. This does not mean that each individual is entitled to sovereignty over a territory, but, minimally, that he or she has a right to meaningfully participate in decisions about sovereignty over the territory in which he or she resides. Insofar as individuals exercise autonomy at the political level only through voluntary participation in a self-governing collective, then violating a citizenry's right to self-governance is ipso facto denying individual citizens the right of political participation. In this way, an established citizenry has a right of collective self-determination only because individuals have the right to be self-governing in the sense specified. The issue of how collective self-governance is to be implemented is another matter, and it is left unspecified by both the mentioned international covenants. A citizenry's right of self-determination requires that governing institutions are to derive from the consensus of the entire community, not by the preferences of internal minorities or agencies, or by external communities or nations. But once the decision is effected, the precise mode of subsequent citizenry participation in the governing institutions is open to debate. While it has become customary to expect that institutions regulating public life be freely determined through popular consent and operate on democratic principles, it is less clear that the notions of "popular consent to" and "free determination of" a particular political order require democracy. For example, a society might have an established and widely supported tradition whereby significant political decisions are deliberated upon and made by an unelected council of elders. Although decisions are not made within a democratic system characterized by universal suffrage, so long as the society enjoys freedom from external intervention, there is no automatic violation of the mentioned rights of self-determination. The United Nations documents that codify the principle of self-determination do not dictate any particular implementation process or political outcome or specify any enforcement mechanism. The exercise of the right to self-determination could lead to independence, federation, protection, some form of autonomy or even consensual assimilation. "Exercise of this right [to self-determination] can result in a variety of different outcomes ranging from political independence through to full integration within a state. The preferred outcome of an exercise of the right to self-determination varies greatly among the members of the UNPO. For some, the only acceptable outcome is full political independence. This is particularly true of occupied or colonized nations. For others, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the essential aim of a struggle for self-determination." Unrepresented Nations and Peoples Organization" Independence Is Only One Manifestation Of Self-Determination. Self-determination is not synonymous with independence. On the contrary, independence is merely one of an infinite variety of potential outcomes of the exercise of self-determination: The establishment of a sovereign and independent State, the free association with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." The Case Concerning Tibet, Hardly any right recognized by law is absolute. This is true also of the right of self-determination, which is not self-executing nor unilaterally applicable. When the right, in the manner in which it is claimed, clashes with other international legal principles and rights, all of these rights and principles should be weighed and balanced, keeping in mind the overall international law objective of maintenance of peace and security. Other rights and principles which may have to be considered in this process include: the rights of minorities or indigenous peoples and other peoples and population groups within the territory of the people claiming the right to self-determination; the territorial integrity of the state, where a people's claim may entail separation from it; rights and obligations to which the parties involved may be bound, for example, by treaties; and provisions of human rights law. Most often, reference is made to antagonism between the right to self-determination and the principle of territorial integrity of states. recognizes the right of all peoples to self-determination but states that this: shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. This paragraph imposes a requirement of legitimacy on a state invoking the principle of territorial integrity against a self-determination claim which threatens that integrity. This means that a state that oppresses, destroys or unduly exploits a people or community instead of protecting it or representing its interests has no legitimate right to invoke the principle of territorial integrity against that people or community. A state that gravely violates its fundamental obligations to its citizens loses the legitimacy to rule over them. This also applies with respect to a state's obligations towards a distinct people or community within its boundaries. Self-determination also imposes responsibilities on the claimants to respect the human rights, including the rights

of minorities and indigenous peoples and of other peoples and communities within their jurisdiction, and to constructively resolve problems that arise from the implementation of the right. The acceptance of self-determination in the broad sense, as a right which can be exercised by democratic means and through dialogue and which does not in most cases necessitate the break up of a state, would be a major contribution to the prevention and resolution of conflicts. Real prevention should not be aimed at the maintenance of the status quo, but at ways to allow for change to occur peacefully. This requires the development of a culture of self-determination, as it were, where self-determination is seen as a necessary and positive process of human emancipation and a corollary to democracy, in which people take greater responsibility for their community. At the same time, the traditional notion of the nation state needs transformation. Sovereignty must no longer be understood to be the exclusive prerogative of the central authorities of the state, but, rather, a collection of functions that can best be exercised at different levels of society, depending on the nature of decisions that need to be made and the manner of their most appropriate implementation. For peace, security and stability to exist, any associations between peoples and communities or between them and the state must be based on genuine and continuing consent, mutual respect and mutual benefit. Peace cannot exist in states that lack legitimacy or whose governments threaten the lives or well being of a section of the population. The international community, its members and institutions have an obligation to act where international law, including human rights and especially the right to self-determination, is violated. The time to act is always now, not when a conflict is "ripe" for resolution, as some would have it. Prevention of conflicts requires proactive measures to persuade states to act in compliance with international legal standards towards their citizens, including distinct peoples and communities that exist within their borders, and to desist from actions, such as population transfer or forced assimilation, which impede the exercise of self-determination. States must be made to realize that aspirations of peoples and communities cannot be ignored. Populations, It is often pointed out that the International Covenants on Human Rights affirm the right to internal self-determination of the entire population of states, whereas the Vienna Declaration and Programmed of Action repeats the traditional decolonization approach. The distinction, however, is not entirely evident from the wording of the Covenants and the Vienna. This working paper has analyzed the impact of *de facto* states on both international law and international society. While the limited numbers of these entities relegates the *de facto* state to a somewhat peripheral role in international relations, their impact on such things as conflict and political economy is far from negligible. International society has traditionally chosen to deal with them in one of three main ways actively trying to undermine them; more or less ignoring them; and reaching some sort of limited working accommodation with them. Each of these various methods has a different set of costs and benefits both for the *de facto* state and for the society of states as a whole. An implicit theme running throughout this paper is that these entities matter and that the members of international society need to devote more attention to the question of how best to cope with their existence. In terms of international law, the *de facto* state's lack of sovereignty does not prevent it from having a juridical recognizable existence. Perhaps surprisingly, international law is revealed to be quite capable of accommodating the *de facto* state—at least theoretically. There are obvious political reasons why existing sovereign states will likely continue to resist such an accommodation within the international legal system. Yet, there are also compelling practical reasons why sovereign states should want to see these entities further incorporated both into international law and into their own national legal systems. Intuitively, barring the legal gates and denying the *de facto* state even an extremely limited legal competence does not seem to be the way to encourage compliance with the fundamental norms, let alone the *desiderata* of international law. Finally, in contrast to the prevailing negativity and disparaging judgments usually leveled against such entities, the argument put forth here is that the *de facto* state may, in some cases and in some regards, actually serve beneficial purposes. It is not claimed that the members of international society have consciously turned to these entities in an attempt to find the proverbial "lesser of two evils" when faced with particularly difficult choices. Nor is it argued that these entities provide ideal solutions or pareto-optimal outcomes. Rather, the much more limited claim is that the existence of *de facto* states produces not only costs, but also benefits for the society of states. The evidence presented for the *de facto* state's utility is more speculative than it is conclusive but it does suggest that the prevailing view of these entities in solely negative terms obscures as much as it reveals. By its very nature, the *de facto* state is well suited to situations where the international community needs to be seen to be upholding cherished norms, while at the same time it finds creative or ad hoc ways to get around those very same norms. Its inherently nebulous status has the additional benefit of not precluding any other future settlement arrangements. If the *de facto* state did not exist, it might not need to be invented. Its very existence does, however, potentially offer a number of benefits to the society of sovereign states.

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