

## THE REVIVAL OF A FORGOTTEN DISPUTE: DECIDING KOSOVA'S FUTURE

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### I. INTRODUCTION

Should the rights of over two million people to live freely, self-govern, and ultimately decide their own fate, be sacrificed for the sake of preserving an ever-eroding principle of territorial sovereignty? The aforementioned is a dilemma that the international community will face when deciding the future status of Kosova.<sup>2</sup> Six years after the conclusion of the Kosova war, the international community has been persuaded that the two parties to the former conflict are ready to begin discussions regarding practical issues, with the ultimate goal of addressing the final status of the former Socialist Federal Republic of Yugoslavia's ("SFRY") province.<sup>3</sup>

This article will focus on the future of Kosova and its final status, rather than discussing the North Atlantic Treaty Organization's ("NATO") use of force against Serbian military and paramilitary forces to prevent a humanitarian disaster in Kosova.<sup>4</sup> Moreover, the article will discuss potential precedent that may be applied to legitimize the final determination of Kosova's final status. Finally, the article will tackle the issue of whether the decision on Kosova's status will serve as a future precedent in resolving other international law secession issues. Before discussing the future of Kosova, however, it is imperative that its history be given a brief overview.

### II. BACKGROUND

There are few places in the world with as colorful a history as Kosova. Approximately two million people currently populate Kosova, over 90 percent of whom

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<sup>2</sup> The term "Kosovo" is the widely known international name for a province of the former Socialist Federal Republic of Yugoslavia, which is currently under United Nations administration. Kosovar Albanians refer to Kosovo as Kosova (Ko-so-vah) whereas the Serbs refer to Kosovo as Kosovo and Metohija.

<sup>3</sup> *U zhvillua raundi i pare i bisedimeve mes Prishtines dhe Beogradit*, KOSOVA INFORMATION CENTER, March 4, 2004, available at <http://www.kosova.com/lexo.php?kat=1&artikulli=16609>; see also, Anger *Surfaces at Historic Kosovo Talks*, BBC NEWS, October 14, 2003, available at <http://news.bbc.co.uk/2/hi/europe/3190624.stm>.

<sup>4</sup> Michael M. Gallagher, *Declaring Victory and Getting Out [Of Europe]: Why The North Atlantic Treaty Organization Should Disband*, 25 HOUS. J. INT'L L. 341, 364 (2003).

are Albanian, with the Serbs being the largest minority, at fewer than 10 percent.<sup>5</sup> Kosovar Albanians are the descendants of the Illyrians, the ancient inhabitants of the entire Balkan peninsula.<sup>6</sup> Kosova's vast cultural and religious monuments reflect its quaint past and are used by both sides as leverage in discussing the territory's future status. Nonetheless, despite its Albanian majority, at the fall of the Ottoman Empire, the international community made Kosova a part of Yugoslavia.<sup>7</sup>

During World War II ("WWII"), Kosovar Albanians made another unsuccessful attempt to secede Kosova from Yugoslavia and make it part of Albania.<sup>8</sup> Having lost their secessionist quest, Kosovar Albanians were once again placed under Yugoslav rule.<sup>9</sup> Soon after, Serbs drove over 250,000 Albanians out of Kosova into Albania and Turkey.<sup>10</sup> After violent Kosovar Albanian student demonstrations in 1968,<sup>11</sup> the then dictator of Yugoslavia, Tito, granted substantial autonomy to Kosova and its people in 1974 by changing the SFRY Constitution and raising Kosova's status to an SFRY autonomous province.<sup>12</sup> Once again, in 1981, Kosovar Albanian students held massive demonstrations requesting a Republic status for Kosova.<sup>13</sup> These demonstrations were violently quashed by the Yugoslav military and special police forces.

Instead of extending more rights to Kosova, in 1989, the Serb nationalist Slobodan Milo\_evi\_ turned Kosova into a *cause celebre* among Serbs and made good on his rhetoric by illegally revoking the rights granted to Kosova in the 1974 SFRY Constitution, thus ending Kosovar self-rule for many years to follow.<sup>14</sup> Milo\_evi\_

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<sup>5</sup> Ted Baggett, *Human Rights Abuses in Yugoslavia: To Bring An End To Political Oppression, The International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457, 459 (1999). There are other minorities living in Kosova, such as Turks, Bosnians and Romas.

<sup>6</sup> *Id.*

<sup>7</sup> Valerie Epps, *Self Determination After Kosovo and East Timor*, 6 ILSA J. INT'L & COMP. L. 445, 450-51 (2000). At the end of World War I, via the Versailles Treaty, the major powers redrew the maps of Eastern Europe thereby creating many new countries, formerly under Ottoman rule, during which Kosova was given to Yugoslavia, despite its majority Albanian population, and the Albanian people were divided. *Id.* Some maps were drawn even earlier during the 1815 Congress of Vienna, based on the principle of the so-called spheres of interest. For the Balkans that meant that no consideration was given to the ethnic composition of the territories to be partitioned and the new countries were formed based on pure geopolitical reasons. Enver Hasani, *Uti Possidetis Juris: from Rome to Kosovo*, 27-FALL FLETCHER F. WORLD AFF. 85, 87 (2003).

<sup>8</sup> Lieutenant Colonel Michael E. Smith, *NATO, the Kosovo Liberation Army, and the War For an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?*, 27-FEB ARMY LAW. 1, 2 (Feb. 2001). The major force fighting for the liberation of Kosova and its integration into Albania was *Balli Kombëtar* (National Front).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Ved P. Nanda, *Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L L. & POL'Y 305, 319 (2001). Article 5 of the 1974 Constitution of SFRY granted substantial autonomy to Kosova. Article 5, section (2) stipulates that a republic's territory cannot be altered without the consent of that republic, and *the territory of an autonomous province without the consent of that autonomous province*. Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U.L. REV. 50, 66 (2000) (emphasis added).

<sup>13</sup> Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9, 13 (1999).

<sup>14</sup> Nanda, *supra* note 12, at 319.

established martial law in Kosova<sup>15</sup> that did not end until 1999, when NATO bombing of Serb targets in Serbia and Kosova forced the complete withdrawal of Serb forces.

The removal of Kosovar rights prompted a decade of peaceful resistance by the Kosovar Albanians under the leadership of Dr. Ibrahim Rugova,<sup>16</sup> which was met with additional violent oppression. In 1992, the overly oppressed Kosovar Albanians voted in a referendum by almost a 100 percent majority to secede from Serbia.<sup>17</sup> Seeing the lack of international attention to the suffering of the Kosovar Albanians and the Serbian insistence on an Apartheid-like oppression of the Albanian majority, the Kosovar Albanians organized a new resistance force known as the Kosova Liberation Army (“KLA”).<sup>18</sup> What initially began as a small group of frustrated Kosovar Albanians grew, by 1998, into a widely supported military that at times controlled one-third of the Kosova territory.<sup>19</sup>

The intensified fighting between the KLA and the Serb hordes led to international attempts to bring an end to the conflict. In February and March of 1999, the international community organized negotiations between the Kosovar Albanians and the Serb government in Rambouillet, France.<sup>20</sup> While the future status of Kosova was not discussed in the Rambouillet Accords, it was intended as a roadmap to a peaceful resolution of the Kosova conflict.<sup>21</sup> Serbs refused to sign the Accords, whereas the Albanian delegation reluctantly agreed to the terms and signed the Accords.<sup>22</sup>

Seeing no end to the Serb oppression of the Kosovar civilian population and wanting to prevent a humanitarian disaster, NATO began a bombing campaign of Serb targets in Serbia and Kosova called Operation Allied Force on March 24, 1999. This operation ultimately forced the withdrawal of Serb forces and their replacement by NATO forces.<sup>23</sup> Since then, Kosova has been under United Nations (“UN”) administration and, after the international-community-established standards are satisfied, the final step will be to decide the future status of Kosova. Assuming that those standards will be achieved, the author suggests a viable option for the final status of Kosova as warranted by customary international law.

### III. PRECEDENT ON SELF-DETERMINATION AND SECESSION

There are a number of theories in international law that deal with self-determination and secession. While none of them are an exact fit for the resolution of Kosova’s final status, when put together, they form a new direction for the international

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<sup>15</sup> Kathleen Sarah Galbraith, *Moving People: Forced Migration and International Law*, 13 GEO. IMMIGR. L.J. 597, 599-600 (1999).

<sup>16</sup> Lieutenant Colonel Smith, *supra* note 8, at 3.

<sup>17</sup> Grant, *supra* note 13, at 14.

<sup>18</sup> Lieutenant Colonel Smith, *supra* note 8, at 3.

<sup>19</sup> *Id.*

<sup>20</sup> Nanda, *supra* note 12, at 320.

<sup>21</sup> See *Interim Agreement for Peace and Self-Government in Kosovo*, available at <http://jurist.law.pitt.edu/ramb.htm>.

<sup>22</sup> Lieutenant Colonel Smith, *supra* note 8, at 3.

<sup>23</sup> Grant, *supra* note 13, at 15-16. NATO attacked Serb targets without the blessing of the UN Security Council to prevent a humanitarian catastrophe. Within weeks, over 800,000 Kosovar Albanians had been displaced by the Serb forces into the neighboring countries, and over 10,000 Kosovar Albanians had been killed by the Serb hordes. Lieutenant Colonel Smith, *supra* note 8, at 3.

law of self-determination and secession. The most relevant models to consider are Article 1(2) of the UN Charter, East Timor, the Supreme Court of Canada's decision on Quebec, the principle of *uti possidetis juris*, non-self-governing territories and Professor Charney's principle of self-determination. Each will be discussed in respective order.

Article 1(2) of the UN Charter guarantees respect for peoples' rights to self-determination.<sup>24</sup> Actually, self-determination did not amount to an international rule of law at the creation of the UN Charter.<sup>25</sup> Self-determination is not even mentioned in the 1948 Universal Declaration of Human Rights.<sup>26</sup> However, over time, self-determination developed from a general principle to a right that was formalized in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>27</sup> It is important to note that the debate on whether the right to self-determination has reached the level of *jus cogens* (meaning a rule of customary international law) and whether it may be applied in an extra-colonial context continues to date.<sup>28</sup>

One of the oldest principles is that of *uti possidetis*.<sup>29</sup> The principle of *uti possidetis* originated in Roman times and it usually allowed countries to keep those territories that they possessed at the end of hostilities.<sup>30</sup> The principle's first modern application occurred in the decolonization of the Central and South American territories.<sup>31</sup> Its application allowed the colonial borders to become those of newly formed independent states.<sup>32</sup>

Another principle applied in the colonial context is that of the non-self-governing territories ("NSGT"). Former colonies received NSGT status before becoming fully independent countries and members of the UN.<sup>33</sup> The legal foundation for NSGTs was found in Article 73 of the UN Charter.<sup>34</sup> In actuality, NSGTs were territories whose people had not yet attained a full measure of self-government due to their former colonial status.<sup>35</sup> This model was initially applied to former colonies only with the consent of the colonial powers; however, the UN General Assembly has designated certain territories as NSGTs despite resistance or lack of consent by the administering colonial power.<sup>36</sup>

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<sup>24</sup> U.N. CHARTER art. 1, para. 2, available at <http://www.un.org/aboutun/charter/>.

<sup>25</sup> Lieutenant Colonel Smith, *supra* note 8, at 17.

<sup>26</sup> See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, 33 (1996).

<sup>27</sup> *Id.*

<sup>28</sup> Lieutenant Colonel Smith, *supra* note 8, at 17.

<sup>29</sup> See generally Hasani, *supra* note 7.

<sup>30</sup> Radan, *supra* note 12, at 59.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 59-60. There are two versions, *uti possidetis de facto* and *uti possidetis juris*. In *uti possidetis de facto*, borders are defined by territory actually possessed and administered by the former colonial unit at the time of independence, irrespective of the legal definition of former colonial borders. In *uti possidetis juris*, as applied in South and Central America where no hostilities existed regarding bordering, borders are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence. *Id.*

<sup>33</sup> Grant, *supra* note 13, at 27.

<sup>34</sup> Art. 73, *supra* note 24.

<sup>35</sup> Grant, *supra* note 13, at 27.

<sup>36</sup> *Id.*

A situation resembling Kosova occurred when East Timor, a former colony and NSGT, gained its independence. East Timor had been invaded by Indonesia in 1975.<sup>37</sup> However, at its population's request, the international community supported a referendum in 1999, in which the East Timorese decided to become an independent country.<sup>38</sup> This independence came at a great expense because Indonesian forces killed a quarter of the East Timor population.<sup>39</sup> Despite the casualties incurred during East Timor's secession from Indonesia and the inefficiencies of the UN's Mission, East Timor reached its goal of self-determination and secession.<sup>40</sup>

In the line of secession, the Supreme Court of Canada issued its decision on Quebec, which is actually a landmark case in the field of self-determination and secession.<sup>41</sup> Unlike the previous principles, this Court discussed self-determination and secession in a non-colonial context. One important point is that the Court recognized the right of secession when "a people is blocked from the meaningful exercise of self-determination internally."<sup>42</sup> Another idea coming out of this case is the effectivity principle in law.<sup>43</sup> In other words, the Court recognizes that changes in international law rarely come in the shape of a multilateral treaty that is immediately ratified, but instead occur in not-so-tidy ways that may recognize a right before a treaty ever goes into effect.<sup>44</sup>

Lastly, Professor Charney has introduced a new overall principle on self-determination and secession.<sup>45</sup> He argues that people could seek international support in reaching self-determination even in non-colonial contexts so long as the following occurs: "(1) all peaceful methods of resolving the dispute between the government and the group claiming an unjust denial of internal self-determination have been exhausted; (2) a demonstration that the persons making the group's self-determination claim represent the will of the majority of that group; and (3) a resort to the use of force and a claim to independence is taken only as a means of last resort."<sup>46</sup>

The combination of all of these principles establishes a new direction in customary international law regarding self-determination and secession. Kosova is an appropriate venue where this customary self-determination law cocktail should be applied.

#### IV. THE FINAL STATUS OF KOSOVA

The parties to the Kosova discussions regarding its final status stand on the opposite sides of the spectrum. The Serbs insist that Kosova is the cradle of the Serbian

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<sup>37</sup> See Epps, *supra* note 7, at 452.

<sup>38</sup> *Id.*

<sup>39</sup> Nanda, *supra* note 12, at 322-23.

<sup>40</sup> *Id.*

<sup>41</sup> See Epps, *supra* note 7, at 449.

<sup>42</sup> *Reference re Secession of Quebec*, 2 Can. S.C.R. 217 (1998). The court defined internal self-determination as "a people's pursuit of its political, economic, social, and cultural development within the framework of an existing state." *Id.*

<sup>43</sup> *Reference re Secession of Quebec*, 2 Can. S.C.R. 217 (1998).

<sup>44</sup> See Epps, *supra* note 7, at 450.

<sup>45</sup> Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT'L L. 455, 464 (2001).

<sup>46</sup> *Id.*

people and that it belongs within Serb territory, whereas Kosovars, understandably weary of any type of Serbian control over Kosova, will settle for nothing less than full independence. Thus the true question is not only of self-determination, but of self-determination via secession. For years, the international community had claimed that before the decision on the final status of Kosova is made, it must first decide whether the conditions for such discussions have ripened.

Five years after the end of the Kosova conflict, the international community sponsored the commencement of negotiations between Serbia and Kosova.<sup>47</sup> On October 14, 2003 the delegations representing the Serbian government and the Kosovar government met in Vienna.<sup>48</sup> While that meeting was deemed unsuccessful due to severe disagreements among the parties, the international community welcomed the act as a first step toward ultimately resolving the remaining issues between the two sides.<sup>49</sup>

The negotiations between the parties were part of the standards created by the international community, the completion of which were antecedent to any discussions regarding Kosova's final status. The standards that a Provisional Institution for Self-Government must achieve before final status of Kosova can be addressed consist of the following: (1) functioning democratic institutions; (2) rule of law; (3) freedom of movement; (4) returns and reintegration of all refugees; (5) economy; (6) property rights; (7) dialogue with Belgrade; and (8) Kosova Protection Corps.<sup>50</sup> These standards have their origin in the Security Council's Resolution 1244 and were seen as a precursor to any talks regarding Kosova's final status.<sup>51</sup> Substantial steps have been made, especially in the fields of the establishment of a democratic government, the functioning rule of law, and the Kosova Protection Corps. Work is being done regarding freedom of movement for minorities and the return of refugees, and laws are being written to deal with the economy and property rights. Moreover, Serb authorities have begun returning the bodies of Albanian civilians who had been murdered during the Kosova war and have been missing since its conclusion. Even the dialogue between Belgrade and Prishtina has commenced on minor technical issues.

Soon after the failure of the Vienna meeting between Serb and Kosovar representatives, the first round of discussion between the two parties occurred in Prishtina, Kosova on March 4, 2004. The discussion focused mostly on energy problems experienced in post-war Kosova and Serbia.<sup>52</sup> The negotiations for the completion of the remaining standards continued at low levels, thereby paving the way for final negotiations regarding the final status of Kosova.<sup>53</sup>

Realizing that the status quo could no longer be maintained in Kosova, the international community decided to investigate progress made by the Kosovars in achieving the standards. The United Nations appointed Ambassador Kai Aide as an

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<sup>47</sup> *Anger Surfaces at Historic Kosovo Talks*, BBC NEWS, October 14, 2003 available at <http://news.bbc.co.uk/2/hi/europe/3190624.stm>.

<sup>48</sup> *Landmark Kosovo-Serbia Talks to Begin Despite Last-Minute Uncertainty*, BALKAN PEACE, October 14, 2003 available at <http://www.balkanpeace.org/hed/archive/oct03/hed6048.shtml>.

<sup>49</sup> *Anger Surfaces at Historic Kosovo Talks*, *supra* note 47.

<sup>50</sup> U.N. SCOR, 4880<sup>th</sup> mtg., press rls. SC/7951, available at <http://www.un.org/News/Press/docs/2003/sc7951.doc.htm>.

<sup>51</sup> U.N. SCOR, 4910<sup>th</sup> mtg., press rls. SC/7999 available at <http://www.un.org/News/Press/docs/2003/sc7999.doc.htm>.

<sup>52</sup> See *U zhvillua raundi i pare i bisedimeve mes Prishtines dhe Beogradit*, *supra* note 3.

<sup>53</sup> *Id.*

envoy to Kosova with the sole purpose of preparing a progress report on the completion of the standards. The report he handed over to Secretary-General Kofi Annan contained mixed feelings about the progress shown. When asked about his report to the United Nations, Ambassador Kai Aide responded:

The main findings are mixed. What I found were significant achievements in some areas, such as building of institutions and establishment of legal framework. We must remember that back in 1999 there was, in fact, nothing and there was a need to start from the very ground. So I think in this respect there have been some very significant achievements. And then there are some very, very important shortcomings. The justice system is very weak; the question of respect for rule of law is weak too. There is no doubt about that. Regarding interethnic problems, I believe very little has happened and the reconciliation process has not yet started.<sup>54</sup>

Still, Ambassador Kai Aide declared that sufficient progress had been made and recommended that negotiations regarding Kosova's final status begin.<sup>55</sup> Secretary-General Annan adopted the Ambassador's recommendation and declared that final status talks for Kosova should begin shortly.<sup>56</sup>

With these developments in mind, the article next discusses the application of international customary law on Kosovar's right to self-determination via secession. It is worth mentioning that the analysis in the following section is legal in nature, but deviates slightly to accommodate developments on the ground.

## V. EVALUATION OF PRECEDENT WHEN APPLIED TO KOSOVA

Kosova presents a new battle between the ever-evolving principles of self-determination and secession<sup>57</sup> and the once-upon-a-time unassailable principle of territorial sovereignty of states.<sup>58</sup> If handled appropriately, Kosova could actually crystallize the future rules for international self-determination and secession.<sup>59</sup> Some have gone as far as calling the new direction in the law of self-determination "a genie that cannot be placed back into the bottle of national sovereignty."<sup>60</sup>

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<sup>54</sup> See Kosovo: RFE/RL Speaks with UN Special Envoy Kai Aide, available at <http://www.rferl.org/featuresarticle/2005/10/b8f625da-ob53-4b62-b9a2-21cd562f63db.html>

<sup>55</sup> Id.

<sup>56</sup> Kosovo: Annan Recommends Starting Future Status Talks Now, available at [www.un.org/apps/news/story.asp?NewsID=16322&Cr=kosovo&Cr1=](http://www.un.org/apps/news/story.asp?NewsID=16322&Cr=kosovo&Cr1=)

<sup>57</sup> See generally Paul C. Szasz, *The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Fairy Tale About Clashes in Kosovo and Elsewhere*, 28 GA. J. INT'L & COMP. L. 1 (1999).

<sup>58</sup> The Author argues that state sovereignty is no longer as strong of a principle as it once was due to the recent events such as East Timor, Kashmir, Kosova, Afghanistan and the second US-Iraq war.

<sup>59</sup> Francis A. Gabor, *NATO's New Paradigm For European Security: International Legal Issues in Ethnic Self-Determination*, 26 SUFFOLK TRANSNT'L L. REV. 39, 48 (2002).

<sup>60</sup> Henry J. Richardson, *A Critical Thought on Self-Determination For East Timor and Kosova*, 14 TEMP. INT'L & COMP. L.J. 101, 102 (2000). Independence for Kosova has been seen in the past as a threat to South European stability because it was seen as a spark to initiate secessionist movements in Montenegro and Macedonia. *Id.* However, this theory has been proven inaccurate because, regardless of Kosova's final status,

Before examining precedent, which mostly focuses on decolonization, the article must first consider the treatment Kosovo received from Serbia during its years under Serb control. Despite its Albanian majority, Kosovo was led by a government comprised of Serbian officials who were puppets of Belgrade. Additionally, anything produced by Kosovo benefited Serbia. The police, hospitals, education, and all other departments were controlled by Serbia. Serb refugees from Croatia and Bosnia were brought to Kosovo with hopes of increasing the percentage of Serb population there. Moreover, marshal law was ever present for over a decade. Any requests for rights by Kosovar Albanians were met with a bloody iron fist. Therefore, the only difference between a commonly known colony and Kosovo was the fact that the colonial power in Kosovo was its neighbor, Serbia, whereas in the usual colonial context, the colonial powers are geographically more distant. This, to a degree, proves that rules applied to decolonization, though not a perfect fit, should be applied in determining Kosovo's final status.

Next, the article will consider whether Kosovo has the makings of a territory that could be an independent country. The Montevideo Convention on Rights and Duties of States, written in 1933 and adopted by the Seventh International Conference of American States, sets out four requirements that are considered the customary characteristics of statehood in modern international law.<sup>61</sup> The requirements are: (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter into relations with other States.<sup>62</sup>

First, Kosovo has always had a permanent population, the composition of which may have changed over time, although the Albanian population has always been the majority.<sup>63</sup> Secondly, Kosovo's territory has existed in its current, if not broader, since the Ottoman Empire's rule over that area. From the time Kosovo's territory fell under Serb control, yet the Kosovo government has exercised complete control over its territory, though under oppression, without even having its own police and military to enforce its directives.<sup>64</sup> Thus the territory of Kosovo and its population were under Kosovo's shadow government rule on a purely voluntary basis. Thirdly, Kosovo's shadow government was democratically elected despite the violent oppression of all of Kosovo's territory, thereby giving it full legitimacy.<sup>65</sup> Finally, Kosovo, though under severe oppression, has shown clear capacity to enter into relations with other States. The then Kosovo shadow government entertained delegations from many countries around the globe, and Kosovo's representatives reciprocated those relations.<sup>66</sup> Moreover, the Kosovo delegation's participation in the Rambouillet negotiations

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the conflict in Macedonia happened and is now settled, and Montenegro continues its quest for ultimate independence from the Serbia-Montenegro Union irrespective of the Kosovo outcome.

<sup>61</sup> See Bagget, *supra* note 5, at 471.

<sup>62</sup> *Id.* Permanent populations are broadly defined as an aggregate of individuals of both sexes living together as a community, regardless of whether they all belong to the same race. Territory is measured by the ability of a state to exercise control over a geographic area. Government is defined as a political organization that compels obedience of the bulk of the population. Finally, capacity to enter into relations with other states is typically analyzed in a strictly legal sense, requiring independence from outside authority in negotiating with other nations. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



indicated Kosova's equality to their oppressor Serbia, a fully recognized independent country. Now that Kosova has proven able to exist as an independent country and is quite similar to the commonly known colonies, one must look to see whether precedent supports its independence.

The discussion of precedent begins with Article 1(2) of the UN Charter.<sup>67</sup> Article 1(2) promotes self-determination, but when it was written, its meaning was defined in relation to decolonialism. While Article 1(2) cannot be used in the Kosova context, it can serve to show that the right to self-determination, be it internal or through secession, has evolved over time from a general principle to a *jus cogens* customary rule of international law.<sup>68</sup> Therefore, few can argue today that the right to self-determination is not a right for all peoples in the world.

Serbia denied Kosovars their internationally allotted right of self-determination, consequently leading to a bloody conflict. The conflict eventually ended with Serbian forces fully withdrawing from all of the Kosova territory. When choosing whether to apply *uti possidetis de facto* or *uti possidetis juris* to the Kosova situation, one must recognize that *uti possidetis juris* was applied in South and Central America because there were no border disputes between the colonial powers or the newly formed countries; thus the use of old existing borders was appropriate. Because there were bloody hostilities in Kosova and border disputes, the theory of *uti possidetis juris* is inapplicable and *uti possidetis de facto* serves a better purpose to avoid further conflict. Using the theory of *uti possidetis de facto*, which defines borders based on who possesses them after hostilities cease irrespective of the legal definition of former colonial borders, Kosovars are now in charge of Kosova's territory and Serbs have no control therein.<sup>69</sup> Thus its borders should be drawn as they currently exist – outside of Serb territory. Even if Serbia has a legal claim over Kosova based on its territorial sovereignty, the war has left Kosova out of its control and one of the oldest principles of international law – *uti possidetis de facto* – requires that Kosova be left outside their borders.

Though existing outside of the Serb borders, Kosova is not fully self-governing because the United National Mission in Kosova (“UNMIK”) has substantial control over all the functions in Kosova. Thus, despite not being a former colony by exact definition, Kosova resembles a NSGT. Similar to a NSGT,<sup>70</sup> Kosova has a government, but that government is not completely ripe to self-govern. Upon UNMIK's departure from Kosova, Kosova's government will strive to ultimately achieve full independence. While Serbia is likely to oppose full independence, the UN General Assembly has not hesitated to grant independence to a NSGT despite resistance or lack of consent by the administering colonial power.<sup>71</sup> Thus, Serbia's stance on the issue is irrelevant.

A former NSGT that serves as potential on-point precedent for Kosova is East Timor. Both East Timor and Kosova have been occupied by neighboring countries.

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<sup>67</sup> Art. 1, para. 2, *supra* note 24.

<sup>68</sup> See Hannum, *supra* note 26. Self-determination was formalized as a right in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. *Id.*

<sup>69</sup> The Serb minority has control over decision-making in Kosova via the political process, which gives them greater representation than their percentage requires.

<sup>70</sup> Grant, *supra* note 13. The legal foundation for NSGTs is found in Article 73 of the UN Charter. Art. 73, *supra* note 24.

<sup>71</sup> Grant, *supra* note 13.

Moreover, in both Kosova and East Timor, the occupying power violently quashed any request by the local population for self-determination. Both territories held referendums under oppression that expressed the population's overwhelming support for independence.<sup>72</sup> Ergo, due to their synonymous recent histories, there is no other sensible solution to the Kosova final status debate other than independence.

Even if some argue that Kosova is unlike East Timor because East Timor was a colony and a NSGT, whereas Kosova was neither, the Supreme Court of Canada issued an opinion that makes the East Timorese situation even more identical to Kosova. The opinion recognizes self-determination in a non-colonial context and it states that the right to secession is recognized when "a people is blocked from the meaningful exercise of self-determination internally."<sup>73</sup> It is obvious that the people of Kosova, as per the Supreme Court of Canada's definition, were denied their pursuit of political, economic, social and cultural development within the framework of Serbia. Moreover, the court recognized that the right for independence in a non-colonial context must be recognized despite the lack of international treaties or formal arrangements on the issue. In other words, when applying East Timor precedent and the Quebec opinion to the Kosova situation, one must arrive at the conclusion that Kosova must be granted independence despite the lack of formal recognition of peoples' rights to independence outside the colonial context.

Lastly, Professor Charney has introduced a general principle on self-determination via secession in a non-colonial context. He argues that a territory could secede in a non-colonial context if "1) all peaceful methods of resolving the dispute between the government and the group claiming an unjust denial of internal self-determination have been exhausted; (2) a demonstration that the persons making the group's self-determination claim represent the will of the majority of that group; and (3) a resort to the use of force and a claim to independence is taken only as a means of last resort."<sup>74</sup> Kosova meets all three of these requirements. For years, its people exhausted all peaceful methods to gain self-determination. Additionally, the government of Kosova, which insists on full independence, has been democratically elected on many occasions. To further support the Kosova government's stance, the people of Kosova expressed, through overwhelming support, their desire for full independence in the 1992 referendum.<sup>75</sup> Finally, the establishment of the Kosova Liberation Army, which violently opposed the Serb oppression, occurred as a means of last resort only after all other peaceful means had been exhausted. Consequently, using Professor Charney's principle, one can only arrive at the conclusion that Kosova should be recognized as an independent country.

Academics have argued that if the deprivation of Kosovars' rights were so infringed by Serbia "that they were denied their right to pursue their economic, social, and cultural rights or determine their political status, and peaceful means proved ineffective or unavailable, then the Albanians were entitled to [use force against Serbia]," seek other states to support them and, "[i]f reconciliation sufficient to guarantee their right to self-determination turns out to be impossible within the

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<sup>72</sup> See Epps, *supra* note 7; see also Grant, *supra* note 13, at 14.

<sup>73</sup> See *Reference re Secession of Quebec*, 2 CAN. S.C.R. at 217 (1998).

<sup>74</sup> Charney, *supra* note 45, at 45.

<sup>75</sup> Grant, *supra* note 13.

established state, then secession would be a solution of last resort..."<sup>76</sup> History has shown that the Kosovar Albanians have used every possible venue to reach their goals of self-determination. For a long time Serbia has been reluctant to allow any kind of internal self-determination by the Albanian majority in Kosova. It is clear that the Kosovar Albanians sought independence only after realizing that Serbia was an oppressor unwilling to allow any kind of internal self-determination for the Kosovars.

The situation in Kosova and the surrounding area is delicate. The recent political turmoil<sup>77</sup> in Serbia and the ever-increasing strength of Serb radical nationalist parties<sup>78</sup> are clear signs that any scheme proposing to shelve Kosova under Serbia would only cause further bloodshed and insecurity in that part of Europe. Furthermore, the latest violence in Kosova prompted by the ethnic divisions in the town of Mitrovica<sup>79</sup> suggests the necessity and urgency for an even quicker resolution to the final status of Kosova, as Albanian impatience with the uncertainty of Kosova's future grows and the Serb minority's inability to participate in the political process remains stagnant. The international community has thankfully perceived the March 2004 events as a wake-up call to perhaps resolve the final status of Kosova prior to the full fulfillment of the standards, thus preventing the Belgrade government from further enticing Serb extremists operating outside of and within Kosova.

The stances of the two sides remain on opposite sides of the spectrum. Kosovars have indicated that they have conceded down to full independence by giving up the options of unification with Albania or other Albanian populated territories that fall under Serbia, Macedonia and Montenegro. If the Albanian Unity Group, responsible for negotiating on behalf of Kosovars does not make any major mistakes, they should be able to ride the wave all the way to conditional independence. However, the recent intra-government conflicts between the President of the Kosova Parliament and the leader of the opposition Democratic Party, both members of the Unity Group, could become the team's Achilles heel. It is important for them to realize the historical position they have been granted and to put aside their political aspirations for the good of the country.

The Serb government, on the other hand, realizing that it may have lost Kosova, is attempting to regain some footing by proposing that Kosova obtain a status greater than autonomy but less than full independence.<sup>80</sup> Serbia has yet to explain in practical terms what this establishment would entail or how it would work, but it seems to be a

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<sup>76</sup> Linda A. Malone, *Introduction: Seeking Reconciliation of Self-Determination, Territorial Integrity, and Humanitarian Intervention*, 41 WM. & MARY L. REV. 1677, 1681 (2000).

<sup>77</sup> Serbian Prime Minister Zoran Djindjic, viewed by many as pro-western, was recently murdered by a Serb organized-crime gang consisting of many former Serb police and military officials.

<sup>78</sup> The political party of Vojislav Seselj, a Serb nationalist politician and leader of paramilitary forces that fought in Croatia, Bosnia and Kosova currently held in the Hague Criminal Tribunal for Former Yugoslavia, has won the majority of votes in the recent elections in Serbia.

<sup>79</sup> *Six Die In Riot-Hit Kosovo Town*, BBC NEWS, March 17, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3521068.stm>. At least twenty-two people were killed and over 500 were wounded as a result of tensions that flared between Albanians and Serbs in the towns of Mitrovica and \_aglavica. The confrontations, which spread to the rest of Kosova, were supposedly a consequence of the drowning of three Albanian children who were trying to escape from Serbs who chased them with a dog. The other reason for the confrontation was the wounding of a Serb youth days earlier in the town of \_aglavica. A total of 19 people died, mostly Albanians, and many homes were destroyed, mostly Serbian.

<sup>80</sup> Sanda Raskovic-Ivic, *More Than Autonomy, Less Than Independence - A Fair Offer*, available at [http://www.kosovo.com/news/archive/2005/October\\_17/3.html](http://www.kosovo.com/news/archive/2005/October_17/3.html).

desperate attempt to keep hold of Kosova by giving up all but territorial jurisdiction over Kosova. Serbs are likely to enter negotiations with split loyalties. On one side, they cannot give Kosova up because it would constitute political suicide. However, on the other side, if they give up on Kosova, they could receive substantial guarantees from the European Union and the United States regarding financial aid and possible EU talks. Whether the latter will save the Serb government from committing political suicide is tough to predict and remains to be seen.

The United States and the European Union have agreed that the partitioning of Kosova, as suggested by some groups in Serbia, is out of the question and that status talks will not lead to a redrawing of the borders in the Balkans.<sup>81</sup> Under-Secretary of State R. Nicholas Burns testified before the Senate Committee on Foreign Relations on November 8, 2005 and was expectedly vague.<sup>82</sup> He declared that the United States' policy on Kosova's status is to ensure peace in the Balkans and to establish a multi-ethnic Kosova.<sup>83</sup> His language was consistent with the current trend of possibly awarding Kosovars independence, but with attached conditions – namely guarantees for rights of Serbs and their religious monuments. That is also the view of the Contact Group, with the exception of Russia – a sworn Serb ally.

Keeping all this in mind, the international community should reward Kosovars for their patience in seeking self-determination, and their use of force only as a last resort, by allowing them, in pursuance with international law, to secede from their long-time oppressor and obtain the status of a fully independent country. Even Mr. Richard Holbrooke, the broker of the Dayton Accord that concluded the war in Bosnia and the most able authority on the Balkans, agrees that independence for Kosova is the only possible outcome.<sup>84</sup> Whatever type of independence the international community decides to grant to Kosova, it is important that it excludes any Serbian control. The conditions that the diplomats speak of should remain within the purview of guaranteeing minority rights. Any other option would simply maintain the current environment – that of extreme stress and full of potential for violence. Kosovar Independence should not be sacrificed once again for the sake of keeping everyone else happy at the expense of the Kosovars. All know that the Kosovars deserve better treatment because they have certainly earned it with their own blood!

## VI. CONCLUSION

Kosova's recognition as an independent country would create a mold for future peoples in distress to follow when faced with a lack of internal self-determination. It would also encourage the Serb minority to fully participate in the political process in Kosova, thereby giving up on their resistance to such incorporation.<sup>85</sup> The UN structure

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<sup>81</sup> U.S., Europe Reject Partitioning Kosovo, State's Burns Says, *available at* <http://www.albanian.com/community/modules.php?name=News&file=article&sid=771>

<sup>82</sup> See A Hearing on Kosovo: A Way Forward?, *available at* <http://www.state.gov/p/us/rm/2005/56602.htm>

<sup>83</sup> *Id.*

<sup>84</sup> Independence Only Way Forward for Kosovo: Holbrooke, *available at* [http://news.yahoo.com/s/afp/20051108/pl\\_afp/usserbiakosovo\\_051108233146](http://news.yahoo.com/s/afp/20051108/pl_afp/usserbiakosovo_051108233146)

<sup>85</sup> The Serb minority is often encouraged by the Serb government in Belgrade to refuse participation in the Kosovar political process with the belief that such participation by the Serb minority in Kosova's

is unfriendly toward formal recitation of international law via treaties or formal agreements. Ergo, the international community must respond swiftly to the rapidly changing world and remedy some of its previous mistakes in drawing borders in Eastern Europe. It must recognize Kosova as an independent country and thus create a roadmap for other distressed people around the world seeking freedom and self-determination. Luckily, the situation in Kosova parallels what international law dictates: some sort of independence. If Kosova is recognized as independent, its long term positive effect would be to encourage people to exhaust all peaceful means before resorting to violence in their quest for self-determination. Such recognition would only further support the UN purpose of “maintain[ing] international peace and security ... and removal of threats to the peace...”<sup>86</sup>

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political process would show their acceptance of Kosova’s quest for independence. Yet, Serb participation in the Kosovar political process would ensure political stability and guarantee just representation of the Serb minority’s interests in Kosova.

<sup>86</sup> Art. 1, para. 1, *supra* note 24.

