

**MANAGEMENT OF GEOPOLITICAL RISKS IN THE BALKANS.
JURIDICAL IMPLICATIONS OF DECLARING THE
INDEPENDENCE OF KOSOVO PROVINCE**

Part one

Ph.D. Eliot Gaviria VALVERDE
Consul of the Embassy of Peru in Romania
Doctor of Law – University of San Marco, Peru

Ph.D. Daniela MITRAN
“Athenaeum” University
Bucharest

Abstract:

The paper is meant to analyse the juridical aspects in determining the juridical status of Kosovo province, the importance of its recognition by numerous countries of the international community, and to analyse the situation in the Western Balkans after the declaration of independence of Kosovo.

Keywords: independence, human rights

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We preferred to start the analysis from the perspective of Public International Law and International Law of Human Rights as well as from the viewpoint of Political Sciences and International Relations in order to try to explain *sui generis* the case of the unilateral independence of Kosovo province. It is very important to take into consideration the position adopted by the international community regarding the unilaterally declared independence by the Parliament of Kosovo, especially the recognition immediately declared by certain states.

1. Historical aspects and present situation

Having studied the historical context referring to the formation of the population on the territory of Kosovo, we find out that the Serbs reached the Balkans around the end of the 6th century and beginning of the 7th, and it is possible that they could have migrated from the north of Caucasus. The Serbs were occupying the areas where at present there lies the Czech Republic and Saxony, while the Croatians were in Bavaria, Slovakia and south of Poland. The Slavic population in the Balkans was much bigger then, than nowadays, even reaching Greece and Albania.¹

¹ MALCOLM, Noel, *Kosovo: A short history*, Pan Books, Oxford, 2002, p. 101

The origins of the Albanians are less clear. Most of the specialists believe that the Albanians descend from the population of the “Illyrians”, the ancient inhabitants of the western Balkans during the Romans; on the other hand, the Byzantines date the arrival of the Albanians (Alvanoi) coming from the south of Italy as having taken place in 1043 when they reached the Central Albania (Durrës) as mercenaries in the army of Maniakis. Some historians, including the Serbian ones, state that the Albanians come from Caucasus, mainly from the Albanian Caucasus but most of the historians contest these arguments.

The region of Kosovo was lying between the outer limit of the territory occupied by the Byzantine Empire and just on the path of the Slavic expansion. Between 850 – 1014 the region was ruled by Bulgarians and Macedonians. The Byzantine control was later on reinstalled by the powerful emperor Basil “The Bulgarians Destroyer”. The small Serbian kingdoms were lying on the north and west of Kosovo; among those, the most powerful were Raska (the Central Serbia of today) and Dioclea (Montenegro and north of Albania). In 1180, the Serbian ruler Stefan Nemanja took possession of Dioclea and some parts of Kosovo. His successor, King Stefan Prvovencani took possession of the rest of Kosovo in 1216, establishing a state which covered the most part of today’s Serbia and Montenegro.²

The medieval Serbian Empire occupying Kosovo lost control over the territory in 1389, during the famous battle of Kosovo, when the Ottoman Empire defeated the Serbian Empire and started the Ottoman occupation of the Balkans which lasted for five centuries. Serbia recovered its independence between 1817 – 1878 but the myth of the defeat in 1389 stamped upon their minds the first loss of the territory of Kosovo.³

After that, between 1912 – 1913, Serbia and Montenegro recovered the possession of Kosovo during the Conference of Ambassadors in London. Despite Serbia’s attempts to repopulate Kosovo during the existence of the two Yugoslavias, at that moment over one half of the Albanian population was already of Albanian origin.

During the regime of Marshal Josip Broz Tito, the province of Kosovo enjoyed the statute of autonomous province of Serbia, a fact recorded in the Albanian Constitution of 1974, and the Albanian majority, feeling in control, took over the administration of the province, however, years later, the Serbian leader Slobodan Milosevic cancelled the autonomous status in 1989, resulting in the beginning of the Kosovar requests for independence. In October 1991, the Albanian leaders unilaterally declared the independence of Kosovo, a fact only

² Ibidem, p. 134.

³ International Crisis Group, http://www.crisisgroup.org/home/index.cfm?action=conflict_search, on 9th June 2008.

recognized by Albania⁴ and suppressed by the forces led by Slobodan Milosevic who tried to perform an ethnical purification of the province.

The re-establishment of direct Serbian domination upon an overwhelming Albanian majority started the setting-up of a kind of “apartheid” in Kosovo. Precisely, force measures were taken, specific to any authoritative regime, such as the closing down of the Legislative Assembly, declaration of permanent state of emergency, elimination of over 140 thousand Albanians from public administration and state companies, and dismissal of most of the Albanian doctors, workers in the public health system and teachers. Moreover, restrictions were imposed regarding the development of Albanian culture by eliminating the teaching of Albanian history and literature in schools and universities, forbiddance of national symbols and limitation of use of the Albanian language, by closing down the newspapers, TV and radio stations that used the language.⁵

These abuses committed by the army of the former Federative Republic of Yugoslavia, then formed of Serbia and Montenegro, started to draw the attention of the international community to the genocide and serious infringements upon human rights committed in Kosovo during 1997 – 1999.

Later on, as it is already known, the international conflict in Kosovo emerged, between 1998 – 1999, when the Forces of the North Atlantic Treaty Organization (NATO), without the authorization of the Security Council of the United Nations Organization, decided to intervene in order to stop the genocide and discriminations committed by the Yugoslavian army. Kosovo was then an autonomous province within the Republic of Serbia, integrant part of the former Federative Republic of Yugoslavia. After 78 days of bombing over Serbia and Kosovo, Slobodan Milosevic had to surrender, to allow the entering of the NATO forces and withdraw the Yugoslavian army from Kosovo. In June 1999 the Council of Security adopts Resolution 1244, maintaining the presence of NATO forces, called “Kosovo Forces” (KFOR) and establishing that the province should be governed by a Civil Mission of the United Nations (MINUK), under the sovereignty of the Federative Republic of Yugoslavia of that time (Serbia and Montenegro).

The Civil Administration of the United Nations Organization settled in Kosovo (UNMIK) assumed the general government of institutions, organizing a govern with the participation of the population of Kosovo but without the power to decide the next steps to be taken in the reconstruction of the province. As a reaction to the aggression of the Yugoslavian army in Kosovo, the forces of paramilitary guerilla of the Albanian origin population started to fight back against the Serbian population, making the Serbs leave the province. Dwellings, orthodox churches

⁴ CRAWFORD, James, *The Creation of States in International Law*, Oxford, Second Edition, 2007, p. 408.

⁵ D'ANGELO, Gustavo. *Kosovo: Una independencia incierta*, Ideele, Revista del Instituto de Defensa Legal, No 185/2008, p.78.

and monasteries were destroyed by the Albanian armed groups. The United Nations High Commissioner for Refugees made public a number of 200 thousand people, most of them Serbs, who, because of the retaliation, took refuge to Serbia or enclaves in Kosovo protected by NATO.⁶

Also, the Albanians started to make pressure in order to send away the Serbs who were living in Pristina, offering them important amounts of money for their houses. Due to the social harassment initiated by the Albanian majority, a lot of Serbs were obliged to sell their properties in the capital of Kosovo.

After the withdrawal of a significant number of Serbs from Kosovo, the remaining population is formed of approximately 92% inhabitants of Albanian origin and 8% inhabitants belonging to other ethnical groups such as Serbs, Croatians, Montenegrins, Egyptians, Turks, Gypsies, and others. This huge majority of Albanian ethnics are the ones sustaining at present the demand for independence of the province of Kosovo.

In 2003, the Group of Contact formed of the USA, Great Britain, France, Germany, Italy and Russia convened to draw up the programme "Standards Previous to the Statute" so that the Albanians of Kosovo could make the necessary efforts in order to attain democratic institutional standards in Kosovo, before discussing the matter of a final statute of the province.

The authorities of the Civil Mission of the United Nations and the Group of Contact established eight political standards of consolidation of the democratic institutions of local administration and economic development as well as the total pacification of the province and strict observance of human rights as a condition to put on the international agenda the issue of the final juridical status of the province of Kosovo.

In 2005, after having examined the standard of living in Kosovo and having found that not all the established standards had been achieved, only part of them, the report of the special envoy of the Secretariat General of the United Nations Organization, the Norwegian Ambassador Kai Eide, signaled that total observance of the established standards was not necessary and he would start the dialogue between the authorities in Serbia and Albanian authorities in Kosovo, in order to reach an agreement regarding a new juridical status of the province.

In 2006, the Council of the European Union assigned work tanks to Kosovo in order to maintain the safeguarding of the law-governed state (European Security and Defence Policies – ESDP Mission) and an International Civil Bureau (ICB) of the EU, meaning special representatives of the European Union to Kosovo. Since February until September, Marti Ahtisaari, special emissary of the United Nations to Kosovo participated to the reunions held in Vienna by the authorities in Belgrade and Pristina as well as to the reunions of experts which took place in both capitals.

⁶ Ibidem, p. 79.

The discussions continued but no agreement was achieved between the parts, and, later on, in March 2007, the special envoy of the UN Secretary General, the former President of Finland, Marti Ahtisaari presented a report of 63 pages, the so-called "Global Proposal of Agreement on the Status of the Province of Kosovo" where he recommends supervised independence.

When the Security Council could not adopt an Agreement of Support to join Ahtisaari's plan for supervised independence in Kosovo because of the opposition expressed by Russia and China, the six nations of the Contact Group initiated a new round of negotiations with the authorities in Belgrade and Pristina which ended on 10th December 2007 without any result regarding the future status of Kosovo. After that, on the 14th December 2007, at a Summit of the European Commission in Brussels, the leaders of the EU discussed over the application of the Ahtisaari Plan and deployment of a contingent of 1,800 soldiers of the European Union to Kosovo.⁷

Finally, on the 17th February 2008, Kosovo declared its independence unilaterally, confirming the acceptance of the Ahtisaari Plan and the presence of the European Union missions as well as maintaining of the NATO forces on its territory. In Serbia, the unilateral declaration of independence was received with violent street demonstrations in Belgrade and attacks on the embassies of the countries which had recognized the new State of Kosovo.

The European Union Rule of Law Mission (EULEX) has been sent to assist and support the Kosovo authorities in the rule of law area, having three major fields of action: police, justice and customs.

Many European states together with USA established, in Vienna, on the 28th of February 2008, an International Coordination Group to watch the independence of Kosovo province.

In June 2008, the Kosovo Parliament began to adopt laws in order to implement the Ahtisaari Plan and promulgated a new Constitution, as planned.

Serbia implemented a new sophisticated policy to undermine the validity of the new state, by strengthening the institutions in the Kosovo areas inhabited by Serbs and by intimidating those wishing to work with Pristina. In October 2008, the representatives of Serbia to the United Nations succeeded in obtaining at the General Assembly that this case of the legality of Kosovo's unilateral independence should be reviewed by the International Court of Justice in the Hague, where it is still now under study.

The entire Kosovo territory is administered by the new Government in Kosovo, with the exception of Kosovska Mitrovica town, which is still administered by Serbia.

⁷ International Crisis Group, Op. Cit. p. 4.

Currently, 65 states have recognized the independence of Kosovo. All the EU Member States did, with the exception of the following states: Spain, Greece, Romania, Slovakia and Cyprus.

2. An analysis from the perspective of the Public International Law

There has been much talk about the existing legal regulations on the legal status of Kosovo province. So far, in keeping with international norms, United Nations Security Council Resolution 1244 is not annulled and this provides that the region made up of Kosovo and Metohia is part of the territory of the Federal Republic of Yugoslavia. As known, the Federative Republic of Yugoslavia ceased to exist and the successor state is Serbia, which has always been the Republic from the former Yugoslavia which included the Kosovo province.

Moreover, it must be taken into consideration the fact that law is evolutive and that not only international Agreements and Norms with an international character are sources of law but so are the general principles and the doctrine of Public International Law.

Likewise, there is the international doctrine on the creation of new states, which supports the recent declaration of independence of Kosovo province. Mainly in the second half of the 20th century we witnessed the emergence of several new states, consequently the doctrine of the International Law accepts the creation of new states which meet certain requirements and which are recognized by the international community.

Albanian authorities in the Kosovo Parliament declared unilaterally the independence on the 17th of February 2008. The initial question that comes to mind is whether Kosovo fulfills the necessary requirements to be a new independent and sovereign state.

In the doctrine of Public International Law there are certain requirements for the new entities wishing to be recognized as nation-state. For instance, the Inter-American Convention from Montevideo in 1933 establishes the following constitutive elements: territory, population, government and the capacity to develop international relations.

2.1. The constitutive elements of a state

2.1.1. Territory

In principle, the size of the territory is not important so that International Law norms grant it the condition of state. There are big, small and medium states, without any influence of their recognition as sovereign states under the International Law. The essence is given by the existence of a territory, stable in principle, even if of small sizes. Currently, Kosovo is delimited and has a surface of about 10,940 square km.

2.1.2. Population

A major feature of the population element is its stability within the territory. In this framework, consideration should be given, on one hand, to the internal aspect likely to lead to the conclusion that the population undergoes permanent changes, proven by births, deaths, naturalizations, etc., which does not mean that the central nucleus of the population, in broad lines, is not the same. On the other hand, which matters in International Law is the stability of the population toward the exterior, namely that the population should have a permanent character or relative immobility on that territory. Kosovo population had several deaths during the years of armed conflict, as well as great displacements of people who ran away from the ethnic violence from both sides in conflict. These days, there is a tendency toward the stability of the population on the province territory, numbering about 2 million inhabitants.

2.1.3 Government

From the declaration of independence by the Kosovo Parliament in February 2008, its inhabitants began to exercise their government on the territory, with the exception of the northern part of Kosovska Mitrovica town, still administered by Serbia. The Athisaari plan is being implemented, which provides for the elaboration of a new Constitution and the creation of Ministries necessary to ensure the good government of the new state.

As mentioned in the Athisaari plan, the Kosovo Government must give priority to decentralization and consolidation of local governments, the defense of ethnic minorities' rights, protection of cultural and religious government in order to make viable a democratic, prosperous multi-ethnic state.

2.1.4. Capacity to develop international relations

In keeping with the Athisaari plan, Kosovo will have the right to negotiate and conclude international agreements, including the right to be a member of International organizations.

Even before its independence, Kosovo authorities maintained relations with Albania and took part in the Council of Europe Regional Committees.

At present, Kosovo has been recognized by 65 states and there are 28 resident Embassies in Pristina, as well as over 15 representatives of International Organizations having their offices in the capital city of Kosovo province.

2.2. The General Principles of International Law and Doctrine

The general principles of Public International law establish the pro and con reasons for state secession.

2.2.1. Self-determination of peoples

The Charter of the United Nations of 1948 was a step forward by recognizing under articles 1.2 and 55 the principle self-determination of peoples.

However, in 1945, nobody could predict that, a few years later, it launched a process of decolonization fuelled by the peoples' self-determination, a principle that became imperative due to a multitude of declarations of the General Assembly and by its inclusion in the topic of the human Rights Conventions (1966).

A symbiotic relation was established between the historic event of decolonization and the principle of peoples' self-determination: the principle facilitated the operation of decolonization; decolonization allowed the structuring and strengthening of the principle from a legal viewpoint.

The identification of the people holding the right to self-determination with the population of the sovereign state focuses the attention on democratic governance, leaving on a second level ethnic, religious, linguistic and cultural differences of various human groups living in multinational states.

According to international doctrine, a population has the right to choose the state to which it wishes to belong. Moreover, the declaration of independence is in agreement of course with the popular will. When this is the basic argument to win independence, that it is necessary to hold a referendum in keeping with international standards, in order to decide on the independence of a new state. Likewise, certain special conditions should prevail likely to allow the region seeking to obtain independence to require this new status.

2.2.2. The territorial integrity of states

The state can resort to all the means to peacefully solve any conflicts, if necessary, with a view to keeping its own territory. All the same, if these attempts do not succeed it is empowered, in keeping with the right to self defense, to resort to the use of force against any attempt to dismember its territory, to intervene or affect in any way its autonomy or its geographical borders.⁸

Any attempt aiming to affect partially or totally the unity and territorial integrity of the state is considered incompatible with the goals and principles of UN Charter; all states should refrain from the threat or the use of force against the independence and territorial integrity of anyone of them and it would be, on the other hand, an act of illicit intervention internationally to support separatist movements.

International order could only allow in two extreme cases the existence of the right to separation.⁹ The first is the case of the population living on a territory annexed by force by a state, which is against international Law. This was the case of the Baltic States which gained the status of sovereign states in 1991 and, probably, could be invoked also in the case of peaceful liberation of the Tibet (1950 – 1951) by China, which put an end to its theocratic regime. The second possibility could intervene in the case in which a state massively encroaches on a

⁸ Novak, Fabian y Garcia Corrochano Luis, Derecho Internacional Publico, Lima, PUCP Editorial Holding, Vol. II, p. 71.

⁹ Brotons, Remiro, Derecho Internacional Publico, Madrid 1992, Op. cit., p. 129

people's rights, by planning and executing, or by tolerating the genocide, by discriminating it, seriously and systematically, from a political viewpoint and stifling and destroying its identity.

The state must be condemned by approving the secession of a part of its territory to the extent to which it was not able to protect or promote in a reasonable way the rights of its citizens belonging to a minority, rights that include, among others, those that refer to their quality as members of an independent state.

In our opinion, the latter hypothesis applies also to the case of Kosovo province, because during the government of Serb president Slobodan Milosevic, by the intermediary of Yugoslav army, was committed a genocide against the minority population and the serious discrimination of the population belonging to Albanian ethnic group from Kosovo. This situation raised the legitimate interest of international community and, especially, of the United Nations Organization, and the North Atlantic Treaty Organization (NATO), in an issue which exceeding already the internal jurisdiction of the state, should have been examined from the perspective of a conjuncture susceptible to endanger international peace and security.

BIBLIOGRAPHY

1. Crawford, J. - *The Creation of States in International Law*, Oxford, Second Edition, 2007;
2. D'Angelo, G. - *Kosovo: Una independencia incierta*, Ideele, The Magazine of the Institute for Legal Defense, N° 185/2008;
3. De Obieta Chalbaud, J.A. - *El Derecho Humano de la autodeterminación de los pueblos*, Tecnos Publishing House, Madrid, 1985;
4. Forno, G. - *Apuntes sobre el principio de la libre determinación de los pueblos*, from the International Agenda, Year IX, N 18, Catholic Pontifical University, Peru, The Institute of International Studies;
5. International Crisis Group, http://www.crisisgroup.org/home/index.cfm/action-conflict_search, accessed on the 9th of June 2008;
6. Kuci, H. - *Independence of Kosova/o*, Houston Texas, EEUU, 2005, First edition;
7. Le Monde Diplomatique - *Kosovo: En los Balcanes, precipitación diplomática es a veces sinónimo de catástrofe*, Year I, No 03, July 2007.
8. Malcolm, N. - *Kosovo: A short history*, Pan Books, Oxford, 2002;
9. Malcolm, N., Shaw, Q.C. - *International Law*, Cambridge University Press, United Kingdom 2003, Fifth Edition;
10. Novak, F., Salmon, E - *Las obligaciones internacionales del Perú en materia de Derechos Humanos*, Catholic Pontifical University, Peru, Editorial Holding, 2002;

11. Novak, F., Garcia Corrochao, L. - *Derecho Internacional Público*, Lima, PUCP Editorial Holding, Volume II;
12. Pastor Ridruejo, J. - *Derecho Internacional Público*, 1998;
13. Podesta C., Ruda, J.M. - *Derecho Internacional Público*, Publishing House Printing Press, Buenos Aires, 1985;
14. Remiro Brotons, A. - *Derecho Internacional*, McGraw Hill, First Edition, Madrid, 1997;
15. Ruda Santolaria, J.J. - *Sujetos de Derecho Internacional – Selección de Textos*, Vol I y II, Catholic Pontifical University, Peru;
16. The Belgrade Center For Human Rights, *Human Rights in Yugoslavia 2001*, Belgrade, 2002.