

THE RIGHT TO SELF-DETERMINATION AND ITS IMPLICATION ON THE SOVEREIGN RIGHT OF STATES: THE INCONSISTENT APPLICATION OF INTERNATIONAL STANDARDS FOR INDEPENDENCE WITH RESPECT TO KOSOVO

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INTRODUCTION

The process by which a people forge a path towards independence begins with their right to self-determination. Self-determination has been defined as the “determination by a group of people with the same social, ethnic, and cultural background inhabiting one area, or sometimes a group of people living in a territory within a state, of its own political future, including establishing a state of its own by a referendum or other methods.”¹ It is the right given to people to hold referendums and pursue their independence. Once the people have established a desire to exercise independence through self-determination, they first must fulfill the criteria of a state, specifically

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1. Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 *FORDHAM INT'L L.J.* 959, 1002 (2000).

the “four qualifications prescribed in the Montevideo Convention.”² The next requirement, that states must declare themselves as states to the international community, “is derived from international custom . . . [and] may take a formal or an informal form.”³ However, without this declaration, a state’s assertion of independence will be unprofitable since it cannot expect the international community to recognize it as sovereign if it does not see itself as a sovereign nation.

Once a secessionist region has fulfilled the criteria for a state and has made it known to the international community that it is seeking independence, the sovereign right of its governing state is implicated. The right of a sovereign state to exercise control is threatened by the right of self-determination. The two are forced to co-exist, however, not harmoniously. The tension is most visible when the international community applies inconsistent methods of implementation with respect to standards set forth in the Montevideo Convention. When they are not applied equally amongst the States seeking independence, they create unpredictable results and do not enforce the Convention’s intention of creating a solid set of guidelines. As a result of this unpredictability, states are not encouraged to alter their behavior to fit the guidelines. In contrast, states rely on the international community’s interpretation of when the standards should be applied and when other forces come into play.

The political implications of the granting of Kosovo’s independence are not discounted in this article because, as law Professor Christopher J. Borgen states, “Kosovo presents a quintessential ‘tough case,’ demonstrating the ways in which political interests of States affect how the international law is given effect.”⁴ The major thrust of this paper is the analysis of the independence of Kosovo and adherence (or lack of) to the standards set forth in international law. A brief comparison and analysis will be made to the international community’s denial of independence for Quebec and Taiwan, since these two situations have been previously analyzed and documented in detail by other authors.

In its Advisory Opinion of July 22, 2010 regarding Kosovo’s independence, the International Court of Justice stated that “the Court considers that general international law contains no applicable prohibition of declarations of independence.”⁵ The Court further stated that “[d]ebates

2. *Id.* at 971.

3. *Id.*

4. Christopher J. Borgen, *Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition*, ASIL INSIGHTS (Feb. 29, 2008), <http://www.asil.org/insights080229.cfm>. See generally Ian Brownlie & C. J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT’L & COMP. L. Q. 878 (2000) (discussing whether intervention by NATO states in Kosovo is appropriate under international law).

5. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 84 (Jul. 22).

regarding the extent of the right of self-determination and the existence of any right of 'remedial succession,' however, concern the right to separate from a State. . . . [T]hat issue is beyond the scope of the question posed by the General Assembly."⁶

I. KOSOVO: SELF-DETERMINATION AND THE CLASH WITH SOVEREIGNTY

The ideas of sovereignty and self-determination for Kosovo have long been a bone of contention between the Kosovo Albanians and the former Yugoslavia (now Serbia). This type of struggle can be pinned as "[t]he underlying cause of the tragedy of Yugoslavia."⁷ However, this struggle *alone* could not have led to the breakup of the region. It is in fact the "ad hoc rejection of the principle of the territorial integrity and *sovereignty* of states."⁸ Specifically, "where the territorial integrity of the state is violated and territorial secessions are encouraged, it leads to more demands by other ethnic or ideological groups for the same right of secession leading to more violence."⁹ Thus, the concern arises that once the sovereignty of a state is violated, manipulation of the system by groups seeking secession becomes a grave possibility. For example, how would the international community react if illegal immigrants in Arizona or Texas became the majority and declared secession from the United States?

When the United Nations General Assembly enacted Resolution 2649, the meaning behind the concept of "self-determination" was unclear.¹⁰ In the Resolution, it notes the concern "that many peoples are still denied the right to self-determination and are still subject to colonial and alien domination."¹¹ Yet, there does not seem to be any mention of what constitutes this type of domination. It achieves the "speedy granting of independence to colonial countries and peoples" without setting the criteria.¹² Self-determination is recalled in later Resolutions, such as 2787 (XXVI) and 2955 (XXVII).¹³ Yet, the General Assembly reminds member States that it is "mindful that interference in the internal affairs of States is a violation of the Charter and can pose a *serious threat* to the maintenance of

6. *Id.* ¶ 83.

7. Raju G. C. Thomas, *Sovereignty, Self-Determination, and Secession: Principles and Practice*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION 3, 16 (Raju G. C. Thomas ed., 2003).

8. *Id.* (emphasis added).

9. *Id.* at 16-17.

10. G.A. Res. 2649 (XXV), at 73, U.N. Doc. A/8163 (Nov. 30, 1970).

11. *Id.*

12. *Id.*

13. See G.A. Res. 2787 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8543 (Dec. 6, 1971); see also G.A. Res. 2955 (XXVII), U.N. Doc. A/8936 (Dec. 12, 1972).

peace.”¹⁴ If the General Assembly is mindful that interference in the internal affairs of a state is a violation of the Charter, and is a threat to peace, then it becomes questionable why a right of self-determination, without guidelines, should be enforced.

It appears enforcement of this principle in Kosovo is the true purpose behind the concept of self-determination, as envisioned by the General Assembly. The secession of Kosovo from Serbia has clouded an already undefined theory. The U.N. Charter leaves “self-determination” ambiguous with one of its purposes stated in Article 1: “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”¹⁵ It has made it more difficult to distinguish a victim from an aggressor. Within the Kosovo province, “[t]he promise of external support for independence encouraged the Albanians of Kosovo to provoke the Serbian security forces into committing human rights violations in order to invite NATO military intervention.”¹⁶ This concern has been addressed, to a similar extent, by Satish Nambiar in the article *Reflections on the Yugoslav Wars: A Peacekeeper’s Perspective*.¹⁷ Specifically, because the Kosovo problem was ignored in the Dayton Accord, it was unavoidable that “Albanian extremist elements . . . would displace the moderate elements in Kosovo, assert themselves, and provoke the Yugoslav authorities into a heavy-handed response.”¹⁸ The blurring of distinctions between aggressor and victim is even more frightening when the population of Kosovo consisted of “75 percent ethnic Albanians and 12.5 percent Serbs” in 1981.¹⁹ Thus, fitting a majority population into a victim category becomes more difficult to accept.

The support of the secessionist movement in Kosovo is deeply troubling when considered as an act of self-determination since there have been concerns about the majority population oppressing minorities within the province. The General Assembly even addresses this when it recognizes “the frequent instances of harassment, periodic kidnapping and murder of ethnic Serb, Roma and other minorities of Kosovo by ethnic Albanian extremists.”²⁰ This Resolution was adopted in 2000, the same year that the Albanian population in Kosovo reached 85.3 percent.²¹

14. G.A. Res. 2787 (XXVI), *supra* note 13, at 83 (emphasis added).

15. U.N. Charter art. 1, para. 2.

16. Thomas, *supra* note 7, at 34 (emphasis added).

17. See generally Satish Nambiar, *Reflections on the Yugoslav Wars: A Peacekeeper’s Perspective*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION, *supra* note 7.

18. *Id.* at 357.

19. *Id.* at 345 (emphasis added).

20. G.A. Res. 54/183, U.N. GAOR 3d Comm., 54th Sess., Agenda Item 116(c), U.N. Doc. A/RES/54/183, at 2 (Feb. 29, 2000).

21. *Id.*; see World Bank, *Kosovo—Living Standards measurement Survey 2000*, <http://microdata.worldbank.org/index.phpcatalog/77/variable/V949> (last visited Nov. 25, 2010).

Just a year prior to the General Assembly's recognition of violence by Kosovo's dominant population, Rambouillet, France hosted an international conference on the Kosovo issue. At the conference, "American officials drafted an agreement that largely favored the Albanians—demanding a referendum on independence after three years and free passage for NATO troops throughout *all* of Yugoslavia."²² The process by which this agreement was reached has been criticized as a "violation of the Vienna Convention on the Law of International Treaties."²³ Specifically, Rambouillet has been criticized as "a farce enacted to justify . . . NATO intervention in the form of missile and air attacks on Kosovo and other areas of Yugoslavia."²⁴ Thus, it would appear that the process undertaken to ensure the independence of Kosovo was a direct violation of the General Assembly's own guidelines. The General Assembly "[u]rges all States to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic, and social system."²⁵ The interference by NATO violated the sovereign right of the people of Serbia to determine their political fate. In fact, it forced the state to submit to the Rambouillet secessionist agreement.

Years before the secessionist agreement was adopted by Serbia and Kosovo, the United States, a member state of NATO, made important statements regarding the situation in Kosovo. In a Department of State Press Statement from May 24, 1991, it stated that it "will not encourage or reward secession Yugoslavia's external or internal borders should not be changed unless by *peaceful* consensual means."²⁶ However, in 2008 the United States gave its support to the secessionist movement. It is difficult to understand why one of the most prominent NATO states changed its opinion, from 1991 to 2008, to support secession and the bombing of a sovereign state.

A concern specified in the Department of State Press Statement was the process of elections in Kosovo. Specifically, "[t]he holding of free and fair elections, like the free flow of information, is a measure of a government's

22. Alan J. Kuperman, *Transnational Causes of Genocide, or How the West Exacerbates Ethnic Conflict*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION, *supra* note 7, at 66 (emphasis added). See Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFF. 211 (1999) (detailing one author's interpretation of the process involved in the Rambouillet agreement).

23. Nambiar, *supra* note 17, at 357.

24. *Id.* See Jason R. Struble & Richard A.C. Alton, *The Legacy of Operation Allied Force: A Reflection on its Legality Under United States and International Law*, 20 MICH. ST. INT'L L. REV. 293, 307-09 (2012) for a discussion of how military force was used to promote Kosovo independence.

25. G.A. Res. 46/130, ¶ 5, U.N. Doc. A/RES/46/130 (Dec. 17, 1991).

26. Press Release, Dep't of State, Dep't of State Press Statement (May 24, 1991), in THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS 49, 50 (Philip E. Auerswald & David P. Auerswald eds., 2000) (emphasis added).

commitment to a democratic political process.”²⁷ This is a concern that is also shared by the General Assembly.²⁸ However, the General Assembly emphasizes that states should not provide any type of “overt or covert support for political parties or groups and from taking actions to undermine the electoral processes in any country.”²⁹ Thus, to provide an analogy, Serbia and other states may not provide support for any political party in the Kosovo region and may not try to undermine the electoral process. If the electoral process is respected, then the need for intervention by other States is unnecessary.

The electoral process in Kosovo was not obstructed. Following a referendum that was held from September 26th to the 30th, a statement was made by the provincial assembly that “the Assembly of the republic of Kosova declares the initiative a success.”³⁰ In this election 87.01% of the inhabitants of Kosovo participated, of which nearly all were ethnic Albanians.³¹ It also notes that there were “1,500 polling locations,” an indicator that the electoral process was set in motion.³² Already the republic renamed itself “Kosova,” and declared itself to “be a sovereign and independent republic.”³³ The results of the Referendum speak for themselves—that there was no obstruction by Serbia. There was no need for support or involvement by other States to ensure the fairness of the electoral process in Kosovo.

Following the electoral process, the European Community considered the Kosovo independence issue. The European Community “refused to consider the request for recognition as an independent state” due to the constitutional principles of the former Yugoslavia.³⁴ The constitutional principle of 1943 that governed the European Community’s refusal stated that “the status of [a] republic should be reserved for nations (*narodi*) as opposed to nationalities (*narodnosti*).”³⁵ This is relevant to show that the Kosovar Albanians did not fit within the constitutional interpretation of a people that were eligible to gain independence through self-determination. Following from this, the “Kosovar Albanians were thus a nationality because they presumably had their homeland in Albania.”³⁶ The Constitutional Declaration created by Kosovar Albanians declared that they

27. *Id.* at 51.

28. G.A. Res. 46/130, *supra* note 25.

29. *Id.* ¶ 6.

30. Press Release, Republic of Kosova, Statement by the Assembly of the Republic of Kosova (Oct. 19, 1991), in *THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS*, *supra* note 26, at 59.

31. *Id.*

32. *Id.*

33. *Id.*

34. Richard Caplan, *International diplomacy and the crisis in Kosovo*, 74 INT’L AFF. 745, 748 (1998).

35. *Id.*

36. *Id.*

were “the majority of the population and one of the most numerous peoples of Yugoslavia, as well as the Serbs and others living in Kosova, [and] are considered a nation-people and *not* a nationality (national *minority*).”³⁷ If a group is not a minority and considers itself numerous within the governing State, then justification by self-determination is a weak argument.

If a group is a majority within an area, it has dominant control within that area. In Kosovo, Albanians consisted of a majority of the population. That same population articulated its position clearly in the Constitutional Declaration. The Kosovar Albanians did not feel that they were a minority within the greater State of Yugoslavia. The legal principles of self-determination cannot apply to every group in the world that wants to separate. Self-determination cannot apply to every situation because it will only lead to greater border disputes, problems with national identities, and violence. Self-determination should, therefore, not be a loosely used justification for secession.

The doctrine of self-determination itself has been criticized by international scholars as lacking “any firm foundation, floating as if it were in midair.”³⁸ The lack of standards is evident since its supporters advocate a position that is in direct contradiction with rational ideas of self-determination. Specifically, they argue “that it should be identified with majority rule,” an idea synonymous with a nation; yet, this is not even articulated in the U.N. Charter, Article 5, which “carefully avoids specifying that this right is vested in nations.”³⁹ Thus, the definition of “majority rule” or what gives a group the right to demand secession by self-determination remains unclear.

The lack of specificity by the U.N. Charter, Article 5, on the subject of self-determination leaves the doctrine open to interpretation within the legal community. However, interpretation turns into a double-edged sword when it involves international disputes. Interpretation of disputes will always lead to criticism by some member of the international community. If one state is granted independence, then another state will require the same approval. However, if the other state is not granted independence and secession, then a lack of trust in the international political system results. It is an inevitable result that is the consequence of a lack of standards articulated when self-

37. Press Release, Kos. Assembly, Constitutional Declaration Adopted by the Kos. Assembly (July 2, 1990), in *THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS*, *supra* note 26 at 44 (emphasis added).

38. SABRINA P. RAMET, *THE LIBERAL PROJECT AND THE TRANSFORMATION OF DEMOCRACY: THE CASE OF EAST CENTRAL EUROPE* 50 (2007).

39. *Id.* at 50-51. “Majority rule, in the western world, assumes that the forces for cohesion are stronger than those for separation so that, in any majority decision, the legitimate interests of the minority may be presumed to have influenced and modified majority will, at least to the point where the minority does not reject or rebel.” Aleksander W. Rudzinski, *Majority Rule vs. Great Power Agreement in the United Nations*, 9 INT’L ORG. 366, 370 (1955).

determination was accepted as a legal concept. Based on the analysis, this deficiency has led to the belief that the approval of secessionist movements is based on a lack of foundation.

II. KOSOVO'S FAILURE IN PASSING THE MONTEVIDEO "TEST" FOR INDEPENDENCE

The legal requirements for statehood are set forth in the Montevideo Convention of 1933, an agreement that has been accepted as customary international law.⁴⁰ It remains the primary source for the determination of statehood and is even taught in law schools as such. The requirements are laid out in four points, "[t]he state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states."⁴¹ Therefore, in order for Kosovo to be recognized as a legitimate, independent state, it would have to fulfill *all* of the Montevideo Convention's requirements. Anything less than full compliance with the recognized standards would be reason to decline its application for independence.

Additional requirements for new states seeking independence were created and adopted in the European Community's Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union."⁴² The requirements iterated that new states act with:

[R]espect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;

[G]uarantees for the *rights of ethnic and national groups and minorities* in accordance with the commitments subscribed to in the framework of the CSCE;

[R]espect for the inviolability of all frontiers which can only be changed by *peaceful means* and by common agreement;

40. MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. See ERROL MENDES, STATEHOOD AND PALESTINE FOR THE PURPOSES OF ARTICLE 12(3) OF THE ICC STATUTE 2, 2 (2010) for a discussion on how the Montevideo Convention is a part of customary international law.

41. *Id.* art. 1.

42. Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," Dec. 16, 1991, 31 I.L.M. 1485, 1487 [hereinafter Declaration] (emphasis added).

[A]cceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;

[C]ommitment to *settle by agreement*, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The community and its Member States will not recognise entities which are the *result of aggression*. They would take account of the effects of recognition on neighbouring States.⁴³

Taking the Montevideo Convention requirements into account first, Kosovo does not fulfill all four points. It *does* contain a “permanent population” of individuals who reside in the area, granted the entire population is not of the same ethnicity. This in and of itself poses problems because the entire population was not in favor of the secessionist movement. It poses concerns of what would happen to the minority group once total independence is granted. It creates the unfortunate reality that the minority group that is left in the secessionist region will be oppressed and discriminated against. Freedom of speech and expression will be limited in order to silence minority opposition. This is an unfortunate result that is not always contemplated when granting independence.

The next requirement, that there exist a “defined territory,” is evident in this case. Kosovo has long been considered an autonomous region. However, there is concern by international scholars that when secession occurs in a country, the “former internal boundaries of the state, whether they are called provinces, ‘states,’ or ‘republics,’ cannot automatically become the boundaries of the new state.”⁴⁴ Thus, when Kosovo seceded from Serbia in 2008, the possibility exists that it will divide into two regions. It would involve partitioning Kosovo into two parts, where the northern section would be under Serbian control and the southern region would be under Albanian control.⁴⁵ This shows that although there may have been a defined territory when independence was granted, the strong cultural differences in the region could lead to a further division. This is a likely scenario since it has already occurred in other contexts: in 1992, when Northern Ireland separated from Ireland and when Bengal and Punjab divided after Pakistan’s secession from India in 1947.⁴⁶ Therefore, Kosovo is not unified enough to retain the same “defined territory” that it held when it seceded.

43. *Id.* (emphasis added).

44. Thomas, *supra* note 7, at 20.

45. Caplan, *supra* note 34, at 759-60.

46. Thomas, *supra* note 7, at 20. See Roger Mac Ginty, Orla T. Muldoon & Neil Ferguson, *No War, No Peace: Northern Ireland after the Agreement*, 28 POL. PSYCHOL. 1 (2007); see also O. H. K. Spate, *Geographical Aspects of the Pakistan Scheme*, 102 GEOGRAPHICAL J. 125 (1943).

The greatest failure in fulfilling the Montevideo Convention's requirements for statehood is in the third requirement, that of a new state's "government." In order to have a functioning government that is able to respond to the demands of a new state, it must be stable. Kosovo's government has been anything but stable. There have been numerous groups that governed the province, and none have consistently held power. For instance, prior to the conflict, the Serbian government was active in Kosovo. Following this, the Albanian extremist group known as the Kosovo Liberation Army (KLA) took control. This group was "[t]he proximate cause of the 1999 Kosovo conflict."⁴⁷ This is the same group that was recognized to be a threat to security. The KLA's leading members were considered to be "an unusual and extraordinary *threat* to the national security and foreign policy of the United States" by former President George W. Bush in an Executive Order signed July 2001.⁴⁸ The KLA was influential for a number of years and it was only until 2000 that a change in leadership occurred when Ibrahim Rugova, an Albanian leader of the moderate party, was elected.⁴⁹ However, the reality that an extremist party was able to gain enough control and support to be in power in Kosovo for a period of time should have been a red flag that Kosovo did not have a stable government. The Montevideo Convention required that *all* four factors be fulfilled, including the requirement for a "government." The failure of this requirement alone should have stopped the process for granting independence to the unstable region.

In an article written by author Charles A. Kupchan in 2005, the political situation in Kosovo is illustrated as unstable, even after Rugova took power.⁵⁰ Particularly, the "[p]olitical and legal institutions had yet to mature, stymied by infighting among political parties, crime and corruption, and patronage systems deeply embedded in the clannish structure of Albanian society."⁵¹ By this description, the political and legal system is to be controlled by the majority Albanian population and will disregard the minority populations. This shows the government's instability, just three

47. Kelly M. Greenhill, *The Use of Refugees as Political and Military Weapons in the Kosovo Conflict*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION, *supra* note 7, at 205, 207.

48. Gordon N. Bardos, *International Policy in Southeastern Europe: A Diagnosis*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION, *supra* note 7, at 139, 151 (emphasis added) (citing Exec. Order No. 13219, 66 Fed. Reg. 34,777 (June 27, 2001)). See also "UN Suspends Five Top Members of Kosovo Civil Corps," *Agence France-Presse*, July 6, 2001, <http://www.balkanpeace.org/index.php?index=article&articleid=9918>).

49. Milica Z. Bookman, *Economic Aspects of Yugoslavia's Disintegration*, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION, *supra* note 7, at 117, 131.

50. Charles A. Kupchan, *Independence for Kosovo: Yielding to Balkan Reality*, FOREIGN AFF., Nov.-Dec. 2005, at 14, 18.

51. *Id.* at 17.

years prior to the granting of Kosovo's independence. A government that is clannish and corrupt cannot be a good representative of the entire state. In this type of government, a minority would not even have the opportunity to campaign for a position. This type of government, therefore, could not enter into "relations with other states," the last requirement. These last two requirements are interdependent because neither can exist efficiently without the other. A government needs interaction with other states to survive economically and politically, and other states cannot trust an unstable government. Kosovo's independence should not have been granted because these two requirements were not fulfilled.

Although the Kosovo region could fulfill the first two requirements of the Montevideo Convention, it fails in the remaining two. In a sense, the third requirement is the most important since a government is the heart of a secessionist state. It is the piece that holds the independent state together once secession occurs. Granting Kosovo independence circumvented the Montevideo Convention and is an insult to the standards that were created. It sets a precedent for other states seeking independence to view the Montevideo Convention as a flexible standard instead of the customary international law that it was meant to be. This is a concern that the international community has considered to create "a redrawing of international borders which might awaken latent or historical claims elsewhere in the region."⁵² Similarly, at that time the United States and western European states were concerned "that an independent Kosovo will serve as a positive example for the numerous self-determination movements bent on separation elsewhere in Europe."⁵³ This apprehension, in and of itself, should have been a controlling consideration in declining independence. However, when adding to this hesitation, Kosovo's failure to present a complying state, the rejection of independence should have been a given. Since these factors were not considered and the international community granted Kosovo independence, this result was a direct violation of the Montevideo Convention.

III. KOSOVO'S FAILURE TO FULFILL ADDITIONAL REQUIREMENTS SET OUT BY THE EUROPEAN COMMUNITY'S DECLARATION FOR EASTERN EUROPEAN STATES

The first requirement addresses the need for new states to respect the U.N. Charter along with other agreements. However, the U.N. Charter cannot be applied to Kosovo until it becomes a new state. Thus, to use this as part of the analysis of whether independence should have been granted is unnecessary.

52. Caplan, *supra* note 34, at 751.

53. *Id.* at 755.

The U.N. Charter *may* be applied to member states that became involved in the Kosovo independence conflict. Article 2 is of the greatest importance because it outlines the boundaries for member states. Article 2(4) states that members must “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁵⁴ The actions undertaken by member states, who are concurrently members of NATO, were a violation of the U.N. Charter. Specifically, states involved in the bombing campaign were in violation because this is a direct threat against the territorial integrity of Serbia. It was used to coerce Serbia into signing the agreement with respect to Kosovo’s independence. Such attacks have already been noted by authors as a breach of “the U.N. Charter and even NATO’s own charter.”⁵⁵ This also interfered with Serbia’s domestic jurisdiction and can be attributed as an infringement of Article 2(7), in particular that the United Nations shall not “intervene in matters which are essentially within the domestic jurisdiction of any state.”⁵⁶ Kosovo may have been granted autonomy; however, it was still within Serbia’s jurisdiction at the time of the conflict. It was not an independent state and thus, any intervention on the part of United Nations members was an encroachment on the sovereign state’s rights.

However, the violations did not end with these two, but in fact were found in other sections of the U.N. Charter. Specifically, Article 2(6) states that the U.N. will “ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”⁵⁷ States were required to both refrain from contributing to the violence in Kosovo and Serbia and to maintain the peace and security of the region, per Article 2(6). In fact, only the Security Council had legitimate reason to get involved in the crisis through its authority granted by Article 34. It states that it “may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute.”⁵⁸ From all of the cited articles of the U.N. Charter, this analysis shows that one common theme arises: the Charter limits state’s involvement in matters of international disputes so that the broadest powers granted to outside states are those of an “observer.” This is a likely conclusion, since any involvement by the states with respect to Serbia and Kosovo is in one way or another, a violation.

The second requirement bound new states to abide by guarantees of minority rights with respect to the framework set out by the Conference on

54. U.N. Charter art. 2, para. 4.

55. Nambiar, *supra* note 17, at 357.

56. U.N. Charter art. 2, para. 7. Intervention is controversial and can have unanticipated side effects. Even humanitarian intervention becomes questionable when the definition of ‘humanitarian’ is misapplied. See Tom J. Farer, *The Ethics of Intervention in Self-Determination Struggles*, 25 HUM. RTS. Q. 382 (2003).

57. U.N. Charter art. 2, para. 6.

58. U.N. Charter art. 34.

Security and Cooperation in Europe (CSCE).⁵⁹ This section deals particularly with Kosovo's actions towards their minorities. Some of the most basic rights have been violated, and yet the region was granted independence. The concept of minority rights dates back to the Paris Peace Conference, which after World War I created "minority treaties . . . and applied to the new states of Eastern Europe that harbored substantial national minorities."⁶⁰ It is a guarantee particularly noteworthy where a minority inhabits a region populated by one dominant group. This was the case of Kosovo.

In 1990, the Constitution of the Republic of Kosova stated that it guaranteed "full human and citizen's rights for all individuals."⁶¹ This was a declaration made eighteen years prior to the region's independence. Also, within the European Community "extensive provisions for safeguarding the rights of ethnic minorities within the boundaries of the new states" were a priority.⁶² If Kosovo upheld its promise to honor the rights of its minority citizens, then there should be no argument for not recognizing its sovereignty. Yet, the guarantees were not specifically upheld and numerous groups of minorities were victims of abuse. Just recently, the reality of this abuse has come to light when "[a] two-year international inquiry has concluded that the prime minister of Kosovo [Hashim Thaci] led a clan of criminal entrepreneurs whose activities included trafficking in organs extracted from Serbian prisoners executed during the Kosovo conflict in 1999."⁶³ This grim reality is just another indication that it is highly unlikely an independent Kosovo will adhere to minority rights. It will be interesting to see if the international community will impose stricter standards for requiring new states to adhere to the requirements they vowed to follow in order to gain their independence.

Even in 2004, concerns had been noted by U.N. military force spokesman Derek Chappell that "some in the Kosovo Albanian leadership believe that by cleansing all remaining Serbs from the area . . . and destroying Serbian cultural sites, they can present the international community with a *fait accompli*."⁶⁴ This was also noted by the

59. Declaration, *supra* note 42.

60. Michael Mandelbaum, *The Future of Nationalism, in YUGOSLAVIA UNRAVELED: SOVEREIGNTY, SELF-DETERMINATION, INTERVENTION*, *supra* note 7, at 41, 50. See Geo A. Finch, *The Peace Conference of Paris, 1919*, 13 AM. J. INT'L L. 159 (1919), for a brief historical overview of the conference that reshaped Europe after World War I.

61. Constitutional Declaration Adopted by the Kosovo Assembly, *in THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS*, *supra* note 37, at 45.

62. Caplan, *supra* note 34, at 749.

63. Doreen Carvajal & Marlise Simons, *Report Says Kosovo Prime Minister Led Organ Trafficking Network*, N.Y. TIMES, Dec. 15, 2010, <http://www.nytimes.com/2010/12/16/world/europe/16kosovo.html>.

64. AM. COUNCIL FOR KOS. & LORD BYRON FOUND. FOR BALKAN STUDIES, *KOSOVO: The Score 1999-2009*, at 24-25 (2009), *available at*

International Crisis Group as shattering “international confidence that the Albanians were committed to a tolerant society.”⁶⁵ The actions by Kosovo’s majority were a contradiction of the promises enumerated in its constitution from 1990. Thus, Kosovo’s constitution was not reflective of its actions towards minorities and therefore, there were no guarantees that minorities would be protected in the future if independence were granted.

The third requirement that frontiers change by peaceful means coincides with the all-encompassing requirement that new states will not be recognized if they are the result of aggression. How can Kosovo have been recognized as a new state when its entire existence depended on gaining the international community’s attention through its means of aggression? It would only be logical that a petitioning state of this type should be denied. However, somehow it was not. If there is disbelief that it was the result of aggression, Kosovo’s politicians and leading media figures threatened violence if independence was not granted. Kosovo’s Prime Minister, Bajram Kosumi, threatened that “[i]f Kosovo does not become independent, there will be serious consequences.”⁶⁶ Another politician, Adem Demaci, threatened that violence will occur if the “West does not grant independence.”⁶⁷ Similarly, Veton Surroi, an editor-in-chief of a large newspaper in the capital of Kosovo, stated that “international attention can only be obtained through war.”⁶⁸ These are supposed to be some of the leaders of the “peaceful” movement attributed to the Kosovo campaign for independence. However, the statements show that both the Albanian population and the majority leaders in Kosovo held that movement to be a farce.

It should come as no surprise then that the people of Kosovo were willing to resort to threats as well. Richard Caplan came to the conclusion that “[f]ewer and fewer Albanians are now willing to settle for anything less than a total Serbian withdrawal from Kosovo.”⁶⁹ This was stated prior to Kosovo’s independence, yet it is reflective of a non-native’s opinion of the situation. There was no chance for a peaceful resolution, especially when the KLA preached that the people should “mercilessly hit the enemy for it is

<http://www.balkanstudies.org/sites/default/files/newsletter/Kosovo%20The%20Score%201999%202009.pdf>.

65. *Id.* at 25.

66. Kupchan, *supra* note 50, at 17.

67. Doug Bandow, former Special Assistant to President Reagan, A Critical Issue Back on the Radar Screen, Address Before the American Council for Kosovo (Sept. 28, 2006), in AM. COUNCIL FOR KOS., RECONSIDERING KOSOVO: PROCEEDINGS OF THE INTERNATIONAL CONFERENCE HELD ON SEPTEMBER 28, 2006 IN WASHINGTON D.C. 47, 51 (2006), available at www.savekosovo.org/documents/Kosovo_Conference_Book_File.pdf.

68. Caplan, *supra* note 34, at 752.

69. *Id.* at 746.

in this way that we are going to win our freedom.”⁷⁰ It can only be described as a blatant and ruthless statement that shows the extent of aggression the secessionist group would take if their wishes were not honored. It is difficult to believe that these threats were unknown to decision-making states at the time of Kosovo’s independence discussions. Thus, it is only logical to assume that they were circumvented for the purposes of granting independence. Otherwise, it is contrary to the requirements that a state will not be recognized if it is formed as a result of aggression.

Requirements four and five do not necessitate further analysis since they fall within the greater picture emphasized in the first three requirements. The fourth requirement, demanding regional stability, has been answered through the analysis of whether the region would have a stable government and whether minority rights would be protected. From that study, the fourth requirement would show that Kosovo could not make a commitment to regional stability. The fifth requirement, a commitment to settle by agreement issues of regional disputes and state succession, can be answered through the same method as that in the third requirement. It is difficult to believe that a state that is the result of aggression can be committed to peacefully settling regional disputes. You can remove the state from the aggression, but you cannot remove the aggression from the State.

The European Community created the guidelines for new, Eastern European, independent states as a response to the conflicts between ethnic groups in that region.⁷¹ It appears that these guidelines were created to try and deter new States from engaging in additional conflict once they were granted independence since a state’s “commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations.”⁷² In a sense, this could be thought of as a contract between the secessionist state and the European Community. The European Community had a reasonable expectation that the new states would honor their end of the bargain and refrain from any acts of violence or discriminatory behavior. The European Community would, in turn, grant them independence because of this reasonable expectation. However, how could the community have expected Kosovo to be able to uphold its end of the bargain when it did not meet the requirements in the first place? How could the community have even had a reasonable expectation that Kosovo would follow the guidelines after independence if it were not able to meet them initially?

70. Kosova Liberation Army, Statement by the KLA General Staff (Mar. 20, 1999), in *THE KOSOVO CONFLICT: A DIPLOMATIC HISTORY THROUGH DOCUMENTS*, *supra* note 26, at 672.

71. Declaration, *supra* note 42.

72. *Id.*

The guidelines set forth in the Montevideo Convention have been accepted as “reflecting customary international law.”⁷³ In order for law to be effective it must be predictable. It must contain this quality in order for people to have faith in the legal system. Thus, the legal standard for independence must be applied consistently in order for states to conform their behavior appropriately to fit the guidelines. If this criterion is not applied consistently then independence will lack legitimacy. It will be sporadic and based on principles that are not enumerated in writing or as customary international law. This was the case of Kosovo. It did not fit within the legal standards, and the result appeared more impulsive than substantiated. At this point it is important to review briefly how the Montevideo Convention has not been applied consistently with respect to both Quebec and Taiwan, since both of those regions fit the requirements but were denied independence.

IV. CANADA’S CONSTITUTIONAL LIMITATION TO SECESSION WITH RESPECT TO QUEBEC

Quebec is one of ten provinces in Canada and has long vowed to gain independence. The French Canadians are the supporters of the secessionist movement in Quebec. This is because they “established [a] birthright” in Canada when they first settled in the mid-seventeenth century.⁷⁴ Their view of the English Canadians as having a “continuing loyalty to England” promoted their desires to create a state that would not forget their French heritage.⁷⁵ One scholar has noted that this history is important when “assess[ing] French demands for statehood or independence.”⁷⁶ The history is critical because of Quebec’s perception of emphasis on colonial domination, particularly an aversion towards English rule. The Quebecers’ claim for independence through self-determination fits precisely within the definition enumerated in General Assembly Resolution 2649 that “many peoples are still denied the right to self-determination and are subject to colonial and alien domination.”⁷⁷ Quebec is fighting for its right not to be subject to Canadian-English governance. If this was its goal, where did it fail?

Referendums in Quebec played a key role in the determination of support for independence. The first referendum on sovereignty, held in 1980,

73. LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 301 (5th ed. 2009).

74. Alan S. Alexandroff, *The Never-Ending Story: Quebec and the Question of National Self-determination*, in *NO MORE STATES?: GLOBALIZATION, NATIONAL SELF-DETERMINATION, AND TERRORISM* 221, 221 (Richard N. Rosecrance & Arthur A. Stein eds., 2006).

75. *Id.*

76. *Id.*

77. G.A. Res. 2649 (XXV), *supra* note 10.

garnered little support, with only 40.4% of Quebecers in favor.⁷⁸ However, a later referendum, which was held beyond 1995, found 49.4% support, a number that is crucial to the determination of sovereignty.⁷⁹ These numbers are important because the Canadian government left the issue of secession to the Canadian court. The court declared that “a clear majority vote in Quebec on a clear question would constitute a moral obligation on the part of Canada to negotiate with a Quebec government over the country’s future” with respect to independence.⁸⁰ This majority vote had to constitute 51%, a number that the province had not yet attained. Yet, it also shows that “the court did not accept a unilateral declaration of independence by Quebec.”⁸¹ Support for Quebec’s independence was not high enough to allow negotiations. This hurt the independence movement for many years, and it was not until 2005 when an unofficial vote (non-referendum) showed 54% support for sovereignty, a figure that would give hope to the Quebec province in the future.⁸²

In 1998, the Canadian Supreme Court was asked to render an Advisory Opinion by Parliament regarding Quebec’s move towards secession. This was accomplished in the case of *Reference re Secession of Quebec*.⁸³ An interesting point the court makes is that “[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation.”⁸⁴ Through this statement Canada is binding Quebec, an autonomous province, to the strictures of the national constitution. It renders any secessionist action by Quebec, without Canada’s approval, unconstitutional. The lack of autonomy given to the Quebec government is shown through further statements by the court that declare any unilateral acts to be unlawful.⁸⁵ The actions exercised by the Canadian Supreme Court by binding secession to the national constitution, at the direction of the country’s national government, could be viewed by Quebecers as an interference with their pursuit of sovereignty.

78. Alexandroff, *supra* note 74, at 223-24.

79. *Id.* The 1995 referendum was a pivotal point in Quebec’s quest for independence, and since then, there has been much analysis of how this referendum was perceived by the public. See Harold D. Clarke, Allan Kornberg & Marianna C. Stewart, *Referendum Voting as Political Choice: The Case of Quebec*, 34 BRIT. J. POL. SCI. 345 (2004) (analyzing the 1995 Quebec referendum using the Nadeau, Martin and Blais Model); see also John Fox, Robert Andersen & Joseph Dubonnet, *The Polls and the 1995 Quebec Referendum*, 24 CAN. J. SOC. 411, 423 (1999) (demonstrating that, with respect to the 1995 referendum and other polls, “statistical meta-analysis of polling data can address questions about the trajectory of public opinion.”).

80. Alexandroff, *supra* note 74, at 229.

81. *Id.*

82. *Id.* at 223 (endnote omitted).

83. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

84. *Id.* ¶ 84.

85. *Id.* ¶ 104.

The court also addresses the right of secession with respect to international law. It supports its stance against unilateral secession by arguing that “international law does not specifically grant component parts of sovereign states the *legal right* to secede unilaterally from their ‘parent’ state.”⁸⁶ With respect to self-determination, the court notes that this right “will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.”⁸⁷ Self-determination for Quebec would be “internal” since it would be Quebecers’ “pursuit of its political, economic, social and cultural development” within Canada.⁸⁸

Further, Quebec could not be granted secession, according to the Canadian Supreme Court, because it did not contain a dominated people that could qualify under the self-determination doctrine. Specifically, Quebecers were not “subject to alien subjugation, domination or exploitation.”⁸⁹ However, taking into account the historical nature of the region and the Quebecers’ opinions about the English land, the rejection of the claim of alien subjugation could be considered a point of controversy by Quebecers. Canadians would argue that Quebecers were not “denied meaningful access to government” and thus were not subjugated.⁹⁰ It appears that Quebecer’s participation in the Canadian government is particularly noteworthy since history has shown that Quebec has produced numerous prime ministers. Thus, the court’s proposition that they can enjoy freedom without secession is supported by this point.

The history of Quebec and the role played by the Canadian Supreme Court give credence to the theory that Canada stopped the secessionist movement. Canada used its constitution and court as a shield to protect itself against Quebec’s secessionist arguments. Through this process, it created hurdles that could not be overcome. However, it appears that the international community did not object to Canada’s involvement in Quebec as it did with Serbia’s involvement in Kosovo. Both states were entitled to enjoy its right to sovereignty, and yet only one was actually allowed to exercise it.

Canada and Serbia both exercised control over their prospective secessionist regions. They both had integrated, within their constitutions, requirements set out for secessionist States. The Canadian court also relies on the argument that there is no legal right to unilateral secession.⁹¹ A

86. *Id.* ¶ 111 (emphasis added).

87. *Id.* ¶ 122.

88. *Id.* ¶ 126. Specifically, “[t]here is no provision in the Canadian constitution for using the referendum procedure, either for constitutional amendment or any other purpose.” Peter Leslie, *Canada: The Supreme Court Sets Rules for the Secession of Quebec*, PUBLIUS, Spring 1999, at 135, 142.

89. Reference re Secession of Quebec, [1998] 2 S.C.R. ¶ 154.

90. *Id.*

91. *Id.* ¶¶ 154-55.

consistent application of international law and standards for independence would dictate that *both* sovereign states should be accorded the right to have the international community honor their constitutions. Yet, this is not the case.

Serbia's constitution implemented criteria for granting an independent state in the same manner that Canada undertook in its constitution. Serbia stated, "that the status of [a] republic should be reserved for nations (*narodī*) as opposed to nationalities (*narodnosti*)," and that the *people* of Kosovo did not apply by this definition.⁹² Canada similarly stated that the *people* of Quebec did not fit within their criteria. An argument stands that although they were not being "subjugated," they were being "exploited" by Canada. Particularly, the Quebecers wanted to secede in order to enjoy greater political and economic freedoms outside of the confines of Canada.⁹³ A similar argument can be made for Kosovo Albanians in their claim for independence.

Each sovereign state is entitled to have the international community respect its constitution. Some critics may argue that this necessitates limits. I will concede to this and argue that limits should only be found when another sovereign State's citizens require a more flexible interpretation of the constitution in order for their individual rights to be honored. However, at the time of attempted secession neither Kosovo nor Quebec was a sovereign state. Per this analysis, either both or neither should have been given the ability to contradict Serbia and Canada's respective constitutions. This type of consistent treatment is required if a state's constitution is to have any respect in the international community.

There is hardly any debate that Quebec has fulfilled the Montevideo Convention's guidelines for a state. It has also been proven in this article that Kosovo did *not* fulfill the guidelines set out by the Convention. The only drawback to the Quebecers' pursuit of sovereignty is their low referendum results. Once they reach a number high enough to catch the attention of the Canadian government and court, it will be interesting to see whether Canada will honor its promise to negotiate regarding the secessionist issue. At that point, the international community will have a duty to *not* honor Canada's constitution, which poses restrictions on secession. This is necessary in order for international law to have consistent application. There is no justification in allowing some states greater constitutional deference and others, none. This is one of the necessary paths that must be forged in order for a more stable set of requirements for independence to be formed and respected.

92. Caplan, *supra* note 34, at 748.

93. Alexandroff, *supra* note 74, at 222.

V. CHINA'S ACTIONS THREATENED TAIWAN'S RIGHT TO SELF-DETERMINATION

Self-determination has also proved ineffective in the case of Taiwanese independence. This part of the analysis will look at the justifications used to decline independence to Taiwan and whether it was based on the same type of criteria that granted Kosovo its sovereignty. In the process, China's relationship with Taiwan will be examined and whether its actions constituted threats towards Taiwan's right to self-determination.

Taiwan has been autonomous for half a century and has exercised significant power in the economic sector along with trying to achieve independence.⁹⁴ This pursuit has produced a "strong sense of 'Taiwan identity' on the island, and has enhanced its belief that its region 'merits international recognition as a sovereign country.'"⁹⁵ However, the island itself is not composed of only Taiwanese peoples. Its population includes a portion of its neighboring state, the Chinese. In the past, the Chinese have had substantial influence in governing the island. However, this influence has dissipated and a "growing separatist-leaning Taiwanese leadership" has emerged.⁹⁶ It is this separatist movement that is encouraging other Taiwanese to claim their independence.

There exists debate on whether China can even exercise any sovereign rights to Taiwan since Taiwan is an autonomous province. The argument that China does not have "sovereignty over the island of Taiwan" since it did not acquire title to the land through either treaty or through occupation of the territory is problematic if China wants to claim sovereign control over the region.⁹⁷ If China did not occupy Taiwan through either treaty or occupation, then it does not have sovereignty over Taiwan. Following from this, "[a] state with no sovereignty over a territory cannot have sovereignty over the people in the territory."⁹⁸ This is significant since there exists the possibility that China does not even have a right to invoke sovereignty claims. If that were the case, Taiwan would not need to raise claims of a right to self-determination since it would already exist as an independent State.

It has not been the case that China has stopped exercising sovereignty over Taiwan. In fact, the Chinese constitution regards Taiwanese

94. Robert S. Ross, *Taiwan's Fading Independence Movement*, FOREIGN AFF., Mar.-Apr. 2006, at 141, 142. The author argues that "[t]he peaceful transformation of relations between China and Taiwan will help stabilize eastern Asia, reduce the likelihood of conflict between China and the United States, and present an opportunity for Beijing, Taipei, and Washington to adjust their defense postures." *Id.* at 141.

95. *Id.* at 142.

96. Michael D. Swaine, *Trouble in Taiwan*, FOREIGN AFF., Mar.-Apr. 2004, at 39, 45.

97. Chiang, *supra* note 1, at 998.

98. *Id.*

sovereignty as residing “with the people of ‘China.’”⁹⁹ This has been a bone of contention in the independence movement since China is opposed to the drafting of a new constitution and the Taiwanese independence leader, Chen Shui-bian, had declared that a “new constitution [should] be drafted by 2006.”¹⁰⁰ This new constitution never evolved due to lack of support in the international community and China’s interference with any movement towards Taiwanese independence.

China has been anything but supportive. It has used “provocative missile tests near the island, interfering with shipping to Taiwan and provoking the United States to deploy two aircraft carrier battle groups to the vicinity of Taiwan.”¹⁰¹ China has asserted its claims over Taiwan through its statements as well. Particularly, it has made it clear that any change in the country’s name from “‘the Republic of China’ to ‘the Republic of Taiwan’” would be considered “acts of war.”¹⁰² China’s voice against independence has also been passed by China’s legislature in 2005 in the Anti-Secession Law, “which codified Beijing’s threat to go to war if Taiwan declared independence.”¹⁰³ These codifications can be understood as nothing less than a deterrent to Taiwan’s pursuit of independence.

Such actions by China have in fact produced the effect of containing the independence movement on the island. “Voters, reflecting Beijing’s military and economic hold on the island, have preferred to accommodate China’s opposition to Taiwan’s independence.”¹⁰⁴ The waning of support has been attributed to China’s threatening response. This has also posed a problem in the establishment of referendums on the issue of independence. Ever since the People’s Republic of China government established a stronghold in China in 1949, there has been a threat “to use force to ‘reunite’ Taiwan with China [specifically] if they did not vote for the candidate of its choice.”¹⁰⁵ It has been argued that under these circumstances, the “people in Taiwan cannot express their free will in a referendum.”¹⁰⁶ Additionally,

99. Swaine, *supra* note 96, at 49.

100. Emerson M.S. Niou, *Understanding Taiwan Independence and its Policy Implications*, 44 *ASIAN SURV.* 555, 556 (2004).

101. Ross, *supra* note 94. See Andrew Bingham Kennedy, *China’s Perceptions of U.S. Intentions Toward Taiwan: How Hostile a Hegemon?*, 47 *ASIAN SURV.* 268 (2007) for an analysis of United States’ involvement in the Taiwanese independence movement and its implications for Chinese diplomacy.

102. Ross, *supra* note 94, at 144.

103. *Id.* at 145.

104. *Id.* at 142. See generally Hung-Mao Tien & Chen-Yuan Tung, *Taiwan in 2010: Mapping for a New Political Landscape and Economic Outlook*, 51 *ASIAN SURV.* 76 (2011) (discussing Taiwan’s current foreign policy and its economic relationship with China).

105. Chiang, *supra* note 1, at 1003. Threats against separatist movements impacted independence even in 1991. See Nicholas D. Kristof, *Beijing Warns Taiwan’s Independence Advocates*, N.Y. TIMES, Oct. 16, 1991, <http://www.nytimes.com/1991/10/16/world/beijing-warns-taiwan-s-independence-advocates.html?src=pm>.

106. Chiang, *supra* note 1, at 1003. For a discussion of the implications of the Taiwan Referendum Law passed on November 28, 2003, see Mily Ming-Tzu Kao, *The Referendum*

“Taiwan’s electorate has consistently rejected a declaration of independence” because the risk of going to war with China is too great.¹⁰⁷ This then begs the question of why the international community has not recognized Taiwan as an oppressed or dominated region, considering China’s influence over its political, economic, and societal situation.

There seem to be three main reasons why the international community has not responded with vigorous force to defend Taiwan’s rights. Firstly, “Taiwanese independence would [likely] establish a dangerous precedent for other potentially secession-minded areas of the country, such as Tibet, Xin-jiang, and Inner Mongolia.”¹⁰⁸ Secondly, “Washington has long considered Taiwan’s moves toward independence a threat to U.S. security because [it] could lead to war” with China over the region.¹⁰⁹ This second concern brings about the proposition that had China’s role in the situation not been as threatening to both Taiwan and the international community, the right of Taiwanese self-determination would have garnered greater support. Lastly, the Taiwan Relations Act has been created by the United States to “protect the interests of Taiwan,” and thus, there is no additional need for the international community to come to the aid of Taiwan.¹¹⁰ From this, a conclusion can be reached that although the people of Taiwan were dominated by China, without the support of the international community they had no hope of gaining independence. The question then becomes, why did the international community respond so differently to Taiwan in comparison to Kosovo when both could bring allegations of oppression?

There is no debate that Taiwan can be classified as a state. It fulfills the Montevideo Convention’s requirements and “the elements of the definition [of a state].”¹¹¹ If that is the case, then why has it not been granted independence? Scholars have responded to this by putting the blame on Taiwan, particularly that “its authorities have not claimed it to be a state, but rather part of the state of China.”¹¹² If this is true, then Taiwan has not recognized itself as a state for fear that China will inflict violence if it makes any movement towards independence.

China’s interference through overt threats of force is visible in Taiwan’s inability to successfully initiate a referendum for independence. The General Assembly has made it clear that states cannot “undermine the

Phenomenon in Taiwan: Solidification of Taiwan Consciousness?, 44 ASIAN SURV. 591 (2004).

107. Ross, *supra* note 94, at 146.

108. Swaine, *supra* note 96, at 41.

109. Ross, *supra* note 94, at 148.

110. Chiang, *supra* note 1, at 977.

111. *Id.* at 986.

112. *Id.*

electoral processes in any country.”¹¹³ When using the General Assembly’s proclamations, it is necessary to advance the position that Taiwan can be considered to fit within the definition of a country with its own electoral process because it has exercised enough autonomy by creating its own government, the Republic of China.

China has interfered with the referendum and has violated the General Assembly’s instructions. Yet, the international community has not come to support Taiwan’s right to hold a referendum. In fact, they have pulled back. Kosovo was able to hold a referendum without any interference from Serbia, and yet the international community found it necessary to come to Kosovo’s aid even though the electoral process was not undermined. The referendum is a crucial step in a state’s assertion of independence since a state will not be able to evidence support without it. The international community’s inconsistent support of referendums shows that there needs to be a more reliable application if all states that fulfill the Montevideo Convention’s requirements are to be given the ability to exercise their right to self-determination.

Kosovo did not fulfill the Montevideo Convention’s requirements and yet it was acknowledged as an independent state. This could not have been accomplished without assistance by the international community. It has already been noted earlier that Article 2(4) of the U.N. Charter was violated when NATO inflicted a bombing campaign against Serbia in order to compel the country to concede to the secessionist agreement in favor of Kosovo.¹¹⁴ However, it becomes questionable why NATO or the international community did not exert force towards China when China explicitly posed the ultimatum that if Taiwan makes any movement towards independence it will be considered an act of war.¹¹⁵

Article 2(7) of the U.N. Charter declares that states shall not intervene “in matters which are essentially within the domestic jurisdiction of any state” was also respected with China’s assertion of sovereignty over Taiwan.¹¹⁶ The international community, however, did not respect Serbia’s right to assert sovereignty over Kosovo. Both claimed the territories to be within their sovereign jurisdiction, and yet only one was allowed to exercise control without intervention. If a secessionist region chooses to pursue independence, and its governing state wishes to exercise its right of sovereign control, the international community cannot pick and choose when it will intervene. It must either consistently allow all states to exercise control or prevent them. By allowing China to exercise control and

113. G.A. Res. 46/130, *supra* note 25, ¶ 6. For the purposes of this analysis, a referendum is considered a part of the electoral process since it is representative of a people’s right to vote.

114. U.N. Charter art. 2, para. 4.

115. Niou, *supra* note 100.

116. U.N. Charter art. 2, para. 7.

preventing Serbia from doing the same, the international community has claimed the authority to be the ultimate arbiter of when the right to independence may be exercised.

Comparing how Kosovo and Taiwan's desire for independence was handled, a cynic would conclude that Taiwan was denied independence because China posed a greater threat if angered than would Serbia. Thus, the standards set forth in the Montevideo Convention are more flexible in the Kosovo application, since upsetting Serbia would have minimal impact on the international community. The opposite is true for Taiwan. Additionally, the international community's involvement in ensuring the process for referendums is more stringent with states that are not threatening. These inconsistencies provide evidence that smaller and less powerful sovereign states are not provided with the same rights when secessionist states try to exercise independence. Until a more reliable set of standards is created, aggressor states seeking independence will consistently be provided with greater opportunity to exercise sovereignty.

CONCLUSION

When reconciling the secessionist movements of Kosovo, Quebec, and Taiwan, and the justifications used to accept or reject claims for independence, the conclusion can be reached that there does not exist a defined set of standards that are applied on a consistent basis. Rather, as one scholar accurately stated, the "recognition of a people's status as a nation-state is conferred by the international community and is highly subject to the calculations and interests of the most influential powers involved."¹¹⁷ Kosovo's declaration of independence is a product of this conclusion. Serbia was a less influential and powerful country than both Canada and China, so its sovereignty was not respected. Had Taiwan or Quebec been given independence, the international community would have been faced with two powerful nations that could have destroyed the interests that were at stake for those countries granting independence to their secessionist regions.

From this perspective, a clearer set of standards needs to be established. Since it is evident that the Montevideo Convention is not applied consistently, the international community should create new requirements that are more detailed and that take into account a state's sovereign right to defend its territory from secession. Within these requirements, a secessionist state's assertion of self-determination should be defined, keeping in mind that this right can be revoked if the secessionist group resorts to any threats or violence towards other ethnic groups within the region.

117. Swaine, *supra* note 96, at 47.

The overarching conclusion is that there need to be better guidelines in order to achieve more consistent results. Granting independence to some states that do not fit the requirements, while denying it to others that do fit the requirements, does not allow the international community to feel comfortable with the established standards. It in turn leads to insecurity in the international legal system and the belief that other factors are the basis for granting independence.

