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Yugoslavia and Self-Determination of Peoples: The Power to Create and the Power to Destroy*

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Abstract: Over the last hundred years, the terms “Yugoslavia” and “self-determination of peoples” intertwined in numerous ways. Closer inspection reveals that self-determination was important element of the rationale used in a period of establishment of the first and the second Yugoslavia in 1918 and 1945 respectively, and in the course of violent dissolution of SFRY during the last decade of the XX century. This article elaborates on legal status of self-determination in these crucial moments of history of Yugoslav peoples and on the way in which key political figures in Yugoslavia(s) used this principle/right to legitimize their goals. Hence, the article itself is primarily focused on the legitimising role of international law. The way that self-determination was used in the case of Yugoslavia illustrates its great power to influence creation and dissolution of states.

Keywords: international law, self-determination of peoples, Yugoslavia, legitimacy, the people

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Introduction

One hundred years since the establishment of the first Yugoslavia is the perfect time to re-evaluate the significance of the concept of people's self-determination for the establishment and violent dissolution of this country. The indeterminacy of both the idea of Yugoslavia and the principle of self-determination was the reason for their attractiveness and their weakness alike. The country was able to be established against all probability precisely because different actors could identify their interests and their values with the vague ideas of Yugoslavia and the self-determination of the various people/peoples.

There are many disputable issues concerning the indeterminacy of the Yugoslav idea and the self-determination of people, but the lack of a precise definition of the notion of the people is especially illustrative in this regard. In her seminal work, Margaret Canovan stated that "most subversive of all is the belief... that any 'people' has a right to self-determination; in the decade that followed the collapse of communism bitter wars were fought in the Balkans and elsewhere as rival 'peoples' claimed that right".¹ She also added that the "current ambiguities of 'the people' are a legacy of centuries of use in political ambiguities".² Jörg Fisch is even more straightforward: "...why do states not want a definition of the people or in any event cannot reach an agreement on such a definition? In view of the human rights Covenants, those who decide whether a group or collective is a people at the same time decide indirectly the division of the world into states and thereby exercise much power".³

From the perspective of international law, Marti Koskenniemi posed similar questions.⁴ Antonio Cassese, on the other hand, made an incredible effort to bring some clarity to the legal concept of self-determination of people, advocating, from the perspective of positivism, certain limitations to the concept of the right to self-determination.⁵ It seems, however, that the concept is inherently indeterminate, and that may be the reason why Cassese was not completely satisfied with his effort in clarifying the legal aspects of the self-determination of peoples.⁶

The conceptual vagueness of the nature of Yugoslav state and people was an important reason for both its initial attractiveness and inherent weakness of the state. At the beginning, the concept of "the people with three names" was promoted during the First World War and in the 1921 Constitution.⁷ Later on came the Constitution that formally ended the period of dictatorship started in 1929. In the Preamble to that Constitution, "Yugo-

1 Canovan, 2005, 1–2.

2 *Ibid.*, 2.

3 Fisch 2015, 32.

4 Koskenniemi 1994.

5 Cassese 1995.

6 Cassese 2008, xlv.

7 Banac 1988; Ustav Kraljevine Jugoslavije 1931.

slav peoples” were directly mentioned without any further explanation.⁸ The Communist Constitution from 1946 adopted the concept of “community of equal peoples” and five nations, marking the first phase of the Communist politics regarding the national question in second Yugoslavia. The second Communist phase started at the beginning of the 1980s and ended with a fierce debate about the bearer of the right to self-determination, secession and a violent break-up of the country.⁹

The main argument of this paper is that the self-determination of people was a key instrument used for legitimising the establishment of the first and second Yugoslavias, but also for its subsequent violent dissolution. The relative indeterminacy of the principle of self-determination (and especially the concept of *the people* in it) and its roots in nationalism and popular sovereignty made it a very powerful tool for both the creation and the destruction of Yugoslavia. Additionally, it seems that the different actors who participated in all the acts of the Yugoslav drama used international law and the aforementioned indeterminacy to legitimise their own specific political goals, although that does not mean that all of these arguments were equally persuasive.¹⁰ Therefore, this article is thoroughly considers the legitimising function of international law – how we use it in order to legitimise our political goals in world politics.¹¹

The article unfolds as follows. First, I begin by critically assessing the substance of the political principle of self-determination of people in 1918 and how this principle has been used for the creation of first Yugoslavia during and immediately after the First World War. Second, I deal with the establishment of second Yugoslavia, the use of the legal norm of self-determination of people and deliberate avoidance of the concept of “Yugoslav people” during this period. Finally, the destructive potential of the post-Cold War concept of self-determination of people (“postmodern tribalism”) is illustrated by using the violent dissolution of Yugoslavia as an example. Concluding remarks are presented at the end of the article.

8 Ustav Kraljevine Jugoslavije (Constitution of the Kingdom of Yugoslavia) 1931, Preamble.

9 Golubović 1995.

10 Oklopčić 2015.

11 Onuma 2003.

The Establishment of the First Yugoslavia and Self-Determination

Self-Determination of People as a Political Principle in 1918

Even though the right to self-determination is usually understood as a natural, self-evident right, James Summers rightfully points out that “it is a product of particular political, economic, social and cultural circumstances... These include national political institutions, a broadening of identities, social and economical mobility and a secular approach to politics.”¹² Notwithstanding some important differences, both Summers and Fisch place the roots of the right to self-determination in the early modern period, and they both insist on the close relationship between this right and the concept of sovereignty.¹³ These two authors, together with many other scholars including Cassese, also underline the connection between self-determination and American and French revolutions.¹⁴

Still, the end of the First World War arguably marked the key period for the development of the political principle of self-determination in the international domain. The two crucial figures in this regard were, of course, Lenin and Woodrow Wilson. After some initial dilemmas, Lenin and other Bolsheviks accepted a very radical interpretation of the notion of self-determination, which meant that “every people had a right to political independence, to sovereignty.”¹⁵ In 1917, Lenin consequently advocated the position that “the right of all the nations forming part of Russia to freely secede and form independent states must be recognised.”¹⁶ Stalin insisted even more on the right to self-determination which included secession. Namely, in 1921, he even claimed that the concept of national self-determination should be rejected as an imperialistic one and that it should be replaced with the notion of peoples right of secession.¹⁷ The stance of both Stalin and Lenin of utmost importance for the development of the communist stance on the self-determination and the secession in Yugoslavia was that “small, subjugated nations” should have the right to secession against “ruling nations” such as Russians or Serbs.¹⁸ Moreover, the goal should not be the formal equality of ruling and subjugated nations but even acceptance of the inequality between them in favour of subjugated nations as a compensation for a real inequality which is created by life in these kinds of communities.¹⁹

Of course, both Lenin and Stalin always made the distinction between the theoretical right of secession and its application. For example, in the above quoted document, Lenin

12 Summers 2007, 134, 136.

13 Fisch 2015, 5969; Summers, 137–45.

14 Cassese 1995.

15 Fisch 2015, 119.

16 Lenin 1917, in: Fisch 2015, 120.

17 Jović 2015, 28.

18 *Ibid.*

19 Vlačić 1987, 75.

emphasised that "...the right of nations freely to secede must not be confused with the advisability of secession by a given nation at a given moment. The party of proletariat must decide the latter question quite independently in each particular case..."²⁰ This duality between the theoretical basis of the concept of self-determination of people and its application in the Bolshevik tradition was, as we shall see, of utmost significance for the implementation of self-determination in second Yugoslavia.

Be that as it may, the particularly explosive component of the Bolshevik concept of self-determination was the claim that all peoples, including those in colonies, have the right to self-determination. This stance placed Woodrow Wilson in an exceptionally unpleasant situation. Namely, "Wilson spoke increasingly of *self-government* and the fight against despotism and autocracy... The right of *self-determination*, however, was not a part of his repertoire"²¹ Faced with the popularity of Lenin's interpretation of the concept of self-determination, Wilson decided to accept the words, but not what they stood for. It is therefore not surprising that many hopes were raised in the colonial world that self-determination could be the new basis of a just international order. Unfortunately, these hopes were scattered soon afterwards, as Wilson and representatives of other major powers significantly limited the application of the principle.²²

On the other hand, it is important to stress that even the limited scope of the concept of self-determination was not a right in 1918, but only a political principle. Confirmation of this thesis can be found in the dispute concerning the status of the Aaland Islands, in which the Committee of Jurists famously stated that the principle of self-determination "is not, properly speaking, a rule of international law"²³ However, as Cassese quite rightly emphasised, this Committee, together with the Commission of Rapporteurs, "...delineated, based on general principles of law and justice, the policy lines that the international community ought to adopt..."²⁴

It was, of course, unrealistic to expect that the term "people" as part of the political principle of self-determination could have a very precise meaning and substance in these historical circumstances. After all, it was "just" a political principle and not the norm of international law which usually demanded greater precision and determinacy of substance. This does not mean, however, that the question "self-determination for whom" was not seriously posed.²⁵ One of the limitations of the view that *all* people have the right to self-determination came from Robert Lansing, Wilson's Secretary of State, who declared that the principle was not applicable to "races, peoples or communities whose state of barbarism

20 *Ibid.*

21 *Ibid.*, 133.

22 Manela 2007, 8.

23 Report of the International Committee of the Jurists 1920, 5.

24 Cassese 1995, 30.

25 Manela 2007, 19.

or ignorance deprive them of capacity to intelligently choose their political affiliations.”²⁶ It seems that Wilson failed to refute the idea that people under colonial domination should have the right to self-determination. The difference between him and Lenin was that Wilson believed that these peoples should get there through gradual reforms and institutional processes and not through revolution.²⁷

But even in the European context it was obvious that the principle of self-determination was applicable only to the peoples that belonged to defeated empires. That is, the “Wilsonian moment”, in which the important part of the globe believed in this imminent peaceful revolution of the international order, lasted only until 1919, when Wilson openly declared that principle of self-determination would apply only to the peoples living in the territories of defeated empires.²⁸ It was clear from the very beginning that the history of self-determination of peoples was actually a history of attempts to impose limitations.²⁹ But, as Manela correctly pointed out, the genie of the political principle of self-determination was out of the bottle and it was impossible to put it back.³⁰

Self-Determination of People and the Establishment of First Yugoslavia

Ivo Banac argues that most European intellectuals thought that only two paths were open to the South Slavs in the second half of the 19th century: “They could either lose their identity and fall in with Magyars and Germans, or... they could seek to build their own special hybrid nationality. The nurturing of separate national identities, within their traditional bounds, was rarely considered.”³¹ Banac added that “...despite all the differences, foreign pressure often compelled the South Slavs to view one another as possible... material for national hybridisation, out of which a vibrant power could emerge...”³²

Of course, as Banac also recognises, foreign pressure was not the only factor that motivated South Slavs to unite. The other was the common language, although not completely “natural”. As Milorad Ekmečić and some other authors have noted, even this common language was the product of a broader (political) project, which involved many great minds such as Ljudevit Gaj with his Illyrian movement or Vuk Stefanović Karadžić (until 1918, a unified Yugoslavia remained the project of various intellectual and social elites).³³ The project of South Slav unification based on a common language (some authors called the

26 *Ibid.*, 24.

27 *Ibid.*

28 Fisch 2015, 137.

29 *Ibid.*

30 Manela 2007, 24.

31 Banac 1988, 70.

32 *Ibid.*

33 Ekmečić 1989.

thesis of a common language a myth³⁴) was in line with wider political tendencies that were present in Europe at that time – e.g. Herder’s view of language and customs as the expression of unity of one nation.³⁵ The idea of one South Slav nation based on a common language had its opponents and various alternatives were offered instead. In that sense, the 19th century can be viewed as a battlefield for various projects for South Slavs unification into one nation. Ekmečić identifies at least three main ideas:

- 1) Community of language, which gathers South Slavs under leadership of Croatia;
- 2) Community of language, which gathers South Slavs under leadership of Serbia;
- 3) Nation as a community of historic right.³⁶

Therefore, at the root of the idea of unification there was also a competition of at least two national liberation ideologies – Croatian and Serbian.³⁷ Furthermore, there were some internal divisions or different perspectives even among these two main ideologies.³⁸

But if this provides us with the general historical context of the problems that were faced by the unification project of South Slavs, the key issue for the purpose of this article still awaits its resolution: which role did the principle of self-determination of people play in the accomplishment of this political, cultural and economic project? Was it just used as a political tool to legitimise previously defined political goals, or was there actually a genuine belief in one South Slav nation and its “right” to an independent state? In addition, who was the addressee of the alleged right to self-determination in this situation? Or, to put it differently, who were “the people” in this context?

These are extremely complex issues, and it seems that there is no consensus among the historians or political scientists concerning them. A cynic could even say that the vagueness of both the idea of South Slav unification and the concept of “people” in the principle of self-determination served the purpose of establishing a new state quite well. This fact has been noted by numerous researchers: “The protagonists of the South Slavic idea were aided in their effort by a degree of conceptual vagueness: in this context, the vocabulary of local languages contained just the word *narod*, a word that made no semantic distinction between ‘people’ and ‘nation’. Herein lay a creatively exploitable but also dangerous ambivalence“.³⁹

34 Pavkovic 1997, 12.

35 Ekmečić 1989.

36 *Ibid.* 156.

37 Pavkovic 1997, 11.

38 Calic 2019.

39 *Ibid.*, 8.

Key political figures in Serbia, such as Nikola Pašić, slowly evolved from being very sceptical about the unification of Yugoslavs in 1894 to the new pragmatism immediately prior to the Balkan Wars. This new pragmatism finally abandoned the two-people theory and accepted the one-people theory (that Serbs and Croats represent one people, with the right to cultivate their cultural differences).⁴⁰ But even when one examines the period of the First World War, it is not easy to conclude with any definition what Pašić's "real" stance was regarding the idea of one people granted the "right" to self-determination.⁴¹ It seems that he considered the geostrategic position and interests of the new country as priorities over principles such as self-determination; namely, he wrote that 20th century would be the century "...of large and strong states... small states will not be able to survive a tough economic, political and cultural competition."⁴² One of the proponents of unification on the Croatian side, Ante Trumbić, also had his concerns regarding this process and the unity of Croats and Serbs.⁴³ He, too, sort of levitated between sincere and pragmatic Yugoslavism.⁴⁴ However, even before the First World War, he and some other intellectuals from Croatia were already negotiating the unification of Yugoslavs in the case of war.⁴⁵ After the war broke out, they went into exile, formed the Yugoslav Committee with extensive support from the Serbian Government, and worked very actively on the establishment of the Yugoslav state.

Pavković is one of the authors who critically assessed the genuine belief among leading Serb and Croat figures of the existence of one Yugoslav nation as a key incentive for unification: "...in spite of the Yugoslav idea which they endorsed, the political unity achieved in 1918 was based on relatively short-term practical political interests. The Croat parties were primarily motivated by the need to defend Croatia from foreign domination..."⁴⁶ while the idea of national unity (*nacionalno jedinstvo*) of Serbs and Croats supported by Serb national ideologues was for Serbs "...an instrument – or, rather, a weapon – in the struggle of national liberation."⁴⁷ Other authors are not so critical of the possibility that, at the beginning of the 20th century, Serbs, Croats and Slovenes genuinely believed that they all belonged to one people with three "tribe" names.⁴⁸ It is important to stress that the position of other peoples that became minorities in the new state after 1918 (Albanians,

40 *Ibid.*, 47.

41 Djokic 2010.

42 *Ibid.*, 19.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 Pavkovic 1997, 13.

47 *Ibid.*, 16.

48 This is especially visible in the national historiography after the First World War. But, one should have in mind that national historiography is also one of the tools for nation-building project.

Macedonians, Hungarians, Germans...) regarding the establishment of that new state is still very much open.⁴⁹

Be that as it may, the First World War speeded up the above-mentioned processes of unification of Yugoslavs. At the end of 1914, Serbia officially declared its war goals in the Niš Declaration: "The Government of The Kingdom considers as its most important, and in these crucial moments the only goal, to secure a successful ending of this great war which... became the fight for liberation and unification of all our brothers - Serbs, Croats and Slovenes – who are not yet free."⁵⁰ Šišić argues that this was the crucial political decision, made in a very difficult moment, by which Serbia definitely abandoned the idea of Greater Serbia which would include only territories with majority of Serbs and accepted the idea of Yugoslavia.⁵¹ Allies were mentioned in the Declaration and informed about its content because the representatives of Serbia already knew that their support will be crucial for the accomplishment of the defined war goals.

There were several factors both before and during the War that determined the positions of key actors in the Yugoslav drama towards the issue of self-determination of peoples and the establishment of Yugoslav state. First of all, Pašić, for various reasons, prioritised the Macedonian issue over any eventual gains that would be made after the war (including Bosnia and Herzegovina and all other territories that were part of the Austro-Hungarian Empire).⁵² On the other hand, the great majority of the members of the Yugoslav Committee prioritised areas that were part of Austro-Hungary, such as Dalmatia and Istria. At the end of the First World War, the principle of self-determination was a convincing argument that could be used to gain most of these former Austro-Hungarian territories, but not so much, to put it mildly, when it came to Serbian pretensions over Macedonia. Furthermore, during the war, the Allies signed treaties with Italy and Romania that stipulated territorial concessions for those two countries. These stipulations were contrary to the principle of self-determination and the war goals of Yugoslav representatives. It seemed that Pašić was more willing to rely on the old diplomatic principles of negotiations and "victorious justice" than Trumbić, who assertively insisted on the application of the principle of self-determination (which was understandable, since the first step in Trumbić's idea of Yugoslav unification was the inclusion of Dalmatia, Istria and some other territories in the Croatian political space). This difference between Pašić's and Trumbić's positions was further complicated by the fact that, before and at the Paris Peace Conference, key states had different opinions regarding the importance of the application of the principle of self-determination in the post First World War order.

49 Helsinki Committee for Human Rights in Serbia 2017.

50 Šišić 1922. More on war goals of Serbia: Ekmečić 1990.

51 *Ibid.*

52 There are several reasons which arguably influenced Pašić's position. First of all, he believed that Macedonia had huge geo-strategic importance. Additionally, he was bitterly disappointed with previous encounters with Bulgaria and thought that it was of utmost importance for Serbia to once and for all resolve the Macedonian issue. Finally, Pašić originated from Macedonia.

On the other hand, it is fair to say that there was no disagreement among the representatives of Yugoslavia⁵³ at the Paris Peace Conference concerning the issue of identification of the Yugoslav peoples and “right-bearers”⁵⁴ of the principle of self-determination.⁵⁵ After all, that was already settled during very complex negotiations on the adoption of Corfu and Geneva Declarations.⁵⁶ Representatives of Yugoslavia in Paris understood the *zeitgeist* very well. Especially after the direct involvement of America in the war efforts and Wilson’s statement of 14 points, the USA insisted that Serbs, Croatian and Slovenes were actually one people with three tribes (*troimeni narod*). But, during the negotiations at the Paris Peace Conference it was obvious to everyone, including the representatives of the Yugoslav delegation, that the principle of self-determination was only one of the principles according to which new borders in Europe were to be defined. Finally, if we look at the results of Paris Peace Conference and the later developments regarding the application of the principle of self-determination to the territory of “first” Yugoslavia, we need to satisfy ourselves with the conclusion that the principle was respected only in part.⁵⁷

To conclude, it is not possible to argue that the political elites of the new Yugoslav country used the principle of self-determination and the theory of one Yugoslav people only to accomplish their already set political goals, without genuinely believing in it. The complex 19th century history of South Slav national ideologies illustrates the fact that the project of unification of Yugoslav peoples into one new state prevailed over several others before the First World War broke out. Even if sceptical of the existence of one Yugoslav people at the beginning, political leadership of Serbs, Croats and Slovenes later accepted the idea of one Yugoslav people with three names. This happened before the principle of self-determination was widely acknowledged verbally as one of the principles of the new world order.

On the other hand, one should admit that political representatives of the Serbs, Croats and Slovenes very successfully used the power of the self-determination of people and its inherent openness as a legitimising force for the accomplishment of their previous political goals. The lack of concrete content of the principle of self-determination was a nice cover for different ambitions and national ideologies of Yugoslav political elites. What these political elites did not understand at the moment was that self-determination as an “*idée-force* of powerful magnitude”⁵⁸ and its openness could also be used as a tool for the dissolution of Yugoslavia, because “despite the efforts to craft a conception of self-

53 The Kingdom of Serbs, Croats and Slovenes was not officially recognized as such at the Conference even though it had been established on the 1st of December 1918. Countries at the Conference recognized only the delegation of Kingdom of Serbia but members of Yugoslav Committee were part of the delegation.

54 Formally speaking, there is no right-bearer if there is no right.

55 Djokic 2010.

56 Janković 1967; Šišić 1922.

57 Some territorial disputes could not be solved during the Conference. That is the case even with probably most difficult one between Kingdom of Serbs, Croats and Slovenes and Italy.

58 Stavenhagen, 1996, 2.

determination that does not disturb the established order, the idea is subversive to the legitimacy of all political arrangements between distinct peoples that do not flow from genuine and continuing consent.”⁵⁹

Establishment of the Second Yugoslavia and Self-Determination

Self-Determination of People as a Legal Principle before and after the Second World War
Before one move to the role that self-determination played after the Second World War, it is necessary to highlight a couple of tendencies that existed during the inter-war period. Immediately after the Great War, the principle of self-determination was in tension with the right of conquest.⁶⁰ As previously discussed, that was the reason for hard negotiations and compromise solutions regarding territorial disputes:

...after differing principles were introduced, all participants could justifiably believe to be in the right... Whereas in the past, the peace reflected the power relations at the end of war, now justice (in the form of self-determination) stood opposed to arbitrariness (in the form of the right of conquest). The peace treaties aimed to bring more justice than their predecessors, but were not able to fulfil this aim because no domination-free relation between the participants and therefore no real self-determination could prevail.⁶¹

One of the results of this situation was that the “legitimacy of colonial rule was not challenged after the World War I, and the victorious colonial powers acquired considerable control over additional peoples by way of the mandates system...”⁶² Hence, even if one presumed that the right to self-determination did exist, peoples in these colonies were not the bearers of this right. Additionally, the entire system of minority rights in Europe was devised to somehow limit the power of self-determination of the peoples because it was obvious that new states, created after the war, were as multinational as the previous empires (Yugoslavia being one of the examples).⁶³ Or, to use the words of Mazower:

...the spread of nation-state to the ethnic patchwork of eastern Europe also meant the rise of minority as a contemporary political problem. Where a state derived its sovereignty from the ‘people’, and the ‘people’ were defined as specific nation, the presence of other ethnic groups inside its borders could not but seem a reproach, threat or challenge to those who believed in the principle of national self-determination.⁶⁴

59 Falk 2002, 41.

60 Fisch 2015, 137.

61 *Ibid.*, 145.

62 Falk 2002, 40.

63 Hobsbawm 1994, 33.

64 Mazower 1998, 40.

Another inter-war tendency was the practice of carrying out a limited number of plebiscites as confirmation of the relevance of the self-determination of peoples. But again – not always – not for all the disputed territories and, therefore, *not for all people*.

Radical change to the framework of the international legal order is always the consequence of radical change to the international system. The revisionists in the inter-war period based their argumentation in favour of the review of the Versailles Order partly on the application of the principle of self-determination.⁶⁵ However, it is disputable whether these radical changes occurred in the field of self-determination of peoples during or immediately after the Second World War. At the beginning of the War, F. D. Roosevelt and Winston Churchill proclaimed self-determination to be the general standard governing territorial changes (but, again, not applicable to colonial peoples).⁶⁶ Upon the insistence of the Soviet Union and after some very complex negotiations, self-determination of peoples found its place in the UN Charter, but only in a very limited way.⁶⁷ Namely, article 1(2) of the Charter stipulates that one of the purposes of the United Nations is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”.

But again, in a way similar to the situation at the end of the Great War, this most important multilateral treaty “deliberately refers to self-determination as a ‘principle’ rather than a right.”⁶⁸ In addition, “there is no explicit reference to self-determination in Chapters XII and XIII, with regard to the establishment and regulation of the Trusteeship System”, even though the principle is laying behind the norms found in these chapters.⁶⁹ Having in mind the fact that the legal nature of self-determination of people was disputable in the UN Charter, to put it mildly, it was still premature to discuss the issue of the bearer of that right.

After thorough analysis, Cassese concluded that the principle of self-determination of peoples in the Charter “...boils down to very little... The Charter *did not impose direct and immediate legal obligations on Member States* in this area...”⁷⁰ However, he also added that “in spite of all... limitations and shortcomings, the fact remains that this was the first time that self-determination had been laid down in a multilateral treaty”⁷¹, and that adoption of UN Charter signalled “the maturing of the political postulate of self-determination into a legal standard of behaviour.”⁷² This maturing finally occurred with the adoption of International Covenants on human rights in 1966.

65 Musgrave 1997, 57–60.

66 Cassese 1995, 37.

67 *Ibid.*

68 Falk 2002, 41.

69 Musgrave 1997.

70 Cassese 1995, 42–43 (emphasis in original).

71 *Ibid.*, 43.

72 *Ibid.*

Self-Determination of Peoples and the Establishment of the Second Yugoslavia

The establishment of the second Yugoslavia was not under the influence of the development of self-determination into a legal principle. Rather, the story of the relationship between the second Yugoslavia and self-determination of peoples must be understood as a direct result of resolving the “national question” in the first Yugoslavia⁷³ and the stance of the Communist Party of Yugoslavia toward this issue.⁷⁴ It is not possible to go into the details on these issues here, but some information is crucial for the understanding of the use of the self-determination of peoples as a principle during the establishment of second Yugoslavia.

As previously explained, all key actors in the unification of the Kingdom of Serbs, Croats and Slovenes had already agreed to the concept of a single nation with three tribes.⁷⁵ Even those that were in hard opposition to the regime, like the Croat People’s Peasant Party⁷⁶ and its leader Stjepan Radić, or the Communist Party of Yugoslavia,⁷⁷ did not oppose this position (at least not once the new state was established). As Đokić asserts, Radić strongly opposed the centralism of the new state and “...envisaged a Yugoslavia within which the Croats would get maximum autonomy, but he did not reject the idea of a Yugoslav state, or even a common South Slav identity”.⁷⁸ Banac, however, believes that Radić’s acceptance of the policy of national unity and the Yugoslav state, and even his support for federalism were only tactical steps towards Croatian independence.⁷⁹ Radić’s formula of federalism is especially interesting from the standpoint of the application of the principle of self-determination: “to us (*and to the people*), the main thing is a republic and federalism, because republic = self-determination and federalism = Norway toward Sweden and at the opportune moment Norway away from Sweden”.⁸⁰ This was especially important since, after unification, the debate between centralists and decentralists gradually turned into a Serb-Croat disagreement.⁸¹

The stance of the Communist Party of Yugoslavia (CPY) towards the establishment and constitutional organisation of the new country was especially interesting. Due to historical preconditions, the Communists of Yugoslavia argued for centralism and a unitary state but, of course, not for centralism and a unitary kingdom under King Alexander. The national question was not on the list of Communist priorities immediately after the First

73 Banac 1988.

74 Shoup 1968.

75 Section 2.2; Djokic 2003.

76 From 1920, the name of the party was Croatian Republican Peasant Party and from 1925 Croat Peasant Party.

77 The previous name of the party was Socialist Workers’ Party of Yugoslavia.

78 Djokic 2003, 144.

79 Banac 1988, 236.

80 *Ibid.* It should be recalled, however, that Radić changed his political stance very often and it is not always easy to grasp whether these changes were only tactical moves, or genuine transformation.

81 Djokic 2003, 142.

World War and it was very difficult to find consensus on this issue among the Communist leaders at that time.⁸² In essence, the leaders of CPY believed in one Yugoslav nation and any apparent tensions between the various nationalities were mostly perceived as the secessionist activities of the Croatian, Serbian and Islamic bourgeoisie.⁸³

In the beginning, all this served them well because “as a result of its support for a unitary state, the Party gained favour in Serbia and Montenegro, and by its unceasing attacks on the government, it attracted support in regions where national unrest was growing”⁸⁴ The effect was that the CPY was the fourth party in the new Parliament after the elections in 1920, with almost 200,000 votes and 59 seats. As opposed to some other parties (Radić’s HSSP is just one of the examples), CPY even had a relatively good regional coverage – their best results were achieved in Macedonia and Montenegro, worst in Slovenia and Croatia - Slavonia. Still, it did well in some of the urban centres.⁸⁵

However, in May 1923, the Comintern criticised the CPY’s stance on the national question calling it “primitive”⁸⁶ and “insisted that the Yugoslav Party come out for ‘absolute self-determination of nationalities, even to the point of actual separation from the Yugoslav state’”⁸⁷ The position of the Comintern was in accordance with Stalin’s general stance on national question at that particular time.⁸⁸ Namely, during the period of 1918-1922, Bolshevik propaganda “concentrated on the right of nations to self-determination and severely censured greater-Russian chauvinism”⁸⁹ In addition, the position of the Comintern was connected to the Bolshevik’s negative standpoint towards the Kingdom of Serbs, Croats and Slovenes. First of all, Lenin saw this new state as the consequence of hegemonic expansion of Serbia. Second, the new state was perceived as a strong ally of imperialist states – France and Great Britain – and enemy of the Soviet Union.⁹⁰ Therefore “the obvious strategy for the Comintern was to look for allies among the non-Serbian nations that felt oppressed and to support their... right to secede”⁹¹

Having in mind the internal factions, the strong posture of Comintern, and the fact that the National Assembly formally banned the Party in 1921, the CPY continued to face very serious crises up to 1934. As one observer put it, during this period of time, the CPY “tested all the viewpoints that were possible about Yugoslavia and about the national question in

82 Vlačić 1987, 34, 37.

83 *Ibid.*, 48.

84 Shoup 1968, 20.

85 Banjac 1988, 331.

86 Vlačić 1987, 76.

87 Shoup 1968, 23.

88 Djilas 1991, 50.

89 *Ibid.*, 49.

90 *Ibid.*, 55–56; Vlačić, 28.

91 *Ibid.*

Yugoslavia.”⁹² Until the rise of Hitler in Europe, Stalin argued for the right of self-determination and secession of all peoples in Yugoslavia, including the Albanians. In 1936, Stalin and the leaders of CPY finally, therefore, agreed on the need for Yugoslav unity:

The identification of the Party with the slogans of self-determination and even secession was apt to be misleading in this respect; the Yugoslav Communists never *really* believed that these rights would have to be exercised, and Stalin’s argument that the boundaries of Yugoslavia should not be taken as the legal starting point for the solution of the national question seems to have had little influence within the Party... Thus the Party had come to acquire sensitivity to the point of view of the individual Yugoslav nationalities while at the same time being fully committed to finding a Yugoslav solution to the national question.⁹³

This change in Stalin’s stance on national question was *inter alia* a consequence of his new pragmatism⁹⁴ and belief that “Russian language and culture, once they were censored and ‘adapted’ by the Bolsheviks, would provide a more powerful cohesive force than pure Marxism-Leninism.”⁹⁵

The sensitivity of the CPY to individual Yugoslav nationalities during the 1930’s was even more important having in mind the complete failure of the integral Yugoslavism of King Alexander at the time of his dictatorship (1929-1934).⁹⁶ On 3 October 1929, the state officially changed its name to become the Kingdom of Yugoslavia and was administratively divided into nine *banovinas* (provinces). However, this integral Yugoslavism was rejected, especially among Croats who, after their initial support for dictatorship, were afraid that this was just another name for their own denationalisation.⁹⁷ Additionally, integral Yugoslavism has been equalised with the regime and its undemocratic nature which, *inter alia*, made it unpopular even among some Serbs.⁹⁸ Finally, King Alexander was so focused on the Croatian question that he did close to nothing to prevent the permanent state crisis in Macedonia and among the Albanians.

It is interesting to note in this regard that even though integral Yugoslavism was the key concept of the King’s ruling, it has never been explained in detail: “Despite literally thousands of laws... calling for the abandonment of ‘tribalism’, and despite the trumpeting of a new and modern Yugoslav identity, a core question remained unanswered: did the shift to Yugoslavism entail complete elimination and denial of a ‘tribal’ past, or did it mean building an ecumenical Yugoslav identity on ‘tribal’ foundation?”⁹⁹

92 Banjac 1988, 332.

93 Shoup 1968, 55–56.

94 Jović 2015, 28.

95 Djilas 1991, 50.

96 Nielsen 2014.

97 Djokic 2003, 150.

98 *Ibid.*

99 Nielsen 2014, 150.

The CPY learned the lesson from this failed attempt at integral Yugoslavism and, as already mentioned, also insisted on the self-determination of Macedonians and Montenegrins, the autonomy of Bosnia, and freedom and equality of the national minorities.¹⁰⁰ However, they were not politically strong enough to implement these ideas before the war broke out. It was a radical change of circumstances that put them in a position to offer their solution to the national question. At the beginning of the war in Yugoslavia, in order to begin the fight for national liberation, the CPY still needed to wait for the formal beginning of a war between the Soviet Union and Germany. After this finally happened on 22 June 1941, the CPY started to organise resistance but, at least at the beginning, it was very cautious not to mention that resistance's revolutionary goals.¹⁰¹ In December 1942, Tito mentioned the "inseparably related issues of national liberation struggle and national liberation"¹⁰² for the first time since 1937, as well as – even more importantly – the principle of self-determination and secession. Equally significant, the idea was that only nations (Montenegrins, Macedonians, Croats, Slovene and Serb) and not minorities (Albanians, Hungarians, etc.) were the bearers of the right to self-determination.¹⁰³

The spirit of Tito's ideas and the increased self-confidence of the CPY were felt during the second Anti-Fascist Council in 1943, where it was confirmed that the nations of Yugoslavia "started to liberate their country and by doing so not only gained but also secured the right of self-determination, including the right to secession..."¹⁰⁴ This was repeated in the *Decision on the building of Yugoslavia on federative principles*, with an addition that the national liberation struggle "created an inseparable brotherhood between the Yugoslav nations" ("*skovala nerazdruživo bratstvo naroda Jugoslavije*").¹⁰⁵ The substance of the Decision in 1943 on the building of Yugoslavia later became Article 1 of the 1946 Constitution which cemented the notion of "revolutionary self-determination."¹⁰⁶ Some major proponents of the above stance on the revolutionary right to self-determination of peoples in Yugoslavia argued that this meant that the right of self-determination was once and for all used during the fight for national liberation and that it could hardly be used again. Moša Pijade, one of the key figures in the process of drafting the Constitution, commented more than once on this issue:

100 Shoup 1968, 50.

101 Even the first Anti-fascist Council held in Bihać in 1942 was very cautious in its conclusions on this issue.

102 Štiks 2015, 38.

103 Shoup 1968, 75.

104 The Declaration from the Second Session of the Anti-Fascist Council of National Liberation of Yugoslavia, November 29, 1943. See: Archives of Yugoslavia, n.d.

105 Decision on the building of Yugoslavia on federative principles.

106 Bing 2016.

Our Constitution contains no clauses which would give the republics the right of secession... Insofar as the Constitution has mentioned the right to secession, it is only in connection with the origin of the FNRJ and not in order to ensure that our republics still have today the right to separation... Meanwhile, although our Constitution has not guaranteed the right to secession, this does not mean that it is ruled out altogether. It is theoretically possible that *some people or people's republic* would bring up the matter of its secession. But that would be a thing to be solved *in concreto*...¹⁰⁷

Hence, the possibility of applying the right of self-determination in Communist Yugoslavia was limited even further. It seems that this view was supported by at least some of the scholars who later dealt with this issue,¹⁰⁸ but it also had some serious opponents (one of whom was Kardelj).¹⁰⁹ Tito, on the other hand, believed that this was only a theoretical issue, as there was a sincere and genuine will of all Yugoslav nations to live in one country: "Josip Broz (...) almost never, or never, particularly after the People's Liberation Struggle and the armed phase of the Revolution, spoke of elements of *the right to self-determination including secession*".¹¹⁰ Anyway, the above mentioned documents always used the term "*narod*", which could imply both people in an ethnic sense and nation in one republic as the bearer of the right to self-determination. In the above quoted letter written by Moša Pijade, it is obvious that he was speaking of "the right of people or a people's republic" without specifying exactly who the right-bearer was. Future practice will reveal the fundamental importance of this issue, which has been noted by many authors: "In one of the standing documents of the future socialist Yugoslavia, the very definition of peoples – the Yugoslav ethnic nations and/or the peoples of the constitutive republics is imprecise and ambiguous".¹¹¹ Again, as it was the case during the establishment of the first Yugoslavia, the second Yugoslavia represented "a 'catch all' formula, which offered something to many sides, yet everything to none".¹¹²

Therefore, the new federal state was created based on the rather mythical acts of self-determination of its five constituent nations named in 1943.¹¹³ In 1943, it was literally impossible to measure the real level of support of the people for the new regime and state organisation, but the Communist power was arguably cemented in the first few years after the war notwithstanding the fact that there was also some resistance. Even though the 1946 Constitution established the federal state, due to the real power of the Communist Party, Federal Peoples' Republic of Yugoslavia was "a state that was probably more centralised state than ever since its creation in 1918".¹¹⁴ Another author commented on the 1946

107 Hondius 1968, 142–143 (emphasis added).

108 Bakić 2011, 56; Shoup 1968, 115.

109 Bakić 2011, 59.

110 Milosavljevski 1990, in: Bing 2016, 74.

111 Štiks 2015, 49.

112 Jović 2003, 160.

113 Pavkovic 1997, 46.

114 *Ibid.*, 61.

Constitution in this regard by acknowledging that it “might give grounds for asserting both that nations were sovereign, and that republics were sovereign, but in fact the party was sovereign. As long as this remained the case, there was no need to consider any of the political issues concealed in the phrase ‘the nations and their republics’”.¹¹⁵

The crisis of the relationship between the Comintern and Yugoslavia in 1948 further cemented the Communist regime. To be sure, many victims of the Secret Police were sacrificed to lay the foundation for its support. But, generally speaking, the real danger of foreign intervention mobilised popular support for preserving national independence. The year 1953 was important for several reasons, but two were more significant: the death of Stalin and with it the relaxation of CPY measures against “internal enemies”, and the adoption of the Constitutional Law. This period was marked by the hope of Yugoslav leaders that it would be possible:

...to create the conditions under which social change and economic progress would lead to a mixing of the nationalities and a lessening of their parochial national outlooks rather than continuing to rely indefinitely on the revolutionary formulas and techniques of political indoctrination employed as a means of transforming national attitudes in the immediate post-war years. The influence of this new approach toward the national question was evident in the constitutional law of 1953...The right of self-determination was no longer mentioned in the new constitutional law, while sovereignty was ascribed to the republics only in an indirect fashion.¹¹⁶

One of the consequences was that the right to self-determination was not mentioned in this Constitutional Law. However, instead of an abstract right to self-determination which was impossible to implement due to the power of the Communist Party, republics gained some small, but concrete benefits.¹¹⁷ This tendency continued between the Constitutional Law of 1953 and the new Constitution in 1963. This period, which actually came to an end in 1974 or even before, was marked by oscillations or dilemmas about the future prospects of Yugoslavia. At the beginning, different arguments were based on the ideological reasons.¹¹⁸ Later on, they became part of the national question (interestingly enough, this was in a way similar to the inter-war period).

115 Budding 2007, 100.

116 Shoup 1968, 186.

117 *Ibid.*

118 Jović 2003, 161.

Anyway, it seems that Tito hoped that building a Yugoslav nation was possible (at least in the long term). He also believed in the South-Slav nature of the country.¹¹⁹ But, he was also more than aware of all the negative consequences of the failure of King Alexander's project of integral Yugoslavism, and he was therefore very cautious in this regard. On the other hand, there was Kardelj with his more doctrinal stance toward the national question and anti-statist arguments.¹²⁰ He persistently refused the possibility of establishment of a Yugoslav nation. He also insisted that the essence of Yugoslav unity was not the ethnic similarity between the peoples, but Socialist ideology. In a somewhat ironical way, it later turned out that he was right about this. However, his argument – that, if you allow all nations to create their own states within Yugoslavia, separatism will be defeated – has not been confirmed in practice.¹²¹ Maybe it is overly simplistic to view this battle of different conceptions as a battle between the two men, but it is illustrating. At the end, Kardelj won and Tito's conception had to retreat. This marked the last phase of the history of Socialist Yugoslavia.¹²² Or at least the last phase before the war.

The Dissolution of Yugoslavia and Self-Determination

Self-Determination in Post-Cold War Era

On 9 November 1989, the citizens of East Berlin were free to cross the border of the country – the Berlin Wall had fallen. A unification treaty was ratified in the Bundestag and went into the effect on 3 October 1990. German people celebrated this day as the victory of the self-determination of the people. The celebration was, however, followed by an increasing fear that the rise of self-determination of peoples in Europe would not only mean unification, but also (violent) dissolution. Just one month after the unification of Germany, the Heads of State or Government of the States participating at the Conference on Security and Co-Operation in Europe (CSCE) held meetings in Paris. In the final Act of those meetings, the Charter of Paris for New Europe, they, *inter alia*, reaffirmed “the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, *including those relating to territorial integrity of States*”.¹²³

119 Shoup 1968, 189. On the other hand, there are authors who do not support this kind of conclusion (Bakić 2011).

120 Jović 2003, 168.

121 *Ibid.*, 170.

122 *Ibid.*

123 OSCE, n.d.

This last emphasis has not been made by accident. Namely, heads of states and governments wanted to underline that the application of self-determination of people did not imply change of international borders. From today's perspective, the naivety of the heads of states or governments that were present at the Paris meeting has been astonishing, since they declared that "the threat of conflict in Europe has diminished".¹²⁴ Armed conflicts in Yugoslavia began some six months later.

Armed conflicts in Yugoslavia represented a shock to the new post-Cold War world in which liberal democracy promised progress.¹²⁵ This was especially the case with the European space:

In the late twentieth century, which we had come to call the "post-war" and then "post-Cold War" era, *European* states simply do *not* descend into a state of total warfare. *European* people in the late twentieth century do *not* commit atrocities against one another. *European* people do *not* forcibly "cleanse" ethnically diverse towns and villages. *European* political and military leaders do *not* provoke or promote any practice resembling *genocide*. Atrocities, crimes against humanity, massive human rights abuses do not happen in *Europe*, and if they did, *Europeans* would hold the perpetrators accountable.¹²⁶

The leaders of the Western world were, of course, aware of the serious crises in USSR and Yugoslavia, but they still believed that insistence on democracy and the internal aspect of the right to self-determination could prevent major violence. The space for this internal aspect of self-determination opened up when USSR, as the leading force insisting on the exclusively external aspect of self-determination, experienced a major crisis. It was assumed that the internal aspect of self-determination could provide solid replacement for ethno-nationalism, which looked completely outmoded from the perspective of liberal democracy.¹²⁷ The reason was that the main function of this internal aspect of the right was to protect the rights of the people from their own governments.

Many people rightly pointed out that self-determination from the Wilsonian perspective already presumed the concept of self-government and democracy. This fitted well with the new insistence on the internal aspect of self-determination.¹²⁸ In a changing post-Cold War era, this U-turn from external to internal aspect of self-determination was perceived as actualisation of some of its potentials.¹²⁹ It seemed that this process was in line with the new *zeitgeist* which was arguably best illustrated by the advocacy of the alleged right to democratic governance:

124 *Ibid.*, 8.

125 Hayden 2013.

126 Wilmer 2002, 27–28.

127 Eide 1993.

128 Rosas 1993.

129 Thornberry 1993.

When the Covenant [on Civil and Political Rights] came into force, the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies), and became a right of everyone. It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and opens participation in the democratic process of governance freely chosen by each state.¹³⁰

The efforts made by Franck and some other authors to assert the internal aspect of the right to self-determination of people was not based on some new rules of international law (as can be seen from above quote). It was rather based on the (new) interpretations of the already existing sources of law which were also present in the Cold War period.¹³¹ In addition, it was the consequence of the practice of Human Rights Committee, which continuously underlined the importance of the internal aspects of self-determination of people.¹³² One of the perceived advantages of the internal aspect of the people's right to self-determination was that it could avoid the trap of binary selection between self-determination of peoples and the territorial integrity of states. The idea was that self-determination was deeply connected with other human rights included in the Universal Declaration and Covenants. Therefore, the self-determination of peoples guarantees democratic governance. If there is a guarantee of democratic governance followed by the additional respect of minority rights, then there is allegedly no reason for violent secessions. Hence, immediately after the fall of the Berlin Wall, many people believed that the flag of self-determination of peoples could be used for the victory of democracy.

Instead, Europe witnessed the rise of “postmodern tribalism” – “the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute different uninational and unicultural states”,¹³³ and/or irredentism which in this context involves “self-determination by members of a single ethnic group who inhabit more than one state”.¹³⁴ How the clash between the great expectations from the rise of the internal aspect of self-determination and the unfortunate practice of post-modern tribalism occurred will be analysed in the following section.

130 Franck 1992, in: Hannum 1996.

131 Rosas 1993, 24; Salmon 1993.

132 Higgins 2009, 830.

133 Franck 1993; Higgins 2009.

134 Musgrave 1997, 211.

Self-Determination and the Violent Dissolution of Yugoslavia

The story of the unification of the First Yugoslavia began with the accepted term of one people and three *tribes*. After the Second World War, however, these “tribes” no longer believed that there was only one people in Yugoslavia. At the end of the 20th century, some of them no longer believed that they should live together in one country. This, of course, was the consequence of various historical circumstances in the century and the relatively short life of the Yugoslav state(s).

Different interpretations of the federal nature of Socialist Federative Republic of Yugoslavia (SFRY) and various perspectives regarding its future were, *inter alia*, legitimised by the invocation of the self-determination of peoples.¹³⁵ Controversies concerning the bearer of the right to self-determination were revived, but this time there was no Tito or a strong CPY to pragmatically solve the dispute. In other words, since the old ideology of Communism was in crisis, political elites found nationalism and the insistence on a particular version of self-determination to be powerful tools for self-legitimation.¹³⁶ Nationalism became the political expression of social dissatisfaction, and liberal democratic alternative was rejected.¹³⁷ Therefore, it is reasonable to conclude that self-determination of people had been used as a tool for nationalist goals once again. It was a powerful and persuasive tool in this context for several reasons: first of all, one of the deep roots of self-determination can be found in nationalism;¹³⁸ second, the “penumbra of uncertainty” surrounding the concept of self-determination was so pronounced that it obscured the term’s widely accepted meanings (in these types of situations, self-determination could be used for various mutually opposed objectives).¹³⁹ Finally, as already explained, the genesis of the use of self-determination of peoples in the Yugoslav context has always been disputable, and different interpretations of its application were thus expected.

In the situation that involved high political tensions and the rise of ethnic-nationalism in all Yugoslav republics, it is perhaps understandable that legal scholars could not reach a consensus on the right interpretation of the 1974 Constitution regarding the application of self-determination of peoples.¹⁴⁰ Politicians took the floor and two main positions became obvious. In March 1991, at one of the crucial meetings that were held before the hostilities started, presidents of the six republics met in Split to discuss the future of the country.¹⁴¹ Milan Kučan from Slovenia and Slobodan Milošević from Serbia presented two contrasting positions. On the one side, Kučan advocated for the right of self-determination and secession of Yugoslav republics. On the other, Milošević claimed that

135 Bing 2016, 79.

136 Jovanović 2002.

137 Gligorov 2017, 384.

138 Summers 2007.

139 Tierney 1999.

140 Oklopčić 2013; Roth 2015.

141 Budding 2007, 92.

the right to self-determination, including secession, was reserved for nations regardless of where they lived. Possible political repercussions of these two positions were obvious, considering that Slovenia's republic and national borders were almost synonymous and that approximately 30% of Serbs in SFRY lived outside Serbia.

The aforementioned disagreement between the representatives of the republics deviated from earlier disagreements on the right of self-determination in Socialist Yugoslavia. As previously explained, the disagreement after the Second World War concerned whether the right of self-determination was used once and for all during the war, or the right of self-determination including secession still existed. At the end of the 1980's and the beginning of the 1990's, however, the situation changed:

Official actors on all sides affirmed the existence of a continuing right to self-determination including secession... The debate focused instead on two interrelated issues. The first was who could exercise the right to self-determination—the (citizens of a) republic or the (members of a) nation. The second was who could establish a procedure for realizing that right. Could a republic act unilaterally to leave Yugoslavia, or was some form of all-Yugoslav agreement required?¹⁴²

In September 1989, Slovenia adopted several amendments to the republic's Constitution by which they tried to resolve these disputes unilaterally. In these amendments, they argued that the Slovene nation had the right to self-determination including secession, and that Slovenian legislation could establish procedures through which it could exercise its right to secession.¹⁴³ These arguments were disputable, to say the least, and the entire thing ended up before the Constitutional Court.¹⁴⁴ The Court decided that “the peoples of Yugoslavia and their Socialist republics do have the right to self-determination including secession,”¹⁴⁵ but that “establishing procedures for realising the right to self-determination was a matter of the federal Constitution, not the republic ones, and that it could be decided only with the agreement of all the Socialist republics and autonomous provinces.”¹⁴⁶ This opinion of the Court was backed by the invocation of Article 5 of the Constitution, which stipulated that the territory of the SFRY was a single unified whole and that borders cannot be changed without the consent of all the republics and autonomous provinces.¹⁴⁷

The plans to constitutionally reconfigure the state into a confederation or a strong federation later failed, and in the first half of 1991, the SFRY entered a serious constitutional crisis. On 25 June 1991, after all the attempts to find a compromise solution had failed, Croatia and Slovenia declared their independence. The first sentence of the Slovenian Declaration of Independence mentioned the right to self-determination (interestingly enough, it

¹⁴² *Ibid.*, 109.

¹⁴³ *Ibid.*

¹⁴⁴ Iglar 1992, 279.

¹⁴⁵ Budding 2007, 109.

¹⁴⁶ *Ibid.*

¹⁴⁷ Jovanović 2002, 76.

mentioned it as a part of natural law): “based on the fundamental principles of natural law, i.e. the right of the Slovene nation to self-determination... and on the basis of the absolute majority vote in the plebiscite held on 23 December 1990, the people of the Republic of Slovenia will no longer be part of the Socialist Federal Republic of Yugoslavia”¹⁴⁸ The first sentence of the Croatian Declaration of Independence stipulates that the Declaration is based on Article 140 of the Croatian Constitution from 1990.¹⁴⁹ This article also mentions the right to self-determination.¹⁵⁰ Croatia’s Declaration of Independence stipulates that the Republic of Croatia had the right to self-determination, including secession, even according to the earlier Constitutions of the Federal People’s Republic of Yugoslavia and the Socialist Federal Republic of Yugoslavia. A dispute over these issues still existed, but there was no one in the SFRY who could resolve them anymore. Armed conflicts broke out, and it was obvious that the stance of international actors would be crucial.

Just four days prior to Croatia and Slovenia declaring their independence, the US Secretary of State, James Baker, visited the SFRY.¹⁵¹ Even though he reiterated the support of his country for its integrity, it was clear that the United States would not actively intervene in the crisis. Croatia and Slovenia understood this as license to push the secessionist programme. The policy of the European countries was inconsistent. Verbal support for the territorial integrity of the SFRY was strong, but there were clear signs that at least some countries – led by Germany, Austria, Hungary and Denmark – were providing at least covert support to the secessionist projects.¹⁵² German Chancellor Helmut Kohl declared his support for Slovenia and Croatia’s independence directly, invoking the right to self-determination.¹⁵³ In its Declaration on the situation in Yugoslavia, the European Commission also made reference to the right to self-determination.¹⁵⁴

The Declaration of August 1991 made it clear that the relevant authorities’ Declaration on Yugoslavia, made at the Ministerial Meeting held in Brussels on 16 December 1991, was crucial to the recognition of ex-Yugoslav republics as new states: “The Community and its Member States agree to recognise the independence of all the Yugoslav Republics fulfilling all the conditions set out below...”¹⁵⁵ The Declaration also invoked the work of The Arbitration Commission of the Conference on Yugoslavia (the Badinter Committee, named after its President), which was established under the European Community Conference on Yugoslavia as its primary legal organ. The Arbitration Committee was founded as an *ad hoc* organ “in the absence of established mechanisms for dealing with such intra-

148 Government of the Republic of Slovenia, n.d.

149 Narodne novine n.d. 1.

150 Narodne novine n.d. 2.

151 Radan 2002, 155.

152 Woodward 2000, 221.

153 Radan 2002, 162.

154 *Ibid.*

155 Dipublico n.d.

state conflicts”.¹⁵⁶ This Arbitration Committee was a rather unusual one. Namely, the rule of procedure was not established at the beginning of its operation; it was not clear what the applicable law would be; the composition of Committee was peculiar, having in mind its main purpose (there was no one from the SFRY and the five Presidents of the Constitutional Courts of EC Member States were to take decisions which encompassed not only constitutional, but also international law issues); the exact mandate of the Committee was not obvious.¹⁵⁷

In the Opinion No. 1, handed down on 29 November 1991, the Badinter Committee avoided the issue of self-determination and secession, and ruled that the SFRY was in the process of dissolution. This stance was crucial because, by doing this, the Committee avoided having to rule on the issue of legality of secession of the former republics. It ruled that the “existence or disappearance of the state is a question of fact” and, keeping in mind various factors (plebiscites in Croatia, Slovenia and Macedonia as well as relevant decisions in Bosnia and Herzegovina; powerlessness of federal and republics’ authorities to enforce ceasefire agreements; lack of representation of key federal institutions), took the decision that Yugoslavia was in the process of dissolution.¹⁵⁸ In the Opinion No. 8 of July 1992, the Committee held that the process of dissolution was “now complete and that SFRY no longer exists”.¹⁵⁹ This difference between dissolution and secession was noted and accepted by several authors.¹⁶⁰ However, it is not always clear how one could note the difference between secession and dissolution, since logically in most cases dissolution starts with secession (under the condition that there is no agreement between all the federal units on the issue of dissolution).

Other important issue that was ruled upon by the Badinter Committee concerned the borders between Croatia and Serbia, and Serbia and Bosnia-Herzegovina. The Committee decided that “the boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at... Except where otherwise agreed, the former boundaries become frontiers protected by international law”.¹⁶¹ The Committee based this decision on “the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognised as a general principle”.¹⁶² This could be viewed as an extremely original contribution of the Badinter Committee to the theory of international law. Namely, although the principle of *uti possidetis* had indeed been used in the

156 Terrett 2017.

157 *Ibid.*

158 Pelle 1992, 183.

159 Radan 2002, 205.

160 Crawford 2007, 390.

161 Pelle 1992, 185.

162 *Ibid.*

process of decolonisation, this was the very first case of its application to a federal country outside the process of decolonisation. As such, the reasoning of the Badinter Committee in Opinion No. 3 came under heavy fire in the international law doctrine:

To simply apply *uti possidetis* without any underlying justification is hardly convincing. According to the principle of self-determination, as applied after the First World War, one would probably have had to organize plebiscites in many frontier areas of Croatia and Bosnia-Herzegovina. A lot can be said for the approach made by the Badinter Committee, but one wonders whether lawyers should automatically declare, as legally prescribed, what they consider to be the most appropriate solution in political terms.¹⁶³

But, for the purpose of this article, Committee's Opinion No. 2 was arguably the most important of them all. In it, the Committee needed to answer the question whether "the Serbs in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, has the right to self-determination."¹⁶⁴ The Committee replied that it:

...considers that international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.

Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.¹⁶⁵

It seems reasonable to conclude that the Arbitration Committee intentionally decided not to invoke self-determination of peoples as the basis of statehood of new states (former Yugoslav republics). Instead, it concluded that their independence was a state of fact. In addition, the decisions were based on the rules of international law and not on the national law of SFRY.¹⁶⁶ At the same time, it concluded that various intra-republic entities could not invoke the principle of self-determination to change the "existing frontiers". However "the method used by Commission was hardly in accordance with traditional doctrines (of international law)... Adoption of this approach has represented not just a failure to look after, but also violation of international legal rules."¹⁶⁷

163 Frowein 1993, 217; Weller 1993.

164 Pelle 1992, 184.

165 *Ibid.*

166 Roth 2015.

167 *Ibid.*, 56–57.

The Committee rightly admitted that international law does not spell out all the implications of the right to self-determination, but then again it controversially based its decision on the principle of *uti possidetis juris* although outside of the colonial context. Also, it is not easy to understand the argument that federal borders were sacrosanct because of the principle of *uti possidetis*, since this principle was used in the process of decolonisation based on the right to self-determination of peoples. It seems that the Committee concluded that the independence of the former SFRY republics was not based on the right of self-determination (dissolution as the question of fact, even though both Slovenia and Croatia stipulated the right to self-determination in their Declarations of Independence), but that their borders were still protected by the *uti possidetis* principle, which is applicable in the situation that involves the self-determination of peoples. Third, by adopting this kind of rationale in its Opinion, the Committee avoided having to provide an answer to the key issue – who was the bearer of the right to self-determination, including secession, in the SFRY (who were *the people*): nations, republics, or neither of them?¹⁶⁸ Fourth, even if Serbs in Bosnia and Herzegovina and Croatia did not have the right to secede from those new states (that was another issue – whether these entities were states on 29 November 1991), that could not mean that the borders of Bosnia and Herzegovina and Croatia could not be changed as secession was usually understood as the question of fact in international law (of course, if Croatia and Bosnia-Herzegovina were states in November 1991, other states should not provide help to secessionist actors since that would mean the violation of non-intervention and/or prohibition of the use of force rules of international law). Fifth, as some sort of restitution for denying the minorities in new states the external right of self-determination, the Badinter Committee insisted on respecting their rights and the internal right on self-determination, but failed to specify the substance of that right (Opinion no. 2).¹⁶⁹

Coupled with the way that the Committee had been established, and the position of the European Community Member States at the end of 1991, these issues made the Badinter Committee an easy target for accusations of bias. Anyway, the Commission was clear (to repeat): “The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at...”¹⁷⁰ That meant that “the disintegration of the Yugoslav federation was permissible only along its constituent federal republican units, leaving no room for adjusting borders to ethnic divisions, or for further claims of independence for minorities trapped within those borders”.¹⁷¹

168 Radan 2002, 221.

169 Kovacs 2003. Of course, opinions of Badinter Commission raised several other issues, but these are crucial ones having in mind the issue of application of the right of self-determination in Yugoslavia.

170 Pelle 1992, 185.

171 Kovacs 2003, 441; Craven 1995, 412.

These international law controversies became in this way the crucial part of the process not just of “legalizing, but implicitly legitimizing of concrete project of Croatian independence too”.¹⁷² This is arguably also the reason why these international law issues became almost inseparable from national myths of new countries established in the Yugosphere.

Even though opinions of Badinter’s Commission were perceived in Federal Republic of Yugoslavia as unjust and based on political rather than legal criteria, one positive consequence of it for Serbia was that Kosovo’s¹⁷³ claim to independence could not be realised in accordance with international law. Once again, the same as after the First World War, the international community opened the door to self-determination, but only to a certain degree. Afraid that it might cause indefinite fragmentation of states, it decided to limit the possibilities for its application. However, after the 1999 armed conflicts in the Federal Republic of Yugoslavia and especially in Kosovo, the situation changed again and a great number of states decided to recognise the independence of Kosovo (the promulgation of Kosovo’s Declaration of Independence occurred in 2008). Interestingly enough, there is no mention of the term self-determination of peoples in this Declaration.¹⁷⁴ Rather, Kosovo’s independence is described as the final stage of SFRY’s violent dissolution.¹⁷⁵ This was arguably a part of a wider strategy for independence – the proof is the fact that the written contribution of the authors of the Declaration presented before the International Court of Justice¹⁷⁶ did not insist on the right of self-determination of peoples as the basis for Kosovo’s independence.¹⁷⁷ Such a strategy could have been employed because of the widespread opinion that granting independence to Kosovo would be in contradiction to the conclusions of the Badinter Committee:

Independence for Kosovo would imply that, for the first time during the Yugoslav crisis, statehood would be granted to a territory smaller than a former federal republic. Unless Yugoslavia (Serbia-Montenegro) would agree to a negotiated divorce, the recognition of Kosovo’s independence would override the rule of *uti possidetis* (prescribing the territorial integrity of federal republics), or at least the way this principle was applied by the EU’s Badinter Commission, which limited the right to independent statehood to former republics... Predictably, such a decision would provide new ammunition to those critics who, all throughout the 1990s, kept arguing that the borders of former federal units within Yugoslavia were not proper units of future statehood.¹⁷⁸

172 Oklopčić 2015, 8. Of course, this is equally true in the case of independence of other ex-Yugoslavian republics.

173 The official name for Kosovo in Serbia is Kosovo and Metohija.

174 Republic of Kosovo Assembly n.d.

175 *Ibid.*

176 That was an official name of Kosovo delegation before International Court of Justice in the process of Advisory opinion on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo.

177 Hrnjaz 2012.

178 Kovacs 2003, 446–447.

The same author predicted that different types of arguments (which would imply a “certain degree of legal sophistry”¹⁷⁹) would be used in order to avoid the accusations of the use of double standard concerning the application of the right to self-determination in the case of Kosovo.¹⁸⁰

Conclusion: After the End

Everyone wants to be free. But free from whom? Free from others. I (self) and other (not-self) are absolutely opposed, but mutually constitutive of each other.¹⁸¹ In some circumstances “I” could take the form of plural (“We”) and there is only one small step between “we” and “we, the people”. “We, the people” is one of the versions of “we”. Usually, the process of becoming “we, the people” from “we” is both spontaneous and deliberate. When the process is “done” (and we will see that the process is never done), “we, the people” usually declares its wish to be free from other peoples. “We, the people” wants to have the power to determine its future without any interference from other(s).

In one historical moment (not literally, of course), due to complex circumstances, Serbs, Croats and Slovenes (or their elites at least) started to believe that they could become “we, the people”. They naturally wanted to become free from Austro-Hungary and other others. They wanted the power to determine their own future and that was possible only in a big country (both Pašić and Kardelj insisted on this). And they succeeded in creating a state against all the probability – despite the power of their adversaries, and thanks to their wisdom and idealism. They wisely used the new emerging power of the weak: the self-determination of peoples. But that did not mean that they succeeded in creating “we, the people” in new state. No one will ever know exactly how many Croats supported the creation of Yugoslavia at the end of 1918, or how many of them really believed in one Yugoslav nation. But it is reasonable to conclude that several years later, a great majority of them saw Serbs as other, and not as part of “we, the people”. And then, some of the Croats wanted to be free from that other. First at a smaller scale, within the federation. Later, they decided they wanted to become completely free by using the same principle of self-determination of peoples.

This is one of the most important lessons about the principle of self-determination of peoples. The concept of “the people”, and with it the principle and later right to self-determination, is not fixed; it is relational. And it could be multidimensional. That is one of the reasons for its strength and weakness, for its attractiveness and the fear of it. That is also the reason why international law has so many problems with self-determination of peoples. It is usually presumed that one of functions of the (international) law is to limit the power by fixing possible interpretations. But, the self-determination of peoples is one of

179 *Ibid.*

180 *Ibid.*

181 Allot 1993, 179.

those areas of international law that resists firm limitations of interpretations. The reason is the power behind the principle and unwillingness of states to limit that power.

In the inter-war period, some subjects in Yugoslavia believed that they could create the “we, the people” described above. And if the idea of Yugoslav “we, the people” ever had any chance, it was compromised by insincere insistence on integral Yugoslavism.

The Communists’ response was radical. It was caused by several factors: Stalin’s insistence on the self-determination of peoples including secession; the use of the national question by the CPY to benefit the Socialist revolution; and King Alexander’s fatal failure with the idea of integral Yugoslavism. In 1943, the CPY used self-determination of peoples including secession to create the myth that, this time, most Croats, Serbs, Macedonians and all others had really chosen freely (on their own) to live and be part of Yugoslavia. But, that was just a useful myth. As a result of the power of the Party after the Second World War, no one was really free. In addition, the Party also decided not to cultivate “we, the people” because some of the main ideologues of the CPY were afraid that a one nation project necessarily represented a cover for hegemony.

The use of self-determination of peoples including secession as a legitimising force by the CPY had limited success. It helped with the survival of a state that experienced horrifying, almost inconceivable, crimes during the Second World War. But, the price was that the seed of violent break-up had been planted. The leaders of the CPY thought that they would never need to resolve the inherent tensions between Yugoslavia and its republics/people. Yugoslavia outlived them, and then came other actors who needed to resolve the tensions. Those actors understood very well that self-determination of peoples not only had the power of creation, but that it was also a force of destruction. The genesis of the second Yugoslavia led to the reconfiguration of self and not-self once again. The new self, who wanted formal recognition, was the self of several republics/peoples. It is important to stress in this regard that the promises of self-government and the internal aspect of self-determination could not restrain the destructive power of nationalism. The priority for peoples was not democracy, but nationalism.

Another important lesson that could be learned from the fights for self-determination in the Yugosphere was that subjects that fight to break the status quo (Serbs, Croats and Slovenes after the First World War and Croats, Slovenes, Bosniaks and Macedonians in the last chapter of the Yugoslav drama) all needed the support of major powers. And those major powers were not (not after the First, Second or Cold War) consistent in their politics – they were, of course, primarily driven by the perception of their own interests.

Finally, is this the end of the relationship between the Yugosphere and the self-determination of peoples? It would be naïve to think so. Self and not-self will inevitably change again in the Yugosphere, as will the position of the major powers. Right now, it looks like we are closer to the power of destruction than the power of creation and nationalism than democracy in the region. But, no one can tell when/if this will happen, and whether “we” will find the wisdom to no longer engage in wars because of this.

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