

Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition^a

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I. BACKGROUND

Within the former Socialist Federal Republic of Yugoslavia (SFRY), Kosovo was an autonomous province within the Republic of Serbia. The ethnic make-up of Kosovo is majority Albanian with a Serb minority. Kosovo's special autonomy was ended by Slobodan Milosevic in 1989. In 1991 and 1992, Slovenia, Croatia, Macedonia, and Bosnia, four of the six republics of the SFRY, declared independence. In 1992, the Federal Republic of Yugoslavia (FRY) succeeded the SFRY, and in 2003, the FRY was succeeded by the federation of Serbia-Montenegro. In 2006, Montenegro declared independence in accordance with the law of Serbia-Montenegro. Serbia declared itself the [lone] successor to [the State that had been known as] Serbia-Montenegro later that year.

Throughout the 1990s, Kosovar Albanians sought restored autonomy for Kosovo or independence. In 1998, the Serb government initiated police and military actions in the province, which resulted in widespread atrocities. After failed political negotiations to resolve the status of Kosovo and the rights of the Kosovar Albanians, NATO launched an air campaign to force the Serb government to withdraw the police and military. In the aftermath of NATO's intervention, the UN Security Council passed Resolution 1244 (1999), which authorized the UN's administration of Kosovo and set out a general framework for resolving the final political and legal status of Kosovo. For the next nine years, the UN participated in the administration of Kosovo, while political negotiations over the final status of the territory were largely inconclusive.

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In an effort to revive the mediation process, the EU, Russia, and the U.S., (the "Troika") oversaw negotiations between the Government of Serbia and the Kosovar Albanians, from August to December, 2007. In a response to the Secretary General, the Troika reported on December 10, 2007:

[T]he parties were unable to reach an agreement on the final status of Kosovo. Neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo.

In the aftermath of the Troika's announcement of the collapse of negotiations, Serbia, Russia, Romania, Moldova, and Cyprus—countries grappling with some type of

^a Endnotes omitted; minor editing of four numerical headings; reprinted with permission of the American Society of International Law.

secessionist issue in their own domestic politics—argued that Kosovo’s secession and/or recognizing that secession would be a breach of international law....

On February 17, the Parliament of Kosovo issued a statement declaring “Kosovo to be an independent and sovereign state.”

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II. ASSESSING RESOLUTION 1244

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Serbia and Russia have argued that Resolution 1244 would not allow the secession of Kosovo without the agreement of Serbia. In particular, they refer to the resolution’s preambular language “[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia....”

The EU has taken the position that Resolution 1244 is not a bar to Kosovo’s independence. In a memorandum written prior to approving the EULEX legal assistance mission to Kosovo, it found that “[a]cting to implement the final status outcome in such a situation is more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.” Moreover, the EU contends that 1244 did not predetermine the outcome of final status talks.

On balance, it appears that Resolution 1244 neither promotes nor prevents Kosovo’s secession....

III. INTERNATIONAL LAW AND SECESSION

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The legal concept of self-determination is comprised of two distinct subsidiary parts. The default rule is “internal self-determination,” which is essentially the protection of minority rights within a state [textbook §2.4.C.]. As long as a state provides a minority group the ability to speak their language, practice their culture in a meaningful way, and effectively participate in the political community, then that group is said to have internal self-determination. Secession, or “external self-determination,” is generally disfavored....

Although issues of secession rarely receive formal adjudication, state practice, court opinions, and other authoritative writings, point the way to categorizing what are the “extreme cases” and “carefully defined circumstances” under which the privilege of secession exists. Any attempt to claim legal secession—that is, where secession trumps territorial integrity—must *at least* show that:

- a. the secessionists are a “people” (in the ethnographic sense);
- b. the state from which they are seceding seriously violates their human rights; and
- c. there are no other effective remedies under either domestic law or international law.

(a) *Are the Kosovar Albanians a “people?”* As the Canadian Supreme Court put it in the [1998] *Secession of Quebec* opinion, the meaning of ‘peoples’ is “somewhat uncertain.” At various points in international legal history, the term “people” has been used to signify citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group....

One may argue that the Kosovars are a “people”, having inhabited Kosovo for centuries. However, the Kosovar Albanians are more generally perceived as an Albanian ethnic enclave, rather than a nation unto themselves.

This definition of the word “people” as “nation” has been criticized for being too restrictive. Consequently, it remains an open question whether widespread support of Kosovo's independence would signal a shift in the definition of “people” so that the term no longer represents a *complete ethnic nation* but can be used to refer to a *homogenous ethnic enclave* within another nation.

(b) *Are there/were there serious human rights violations?...* Here, there is at least a credible argument that the Serbs were responsible for serious human rights abuses against the Kosovars, as Resolution 1244 notes, a “grave humanitarian situation” and a “threat to international peace and security.” It was mass human rights abuses that led to NATO’s 1999 intervention. (It should also be noted, however, that human rights abuses have been reported to have been committed by Kosovar Albanians as well.) To the extent the international community considers it relevant whether human rights abuses are ongoing or historic, the situation in Kosovo is ambiguous. In relation to this question, one may argue that the ongoing international presence in Kosovo is legally relevant as it is evidence of the international community’s determination that the situation in Kosovo was and is highly volatile and that it cannot be solved completely via domestic political structures.

(c) *Is secession the only solution?* The political situation prior to the declaration of independence did not appear to offer any realistic alternatives to secession. As of December 2007, the two sides could not seem to resolve their differences and the Troika has declared the political negotiations a failure. It is unlikely that anything short of military intervention could have kept Kosovo within Serbia. Thus, it appears that most, if not all, realistic options other than separation had failed.

As should be clear from this analysis, the basic framework provided by international law permits arguments for and against secession. This is the quintessential “tough case.” In the interest of systemic stability, international law has a bias against secession. However, if we take as a given that secession is not absolutely prohibited by international law, then the case of Kosovo presents a set of facts that may be persuasive: an ethnic group (though perhaps not a “nation”), within a region with historically defined boundaries (Kosovo as a province), after an international intervention to prevent a humanitarian disaster being caused by the predecessor state, and after negotiations with the predecessor state leading to a complete deadlock, that seeks independence via a declaration that is coordinated with, and supported by, a significant segment of the international community. It thus stands in contrast to other claims of a “right” to secede ..., which due to different material facts would fail under the same legal analysis.

IV. THE LAW AND POLITICS OF RECOGNIZING KOSOVO'S DECLARATION

In difficult situations such as these, the issue of legality often shifts from the question of the legality of secession, to the question of the legality of the recognition of secession, a subtly different, but nonetheless different, question.

The EU memorandum on Resolution 1244 contends that “[g]enerally, once an entity has emerged as a state in the sense of international law, a political decision can be taken to recognise [sic] it.” This reflects the general understanding that recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts a factual occurrence. Thus recognition is “declaratory” as opposed to “constitutive.” Nonetheless, no state is required to recognize an entity [that is] claiming statehood.

To the contrary, a good argument may be made that states should not recognize a new state if such recognition would perpetuate a breach of international law. The treatise *Oppenheim's [International Law] (Ninth)*, Sec. 54, states that “[r]ecognition may also be withheld where a new situation originates in an act which is contrary to general international law.” Russia and Serbia argue that, inasmuch as Serbia did not consent to an alteration of its territory and borders, there can be no legal recognition. But, absent any qualification, that argument cannot be legally correct. Changing the boundaries of a sovereign state (Serbia) in and of itself would not make Kosovar independence illegal because, as discussed above, the international community has come to accept the legality of secession under certain circumstances.

Furthermore, the self-determination analysis is very fact specific, such that absolute arguments of illegality become difficult. And, state practice evinces that, absent a clear indication of illegality, in matters of state recognition there is considerable deference to the political prerogatives of outside states to decide whether or not to recognize an aspirant state. For an example of the international community indicating illegality, the Security Council issued a resolution condemning the recognition of the Turkish Republic of Northern Cyprus. There is no such resolution here, but rather a growing momentum to accept Kosovo's declaration. This does not, in and of itself, make Kosovo's secession legal. But it does show that, in cases of secession, law and politics are especially tightly intertwined.

V. IS KOSOVO UNIQUE? IMPLICATIONS FOR OTHER SECESSIONIST CLAIMS

Given the ambiguity of the claim of a legal privilege of secession and the fairly broad leeway that states have to recognize Kosovo, should they choose to do so, is the example of Kosovo of legal relevance to other separatist conflicts, such as those in Abkhazia [Russia], South Ossetia [Georgia], Nagorno-Karabakh [Azerbaijan], and Transnistria [Moldova]? Or is Kosovo *sui generis* and of no precedential weight? In announcing the recognition of Kosovo by the United States, Secretary of State Rice explained:

The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration—are not found elsewhere and therefore make

Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.

By contrast, the Russian Duma issued a statement that read, in part:

The right of nations to self-determination cannot justify recognition of Kosovo's independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states, which have obtained de facto independence exclusively by themselves.

Moreover, Bosnian Serbs had earlier stated that, should Kosovo declare independence, they would seek independence for "Republika Srpska," the self-proclaimed Bosnian Serb ethnic enclave within Bosnia....

It can be argued that Kosovo is different from other secessionist claims because Kosovo has been under international administration as the international community considered the situation so volatile. Reintegrating such a territory is different from assessing a claim by a separatist group that, on its own, is seeking to overturn the authority of the pre-existing state and unilaterally secede. While secessions are primarily an issue of domestic law, Resolution 1244 internationalized the problem. It also moved Kosovo from being solely under Serbian sovereignty into the grey zone of international administration.

This is a highly controversial position. Various reactions to the "uniqueness" argument include that such a contention is "absurd" or that it is an esoteric legal point that will be forgotten in the rush of politics.

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[T]he international community may be creating precedent that we will see cited by other ethnic enclaves seeking separation, be they Russians in Abkhazia or Krajina [Croatian] Serbs. Previously, neither of these groups was viewed as having a strong claim for the privilege of secession, as neither of these groups is a "nation" in the ethnographic sense, but rather fragments of Russian or Serb ethnic groups. But their arguments may be strengthened, and one of the bulwarks of international law against facile secessions may be weakened, if the facts of the Kosovo claim are not carefully and narrowly construed.

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