

Assessing the Legality of Kosovo's Declaration of Independence

Written by Christopher Borgen

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CHRISTOPHER BORGEN, MAR 18 2008

On February 17, 2008, the parliament of Kosovo declared Kosovo's independence from Serbia.[1] Kosovo had been a majority Albanian province (with a Serb minority) within Serbia. Until 1989, Kosovo had held autonomy within Serbia, which in turn had been part of the Socialist Federal Republic of Yugoslavia (SFRY). In 1989 Slobodan Milosevic ended Kosovo's autonomous status. Kosovo remained within Serbia, first as the SFRY dissolved and was succeeded by the Federal Republic of Yugoslavia (FRY) in 1992, and then when the FRY was succeeded by the federation of Serbia-Montenegro in 2003. In 2006, Montenegro left the federation and Serbia declared itself the successor to Serbia-Montenegro.

Throughout the 1990s, Kosovar Albanians sought either a restoration of autonomy or independence. In 1998, the Serb government initiated police and military actions in the province, resulting in widespread atrocities. After failed political negotiations to resolve the status of Kosovo and the rights of the Kosovar Albanians, in March 1999 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),[2] 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.

In an effort to revive the mediation process after the rejection by Serbia of the so-called "Ahtisaari Plan" which envisioned eventual sovereignty for Kosovo,[3] 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. On December 10, 2007 the Troika reported:

[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.[4]

On February 17, the Parliament of Kosovo issued a statement declaring "Kosovo to be an independent and sovereign state." [5] The Parliament pledged compliance with the process envisioned in the Ahtisaari Plan.

International reaction has been mixed, ranging from formal recognition by the U.S. the U.K., France, Germany, and certain other EU member states, as well as a host of other countries,[6] to the reaction of states (besides Serbia) such as Russia, Romania, Moldova, and Cyprus that have argued that Kosovo's secession and/or the recognition of that secession would be a breach of international law. [7] As of this writing, the majority of states have positions someplace in between these two poles.

International Law and Secession

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In assessing the question of whether Kosovo's declaration is a violation of international law or legal obligations, we must first consider the framework provided by Resolution 1244.[8] Serbia and Russia, referring 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", have argued that Resolution 1244 would not allow the secession of Kosovo without the agreement of Serbia. By contrast, the EU has taken the position that Resolution 1244 is not a bar to Kosovo's independence as, in its view, the resolution does not define the outcome of final status talks.[9]

On balance, it appears that Resolution 1244 neither promotes nor prevents Kosovo's secession. Although operative paragraph 1 of Resolution 1244 states that a political solution shall be based on the principles of the annexes, those annexes are silent as to the governmental form of the final status. The annexes only state that, pending a final settlement, an "interim political framework" shall afford substantial self-governance for Kosovo and take into account the territorial integrity of Federal Republic of Yugoslavia.[10] Moreover, the references to the territorial integrity of Serbia are only in the preambular language and not in the operational language. The document is therefore silent as to what form the final status of Kosovo takes.

Regarding the general legal principles concerning secession and self-determination, Thomas Franck, one of the five international law experts asked by the Canadian government to consider certain issues regarding a hypothesized secession of Quebec, wrote that:

It cannot seriously be argued today that international law prohibits secession. It cannot seriously be denied that international law permits secession. There is a privilege of secession recognized in international law and the law imposes no duty on any people not to secede.[11]

While international law does not foreclose on the possibility of secession, it does provide a framework within which certain secessions are favored or disfavored, depending on the facts. The key is to assess whether or not Kosovo meets the criteria for the legal privilege of secession.

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. 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.

In *re Secession of Quebec*, the Supreme Court of Canada found that "[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances..."[12]

Although issues of secession rarely receive formal adjudication, state practice and authoritative writings also 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.[13]

(a) *Are the Kosovar Albanians a "people?"* As the Canadian Supreme Court put it in the *Secession of Quebec* opinion, the meaning of 'peoples' is "somewhat uncertain." [14] 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. The commission of jurists who arbitrated the status of the Aaland

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Islands in 1920-21 found that for the purposes of self-determination one cannot treat a small fraction of people as one would a nation as a whole. Thus, the Swedes on the Aaland Islands, who were only a small fraction of the totality of the Swedish "people" did not have a strong claim for secession in comparison to, for example, Finland, which, when it broke away from Russian rule, contained the near totality of the Finnish people. This definition of the word "people" as "nation" has been criticized by some for being too restrictive, but it is nonetheless has been supported by state practice.

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.

(b) Are there/were there serious human rights violations? The *Aaland Islands* report found that there was no right to secede absent "a manifest and continued abuse of sovereign power to the detriment of a section of population." [15] 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 ongoing or historic, the situation in Kosovo is ambiguous. In relation to this question, one may argue that the ongoing international presence 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, such as those of Transnistria, which due to different material facts would fail under the same legal analysis. [16]

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. [17]

The general understanding that recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts (or "declares") the factual occurrence of the establishment of a new state. Nonetheless, no state is required to recognize an entity claiming statehood.

To the contrary, a good argument may be made that states should not recognize a new state if such recognition

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would perpetuate a breach of international law. The treatise *Oppenheim's (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."^[18] 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 external self-determination analysis is fact-sensitive, 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.^[19] 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.

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, does the example of Kosovo set legal precedent for the other separatist conflicts, such as those in Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria?^[20] Or, as the U.S. and the U.K. have argued, is Kosovo *sui generis* and of no precedential value?^[21]

Kosovo's declaration has seemingly redoubled claims by the Abkhazia and South Ossetia, both in Georgia, for independence. Russia has also increased its support for Abkhazia in particular, ending its adherence to a twelve-year old economic embargo since Kosovo's declaration, although Russia states that its policy shift was not a reaction to the declaration.

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. 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.

Moreover, it may be that Kosovo is *both* unique *and* a source of precedent at the same time. Two reasons are cited for Kosovo's uniqueness: (1) Kosovo has been under international administration since 1999; and (2) the Kosovar Albanians are an ethnically homogenous enclave, physically separate and ethnically different from the Serbs.

Let us assume that the first point, international administration, is persuasive and makes Kosovo a special case. Nonetheless, Kosovo can *still* be cited by other separatists as precedent for the specific issue of how the international community defines a "people" for the purpose of self-determination. And it would be irrelevant whether or not Kosovo had been under international administration. As mentioned above, modern state practice has tended to treat a "people" as a *complete ethnic nation* (not just a fragment of a larger ethnic group that exists elsewhere). However, those arguing that secession is legal in the Kosovo case seem to be defining people as a *homogenous ethnic enclave*. In other words, unless those recognizing Kosovo's declaration claim that the Kosovar Albanians are an ethnicity unto themselves, as opposed to just *part* of the Albanian ethnic group, then they may well be changing what had been the most common definition as to who may claim the privilege of secession. If that is the case, then the international community may be creating precedent that we will see cited by other ethnic *enclaves* seeking separation, be they Russians in Abkhazia or Krajina Serbs in Croatia.

Despite the declarations and best intentions, just saying something is "unique" may not be enough. States and

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commentators may need to ask why one claim of independence is purportedly unique and then consider its downstream political and legal effects. In the end, we need to keep in mind that sometimes the most effective law in politically-charged situations may be the law of unintended consequences.

Christopher J. Borgen is an Associate Professor of Law at St. John's University School of Law in New York City. He is a co-founder of the weblog *Opinio Juris*, www.opiniojuris.org. From 2004 -2006 he served on a legal assessment mission concerning the attempted secession of Transnistria from Moldova. An expanded version of this essay appeared as an *American Society of International Law Insight*, available at <http://www.asil.org/insights/2008/02/insights080229.html>.

[1] Full text: *Kosovo declaration*, BBC News (Feb 17, 2008) <http://news.bbc.co.uk/2/hi/europe/7249677.stm>

[2] S.C.Res 1244 (10 June 1999) available at <http://www.nato.int/Kosovo/docu/u990610a.htm>

[3] In November 2005, the Secretary General appointed Martti Ahtisaari Special Envoy for Kosovo. After mediating negotiations between the parties for fifteen months, Ahtisaari submitted in March 2007 the *Comprehensive Proposal for the Kosovo Status Settlement* ("the Ahtisaari Plan"). The plan envisioned Kosovo becoming independent after a period of international supervision. Serbia rejected the Plan while the Kosovar Albanian leadership endorsed it.

[4] Report of the EU/ U.S./ Russia Troika on Kosovo, para. 1 (Dec 4, 2007) available at <http://www.icos-kos.org/pdf/Report%20of%20the%20EU-US-Russia%20Troika%20on%20Kosovo.pdf>

[5] Declaration, supra note 1.

[6] Wikipedia is a useful resource for keeping track of international reactions to Kosovo's declaration. See, International reaction to the 2008 Kosovo declaration of independence

available at http://en.wikipedia.org/wiki/List_of_states_that_have_recognized_the_Republic_of_Kosovo

[7] Russian Foreign Minister Sergei Lavrov said concerning a potential Kosovar secession:

We are speaking here about the subversion of all the foundations of international law, about the subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence

Paul Reynolds, *Legal furore over Kosovo recognition*, BBC News (Feb 16, 2008) available at

<http://news.bbc.co.uk/2/hi/europe/7244538.stm>

The Romanian Defense Minister said that such a declaration "is not in keeping with international law." *Romania not to recognize unilateral Kosovo independence, says minister*, ChinaView.cn, available at http://news.xinhuanet.com/english/2007-12/12/content_7231934.htm

The Cypriot Foreign Minister warned against the EU "breaking international law." Harry de Quetteville and Bruno Waterfield, *EU-US showdown with Russia over Kosovo*, The Daily Telegraph Online (Dec. 12, 2007) available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/12/11/wkosovo111.xml>

[8] The operative paragraphs of Resolution 1244 focus on the cessation of military and paramilitary activities by all

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parties and the commencement of demilitarization of armed groups, the establishment of an international civilian presence under UN auspices to assist in interim administration, and similar framework issues. In addition, two annexes list "general principles" to use in the resolution of the crisis.

[9] Reynolds, *supra* note 7

[10] Paragraph 11(a), states that the international civil presence will promote "the establishment, *pending a final settlement*, of substantial autonomy and self-government in Kosovo..." (emphasis added.)

[11] Thomas Franck, *as quoted in* Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* 209 (2002) (emphasis in original).

[12] Reference re: Secession of Quebec, 2 S.C.R. 217 at para. 123 (1998).

[13] This framework is covered at greater length in a report (of which I am the principle author) on the international legal issues concerning the secessionist conflict in Moldova. *See*, Special Committee on European Affairs, *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 61 Rec. of the Ass'n of the Bar of the City of New York (2006), *available at* http://www.abcny.org/Publications/record/vol_61_2.pdf

[14] Secession of Quebec, *supra* note 12, at para 123

[15] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, *League of Nations Off. J.*, Spec. Supp, No. 3, at 5-10 (1920).

[16] *See, generally*, Moldova Report *supra* note 13; see also Chris Borgen, *Assessing the Legal Issues of the Moldovan Separatist Conflict*, *Opinio Juris* (Aug. 2, 2006) *available at* <http://www.opiniojuris.org/posts/1154547799.shtml>.

[17] As Daniel Thurer put it (perhaps overstating the case) in his 1998 addendum to the entry on "Self-Determination" in the *Encyclopedia on Public International Law*,

Rather than formally recognizing a right of secession, the international community seems to have regarded all these processes of transition as being factual rearrangements of power, taking place outside the formal structures of international law: international law only became subsequently relevant within the context of recognition.

Daniel Thurer, *Self-Determination, 1998 Addendum*, in 4 *Encyclopedia of Public International Law* 364, 367 (R. Bernhardt, ed. 2000).

[18] 1 *Oppenheim's International Law* (9th ed. 1992) (Robert Jennings and Arthur Watts, eds) at §54, p. 183.

[19] 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.

[20] See for example, the statement of the Russian Duma 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.

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As quoted by the NY Times in Nicholas Kulish and C.J. Chivers, *Kosovo Is Recognized but Rebuked by Others*, NY Times (Feb 19, 2008) available at <http://www.nytimes.com/2008/02/19/world/europe/19kosovo.html?pagewanted=2&hp>.

[21] 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

U.S. Recognizes Kosovo as Independent State, statement of Secretary of State Condoleeza Rice, Washington DC (Feb, 18 2008).

Moreover, in a statement to the UN Security Council following Kosovo's declaration, British Ambassador John Sawers said that

the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented UN administration of Kosovo make this a sui generis case, which creates no wider precedent, as all EU member States today agreed.

Ban Ki-moon urges restraint by all sides after Kosovo declares independence, UN News Centre (Feb. 18, 2008), available at <http://www.un.org/apps/news/story.asp?NewsID=25659&Cr=Kosovo&Cr1=>.