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Kosovo: An Application of the Principle of Self-Determination

Second article in a two part series on the Kosovo crisis

by Jennifer P. Harris*

Since 1919, Kosovo's ethnic Albanians have encountered periods of institutionalized discrimination under Yugoslav and Serbian leadership, alternating with periods in which they gained a greater degree of self-governance. Since 1989, however, the actions of the Serbian government have eroded substantially the basic human rights of Kosovar ethnic Albanians in education, self-governance, and autonomy. In addition, beginning in 1998, specific instances of violence that the Serbian leadership directed toward ethnic Albanians substantially increased, leading to the current crisis in Kosovo. Part One of this two part series presented a historical background of the region. Part Two will discuss the criteria necessary for Kosovo to assert independence under international law. Kosovars' ability to assert independence is dictated by their right to self-determination, which the 1970 UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Friendly Relations Declaration) defined as the right of "all peoples . . . freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."

Secession as a Means for Gaining Self-Determination

The internationally recognized right to self-determination is satisfied when a defined group is able to exercise its own choice regarding its political future. The principle of self-determination originated in the post-World War II era, which focused on the promotion of individual human rights during a period when many colonial states gained independent country status. The UN Charter, produced during this period, recognized this right as a prerequisite to the enjoyment of other human rights, noting in Article 1(2) that the development of friendly relations among nations is based on respect for the equal rights and self-determination of peoples. In addition, Article 55 of the Charter requires member states to promote human rights and fundamental freedoms. Other sources of international law relating to human rights that recognize the right to self-determination are the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the UN General Assembly in 1960; the International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976; the International Covenant on Economic, Social and Cultural Rights (ICESCR), which also entered into force in 1976; the UN Friendly Relations Declaration, unanimously adopted by the UN General Assembly in 1970; and opinions of the International Court of Justice (ICJ). Each of these documents contains language granting all people the right to self-determination. Through recognition in these instruments and in ongoing state practice, the right to self-determination has become *jus cogens*, a customary norm of international law.

Although the right to self-determination is well-established in international law, it historically has been seen as applicable primarily to colonial-dominated peoples. There is currently debate regarding whether its scope extends to minorities within an existing state. Nonetheless, human rights treaties like the ICCPR and ICESCR, UN General Assembly resolutions, and the practices of the international community indicate a broadening of the right to self-determination

to include the right of minority groups, in addition to colonially-ruled peoples, to secede.

Secession, with regard to a state, is the act of withdrawing from a union with a larger state and becoming a self-determinate independent entity. In international law, secession is neither a right, nor is it prohibited. According to current principles of state practice, most recently used to analyze the secessions of Bosnia-Herzegovina, Croatia, and Macedonia, minorities within existing states can secede as a means to gain self-determination only when they meet the following six criteria for self-determination: (1) the existence of a distinct, self-defined group within a state that overwhelmingly supports separatism; (2) a legitimate claim to the territory; (3) a pattern of systematic discrimination or exploitation against a sizable, self-defined minority; (4) the central government's rejection of compromise solutions; (5) the prospect of the territory and people concerned becoming a viable state; and (6) the effect of granting or refusing self-determination on regional and international peace, the effectuation of authoritative governmental processes and respect for human rights, and the impact on both regional and global value processes.

Secession of a territorial entity, however, may conflict with other international principles such as sovereignty, *uti posseditis juris*, and territorial integrity. Sovereignty is the right of a state to govern its internal affairs. The principle of *uti posseditis juris*, adopted by the ICJ in *Burkina Faso v. Mali*, requires nations to respect pre-established territorial borders and frontiers. The UN Charter recognizes the right to territorial integrity, or a state's right to its currently existing borders, in Article 2(4), which prohibits the use of force by states against each other. Secession conflicts with sovereignty, *uti posseditis juris*, and territorial integrity by denying an existing state its right to exercise continued sovereignty over its territory, have its borders remain unchanged, and maintain its territorial integrity.

Proponents of secession, however, argue that if sovereignty, *uti posseditis juris*, and territorial integrity are viewed with consideration to the spirit of the UN Charter, they do not act as bars to secession by minority groups. For example, Article 2(4) purports to maintain international peace and security and to reaffirm faith in fundamental human rights. Secession may be necessary in some cases to secure peace, security, and respect for human rights, particularly self-determination, in a given area. In addition, many state borders historically were drawn arbitrarily without regard to the minorities encompassed within them. Genuine enjoyment by these minorities of the right to self-determination, therefore, must include the right to secede from larger, capriciously formed state entities.

Recent examples where states recognized the right to secede by way of an expanded self-determination analysis that encompassed non-colonial people are Palestine, the Baltic states, Bosnia-Herzegovina, Croatia, and Macedonia. These examples provide a precedent with which the international community can review the ever-increasing list of claimants seeking independence by way of this broader right to self-determination, which goes beyond the limited, colonial-based interpretation of self-determination.

continued on next page

Kosovo, continued from previous page

In today's international environment, however, countries hesitate to recognize the right to secede via self-determination because they do not want additional states in the international arena. The international community also fears the possibility that recognizing a seceding region could ignite additional internal state conflicts and increase the number of self-determination claims asserted by minorities in other states. The international community exhibited these sentiments with regard to Kosovo through its support of a peace agreement brokered in Rambouillet, France, in February 1999. In lieu of an arrangement granting Kosovo independence, this pact, if the Federal Republic of Yugoslavia had signed it, would have granted Kosovo "intermediate sovereignty," thus providing Kosovo with a substantial degree of self-governance while maintaining it as part of Yugoslavia.

Application of the State Practice Test for Secession Via Self-determination to Ethnic Albanians in Kosovo

One group currently seeking to assert its right to secede based on its right to self-determination is the ethnic Albanians inhabiting Kosovo. The members of this group satisfy the first element of the self-determination test—a distinct, self-defined regional group that supports separatism—because they have a sense of identity, based in their common ancestry (Thracians or Illyrians), religion (Islam), language (Albanian), history (dominated by Ottoman Turks and then Serbs), and cultural heritage. Furthermore, this population has showed its strong support for separatism by electing a government whose agenda is self-rule, in May 1992 and again in the spring of 1998, and through its involvement in the direct armed resistance of the Kosovo Liberation Army (KLA).

Kosovo has a legitimate claim to the territory, the second prong of the test, because it is sufficiently identifiable from the rest of Serbia to constitute one territorial unit. Kosovo as a self-governing unit has a short history. Nonetheless, the fact that it gained Autonomous Region status in 1946, establishing firm territorial boundaries, and Autonomous Province status in 1963 shows a trend toward increased self-determination for this region.

The situation in Kosovo also meets the test's third requirement: a pattern of systematic discrimination against a minority group. Over the past 80 years, as illustrated by the first article in this series, Kosovars have experienced repeated periods of severe discrimination by the Yugoslav government. These discriminatory policies have ranged from colonization programs, which encouraged ethnic Albanians to move out of Kosovo and ethnic Serbs to move in, to ethnic cleansing, witnessed during March and April of 1999 when the Serbian military forced at least 500,000 ethnic Albanians to leave Kosovo. The policies of the Serbian government are systematic, with the objective of eliminating ethnic Albanians' majority status in Kosovo.

According to some legal scholars using a stricter standard to interpret this third criterion, the pattern of systematic discrimination must rise to the level of gross violations of fundamental human rights. Under this analysis, independence can only be justified legally when the very existence of a group is threatened. Kosovo, however, also satisfies this stricter interpretation due to the fact that Serbian authorities have killed and displaced thousands of civilians throughout 1998 and 1999. The widespread scope of these actions threatens the very existence of the Kosovar Albanian ethnic group in Yugoslavia.

Regarding the fourth prong of the self-determination test—the government's rejection of compromise solutions—President Slobodan Milosević of the Federal Republic of Yugoslavia (Serbia/Montenegro) has not shown a willingness to negotiate with ethnic Albanians in Kosovo. Specifically, Milosević rejected a proposal to return the region to its pre-1989 Autonomous Region status, opposes the establishment of an international peacekeeping force in the region, and refuses to sign the peace agreement brokered in France in February 1999. His refusal to deal with the Kosovars satisfies this fourth prong of the test.

Kosovo also fulfills the fifth prong of the secession via self-determination test: the seceded area's capacity to become a viable state. Kosovo's status as an Autonomous Province from 1963 to 1989, as well as the 1992 and 1996 popular elections, which selected a government that successfully administered an unofficial system of schools, a health care system, and a bureaucracy, attest to the fact that ethnic Albanians in Kosovo could maintain a viable state.

The sixth element of the self-determination test examines the general effect of self-determination on peace, governance, human rights, and regional and international "value processes." The international community has expressed concern that granting Kosovo's independence could result in additional conflicts both regionally and internationally, as other minority groups might attempt to secede based on Kosovo's example. However, these potential ramifications are outweighed by the gravity of the current situation, as fighting between Serbian forces and ethnic Albanians, whom the North Atlantic Treaty Organization (NATO) supports, is ongoing. No lasting prospect for peace exists without Kosovo achieving independence, as ethnic Albanians will continue to suffer persecution at the hands of the Serbian leadership until separation from Yugoslavia is achieved. Kosovo therefore satisfies the sixth prong of the current state practice test regarding secession via self-determination. Having fulfilled each of the six requirements under this test, the remaining potential obstacles to independence for Kosovo must be examined.

International Recognition

International recognition of a state is inextricably linked to secession via the right to self-determination, as the international community's recognition of a state plays a critical role in the actual formation of new states by secession. A conclusion by the international community that a group has the right to secession via self-determination will likely tip international opinion in favor of recognition, but the group will still have to satisfy the requirements of international recognition. The traditional international law recognition standards are found in the 1933 Montevideo Convention on the Rights and Duties of States. The requirements of a state are: (1) a "permanent population," (2) a "defined territory," (3) a "government," and (4) the "capacity to enter into relations with other states."

The first two prongs of the Montevideo Convention's requirements are satisfied because Kosovo has a defined territory, as discussed, and a permanent population of two million. The third requirement is satisfied because the elected government of Kosovo has popular support to govern and thus challenges the legitimacy of the Serbian regional government. Lastly, the fourth prong of the Montevideo

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Kosovo, continued from previous page

Convention is satisfied because Kosovo has a president, a prime minister, and government representatives living in many other countries, demonstrating the region's capacity to enter into diplomatic relations with other states.

The European Community (EC) adopted a common position on state recognition in the 1991 document, "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (Guidelines). These criteria lay out political considerations for state recognition, and they set a precedent for the types of political criteria that may be applicable to Kosovo's claim because they were used previously to recognize similar claims by Bosnia-Herzegovina, Croatia, and Macedonia. The requirements for state recognition in the Guidelines are: (1) respect for the UN Charter; (2) guarantees for the rights of ethnic groups and minorities under the Final Act of Helsinki and the Charter of Paris; (3) acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation; (4) non-recognition for entities that are the result of aggression; (5) respect for the inviolability of all frontiers unless changed by peaceful means and by common agreement; (6) acceptance of the commitments for regional stability and security; and (7) commitment to settle peacefully all questions of state succession.

Kosovo took steps towards meeting these considerations when the ethnic Albanians of Kosovo, acting through representatives of their popularly elected government and the KLA, signed the Rambouillet Peace Agreement in France in

February 1999. The agreement's drafters were conscious of the EC guidelines, and the resulting peace agreement fulfilled the criteria set forth therein. An especially important guarantee that Kosovo made in signing the agreement is the implementation of policies to protect the estimated ten percent Serbian minority in Kosovo.

Conclusion

Kosovo has a compelling case for secession. International legal criteria established through state practice support this outcome, which would allow Kosovars to exercise their right of self-determination. The Rambouillet compromise agreement would have granted Kosovo intermediate sovereignty and made secession unnecessary. In light of Milosević's unwillingness to sign the agreement, the ongoing NATO bombing, and the gross violations of human rights committed by Serb forces in Kosovo, however, the continued stance of Western states to promote intermediate sovereignty instead of independence for Kosovo is shortsighted. The tide may be turning, as some NATO countries have begun to express their support for Kosovo's independence. Kosovo has met the legal criteria necessary for secession under current state practice, and, therefore, the only remaining impediment to secession is the political will of the international community. ☉

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Belarus, continued from page 26

A third restrictive provision adopted by the Belarusian government amends the Administrative Code of Belarus to prohibit "the use in public places of placards, banners, and other items the content of which degrades the honor and dignity of the President." Convictions under this provision can lead to a fine of up to U.S.\$500 or 15 days imprisonment.

The limitations on free expression imposed by these three provisions have grave consequences for the citizens of Belarus. The press and individuals are prevented from offering legitimate criticism of state officials, a fundamental cornerstone of democracy that is supported by international law. In *Lingens v. Austria*, the European Court of Human Rights stated that "freedom of political debate is at the very core of the concept of a democratic society The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual." In addition, the U.S. State Department's 1998 country report on Belarus criticizes the government because its defamation law "makes no distinction between private and public persons for the purposes of lawsuits for defamation of character." By erasing the difference between public and private persons, the passage of these provisions by the Belarusian government hinders its citizens' ability to engage in meaningful political discourse.

Additionally, as noted, Article 19(3) of the ICCPR and Article 10(2) of the ECHR permit certain narrowly defined exceptions governing freedom of expression. *Klass*, however, clarified that these exceptions are allowed only when they are absolutely necessary for the preservation of a democratic society due to a specified national security concern or other clear exception. The amendments to Article 5 do not fall under these limited exceptions because they offer no

rationale for limiting expression other than to protect the "honor and dignity of government officials." Furthermore, the changes to the Belarusian criminal and administrative codes, which similarly limit free expression, also fail to justify such limitations for any legitimate government necessity.

Conclusion

The Belarusian government has defended its actions as the natural consequence of a new and emerging democracy and as the outgrowth of Belarus's unique approach to representative government. In a June 1998 statement, Mikhail Myasnikov, a presidential advisor, asked his supporters to offer a "decisive rebuff to those who impose their views and notions of democracy, taking advantage of strength and international influence." The international community, however, has criticized the government's measures as anti-democratic. For example, in addition to the U.S. State Department country report, in November 1998 the Commission on Security and Cooperation in Europe (CSCE) published a report assessing the current situation in Belarus. The CSCE found that the Belarusian Government "continues to suppress [freedom of expression, association, and assembly] through restrictive presidential decrees, arbitrary arrests, detentions, fines (many excessive), beatings, threats and other forms of intimidation and harassment." The citizens of Belarus have recognized the unlawful practices of President Lukashenka's regime, but need more assistance in their efforts to reverse current restrictive policies on free expression. Only with these advances can Belarus effectively move towards democracy and protect the human rights of its citizens. ☉

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