The Secession of Kosovo – A Precedent for the Region?

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Introduction

For almost nine years, Kosovo had been in limbo concerning its formal status, and sovereignty. On the formal side, it still retained its status as a province of Serbia. In real terms, power was exercised in parts by international actors, but also increasingly by local and more and more "national" authorities of Kosovo. The unclear situation was finally solved by Kosovo's unilateral declaration of independence on 17 February 2008.

For Kosovo's Albanian majority, the only solution for the undetermined situation had never been less than full-fledged independence. *Au contraire*, the Serbian side had consistently insisted that Kosovo belonged to Serbia – for all eternity, with no change of its status. Both sides had referred in their argumentation to two main principles of international law. The Albanian side claimed the right to secede on basis of the principle of self-determination; the Serbian side claimed the right of continued possession of Kosovo based on the principle of territorial integrity. Beyond its power political dimension, the question of the status of Kosovo – either independence or continuation as province of Serbia – had thus been inseparably linked to fundamental legal issues, which had only been exacerbated by the actual declaration of independence.

This is also true for others who are genuinely concerned about the future development of security and stability in the region. It reads that the secession of Kosovo from Serbia would set a dangerous precedent for the region, with far-reaching consequences. It would give the same right of secession to the various Albanian minorities as for example in Mace-

donia[1] or Montenegro, as well as to other ethnic groups and entities, with a specific emphasis to a possible secession by Republika Srpska from Bosnia and Herzegovina.

On the surface, the claims that Kosovo would set a precedent for possible future secessions in the region would thus look rather convincing. The term "precedent", however, is also of a legal nature. Generally speaking, it would mean that a practice accepted as in conformity with the law could be invoked by all who might find themselves in a similar situation as justification for their claims, and is as such a cornerstone for the development of customary law which by definition requires precedents ("practice") to build upon.

In order to assess whether the independence of Kosovo really would constitute a "precedent" under international law for other would-be secessionist forces in the region, it is necessary to analyze

- whether it has been undertaken within an already established set of rules or principles of international law which would contain the alleged role as a "precedent" within controllable limits, or
- whether the secession of Kosovo and its subsequent recognition by many Western States, including major powers, would indeed constitute a "precedent" in the legal sense, having opened Pandora's box of uncontrolled and destabilizing further secessions both in the region and on a wider scale.

For this purpose, the paper will

- outline the legal framework for secession between the two contradicting principles of the right of self-determination on one hand, and of territorial integrity on the other hand;
- apply the legal framework to the case of Kosovo, and
- try to answer the question how far – if at all – the secession of Kosovo could be regarded a precedent for other secessionist movements and tendencies in the region.

[1] The author recognizes Macedonia under its constitutional name.

The findings would then allow for an assessment whether the secession of Kosovo from Serbia undermines, or increases, the stability and security in the region.

Self-determination and Secession under International Law[2]

It is a wide-spread perception that self-determination and secession are congruent terms.[3] This could also be seen in the developments around Kosovo, where the Albanian side frequently claimed having the right of self-determination and therefore the right to secession, whereas on the Serbian side the argument was frequently heard that Albanians in Kosovo would have no right for self-determination, and therefore also no right of secession.[4]

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[2] See also: Enver Hasani, *Self-Determination, Territorial Integrity and International Law*; PhD Dissertation; Published by Austrian National Defence Academy; http://www.bmlv.gv.at/pdf_pool/publikationen/hasa03.pdf.

[3] This also happened to the Badinter-Commission which "equated the right to self-determination solely to secession and changes in boundaries, and thus lost an opportunity to clarify alternatives to secession as a valid exercise of self-determi nation"; Ved P. Nanda, Self-determination and Secession under International Law; Denver Journal for international Law and Policy; vol. 29:4 (2001); pp. 305-325 (314), http://www.encyclopedia.com/doc/1G1-87029934.html.

[4] The author has as far back as 1993 quite frequently heard the following Serbian line of argumentation: Albanians in Kosovo are no "people", and therefore have no right of self-determination – whereas Serbs e.g. in Croatia or Bosnia would be a "people" and therefore would have the right of self-determination, "naturally" understood as the right to secede.
This distinction is rooted in the constitutional law of the former Socialist Federal Republic of Yugoslavia (SFRY) which made a distinction between "*narod*" ("constituent people" of Yugoslavia, e.g. Serbs, Croats, Slovenes and so on) and "*narodnost*" (ethnic group which has a home country beyond Yugoslavia, e.g. Albanians, Hungarians, Slovaks, etc.).
The denial of self-determination for a "*narodnost*" is rooted in the mistaken equation of the specific term "*narod*" (which means literally "people") of the SFRY´s legal terminology with the general term "people" within international law, which does not differentiate. Given the reason for the whole regulative framework

While both positions come to opposite results, they are both based on a simplistic equation of "self-determination" with "secession", which is mistaken.

The Development of the Right of Self-determination under International Law[5]

The concept of "self-determination" is of liberal origin and emerged during the period of enlightenment. It had its first political impact in the implosion and dissolution of empires in the aftermath of World War I[6] – both with respect to the Russian empire and the Austro-Hungarian Empire. At that time, however, its nature was not regarded as legal but rather as political.[7]

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of international law, it would mostly refer to what in the SFRY´s legal terminology would have been called a "*narodnost*".

5 See on the development V. P. Nanda; above; See also Richard A. Falk, the Right of Self-Determination under International Law: The Incoherence of Doctrine versus the Incoherence of Experience, in: Wolfgang Danspeckgruber/Arthur Watts; Self-Determination and Self-Administration; A Sourcebook; Lynne Rienner Publishers; Boulder (Colorado, 1997; ISBN: 1-55587-786-9; pp.47- 63. Another major contribution to the elaboration on Self-Determination can be also found in the Judgement of the Supreme Court of Canada concerning *"Certain Questions Relating to the Secession of Quebec from Canada; Secession of Quebec"*, [1998] 2 S.C.R. 217 August 20, 1998; http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html.

6 Cf. the famous "fourteen points" by President Woodrow Wilson at his address to the Conditions of Peace, delivered at a Joint Session of Congress on 8 January 1918; reprinted in W. Danspeckgruber/A. Watts; Self-Determination; pp.463.

7 See for example the findings of the International Commission of Jurists in the Case of the Aalands Islands. The Commission further concluded that the principle [of self-determination], while currently garnering support in the division of European territories (such as Ireland's independence) had not yet attained the status of a positive rule of international law "*The commission further concluded that the principle was essentially political and thus could not be employed as justification of dismemberment of a clearly established State*"; ´Aalands islands case (1920), LNOJ Special Supp NO. 3 3.5'; quoted in: Dajena Kumbaro; the Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the

This changed with the adoption of the United Nations' Charter in 1945. Its Art. 1 (2) already contains a clear reference that the purpose of the United Nations is "*to develop friendly relations among nations based on the respect for the principles of equal rights and self-determination of peoples*". A similar reference is found in Art. 55 which also refers to peaceful and friendly relations among nations *"based on respect for the principle of equal rights and self-determination of peoples"*.[8] The Charter as such does not, however, allow for an operational application of the right of self-determination in practice. It has not been enshrined as a concrete right, but as a principle.[9]

The principle was subsequently developed further in the context of human rights. The common article 1 of both the UN Covenant on Civil and Political Rights[10] and on Economic, Social, and Cultural Rights[11] contains the following wording:

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

NATO Intervention; NATO, *Office of Information and Press; Final Report, July 2001.*

8 Italics from the author.

9 See also Kumbaro; p. 11.

10 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

11 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

While the emphasis was at that time clearly with de-colonization[12] and with concern to non-self-governing and trust territories, the wording of the first clause of Art 1(1) that *all peoples have the right of self-determination* affirms the universality of the right,[13] and not just a limitation to peoples under colonial rule.

The next and most decisive step followed within the Declaration on Friendly Relations,[14] which finally contributed to the formation of a set of general rules concerning the right of self-determination.[15] The Declaration "solemnly proclaims"[16] and elaborates on the principles of refraining from the threat or use of force; settling international disputes by peaceful means; the duty not to intervene in matters within the domestic jurisdiction of any state; and co-operation with one another in accordance with the Charter, but also

- the principle of equal rights and self-determination of peoples;
- the principle of sovereign equality of states.

The section dealing with the principle of equal rights and self-determination of peoples first reiterates some of the statements of earlier documents e.g. concerning the relation between self-determination and human rights and enumerates various modes how the right of self-determination may be exercised, as for example that

> the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

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12 See also the Declaration on the Granting of Independence to Colonial Countries and Peoples; GA Resolution 1 514 (XV) ; 947th plenary meeting, 14 December 1960.

13 Kumabro, op. cit, p. 13.

14 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; 24 October, 1970.

15 See Kumbaro, p.17, also for the further elaboration of the character of General Assembly declarations as mere recommendations or binding legal rules.

16 Thus the text of the Declaration.

While most of the provisions could be seen primarily in the context of de-colonization, the pertinent section also contains a paragraph which would constitute the first legal delineation balancing the principle of territorial integrity on the one hand, and of self-determination on the other. The paragraph reads:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The provision thus gives clear priority to territorial integrity, but with a caveat. In order to claim that right, the group has to [conduct itself] *"in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"*. Priority of territorial integrity must no longer be seen as an absolute right, but only in balance with respect for the self-determination of peoples living within the respective country.[17]

In 1993, the Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights on 25 June 1993 reiterated the position. Its paragraph 2, section 3 repeats the above position that "*[in] accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind*".

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[17] "The logical reading is that, to be entitled to protection of its territorial integrity against secession, a State must possess a government representing the whole people"; V. P. Nanda, p. 310.

The wording appears now more generic in the last sentence, referring no longer to "*distinction as to race, creed or colour*", but to "*distinction of any kind*".

Finally, the General Assembly in its Declaration on the Occasion of the Fiftieth Anniversary of the United Nations[18] reconfirmed this position practically in the same wording concerning *States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*

As a result from the above, we can come to the following conclusion:

- When the concept of "self-determination" appeared first in the aftermath of World War I, it was clearly seen as inferior to the principle of territorial integrity, being of a political rather than a legal character;
- It had been subsequently enshrined within the United Nations Charter as a principle, but not yet leading to concrete rules and rights;
- Finally, from the Declaration on Friendly Relations onwards, clear rules emerged concerning the balance of territorial integrity and self-determination respectively.

The legal situation since then presents itself in the following way:

- As long as states conduct themselves in accordance with the principles of self-determination, being truly representative for the whole population of the state without distinction of any kind, they are entitled to the undiminished right of territorial integrity. This so-called "internal self- determination"[19] within a state should be the rule, and would not give the right for secession;
- as an exception, secession (the so-called "external self-determination") would become a justified option in the case of states not liv-

[18] A/RES/50/6; 40th plenary meeting; 24 October 1995; Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.

[19] On the distinction between "external" and "internal" self-determination see V. P. Nanda, ibid., p. 307.

ing up to the demands of granting "internal self-determination", by exerting discriminatory and repressive policies against peoples on their territory.

State practice does confirm the development in the legal sphere. Shortly after the adoption of the Friendly Relations Declaration the people in the then East Pakistan in 1971 revolted against Pakistani rule.[20] While the people in East Pakistan were predominantly Bengalis, they had to live under the rule of (predominantly Urdu-speaking) West-Pakistanis. The revolt led into full-fledged civil war which ended, after Indian intervention, with the successful secession of East Pakistan in 1972 which declared itself independent under the name Bangladesh. The new state was quickly recognized by the majority of other states.[21]

This does not mean that states would have done so in explicit and deliberate reference to the previously adopted Friendly Relations Declaration where the legal framework for justified secession had developed. The coincidence in time can be, however, seen as an indicator for a shift in paradigm. It expressed itself on the one hand in adopting a resolution which now sets rules and guidelines for exceptionally justified secession, and on the other hand in the political practice in recognizing a secession which had followed the criteria established a year before.

Further cases since then have concerned the secession of Eritrea[22] and of East-Timor,[23] in both cases based on previous repression by a state power of different ethnicity.

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[20] On the secession of Bangladesh see Library of Congress, Bangladesh: http://lcweb2.loc.gov/cgi-bin/query2/r?frd/cstdy:@field(DOCID+bd0139) through http://lcweb2.loc.gov/cgi-bin/query2/r?frd/cstdy:@field(DOCID+bd0141).

[21] See R. A. Falk, op. cit., p. 56.

[22] After a decades-long guerilla war and the fall of the Marxist Mengistu government in Ethiopia, a procedure for the secession of Eritrea from Ethiopia was agreed in 1991, and a referendum held in April 1993 which resulted in a overwhelming majority for Eritrea's independence. On May 28, 1993, the United Nations formally admitted Eritrea to its membership. On Eritrea's war of independence see http://en.wikipedia.org/wiki/Eritrean_War_of_Independence;

[23] On East Timor see P.V. Nanda, ibid., pp. 324.

We may thus conclude that the simplistic equation "self-determination means secession" is utterly wrong. Neither legal norms nor state practice would support such statement. It is, on the other hand, also true that international law does no longer exclude secession, either. It is justifiable under rather limited but well-defined circumstances, as a last resort or "emergency exit" from unrepresentative and repressive regimes.[24] In a nutshell we may say the guideline reads "***no repression – no secession***", with its reverse meaning – "secession is the consequence of repression".

The situation in Kosovo[25]

Kosovo had been for centuries been part of the Ottoman Empire and occupied by Serbia after the Balkan wars 1912/1913 under claims of an "historical right"[26] to this territory which had been seen as "the cradle of Serbian identity" – despite the fact that even at that time it was predominantly inhabited by Albanians rather than Serbs.[27]

During the "first Yugoslavia", Kosovo had no special status but was regarded a district in Southern Serbia. To counterbalance the Albanian majority, frequent attempts were undertaken to redress the ethnic bal-

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[24] "[T]here could be circumstances which might lead to the acceptance of unilateral secession. One such exception … is in the colonial context. The second exception is undemocratic, authoritarian regimes, which are not representative, thus not providing the opportunity for the "people" to participate effectively in the political and economic life of the State, especially when there is a pattern of flagrant violations of human rights": P.V. Nanda, ibid., pp. 325.

[25] On the historical background see Miranda Vickers; Between Serb and Albanian, A History of Kosovo; Columbia University Press; New York, 1998.

[26] Branislav Krstić, Kosovo izmedu istorijskog i etničkog prava (Kosovo between historical and ethnic right(s); Kuča vid, Belgrade, 1994; the book deals primarily with population development. That author's father had written a book about the Serbian colonization of Kosovo (Djordje Krstić, Kolonizacija u Južnoj Srbiji (Colonization in southern Serbia), Sarajevo, 1928; referred to in the introduction, p. 9.

[27] The first reliable population census of 1903 counts 111 350 orthodox, 69 250 muslim and 6 600 catholic Serbs and 230 000 Albanians, mostly (215 050) Muslim; quote from *The Development of the Situation in the Kosovo*; background working paper, CSCE Conflict Prevention Centre, fall 1993.

ance, inter alia by settling Serbs in what was openly called a "colonization" of Kosovo,[28] with simultaneous attempts to convince the Albanians to leave,[29] and some forced expulsions. Nevertheless, these attempts mostly failed as most of the "colonists" left Kosovo and settled elsewhere.[30] In reaction, some also called for more radical measures as for example the expulsion of Albanians from Kosovo.[31]

During World War II Kosovo was split with parts controlled by Bulgaria, others by German forces, and parts merged with Albania, under Italian domination.[32] After World War II, the original situation was reestablished, with increasing respect for the Albanian population from the sixties onwards.[33] While Kosovo had until then still been a "district", it was during the constitutional reform of 1963 turned into a "province". Amendments to the Yugoslav constitution in 1968 and 1971 gave Kosovo increased competencies, which were finally enshrined in the Yugoslav Constitution of 1974.[34]

In accordance with the constitution, the competencies of the two autonomous provinces within the Socialist Republic of Serbia[35] were in practice almost identical with those of the republics. They had their own leg-

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[28] M. Vickers; *Between Serb and Albanian*; ibid., chapter 6: The Colonisation Programme (pp. 103-120); See also the respective title of the book by Djordje Krstić, above; D. Krstić´s book is also frequently referred to by M. Vickers.

[29] M. Vickers; ibid., p. 108.

[30] B. Krstić quotes his father that Serbs resettled from Kosovo as they did not feel themselves in Serbia.

[31] As for example Vasa Čubrilović in his infamous 1937 Memorandum to the Yugoslav king; See Vickers, pp. 116-120.

[32] M. Vickers; ibid., p. 121.

[33] Repression lasted to a certain degree as long as Aleksandar Ranković served as Yugoslav Minister of the Interior. He was a Serbian nationalist and ousted in July 1966 after having bugged Tito´s bedroom. From then onwards the rights of Albanians in Kosovo developed.

[34] Ustav Socijalističke Federativne Republike Jugoslavije; published in the "Službeni list" (legal gazette) of the SFRY no. 9, of 21 February 1974.

[35] The other autonomous province was the Vojvodina.

islation, jurisdiction and administration and were a constituent part of the republic and an equal part of the (state) federation.[36]

Albanians, however, frequently demanded the status of a full-fledged Yugoslav "republic" for Kosovo, pointing to their distinct ethnicity and the fact that Kosovo with an area of 10 877 square kilometres and a population of more than one million would be no lesser entitled to that status than Montenegro with an area of 13 812 square kilometres and a population of about 550 000.[37] The key slogan thus became the demand "Kosova-Republika".

A students' demonstration in Prishtina against the price increase of the students' cafeteria in 1981 turned political with exactly that slogan, which led to a first crackdown. From 1981 until 1985 about 3 500 persons in Kosovo were accused of "political crimes", out of which 668 were convicted.[38] Out of the overall 1 872 persons convicted in the whole of the then SFRY of "political crimes", 1 087 came from Kosovo.[39]

At the same time, the issue of increased emigration of non-Albanians (in particular Serbs and Montenegrins – from Kosovo gained prominence) being allegedly caused by repression of Serbs by the local Albanian majority.[40] Between 1981 and 1986 more than 40 000 Serbs had allegedly emigrated, lowering their overall number to less than 10% in Kosovo.[41]

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36 Ustav Socijalističke Federativne Republike Jugoslavije; published in the "Službeni list" (legal gazette) of the SFRY no. 9, of 21 February 1974; Art. 2.

37 Quote from "Mutual Perceptions in the Kosovo"; background working paper, CSCE Conflict Prevention Centre, November 1995. The figures for 1981, when the last census had been taken in Yugoslavia, were a population of 1 245 000 for Kosovo and 583 000 for Montenegro.

38. Neue Zürcher Zeitung (NZZ), 03. 08. 1986.

39. Wolfgang Libal, Das Ende Jugoslawiens; Vienna, 1991, p. 112.

40 The claim looks rather dubious, given the strong Serbian police presence in the province after the 1981 unrest. The author could verify the strong presence of heavily armed riot police in Kosovo in 1985 which makes the idea of the alleged "Albanian terror" rather unlikely.

41 In an assessment of the situation, the majority of the Serbian members of the Central Committee of the League of Communists (i.e. the Party) pointed out, however, that emigration had been caused by the economic situation rather than by

Kosovo thus served as a catalyst for a re-emerging Serbian nationalism, which found its most significant early expression in the Memorandum of the Serbian Academy of Sciences published in September 1986.[42]

Subsequently, Serbian nationalism merged with illiberal centralist ideas, demanding a strong central state under Serbian domination.[43] Against this background the leadership in the Serbian branch of the League of Communists was taken over by Slobodan Milošević[44] who utilized the Serbian and Montenegrin emigrants from Kosovo and their frequent rallies in Belgrade as his power basis, with increasingly nationalist and anti-Albanian rhetoric.

In 1989 Kosovo's autonomy was mostly revoked. Police and justice were brought under direct Serbian rule. Demonstrations by Albanians were crushed by force, with several dozens of demonstrators killed. When at the end of June 1990 the Serbian Republican Parliament further limited the autonomy of Kosovo, the Albanian deputies to the Provincial Parliament of Kosovo declared their sovereignty. In response, the Serbian parliament completely dissolved the provincial parliament and government of Kosovo, *de jure* incorporating Kosovo under Serbian administration. Subsequently, on 7 September 1990 the Albanian former deputies declared their sovereignty still as a Yugoslav Republic, thus symbolically

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ethnic tensions and that out of the 10 000 annual emigrants from the Kosovo there were about 9 000 Albanians but only 1 000 Serbs and Montenegrins, thus roughly reflecting the ethnic composition of the Kosovo; quote from "Mutual Perceptions in the Kosovo"; background working paper, CSCE Conflict Prevention Centre, November 1995.

42 See on the background: Yugoslav Situation Report # 11, RFE Research, November 1986, See on the contents: Christopher Cviić, *Implications of the Crisis in South Eastern Europe*; in: *New Dimensions in International Security*; Adelphi Paper no. 265, IISS, London, 1991/92, pp. 82-92.

43 In reaction to the growing assertiveness of Serbian nationalism and the closing of ranks with Communist centralist forces, opposition grew in Slovenia, Croatia, Bosnia and Macedonia against the ever growing centralist tendencies, which from 1991 onwards culminated in the wars of secession.

44 On the role of Milošević for the further development see also: Aleksa Djilas, "A Profile of Slobodan Milošević", *Foreign Affairs*, vol. 72, no 3, summer 1993, pp. 81-96.

formalizing their long-standing demand of "Kosova-Republika". Finally, on 28 September 1990 the Serbian Republican Parliament adopted a new constitution for Serbia which formally provided for some autonomy of Kosovo, but without serious competencies, subordinating it completely to Serbian rule.[45]

Immediately after that, a wave of repression against the Albanian population followed. Not only the political but also the cultural autonomy was eliminated, and the whole society went practically underground into civilian resistance.

The following years were characterized by an uneasy quietude, with the development of "parallel societies" of the Albanian and Serbian part of the population, and continued Serbian repression by Belgrade. A report by the then CSCE Conflict Prevention Centre in late 1993 described the situation as follows:

Since the establishing and further tightening of Serbian power the situation for Albanian individuals has consistently deteriorated. Cases of human rights violations have been described by the CSCE Missions and in the weekly surveys of the CPC since the departure of the Missions. More serious cases include the killing of unarmed persons by the police, where the Kosovo Helsinki Committee enumerates five cases alone for the period of mid-August to mid-September 1993 (plus two cases of death during police operations without the use of arms).

Reports give the impression that police and other forces of the Serbian side act like in an occupied territory, preferring to use their arms before asking questions. Other cases of human rights violations include arrests, often under accusation of acts against the territorial integrity of Yugoslavia (which would, however, correspond to the pledged objective of establishing an independent State of Kosovo). In the broader sense, it appears that force or humiliating treatment against Albanians are used on a large scale and at random.

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45. W. Libal, ibid., p. 134.

As a rule, Albanians have been evicted from the public service which has included, in accordance with the former Yugoslav economic system of "Socialist Workers' Self Administration", also any major enterprises. A recent report by the International Helsinki Federation claims that

- of the 500-plus Albanian judges, district-attorneys and other judicial officials, only 16 have remained in their offices after 1992;
- a total of about 6 000 Albanian policemen have lost their jobs;
- about 22 000-26 000 Albanian teachers have been dismissed;
- the health care system has been virtually depleted of Albanian personnel without, however, adequate replacement by other medical personnel, thus leading to a significant lowering of health care and public health; and
- an estimated number of 115 000 ethnic Albanians have lost their jobs since 1990, leaving only about 20% of the Albanians in employment.

While the report noted the significant absence of armed resistance against Serbian repression, it also considered the conflict potential in Kosovo as relatively high, although major armed confrontations have been avoided until now. Notwithstanding the high level of undeniable human rights infringements by the government and its agencies, no side of the opponents within the Kosovo has until now shown a tendency to escalate tensions into outright confrontation.

It foresaw, however, that, in order to recapture the attention on the international level, some segments on the Albanian side may consider it necessary to provoke, by violent means, heavy repression on the Serbian side. In a similar scenario, violence may erupt on the Albanian side simply because of frustration about the failure of the non-violent course, which may become discredited if it would not yield any results, and consequently could no longer be expected to be adhered to by the majority of the Albanian population.

On the Serbian side, tendencies towards deterioration have already been inherent to the practice until now. However, there may be new qualities,

as for example massive violence against the Albanian population, with large-scale "ethnic cleansing" of the Kosovo, or at least parts of it. [46]

The "uneasy quietude" ended in the late 1990s indeed as described in the scenarios above, fuelled by two events:

- On the one hand, the hope for internationalization of the Kosovo issue evaporated when the issue was sidelined in the Dayton/Paris peace talks, and the non-violent course had proven unsuccessful;[47]
- On the other hand, the melt-down in Albania in 1997 gave access to a vast amount of weaponry which then could be smuggled into Kosovo and used to arm resistance groups no longer non-violent.

The following situation led into full-fledged guerrilla war, which finally drew the attention of the international community to the problem. From March 1998 onwards, the UN Security Council in various resolutions urged the Yugoslav authorities to re-establish the autonomy of Kosovo, whereby the territorial integrity of Yugoslavia would have been respected.[48] Even during the negotiations in Rambouillet (6 to 23 February 1999) and Paris (15 to 18 March 1999) the Western proposals were based on the principle of "internal self-determination", i.e. the maintenance of the territorial integrity of Yugoslavia and political autonomy for Kosovo but rejected by the Milošević regime.[49] Instead, the Serbian side increased its military efforts. In reaction, the West launched on 23 March an air campaign against Yugoslavia that lasted eleven weeks.

After the end of the conflict, the United Nations' Security Council passed resolution 1244 which established a United Nations Administration (UNMIK), a robust peacekeeping force (KFOR), but also foresaw the

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[46] Quote from "*The Development of the Situation in the Kosovo*"; background working paper, CSCE Conflict Prevention Centre, fall 1993.

[47] See Vickers, ibid, p. 290.

[48] See in detail V. P. Nanda, ibid; pp. 319-321.

[49] See V. P. Nanda, ibid; pp. 320; The proposals would, however also have foreseen a "mechanism" for the final settlement for Kosovo, to be determined by an international meeting three years into the future, convened primarily on the basis of the "will of the people" of Kosovo – a clear reference to the right of self-determination.

"facilitating of a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords".[50]

Internal peace and security have since then been maintained by a strong international military, police and administrative presence, with a gradual transfer of competencies towards local ownership until the declaration of independence.

Legal Assessment

During the major part of Kosovo's belonging to the Serbian/Yugoslav State, the Albanian population had been most of the time subject to Serbian repression, with little chance for "internal autonomy". It was only the short period of autonomy – from the first incremental stages in 1968 and 1971 towards the full-fledged status of autonomous province under the 1974 constitution – when one could argue that Kosovo had indeed internal autonomy.

Previous repression before the 1960s does not count for the legal assessment, as the legal situation regarding the application of the right of self-determination had not yet been fully developed at that time. The establishment of the legal rules regulating self-determination and the development of Kosovo's "internal self-determination" developed practically at the same time. However, when Kosovo's autonomy was revoked in 1989/1990, this happened against already well-established rules concerning the right of self-determination. The abolition of autonomy was coupled with clear-cut discrimination and massive violations of the human rights of the Albanian population and lasted for practically one decade.

We may thus conclude that the secession of Kosovo has been finally justified by the elimination of Kosovo's "internal self-determination" a decade earlier. It appears an irony and self-fulfilling prophecy that the Serbian actions were allegedly driven by the desire to "prevent the

[50] S/RES/1244 (1999), 10 June 1999.

secession of Kosovo" – only to create a situation where it would have been finally justified.

There are some serious objections to this notion. One of them would claim that while the reasons for secession would have been valid throughout the time of obvious repression, they would have lost their validity with the end of the Milošević regime and the establishment of democracy in Serbia in late 2000. From now onwards, the rights of Albanians in Kosovo would be respected, and the appropriate solution would be a far-reaching autonomy.

Unfortunately, this view depicts the development of democracy in Serbia in too positive colours. It would have been to a certain degree true until 2003, when the development of a liberal political climate in Serbia was, however, brought to a halt with the assassination of Prime Minister Zoran Djindjić that year. Since then, the political climate took a backward orientation towards increasing nationalism, with the most nationalist force, the Radical Party, consistently turning out as the strongest party throughout the various elections. That party has not yet distanced itself from the policies of "ethnic cleansing". Also, Vojislav Koštunica's allegedly more liberal Democratic Party of Serbia (DSS), while formally advocating an autonomous status for Kosovo, has mostly referred to the "Serbian character" of Kosovo but said little about the rights of Albanians who are still implicitly regarded as "living on holy Serbian lands against our will".[51]

Another argument would claim that the situation had now been stabilized due to the deployment of the rather robust KFOR peacekeeping force[52] of about 15 000 troops which would guarantee a secure environment and ensure public safety and order, and therefore there would be no further need for secession. This argument is self-defeating. It would presuppose to keep that force in place as the situation would be volatile without it.

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[51] One could argue that Serbs and Albanians are in agreement that Albanians should leave Serbia. They are, however, in disagreement whether the Albanians could take Kosovo with them, or should leave it behind …

[52] The author encountered this argument during various discussions.

As a result, none of these arguments would invalidate the arguments brought forward for Kosovo's secession in reaction to the previous repression by Serbia. Neither has the underlying Serbian perception changed, nor could the situation be regarded as stable enough to exclude further confrontation over the disputed piece of land. Kosovo's secession has been and still is justified by the previous events.

But does it constitute a precedent for other ethnic disputes in the region?

Is Kosovo's Secession a Precedent for the Region?

The first question in this context refers to the notion of "precedent". A "precedent" under international law would normally not refer to a specific region but to international law as such.

Here we may state that Kosovo is by far not the first case that a part of a State seceded under the exceptional circumstances of justified "external self-determination". As outlined above, the real precedent under the changed legal situation after the adoption of the Friendly Relations resolution happened with the unilaterally declared secession of Bangladesh in 1971, more than three decades before the application of the same criteria in the case of Kosovo. Since then, the secessions of Eritrea and East Timor have taken place, although these cases were resolved at the end by brokered solutions. Kosovo does thus in a legal sense constitutes no precedence at all.

What might be meant with the phrase might be, however, the question whether other ethnic groups, minorities, or entities in the region may have recourse to the example of Kosovo to legally secede from their current States.

For that, they same criteria should be given as in the case of Kosovo, or, as shorthand: ***is there enough repression to justify secession***?

We shall thus evaluate the respective potential candidates along these criteria.

The Albanian minorities in Montenegro and Macedonia

Montenegro
Montenegro has an Albanian minority of about 5%.[53] The Albanian minority is politically represented by various Albanian parties (Albanian Alternative or AA; Democratic League-Party of Democratic Prosperity or SPP, a Democratic Union of Albanians or DUA) who have each one seat in the 81 seats parliament, more or less reflecting their percentage in population. The parties do not participate in the government.

The Albanian minority which is primarily concentrated in the South-East is fully integrated and has inter alia strongly supported Montenegro's peaceful secession in 2006.

There is thus no indication for repression of this minority, as much as there is – correspondingly – no serious political initiative for secession.

Macedonia:
Macedonia has an Albanian minority of 25,2%, in accordance with the 2002 census.[54] After the end of the conflict in Kosovo some Albanians in 2001 initiated a similar uprising in Macedonia which quickly spread throughout the Albanian population of Macedonia. It was ended however by negotiations leading to the Ohrid-Agreement.

The Agreement was signed on 14 August 2001[55] and foresees inter alia amendments to the constitution which give the Albanian minority a large degree of cultural autonomy, as for example the implicit recognition of Albanian as the second official language besides Slavic Macedonian.

There are several Albanian parties which are also represented in the parliament – the Democratic Party of Albanians or PDSh/DPA with 11 deputies and the Democratic Union for Integration or BDI/DUI with 17

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53 https://www.cia.gov/library/publications/the-world-factbook/geos/mj.html#People.
54 https://www.cia.gov/library/publications/the-world-factbook/geos/mk.html#Intro.
55 http://www.coe.int/t/e/legal_affairs/legal_cooperation/police_and_internal_security/OHRID%20Agreement%2013august2001.asp.

deputies. Other Albanian Parties exist but have no deputies in the parliament. One of the major Albanian parties – the PDSh/DPA – is currently in a coalition government with major Slavic Macedonian parties, with the BDI/DUI in opposition. It should be noted that before the elections in 2006, the BDI/DUI had been part of a multiethnic coalition government, then with the PDSh/DPA in opposition. In accordance with background reports, the political "cleansing" of ministries after the changes from one Albanian party to the other were more severe than in case of changes from a Macedonian to an Albanian minister.

While there had been secessionist tendencies up to 2001 which might have referred to what Albanians could have considered discrimination (e.g. the use of languages), the Ohrid-Agreement would have removed the justification for such concerns. On the other hand, it is also noted that the two ethnic groups increasingly lead "parallel lives" through cultural separation.[56]

The Republika Srpska

The Republika Srpska (RS) was founded in the course of the armed conflict in Bosnia-Herzegovina, and later recognized by the Dayton Agreement as one of the two entities within Bosnia-Herzegovina. Its origin and ethnic composition are somewhat problematic as it had been conceived as an exclusively, "ethnically clean" Serbian "state", with a clearly discriminatory policy against any other ethnic group, resulting in the expulsion and killing of non-Serbs, in particular Bosnian Muslims but also Croats and others. As a result, major areas which before the conflict had been predominantly non-Serbian have now become almost exclusively inhabited by Serbs, and the overall ethnic composition would indicate about 90% Serbs in the RS. Thus, there have been frequent references that the RS, being ethnically rather compact, would

[56] Biljana Vankovska, The Framework Ohrid Agreement as a cradle of federalization, http://www.transnational.org/Area_YU/2007/Vankovska_Maced_structure.html

also have the right to secede from Bosnia-Herzegovina, as much as the ethnically almost homogenous Kosovo would have had.

These references are, however, mistaken. The key criterion for the right of secession is not the homogenous ethnic composition of the population but the question of repression and discrimination by the majority.

Here, the Serbian part of the population of Bosnia and Herzegovina as well as the RS present themselves in a rather favoured situation concerning both the legal and the de facto situation.

On the legal side, the Constitution of Bosnia-Herzegovina[57] gives far-reaching rights both to the Serbs in Bosnia-Herzegovina (BiH) and to the RS. Serbs are recognized as one of the "constituent people"[58] of BiH and have the right to use their language as well as to exert their (orthodox) religion. The State Constitution in its Article V on the (collective) State Presidency is based on parity and explicitly foresees that one of the three members must be a Serb. Within parliament, at the house of peoples one third of the deputies must be Serb (Art. VI, par. 1), while in the House of Representatives one-third of the Deputies have to come from the territory of the Republika Srpska (Art. VI, para. 1). Parity between all "constituent peoples" is also foreseen for practically all major public functions, e.g. any State level minister is supposed to have two deputies from the respective other "constituent peoples". Serbs are thus not in a discriminated but rather privileged position within BiH.

Assessing the position of the RS within the State of BiH would come to similar conclusions. The Dayton Constitution has kept the competencies at the State level quite narrow, with the majority of competencies de-

[57] Constitution of Bosnia-Herzegovina, Annex 4 to the General Framework Agreement ("Dayton Agreement"), Wright-Patterson Air Force Base, Dayton Ohio; 21 November 1995.

[58] Together with Bosniacs and Croats.

volved to the Entities. Key issues like public security or education but also justice are practically all at the Entity level.[59]

Both the Serbian population of BiH and the RS thus enjoy a high degree of internal self-determination which in many cases by far exceeds the established standards. The very existence of a "Republika Srpska" under this name constitutes a clear indicator against any ideas of repression or discrimination of Serbs in BiH.

Given the criteria under international law as established by the Friendly Relations Declaration and afterwards, the rather privileged position of the RS within the State of BIH would strongly speak against any justification of secession or secessionist tendencies.

Conclusions

Based on the above findings, we can come to the following conclusions:

- The Secession of Kosovo is no precedent under international law. It has taken place under rather exceptional circumstances but within the set of criteria established under international law progressively for regulating both "internal" and "external" self-determination. While these criteria favour in principle the "internal self-determination" in the shape of autonomy within a State, thus giving priority, in principle, to territorial integrity, international law no longer excludes the right to secede when key criteria for "internal self-determination" are not met;
- it is also no precedent within the historical sequence. The first such case of justified secession under the above criteria was undertaken by East Pakistan/Bangladesh in the early 1970s, and quickly recognised by the international community. Similar cases can be seen in the secession of Eritrea and East Timor;

[59] As was even defense until the Defense reform of 2002-2006 which established in a first step State control over the separate Entities' armed forces, and finally a single army at the State level.

- the secession of Kosovo thus cannot be regarded a "precedent" in either respect. It happened in the context of an already established legal framework, and it has not constituted the first case, either, with earlier State practice to recognize such secession when it meets the established criteria;
- the same arguments would invalidate some of the claims made by advocates of Kosovo's secession that it would constitute a "unique" case and thus constitute no precedent. As outlined above, there have been earlier cases, and we cannot exclude more to come whenever the criteria for justified secession would be met. While secession should be the exception rather than the rule, and justified only under rather limited and exceptional circumstances, the secession of Kosovo it is not a unique and isolated phenomenon, either. The fact that it does by itself not constitute a "precedent" (understood in a simplistic way) would not derive from its "uniqueness" but from the fact that it had to meet certain legal criteria to be acceptable;
- The secession of Kosovo does not constitute a "precedent" for the region, either. It was not justified because it had been undertaken in the context of the region, or of the breakdown of former Yugoslavia, or because the population would be predominantly Albanian, but for the simple reason of meeting certain necessary criteria. These criteria would have to be met by any other would-be secessionist tendencies or movements in the region (but also worldwide). These criteria which could be encapsulated in the formula "***no repression – no secession***" have not been met in the case of any other minority dispute in the region. Neither Albanians in Montenegro or Macedonia, nor Serbs in BiH are discriminated against, or repressed, in a way which would meet the exceptional criteria for "external self-determination", i.e. secession.

Outlook: the Secession of Kosovo and its Impact on Peace and Stability in the Region

Given the above findings, the secession of Kosovo should have no effect as "precedent" for secessionist tendencies in the region which would

lack the key criteria for justifiable secession. Taken in a proper perspective beyond simplistic and superficial analogies ("*any minority can secede*"), there should be thus no further impact on peace and stability in the region.

This does not exclude that nationalist and/or secessionist movements in the region would point to the example of Kosovo to claim that it has "set a precedent", but we should be aware that this is a phony claim without justification in international law, based either on ignorance or – worse – on the deliberate misuse of the term "precedent" which must be rejected.

More important, however, any dispute about the alleged "precedent" set by Kosovo's secession would have to ask the reverse question: What would have been the consequence if Kosovo would have been *denied* the right to secede? First of all, it would have sent a clear signal to all would-be repressive regimes that one could repress minorities without legal consequences. Attempts in "ethnic cleansing" would be without sanctions and could be repeated in due time, until they would have achieved their purpose.

Secondly, on the side of international law, it would have turned the development of the balance between territorial integrity and self-determination backward into the time before the adoption of the key instruments as for example the Friendly Relations Declaration, or even the adoption of the United Nations' Charter. It is no coincidence that inherently authoritarian regimes were among the loudest to protest against Kosovo's secession, as the right of self-determination is inseparably linked to the question of human rights, and any step backwards in this field would be seen by them with relief. Any such attitude also can be seen as expressing the view that the people – as much as the peoples – would be objects, rather than subjects of the State they live in.

Finally, any denial of the right of secession would have happened in visible contradiction to already established international law. The **denial** – and not the recognition – of the right to secede under the given specific circumstances would have indeed constituted a dangerous precedent, undermining the already developed legal framework for the balance of

territorial integrity and self-determination and sending international law back to the nineteenth century.