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The Precedent of Kosovo – Law and Politics

Matej Hamran

Introduction

It has been two years since the Assembly of Kosovo declared independence without any bilateral agreement with Serbia. The proclaimed Kosovo Statehood raises multiple issues of the relationship between law, facts and politics on the international plane. The Unilateral Declaration of Independence[41] on 17 February 2008 initiated further dispute about the significance of the principles and real authority of international law.

Kosovo, a small country in South Eastern Europe, finds itself at the centre of geo-political interests of the world's major states competing for influence in the Balkans, undoubtedly an area with strategic significance. As a consequence of the substantial political interest in this matter, the legal reasoning asserting secession of Kosovo is highly ambiguous and

[41] UDI.

varies according to the political claims of particular parties involved. The primary aim of this article is to present a relevant and purely legal argument in regard to the question of the legality of the creation of a Statehood of Kosovo and whether there has been established a legal precedent suitable for other secessionist claims elsewhere, or whether it is a singular case in its own right - *sui generis*. In order to reach an acceptable conclusion it is crucial to clearly distinguish between the legal argumentation and any political matters which may interfere.

As an introduction to the dispute it is necessary to briefly acknowledge several historical and social factors evolving into the current situation in Kosovo. There is a common practice of misinterpretation of history in order to support the political stands of the parties involved; therefore; the summarisation has to be made in a politically accurate way with no preference given to any of them. Arguments based on incorrect utilisation of the historical facts in order to support the legitimate claim lose their reliability. The conflict in Kosovo is long and complicated; there is no simple black or white, good or bad. Some issues have to be taken sensitively, owing to the large number of victims involved.

Kosovo is nowadays populated 90 per cent by Albanians and seven per cent by Serbians, while and the rest of its inhabitants comprise other

ethnic groups, including Roma, Bosniaks or Gorani. The structure of Kosovo's population has been changing over the decades and no ethnic group has ever made it easy for the others to co-exist.

The legal framework for the constitutional parts of the former multi-ethnic SFRY[42] has been established by the 1974 Constitution as a result of a long-lasting process of establishment of a federal system which would uniformly divide the country so no ethnicity would feel unequal or left out in the sphere of the government. Six Republic units[43] and two Autonomous provinces were confirmed. Within the Republic of Serbia there were constituted the Autonomous provinces of *Vojvodina* and *Kosovo*[44] with *dual status,* becoming *de facto* federal constitutional Republics as the other units.[45]

The period of the 1980s was influenced by the rise of Serbian nationalism, the major ethnicity of the former Yugoslavia. Under the regime of Slobodan Milosevic Serbia gained dominance in the Federal government, which was the downfall of the cautious balance created by the 1974 Constitution. As a consequence, in 1989 Kosovo suffered the

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[42] Socialist Federal Republic of Yugoslavia (1943-1992).

[43] Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, Macedonia. In spite of this, a new nationality was created - Bosniaks (Muslim Serbo-Croatian speakers).

[44] In Serbian terminology = *Kosovo i Metohija*, in Albanian= *Kosova*, in English= *Kosovo*.

[45] Müllerson. R. *op. cit*. p.127.

abolition of its previous status; simultaneously, with the claims of the other constitutional republics seeking independence, the tensed atmosphere blurred into tragic civil war, the "*final nail into the coffin*" of the Federation remaining united.

During the 1990s the Albanian minority in Kosovo became less tranquil and the oppression of the Central Government resulted in increased violence and threats. According to the conditions determined in *Rambouillet*,[46] Yugoslavia should loosen control over Kosovo[47] and provide Albanians with self-governance, where the eventual chance for secession arose. Later the actions of the illegal Kosovo Liberation Army[48] led to a gradual loss of control over Kosovo by the Yugoslav Central Government. The Yugoslav Army reacted with a rampage through Kosovo, which resulted in approximately a million refugees in a region of a population of around two million. In 1999, the Yugoslav attack was followed by the no-UNSC[49]-approved 78-day NATO air campaign against

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[46] 1999 *Rambouillet Accords* - proposed agreement between Yugoslavia and Kosovo Albanian minority drafted by NATO.

[47] It should be also borne in mind, not only the loss of a territory, but also the special value of Kosovo for Serbs as the crib of Serbian culture and religion. Andrew Bell-Fialkoff used a zinger comparison to show the importance of Kosovo to Serbs. To lose Kosovo would be to "leave out Orleans from the History of France, or Oxford from the History of England, however not quite completely, since Kosovo is sacral for Serbs, unlike from Orleans or Oxford".

[48] Kosovo Liberation Army – KLA (UÇK- Ushtria Çlirimtare e Kosovës).

[49] United Nations Security Council.

the FRY[50] which forced the Yugoslav Army to withdraw from the territory of Kosovo.

Since that time Kosovo has been under the patronage of the UNMIK,[51] according to the UNSC Resolution 1244 which emphasised, and was implemented under the condition of, respecting the territorial integrity and sovereignty of the FRY. The UNMIK intended to keep the situation in Kosovo peaceful, but even so several inter-ethnic confrontations occurred. The UN attempted to re-establish the *status quo* in the province by the UN Special Envoy Comprehensive Proposal for Kosovo Status Settlement[52] which introduced the doctrine of "supervised independence", essentially constituting a formal loss of Serbia's sovereignty in Kosovo. The UNSC refused the doctrine, since Russia, as the permanent member of the UNSC, used the veto privilege.

On 16 February 2008, the day before the actual declaration of independence, the EU deployed an Administration Mission called EULEX[53] to Kosovo, operating within the framework of the UNMIK and

[50] Federal Republic of Yugoslavia (1992-2003), Union of Serbia and Montenegro (2003-2006), Serbia (2006 - onward) and Montenegro (2006 – onward).

[51] United Nations Interim Mission in Kosovo (1999 - still operating).

[52] Known also as "supervised independence" or *Ahtisaari* Plan, as proposed by the UN Special Envoy Comprehensive Proposal for the Kosovo Status Settlement, Martti Ahtisaari.

[53] European Union Rule of Law Mission in Kosovo.

the controversial concept of *Supervised Independence* refused by the UNSC. This brought the whole concept into legal dispute. The mandate of EULEX is to increase the quality of self-governance, rule of law, policy, judicial and legislative branches and to support Kosovo in constructing a stable administration structure; seeing the aim to stabilise the whole region, with the potential for further political and economic development in the region. The effort of the EU enabled the Parliament of Kosovo to declare independence on the next day, 17 February 2008.

Serbia, supported by the UNGA Resolution[54], has requested the ICJ[55] for an Advisory Opinion with the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[56] Even after more than a year the ICJ has still not concluded a final verdict. Serbia and Russia believe that the EULEX is illegally maintaining the presence of the UNMIK, which was deployed under the provision of territorial integrity of Serbia as it was declared during the hearings of the ICJ.[57]

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[54]United Nations General Assembly GA/10764 Available: http://www.##.org/News/Press/docs/2008/ga10764.htm (20.8.2009).

[55] International Court of Justice.

[56] ICJ Press Release No. 2009/27 29th of July 2009.

[57] http://www.b92.net/eng/news/in_focus.php?id=91&start=390 (25.3.2010).

Nevertheless, declaratory opinions of the ICJ are not binding and, therefore, are not enforceable. So, it is unlikely that any decision would have any substantial effect on the factual situation although it might bring more light to the legal question and affect the process of international recognition, and it also may eventually move Kosovo toward legal Statehood. Up to now, Kosovo has been recognised by 65[58] out of 192 UN member states; therefore, the majority of the international community still refuses to recognise Kosovo, including several EU member states. In addition, the permanent members of the UNSC, Russia and the People's Republic of China are blocking Kosovo's membership in the UN.

Legal dispute

In order to analyse whether Kosovo constitutes a precedent, it must be acknowledged first whether Kosovo meets the essential criteria of sovereignty drawn by the 1933 Montevideo Convention. Moreover, there needs to be consideration of the principles of self-determination of peoples, territorial integrity and international recognition. Furthermore, the

[58] http://www.president-ksgov.net/site/?id=1,67,67,67,e,,, (25.3.2010).

principles of *jus cogens*, as the prohibition of use of force, and also the principle of *uti possidetis juris*[59], may effectively be utilised.

Article 1 of the *1933 Montevideo Convention on Rights and Duties of States* sets out the most widely accepted formulation of the criteria of Statehood in international law. A state should satisfy these qualifications: (1) a permanent population, (2) a defined territory, (3) government and (4) capacity to enter into relations with other states. During the process of legal dissolution of the SFRY[60], the Arbitration Commission of the European Conference on Yugoslavia,[61] in its Opinion No.1, declared that: "the state is commonly defined as a community which consists of a territory and population subject to an organised political authority". The state that satisfies these criteria can be characterised as sovereign.[62] In the context of Kosovo, two problematic areas arise: effective government and capacity to enter into relations with other states.

The requirement of *effective government* needs attention in light of the Kosovo international administration, which consequently limits the conduct of a state to sovereignty. For a political society to function

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[59] *Uti possidetis juris* - the borders are not to be changed without expressed consent of the concerned states. This principle has been reiterated in the case of Yugoslavia in the Opinion No.3 of the YAC.

[60] Socialist Federal Republic of Yugoslavia (1943-1992).

[61] Yugoslav Arbitration Commission - YAC.

[62] Shaw, M. N., *International Law*, 6th ed. (Cambridge University Press: Cambridge, 2008), p. 198.

responsibly and effectively there is a need to form a government or a central control; however, this aspect cannot be regarded as a pre-condition for recognition as an independent country[63] although the principle of self-determination is often set contrary to the concept of effective government, particularly in arguments concerning continuation of colonial rule.[64]

Kosovo is administrated under the conception of "independence with international supervision" intending to provide independent and efficient self-governance of the territory, with the stipulation that it is to be subject to permanent monitoring by the international community with the presence of an International Civilian Representative[65] appointed by the International Steering Group.[66] The ICR has a final authority regarding interpretation of the civilian aspects of the Settlement, particularly the ability to annul decisions or laws adopted by the Kosovo authorities and to sanction and remove public officials whose actions were determined to be inconsistent with the Settlement terms. International military presence led by NATO ensures a safe environment throughout Kosovo.[67]

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63 *Ibid.,* p. 200.

64 I. Brownlie, *Principles of Public International Law,* 7th ed. (Oxford University Press: Oxford, 2008), p. 71.

65 ICR in Kosovo.

66 The primary purpose of the International Steering Group (ISG), comprising 26 European states and the USA, is to support full implementation of the Comprehensive Proposal for the Kosovo Status Settlement of UN Special Envoy Martti Ahtisaari of 26 March 2007 http://www.ico-kos.org/?id=3 (19.11.2009).

67 Shaw, M. N. *op. cit*., p. 446.

The practice of international law regarding the criterion of effective exercising of control by a government has been modified in relation to the creation of the states of Croatia and Bosnia-Herzegovina. Both states were recognised as independent and admitted to membership of the UN,[68] which, in accordance with Article 4 of the UN Charter, is permitted only to states, at a time when both states did not exercise full control over their territories and where non-governmental forces controlled substantial areas during civil war conditions. On the other hand, Kosovo, two years after its declared independence, is not accepted as a member of the UN. However, behind these issues are apparent political interests and law may just observe it; nevertheless, the conception of supervised independence lies at the edge of the doctrine of independence and dependent state.[69]

The Kosovo government does not provide effective control over the Serb-inhabited areas in Northern Kosovo and it is hard to argue how far the territory can be effectively controlled without the presence of NATO-KFOR troops. The EULEX aim is to remain in place until the government of Kosovo is capable of self-governance, and of constituting a secure and multicultural society. Whether the Kosovans are capable of such

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[68] Both States were admitted on 22 May 1992 http://www.un.org/en/members/index.shtml (21.11.2009).

[69] According to Brownlie, *op. cit.* p.73, a dependent state can be a "legal person of a special type, appearing on the international plane for certain purposes only, as in the case of mandated and trust territories and some protectorates."

achievement in the whole territory of Kosovo is questionable; however, it is a fact that Serbia does not provide effective control over Kosovo either. The lack of effective central control might be balanced by significant international recognition, culminating in membership in the UN.[70] Despite this, the Serbian policy in this matter is quite unclear, since during the recent regional elections in Kosovo, the Serbian government was encouraging the Serb population to ignore the vote. Although it may be argued that this might not be the right track, life continues and in order to normalise the situation for all the people of Kosovo, there must be an effort to build up an effective government, even at the local level.

The capacity to enter into relations with other states represents the concept of independence, which is essential for a state in question in order to be sovereign. The State of Kosovo does operate in this area, although the capacity of Kosovo, due to the non-recognition, or merely partial-recognition by the international community, is rather limited. Even so Kosovo has successfully initiated international relations with a number of states. Kosovo is also a member of several international organisations and UN agencies, including the International Monetary Fund and the World Bank Group, despite the absence of UN membership. Moreover, Kosovo

[70] Shaw, M. N. *op. cit.* p. 201.

has already participated in several international conferences regarding the Balkan regional stability as a sovereign party. However, at the EU-Western Balkan States Summit in Brdo (Slovenia) on 20 March 2010, Serbia refused to attend unless the Kosovo representatives would participate as Kosovo-UNMIK according to the still valid UNSC Resolution 1244 (1999)[71], which effectively caused the meeting to fail.[72] Another summit in Sarajevo is being planned for this year so we might expect further political development soon.

Anyhow the concept of international recognition is disputable in itself, because the recent practice of states indicates that it has more a declaratory, rather than constitutional, meaning. Therefore, it is considered merely as an acceptance of an already existing situation and as an act of policy rather than as a legal requirement of international law for creation of Statehood, even though it certainly affects the ability of a state to be a party to international treaties. For the non-recognising states, the state and diplomatic agents of Kosovo are not entitled to diplomatic and state immunities among other rights and obligations. The division of the

[71] During the process of application for a final Settlement for Kosovo, the UN representatives considered the UNSC Resolution 1244 as no longer reflecting the current situation, although the proposed settlement was refused and the Resolution was not overruled; therefore, it is still valid.

[72]http://sofiaecho.com/2010/03/17/874723_serbia-kosovo-problem-dogs-brdo-western-balkans-summit (25.3.2010).

international community ensures the continuation of uncertainty.[73] A majority of the non-recognising states, including Serbia, are awaiting the declaratory decision of the ICJ and may reconsider their stand in relation to the decision expected in the near future.[74] At the same time, it needs to be noted that most of the recognising states have acknowledged Kosovo only under the stipulation of "international supervision and presence of international community".[75]

Another substantial and complex issue regarding the creation of a new Statehood is the aspect of self-determination of peoples. The right of self-determination is divided into the principle of external and internal self-determination, where "external" signifies primarily constructing an independent state of one's own, or secession. The "internal" on the other hand affects the free organisation of state order and recognises the ethnic minority within the population by providing all necessary rights and duties to develop their culture and prosperity.

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[73] Shaw, M. N. *op. cit.*, p. 453.

[74] The EU non-recognising countries are Spain, Greece, Cyprus, Romania and Slovakia. According to the Council Regulation (EC) No. 333/2002 of 18 February 2002, holders of a Passport of the Republic of Kosovo would be granted a terminated visa in order to enter these countries. The Slovak Republic recognises documents of the UNMIK as legal documents in order to enter the Republic. The Slovak Republic does not recognise unilateral declaration of the Independence of Kosovo. The Slovak Republic supported an agreement under the patronage of UNSC, in order to come to a solution in question. (Source: Centre of Public Relations of Ministry of Foreign Affairs of Slovak Republic).

[75] Warbrick, C., "Kosovo: the Declaration of Independence", *International & Comparative Law Quarterly*, 2008, 57(3), p. 684.

The concept of self-determination arose during the process of decolonisation in order to provide a legal instrument for nations under the colonial rule to gain independence. It is one of the essential criteria of Statehood; however, nowadays the right of self-determination has to be considered as an issue outside any colonial context, since the main process of decolonisation was already completed and overruled in the 1960s.[76] Accordingly, the right of self-determination under its original meaning is not legally relevant to the case of Kosovo, as well as the fact that according to the 1960 Colonial Declaration[77] colonised territory should be "geographically separated"[78] and "distinct ethnically and/or culturally from the country administering it". The geographical criterion does not apply, and according to the Constitution of Serbia, Kosovo is an integral part of the territory, hence not a colony or Non Self-Governing Territory.[79] Therefore, beyond the context of decolonisation, it has been established

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[76] It is claimed that the self-determination context may be used merely in relevance to the events in the 1960s, although it is argued that some features of decolonisation were present at the process of the USSR's dissolution in the 1990s, due to the imperial occupation of several territories during the time of the Russian Empire and the USSR. Nevertheless, this concept is not suitable for the case of dissolution of Yugoslavia or the secession of Kosovo.

[77] 1960 Declaration on the Granting of Independence to Countries and Peoples.

[78] Or so called "sea water" colonisation is used by Prof. Oliver Corten regarding the principle of self-determination of Kosovars http://de-construct.net/e-zine/?p=2854 (20.11.2009).

[79] Monteux, C. A., *The Status of Kosovo under International Law* (University of London, 15 September 2000), p. 28.

that external self-determination has obtained legal relevance under the human rights regime[80].

Beyond the context of decolonisation, self-determination may be argued as a human right to which all individuals are entitled; however, some individuals (solely "people") are denied its enjoyment. It has not been explicitly established whether "people" means the entire people of a state or whether it means all persons comprising distinctive groupings on the basis of race, ethnicity, religion or other.[81] Therefore, it has to be considered whether the Kosovo Albanians are entitled to be "people". On an anthropological and historical basis, Albanians from Albania and Kosovo are of the same ethnicity. Both inhabited Kosovo centuries ago as religious and linguistic groups distinguishable from the Slavic population or other ethnicities. One may use the argument that in the year 1912, the Albanian people were split between Albania, Montenegro and Serbia. It may be therefore asserted that the Albanian nation as a "people" has been granted a territory within the defined borders of the state of Albania as an expression of its external self-determination. As a result, the state of Albania became the international legal representation of the Albanian

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[80] *Ibid.*, p. 13.

[81] Kumbaro, D., *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention – Final Report* (North Atlantic Treaty Organisation, 2001), p. 24.

people. Being outside the borders of that state, Kosovo Albanians are therefore outside the legal realm of the Albanian people with regards to the principle of *uti possidetis*. Consequently, Kosovo Albanians are regarded as a "minority" and were granted extensional minority rights relevant to the internal self-determination within their autonomous province, according to the 1974 Constitution; although later they were abused by Milosević by the withdrawing of their constitutional status and by other means of violation of the principle of internal self-determination.

To remain consistent with the rather restrictive theory of "people" as a "nation", Kosovo Albanians should be considered as a "minority" or as an "Albanian ethnic enclave". Therefore, they are not entitled to an external right of self-determination in this context. This doctrine might be redefined in the future, whether the definition of people represents a "complete ethnic nation" or a "homogenous ethnic enclave" within another nation.[82] A shift may also occur in terms of strengthening the right to secession in favour of minorities; nevertheless, at this point, the definition is explicit. This analysis also shows the position of Kosovo Albanians within the former federation of Yugoslavia, where a minority

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[82] Borgen, C. I., "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", *American Society of International Law,* February 2008, pp.1-5 [online] Available: http://www.asil.org/insights080229.cfm#author (25.10.2009).

was entitled to internal self-determination, although not secession, as, for example, Slovenes or Croats. Such an analogy was also followed during the process of dissolution of Yugoslavia, although at that time it was politically motivated in order not to trigger off more secessionist claims of ethnical minorities such as Serbs in Bosnia and others.

Regarding Kosovo Albanians, as a minority, they might seek legal claim to unilateral secession under the concept of “the most extreme of cases and carefully defined circumstances”[83], as well as under the term of inadequate *use of force* by a territorial sovereign. This argument justifies Kosovo Albanians as an ethnical minority seeking their independence. It may be argued that such a use of force may inhibit the ethnic group from re-integrating into the majority population of a state. Nevertheless, it is disputable for several reasons. It is a fact that during the war in Kosovo, the Yugoslav army used force with inadequate power against the rebellion in the province, and there was a serious attempt at ethnic cleansing; although, at the time of the proclaimed independence of Kosovo, Serbia has not had armed forces in the region for almost 10 years. So it might be argued that such secession has a retroactive effect. Additionally, at the time of the humanitarian intervention, human rights were being violated by

[83] Canadian Supreme Court in *Re Secession of Quebec* (1998) 161 DLR (4th) 385, 438.

the KLA, which must not be considered as an excuse for either though.[84] The entire population of Kosovo suffered grievously, and victimisation of one ethnic group over the others, and subsequent related consequences are not observed as correct and appropriate in these particular circumstances.[85] Consequently, these doubts in relation to the right of secession under the human rights regime make the situation unclear and incapable of constituting any persistent legal claim. At this stage, it is assumed that the optimal way to deal with the claim of secession, outside of colonial concept, is within the frame of the particular situation together with the aspects of effective control and international recognition[86]; however, as already mentioned these aspects are not sufficiently unambiguous to attach legal outcomes to them.

On the other hand, there are several other arguments supporting the right of secession for Kosovo Albanians. One may see Kosovo as the final step of the dissolution of Yugoslavia, although this argument does not have any legal validity either. In 1992 the YAC Opinion No. 8 established that the dissolution of Yugoslavia was complete; literally the SFRY

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[84] "The KLA were not much better than the Serbs and looking for NATO to bomb Milosevic for them" (Alistair Campbell, Tony Blair's former head of communications, in A. Campbell, *The Blair Years*).

[85] Müllerson, R., "Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia", in *Chinese Journal of International Law,* vol. 8, no. 1., 2009, p. 9.

[86] Shaw, M. N. *op. cit.,* p. 523.

"ceased to exist" and fully-recognised successor states[87] were determined. The dissolution of Yugoslavia was a substantial formal act which enabled the birth of several successor states. Therefore, there was no subject known as a parent state, whose consent would legalise the secession, unlike the case of Kosovo, where the subject of parent state is apparent. The absence of Serbia's consent regarding Kosovo is a crucial factor against the legality of the Statehood of Kosovo, as the form of expression of the principle of territorial integrity. Eventual recognition of Kosovo by Serbia would definitely be a step toward the legality of a Kosovo Statehood; although that is rather unlikely, at least in the near future.

To declare the Statehood of Kosovo legitimate, there need to be other criteria to clarify the legality of the Statehood. The most applicable formal way of constituting legality may be the doctrine of extreme human rights violations and the internal unstable situation recognised by a substantial number of states. However, owing to the ambiguity of these claims, they are incapable of constructing a stable legal argument.

The main question of this topic is whether the creation of a State of Kosovo, with regard to secession of a minority, constitutes a precedent for other minorities seeking independence, or if it is a case of *sui generis* not

[87] Successor states: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, the Federal Republic of Yugoslavia.

suitable for any other case of secession. This is the area where the politics overwhelm the objective legal reasoning in an obvious way.

The Western states declared that the process of secession of Kosovo is *sui generis* as a consequence of taking certain features together, which separately do not make the concept specific. It is argued that the aspects of the NATO humanitarian intervention taken together with the subsequent implementation of the long-lasting UN administration of the territory and the human rights violation make the situation in Kosovo specific and not suitable to any other secessionist claim.

Indeed, in announcing the recognition of Kosovo by the USA, Secretary of State Condoleeza Rice explained:

> The unusual combination of factors found in the Kosovo situation - including the context of Yugoslavia's break-up, 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.[88]

[88] However, contrary to this claim, is the statement of Russian Duma: "The right of nations to self-determination cannot justify recognition of Kosovo's independence along with the simultaneous

This legal reasoning is not relevant. Taking into account the essential purpose of *humanitarian intervention*, limited to fighting against a human rights violation, it is considered as a means to essentially “stop and reverse ethnic cleansing”. Therefore, it might be argued that under these circumstances the essential purpose of the doctrine of humanitarian intervention has been misused as a supportive argument to the claim of independence of a secessionist province. Subsequently, it discredits the concept of the fight for human rights protection and effectively ends up as an “intervention for the claim of independence of secessionists”. Humanitarian intervention must not go beyond the humanitarian purposes.[89] Neither the UNMIK nor NATO presence has been, in legal terms, designed as a preparatory to, or as legitimising the independence of, the province, and there is no such provision for a post-intervention factual situation as the basis for the new legal position.[90] Therefore, this argument should not be used as a cause for the *sui generis* concept. Hence, it may be assumed that it is more reasonable to expect initiation of such an

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refusal to discuss similar acts by other self-proclaimed states, which have obtained *de facto* independence exclusively by themselves” (Borgen, *op. cit.,* p. 4).

[89] Müllerson, *op. cit.,* p.7.

[90] Orakhelashvili, A., “The Kosovo UDI between Agreed Law and Subjective Perception: A Response to Hilpold”, in *Chinese Journal of International Law* (2009), vol. 8, no.2, p.289.

intervention by other violent secessionist parties, with the same subsequent normative consequences.[91]

According to this analysis, Kosovo is unique; in simple terms, it is not identical to other cases, but it is definitely similar in essence to other cases since it involves the "struggle of a minority ethnic group for independent Statehood without the consent of the parent state".[92] Hence, any principle beyond the general framework of international law guiding to the solution of Kosovo will "affect all essentially similar cases around the globe."[93] In keeping with the definition of precedent, it is "judgment or decision used as an authority for reaching the same decision in subsequent cases."[94] The subsequent cases are bound merely by the main principles of the judgment (*ratio decidendi*) and not by the passing comments (*obiter dictum*). Accordingly, if it is not a precedent, no subsequent case should be of such a nature to justify implementation of the already adjudicated case.[95]

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[91] Jovanovic, M.A., *Is Kosovo and Metohija Indeed a "Unique Case"?* (Law Faculty, University of Belgrade) pp.1-8 Available: http://www.kosovo-law.org/mjovanovic.pdf (5.8.2009).

[92] *Ibid.,* p.7.

[93] *Ibid.*

[94] *Oxford Dictionary of Law*, p.404.

[95] Jovanovic, *op. cit.*, p.7.

We can already see the indirect effect of the Kosovo solution, not yet in a legal context, but clearly in terms of the intensification of the claims of other separatist attempts and political rhetoric of their representatives. An example is not difficult to find: Russia in relation to last year's conflict in Georgia, where the Kosovo argument was apparently misused in order to recognise the separatist regions of South Ossetia and Abkhazia. Even though Russia has not been followed by the international community, the Kosovo case has been unarguably used as a pattern in dealing with secessionists and as an instrument to pursue geo-political interests of Russia in Caucasus.

This leads to highly legally vague reflection: Kosovo shall be *sui generis* on the basis of the right to external self-determination under the human rights regime and extraordinary and specifically defined circumstances[96] constructed under joint matters of the NATO action and the UNMIK presence, and the use of force by the central government. This analysis is obviously insufficient to build up a stable legal justification.

In order to legitimise the implementation of the final Settlement for Kosovo, it cannot be modelled simply on principles of international law and at the same time not constituting a precedent. Hence, it is argued that

[96] Term used according to the statement of the Supreme Court of Canada in Quebec case.

there are incorporated aspects of political pragmatism in the legal consideration in order to achieve the particular goal.[97] Consequently, this fact drew denial of any purely legal orders in this context. In this context, by pragmatism, we mean a solution – reasonably applicable in reality – to reach the current political and economic goals, by using means beyond the doctrines of international law.[98] If it is claimed that the secession of Kosovo is *sui generis*, it is argued that it still constitutes a precedent, but in terms of utilising pragmatism within legal-reasoning, otherwise the secession of Kosovo established a clear precedent for other secessionists. In this sense we might be able to expect a shift in legal interpretation.

Conclusion

Kosovo today, two years after declared independence, exists in the same form as during the time of the declaration. It is formed in consistence with the concept of "supervised independence" intending to create an international society with no alien domination and with high-level minority rights, to stabilise the living standards under international police

[97] Regarding the uniqueness of Kosovo, see Professor Oliver Corten, http://de-construct.net/e-zine/?p=2854 (20.9.2009).

[98] This assertion is basically proved by the claim of not overlooking the status quo of Kosovo and the need for not keeping it as frozen conflict as, e.g., Cyprus or Sudan.

forces, to reach optimal self-governance and to include Kosovo within the world community of states, which by itself is not an illegitimate or illogical perception.

Even so, the current situation in Kosovo, under the administration of EULEX, still has not improved much in terms of keeping down the extreme level of unemployment, poverty and organised crime[99]. It may be stated, however, that the proclaimed independence diffuses positive energy among Kosovo Albanians, and slowly but surely the level of ethnic violence in the region is decreasing. The issue of Kosovo still remains significant in Serbian politics. However, it may be said that the Serbian leaders no longer observe Kosovo as the absolute priority of Serbian politics. Naturally, the political situation does not allow Serbians to recognise the State of Kosovo and it is unlikely they ever will, as we could see according to the recent summit in Slovenia. As time passes, we might see that the priorities will shift slightly to other important issues, such as integration into the EU and economic problems, instead of blocking diplomatic progress.

Law does not operate in isolation from reality. Particularly, international law is not taken out of political engagement, as international

[99]http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/articles/2009/05/18/reportage-01 (23.3.2010).

law is not created by one lawful authority as in national circumstances, but by the conduct of two or more states focussing primarily on their own related positions. The purpose of law is to reflect the reality in order to effectively regulate the conduct of members of a society. Therefore, in order to avoid chaos in a society and the law of the jungle, the principles of law should be obeyed. In this particular case the international community undeniably seeks a reasonable Settlement, which is sustainable and capable of achieving regional stability and a background for future economic prosperity, although at the price of bending the legal principles and losing the autonomy of international law. Political or ideological benefits obtained by those who violate policies in one case could be neutralised or even out-weighed afterwards. This is where the significance of observing autonomous principles becomes most obvious. Otherwise law just reflects the conduct of states with no regard to any principles.

In these circumstances it needs to be decided whether to commit to international norms in order to support the authority of law in all circumstances with the intention not to destabilise the international system, although it might not produce a practical settlement of the question in the short term; or whether to give priority to the current stability and economic prosperity of a particular region at the expense of potentially jeopardising

other places around the world in a long-term perspective and weakening the authority of international law in general.

Legal reasoning demands the long-term perspective, rather than current suitability. The international community of states has answered with a division and Kosovo now finds itself in a legal limbo which, for Kosovo Albanians, is still better than being in state with Serbia. What is better for some is worse for the others, though, not only in the context of Serbs in Kosovo, but also for other entities involved in similar conflicts around the world.

Further political actions, as for example recognition by Serbia, might be a solution for this situation. The pending ICJ decision will perhaps shed more light on the dispute and clarify the doctrine of secession. Nonetheless, the current situation in spite of all its problems can be described practically in the words of Mr. Eduard Kukan[100]: "If Kosovo remains as it is, it will be recognised by all sooner or later."

The position of international law represents the conservative perspective and therefore is hostile to the right of secession of minorities. Nevertheless, this dispute is of substantial political importance. It seems a new concept has been implemented into the relationship between politics

[100] Member of European Parliament, Chairman of the European Parliament Delegation for relations with Albania, Bosnia and Herzegovina, Serbia, Montenegro and Kosovo and former Minister of Foreign Affairs of Slovak Republic in interview in the European Parliament 23.3.2010.

and international law, of implementing political pragmatism above the general doctrines of law into legal reasoning. Therefore, in the context of a lack of clarity in international law and the complexities of the politics, it must be concluded that Kosovo has not established its claim to legal Statehood, and as a result, a creation of such a state has set a precedent in international relations.

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