

Kosovo as a (Non-)Precedent: Regulating Secession in the Former Yugoslavia

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Presented to the Harriman Institute Seminar Series on
“Limited Sovereignty and Soft Border in Southeastern Europe and the Former Soviet
States: The Challenges and Political Consequences of Future Changes in Legal Status”

October 24th, 2007

The principle of sovereign equality and its corollary principles of territorial integrity and non-intervention constitute the basis of international law according to the Charter of the United Nations.² International law is the law governing relations among states, and the international legal system would not function if states were not considered equal before law. The international political system, in turn, would be destabilized if law did not protect a defined territory, the cardinal characteristic of a state. For this reason, the principle of territorial integrity is enshrined in all major legal documents. The U.N. Charter directs states to refrain from “the threat or use of force against the territorial integrity or political independence of any state”³ and opposes intervention by the United Nations itself in “matters which are essentially within the domestic jurisdiction of any state.”⁴ Deviation from these fundamental norms can be justified only for reasons of self-defense⁵ and “threat to the peace, breach of the peace or act of aggression,”⁶ but exclusively through either a collective intervention by a recognized international organization or by U.N. members following a specific resolution.⁷ Nonetheless, one should note that U.N. Charter provisions are not always followed and that their interpretation is at times overextended. This trend may continue, judging by the increasing influence of natural law advocates and proponents of the so-called

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² U.N. Charter, Articles 2(4), 2(7).

³ *Ibid.*, Article 2(4).

⁴ *Ibid.*, Article 2(7).

⁵ *Ibid.*, Article 51.

⁶ *Ibid.*, Article 39.

⁷ Individual military action is permitted without a specific Security Council resolution only in case of self-defense, in the period before Security Council takes a decision. *See* Article 51, U.N. Charter.

humanitarian interventions based on unclear guidelines.⁸ Some publicists, such as Horowitz, have also called for an explicit right of secession in certain instances, namely in the case of extreme oppression.⁹ The root of their argument can be found in the basic requirement of a democracy to be ruled by the people, which is where sovereignty meets self-determination.

Despite its political importance or perhaps because of it, the term sovereignty remains without a definition upon which international jurists would agree. Yet, while there is no accord on the definition of sovereignty, it is universally agreed that: “only states can be sovereign.”¹⁰ As proclaimed by the International Court of Justice, sovereignty is the “totality of international rights and duties recognized by international law” as residing in an independent territorial unit – the state.¹¹ With the American and the French Revolutions, popular sovereignty has become the sole legitimate foundation of a modern state for most of the world. Such sovereignty derived from the will of the people has led to the establishment of both the principle of territorial integrity and the principle of self-determination. Modern democracies attempt to balance these two principles, relinquishing their sovereignty internally for the sake of democratic government, and externally for the sake of peace and prosperity. As the then U.N. Secretary-General Boutros Boutros-Ghali declared: “The time of absolute and exclusive sovereignty... has passed; its theory was never matched by reality.”¹²

At the same time, one should note that states tend to be more conservative than legal publicists, for the simple reason that their survival is threatened when sovereignty is challenged. While sovereignty and independence are often questioned, they continue to be the building blocks of the international system. In international law as in international practice, sovereignty remains the essential, compulsory qualification for full membership

⁸ Study of humanitarian interventions is outside the scope of this work.

⁹ Donald L. Horowitz, “A Right to Secede?,” *Secession and Self-Determination*, eds. Stephen Macedo and Allen Buchanan, *Nomos XLV: Yearbook of the American Society for Political and Legal Philosophy* (New York, London: New York University Press, 2003), 50-76: 61-62. See also *The Aaland Islands Question*, Report presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21/68/106 (1921), 28.

¹⁰ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Rev. ed. (Philadelphia: University of Pennsylvania Press, 1996), 15.

¹¹ *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 180.

¹² *An Agenda for Peace*, Report of the Secretary-General to the Security Council, U.N. Doc. A/47/277-S/24111 (1992), paragraph 17.

in the international community. Therefore, the main question is not whether the principle of territorial integrity or the self-determination of people would prevail, but how the two limit each other. This problem is further complicated by the fact that the holder of the right to self-determination - ‘people’¹³ has not been legally defined. As Sir Ivor Jennings remarked in 1956: “On the surface it seemed reasonable: let the People decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people.”¹⁴ Still in 2007, as once pinpointed by Kimminich, “the right of self-determination occupies ‘a unique position’ in international law ‘because it is attributed to an entity which is not a legal person in international law.’ ”¹⁵

State practice in the period preceding Yugoslavia’s disintegration in 1991 has been loyal to Woodrow Wilson’s vision of self-determination, applying the principle as one that speaks to democracy as a method of government rather than independence for each ethnic group¹⁶ – when the principle coincided with strategic political interests. As Buchheit concludes, political opportunism has represented the one undisputed criterion in interpreting self-determination:

Perhaps the only certain lesson to be derived from a study of State practice with reference to secessionist self-determination is that, given the present absence of any indisputable rule of international law, a State’s response to a particular situation will most often be determined solely by its own political interests.¹⁷

States have arguably exploited the ambiguity of the legal meaning of a “people” to the advantage of the ruling authority, generally opposing secession and other potentially separatist forms of self-determination. Until relatively recently, they strongly resisted the development of minority and human rights and continue to be watchful of any negative repercussions. Nonetheless, while governments worldwide continue to manipulate human rights jargon for political purposes, many have also understood that a certain degree of

¹³ U.N. Charter, Article 1(2).

¹⁴ Ivor W. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), 56.

¹⁵ Otto Kimminich, "The Issue of a Right of Secession," in *Modern Law of Self-Determination*, ed. Christian Tomuschat, Developments in International Law (Dordrecht; Boston: M. Nijhoff Publishers, 1993), 86.

¹⁶ Self-determination, as conceived by Wilson “was an imprecise amalgam of several strands of thought, some long associated in his mind with the notion of ‘self-government,’ others newly hatched as a result of wartime developments, but all imbued with a general spirit of democracy.” Woodrow Wilson, cited in Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (The Hague; Boston: M. Nijhoff, 1982), 1.

¹⁷ Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), 105.

devolution of sovereignty may actually serve to protect their territorial integrity. As Thornberry reminds us, “self-determination and minority rights are locked in a relationship which is part of the architecture of the nation State, since whenever a State is forged, the result is the creation of minorities.”¹⁸

Case of Kosovo: Status before Standards?

NATO’s controversial bombing of the Federal Republic of Yugoslavia (now Serbia and Montenegro) in 1999 raised expectations harbored by Kosovo and Metohia’s ethnic Albanians that Serbia’s southern province would be recognized as an independent state. However, key international actors such as former U.S. Deputy Secretary of State Strobe Talbott rebutted such aspirations, expressing fear that Kosovo’s “secession would give heart to separatists and irredentists of every stripe in the region.”¹⁹ The body guiding international efforts in southeastern Europe, the Contact Group, which included the United States, Russia, United Kingdom, France and Germany, urged patience and delayed the resolution of the Kosovo status, presently defined by U.N. Security Council Resolution 1244 (1999) as “substantial autonomy within the Federal Republic of Yugoslavia” and administered by the United Nations. As postulated by U.S. diplomat Christopher Hill in 2000:

Kosovo status cannot be solved now. It has to be solved peacefully, and this is a long-term process. Kosovo will be under UN mandate for many years.²⁰

Although the United Nations Interim Administration Mission in Kosovo (UNMIK) in its first enactment stated “All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General [SRSG]”²¹ some of the authority was later devolved to local authorities. In 2001, a Constitutional Framework for Provisional Self-Government²² was adopted, dividing responsibilities between UNMIK and the Provisional Institutions of Self-Government (PISG) to develop self-government in

¹⁸ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford, England and New York: Clarendon Press, 1991) 13..

¹⁹ U.S. Deputy Secretary of State Strobe Talbott, Address at the Aspen Institute: *The Balkan Question and the European Answer*, August 24, 1999 (accessed December 15, 2005); available at http://www.state.gov/www/policy_remarks/1999/990824_talbott_aspen.html.

²⁰ Christopher Hill, speaking at the Fletcher School, Boston, USA, February 28, 2000.

²¹ UNMIK/REG/1999/1, July 25, 1999, S/1999/987, 14.

²² Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, May 15, 2001.

Kosovo pending a final settlement, as provided by UNSCR 1244. UNMIK retained control of the most sensitive areas, including security, most economic policy and ‘external relations.’” Moreover, UNMIK was always careful to note when adopting regulations in the international arena, such as issuing travel documents, that these acts had no implications for the international status of the territory.²³ The Constitutional Framework equally reasserted the primacy of UNSCR 1244, affirming that “the exercise of the responsibilities of Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244.” To obtain Serbia’s support for Serb participation in the ensuing elections for the Kosovo Assembly, UNMIK signed a “Common Document” with the Government of Serbia that affirmed that the new institutions would have no authority to take any steps towards resolving Kosovo’s final status, additionally establishing a “High Level Working Group” as a forum under the auspices of the SRSG that would bring together officials from Belgrade, UNMIK and the PISG to discuss minority issues.²⁴

However, the fear felt by Kosovo Serbs that any support lent to provisional institutions would bolster Kosovo’s independence was not placated by this document. The subsequent marginalization of non-Albanian ethnic groups by the Kosovo Albanians in the Assembly and other institutions solidified their decision not to participate in local self-government. As related by international peacekeepers, a multiethnic Kosovo did not feature even symbolically in the Assembly that the Constitutional Framework established:

The official opening of the Assembly’s refurbished hall was marred by Kosovo Serbs’ understandable complaints about murals depicting scenes that reflected only the Albanians’ view of history – effectively erasing that of the other ethnic groups who have inhabited Kosovo for centuries.²⁵

Another factor that instigated the atmosphere of mistrust and prevented interethnic reconciliation in Kosovo was the “reverse” ethnic cleansing which occurred immediately after Yugoslav forces withdrew and international troops took over the security role in the

²³ See House of Lords Debates 610, WA 139-40, March 8, 2000, (2000) 71 British Yearbook of International Law, 556.

²⁴ Ian King and Whit Mason, *Peace at Any Price; How the World Failed Kosovo* (Ithaca, NY: Cornell University Press, 2006), 122-123.

²⁵ *Ibid.*, 7.

province in June 1999. As portrayed by U.S. diplomat Christopher Hill: “War was hell but peace could at least be called purgatory.”²⁶ UNMIK’s inability to take control was so apparent that by May 2003, the Kosovo Protection Corps, established to enforce the rule of law, had direct links to the Albanian National Army, “a terrorist group bent on ethnically cleansing Kosovo of non-Albanians,” leading the Kosovo International Security Force (KFOR) commander to assert that “all members of the KPC were criminals.”²⁷ As a result, the international community demanded that Kosovo and Metohia achieve certain levels of international standards before undertaking negotiations on the status and a policy of “Standards before Status” was formally adopted in December 2003.²⁸ Sadly, this policy was ultimately abandoned. The March 2004 pogrom of Kosovo’s Serbs²⁹ convinced the international community that the situation in the province was “unsustainable”³⁰ but the paradoxical conclusion was that the “Standards before Status” policy needed to be reversed, presumably in the hope that a clear status

²⁶ Christopher Hill, speaking at the Fletcher School, Boston, USA, February 28, 2000. See also Human Rights Watch, *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004*, July 2004 (accessed October 25, 2005); available from <http://hrw.org/reports/2004/kosovo0704/>; OSCE Mission in Kosovo, Human Rights Challenges following the March Riots (accessed October 25, 2005); available from http://www.osce.org/documents/mik/2004/05/2939_en.pdf; International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005 – Serbia and Montenegro (Kosovo)*, 27 June 2005 (accessed on October 25, 2005); available from http://www.ihf-hr.org/viewbinary/viewdocument.php?download=1&doc_id=6456.

²⁷ King and Mason, *Peace at Any Price*, 149.

²⁸ The Standards for Kosovo, presented by the United Nations Interim Administration Mission in Kosovo on 10 December 2003, covered eight broad categories of democratization to be met before addressing the question of Kosovo’s future status: 1) Functioning Democratic Institutions, including elections the Provisional Institutions of Self-Government and media and civil society; 2) Rule of Law (police/judiciary); 3) Freedom of Movement, including free use of language, 4) Returns and Integration; 5) Economy (Legislation, Balanced Budget, Privatization); 6) Respect for Property Rights (Clear Title, Restitution), including preservation of cultural heritage; 7) Dialogue, including Prishtina-Belgrade dialogue and regional dialogue; and 8) Kosovo Protection Corps (Size, Compliance with Mandate, Minority Participation).

²⁹ In March 2004, according to UN statistics, 50,000 Kosovo Albanians – in the presence of 18,000 NATO ‘peacekeepers’ – drove 4,500 Serbs and other non-Albanians from their homes, injuring 900, including 150 peacekeepers, and killing 19 persons. Over 8,000 homes were looted and demolished and over 20 Serb Orthodox churches and monasteries destroyed. See Rev. Irinej Dobrijevic (Coordinator, Kosovo and Metohia Committee Office, Holy Assembly of Bishops of the Serbian Orthodox Church), “Kosovo: Current and Future Status,” Testimony Before the Committee on Foreign Relations, U.S. House of Representatives, Washington, DC, May 18, 2005; Harry De Quetteville, “Kosovo In Flames As Albanians Renew War On Serbs,” *Telegraph* (U.K.), March 18, 2004; Matt Robinson and Christina Jennings, “Kosovo Clashes Were Planned, Says Un Official,” *Scotsman*, March 18, 2004; Bill Hayton, “‘Sinister Purpose’ To Kosovo Clashes?,” BBC, March 19, 2004; “Kosovo Clashes ‘Ethnic Cleansing’ ”, BBC News, March 20, 2004; Kim Sengupta, “Burnt-Out Serbs Driven Into Exodus From Kosovo,” *The Independent* (London), March 19, 2004; Shaban Buza, “NATO sees specter of ethnic cleansing in Kosovo,” *Reuters*, March 19, 2004, etc.

³⁰ International Commission on the Balkans, *The Balkans in Europe’s Future*, April 2005, 10.

would lead to enhanced human and minority rights. International peacekeepers on the ground were bitterly disappointed after the March riots:

They all came to Pristina bright-eyed and ready to help the poor downtrodden Albanians. Now they gripe more than anyone, frustrated because they feel the Kosovo Albanians aren't even trying to make a democratic state for themselves.³¹

The new policy became one of "Standards and Status," as pronounced by U.S. Undersecretary of State Nicholas Burns.³² In December 2005, the Norwegian Permanent Representative to the NATO Council, Kai Aide, appointed by U.N. Secretary-General Kofi Annan to assess the situation on the ground, effectively concluded that despite progress, standards had *not* been met in most areas:

The main findings are mixed. What I found were significant achievements in some areas, such as building of institutions and establishment of legal framework. We must remember that back in 1999 there was, in fact, nothing and there was a need to start from the very ground. So I think in this respect there have been some very significant achievements. And then there are some very, very important shortcomings. The justice system is very weak; the question of respect for rule of law is weak too. There is no doubt about that. *Regarding interethnic problems, I believe very little has happened and the reconciliation process has not yet started.*³³

Aide nonetheless recommended that negotiations on the future status of Kosovo begin and the U.N. Secretary-General adopted the Ambassador's recommendation,³⁴ despite the fact that he had personally concluded several months prior, on 14 February 2005, that "none of the eight standards has yet been fulfilled" and that "there must be 'real progress on the standards' before Kosovo's final status can be determined."³⁵ In line with the new political decision, the European Commission officially described the political situation in Kosovo in November 2005 as "stable" and relations between Serbs and Albanians as simply "strained."³⁶ In January 2006, the European Commission integrated the eight

³¹ King and Mason, *Peace at Any Price*, 18.

³² Nicholas Burns, cited in Jonathan Steele, "US pushes for decision on Kosovo status," *The Guardian* (London), June 8, 2005.

³³ See "Kosovo: RFE/RL Speaks with UN Special Envoy Kai Aide" (accessed December 31, 2005); available from <http://www.rferl.org/featuresarticle/2005/10/b8f625da-0b53-4b62-b9a2-21cd562f63db.html> [Emphasis added].

³⁴ "Kosovo: Annan Recommends Starting Future Status Talks Now" (accessed December 31, 2005); available from <http://www.un.org/apps/news/story.asp?NewsID=16322&Cr=kosovo&Cr1=>.

³⁵ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2005/88, February 14, 2005, paragraphs 2, 17; "Progress in Kosovo Insufficient for Final Status Review," *Southeastern European Times*, February 16, 2005. For a brief outline of the standards, see footnote 28 above.

³⁶ *2005 Enlargement Strategy Paper*, 26.

chapters of the “UN Standards for Kosovo” into the document that serves as a roadmap for the region’s European integration process – the European Partnership. In November 2006, the EC for the first time produced a separate “Progress Report on Kosovo (under UNSCR 1244)” in terms of the Stabilization and Association Process,³⁷ having previously merged its reporting on Kosovo with the wider report on Serbia.³⁸ At the same time, the EC officially announced that “the EU will have a major role to play in the status settlement and its implementation, once it is agreed by the United Nations Security Council.”³⁹ Once again it was recognized that “the European perspective is crucial to provide all involved with a vision of a common future in the European Union.”⁴⁰ Yet to make that perspective more real for the people of Kosovo, the E.U.’s 27 member states will be asked to provide at least 1.5 billion euros to finance the development of Kosovo as soon as its status is settled by the United Nations Security Council, according to Olli Rehn, the E.U. enlargement commissioner:⁴¹

An injection of money will be needed to protect the Serb minority and its cultural monuments, end widespread corruption and find ways to attract investment in an area where unemployment is running at 40 percent, according to the European Bank for Reconstruction and Development. While NATO will maintain a large military presence, the EU will need money to send 2,000 police and judicial experts.⁴²

On November 14, 2005, former Finnish President Martti Ahtisaari was appointed the special envoy of the U.N. Secretary-General for the negotiations on Kosovo’s future status, initiated on February 20, 2006. Several meetings of the Prishtina and Belgrade delegations, organized under the auspices of Mr. Ahtisaari, were held

³⁷ Official name for region’s European integration process. See Communication from the Commission to the Council and the European Parliament on the stabilisation and association process for countries of South-Eastern Europe - Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania, COM/99/0235, 26 May 1999; Conclusions of the E.U. General Affairs Council, 2192nd Council meeting, Luxembourg, 21-22 June 1999.

³⁸ Commission of the European Communities, Communication from the Commission to the European Parliament and the Council, “Enlargement Strategy and Main Challenges 2006 – 2007, including annexed special report on the EU’s capacity to integrate new members” [COM (2006) 649 final], Brussels, November 8, 2006.

³⁹ Commission of the European Communities, *Commission Staff Working Document: Kosovo (under UNSCR 1244) 2006 Progress Report* [COM (2006) 649 final], Brussels, November 8, 2006, 15.

⁴⁰ Ibid.

⁴¹ The E.U. has already spent €2 billion in the province since 1999.

⁴² Judy Dempsey, “€1.5 billion expected from EU for Kosovo development,” *International Herald Tribune*, April 1, 2007.

between February 2006 and March 2007, focusing on decentralization, community rights, religious and cultural heritage and economic issues.

The negotiating parties had different goals. Kosovo Albanian leaders have demanded nothing short of independence. In contrast, the Serbian government, while rejecting independence, has offered a compromise “substantial autonomy” translating to de facto but not de jure independence, albeit with extensive self-rule for certain areas within Kosovo and Metohia with strong links to Belgrade.⁴³ Ethnic Albanian claims for independence have generally been based on demographics and past oppression. As suggested by one Albanian jurist, who ignores Albanian oppression of Serbs both in recent and more distant past and the terrorist nature of the Albanian revolt in late 1990s:

The international community should reward Kosovars [ethnic Albanians] for their patience in seeking self-determination, and their use of force only as a last resort, by allowing them, in pursuance with international law, to secede from their long-time oppressor and obtain the status of a fully independent country.⁴⁴

Both of these arguments—demographics and past oppression—could easily be reversed. First, while the majority of Kosovo and Metohia province is ethnic Albanian, the majority of the state is Serbian. Second, historic evidence shows the oppressors and the victims in the province have not been of one nationality.⁴⁵ It is of particular concern that Kosovo Albanians may have taken cues from the international non-response to Croat ethnic cleansing of Krajina⁴⁶ as an effective means of ending the ‘minority problem,’ when undertaking systematic violence in March 2004. As revealed by an anonymous

⁴³ See Interview, Sanda Raskovic-Ivic, More Than Autonomy, Less Than Independence - A Fair Offer (accessed October 18, 2005); available from http://www.kosovo.net/news/archive/2005/October_17/3.html. For more, see below.

⁴⁴ Korab R. Sejdiu, “The Revival of a Forgotten Dispute: Deciding Kosova’s Future,” *Rutgers University Journal of Law and Urban Policy* 3, no. 1, 117.

⁴⁵ See Ana S. Trbovich, *A Legal Geography of Yugoslavia’s Disintegration* (New York: Oxford University Press, 2007), especially Chapters 2 and 3.

⁴⁶ According to Human Rights Watch, the Croatian offensive of August 1995 “resulted in the death of an estimated 526 Serbs, 116 of whom were reportedly civilians.” Furthermore, “in the months following the August offensive, at least 150 Serb civilians were summarily executed and another 110 persons forcibly disappeared.” Human Rights Watch, “Croatia: Impunity for abuses committed during ‘Operation Storm’ and the denial of the right of refugees to return to the Krajina,” Vol. 8, No. 13 (D), August 1996. *Note*: Veritas, an independent research organization based in Belgrade, Serbia and Banja Luka, Bosnia, which cooperates with ICTY, has documented 1,960 Serbian victims of Operation Storm, out of which 1,205 are civilians (522 women, 12 children). Author’s Interview with Savo Shtrebats, Director of Veritas, Belgrade, December 7, 2005 (updated in March 2007). U.S. administration expressed support for this action. See Dana Priest, “U.S. Cautiously Supports Offensive against Serbs,” *The Washington Post*, August 5, 1995; Misha Glenny, *The Fall of Yugoslavia; The Third Balkan War*, 3rd rev. ed. (New York: Penguin Books, 1996), 284; Bill Clinton, *My Life* (New York: Vintage Books, 2005), 667.

Western diplomat:

Albanians are trying to cleanse the Serbs and create a fait accompli before any talks.
[...] Anyone with political experience can see that.⁴⁷

The Serbian stance on Kosovo is derived from both romantic and practical concerns. The province of Kosovo and Metohia has both a material and non-material value for the Serbian people. The Serbs' emotional and spiritual attachment to this region is comparable to that of Jews to Israel. As relayed by one of the famous Serb poets, Matiya Bechkovich:

... nothing is more critical for the Serb people than the present struggle in Kosovo and for Kosovo...Kosovo is the most precious of Serb words. It has been paid for with the blood of the whole nation. Because of that price it is entrenched at the throne of the Serb language. Without blood it could not be bought, without blood it cannot be sold.⁴⁸

The non-material value of territory is not unimportant. On the contrary, as pinpointed by Monica Duffy Toft: "Recognizing this double meaning of territory is the first step toward a better understanding of the origins, character, and duration of ethnic violence."⁴⁹ Moreover, Serbian insistence on an institutional link with Kosovo is not exclusively non-material. It is based on well-defined interests, including legal protection of Serbs and other non-Albanians, access to Serb religious and cultural sites, and avoidance of negative precedents for other parts of Serbia such as the Preshevo Valley or Sandjak.

On April 29, 2004, the Serbian government adopted a "Plan for Kosovo" which envisaged five "territorial autonomies" for Serbs in Kosovo, "based on the principle of subsidiarity" in areas where Serbs constituted a majority in 1999 and without prejudging the final resolution of the province's status.⁵⁰ In conformity with this plan, during an official visit to Russia in November 2005, Serbian President Boris Tadic proposed that two entities be created in Kosovo, one Serb and one Albanian, which need not be

⁴⁷ Shaban Buza, "NATO sees specter of ethnic cleansing in Kosovo," *Reuters*, 19 March 2004. Note: Similarly, the OSCE described the 1999 incidents as organized: "although many incidents were disparate, individual acts of revenge, others have assumed a more systematic pattern and appear to have been organized. The evidence in part points to a careful targeting of victims and an underlying intention to expel." Report on Human Rights Findings of the OSCE Mission in Kosovo, OSCE, December 1999.

⁴⁸ Matiya Bechkovich, *Косово – најскупља српска реч* [Kosovo – the most precious Serb word] (Valjevo: Biblioteka Glas Crkve, 1989), 7-8.

⁴⁹ Monica Duffy Toft, *The Geography of Ethnic Violence* (Princeton and Oxford: Princeton University Press, 2003), 148.

⁵⁰ Serbian President Boris Tadic's Plan for Kosovo presented in *Politika* (Belgrade), April 30, 2004, A5. See Figure 21.

territorially cohesive, and with the Serbian entity “institutionally linked to Belgrade.”⁵¹ This solution would cater to the different needs of the two communities relating to language, religion or education – needs that are at the core of human rights. The 2004 Serb Plan for Kosovo resembled the model of the Jura canton in Switzerland that enabled internal partition based on local plebiscites while safeguarding the state’s territorial integrity.⁵² President Tadich insisted that Serbia was ready “to recognize all the possible rights of ethnic Albanians and their maximum possible independence from Belgrade, while at the same time preserving the sovereignty and territorial integrity of Serbia over Kosovo.”⁵³ On 4 April 2007, at the U.N. Security Council debate on the future status of Kosovo, the Serb Prime Minister Vojislav Kostunica reiterated the position that Serbia would provide Kosovo with “the highest degree of autonomy” but not independence.⁵⁴

After one year of negotiations, U.N. mediator Martti Ahtisaari concluded that “the parties [were] not able to reach an agreement on Kosovo’s future status,” and that “the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status [was] exhausted.”⁵⁵ In his report to the Security Council, delivered on March 29, 2007, Ahtisaari recommended “independence, to be supervised for an initial period by the international community.”⁵⁶ The Special Envoy asked the United Nations to encourage the dismemberment of one of its member states for the first time in history, claiming that Kosovo’s secession, guided by the advised “Comprehensive Proposal for the Kosovo Status Settlement”⁵⁷ would bring prosperity to the region:

Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history — one that is based upon peace, stability and prosperity for all.⁵⁸

In contrast to Ahtisaari’s optimism, the international human rights organization

⁵¹ Katarina Subasic, “Kosovo can be Independent within Serbia: Serbian President,” *Agence-France Presse* (AFP), December 15, 2005.

⁵² For more, see Pierre Boillat, *Jura, naissance d’un état – Aux sources du droit et des institutions jurassiennes* [Jura, Birth of a State – At the Source of Jurassian Law and Institutions] (Lausanne: Editions Payot, 1989).

⁵³ *Ibid.*

⁵⁴ Often spelled as Vojislav Kostunica in international press. See Nikola Krastev, “Kosovo: UN Security Council Begins Final-Status Debate,” *Radio Free Europe/Radio Liberty*, April 4, 2007.

⁵⁵ Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, March 26, 2007, 2.

⁵⁶ *Ibid.*

⁵⁷ Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, March 26, 2007.

⁵⁸ Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, March 26, 2007, 5.

Amnesty International expressed concern “that an imposed solution would exacerbate the already heightened tensions within Kosovo, and may lead to further violations of human rights.” The organization continues to urge that any final agreement must be arrived at in consultation with, and address the rights of, all communities in Kosovo – including Albanians, Serbs, Roma, Ashkali, Egyptians, Bosniaks, Gorani, Turks – as well as women, even if that consultation requires further time.⁵⁹

The “supervised independence” for Kosovo proposed by Special Envoy Ahtisaari is analogous to conditional recognition, defined by Lauterpacht as “recognition the grant or continuance of which is made dependent upon the fulfillment of stipulations other than the normal requirements of statehood.”⁶⁰ In the past, states generally have not adhered to the imposed conditions, leading James Crawford, who specialized in international public law relating to the creation of states to conclude: “Collective conditional recognition is thus of limited value in qualifying the authority or conduct of new states.”⁶¹ As a guarantee that “Comprehensive Proposal for the Kosovo Status Settlement” would be implemented, the document provides for “an International Civilian Representative” who would essentially be a carbon copy of the High Representative in Bosnia and Herzegovina, exercising power to annul laws or decisions by Kosovo authorities and the right “to sanction or remove from office any public official *or take other measures, as necessary*, to ensure full respect for this Settlement and its implementation.”⁶² The U.N. Special Envoy thus proposed for Kosovo the very model that the Parliamentary Assembly of the Council of Europe had berated in Bosnia as “irreconcilable with democratic principles.”⁶³ The Serbian government rejected Ahtisaari’s proposal for the Kosovo

⁵⁹ Amnesty International Public Statement, “Kosovo (Serbia): Need to consult civil society and ensure effective protection of human rights,” AI Index: EUR 70/014/2006 (Public) News Service No: 249, 22 September 2006.

⁶⁰ Hans Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 358.

⁶¹ James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006), 546.

⁶² Article 2, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007, 52.

⁶³ Parliamentary Assembly of the Council of Europe Resolution 1384: “Strengthening of democratic institutions in Bosnia and Herzegovina,” June 2004, Paragraph 13. Council of Europe’s Venice Commission concurred. See European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, based on Comments by Mr. J. Helgesen (Member, Norway), Mr. J. Jowell (Member, United Kingdom), Mr. G. Malinverni (Member, Switzerland), Mr. J.-C. Scholsem (Member, Belgium), Mr. K. Tuori (Member,

Status Settlement, recalling the amendments that the Serb negotiating team suggested to the Envoy's draft proposal during the final two rounds of talks in February and March 2007.⁶⁴ These amendments essentially transform the Ahtisaari-advised “supervised independence” into a “supervised autonomy.”⁶⁵ Importantly, the Serbian government has criticized the document’s provisions that relate to group rights of Kosovo’s non-Albanian ethnicities, the largest of which are Serbs. While the U.N. Special Envoy reported to have “incorporated 11 pages of amendments into his final package,”⁶⁶ a member of the Serb negotiating team and long-standing Kosovo expert Dushan Batakovich has asserted that Ahtisaari’s final proposal instead “ignored various agreements achieved during the negotiation process, namely in relation to decentralization and the protection of the Serb cultural and spiritual heritage in Kosovo.”⁶⁷ The key Serbian amendment, in addition to changes that relate to the province’s ability to conduct foreign relations, refers to the right of the majority Serb municipalities to “form a Serbian entity in order to secure efficient application of their authority and competences.”⁶⁸

After a debate held on April 3, 2007, Security Council members could not come to an agreement on the future status of Kosovo, with Russia taking the lead among states that rejected Ahtisaari’s proposal. The United States officially supported Kosovo’s independence, as did many European states, including the United Kingdom, Germany and France. In contrast, other European Union members, notably Slovakia, Greece and Romania, declared their preference for a high level of autonomy for the province.⁶⁹ Even

Finland), adopted by the Venice Commission at its 62nd plenary session, Venice, March 11-12, 2005, particularly paragraphs 86-100.

⁶⁴ Government of Serbia Press Release: Belgrade Team submits new Amendments to Ahtisaari's Proposal, February 24, 2007.

⁶⁵ The text of the amendments, including Annex I, was published in the Serbian daily newspaper, *Politika* on February 25-26, 2007. The entire body of the amendments was distributed to the members of the Security Council.

⁶⁶ Security Council Report, April 2007 (accessed April 11, 2007); available from http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2620595/k.8BAE/April_2007BRKosovo.htm

⁶⁷ Author’s Interview with Dushan T. Batakovich, Belgrade, Serbia, April 12, 2007. Note: Ahtisaari became an unacceptable mediator to the Serbian government at this point as he was considered to be biased and unfair.

⁶⁸ Amendments proposed by the Negotiating Team of the Republic of Serbia to the Draft Comprehensive Proposal for the Kosovo Status Settlement, February 24, 2007, Article 6.3 (provision elaborated in amendments proposed to Annex III).

⁶⁹ See Mark Beunderman, “EU divided over future status of Kosovo,” *E.U. Observer* (Brussels), November 29, 2005 (accessed November 30, 2005); available from <http://euobserver.com/9/20437>. “EU fails to endorse Kosovo independence plan,” *Associated Press*, March 30, 2007 (accessed April 3, 2007); available from <http://www.iht.com/articles/ap/2007/03/30/europe/EU-GEN-EU-Kosovo.php>.

the EU states that endorsed the Ahtisaari's proposal did so with anxiety, having earlier suggested solutions that mirror the Serb proposal. The Italian President Carlo Ciampi, for instance, had suggested that Kosovo be resolved according to the model of South Tyrol.⁷⁰ As a result of discord, the European Union also failed to endorse Ahtisaari's proposal.⁷¹

After several draft U.N. Security Council resolutions failed to receive Russia's support during the summer of 2007 because they opened the possibility of Kosovo's independence, new negotiations between Albanians and Serbs over the future status of Kosovo were initiated on August 30, 2007. This time the mediators were a troika made up of European, Russian and American envoys. However, one cannot say that the new negotiations are being conducted 'in good faith' since the Kosovo Albanians had no incentive to consider alternative solutions to independence, given the fact that U.S. officials are stating that the United States will recognize the province's independence if unilaterally declared at the end of the envisaged 120-day negotiating process.⁷²

Only international recognition, itself a political act, can render a secession successful, since secession is "neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."⁷³ Therefore, Kosovo's secession could also be rendered successful by international recognition, especially if heralded by important states such as the United States. The only two examples of successful secession by separatist groups since the Second World War are Bangladesh and the former Yugoslav republics.⁷⁴ However, these are not clear legal precedents. In Bangladesh, the majority of the state 'seceded' while the secession of the former Yugoslav republics was never publicly avowed. It was excused by the dubious legal opinions of the so-called Badinter Arbitration Commission⁷⁵ which pronounced Yugoslavia dead ("dissolved").⁷⁶

⁷⁰ Milan Yakshich, "Kosovo to be resolved like South Tyrol," *Politika* (Belgrade), June 8, 2005, 2.

⁷¹ EU fails to endorse Kosovo independence plan, *Associated Press*, March 30, 2007.

⁷² See *AFP*, September 8, 2007; Daniel Dombey and Neil MacDonald, "Europe, US try to maintain united on Kosovo," *The Financial Times*, August 12, 2007.

⁷³ Crawford, *The Creation of States in International Law*, 2nd ed., 390.

⁷⁴ Note: Czechoslovakia and the Soviet Union disintegrated by consent while Ethiopia agreed to Eritrea's separation and the case of East Timor is linked to decolonization policy.

⁷⁵ Ad hoc advisory body of European constitutional lawyers established in 1991 to provide legal advice with regards to the Yugoslav crisis. See The E.C. Declaration on Yugoslavia of 27 August 1991, reproduced in *Focus*, Special Issue, Belgrade, 14 January 1992, 128-129.

⁷⁶ The term secession was never used by the United Nations or individual states with respect to Yugoslavia's disintegration. Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The*

If Kosovo were granted independence, such a policy would affirm the Badinter rulings that granted the most extreme form of the right to self-determination, secession, to select federal units (republics) rather than peoples. If provinces, namely Kosovo, were extended international recognition in a context that could not even evasively be construed as a case of state dissolution despite Ahtisaari's allusions, "a right of a federal unit to secession" would be more firmly instituted. All separatists enjoying some type of a territorial autonomy, including Spain's Basques or Canada's Quebec, would be in a position to invoke the right to secession. As claimed by one analyst:

The situation in Kosovo makes an intriguing precedent in the world: it shows a mechanism of making unrecognized states legitimate; this can be also applied to the unrecognized states in the post-soviet territory – Transdnestr, South Ossetia, Abkhazia, Nagorno Karabakh.⁷⁷

To counter such alarms, the Contact Group countries, in a document endorsed by the United Nations in November 2005, asserted:

The territorial integrity and internal stability of regional neighbors will be fully respected.⁷⁸

The European Union has supported this position, officially stating in the European Commission's 2006 Kosovo Progress Report that "Kosovo's status question is *sui generis*, and hence sets no precedent."⁷⁹ U.N. Special Envoy Martti Ahtisaari reiterated this stance in his letter to the Security Council, "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts."⁸⁰ Ahtisaari attempted to explain Kosovo's uniqueness by the very UNSCR 1244 that underscores Serbia's territorial integrity, choosing to focus exclusively on the Resolution's provision relating to the promotion of "meaningful self-administration for Kosovo," a concept that could also be interpreted as a high degree of autonomy:

Accommodation of Conflicting Rights, Rev. ed. (Philadelphia: University of Pennsylvania Press, 1996), 498.

⁷⁷ "Expert: 'Kosovo scenario gives the best fit for Transdnestr,' " *Regnum News Agency* (Moscow), November 29, 2005 (accessed November 30, 2005); available at <http://www.regnum.ru/english/polit/548254.html>.

⁷⁸ Contact Group Guiding Principles for a Settlement of Kosovo's Status (Point 6); integral text provided as Annex to the Letter from the President of the Security Council addressed to the Secretary-General, S/2005/709, November 10, 2005.

⁷⁹ Commission of the European Communities, *Commission Staff Working Document: Kosovo (under UNSCR 1244) 2006 Progress Report* [COM (2006) 649 final], Brussels, November 8, 2006, 15.

⁸⁰ Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, March 26, 2007, 4.

In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.⁸¹

In brief, the position that Kosovo's secession would not be a precedent is impossible to uphold. Russian President Vladimir Putin has made plain that if Serbia's southern province were given sovereignty, it would be difficult to explain to people in Georgia's breakaway regions of Abkhazia and South Ossetia why they could not secede from Georgia:

When we hear that one approach is possible in one place [but] is unacceptable in another, it is difficult to understand and is even more difficult to explain to people.⁸²

Statements to the effect that other secessions are not possible out of respect for the home states' territorial integrity automatically lose credibility if territorial integrity of another state, Serbia, were to be simultaneously discarded. Sergey Bagapsh, the leader of Georgia's break-away province of Abkhazia has already announced that they expect Russia's international recognition if Kosovo secedes from Serbia,⁸³ while the Azerbaijani government expressed fear "that any decision granting independence to Kosovo could set a precedent for Nagorno-Karabakh, which has a mainly Armenian population."⁸⁴ Eduard Kokoity, president of the unrecognized Republic of South Ossetia, has also hailed Putin's call for the application of universal principles, asserting that this position signals a break with "double standards" that ignore the universally accepted right of peoples to self-determination and divide peoples into "good and bad," of whom the "good" are considered "more equal."⁸⁵ Indeed, while independence for one group does not automatically grant the same to another even if they invoke it unilaterally, the precedent that Kosovo would set in public international law would enable supportive states to grant recognition to break-away territories and even allow these new states to request membership in the United Nations.

⁸¹ Ibid.

⁸² "Putin urges uniform regional-conflict approaches," *RIA Novosti News Agency* (Moscow), June 2, 2006.

⁸³ "Председник Абхазије: Решење за Косово биће светски прецедан" [President of Abkhazia: Solution to Kosovo will be a World Precedent], *Tanjug* (Moscow), March 28, 2007.

⁸⁴ "Azerbaijan: Baku Urges EU To Reject Kosovo Precedent," Radio Free Europe/Radio Liberty, 20 March 2007.

⁸⁵ "Russia: Putin Calls For 'Universal Principles' to Settle Frozen Conflicts," *Radio Free Europe/Radio Liberty*, February 1, 2006.

An arbitrary territorial reading of self-determination that permits secession of a state's administrative unit dominated by a separatist majority is certain to stall development of minority rights and stimulate separatism worldwide. To prevent this, self-determination should be applied in context of democratic governance, complementing the right to territorial integrity. In Kosovo, this would translate into a carefully drafted autonomy for the province's two main ethnic groups, Albanians and Serbs, legally weaved into Serbia's constitutional system, with continued international monitoring of human rights.

Formerly, Albanian politicians such as the erstwhile Prime Minister of Albania Fatos Nano have voiced their understanding for a compromise solution on the Kosovo status:

This crisis could be more easily settled if Kosovo were recognized as a republic within the Federal Yugoslav Republic, like Montenegro, but a republic without the right of secession. This is the status of the Republika Srpska in Bosnia, for example.⁸⁶

Today, such voices urging compromise are mute. Instead, proponents of Kosovo's independence, such as Frank Carlucci, former U.S. Secretary of Defense, gathered around the "Alliance for a New Kosovo" tout the supposed international benefits such a solution will bring:

At a time when a prospective "clash of civilizations" between the West and Islam is widely feared, the creation of a Muslim-majority secular state, tolerant of all ethnic peoples regardless of personal creed, would be viewed as a victory for the national values espoused by the United States and the nations of the European Union.⁸⁷

The presented romantic view of Kosovo is countered by evidence on the ground, not only in terms of ethnic intolerance,⁸⁸ but also organized crime and corruption that led academic researchers such as Svante Cornell and Michael Jonsson to warn that an

⁸⁶ Interview with Albanian Prime Minister Fatos Nano by Marc Semo, "Turn Kosovo Into a Republic without Right of Secession," *Liberation* (Paris), April 3, 1998, 13.

⁸⁷ Alliance for a New Kosovo, *Independence for Kosovo* (accessed on November 26, 2005); available from <http://www.newkosovo.org/Independence%20for%20Kosovo.pdf>.

⁸⁸ According to two international peacekeepers who served as UNMIK officials, the 2004 March riots "exemplified UNMIK's failure to control the levers of 'soft power' – education and the media – and KFOR's and the police's failure to marshal the 'hard power' necessary to maintain physical security. Without commanding these heights of security and social change, UNMIK's domination of the middle ground of administrative authority counted for very little when violent national chauvinists decided to test its resolve." King and Mason, *Peace at Any Price*, 6. A 124-report commissioned by the German army and released by the Institute for European Politics in Berlin in March 2007 has also concluded that the planned "construction of a multi-ethnic society" has "failed" in Kosovo and that it does not exist "outside the bureaucratic statements of the international community," further noting that the European Union's security strategy for a future mission in Kosovo is "neither analytically nor conceptually sustainable." See "The Failure of the West's 'Ostrich' Policy," *SMD/Spiegel/Reuters/AP*, March 12, 2007.

independent Kosovo “looks set to become a heavily criminalized state in the heart of Europe, with far-reaching implications.”⁸⁹

Other international experts, mainly gathered around the International Commission on Kosovo established in 2000, have attempted to assuage concerns of current and possible future deficiencies in human and minority rights in Kosovo by proposing “conditional independence” for the province, which U.N. Special Envoy Martti Ahtisaari has since endorsed.⁹⁰ Yet the critical feature of independence as an irreversible process refutes proposals for “conditional independence” as unfeasible. Independence cannot be conditioned. Previous attempts at “conditional recognition” have not yielded results even in the former Yugoslav republics, which the U.S. and the European Union had obligated to safeguard minority and human rights upon independence. In Croatia, the Serbian minority has been reduced to a third of its 1990 level, human rights abuses continue to this day and refugee return remains unsatisfactory. Bosnia and Herzegovina was partitioned following an atrocious civil war in which close to 100,000 people perished.⁹¹ Both Bosnia and Macedonia remain fledgling states, despite significant international presence.

Yet, unlike independence, the European Union accession process can be and is conditioned.⁹² The gains of Euro-Atlantic integration should be used for balancing nationalist aims and not for blackmailing one nation as the former U.S. Assistant Secretary of State Richard Holbrooke suggests: “The Serbs will have to choose between trying to join the European Union and trying to regain Kosovo.”⁹³

⁸⁹ Svante E. Cornell and Michael Jonsson, “Creating a state of denial,” *International Herald Tribune*, March 22, 2007.

⁹⁰ Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000).

⁹¹ The Investigation and Documentation Center based in Sarajevo and funded by the Norwegian government, set the toll at close to 100,000 war casualties with 93,000 names verified. About 70 percent are Bosnian Muslims, 25 percent Bosnian Serbs, 5 percent Bosnian Croats and about one percent others. Nedim Dervisbegovic, “Research halves Bosnia war death toll to 100,000” *Reuters*, November 23, 2005.

⁹² The E.U. launched its conditionality policy toward the former Yugoslav countries (with the exception of Slovenia) in October 1995 and elaborated concrete policy instruments in April 1997, in essence conditioning its political and financial assistance with the partner country’s progress in areas of democracy, rule of law, higher human rights and minority rights standards, transition to a market economy and greater interregional cooperation. See General Affairs Council, Conclusions on the application of conditionality with a view to developing a coherent E.U. strategy for its relations with the countries in the region, 29 April 1997, *Bulletin of the EU*, No 4-1997.

⁹³ Richard Holbrooke, “New Course for Kosovo; Rice Makes Her Presence Felt,” *The Washington Post*, April 20, 2005, A25.

If the international community hopes to impose higher human rights standards on a state, it appears more logical - and practical - that it applies such a policy to the original country rather than to recognize one of its parts, where the same problems are simply reproduced. As Horowitz correctly demands, “If, after all, conditions on the exercise of an international-law right to secede can be enforced, why not enforce those conditions in the undivided state so as to forestall the need to secede?”⁹⁴ One could further argue that, since the ousting of Slobodan Miloshević in 2000, Serbia has proved itself more worthy of this proposition than Kosovo’s local government. As highlighted by former Serbian Minister for Human and Minority Rights Rasim Ljajić, himself a Bosniak:

Since the democratic changes in 2000, Serbia and Montenegro accomplished the greatest progress precisely in the area of human and minority rights, not only in terms of legislation but also in creating the appropriate environment.... International standards in the area of minority rights tend to be low and the ones that Serbia built into its state structure are far higher.... Our Law on minorities grants collective rights to minorities and the electoral law has abolished the census for minorities.⁹⁵

In October 2006, the Parliament of Serbia adopted a new Constitution of the Republic of Serbia that features extensive human and minority rights, granting a form of self-rule the autonomous republic of Voivodina and defining the province of Kosovo and Metohia in the preamble as an “integral part of the territory of Serbia” with “the status of a substantial autonomy.”⁹⁶ In this manner, Serbia officially committed itself to granting Kosovo a high degree of autonomy.

By supporting a substantial autonomy for Kosovo short of independence, choosing to supervise autonomy under the auspices of the European integration process instead of supervising independence, the members of the U.N. Security Council would uphold the international legal order and promote further development of the internal application of

⁹⁴ Donald L. Horowitz, “A Right to Secede?” *Secession and Self-Determination*, eds. Stephen Macedo and Allen Buchanan, *Nomos XLV: Yearbook of the American Society for Political and Legal Philosophy* (New York, London: New York University Press, 2003), 50-76: 54.

⁹⁵ Rasim Ljajić, Minister of Human and Minority Rights, “The Rule of Law and European Standards for Human Rights Protection,” International Conference: Serbia – Five Years After, organized by the Belgrade Fund for Political Excellence and the Balkan Trust for Democracy/German Marshall Fund, Belgrade, October 4-5, 2005.

⁹⁶ Organization for Security and Cooperation in Europe and the European Union positively assessed the adoption of the 2006 Serbian Constitution, which was approved by the popular referendum. One should note, nonetheless, that several Serb parties and non-governmental organizations criticized the Constitution’s content in areas such as appointment of judiciary. The text of the Constitution in English version is available online, at the Internet presentation of Serbia’s Ministry of Foreign Affairs, http://www.mfa.gov.yu/Facts/UstavRS_pdf.pdf (accessed March 6, 2007).

the right to self-determination. In contrast, an externally endorsed independence for Kosovo, resisted by the home state, would seriously undermine the founding principle of international law, the right to territorial integrity.

The only other possible solution to the Kosovo question would be a mutually-agreed upon adjustment of the province's boundaries that would permit a legal separation of the Albanian-majority areas in Kosovo. The Contact Group countries had initially ruled out this option:

There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country.⁹⁷

On the other hand, human rights professor Hurst Hannum has instead suggested that change in boundaries represent “the one alternative that might actually help bring peace to the region”:

Changing borders does not guarantee that human rights will be better protected in the new states than they were in the old. In Kosovo, however, it offers the only possibility of a solution, ceding the primarily Serb areas to Serbia and allowing full independence to the remainder of the territory. This option would offer a chance for both peoples to take charge of their destinies.⁹⁸

The policy-makers that support this stance, such as the Czech Republic prime minister, have been rare.⁹⁹ Yet in refuting the possibility of a negotiated change of boundaries, while simultaneously advocating for an imposed change of Serbia's boundaries by the secession of Kosovo, the United States and other proponents of Kosovo's secession are clearly engaged in hypocrisy.¹⁰⁰ In line with this position, the U.S.

⁹⁷ Contact Group Guiding Principles for a Settlement of Kosovo's Status (Point 6); integral text provided as Annex to the Letter from the President of the Security Council addressed to the Secretary-General, S/2005/709, November 10, 2005.

⁹⁸ Hurst Hannum, “Beware Balkans' border solutions,” *The Los Angeles Times*, February 4, 2007. Hannum's proposal was later seconded by other American scholars from National Defense University and George Washington University in Washington, DC. See “Analysis-Kosovo solution may mean partition,” *Reuters*, April 13, 2007.

⁹⁹ See also Charles A. Kupchan, “Independence for Kosovo,” *Foreign Affairs* 84.6 (November-December 2005).

¹⁰⁰ “It's a perilous exercise ... for foreigners to begin to draw lines,” Burns told reporters when asked about the possibility of partitioning Kosovo into separate ethnic enclaves. “It's the view of all of our European allies that it would be a mistake to say that one of the options for the final-status talks in Kosovo would simply to be redefine the borders.” On-the-Record Briefing, Under Secretary of State for Political Affairs R. Nicholas Burns on U.S. Strategy For Kosovo, November 8, 2005, Washington, D.C., USA.

In June 2005, the E.U. heads of states and governments unequivocally concluded, “there will be no partition of Kosovo.” Council of the European Union, Brussels European Council – Presidency Conclusions, Brussels, 18 June 2005, 10255/05, Annex III, 35. They made a similar declaration with regards to Bosnia thirteen years later, where, ironically, Ambassador Marti Ahtisaari also had a role to

Assistant Secretary of State has warned of the danger posed by Serb irredentism, omitting to assess the danger posed by Albanian irredentism that exploded into violence not only in Serbia (in Kosovo and the Preshevo Valley), but also in neighboring Macedonia.¹⁰¹ In August 2006, a senior Albanian official, Koco Danaj, political adviser to Albania's prime minister, Sali Berisha, told the Prishtina-based Albanian language daily *Epoka e Re* that, following Montenegro's referendum on independence, "ethnic Albanians in Macedonia and Montenegro should also have the right to choose with whom to live. Instead of having Albanians participate in those countries' governments, it would be more natural that they had one government in the Albanian capital, Tirana."¹⁰²

The diplomatic inconsistencies are even more apparent when viewed in a wider international setting. Evelyn Farkas, who analyzed the U.S. interventions in Iraq, Ethiopia and Bosnia concluded that the largest world power approached these crises on a case-by-case basis:

There is no evidence that decisions were made based on one set of firm principles or with an interest in maintaining rigid consistency. Indeed, the outcome in all three situations varied – Iraq and Bosnia were de facto partitioned, while Ethiopia was partitioned to create, or recreate, Eritrea.¹⁰³

Susan Woodward has suggested that, by recognizing republic borders in 1991, "the major powers were applying not the sovereignty norm but Occam's razor – that it was simply more prudent to stick with the existing borders than to complicate the diplomatic process manifold."¹⁰⁴ The same analogy could be applied to Kosovo today. However, if a

mediate a settlement:

"The European Council [...] will not] accept the partition of Bosnia and Herzegovina. The European Council strongly supports the efforts of the Co-Chairmen to arrive at a constitutional settlement based on the proposals made by Ambassador Ahtisaari and on a mutual recognition of the multi-ethnic character of Bosnia and Herzegovina." European Council Declaration on Former Yugoslavia, European Council, Conclusions of the Presidency (Annex D.1), Edinburgh, December 11-12, 1992, SN456/92 (accessed September 15, 2005); available from http://www.europarl.eu.int/summits/edinburgh/d1_en.pdf.

¹⁰¹ "We also have some work to do to try to still the forces of irredentism and of violence that unfortunately are part of the fabric of Balkan political life in our time. There are still some Serbs who believe that the Serbs should unite themselves -- the Serbs in Serbia, in Kosovo, and in Bosnia, and that kind of irredentist force which was so destructive when Yugoslavia broke up 10 or 15 years ago cannot be allowed to return to be a political force in the Balkans." R. Nicholas Burns, Under Secretary for Political Affairs Remarks to the Atlantic Council, February 21, 2007 (accessed April 9, 2007); available from <http://podgorica.usembassy.gov/embassy/press/2007/070221.html>.

¹⁰² "Balkans: Official calls for a 'Natural Albania,'" *AKI* (Tirana), August 22, 2006.

¹⁰³ Evelyn Farkas, *Fractured States and U.S. Foreign Policy: Iraq, Ethiopia, and Bosnia in the 1990s* (New York: Palgrave Macmillan, 2003), 3.

¹⁰⁴ Susan L. Woodward, "Compromised Sovereignty to Create Sovereignty: Is Dayton Bosnia a Futile Exercise or an Emerging Model?," *Problematic Sovereignty; Contested Rules and Political Possibilities*,

more complicated diplomatic process would lead to a solution that would be peaceful and that would minimize the displacement of population, it should be considered. Woodward, as an internationally recognized scholarly expert on the former Yugoslavia, supports this position:

ed. Stephen D. Krasner (New York: Columbia University Press, 2001), 268.

In light of the subsequent wars of Yugoslav succession, it is clear that a method to negotiate the borders in 1991 and to confirm popular preferences would have saved much later diplomatic complication, huge loss of life, and massive military and financial commitments to restore peace and stability. [...] Border commissions set up at the time and discussions among members of the Yugoslav collective presidency in 1990-1991 also suggest that there were solutions that might have been debated without violence had the Dutch proposal been accepted.¹⁰⁵

The first sign that a negotiated partition could be a politically acceptable solution came from the E.U. member of the troika charged with mediating Kosovo status talks, Wolfgang Ischinger in August 2007.¹⁰⁶ However, E.U. foreign ministers quickly declared themselves against such a solution, as have the Albanian and Serb representatives. Consequently, Ischinger also reverted to the position that partition would be perilous.¹⁰⁷

Former Yugoslavia's European Integration: Old/New Framework for Conflict Resolution?

Since 2000, the European Union and the United States have principally attempted to reconstruct democracy in the former Yugoslav countries and otherwise facilitate the peoples' expression of self-determination within the bounds of the Euro-Atlantic community. As explained by Antoaneta Dimitrova:

The European Union focused the aspirations of post-communist elites and populations by providing a model of prosperity and democracy to be emulated and thus became the closest thing to an external guiding power.¹⁰⁸

The policies applied with this aim have contributed both to regional stability and

¹⁰⁵ Ibid. Note: The European Commission had rejected the proposal of the Dutch presidency, made on July 13, 1991, eight days after Slovenia and Croatia declared independence within their administrative boundaries, that the Yugoslav crisis be resolved by "a voluntary redrawing of internal borders," precisely to achieve consistency in the application of the right to self-determination:

"The Presidency continues to feel that it is necessary to reconcile the various principles of the Helsinki Final Act and the Charter of Paris which may apply to the situation in Yugoslavia. It considers it especially important that selective application of principles be avoided. The principle of self-determination e.g. cannot exclusively apply to the existing republics while being deemed inapplicable to national minorities" [cited in David Owen, *Balkan Odyssey* (London: Indigo, 1996), 31-33].

¹⁰⁶ The French Foreign Minister Bernard Kouchner and the British Ambassador to Serbia Steven Wordworth had also alluded to this possibility in July 2007. See Douglas Hamilton, "Major Powers nudge Serbs, Kosovo toward partition," *Reuters*, July 12, 2007.

¹⁰⁷ Dan Bilefsky, "Top E.U. Mediator warns against Partition," *International Herald Tribune*, September 15, 2007.

¹⁰⁸ Antoaneta L. Dimitrova, ed., "Enlargement-driven change and post-communist transformations: a new perspective," *Driven to change: the European Union's Enlargement Viewed from the East* (Manchester and New York: Manchester University Press, 2004), 3.

international order and security, but have not yet settled all claims relating to both the internal and external right to self-determination, as shown by different but very much related disputes on the territory of the former Yugoslavia.¹⁰⁹ The reason for this is that even the principally supranational European Union structure reaches its most important decisions in an intergovernmental forum, underscoring the supremacy of nation-states, since:

For a nation to mean something normally means it needs a state, or a share in one.
And for a state to mean something it needs a border.¹¹⁰

Nonetheless, resolving self-determination issues in a wider, regional framework demonstrates a strong potential for success, as demonstrated by the cautious approach to the Montenegrin referendum question¹¹¹ and the Macedonian decentralization process. Momir Bulatović, one of the republican leaders at the time of Yugoslavia's break-up, then the president of Montenegro, expressed regret that this approach was not espoused a decade earlier:

Almost a decade after the end of conflicts on the territory of the Second [Communist] Yugoslavia, we have occurring what should have occurred at the beginning in order to avoid the conflict. The region received a new name (Western Balkans), all states are encouraged (diplomatic expression for forced) to cooperate with one another, conditions for free flow of people, goods and capital have been created. Everyone is adopting modern, European laws, which are in essence one and the same, since all have the same goal – membership in the European Union.¹¹²

¹⁰⁹ In an asymmetric partnership, the international community, led by the E.U. and the United States, has been actively involved in creating the constitutional frameworks for most of the former Yugoslav countries: Constitution of the Federation of Bosnia and Herzegovina (1994); Constitution of Bosnia and Herzegovina (1995); Amendments to the Constitution of the Republika Srpska (1996); Constitutional Framework for Kosovo (2001); Macedonia's Constitutional Arrangement: Ohrid Agreement (2001); Constitutional Charter of Serbia and Montenegro (2003).

¹¹⁰ "Good Fences," *The Economist*, December 19, 1998, 22.

¹¹¹ E.U. mediated Montenegro's peaceful separation from the state union of Serbia and Montenegro. One of the key achievements to this negotiated process was to agree on a referendum threshold. Yet, this important and insufficiently recognized foreign policy success of the European Union could only be temporary if the rights of Serbs and other non-Montenegrins in an independent Montenegro are not respected.

¹¹² Momir Bulatović, *Pravila ćutanja* [Rules of Silence] (Belgrade: Narodna knjiga – Alfa, 2004), 21 [Translation mine]. Original: "Gotovo deceniju nakon prestanka sukoba na prostorima druge Jugoslavije, dešava se ono što je trebalo da se uradi na početku, pa da ne bude sukoba. Region je dobio novo ime (Zapadni Balkan), sve države bivaju ohrabrene (diplomatski izraz za primorane) da međusobno saraduju, kreiraju se uslovi za slobodan protok ljudi, dobara i kapitala. Svi donose moderne, evropske zakone, koji su u osnovi isti, budući da je svima isti cilj – članstvo u Evropskoj uniji."

Note: Steil and Woodward also underscore benefits of economic integration in curbing violent conflicts: "Early staged entry into liberal European economic regimes will encourage private-sector development, reduce the state's economic role, underpin the rule of law, and increase the benefits of forswearing violent conflict over resources and national boundaries." Benn Steil and Susan L.

In a practical and symbolic move, the countries of the Western Balkans have since 2000 created a free trade area in the form of an enlarged Central European Free Trade Area (CEFTA) and established a wider, South East Europe Energy Community, slashing regulations on cross-border electricity trading among Romania, Bulgaria, Croatia, Serbia (including Kosovo and Metohia), Montenegro, Bosnia and Herzegovina, Macedonia and Albania. These regional integrations are reminiscent of the foundation of the European Union, first as the European Steel and Coal Community in 1951 and as a European Economic Community in 1957.¹¹³

In addition to a belated use of “Europeanization” in resolving the former Yugoslav crisis, Louis Sell singles out as “the single greatest overall conceptual fault” of the international community “the failure to address on an equal basis the claims to self-determination of all the peoples that inhabited the former Yugoslavia,” elaborating:

By insisting that the internal borders of the republics that constituted Yugoslavia must be maintained as the external borders of the new states emerging from the rubble of Yugoslavia’s collapse, the international community denied to Serbs and Albanians – the peoples of Yugoslavia whose ethnic borders most deviated from the political ones – the independent nation-states that it granted to Slovenes, Croats, Macedonians, and Bosnians.¹¹⁴

Susan Woodward convincingly argues that double standards are derived from “the way that outsiders redefined events in terms of categories familiar to them”:

The constraining role of the norm of sovereignty is particularly strong in the way in which the history of the Yugoslav crisis has already been rewritten to conform to international decisions of recognition. It is now accepted without demur that the “Serbian army” “invaded” Slovenia, then Croatia, and then Bosnia and Herzegovina; that Serbian aggression was and still is the cause of the war; that the issue in Kosovo was Albanian human rights, ... The consequence of this revisionist history is to obscure another significant effect of the sovereignty norm: in selecting winners and losers from among the alternatives at the time.¹¹⁵

The appearance of double standards is still present, illustrated by proposals to use the European framework for substituting independence with a promise of prosperity in the case of Republika Srpska, but for facilitating secession in the case of Kosovo and

Woodward, “A European ‘New Deal’ for the Balkans,” *Foreign Affairs* 78, no. 6 (November-December 1999): 95. Accessed December 25, 2005. Available from Expanded Academic ASAP.

¹¹³ For more, see the Internet presentation of the Stability Pact for South Eastern Europe, <http://www.stabilitypact.org/>.

¹¹⁴ Louis Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (Durham and London: Duke University Press, 2002), 6.

¹¹⁵ Woodward, “Compromised Sovereignty to Create Sovereignty,” 268-269.

Metohia. The International Commission on the Balkans thus contradictorily argues in the same document that “the E.U. accession process is the only framework that gives Serbia real incentives if not to endorse then at least to consent to such a fundamental change in the status of Kosovo as independence represents” but that this framework would “provide the requisite incentives for the strengthening of the state’s federal structures”¹¹⁶ in Bosnia.

Instead, the European Union should be used as a model for a successful coexistence of romantic and civic nationalism, allowing ‘Bosnians’ to accept the cosmopolitan alternative to the same extent as the ‘Belgians,’ and encouraging Kosovo Albanians to seek a wider political space in lieu of an exclusive right to territory. Serbian Prime Minister Koshtunica has identified the espousal of European standards and the country’s integration in the European Union as a strong argument for an *internal* application of the right to self-determination with regards to Kosovo and Metohia:

Regional cooperation based on the European principles of democracy, human rights and good neighborly relations will constitute a strong incentive for the Western Balkans in their efforts toward a timely accession to the European Union. This is also the only way to solve all disputes, and to find a durable and stable solution for Kosovo and Metohia. A solution that would be a compromise.¹¹⁷

Two key lessons to be drawn from Yugoslavia’s disintegration are that the European integration process offers more opportunities for integrative solutions to conflicting claims of self-determination and that development of the right of self-determination in a manner that strengthens the international legal order requires an equitable approach and consistent principles. The latter is difficult to achieve in the imperfect world where political decisions tend to be based on immediate *realpolitik* considerations. In the ideal world we would have an ‘International Political Tribunal’ as an institution of impartial political arbitration or significantly reformed existing agencies of great power agreement (Security Council etc.), as proposed by István Bibó three decades ago.¹¹⁸ In the interim, redrawing of boundaries, especially internal, pre-recognition boundaries should not be automatically ruled out. As discussed earlier and encapsulated by Hannum:

¹¹⁶ International Commission on the Balkans, *The Balkans in Europe’s Future*, April 2005, 23, 25.

¹¹⁷ Voyislav Koshtunitsa, Opening Speech, European Bank for Reconstruction and Development Annual Meeting and Business Forum, Belgrade, May 22, 2005.

¹¹⁸ See István Bibó, *The Paralysis of International Institutions and the Remedies: A Study of Self Determination, Concord among the Major Powers, and Political Arbitration* (New York: John Wiley and Sons, 1976), 145-147.

Self-determination should be concerned primarily with people, not territory.... In most cases, the best way of determining the wishes of those within a new state would be through a series of plebiscites to redraw what were formerly internal boundaries.... Accepting the possibility of altering borders might be a useful precondition for recognition of a new state whenever a significant proportion of the population appears not to support the new borders.¹¹⁹

Such an approach would avoid the creation of protectorates and costly engagement in state building without the consent of the governed. It would also empower the notion of “people” and return the right to self-determination to its intended titular, ending the current arbitrary application of this noble legal principle, illustrated by Tomuschat:

Whenever a state has come into being, the ethnic communities within that state are legally debarred from asserting themselves as people.¹²⁰

The right to secede, if extended, should be granted to all significant ethnic groups, carefully defined and possibly constitutionalized to allow for a peaceful application of the right to self-determination. If the procedure for secession had been delineated in the Constitution of the former Yugoslavia, this could have been the key factor in preventing war and perhaps even in dissuading certain republics from seceding. This is also the view taken by Koskenniemi, who maintains:

Non-recognition by important European States of the new Balkan entities as States before a peaceful transition had been realized and minority and human rights safeguarded might have paved the way for a new, realistic and politically sensitive doctrine of self-determination.¹²¹

Instead, recognition of the former Yugoslav republics within the state’s formerly internal boundaries, coupled with the strong insistence on respect of each newly created state’s territory “made any compromise settlement vulnerable to the charge of rewarding aggression.”¹²² The same argument applies in reference to the proposed recognition of Kosovo province. In fact, this argument has been accentuated by explanations provided by former U.S. diplomats such as Richard Holbrooke who suggests that Kosovo should

¹¹⁹ Hurst Hannum, “The Specter of Secession, Responding to Claims for Ethnic Self-Determination,” *Foreign Affairs* 77, No. 2 (1998), 13, 17-18.

¹²⁰ Christian Tomuschat, ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993), 16.

¹²¹ Martti Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice,” *International and Comparative Law Quarterly* 43, no. 2 (April 1994), 268.

¹²² Robert W. Tucker and David Hendrickson, “America and Bosnia,” *The National Interest* (Fall 1993), 19, cited by Koskenniemi, “National Self-Determination Today,” 269.

be recognized to avoid the backlash by the disappointed Kosovo Albanians:

A major European crisis would be assured. Bloodshed would return to the Balkans. NATO, which is pledged to keep peace in Kosovo, could find itself back in battle in Europe.¹²³

Holbrooke's assertion has been seconded by Ylber Hasa, a senior member of the Kosovo Albanian negotiating team, who warned that the adoption of a watered-down version of the Special Envoy's Proposal for Kosovo settlement would lead to war: "If you want to see a new Balkan war that is the perfect scenario."¹²⁴ These arguments threaten stability not just in the region but worldwide because they are a signal to separatists that threatening an escalation of violence could lend them more credibility. This signal would be amplified manifold if Kosovo were granted recognition. To safeguard stability, threats over use of violence should instead be interpreted as a factor that undermines the separatists' claim to a right to secession.

While committing a grave error in territorially interpreting the right to self-determination and arbitrarily selecting its titular, the Badinter Commission should at least be credited with attempting to link the external right to self-determination to its internal corollary of human and minority rights. Nonetheless, as experience has shown, independence cannot be conditioned. The lesson has been learnt in the case of Montenegro, where the application of the external right to self-determination has been constitutionally prescribed,¹²⁵ but should now be closely monitored to ensure that the authorities adhere to the ultimate notion of self-determination, democratic governance. Constitutionalizing secession and conditioning membership in attractive regional and international organizations minimizes violence more effectively than does conditioning independence.

Another question to be posed is how far should one extend human and minority rights, including territorial autonomy, without simultaneously encouraging secession. Howse and Knopp effectively describe the dilemma faced by a federal government, which could be applied to the present day Serbian provinces Kosovo or even Voivodina (which jointly constitute about 37 percent of Serbia's territory), as well as many other places worldwide:

¹²³ Richard Holbrooke, "Russia's Test in Kosovo," *The Washington Post*, March 13, 2007, 17.

¹²⁴ John Phillips, "Kosovar warns of War if Self-Rule is denied," *The Washington Times*, February 20, 2007.

¹²⁵ For more see Ana Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (New York: Oxford University Press, 2007), especially Chapter 7.

Either [the federal government] can exercise the powers necessary to advance effectively the common interests that justify the very existence of a federation, in which case it will be accused by the nationalists of intrusive or domineering behavior, or it can allow itself to be weakened or hamstrung, in which case the nationalists will claim that the federal government is ineffective. In sum, the nationalists will always be able to portray a strong federal government as menacing and a weak one as a superfluous annoyance.¹²⁶

Indeed, the principles of sovereignty and self-determination of peoples are usually depicted as two ends of a spectrum, since sovereignty encompasses the right to preserve the territorial status quo, whereas the principle of self-determination is at least potentially aimed at territorial change. Yet, the two principles need not be mutually exclusive. In a modern state, both the principle of sovereignty and the principle of self-determination of peoples are based on the will of the people – or democratic governance.

In practice, the minority-majority conflict reduces to issues such as language, education, access to government civil service or control over natural resources, which are all facets of a representative government and which can frequently be solved by devolving power to the local level. General human rights and minority rights provisions may be adequate in most cases, while in others a more elaborate political autonomy may be necessary. As Tomuschat advocates:

If self-determination were complemented by a hitherto missing dimension of political autonomy, or if it went as far as federal statehood within a given State, the rigidity of the sharp line which divides peoples, the holders of a political right of self-determination, and minorities, essentially the holders only of cultural rights, would be lost.¹²⁷

Following this line of argument, Kirsten Porter suggests that minority rights can be protected and promoted within a system that grants non-territorial autonomy to national minorities while maintaining the administrative unity of a multi-national state.¹²⁸ One of the first such proposed models was devised in 1902 by Karl Renner and Otto Bauer, Austrian politicians and scholars who believed that a national-cultural autonomy could

¹²⁶ Robert Howse and Karen Knop, "Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective," *New Europe Law Review* 1, no. 2 (1993), 269-320: 275.

¹²⁷ Christian Tomuschat, "Self-Determination in a Post-Colonial World," in *Modern Law of Self-Determination*, ed. Christian Tomuschat, Developments in International Law (Dordrecht; Boston: M. Nijhoff Publishers, 1993), 15.

¹²⁸ For more, see Kirsten Porter, "Realisation of National Minority Rights," *Macquarie Law Journal* 3 (2003), 51-72.

alleviate ethnic tensions within Austria-Hungary.¹²⁹ In considering the development of self-determination today, scholars such as Jonathan Schell are returning to the models that provide for concurrent expression of multiple cultural identities within one state:

Self-determination ... must yield to self-determinations and selves-determination – that is, to permission for more than one nation to find expression within the border of a single state and to permission for individuals and groups to claim multiple identities.¹³⁰

Although states tend to be reluctant to approve new rules which might threaten their existence, it appears to be increasingly in their interest to develop the right of self-determination, establishing criteria for the lawfulness and legitimacy of challenges to the unity of a State, which will judge the legality of the claims for separate statehood or federal statehood or simple autonomy. If minority rights were adequately addressed internally, any request for independence would be unwarranted.

When U.S. Secretary of State James Baker visited Yugoslavia in June 1991, days before Slovenia and Croatia proclaimed independence, he understood the resolution of the crisis to be in “the devolution of additional authority and responsibility and sovereignty to the republics of Yugoslavia.”¹³¹ Yet the positions of the member republics appeared irreconcilable. Slovenia and Croatia desired de facto independence, while Serbia and Montenegro preferred a more centralized government while limiting federal competence to “defense, foreign affairs, human-rights protection, national rights protection and one market with one central bank.”¹³² Serbia and Montenegro at the time were not prepared for a formula, famously worded by the President of the Supreme Soviet of the Russian Republic Boris Yeltsin, allowing the republics to “take as much power as they could swallow.”¹³³ In the case of the Soviet Union, this recipe led directly to disintegration.

Intervening in the Yugoslav dispute, the international community granted

¹²⁹ See Ephraim Nimni, ed., *National Cultural Autonomy and its Contemporary Critics* (New York: Routledge, 2005); Stéphane Pierre-Caps, "Karl Renner et l'Etat Multinationale: Contribution Juridique à la Solution d'Imbrolios Politiques Contemporains", *Droit et Société* 27 (1994), 421-441; Tibor Várady, "Collective Minority Rights and Problems in their Legal Protection: The Example of Yugoslavia," *East European Politics and Societies* 6 (1992), 260, 271.

¹³⁰ Jonathan Schell, "The Unconquerable World," *Harper's Magazine* 306 (2003), 53.

¹³¹ Thomas L. Friedman, "Baker Urges End to Yugoslav Rift," *The New York Times*, June 22, 1991, A1.

¹³² Ibid.

¹³³ Cited in Micheal Lesage "Administration in Russia," *Administrative Transformation in Central and Eastern Europe; Towards Public Sector Reform in Post-Communist Societies* (Oxford: Blackwell Publishers, 1993), 123.

independence to all the interested republics within their administrative boundaries without studying the intended purpose of these boundaries. Yet, Yugoslav boundaries were sacrosanct only in terms of Communist ideology,¹³⁴ which was shattered to pieces with the fall of Berlin Wall but resurrected by the Badinter Commission. By invoking a forgotten principle of *uti possidetis juris*,¹³⁵ the Badinter Commission gave Yugoslav administrative boundaries the significance that their creator Josip Broz Tito had constantly refuted:

Many do not yet understand what is the meaning of federative Yugoslavia. It does not mean the drawing of a borderline between this or that federative unit.... No! Those border lines, as I see them, must be something like white veins in a marble staircase. The lines between federated states in a federal Yugoslavia are not lines of separation, but of union.¹³⁶

The key function of the Yugoslav internal boundaries was to counter forced unification of constituent peoples' historical, cultural and other national characteristics, while preventing any effective division in choosing lines that were partly historical but that did not correspond to ethnic maps, with the exception of Slovenia where the compactness of the population prevented alternate administrative division. Such an approach corresponds to a general observation made by Steven Ratner that "governments establish interstate boundaries to separate states and peoples, while they establish or recognize internal borders to unify and effectively govern a polity."¹³⁷ As explained earlier, the different internal administrative arrangements that marked Yugoslavia's political history, both under Communism and under Monarchy, were all designed with a view to preserving Yugoslav unity, and were never seen as possibly becoming

¹³⁴ "The reason for the sacrosanct nature of these borders was the view that they were the achievement of the Partisan war and revolution. As such they were part of the underpinning of the entire constitutional and legal system and thus bound all future constitution-makers." Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge Studies in International Law (London, New York: Routledge, 2002), 153.

¹³⁵ This Latin phrase literary means "as you possess you shall continue to possess." The principle was evoked previously only in context of decolonization, but even there not as the key principle and not as a basis for state's recognition. For more, see Constantine Antonopoulos, "The Principle of Uti Possidetis Juris in Contemporary International Law," *Revue hellénique de droit international* 49 (1996), 29-88; Suzanne Lalonde, *Determining Boundaries in a Conflicting World; The Role of Uti Possidetis* (Montreal: McGill University Press, 2002); Tomas Bartos, "Uti Possidetis. Quo Vadis?" *Australian Year Book of International Law*, 18 (1997), 37-96. Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States," *American Journal of International Law* 90 (1996), 590-624.

¹³⁶ Josip Broz Tito, speaking in May 1945 in Zagreb, cited in Frits W. Hondius, *The Yugoslav Community of Nations* (Hague: Mouton, 1968), 180.

¹³⁷ Steven R. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States," *American Journal of International Law* 90 (1996), 590-624: 602.

international borders in the event that Yugoslavia disintegrated. Interestingly, even the generally compact and economically progressive Slovenia today has an unresolved border dispute with neighboring Croatia, prompting Andrej Ster, the Slovene State Secretary of Foreign Affairs, to assert in January 2007:

It is a known fact that there were no borders between the republics in the former Yugoslavia.¹³⁸

The depth of the recent ethnic conflict in Yugoslavia tragically confirmed that Yugoslav nations would not have accepted the internal division of the country if this division were intended to be permanent, drawing different repercussions for their individual and group rights. It further revealed that an attempt to regulate secession within borders that corresponded more closely to demographics and took account of other relevant factors such as economic viability or historic heritage, be they new international frontiers or perimeters of territorial autonomies would probably have provided for a more peaceful disintegration of Yugoslavia.¹³⁹ Instead, it was the war that changed the demographic reality as the Yugoslav peoples sought refuge within the borders of their own national states. The most poignant example is the 1995 Serb exodus from the Krayina, which transformed this region into a silence of a state-sponsored map that screams of forced exclusion.¹⁴⁰

In addition to fostering new interpretations of the right to self-determination, international policies toward Yugoslav disintegration have shaken the cornerstone of public international law, the right to territorial integrity. In 1991 the international community usurped the right to pronounce a country dissolved and on that basis furnished its select parts with international recognition, potentially creating a territorial right to secession and discouraging decentralization as a means of assuaging national

¹³⁸ “The Dispute between Slovenia and Croatia over the Border in the Adriatic,” *STA News Agency* (Ljubljana), 29 January 2007.

¹³⁹ This view is shared by Musgrave: “Early recognition precluded the possibility of a political settlement based upon a readjustment of boundaries to reflect more closely the ethnic distribution in the region - existing territorial arrangements should be the first framework for examination, dialogue, negotiation, confidence-building and possible disposition.” Thomas D. Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997), 236-7.

¹⁴⁰ State-sponsored maps may not always recognize certain natural or social and cultural realities-sometimes these silences are silences of uniformity and sometimes they are silences of exclusion and even repression that can even be reflected in a change in names of certain places.” Alan Henrikson, “The Power and Politics of Maps,” *Reordering the World; Geopolitical Perspectives on the 21st Century*, ed. George J. Demko and William B. Wood (Boulder: Westview Press, 1999), 105.

concerns. In 1999, NATO militarily intervened in a state it assessed to have reached an intolerable level of minority oppression¹⁴¹ and took over the governance of one of its constituent units, arguably encouraging insurgency and generally failing to construct ethnic tolerance. Finally, externally imposed nation-building efforts, namely in Bosnia and Herzegovina, have returned us to the colonial era deemed long over, a practice that became emulated in the subsequent international interventions in Iraq and Afghanistan.

In contrast, the recently intensified insistence on fulfillment of internal aspects of self-determination, using the E.U. accession process as a carrot and a vehicle, has complemented the principle of integrity and bolstered the international legal order, permitting Western governments to at least partially mollify their past inconsistencies. It is the resolution of Kosovo's legal status, if found within Serbia, that holds the key to the ideal compromise between the provisions of territorial integrity and self-determination, one that speaks of inclusion, empowering all the peoples.

If, on the other hand, Kosovo were to be granted independence without the full consent of its home state, the right of a federal unit (republic, province, canton, etc.) to secession will have been created and the right to territorial integrity practically revoked. In reaction to this, the development of the internal aspects of self-determination, such as minority rights, including decentralization and territorial autonomy, would most certainly be stalled. The only scenario in which neither the international legal order nor the internal application of the right to self-determination would be threatened is one where the right to secession were defined in precise terms, ideally as an amendment to the U.N. Charter, permitting intervention, including international recognition, in cases of extreme oppression but strictly defining the level of required oppression and mandating that a minority created by a recognition of a new state be granted an equal right to self-determination, including secession. The challenge of this task lies in defining 'oppression' and 'a minority,' *a people with a right to self-determination*. Lawyers and policymakers need to address this challenge to advance international peace and security, as well as the very essence of democracy. Thus far, for political reasons, "attempts to declare rules about recognition within the framework of international codification have

¹⁴¹ Prior to NATO's attack, in the two years of fighting between the Yugoslav forces and the Albanian "Kosovo Liberation Army" in Kosovo and Metohia around 2,000 fatalities were recorded on both sides.

always been rejected.”¹⁴² In Kosovo and Metohia, fear of an ethnic Albanian backlash if Kosovo is not granted independence, possibly resulting in systematic attacks on international peacekeepers¹⁴³ may well cause the standards in the province to fall even lower, bowing to the new status.

International intervention in the former Yugoslavia since the initial recognition of the former Yugoslav republics as new states has rendered human and minority rights the only legitimate form of self-determination, a conclusion accepted by current leaders of Macedonian Albanians or Bosnian Serbs – but not by Kosovo Albanians. The right of a territory to secede could have been established by the 1991 recognition policy were it not later reversed by the staunch political refusal to call the international recognition of former Yugoslav republics a precedent, claiming that this was not a case of secession but of "dissolution." Only Kosovo's international recognition now, as a clear case of endorsed secession, would imply that the exclusive international focus on the internal aspects of self-determination following the recognition of the former Yugoslav republics was but a temporary aberration based on geopolitical concerns and that secession remained a viable option for dissatisfied peoples in the twenty first century.

¹⁴² Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006), 37-38.

¹⁴³ See, for instance, "Finally, Final Status," *Financial Times*, 22 February 2006; Steven Woehrel, "Kosovo's Future Status and U.S. Policy," *Congressional Research Service Report for Congress*, RS21721, 9 January 2005; Peter Finn, "Kosovo Hostility Aimed at NATO," *Washington Post*, 14 August 1999; Arben Qirezi, "Kosovo: UN Facing Backlash," *Institute for War and Peace Reporting*, 23 August 2002.