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A LEGAL EXAMINATION OF KOSOVO'S INDEPENDENCE

In conformance with the principles of international law governing the rights of national ethnic minorities, the Kosovar Albanians are entitled to the right of self-administration but not the right to self-determination. Furthermore, this author would argue that the recent unilateral declaration of independence by Kosovo is illegitimate and under international law must be considered an assault on the sovereignty of the Republic of Serbia and a violation of its territorial integrity.

Key words: *Kosovo and Metohia, Serbia, declaration of independence, sovereignty, international law, ethnic minorities*

On February 17, 2008, the region of Kosovo and Metohia unilaterally declared itself an independent nation. I would like to examine the question of whether or not the region of Kosovo has the right to self-determination under the law of nations. In order to answer this question, we must first take a historical look backwards and clarify the legal status of Kosovo. I would like to begin by examining Kosovo's legal status under the constitutions of Serbia and Yugoslavia and then I will examine its legal status under the UN Mission in Kosovo.

I. Kosovo's legal status under the Serbian and Yugoslavian constitutions:

According to the most indisputable legal documents, Kosovo has been an integral part of Serbia since the end of the Balkan wars in 1913 and continued to be subject to Serbia's jurisdiction even after World War I when in 1918 Serbia merged into

the Kingdom of the Serbs, Croats and Slovenians, which in 1929 evolved into the nation of Yugoslavia.¹ As a consequence of the invasion and breakup of Yugoslavia by the Axis powers on April 16, 1941, the territorial integrity of Serbia was violated. Serbia's central territory was occupied by Nazi Germany and named Nedić's - Serbia. The western parts of the country together with Bosnia and Herzegovina were turned into a Nazi puppet state called the Independent State of Croatia. The Northern regions of Serbia were annexed to Hungary, the Eastern and Southern regions to Bulgaria, and the territory of Kosovo and Metohia was annexed to Albania which was itself a puppet state under the control of Fascist Italy.² Following the final defeat of the Axis powers by the Allies, Yugoslavia was liberated and eventually emerged as the Federal Peoples' Republic of Yugoslavia comprised of six peoples' republics as stated in Article 2 of the Constitution of the Federal Peoples' Republic of Yugoslavia:

*"The Federal Peoples' Republic of Yugoslavia is composed of the Peoples' Republic of Serbia, the Peoples' Republic of Croatia, the Peoples' Republic of Slovenia, the Peoples' Republic of Bosnia-Herzegovina, the Peoples' Republic of Macedonia, and the Peoples' Republic of Montenegro."*³

It should be noted that the above-mentioned Article 2 also stresses that:

*"The Peoples Republic of Serbia includes the Autonomous Province of Vojvodina and the Autonomous Kosovo-Metohian region."*⁴

The impermanent nature of the Federal Peoples' Republic of Yugoslavia is evident in Article 1 of the Constitution of the FPRY of 1946. Indeed, Slovenia, Croatia, Bosnia-Herzegovina and Macedonia declared their independence by invoking the provisions of this article which states:

*"The Federal Peoples' Republic of Yugoslavia is a federal people's state, republican in form, a community of peoples equal in rights who on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state."*⁵

¹ See historical notes by the Government of the Republic of Serbia, available at URL: <http://www.serbia-info.com/enc/history.html>

² Ibid

³ Article 2 of the *Constitution of the Federal Peoples' Republic of Yugoslavia, January 30, 1946* as reprinted in *Constitutions of Nations*, by Amos J. Peaslee, The Rumford Press: Concord, N.H., 1950.

⁴ Ibid

⁵ Article 1 of the *Constitution of the Federal Peoples' Republic of Yugoslavia, January 30, 1946*. op cit.

This article clearly implies that the right to self-determination including the right to separation is exclusively confined to the six independent republics that made up the entity of the Federal Peoples' Republic of Yugoslavia. Since the region of Kosovo and Metohia has never had an independent legal personality, it is not entitled to exercise the right to self-determination nor the right to separation.

The fact that the autonomous region of Kosovo and Metohia is an inseparable part of the national territory of Serbia was emphasized in Article 6 of the Constitution of Serbia of September 28, 1990, which states in part:

*"The Republic of Serbia includes the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohia..."*⁶

Following the disintegration of the Federal Peoples' Republic of Yugoslavia, Serbia and Montenegro formed in 1992 the Federal Republic of Yugoslavia (FRY). In 2002, the same two countries formed the State Union of Serbia and Montenegro within the FRY. In the preamble to the Constitutional Charter of the State Union of Serbia and Montenegro, the two contracting parties have expressly stated that the autonomous region of Kosovo and Metohia is an integral part of Serbia.⁷ Moreover, following the withdrawal of Montenegro from the State Union of Serbia and Montenegro on June 3, 2006, Serbia expressly confirmed the legal status of the region of Kosovo and Metohia as an integral part of its national territory.⁸

The legal status of the region of Kosovo and Metohia as an integral part of Serbia has also been confirmed by the United Nations and by different groups of states. The UN position on Kosovo was duly expressed by the UNSC Res. 1160 of March 31, 1998 which affirms:

"...the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia..." and further states that *"...the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE [Organization for Security and Cooperation in Europe] standards, including those set*

⁶ Article 6 of the *Constitution of the Republic of Serbia, September 28, 1990*, available at URL: <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019071.pdf>

⁷ Preamble *Constitutional Charter of the State Union of Serbia and Montenegro, March 14, 2002*, available at URL: <http://www.srbija.sr.gov.yu/vesti/vest.php?id=1292&q=Constitution+of+the+FRY>

⁸ Preamble and Article 182 of the *Constitution of the Republic of Serbia, September 30, 2006*, available at URL: http://www.venice.coe.int/dynamics/N_Opinion_ef.asp?E&CID=53

out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975 and the Charter of the UN..."⁹

Virtually the same language was reiterated in the UNSC Res. 1244 of June 10, 1999.¹⁰ It is clear that the phrase "territorial integrity of the Federal Republic of Yugoslavia" was meant to include the territorial integrity of Serbia and Montenegro — the two pillars of the FRY.

The Contact Group established by the UN to investigate and seek a solution to the Kosovo problem expressed its position in a series of statements including the following issued on March 9, 1998:

*"No one should misunderstand our position on the core issue involved; we support neither independence nor the maintenance of the status quo. As we have set out clearly, the principles for a solution of the Kosovo problem should be based upon the territorial integrity of the Federal Republic of Yugoslavia and be in accordance with OSCE standards, the Helsinki principles and the Charter of the United Nations."*¹¹

The European Union's position on Kosovo was declared in Brussels on April 14, 1999 when:

*"The Heads of State and Government [of the European Union] recall their support for a political settlement of the Kosovo crisis, based on the 'Rambouillet acquis' which provides for substantial autonomy within the border of the Federal Republic of Yugoslavia..."*¹²

A similar statement on Kosovo was made by the Ministers for Foreign Affairs of the Countries of South-Eastern European Cooperation in a joint statement issued in Bucharest on March 19, 1999 in which:

⁹ See paragraph 7 of the preamble and part 5 of the UNSC Res. 1160, March 31, 1998 available at URL: <http://www.un.org/peace/kosovo/98sc1160.htm>

¹⁰ See paragraph 10 of the preamble to UNSC Res. 1244, June 10, 1999 available at URL: <http://www.nato.int/Kosovo/docu/u990610a.htm>

¹¹ From the *Statement on Kosovo* adopted by the members of the UN Contact Group meeting in London on March 9, 1998. See also similar statements adopted on March 25, 1998 in Bonn, on April 29, 1998 in Rome, and on June 29, 1998 in London. All available at URL: <http://www.unmikonline.org/scdocs.htm>

¹² See point 5 of the *Declaration of the Heads of State and Government of the European Union on Kosovo*, adopted April 14, 1999 in Brussels, available at URL: <http://www.unmikonline.org/scdocs.htm>

*The Ministers reaffirmed their commitment to immediate peaceful settlement of the Kosovo crisis on the basis of substantial autonomy for Kosovo, in full respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."*¹³

It should be noted that according to paragraph XXV of the Constitutional Charter of the State Union of Serbia and Montenegro, the Republic of Serbia is entitled to the rights, privileges, and liabilities enjoyed by the FRY under international law in case of the extinction of the FRY:

*"...in the event of Montenegro leaving 'Serbia and Montenegro', the international documents related to the Federal Republic of Yugoslavia, particularly the Resolution 1244 of the U NSC, will relate to and be fully valid for Serbia as the successor..."*¹⁴

Based on the above data, it can be correctly concluded that the problem of Kosovo should be *solved* according to the principles of the legal norms that honor and respect the sovereignty and territorial integrity of Serbia as the legitimate successor of the now extinct Federal Republic of Yugoslavia.

II. The legal status of the region of Kosovo and Metohia under the UN Mission:

Did the placement of Serbia's region of Kosovo and Metohia under United Nations Interim Civil Administration entitle the region to the right of self-determination including the right to independence? It is this author's opinion that the answer to that question is "No" based on the following considerations.

First, the legal bases for the legitimate presence of the UN in the region are the UNSC Resolutions 1160 and 1244 neither of which stripped the FRY (nor by implication Serbia) of its jurisdiction over the region. To the contrary, both resolutions as quoted above expressly affirm the commitment of Member States to respect the sovereignty and territorial integrity of the FRY.¹⁵

Secondly, both resolutions stipulated that the proposed political settlement of Kosovo's conflict should be founded on the principles of the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975 and on the Charter of the

¹³ *Joint Statement by the Ministers for Foreign Affairs of the Countries of South-Eastern European Cooperation*, Bucharest, March 19, 1999, available at URL: <http://www.unmikonline.org/scdocs.htm>

¹⁴ See paragraph XXV of the *Constitutional Charter of the State Union of Serbia and Montenegro*, March 14, 2002, op cit

¹⁵ See page 3, footnotes 10 and 11 above.

United Nations. It is important to note that the Helsinki Final Act is in absolute conformity with the UN Charter.¹⁶

Thirdly, neither of the UNSC resolutions 1160 and 1244, nor the Contact Group proposals, nor the Rambouillet accord has called for granting Kosovo the right to self-determination or independence. To the contrary, all of the above instruments unequivocally call for granting Kosovo substantial autonomy including meaningful self-administration. The following language is from the Contact Group's statement issued in Bonn on March 25, 1998:

*"The fundamental position of the Contact Group remains the same. We support neither independence nor the maintenance of the status quo... we support a substantially greater degree of autonomy for Kosovo which must include meaningful self-administration."*¹⁷

The international community's support for Kosovo's right to self-government was clearly expressed in the *Interim Agreement for Peace and Self-Government in Kosovo*, known as the *Rambouillet Accord*, of February 23, 1999 which states in part:

*"Citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial and other institutions established in accordance with this Agreement..."*¹⁸

The position of the United Nations was expressed in UNSC Res. 1160 wherein the Security Council:

*"Agrees...and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration."*¹⁹

This position was again reiterated in the UNSC Res. 1244 of June 10, 1999.

The strong support of the members of the UN Contact Group for Kosovo's substantial autonomy moves us to pose the following question: Why do these UN Member States support Kosovo's right to meaningful self-administration but not self-determination? To answer this question, the following facts should be taken into consideration.

¹⁶ Helsinki Final Act, available at URL: http://www.osce.org/documents/mes/1975/08/4044_en.pdf

¹⁷ See UN Contact Group statements, op cit

¹⁸ *Interim Agreement for Peace and Self-Government in Kosovo* (Rambouillet Accord), February 23, 1999, available at URL: <http://jurist.law.pitt.edu/ramb.htm>

¹⁹ See point 5 of UNSC Res. 1160, op cit

First, the provisions of UNGA Res. 1514 of 1960 have extremely limited the right of self-determination to peoples of trust territories, peoples of non-self-governing territories and peoples of other territories which have not yet attained independence.²⁰ This limitation was reaffirmed under the principle of equal rights and self-determination of peoples in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* adopted on October 24, 1970 pursuant to UNGA Res. 2625 (XXV).²¹ Since the Kosovar Albanians do not resemble any of the above classified peoples, they are therefore ineligible to exercise the right to self-determination as encompassed in Article 1 of the UN Charter.²²

Secondly, the Kosovar Albanians as an ethnic national minority within the sovereign Republic of Serbia are entitled to substantial self-administration according to the principles of the UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (adopted as UNGA Res. 47/135, Dec. 18, 1992) which states in part:

*"Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life...Persons belonging to minorities have the right to participate in decisions on the national, and where appropriate, regional level concerning the minority to which they belong, or the region in which they live in a manner not incompatible with national legislation."*²³

Therefore, in conformance with the provisions of the above-cited Declaration, the Kosovar Albanians as a national ethnic minority within the Republic of Serbia are entitled to the right of self-administration but not to the right of self-determination.

It should be noted that the exercise of the right to self-administration by national ethnic minorities must be consistent with the principles and objectives of the UN Charter. In this regard, the aforementioned Declaration states that:

²⁰ See paragraph 5 of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* adopted as UNGA Res. 1514, December 14, 1960, available at URL: www.un.org/Depts/dhl/resguide/resins.htm

²¹ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* adopted on October 24, 1970 as UNGA Res. 2625 (XXV) available at URL: www.un.org/Depts/dhl/resguide/resins.htm

²² See Art. 1, para. 2 of the *UN Charter*, available at URL: <http://www.un.org/aboutun/charter/>

²³ See Art. 2, para. 2 & 3 of the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (adopted as UNGA Res. 47/135, Dec. 18, 1992), available at URL: http://www.unhcr.ch/html/menu3/b/d_minori.htm

*"Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."*²⁴

III. Conclusion:

In conformance with the principles of international law governing the rights of national ethnic minorities, the Kosovar Albanians are entitled to the right of self-administration but not the right to self-determination. Furthermore, this author would argue that the recent unilateral declaration of independence by Kosovo is illegitimate and under international law must be considered an assault on the sovereignty of the Republic of Serbia and a violation of its territorial integrity.

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Pravno ispitivanje nezavisnosti Kosova

U skladu sa načelima međunarodnog prava o pravima nacionalnih manjina, kosovski Albancima se priznaju prava na samoupravu, ali ne i pravo na samoodređenje. Dalje, autor raspravlja o nedavnom jednostranom proglašenju nezavisnosti Kosova kao nezakonitom činu koji se mora smatrati kao atak na suverenitet Republike Srbije i povredu njenog teritorijalnog integriteta.

Ključne reči: *Kosovo i Metohija, deklaracija nezavisnosti, suverenitet, međunarodno pravo, etničke manjine.*

²⁴ Ibid, Art. 8 para. 4