

A Right to Self-Determination for the Kosovo Albanians?

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Abstract: The international community's response to recent events in Eastern Europe might suggest that the right to self-determination is evolving in such a manner that it can be invoked by territorially cohesive, ethnic groups within States. The present analysis of whether the Kosovo Albanians have a right to internal and/or external self-determination tends to cast doubt on whether this evolution is taking place. While the international response to the Kosovo crisis may contribute to an emerging norm against the oppression of minorities it is doubtful whether it extends the right to self-determination beyond the existing beneficiaries of the right, namely, peoples organized as States and colonial peoples.

1. INTRODUCTION

Images of ethnic cleansing and gross human rights violations have focused international attention on the rights of the Kosovo Albanians within the Federal Republic of Yugoslavia (FRY). The question arises whether these rights include a right to self-determination. This depends on whether the Kosovo Albanians constitute a people under international law and can claim the right to self-determination. There are at least two possible grounds on which Kosovo Albanians might claim to be a people. One is that they are a territorially cohesive and distinct ethnic group within the FRY. A second is that they are subject to gross human rights violations and are not represented by government because of their ethnicity.

The present article focuses on whether either of these grounds is sufficient to qualify the Kosovo Albanians as a people under international law. It examines the concept of a people under existing international law and in the light of possible evolving standards in this area. It also examines whether the concept of a people is a variable one as suggested by some academics.¹ A variable concept of a people would mean, for example, that a particular group might constitute a people for the purpose of internal but not external self-determination.² In this context, the interna-

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1. See, e.g., J. Dugard, *Secession: Is the Case of Yugoslavia a Precedent for Africa?*, 5 *AJICL* 163, at 171 (1993).
2. External self-determination concerns the right to determine a territory's international status while internal self-determination concerns the right to determine its form of government and policies.

tional community's support for substantial autonomy for the Kosovo Albanians³ might imply recognition of the Kosovo Albanians as a people at least for the purposes of internal self-determination. Whether this is a correct interpretation depends on an analysis of general state practice on the right to self-determination.

2. THE RIGHT TO SELF-DETERMINATION UNDER EXISTING INTERNATIONAL LAW

The legal right to self-determination evolved from the UN Charter, Articles 1(2) and 55 of which affirm the principle of "equal rights and self-determination of peoples." There is no definition of the term "peoples" but interpreting it in accordance with its ordinary meaning, in context and in the light of its object, purpose and drafting history, suggests it refers to (a) peoples organized as states, and (b) the inhabitants of Non-Self-Governing and Trust Territories.⁴ It is doubtful whether it also refers to distinct ethnic groups within independent states. While the ordinary meaning of the term is broad enough to include such groups, the drafting history provides little support for such a broad interpretation. The controversy surrounding the issue of secession⁵ might suggest otherwise but it can be explained by the fact that some colonial powers regarded decolonization claims as secessionist claims.⁶ The drafting history also reveals that the emphasis was on external self-determination. There was no attempt to link the manner in which an independent state governed its citizens with any entitlement to self-determination for ethnic groups within that state. It suggests that at the time the Charter was drafted, the Kosovo Albanians would not have been regarded as a people with a right to self-determination.

Undoubtedly, the right to self-determination has evolved since then. This is evident particularly in relation to the right to self-determination of the inhabitants of Non-Self-Governing and Trust Territories.⁷ The question arises whether the right has continued to evolve so that groups within independent states, like the Kosovo Albanians, have the right to self-determination.

3. See, e.g., UN Docs. S/1998/223 (1998), S/RES/1160 (1998), S/1998/470 (1998), S/RES/1199 (1998), S/1999/107 (1999), S/1999/319 (1999), S/1999/429 (1999), S/1999/649 (1999) and S/RES/1244 (1999).

4. This interpretation is uncontroversial but for a fuller discussion of the relevant Charter articles and academic literature, see H. Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 ICLQ 537, at 539-547 (1998).

5. See, e.g., Documents of the United Nations Conference on International Organization (UNCIO), Vol. VI, at 296 and Vol. XVII, at 142, 143, 381 (1954).

6. The Netherlands, France, Spain and Portugal.

7. When the Charter was drafted self-determination for these peoples was simply an objective to be pursued: see, e.g., UNCIO, Vol. X, at 562, 497 (1954). By 1971, it had evolved into a legal right for all colonial peoples: see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, 1971 ICJ Rep. 16, at 31, para. 52.

Common Article 1 of the 1966 International Covenants on Civil and Political Rights (ICCPR)⁸ and on Economic, Social and Cultural Rights (ICESCR)⁹ affirms the right of 'all' peoples to self-determination. The ordinary meaning, context,¹⁰ and drafting history¹¹ suggest that the right applies universally. This has led some academics to claim that the right applies to groups within states¹² but this is questionable. Article 1 does not define 'peoples' and the drafting history reveals that there was no consensus on the issue.¹³ Several proposals were made defining 'people' according to personal criteria but they were either rejected or not voted upon suggesting a lack of widespread support for them.¹⁴ In the absence of any general criteria to define people, it is difficult to infer a right to self-determination for groups other than colonial peoples and peoples organized as states. It suggests that at the time the Covenants were drafted, the Kosovo Albanians would not have been regarded as a people with a right to self-determination.

It is possible that the interpretation of Article 1 has evolved in the light of the subsequent practice of the state parties. An examination of state reports submitted under Article 40 ICCPR¹⁵ reveals that states regard the right to external self-determination as a right for the entire population of the state.¹⁶ This suggests that there has been no development of the concept of a people at least for the purposes of external self-determination.

The reports suggest some development in respect of internal self-determination. Although this dimension was largely ignored during the drafting of Article 1, most states now comment on it.¹⁷ Usually, this is limited to a brief description of the state's system of government and constitution.¹⁸ To the extent that this represents an evolution of the right to internal self-determination rather than empty rhetoric or

8. 1966 International Covenant on Civil and Political Rights, 6 ILM 368 (1967).

9. 1966 International Covenant on Economic, Social and Cultural Rights, 6 ICM 360 (1967).

10. See, e.g., the wording of Art. 1(2)(3).

11. See, e.g., the comments cited in M. J. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights 27, 32-33, 44-45 (1987).

12. See, e.g., Y. Dinstein, *Is there a right to secede?*, PASIL 299, at 300-303 (1996).

13. See Bossuyt, *supra* note 11, at 20-22, 32, 35-36.

14. *Id.*, 32, 34, 45. It is also significant that two out of the five proposals were put forward by India since India entered a reservation upon accession stating that Article 1 does not apply to independent states: UN Doc. CCPR/C/2/Rev.2 (1989), at 22. The FRG, France and Netherlands objected to the reservation: *id.*, at 37-38.

15. The present discussion is based on a survey of the reports submitted by 97 states which was undertaken by the author. A representative sample is cited in this article.

16. See UN Docs. CCPR/C/81/Add. 5 (1994), CCPR/C/31/Add.3 (1988), CCPR/C/36/Add.2 (1986), CCPR/C/6/Add.9 (1982), and CCPR/C/28/Add.15 (1992). A small number of states confined Article 1 to colonial peoples: see UN Docs. CCPR/C/10/Add.8 (1983) and CCPR/C/70/Add.6 (1994). Some expressly rejected any attempt to apply it to groups within states: see UN Doc. CCPR/C/81/Add.2 (1994).

17. Of the 97 states, 87 commented on self-determination. Of these, 69 states or 79% commented directed or indirectly on internal self-determination. See UN Docs. CCPR/C/32/Add.19 (1994), CCPR/C/58/Add.15 (1992), CCPR/C/36/Add.4 (1988), CCPR/C/68/Add.1 (1991), CCPR/C/32/Add.17 (1993), and CCPR/C/62/Add.1 (1991).

18. *Id.*

a reflection of the changed international climate, it is still of limited use to groups within states. This is because the emphasis in the reports is on the right of the entire population of the state to determine their system of government.¹⁹ Admittedly, a small number of states refer to minority rights in their comments on Article 1.²⁰ However, it is evident from the reports that such rights are granted to these groups by virtue of the wishes of the entire population of the state rather than because the groups are entitled to these rights *per se*.²¹ It suggests that the term “people” refers to the entire population of a state even for the purposes of internal self-determination. The state reports suggest that the Kosovo Albanians would not be regarded as a people under Article 1.

The UN Human Rights Committee’s comments on the ICCPR²² tend to support this conclusion. It distinguishes between the rights of minorities and the right of peoples to self-determination.²³ This is significant because some states refer to autonomy for particular groups as though it were a form of minority rights.²⁴ This suggests that autonomy does not imply recognition of a right to self-determination for the groups concerned. It follows that one has to be cautious in attributing too much significance to international support for autonomy for the Kosovo Albanians. This is reinforced by the Committee’s comments on the right to participate in public life which indicate that no particular group has the right to decide on the modalities of participation as it is a matter for the legal and constitutional system of the state concerned.²⁵ This suggests that where certain rights such as autonomy are granted to a particular group it is by virtue of the wishes of the entire population of the state concerned.

The Kosovo Albanians may derive some support for their self-determination claim from the 1970 Declaration on the Principles of International Law Governing Friendly Relations and Co-operation between States, annexed to General Assembly Resolution 2625 (XXV). It affirms the right of “all” peoples to self-determination. The ordinary meaning, context²⁶ and drafting history²⁷ suggest that the right applies

19. *Id.*

20. Belgium, Denmark, Finland, Spain, US and Colombia: *see* respectively, UN Docs. CCPR/C/57/Add.3 (1991), CCPR/C/37 (1986), CCPR/C/1/Add.32 (1978), CCPR/C/95/Add.1 (1995), CCPR/C/81/Add.4 (1994), and CCPR/C/64/Add.3 (1991).

21. An exception being Finland which refers to self-government by the Ålanders as an “example of how self-determination of a distinct population group can be realized within a larger community” although it is significant that it did not apply it to other groups such as the Samis: *see* UN Doc. CCPR/C/58/Add.5 (1989).

22. On the functions of the Committee, *see* Articles 40-41.

23. General comment No. 23: UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), at para. 3.1.

24. This is evident from their reports on Art. 27 ICCPR concerning minority rights: *see* UN Docs. CCPR/C/92/Add.2 (1997), CCPR/C/51/Add.1 (1989), CCPR/C/103/Add.3 (1996), CCPR/C/81/Add.5 (1994), CCPR/C/95/Add.6 (1995), and CCPR/C/81/Add.10 (1996).

25. Communication No. 205/1986, Mikmaq people v. Canada (views adopted on 4 November 1991, at the forty-third session), UN Doc. A/47/40 (1995), Annex IX, at 208, paras. 5.4-5.5.

26. The principles govern all states.

27. *See* UN Doc. GAOR, Vol. 25, Supp. No. 18, at 41 (1970).

universally. Unlike the International Covenants, the Declaration provides some indirect guidance on defining peoples.

Paragraph seven affirms respect for the territorial integrity of states complying with the right to self-determination and “thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” It suggests that the territorial integrity of a state will be protected if it has a representative system of government. In the absence of such government, it opens up the possibility of secession. By definition, secession is exercised by only one segment of the population. This suggests that a group which is not synonymous with the entire population of the state may be regarded as a people with a right to self-determination.

The Declaration appears to adopt a dual test for defining people. The reference to “race, creed or colour” highlights the relevance of personal criteria. However, not every ethnic or religious group will constitute a people. A second criterion must be satisfied. The system of government must be such that the group is not represented due to its ethnicity or religion. Both criteria appear to be satisfied in Kosovo which suggests that the Kosovo Albanians may claim to be a people with a right to self-determination under the Declaration. The problem facing Kosovo Albanians stems from the legal status of paragraph seven. The drafting history reveals that there was a lack of consensus on the inclusion of this paragraph which suggests that it does not represent a codification of international law but at most an attempt to progressively develop the law.²⁸ The extent to which there is a legal right to self-determination in the circumstances outlined in paragraph seven depends on whether subsequent state practice complies with this provision.

Several observations can be made about subsequent state practice.²⁹ The international community has tended to uphold the territorial integrity of states. This suggests that at least for the purposes of external self-determination, the term “people” refers to the entire population of the state. However, there have been exceptions. The territorial integrity of states has not been upheld where (a) the entire population of the state agree to the break-up of the state or the integration of the state with another state,³⁰ or (b) independent states are illegally annexed.³¹ In both instances, state practice is consistent with the concept of a people under international law since it is the entire population who decide on the status of the territory.

More controversial are those instances where a group within a state secedes from the state without the consent of the rest of the population. International recognition of these secessions might imply that groups within independent states have a right to self-determination. They are at least two instances where this has occurred, East Pakistan and the former Yugoslavia. In East Pakistan, a distinct ethnic and ter-

28. *Id.*, at 51.

29. For a more detailed discussion, see Quane, *supra* note 4, at 564-571.

30. Czechoslovakia, Ethiopia, the Soviet Union, the German Democratic Republic and the Federal Republic of Germany.

31. Arguably, the Baltic Republics.

ritorially cohesive group subject to gross human rights violations seceded from Pakistan with the assistance of the Indian army and established Bangladesh. International recognition of Bangladesh has led some academics to suggest that there may be a right to self-determination for distinct political-geographical entities subject to a *carence de souveraineté*.³² This suggests that the Kosovo Albanians have a right to self-determination. However, it is unlikely that a legal principle with such far-reaching implications could emerge from one instance of state practice especially given the existence of alternative explanations for this practice³³ as well as a considerable amount of state practice to the contrary. It may be that this is an evolving principle of international law in which case state practice in Kosovo may contribute to its further evolution.

In the former Yugoslavia (SFRY) several constituent republics seceded and formed independent states.³⁴ International recognition of these new states might suggest a right to self-determination for groups within independent states. Arguably, the situation is more complex. The international community's initial reaction to the conflict in the SFRY was to try to preserve the territorial integrity of the state.³⁵ When it became evident that this was not possible, it finally moved to recognize the new states. The EC took the lead, making recognition subject to compliance with the conditions outlined in its Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"³⁶ and establishing an Arbitration Commission to decide on related legal issues.³⁷

Some of the Commission's opinions are of interest in the present context. Its opinions that the SFRY was in the process of dissolution³⁸ and that its internal borders had become external borders³⁹ suggest that the inhabitants of a constituent republic of a federal state constitute a people with a right to self-determination at least when the state in question is dissolving. Its opinion⁴⁰ that members of ethnic groups may derive certain rights from the self-determination principle suggest that they may constitute a people at least for limited purposes of internal self-determination since it is generally accepted that only peoples can invoke the right to self-determination.

Several observations can be made about the international response to the conflict in the SFRY. Arguably, it was determined more by the need to prevent gross human rights violations and to maintain peace than any intention to create a new

32. See J. Crawford, *The Creation of States in International Law* 116-117, 100 (1979); and B. Kingsbury, *Claims by Non-State Groups in International Law*, 25 Cornell ILJ 481, at 487 (1992).

33. See L. C. Buchheit, *Secession: The Legitimacy of Self-Determination* 127, 208-209, 213 (1979).

34. For a detailed discussion, see M. Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL 569 (1992).

35. See, e.g., UN Doc. S/PV.3009 (provisional record).

36. See 31 ILM 1486 (1992).

37. On the functions of the Commission, see 31 ILM 1488 (1992).

38. Opinion No. 1, 31 ILM 1494 (1992).

39. Opinion No. 3, *id.*, 1499.

40. Opinion No. 2, 92 ILR 167, at 168-169 (1993).

right to self-determination for the inhabitants of constituent republics of federal states. This does not mean that such a right could not evolve in the future. However, it would require a fairly consistent and representative level of state practice together with an *opinio juris* that such a right existed under international law. Even if this was the case, it would be of limited use to the Kosovo Albanians. Kosovo is not a constituent republic but a former autonomous region which highlights the potential arbitrariness of the proposed right as it depends on the constitutional status of a territory which, as Kosovo shows, can change over time. It seems that a right to external self-determination for the Kosovo Albanians cannot be inferred from state practice on the dissolution of the SFRY.

The Arbitration Commission's opinion on the rights of ethnic groups within states⁴¹ might suggest that the Kosovo Albanians have a limited right to internal self-determination. However, the legal significance of this opinion is undermined by several factors. The EC did not always follow the Commission's opinions.⁴² The opinion in question does not expand on the underlying legal reasoning. Finally, it is not consistent with general state practice on the right to internal self-determination. The latter is illustrated by the international community's response to Liechtenstein's proposal to the General Assembly on "the realization of self-determination through autonomy."⁴³

The Liechtenstein proposal envisaged a basic level of autonomy for territorially and socially cohesive "communities" which would include the right to non-discrimination, the freedom to practise distinctive community characteristics and the guarantee of a "proper role" in areas of public administration.⁴⁴ Subject to the consent of the state, the level of autonomy could increase to independence.⁴⁵ This introduces a variable concept of a people whereby communities could derive certain autonomy rights from the self-determination principle but could not unilaterally declare their independence. The proposal provoked considerable controversy⁴⁶ and discussion was deferred to a subsequent session⁴⁷ but there is no record of it taking place.

The lack of general support for the Liechtenstein proposal does not necessarily reflect indifference to the plight of ethnic, linguistic and religious groups within states. The recent upsurge in instruments protecting minority rights is evidence to the contrary.⁴⁸ However, what it does suggest is that the international community is

41. *Supra* note 40.

42. For example, the EC's approach to the recognition of Macedonia: *see further*, Weller, *supra* note 34, at 594.

43. UN Docs. A/48/PV.36, A/48/147, and A/48/147/Add.1 (1993).

44. UN Doc. A/48/147, 3 (1993).

45. *Id.*, 3, 4.

46. *See* UN Docs. A/C.3/48/SR.22, at 2, 4, 6-11, 13; A/C.3/48/SR.21, at 4-6; and A/C.3/48/SR.4, at 3 (1993).

47. UN Doc. A/RES/48/427 (1993).

48. *See, e.g.*, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. A/RES/47/135 (1992), and the Council of Europe's 1995 Framework Convention for the Protection of National Minorities, ETS 157 (1995).

reluctant to use the right to self-determination to address minority concerns. Instead, it seems to favour addressing these concerns within the framework of individual and minority rights.

This brief overview of state practice on the right to self-determination suggests that the Kosovo Albanians cannot claim to be a people with a right to self-determination simply on the basis of their ethnicity. It may be possible for them to claim to be a people due to the way they have been treated by the government because of their ethnicity. This depends on whether the principle set out in the 1970 Declaration has evolved into a right under international law. The international response to the crisis in Kosovo may provide some insight into this issue. It may also provide some insight into whether there is a variable concept of people so that the Kosovo Albanians may be able to claim at least a limited right to internal self-determination.

3. THE INTERNATIONAL RESPONSE TO THE KOSOVO CRISIS: AN EVOLVING RIGHT TO SELF-DETERMINATION?

Several observations can be made about the international response to the Kosovo crisis. The first concerns the international community's commitment to the territorial integrity of the FRY and its rejection of independence for the Kosovo Albanians.⁴⁹ Given that self-determination is defined as the right to freely determine one's political status,⁵⁰ the rejection of independence for the Kosovo Albanians suggests that they do not have a right to self-determination. It is possible that the right to self-determination is not absolute and that the options on offer may be limited by other considerations such as the need to maintain peace and security.⁵¹ However, on balance⁵², it seems that the international community's response simply reflects existing international law whereby it is for the entire population of a state to determine its international status.

The international community's commitment to the territorial integrity of the FRY is also at odds with any evolving right to self-determination based on paragraph seven of the 1970 Declaration. Even though the international community recognized that the Kosovo Albanians were subject to considerable repression and excluded from government because of their ethnicity, it continued to uphold the territorial integrity of the FRY.⁵³ It suggests that the right to self-determination is not

49. See, e.g., UN Docs. S/1998/223 (1998), at para. 9; S/RES/1160 (1998), at preambular para. 7; S/RES/1199 (1998), at preambular para. 13; S/RES/1203 (1998), at operative para. 10; S/1999/319 (1999), at para. 3; S/1999/347 (1999), at para. 2; S/RES/1244 (1999), Annex 1, principle 7; S/RES/1239 (1999), at preambular para. 7; and S/RES/1244 (1999) at preambular para. 10.

50. See, e.g., Art. 1 ICCPR.

51. See Quane, *supra* note 4, at 553, 557, 565-568.

52. See, documents cited *supra* note 49.

53. See, e.g., S/PRST/1999/2 (1999); and S/1999/429 (1999), at paras. 2 and 5.

evolving in accordance with paragraph seven. It also undermines academic claims that there is a right to self-determination for groups subject to a *carence de souveraineté*.

It may be argued that the peace agreement is only an interim measure and does not preclude independence for Kosovo Albanians in the future.⁵⁴ If the international community does accede to independence claims it will probably be due to the failure of the agreement to protect the Kosovo Albanians.⁵⁵ However, if the recent human rights violations did not entitle them to a right to external self-determination, it is questionable whether violations of an agreement supervised by an international monitoring force will do so in the future.

The question then arises whether Kosovo Albanians have a limited right to internal self-determination. This might be inferred from the international community's support for autonomy for Kosovo. An alternative interpretation is that it simply reflects the international community's recognition of autonomy as a useful means of addressing minority concerns particularly in situations of inter-communal conflict.⁵⁶ Recent minority rights instruments refer to various forms of autonomy as a way of addressing the legitimate concerns of minorities.⁵⁷ They reveal that while the international community was not prepared to countenance the possibility of autonomy under Liechtenstein's proposal on self-determination, it is prepared to countenance it when it is formulated within the framework of minority rights. The overlap in the substance of Liechtenstein's proposal and recent minority instruments,⁵⁸ suggests that the international community remains highly sensitive to the classification of proposed rights. It suggests that international support for autonomy for Kosovo is more consistent with current developments in the field of minority rights than with any development of the right to internal self-determination.

In conclusion, the Kosovo Albanians do not appear to have a right to internal or external self-determination under international law. To the extent that the international response to the Kosovo crisis contributes to international law, it may be in the sphere of minority protection rather than self-determination. It may contribute to what the UN Secretary-General has referred to as an emerging norm against the violent repression of minorities.⁵⁹ However, it does little to extend the right to internal or external self-determination beyond the currently accepted beneficiaries of the right, namely, peoples organized as states and colonial peoples.

54. See UN Doc. S/RES/1244 (1999), at operative para. 11.

55. See, e.g., UN Doc. SG/SM/6878 (1999), at para. 12.

56. See, e.g., Report of the CSCE Meeting of Experts on National Minorities, Geneva, 1991, at 6-7.

57. Cf., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), at para. 35; the Framework Convention for the Protection of National Minorities, *supra* note 48, Arts. 10(2) and 13(1); and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 48, Art. 2(1).

58. Cf., the elements of the Liechtenstein proposal outlined in UN Doc. A/48/PV.36 (1993), at 3, with Arts. 2-5 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, *supra* note 48.

59. UN Doc. SG/SM/6949 (1999), at para. 36.