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# **KOSOVO: THE UNPRECEDENTED STATE**

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## Introduction

This paper argues that Kosovo's quest to independence is a unique case, hence it entitles Kosovo to break independent without violating international law. The case made here is based on a number of arguments, from the specific political dynamics that have brought Kosovo to this day, its legal and moral right to state succession from former Yugoslavia as a federal entity, to the attempted genocide and consistent brutal treatment of the Albanian majority for decades.

For most analysts, the dilemma is no longer "whether" Kosovo will become independent, but "when" and "how". UNOSEK's Comprehensive Proposal<sup>1</sup> for the future status has helped the vast majority of international stakeholders to converge around a consensual position – supervised independence. Now, many governments publicly recognized independence as the only viable solution for Kosovo. With the full support of the United States and most EU countries, the UN Secretary General, Ban Ki-moon, has fully endorsed the outcome as outlined in Ahtisaari's proposed settlement.

The case here highlights a set of circumstances that distinguish Kosovo's claim for independence from other entities potentially seeking statehood. During the last eight years Kosovo has functioned as an international protectorate. Prior to that, Kosovo's majority population has been subject to systematic violations of human rights, which culminated with ethnic cleansing, finally brought to an end via forceful humanitarian intervention. For decades under former Yugoslavia, Kosovo was an autonomous province within the Republic of Serbia and at the same time a constitutive unit of the Yugoslav Federation as other republics, including the right to veto.

At the turn of the previous century, Kosovo was annexed by Serbia and then integrated into Yugoslavia without its consent – and was prevented from breaking free when it disintegrated. While the federation suffered a bloody collapse, Kosovo's territory and its borders have not changed. Today, there are democratic structures in place and the overwhelming majority of Kosovo's citizens support no other option but independence.

The Kosovo Assembly approved the obligations emanating from the Ahtisaari proposal, including advanced provisions for communities. This shows strong political commitment for the protection of minority rights and positive discrimination of ethnic communities. The same level of maturity was demonstrated with explicit guarantees for the territorial integrity of neighboring countries. These are some of the features elaborated in greater detail throughout the paper.

While similar elements are present in other settings where statehood is contested, none of these cases nearly share the wholeness of characteristics as Kosovo. It is the unprecedented and the exceptional sum of these arguments that makes Kosovo a unique case, a *sui generis*, in international law vernacular.

Apart of the argument whether Kosovo is entitled to independence, some fear that this would serve as precedent for other "territories" to seek statehood – thus endangering the very principle that underpins international law, state sovereignty. As a result, the status remains unsolved and may result with serious consequences if status quo persists. To this end, this paper argues that the way Kosovo's status is being addressed need not damage the international system.

Ultimately, whether Kosovo is treated as an exception is subject to interpretation. Countries with ambitions to help their stateless allies to seek statehood or to deter Kosovo from becoming independent, will still insist that Kosovo is indeed a precedent. While political demands will continue

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<sup>1</sup> United Nations Special Envoy for the Future Status of Kosovo, former president of Finland, Marti Ahtisaari, appointed by the UN Secretary-General on 14 November 2005.

for other cases to break independent, this paper attempts to show that upon better scrutiny, the example of Kosovo is markedly different from others.

In order to illustrate and visually compare the exceptionality of Kosovo, the paper presents a matrix of numerous contested lands, judged against several criteria relevant for recognition of statehood (see page 16).

**Values have made it more difficult for states to get away with conducting ethnic cleansing within their territory.**

The basis of today's international system is in the Westphalian arrangement of state sovereignty. Although state sovereignty remains the main principle in international law, it is under increasing pressure to evolve due to growing influence of ethical values in international politics. As a result, it has become more

difficult for states to get away with conducting ethnic cleansing within their territory. The international legal system and the classical concept of sovereignty is evolving, for some too slow and for some too fast.

For some, the evolution of international law has gone as far as to take away the right of a state to govern parts of its territory where it has grossly abused the population. Independence for Kosovo is considered a positive evolution by some, a violation or a stretch of concepts by others. The difficulty to measure this objectively, and the inherent political nature of the matter leave the verdict excessively dependent on interests of permanent members of the Security Council. The instrumentalization of decision-making on political criteria as perceived by member states leads to incoherent use of principles. For example, the Russian Federation has consistently employed different policies for Abkhazia than for Chechnya.

**For international law to remain relevant for conflict resolution, it must provide for exceptional circumstances to keep the door ajar for potential countries.**

One cannot exclude the creation of more states. While not fully open, the door remains ajar for other territories to potentially become independent, not as a rule, but using the exceptional circumstances that the international law must provide if it wants to remain relevant for conflict resolution.

Regardless, being the only case that shares numerous characteristics listed in this paper, Kosovo should be treated as fully in line with the glacial process of evolution of international law. The growing international consensus on Kosovo's independence partly reflects a growing opinion that it does not change the fundamental recognition of state sovereignty. This paper explains why Kosovo deserves independence in the first place and it does not question the international system by doing so.

## **1. Subject to ethnic cleansing and attempt of genocide**

Throughout the nineties, the Serbian regime engaged in a systematic and brutal campaign to forcibly expel ethnic Albanians, who responded by civil resistance. As a result of Belgrade's apartheid policies in Kosovo, by 1998, almost a quarter of Kosovo's population sought refuge abroad. Such a campaign culminated with the killing of around ten thousand people, mainly civilians, and thousands of cases of well-documented torture, rape, destruction of property, etc.

The repression during the nineties was clearly a strategy to change Kosovo's demographic structure. That it was not a historically aberrant plan to be blamed on Milosevic alone is best demonstrated by the consistent policy of the Serbian establishment, including major political parties, the Academy of Arts and Sciences (CubriloVIC in 1937 and the Memorandum of this Academy in 1983), and the Serbian Orthodox Church to render Albanians a minority in the area.

**Even today the party that stands for 'returning' Kosovar Albanians to Albania continues to win more votes than any other party in Serbia.**

The initial occupation of Kosovo was followed by continuous efforts to change the ethnic landscape of the territory. Such efforts included expulsion of Albanians from Kosovo, agrarian reform, i.e. forceful nationalization of the land owned by Albanians, provision of free land parcels to Serb soldiers and volunteers etc. (Malcolm 1998: 291). In the function of such policies, Albanians were projected as a security and demographic threat to Serbia that called

for an increasingly urgent remedy. This paved the way for public acceptance for the violent policies against Albanians.

Serbia's campaign of ethnic cleansing (1998-1999) drove around one million Kosovars out of their homes, most of them abroad, the largest population displacement in Europe since World War II. Upon expulsion, many were stripped of all personal documents and found it difficult to prove their identity later.

The international community took notice, but its reprimands went unheeded, allowing Serbia to repeatedly ignore several resolutions of the UN Security Council. Having exhausted all other diplomatic avenues, the international community at large feared a repetition of the Bosnia scenario. In this direction, NATO launched a humanitarian intervention to prevent "genocide of Kosovo Albanians" (Triantaphyllou 2001).

Following the end of the war, a number of Serbia's governmental officials (including two former presidents) were indicted by the International Criminal Tribunal for former Yugoslavia (ICTY) for crimes against humanity carried in Kosovo during 1998-1999.

**Albanians were consistently projected as a security and demographic threat to Serbia that called for an increasingly urgent remedy.**

From all the contested lands presented in the matrix below, only Sudan and Chechnya resemble the scale of violence and expulsion exercised in Kosovo. Au contraire, some of them base their request for independence on being majorities, although this has come as a result of ethnic cleansing – Republika Srpska, South Ossetia and Abkhazia have forcefully changed demographic outlook of their respective territories. Unlike them, Kosovar Albanians have remained a majority in spite of ethnic cleansing.

Having been subject to a deliberately organized governmental policy that led to attempted genocide, Kosovars will hardly allay their mistrust towards Serbia. However, plight alone does not qualify Kosovo to a state, were it not for other arguments treated further down in the paper.

## **2. Dissolution of the common state**

As described in the previous section, ethnic cleansing came about throughout the violent dissolution of the common state, the Socialist Federative Republic of Yugoslavia (SFRY). This section argues that due to the dissolution of the common state, Kosovo has the right to follow a path of its choice. The issue of Kosovo clearly has to be seen "in the context of Yugoslavia's dissolution" (Kosovo Report 2000: 24). It is commonly acknowledged that the break-up of Yugoslavia started with the violent abolition of Kosovo's autonomy, in 1989.

No UN resolution explicitly assigned Kosovo to Serbia as such; the only one in force (1244) recognizes Kosovo as part of FRY only. The leftover of the Federation, the Federal Republic of Yugoslavia, later the Union of Serbia and Montenegro, also split in 2006, when 55.53% of Montenegrin citizens voted for independence. According to an international lawyer, the transformation of SFRY into the "unrecognized Federal Republic of Yugoslavia ("FRY"), and its subsequent transformation into the

temporary state of Serbia and Montenegro diluted and blurred any legal connection between Kosovo and the remnants of the former Yugoslavia” (Williams 2007). Regardless of the legal implications of such an argument, it shows that subsequent state creatures have not accommodated other communities, i.e. the Montenegrins, which sought to govern themselves without Serbia as a bigger step-brother.

Bearing the identity of no single ethnic group, Yugoslavia stood some chance, albeit little, to keep various ethnic groups living as equals. Moreover, the very name of the state identified with ‘southern Slavs’, leaving Albanians as the only sizable community who found it difficult to identify with (fifth largest: 36.3% Serbs, 19.7% Croats, 8.9% Muslims, 7.8% Slovenes, 7.7% Albanians, according to the last reliable census in former Yugoslavia in 1981). The emancipation of Albanians increased the realization that the will to live within a common country was dependent on them being equal to others. This was manifested with numerous political demands and protests that led to an upgrade of Kosovo’s status in 1974, when the province acquired competences equivalent to republics.

**It is with the resolution of Kosovo’s status that the drama of Yugoslavia’s bloody dissolution will find its epilogue.**

The end of the eighties saw a volte-face move in the opposite direction, to render Albanians a minority group within Serbia, which sparked turmoil that ended the existence of SFRY. The belligerent policy towards Kosovo sent the signal to other republics that they are better off as independent.

The ensuing years saw the resolution of the status of all other entities of former Yugoslavia and mutual recognition even by Serbia. Ironically, the most dissatisfied lot still has not managed to settle its accounts. Thus, it is with the resolution of Kosovo’s status that the drama of Yugoslavia’s bloody dissolution will find its epilogue.

### **3. Equal representation at the federal level in the former structure**

This section illustrates that although a province by name, Kosovo had powers largely equivalent to other republics, it was directly represented in the federal structures, hence upon the latter’s dissolution it has the right to seek to follow a path of its choice.

Some analysts conclude that due to the very label ‘province’, Kosovo should not enjoy the right to secession. However, as there is a wide array of labels in use with nebulous right to secession, the argument should include also the federal arrangements for comparison. For example, the higher tier of ex-Soviet units, ‘union republics’, had the right to secession, while, the second tier, ‘autonomous republics’ did not. Kosovo compares with both types of USSR republics: (a) it did not have the explicit right to secession similarly to the ‘autonomous republics’, but (b) it was an equal federal unit similar to USSR’s ‘union republics’. It can thus be concluded that, when compared to USSR federal arrangements, Kosovo’s case lies between the two types of republics. Hence the need for a more elaborate analysis of Kosovo’s position within Yugoslavia.

**Compared to USSR federal arrangements, Kosovo’s case lies between the ‘union’ republics and ‘autonomous’ republics.**

In establishing that Kosovo had the equivalent status of a federal unit, one should look at (a) level of representation at the federal level, and (b) powers of the entity under question. Within the framework of former Yugoslavia, Kosovo’s autonomy had increased over time and its status was upgraded with the 1974 Constitution, the last before the collapse of SFRY. Thence, as a constitutive federal unit, Kosovo’s consent was required for all executive, legislative, and judicial decisions at the federal level, hardly the case in other federations in the world, apart of advanced federations such as Canada or Switzerland. In all aspects, the status of autonomous

provinces was virtually the same as that of republics – Kosovo became an equal constitutional element of the decentralized Yugoslav federation and remained part of Serbia by name only.

The 1974 Constitution significantly increased the responsibilities of autonomous provinces, giving them powers to veto decisions in the republican and federal parliaments. This was even interpreted as having made Kosovo more powerful than Serbia itself, for Serbia could not veto the decisions of the Assembly of Kosovo. Since the death of Tito, Kosovo was even entitled to the rotating presidency – in 1986-7, a Kosovar Albanian presided over Yugoslavia.

Kosovo was entitled to its own constitution, to elect members of the federal parliament on the same basis and with the same legislative rights as other federal units. Similar to republics, Kosovo had its own police, intelligence, territorial defense forces, national bank, judiciary, and other state-like traits accountable to its Provincial Assembly. Federal bodies were primarily engaged in exercising oversight.

Many arguments against Kosovo's independence point out that it did not enjoy the right to self-determination as other republics did. However, the republics did not enjoy this right explicitly either, for it was not based on territory. This argument was based on the dichotomy of 'constitutive' and 'non-constitutive nations' – *nations and nationalities*. That such a principle was inadequate and fluid, hence counterproductive, shows that it gave rise to claims of Serbia to hold on to parts of Croatia and other areas. Subsequently, this was not taken to apply to 'constitutive' nations when they were a minority in another republic.

Recognizing the right to partition of the same territory of two different groups would have caused mayhem. Hence came about the practical interpretation by the Arbitration Commission of the Peace Conference on the former Yugoslavia (known as the Badinter Commission), for the right to secession to be enjoyed along republican boundaries.

After all, the division between constitutive and non-constitutive nations is an ugly legacy of the past that should not be taken as criteria for in some cases it disenfranchises majorities and legalizes apartheid. Kosovo's majority had a 'non-constitutive nation', which has been asking for independence, and the principles above ought to favor this interpretation.

#### **4. Illegal downgrade of Kosovo's status**

Due to its powerful status within the Federation, the only way to downgrade the autonomous status of Kosovo was to push the Assembly of Kosovo to do so. The very fact that a vote by its Legislature was necessary to have its autonomy reduced is the best illustration where the ultimate sovereign rested. Numerous analyses have demonstrated that Kosovo's autonomy was repealed illegally, hence the dispute on grounds of (a) illegally approving constitutional changes during marshal law (b) duress and (c) of vital procedural malfeasance.

The institution of federal marshal law paved the way for Serbian police forces to enter Kosovo under the authority of federal police, without local consent. Pressure was exercised by the Serbian police that surrounded the Assembly of Kosovo leading to the repeal of the autonomous status in March 1989.

These constitutional changes were done in blatant violation of federal and Kosovo's constitution. The due procedure for adoption of constitutional changes was not respected and there were no sufficient votes in support of the proposed

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changes. As a consequence, when constitutional changes were passed under duress, they were never recognized by Kosovo's representatives and citizens.

It is often stated that the Badinter Commission did not recognize the right of provinces to state succession. Not being explicitly tasked to rule on the right of provinces to state succession, Robert Badinter stated that he could not rule on a matter that was not presented to him (2007). As a result, one cannot conclude that Kosovo was explicitly left under Serbia. During this time, Kosovo was under illegal rule and was not represented by a legitimate leadership. By corollary, no such official requests could be presented to Badinter on behalf of Kosovo. Being de facto under occupation, no consent of Kosovo can be inferred about its future. Finally, it should be interpreted that no rule was made on Kosovo in 1991, and the decision that was made for other then, remains open for Kosovo today.

Overall, it can be concluded that the 'sovereign' rested with the people of Kosovo. The removal of the autonomy in 1989 effectively stripped Kosovo off its 'sovereignty' within Yugoslavia. Whereas for other republics, this internal sovereignty transformed into an external one, Kosovo's sovereignty was lost. Other republics consequently left the union, leaving Kosovo under total submission to the Milosevic regime.

## 5. Objectification of Kosovo

This section argues that having conducted ethnic cleansing, and having treated the Albanian majority as second-class citizens continuously since annexation, Serbia forfeits its right to govern Kosovo. A Serb historian illustrates the treatment that Kosovo received throughout the years, "While seeking to 'free and unite the Serb people' and to create a large national state, Serb politicians proved unable to rule annexed lands equally with the rest of their territory. This was true of the expanded Serbia in 1913, but also of all subsequent Yugoslavias. Attitude of Belgrade vis-à-vis Albanians in Kosovo 'excluded tolerance and equality'" (Stojanovic 2007).

The downfall of Milosevic was no harbinger of better policies towards Kosovo. The new 'democrats' missed the opportunity to show remorse for past injustices afflicted upon Kosovo Albanians. Further, according to senior officials from UNMIK, Belgrade was the main obstacle to the full implementation of United Nations Security Council Resolution 1244 (UNSCR 1244/1999), discouraging the return of displaced Serbs in Kosovo and the participation of Kosovo Serbs in Kosovo's new democratic institutions. A recent egregious example was the referendum on Serbia's new constitution (October 2006) where Kosovar Albanians were not included in the voter list (unlike Kosovo Serbs).

Unfortunately, even today, the Serbian Radical Party, a party that stands for 'returning' Kosovar Albanians to Albania continues to win more votes than any other party in Serbia. Polls over years indicated that most Serbs feel emotionally about Kosovo being part of Serbia, but would not live next to an Albanian as a neighbor. This concludes that Kosovo is only desirable for Serbia without the majority living there.

**"After what Albanians suffered in the hands of FRY authorities, they are absolutely unwilling to accept any meaningful or even symbolic expression of FRY sovereignty on the province" (Kosovo Report 2000: 9).**

On the other hand, the self-proclaimed democrats renounce Serbia's responsibility over previous events. "There is a tendency to treat 5<sup>th</sup> of October 2000 [the fall of Milosevic] as Day Zero. Yet Serbia needs to come to terms with its past as a basis both for return to normality and democratic transition, and for regional cooperation" (Kosovo Commission, 2001). Regardless of the differences that the democratic coalition presents in contrast to their dictatorial past, the treatment of Kosovo sees no change.

On the other side, regardless of a potential policy reversal of Belgrade, the Albanian majority in Kosovo will not agree to be integrated into Serbia. As a prestigious international commission on Kosovo stated, after “what Albanians suffered in the hands of FRY authorities, they are absolutely unwilling to accept any meaningful or even symbolic expression of FRY sovereignty on the province” (Kosovo Report 2000: 9). Today most diplomats agree that Serbia’s rule is so unrealistic that it would never be able to reassert its control or even keep a mild presence in Kosovo without massive bloodshed.

The historical incapacity to govern a part of the territory inhabited by another ethnic group, as well as exercising conducting ethnic cleansing and massive violations of human rights help forfeit a state’s moral authority to govern over the area affected. Although morality has no direct role to play in international law, as said above, decisions are political, hence informed by public opinion in member states. As a result, such moral considerations are gradually becoming a factor in the political rulings on matters of international concern.

## 6. A clearly defined territory with distinct boundaries

According to international law, one of the three main standards for statehood is a clearly defined territory, which Kosovo fulfills. Its borders are stipulated in the Constitution of the Socialist Autonomous Province of Kosovo (SAPK) of 1974, according to which, internal boundaries (of republics and provinces) could not be changed without the consent of respective units, whereas Yugoslavia’s international borders could not be changed without the consent of all of them (SFRY Constitution 1974: Art. 4.5).

Since June 1999 onwards Kosovo’s clearly defined borders are controlled jointly by Kosovo’s authorities (PISG, UNMIK and KFOR). The Constitutional Framework for Provisional Self-Government of 2001 further defines Kosovo as an “undivided territory”. The Contact Group has further precluded the option of partitioning Kosovo during the resolution of its status (Contact Group 2006: Art. 6).

**Kosovo’s clearly defined borders are controlled jointly by Kosovo’s authorities, whereas the Contact Group has precluded the option of partitioning Kosovo.**

Among other countries seeking statehood, few enjoy such constitutional clarity over the boundaries of the territory under dispute (e.g. Basque Country, Northern Ireland). Whereas an area such as Transdniestria has managed to create distinct territory under control, this has never been codified into a recognized legitimate framework.

## 7. Will of the majority to split

In response to the unconstitutional abolishment of its autonomy, Kosovo Albanian leaders organized a referendum in 1991. An extremely high turn-out of virtually all Kosovar Albanians (87% of all eligible voters) produced a 99% majority in favor of Kosovo becoming a sovereign state. In light of apartheid policies exercised by Belgrade throughout the nineties, the pro-independence sentiment has consolidated as the only acceptable option.

Trying to avert forceful intervention in 1999, the international community organized the Rambouillet peace talks. Although this document (refused by the Serbian delegation) precluded referendum as a mode of decision-making, it recognized that the status cannot be decided against the popular will. Similar wording was subsequently enshrined in the declarations of the Contact Group.

Two additional factors highlight Kosovo's characteristics, in contrast to most other state hopefuls. First, not only does the overwhelming Kosovo Albanian majority support independence, but so do all non-Serb minorities living there. It is only the Serb community (out of seven ethnic communities) for whom it has been difficult to wean themselves off being a ruling minority.

Second, unlike some areas that managed to acquire internal majorities through conflict (Abkhazia, South Ossetia, Republika Srpska), Kosovo Albanians have enjoyed undisputed majority throughout the existence of Kosovo as a distinct entity. Whereas there are still some displaced populations, they have the right to return, and even the highest estimates would not alter the demographic structure by more than 3-4%. It is also worth mentioning that Kosovo does not want to join another country, in contrast to many post-Soviet self-proclaimed states.

Unlike some specific cases such as Northern Ireland or Quebec that would have become independent had they mustered more than 50% support, despite the much wider majority, this criteria was not taken as decisive in the case of Kosovo.

## 8. Open status under international protectorate

Unlike most 'frozen' conflicts, Kosovo's status is officially open. It is important to note that all international players, including Russia, express the wish to resolve the status of Kosovo. Kosovo's status process is ongoing, there is no comparable process on any other conflict worldwide.

NATO's military intervention against Serbia in 1999 halted its military campaign and enabled the return of around one million refugees. The subsequent international military and civilian presence was authorized by the United Nations Security Council Resolution (UNSCR) 1244. Invoking powers provided by Chapter VII of the UN Charter, Resolution 1244 vested supreme civil authority over Kosovo in the hands of UNMIK, and respective military authority to the NATO-led Kosovo Force (KFOR). Despite the unclear end-state, UNMIK assumed state-like functions, further clarified in its first piece of legislation, stipulating that "all legislative and executive authority with respect to Kosovo, including the administration of justice, is vested in UNMIK and is exercised through the Special Representative of the Secretary-General" (UNMIK Regulation No 1999/1: Sec.1.1).

**The insistence of Serbia on Resolution 1244 ignores the fact that this resolution is temporary by the very fact that it pronounces Kosovo status an open matter to be resolved.**

Although UNSCR 1244 recognizes the nominal sovereignty of the Federal Republic of Yugoslavia (FRY), it has taken away all traits of its statehood over Kosovo. Further, it has left the status opened, pending final solution. When FRY's sovereignty is mentioned, it is only referred to "...in the context of the interim period prior to a resolution of the final status of Kosovo, and never in perpetuity" (Williams 2004: 409). The insistence of Serbia on 1244 as a guarantee of their sovereignty over Kosovo is a misinterpretation and ignores that fact that the same resolution pronounces status an open matter that needs to be resolved.

**UNSCR 1244 recognizes the nominal sovereignty of Federal Republic of Yugoslavia (FRY) but takes away all traits of its statehood over Kosovo.**

The international mandate established over Kosovo in June 1999 was designed to be of provisional character. Thus, the international administration was tasked to facilitate a "political process designed to determine Kosovo's future status..." (UNSCR 1999: Art.11.e). To this effect, UNMIK was to hold to power temporarily and in the meantime to empower Kosovo for effective self-government so as to prepare for the resolution of its status. This involved building local institutions and gradually transferring to them the responsibilities exercised by

international administration.

In Kosovo, the international community has taken the role of an interim guardianship, not the case in any other conflicting area. There are cases of international involvement in mediation, guarding ceasefires, or ensconcing states to independence, but Kosovo is the only case under international trusteeship with an open status. To that purpose, the UN Secretary-General in late 2005 appointed a special envoy for the future status of Kosovo.

It can be argued that that UNMIK's provisional status, coupled with establishment of democratic self-government structures and provision for determining Kosovo's status, imply a road to independence rather than a return to Serbian rule.

## 9. The Insistence of Serbia to Freeze the Conflict

As discussed earlier in the paper, most analysts conclude that Serbia has never shown readiness to embrace Kosovo in a way that behooves any contemporary standards of Europe, where both aim towards. Serbia is not willing to let Kosovo go, but it is neither able to integrate it in any way acceptable to modern values.

Instead of accepting the loss and blaming it on Milosevic right after his rule, the 'democratic' coalition cling to hopes to keep it. Now they face the option of losing it and getting the blame themselves. Unable to either accept 'loss' or to constructively agree with the Kosovar Albanians upon a solution, the only truly face-saving outcome that Serbia has been left with is (a) partition, or short of that, (b) to freeze the conflict for the foreseeable future.

### **No new factors make new talks more likely to success than the previous ones.**

This has resulted with incoherent policies of Belgrade. In one hand it invokes international law for the right to keep Kosovo, but has nothing to offer that Kosovars would accept. The only offer so far from Serbia has been around the concept of "more than autonomy, less than independence." Serbia was part of talks for years, and chose not to make proper use of them. Instead, it continuously insists on renewed talks, supported by Russia, and both adamantly oppose deadlines (fully coherent with the lack of options that they face).

However, no new factors make new talks more likely to success than the previous ones. In fact, Serbia has employed a number of tactics to stall, disrupt or divert negotiations on Kosovo's status, which makes their insistence on new talks all the more preposterous. It can be concluded that any further talks are to be used by Serbia to put aside the status of Kosovo, so as to avert "loss" and evade the responsibility of having to offer Kosovo an acceptable status.

As the situation on the ground is unsustainable, it is urgent to address the permanent status. This is a viable option especially now that Resolution 1244 has served its purpose and that Kosovo has developed state running capacity.

## 10. Democratic state running capacity

Kosovo today is a functioning entity that has demonstrated the ability to run the country. It has fully legitimate structures created under the mandate of international administration and subsequently, under the guidance of that administration, built democratic structures of their own.

With the establishment of the international administration in Kosovo, Kosovo's political leaders renounced their structures built before, i.e. the Government in Exile and the Provisional Government.

From 2000 to 2004 four elections have been held, two Kosovo-wide and the other two for municipal local assemblies. All were assessed as free and fair by the OSCE and other monitoring organizations. Each of these elections was followed with outstanding adherence to democratic standards and smooth transition of power. The Kosovo electoral system is one of the most conducive to minority representation with a strict proportional system and set-aside seats.

Kosovo has seen most competences that were previously associated with sovereignty transferred to the local institutions. The budget is fully maintained by local revenues. The institutions reflect the multiethnic composition with built-in positive discrimination across the system. Kosovo has a multiethnic and democratically-run police force and has treaty-making powers. Moreover, the Kosovar leadership resisted populist appeals and followed the advice of international community towards creating a democratic system of power-sharing with wide-ranging powers for minorities.

In the past twenty years, Kosovo has developed separately from Serbia with a distinct institutional set up. It has an independent system of governance, its own legal system, separate customs entity, different currency, its own fiscal and tax policies, and a host of different social values, symbols and historical references. None of the territories aspiring independence has a state-like capacity the way Kosovo does.

**Kosovo has seen most competences that were previously associated with sovereignty transferred to the local institutions.**

Unlike other cases where independence is articulated by puppet governments, Kosovo's institutions clearly represent the will of the Kosovars as they emerged through elections organized by the international community and accepted by all as free and fair. A notable exception is the non-participation of the local Serbs in the elections, questioning the legitimacy of the Kosovo Serb leadership (who boycott some of the institutions). Elections held in most contested lands (e.g. Nagorno Karabakh, Transdnistria) have not been recognized by international institutions. Moreover, unlike most other cases with displaced populations, Kosovo remains committed to enable all displaced populations to vote. In previous elections, UNMIK has even set up polling stations inside Serbia and Montenegro.

Be it in minority accommodation, collecting taxes, exercising foreign relations, service delivery, democratic standards, state running ability, etc, Kosovo stands out when compared to most of the other examples.

## **11. Power-sharing, decentralization and minority rights**

In recent decades commitment to protect individual and collective rights has gained considerable weight towards statehood and international recognition. Among various state contenders, Kosovo has demonstrated unique commitment to protect human rights and the rights of minorities. This was achieved against the discouraging legacy and strong opposition, since throughout the nineties, "the Serbian presence in cities like Pristina was identified with a colonial system" (Rupnik 2000).

The legal guarantees established during UNMIK's administration and the acceptance of Ahtisaari's proposal demonstrates the commitment to guarantee an unprecedented level of decentralization and collective rights. Persistent engagement of the international community has helped the Kosovar political elite and the population to mature and come to the realization that the highest interest for Kosovo is peaceful coexistence among all communities. Notably, the authorities have also welcomed direct involvement of future international presence in Kosovo is ensuring that standards in question are achieved and

**As a state-aspirant, Kosovo has shown unprecedented level for decentralization, collective rights and international supervision to ensure implementation.**

promoted.

More specifically, the political leadership has consented to various mechanisms for representation, e.g. three ministerial seats reserved for ethnic minorities (two for Serbs), set-aside seats in the Assembly of Kosovo (10 out of 120 for the Serbs on top of seats they win in the proportional system), fair-share budgeting (on ethnic criteria), wide ranging decentralization, appointment of police chiefs by municipalities, protection for tens of sites of cultural and religious heritage of minorities, immunity status for the clergy of the Serbian Orthodox Church. These and other mechanisms make Kosovo an exceptional example of power-sharing.

No other territory aspiring independence demonstrates a level of positive discrimination that Kosovo has introduced in its legislation and amount of commitments it has taken through Ahtisaari's package. By the same token, none of the other territories share with Kosovo the latter's explicit willingness to have international administration closely scrutinize the situation on the ground as far as protection of minorities is concerned and intervene when required.

## **12. Capacity to enter international relations**

Apart of democratic rule, Kosovo has the experience and the capacity to conduct international relations, often invoked as one of the standard criteria for statehood (e.g. Convention of the Rights and Duties of States, a.k.a. "The Montevideo Convention"<sup>2</sup>).

As a province of former Yugoslavia, Kosovo was entitled and had adequate capacities to conduct foreign relations. Within the framework of the former Yugoslavia, the federal Assembly was the center for formulating common interests in respect to foreign relations. The decisions there were taken with meticulous harmonization of policies between "socio-political communities", i.e. republics and autonomous provinces (Hasani 1988: 243). Kosovo could also enter into certain negotiations with international entities.

During the nineties, the Kosovo Government in Exile maintained a number of "Information Offices" in the main western countries, as well as in Albania and Turkey. While these were not of diplomatic character, they conducted informal public diplomacy (Peci 2007: 6).

Foreign affairs are currently reserved for UNMIK as per Resolution 1244. However, UNMIK "involved the Provisional Institutions of Self Government of Kosovo (PISG) in recent years in external relations and signed more than 20 bilateral and multilateral international agreements on behalf of Kosovo" (Kosovo Assembly Bulletin 2007: 13). The Constitutional Framework further gives powers to the President of Kosovo to conduct foreign affairs. The Office of the Prime Minister has also established an Office for International Cooperation. During the status process, the local authorities engaged in a massive campaign for recognition reaching out to many states and establishing a presence in New York and in Brussels.

Kosovo's substantial capacity to conduct foreign relations has helped it successfully integrate within the framework of regional cooperation and create regional consent over independence.

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<sup>2</sup> "The state as a person of international law should possess the following qualifications:(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states" (Montevideo 1933: Art 1).

### 13. Regional Go-ahead

It has been rightly stated that “the conflict in Kosovo cannot be understood except in the broader regional context” (Kosovo Report 2000: 8). It is thus fundamentally important that with the exception of Serbia, no other neighboring country sees a danger from Kosovo’s independence. Kosovo is probably the only case where the independence is supported by most countries in the region.

An important element which has contributed to such a regional climate lies in the fact that Kosovo has no territorial claims against neighboring states, that in itself being an important element for statehood. Kosovo authorities have already undertaken steps in enshrining these guarantees in a form of non-changeable provisions in the future constitution.

**With the exception of Serbia, no other neighboring country sees a danger from Kosovo’s independence.**

These have addressed some fears of the region, leading most countries to conclude that status quo for Kosovo is the biggest regional enemy. In fact, regional state representatives are becoming more vocal in warning against the *status quo* and increasingly openly supporting supervised independence. By corollary, from the perspective of international security, Kosovo’s independence is set to bring stability. Several regional countries have explicitly declared pro-independence.

### Conclusions

Warnings that Kosovo may trigger a domino effect will certainly continue to be heard. In cautioning against the dangers of spill-over, many seem to disregard that “all the dominos of the former Yugoslavia have already fallen” (Bugajski 2007), with Kosovo remaining the last piece in the puzzle of former Yugoslavia’s collapse. This paper was written to help the international debate and help recognize substantial differences between Kosovo and other cases. The list of differences that this paper develops is an argument that Kosovo is unique in meeting a number of key criteria that qualify for statehood.

Different would-be-states will certainly continue to invoke as many arguments as possible in support of their claims. Among others, they will use Kosovo’s independence as a precedent. Yet, all of them have to be treated by taking into consideration their individual characteristics. The sum of characteristics in the case of Kosovo, as this brief outlines, distinguishes it from all other examples. By the same token, those specific characteristics leave one option only – supervised independence – as proposed by the United Nations Special Envoy for the Future Status of Kosovo.

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