The Independence of Kosovo:
Between Self-Determination, Territorial Rights and Functionality

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Introduction

Many commentators have described Kosovo's independence as 'the last act' in the protracted dissolution of the former Yugoslavia. Like other entities that emerged from the dissolution of the Yugoslav federation, the secession of Kosovo is a rich resource for a normative and jurisprudential investigation of the phenomenon of secession.

However, in comparison with the secessions of Slovenia, Croatia and Bosnia and Herzegovina, Kosovo's unilateral declaration of independence (UDI) is different. In 1992, the recognition of the former Yugoslav republics was swift and unequivocal, and all commentators agreed that self-determination of peoples, as both a normative and legal principle 'applies', irrespective of sharp differences about who is its bearer: the citizenry of an administrative unit or an ethnonational group. While in 1992 the European Community sought an expert interpretation of international law before recognizing the Yugoslav republics, in 2008 the western members of the 'Contact Group' imposed an overarching constitutional settlement without seeking refuge in the principle of self-determination.

While the independence of Slovenia, Croatia, and Bosnia served as a springboard for the development of then nascent normative approaches to secession, the unilateral independence of Kosovo can be examined from the vantage point of three well-developed bodies of thought: remedial, nationalist and choice theories of secession. And judging by the states' written submissions in the advisory proceedings regarding Kosovo's UDI before the International Court of Justice, remedial theories seem to be winning. Most of the states which argue that self-determination still applies after decolonization, anchor their argument in a remedial conception of secession. This is to a large extent understandable; Kosovo Albanians were victims of oppression of the Milosevic's regime. Equally, states are unlikely to subscribe to a permissive theory of secession and self-determination that may, one day, endanger their own existence.

While my position leans toward the position of choice theories, I will not defend or argue against any of the normative assumptions that inform the three dominant theories of secession. Rather, I will use the UDI of Kosovo as a springboard, first, to highlight the new vocabulary of state-building that shuns self-determination as an overarching principle (section 1), and then inquire into two questions that theories of secession have until recently left under-theorized. The first is the question of territorial rights. Recent contributions to theories of secession argue that it is not enough that a group has a moral right to secede, but that in addition to this prima facie right, must also have a right to secede on a particular piece of land. In section 2, I will argue against the

idea of territorial rights as a relevant concern in theories of secession. In its place, I will try to unearth two dominant normative principles concealed beneath claims to a territorial right: maximization of political allegiance and minimization of political coercion. Following that, in section 3, I will address an additional principle—functionality—which normative theorists of secession use to optimize the degree of political allegiance over a reconstituted territory. I will ask what appears to be an important question when judging the legitimacy of a political settlement for Kosovo: what do we mean by functionality, and who should assess it? Unless normative theorists have more say in the matter, in 'hard cases' different political settlements will appear equally legitimate, thus leaving the final say about what is functional in the hands of dominant third parties. I argue that Iris Marion Young's theoretical account of self-determination is a helpful rejoinder to choice theories, which, while mindful of political context, doesn't take for granted pre-fabricated worries about functionality.

1. Main features of the political process leading to Kosovo's UDI

In its own words, Kosovo's Declaration of Independence is an act of the Kosovo National Assembly "responding to the call of its people" to declare Kosovo an independent state. In reality, the UDI is the culmination of a set of events including military action, political fiats and diplomatic maneuvers by the Great Powers that determined the fate and identity of Kosovo's constitutional subject: 'the people of Kosovo'. One of the most significant milestones in this process was the Contact Group's April 2005 statement, which effectively determined who will count as 'the people of Kosovo'. By prescribing that the final status of Kosovo will not entail Kosovo joining another country or a part of another country; that there will be no return to the constitutional arrangements from before 1999; and that Kosovo will not be partitioned, the great powers vindicated Jennings' quip that somebody needs to decide who is the people, before this people can decide its political destiny. Even as Russia supported Serbia in its rejection of Kosovo's independence, the Western members of the Contact Group stood behind the so-called Ahtisaari Plan, which further constrained the range of constitutional options available to 'the people of Kosovo' by prescribing in advance the constitutional power-sharing structures that should operate in Kosovo once it achieves its independence.

While I highlight the hegemonic role of the Great Powers who set the basic parameters of conflict resolution, I do not wish to suggest that such behaviour is historically unprecedented. Actually, the opposite is true. As Gerry Simpson observed, the role of Great Powers was always critical in constitutional reconstruction of smaller, 'outlaw' states.[1] And in fact, Serbia obtained its independence in a manner not unlike that of Kosovo. At the meeting of the Contact Group of the day—the Berlin Congress of 1878—the principality of Serbia, until then formally part of the Ottoman Empire, was granted full independence. But the reason why the explicit involvement of external powers is striking *today*, is that it is situated against a backdrop of a historical period—1945-1989—where naked power politics was tamed by normative consensus on the applicability of self-determination. The fact that African and Asian nationalist elites generally agreed on respecting inherited colonial boundaries, the fact that

[1] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns and International Legal Order* (Cambridge: Cambridge University Press, 2004)

decolonization—for the most part—took place under the umbrella of the United Nations, and finally, the consensus between the United States and the Soviet Union about the desirability and contours of self-determination *as* decolonization; all that must have muted questions about dominant external constitutive influence.

Between 1999 and 2008, the Great Powers were careful not to mention the principle of self-determination as an overarching justification for the final status of Kosovo. For example, the UN Security Council Resolution 1244 endorsed meaningful "self-administration" for Kosovo but carefully avoided mentioning self-determination as a governing principle.[2] Equally—the will of the "people of Kosovo" or the "population in Kosovo"— while featuring as factors in determining the political destiny of Kosovo, were never linked to the exercise of self-determination as a general legal principle.

Instead, international actors used the will of the people as a proxy for the size of the majority demanding independence. According to one American diplomat, the "United States and its allies have already committed to an outcome that takes account of the wishes of a *vast* majority of Kosovo's population".[3] Similarly, a British diplomat stated that "[t]he outcome of the future status will need to be acceptable to the *great* majority of people in Kosovo … and we know that the majority of people in Kosovo *aspire* to independence"[4] What mattered normatively—in addition to Milosevic's oppression—was not the existence of either an 'ethnic' (Kosovo Albanian), or a 'civic' (the People of Kosovo) collective subject with a right to self-determination, but rather the size of the aspiration for independence in a designated territory.

In addition to emphasizing the requirement of a (vast) majority, western members of the Contact Group began to insist that Kosovo is a "unique" case that cannot set a precedent for future cases of creating new independent states. According to Rosemary Di Carlo, then US Assistant Deputy Secretary of State,

> the situation in Kosovo and Kosovo itself as an entity are entirely unique. The situation in Kosovo is the result of the violent break-up of Yugoslavia. The international community took measures to stabilize the situation in Kosovo because Milosevic violated the UN Security Council Resolution 1244 [sic!] As for the possibility of resolving other frozen conflicts using the Kosovo model, the UN Resolution does not apply to them.[5]

Until recently, it was hard to ascertain whether the rise of the uniqueness argument, and the fall of self-determination, was an inconsequential omission on behalf of proponents of Kosovo's independence, or part of a legal strategy that sought to deny relevance to self-determination in the post-Cold War period. Written statements

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2 Christian Tomuschat, "Secession and Self-Determination" in Kohen, *Secession*, supra note 136 at 33. *See also* Helen Quane, "A Right to Self-Determination for the Kosovo Albanians?" (2000) 13 LJIL 219 for an argument against Kosovo Albanian self-determination.

3 James Dobbins, "Majority Rule That Respects Minorities", *Rand Corporation* (June 11 2005), online: http://www.rand.org/commentary/061105IHT.html [emphasis added].

4 "Timeline for Independence", Kosovo Notes and Comment, online: http://www.newkosovo.org/Newsletter_Issue_Six.pdf [emphasis added]. *See also* the interview with Michael Polt, then US Ambassador to Serbia. Polt claims that in the absence of Serb-Albanian political settlement, it is the "majority of the citizens of Kosovo [who] will … be the ones to make this decision. If that ends up being the case, one does not have to be very prophetic to realize what the outcome will be". *B-92 Television*, online: http://www.b92.net/eng/insight/tvshows.php?yyyy=2006&mm=02&nav_id=34189

5 Interview with Rosemary DiCarlo, *Kommersant,* (January 30th 2oo6) [On file with the author].

submitted by the United States, United Kingdom and France to the ICJ in April 2009 suggest that the latter is true. The British written opinion, while mentioning in passing Canadian jurisprudence on self-determination, ultimately made no use of it. Instead, it criticized Serbia for exaggerating the dangers that the independence of Kosovo may pose to the international order. The United States, in their written statement also made no mention of self-determination. Instead, they argued that the UDI is not prohibited by international law; more specifically, that the Declaration of Independence doesn't violate Resolution 1244. According to the Americans, the text of the Resolution makes only tentative reference to the territorial integrity of Yugoslavia, and only during the 'interim' period. This interim period was to be superseded by the 'future status' for which the Resolution doesn't require 'agreement' of the opposed parties. The closest that the United States got to self-determination in their written statement is the argument that the Resolution incorporates a reference to the Rambouillet Accords, which themselves speak not of self-determination, but of 'the will of the people' as one of the parameters for deciding the status of Kosovo. Several months later, during the public hearings stage of the ICJ proceedings, the American position became explicit: "the Court may … opine that international law did not prohibit Kosovo's Declaration of Independence, without addressing other political situations or complex issues of self-determination."

2. Against territorial rights in the context of boundary-drawing

The supporters of Kosovo's independence did not invoke the territorial rights of Kosovo Albanians as a part of the justification for the independence of Kosovo. While one may disagree with the merits of the approach of the Contact Group, and question the motivations of the great powers, I believe that circumventing the vocabulary of rights is appropriate. It is, of course, wrong to assume that the rhetorical silence of commentators and diplomats signals a lack of support for territorial rights. I would think, however, that their silence on the issue ought to be commended and encouraged. The purpose of this section is to commend that approach by engaging in a very preliminary discussion about the vocabulary of territorial rights at a theoretical plane and to argue that the concept of territorial rights is problematic in justifying secession. In this section, I will argue against the vocabulary of territorial rights in all of its incarnations: as territorial rights of nations (TRN), territorial rights of states (TRS), pre-political property rights (PPPR), and pre-political habitation rights (PPHR). What should emerge as a result of this discussion are the two principles that ought to animate legitimate boundary drawing: maximization of political allegiances and minimization of coercion. While these principles sometimes intersect with the various conceptions of territorial rights, there are I think good reasons to abandon the idea of territorial rights as a purportedly inescapable component in normative arguments about justifying secession.

Against Territorial Rights of Nations (TRN)

According to David Miller, TRN are generated through the sequence of acts by a nation that 'invest' the land with symbolic meaning and improve the land for its use. Nations build cathedrals, monasteries; its poets sing about emotionally important localities. Collectively, and over time, the members of a nation clear the land, build dams, bridges

and irrigation systems, and as a result, acquire territorial rights over those lands. These acts give the 'ethical force' that informs the TRN.[6]

While the thrust of my argument against TRN is not directed against the practical difficulties that accompany ascertaining TRN, several things are worth remembering when we speak about TRN in certain regions of the world. First, in many regions it is difficult to establish a clear line of inheritance between different historical groups because of the discontinuities in the various systems of territorial governance. Are Kosovo Albanians rightful descendants of ancient Illyrians or Dardanians? Can Bosniaks of today claim historical rights over medieval Bosnia, which was a Christian country? Would medieval Bosnian rulers and a Christian population approve of the claims of inheritance by a group of people so radically different today in their cultural markers? Second, many acts of symbolic and material investment are the result of the labour of the local population and the capital and know-how of the administering powers of the time. Who has a right to claim these as a part of their heritage? The descendants of the local population, arguing that these are the result of the exploitation they were exposed to, or the descendants of the administering state at the time, which organized the work, and provided the capital and expertise?

The reason why I am not pursuing these objections further is because a number of theorists who endorse the idea of TRN themselves agree that establishing who is the bearer of TRN, or over which land exactly does the TRN extend may pose almost insuperable practical difficulties. Therefore, for the purposes of this paper, I will leave these practical issues of ascertaining historical truth aside. Here however I would like to point to two *conceptual* problems which undermine the idea of TRN.

The first is what we could call the territorial integrity objection. Even if we accept the historical contiguity of a nation, the aggregate of symbolic and material acts does not necessarily create a contiguous territory. It is true that, over time, especially in modern industrialized countries, an aggregate of symbolic and material acts may come to approximate the territory of contemporary independent states. However, we can easily imagine states where this aggregate will yield a pockmarked territory. Even if nations adorn the land with monuments, bridges and roads, there will probably be swaths of land uncultivated, or unsung by any nation. That would certainly leave some deserts, rainforests or wastelands open to habitation by non-members of a nation. Ironically, this conception would also fail to extend territorial rights to uncultivated lands immediately beyond the border. Since a border creates discontinuity in social interaction between communities on the different sides of it, governments generally don't care to cultivate these narrow strips of land immediately following the borderlines. As a result, there is nothing in the theory of TRN that would stop immigrants from settling uninhabited swaths of land, and over time to demand autonomous or separate political institutions to govern them.

A way out of this bizarre implication for the proponents of TRN is to argue that the administration of justice requires 'smooth' territorial jurisdictions. Thwarting human traffickers and drug smugglers, fighting epidemics, and establishing an efficient judiciary are easier if a territory is integral and not pockmarked. An amended conception of TRN

[6] *See* David Miller, *National Responsibility and Global Justice* (Oxford and New York: Oxford University Press, 2007) at 218.

would recognize that initial symbolic and material investment might establish the rough contours of a territory, but that its final shape is determined only after the requirements of the administration of justice and viability are taken into account.

Two things follow from this amended conception of TRN. First, an amended version of TRN can only be legitimately invoked to defend the *status quo*. It could be conclusively invoked to, say, deny residence to those who would, in virtue of their settlement disrupt the administration of justice within a particular territorial jurisdiction, or deprive a nation the enjoyment of symbolically and materially valuable localities. Second, TRN is far less conclusive when invoked to justify the re-drawing of political boundaries. One could, in abstracto, construct an argument in favour of TRN that would yield integral territories, but nationalist politicians generally invoke TRN in the context of boundary-drawing among antagonistic national groups. Invoking TRN is conclusive only insofar as it tells us where boundaries ought not to be drawn in any event. While this conception of TRN may or may not justify Albanian claims to Prizren or Gračanica in Kosovo, or to Preševo Valley in Serbia proper, it cannot give us a definitive answer about how to redraw the boundaries in contentious areas, nor can it vouchsafe that the territory in this case would be integral.

Can we then still speak of nations having territorial rights in the context of boundary drawing? Until a process of boundary drawing is completed, we cannot know who is the bearer of such a right. What nations appear to have is a claim to a process of boundary reconfiguration. They also have a right to have their claim of territorial jurisdiction over symbolically and materially important territories be seriously considered. But until that process is complete we cannot know whether they will get control over all such localities, or some of them, or none. We can speak of TRN in the amended sense, then, as an integral territorial jurisdiction but only trivially, as the legitimate result of a political and/or legal process that impartially sorted out conflicting claims.

But even invoking TRN in this trivial sense—as a right to see the legitimate result of a political process be brought to reality—is conceptually problematic. This leads us to a second conceptual problem with TRN, which I will provisionally call the *transubstantiation objection.* The problem inherent in talking about TRN is that the bearer of the territorial right magically disappears at the moment when its wishes come true. Why? Territorial polities are by definition under and over inclusive. No matter how we draw the boundaries there will always be unwilling minorities trapped within them (Kosovo Serbs), and minorities willing to be included in a nascent polity but who were excluded from it (Albanians from the Preševo Valley in Serbia proper). Both the members of a national majority, (the initial claimant of TRN), as well as a national minority must be included in a new polity on equal terms. Therefore, instead of a trans-generational pre-political (cultural/ethnic) people, modern liberal-democratic states rely on the territorial people that includes all citizens 'captured' under the same constitutional order. As a result the claimant of the TRN and the recipient of a TR are two qualitatively different subjects. A formulaic way to express this is: over-inclusivity + the need to represent citizens' political equality = a qualitative change in collective political subjectivity.

There are rhetorically interesting but conceptually inconsequential ways of squaring the circle of territorial rights between those who demand, and those that receive them. For

example, the constitutions of several Eastern European countries mention historical struggles of the majority nation for statehood; they mention important formative moments where statehood was established, defended, illegitimately lost or restored, but then go on to define the people, in the normative part of the constitution, as a union of all citizens. Kosovo's constitution-makers opted for a slightly different rhetorical strategy. In the Preamble to the Constitution, nowhere is there mention of the ethnic majority, Kosovo Albanians, as a collective entity whose struggles ought to be remembered and honoured. However, in the normative part of the Constitution, 'the Albanian community' (not the people!) appears in Article 3, which prescribes equality under the law. In section 1 of this article, the Constitution defines Kosovo as "a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions." While Kosovo Albanians are singled out in section 1, nothing really follows from that: in s. 2 of the same article the Constitution guarantees that "[t]he exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members."

The transubstantiation problem questions the logic behind the invocation of TRN. But a proponent of TRN may bite the bullet and ask, '*so what?*' if liberal democratic states are *ultimately* phantom ethnocracies. Proponents of TRN could phlegmatically point out that behind every inclusive democracy there are always ghostly TRN which can be legitimately invoked in a situation of civil strife, where a secessionist minority would demand a portion of territory for itself. However, the presence of the national majority's domination through its ultimate dominion over the territory is felt even in stable political situations, and in turn poses the problem from the perspective of ethnocultural justice. Ethnocultural justice maintains that minorities within nation-states are at a disadvantage because unlike the national majorities they lack the tools of their own nation-building. As a matter of both group and individual equality they deserve their own nation-building tools, depending on the circumstances, from more modest minority rights, to territorial autonomy, or full-blown federalization of the country. According to conception of ethnocultural justice, the minority citizen is still co-equal; and the political arrangement, say, of their territorial autonomy, is a result of the demands of justice constrained by political realities. Under the conception of liberal democracy as spectral ethnocracy any minority arrangement is a result of the license of the majority nation. While ethnocultural justice preserves the account of coequal citizens, the conception of TRN produces 'phantom ethnocracies' that in turn produce the landlord-tenant problem. Political autonomy of a minority is a matter of license, an exercise of goodwill, and not a result of the demands of justice.

From what I have said so far, it doesn't follow that there are no good, prudential reasons not to invoke TRN. First, TRN is powerful rhetorical shorthand in situations where a state is existentially threatened by aggressive settlers. The good thing about being able to say 'we have a right' to such-and-such territory is that it provides immediate moral clarity, and arguably amplifies the fighting potential of those who are subject to incursion, and, raises the profile of the case among the international public. Another reason to speak of TRN is perhaps even more important. Invoking TRN will

have a soothing effect on what we can call 'grassroots neurosis' about less sinister forms of immigration. Anxieties about future political consequences of spontaneous changes in local demographics, such as an influx of immigrants, would be alleviated if the national majority knew that the newcomers' possible political demands are normatively inconsequential. Irrespective of the tendency among immigrant communities to cluster together, the dominant nation would be assured that these patterns of inhabitation are politically inconsequential in that they cannot create grounds for territorial autonomy or secession at some point in the future.

But even if we agree that there are prudential benefits to the rhetoric of TRN, these need to be weighed against the detrimental effects that inadvertently follow the vocabulary of rights, such as obtuseness in following one's political objectives, inattentiveness to the interests of others, and so on. The ultimate decision whether or not to commend the vocabulary of rights (irrespectively of the conceptual problems that undermine it) is a prudential, and not a moral one.

Against Territorial Rights of States (TRS)

The second account of territorial rights I'd like to question in the context of boundary-drawing are territorial rights of states (TRS). One could immediately object, arguing that a discussion of TRS in the context of state-building makes no sense: TRS presuppose a state, yet we are concerned with drawing boundaries of new states. TRS, at first, appear only as a conservative principle; they seem to speak only about preserving the boundaries of existing states that protect justice. But TRS do merit investigation in the context of state-formation. If the criterion is the administration of justice, then the boundaries ought to be conducive to that ideal. One could, following Jeremy Waldron, argue that proximity generates conflict, and that the potential for conflict gives rise to the need for ongoing structures that administer justice, and that the territorial state is the political structure best positioned to do that.

Therefore, the re-constructive implication of otherwise conservative TRS is that boundaries ought to be drawn around densely inhabited areas, leaving out portions of land that are only occasionally in contact with axes of social interaction.[7] While that may be the principled implication of TRS, I suspect that a proponent of TRS would opt for a different tack. To map out the patterns of interaction would take time and would itself be divisive, so one needs to leave the state of nature as soon as possible, and join with others in the civil state. There is no time for dilly-dallying as we are leaving the state of nature. As a result, proponents of TRS would probably support the elevation of existing territorial units to the level of an independent state, judging, rightly or wrongly, that their previous existence as autonomous units can be taken as a reliable presumption about the ongoing patterns of social proximity that warrant the existence of a state. Many scholars have questioned the suitability of administrative boundaries of previously sub-state units, to that of independent states, so in this paper I will not question whether that presumption is warranted or not. What is more important is that even if we accept the presumption of functionality of the preexisting unit, that in itself is not enough to create an independent

[7] One could speculate that if for some reason Canada was thrown back into the state of nature, what would end up being reconstituted as a unified Canadian state is a thin strip of land—in the shape of a horizontal Chile—along the US border.

state. Great powers cannot elevate just any administrative unit to the level of an independent state, presuming it is well suited for administering justice and then tell the local population: now go and self-govern yourself. A majority vote is needed to decide for the decision about the status of a territory presumed suitable for administration of justice. Which leads us to the critical question: why do we need a majority vote, instead of a minority vote, or no vote at all? Why do we care to test the will of the people? One answer would be: because it is the will of the people. A majority in a referendum is an *indicator* of the will of a collective body—the people. I think that this answer is deceptive, sometimes disingenuous, and a bit naïve in the context of creating new states. To posit 'the will of the people of Kosovo' in the situation where 'the people' of Kosovo is constructed through the arbitrary delineation of the boundaries of Kosovo, is question-begging.

An illuminating question for proponents of TRS would be: how would you justify a majority vote if you couldn't rely on the concept of 'the people', or collective political agency? Let me answer this question indirectly, by engaging the so-called annexation objection that proponents of TRS, such as Anna Stilz (and I think Jeremy Waldron) tackle. The annexation objection asks why we should respect the autonomy and territorial integrity of states if the annexing state upholds human rights, administers justice (and probably enlarges the range of meaningful individual choices) for the population of the annexed state. Stilz's immediate response is to argue that a state is a moral person because it protects citizens' collective autonomy. For Stilz, the reason why, for example, the United States should not annex Canada is because Canada ought to be considered as a moral person. "In other words, in a well-ordered republican state, citizens participate (via their representatives) in making their laws and shaping their institutions. They cooperate in legislating these laws, and through their deference to state authority, in imposing them on persons in their territory."[8] Since Stilz didn't qualify her description with a modal 'ought' we are right to treat her justification for moral personhood as relying on some objective quality of political life. So let us for the sake of argument imagine a situation where citizens mostly mind their own business, generally see politicians as 'them', political life as the bickering between distant political elites, and don't perceive themselves as represented by their representatives. However, those same citizens root for their national soccer team (very often they care more about that than politics), and are emotionally attached to their state. It is revealing to raise the annexation objection again in this context: What would be wrong with annexing a relatively docile, but politically attached population into an adjacent, and equally just state?

If there is anything wrong with that it is because political allegiances count *as such*. What is ultimately wrong with annexation is that it reduces the degree of political allegiance over the reconstituted territory (i.e., USA-Canada). If the United States annexed Canada, the degree of political allegiance would be reduced in comparison to status quo ante. The same principle is visible in the case of Kosovo. The Western advocates of Kosovo's independence invoked the will of the 'great'/'vast' majority of Kosovo's population for secession as one of the normatively relevant arguments for its secession. The implication of this argument is that the level of political allegiance over the whole of the territory of 'Serbia pre-1999' would improve if Kosovo seceded. While the Serbs would not approve of the secession of Kosovo, and would see their first-order

[8] Anna Stilz, "Why do states have territorial rights?", *International Theory* 1:2 (2009) 185, at 206 *passim*.

preferences violated (to keep Serbia territorially intact), in the new political constellation, both the Serbs in Serbia and Albanians in Kosovo would have political allegiance to the entities emerging out of boundary reconfiguration—independent Kosovo and Serbia minus Kosovo.

Against pre-political property rights (PPPR) and its kissing cousin pre-political habitation rights (PPHR)

In this paper I won't delve deeply into the problem of pre-political property rights. The idea derives from Locke, but was used by Rousseau as well.[9] Under this conception, the territory of the state is created as an aggregate of individual pre-political property rights when individuals come together to form the social contract. The idea of PPPR has been extensively critiqued. Commentators argue that 'meta-jurisdictional authority' is chronologically and logically prior to property rights as the property rights regime can only be established by the state. Equally, the purposes of territory and property are different: territory serves to establish and maintain justice, while property serves to enable individuals to pursue their own conceptions of the good.[10]

While I believe that the idea of PPPR is problematic, its application would, in certain cases, correspond with the application of the principle emerging from the discussion in the previous section: the maximization of political allegiance. In more urbanized areas this link is less obvious: tenants and squatters would have no say, under the neo-Lockean conception, in determining the fate of the territory. The same goes for the owners of condos whose PPPR would be meaningless. But we can imagine a situation where the link is immediately obvious: a more or less agrarian society where individuals live on their plots of land and covenant together to form a new state. Political space reconstituted along the lines of real estate would improve political allegiance in comparison to the status quo ante.

A more attractive variant of pre-political rights, similar to PPPR, is Harry Beran's account of pre-political habitation rights (PPHR), the aggregate of which creates the territory of the state. For Beran, territorial communities posses pre-political habitation rights because they have a right to maintain themselves.[11] This raises an immediate question: why shouldn't they maintain themselves somewhere else if they wanted to secede? For Beran that would be problematic, because, unlike families (which are also communities, but not suitable for political self-determination), the survival of territorial communities is sensitive to geographical location. For Beran, "it is possible (logically and even practically) for a community to maintain itself if moved to a new location against its will, [but] such forced relocation creates a very high risk of disintegration."[12] While Beran is probably empirically right, his suggestion is morally counterintuitive. Would he suggest *a contrario,* that it is morally permissible to relocate families—non-territorial communities—against their will? Or, would it be morally justifiable to relocate territorial

[9] According to Rousseau, "lands of private persons when they are united and contiguous become public property". Jean-Jacques Rousseau, *The Social Contract,* transl. and intro. by Maurice Cranston (London: Penguin Books, 1968) at 67.
[10] See Cara Nine, (2008) 56 Political Studies 9 5 7 – 9 6 3
[11] Harry Beran, "A democratic theory of political self-determination for a new world order" in Percy B. Lehning, ed., *Theories of Secession*, (Routledge, 1998).
[12] Ibid., at 37.

communities if we provided comparable amenities, geographical location and so on, so that we are assured of their perpetuation? If we did so, we would improve political allegiances over the referent territory not by redrawing boundaries, but by relocating those who want to secede. Beran's insistence on the negative effect of coercion on the reproduction of communities conceals what I take to be the simple reason behind the argument against relocation, namely that it is coercive. The only way in which a political environment can impose its will over a secessionist village for instance, is to use violence either to physically assert control over the people and the land, or to use less drastic means to break the will of politically mobilized individuals. [I am realizing now that I may owe a separate account of what would be justifiable coercion in the context of boundary-drawing. I am not sure, but I think I am making a comparative point. Can I say that the reason why boundary drawing along the lines of PPHR would require less coercion than keeping the territorial integrity of the state through intimidation, violation of basic rights, or possibly worse?]

If the preceding discussions of TRS and PPHR raised the profile of two salient principles of boundary drawing—maximization of political allegiance and minimization of political coercion, and if the application of these two principles in tandem generally corresponds to the application of PPHR, why don't we embrace PPHR, at least as shorthand?[13]

There are two problems with this proposition. The first is similar to the conceptual problem I identified with respect to TRN. When a representative of a territorial political community (say, a village) invokes PPHR in the context of secession he or she doesn't know the exact boundaries of his or her territory. Beran speaks of villages as one of the smallest imaginable territorial communities possessing PPHR, but, before the boundaries are agreed upon with the other side, we cannot know their location. That poses a problem for the vocabulary of rights, because the bearers of rights cannot invoke them approximately. The representative of our secessionist village cannot say, 'we have a right to *roughly* 100 acres of land surrounding our village, with the boundary following *more or less* the edge of the forest that we need to keep our independent village functional'. Beran is aware of this, so he stipulates that in order to exist, PPHR must yield functional territorial communities. The alternative is to grant that the representative of the secessionist village has a right to claim a distinct, delineated territory. The final outcome would depend on the balancing of other considerations, such as what secession would mean for the administration of justice, viability of the territory, regional stability, and so on. If adopted, this position would still be unclear on what is gained by the vocabulary of right.

The second problem with the vocabulary of PPHR is that it arbitrarily stops with

[13] One could argue that forsaking the vocabulary of rights would prevent us from making normative judgments about political situations in which certain groups settle on land previously inhabited by another group. If we weren't operating with an idea of a territorial right (held by a nation or small territorial group, irrespectively) how would we reject the encroachments of the settler group on the 'territory' of the violated group? While I won't pursue this question in detail here, I'd hazard a speculation: what is doing the normative work in our judgment against settlers is not the idea of a territorial right on the part of the 'violated' group. Rather, it is the coercion against the patterns of everyday interaction between the members of the 'violated' group, on the one hand, and the *strategic, aggrandizing animus* on behalf of the settler group on the other.

the smallest territorial unit, a village, or at least a 'habitat' consisting of numerous families.[14] For many theorists, it is problematic enough to posit such a small territorial community as the basic unit of self-determination. To question even those basic units of self-determination under the guise of maximization of allegiance, may lead to anarchy. But real life puts these fears in perspective. We can start from an individual, who decides to secede from the state, and declares an independent state in his apartment. These individuals are often a source of amusement, and are regularly ignored by authorities. If they are prosecuted, they are not prosecuted for high treason, but for more mundane crimes, such as not paying taxes, or violating city bylaws. Let us now imagine a larger community, say a city quarter, or a village. In this case, most often, even if autonomy or statehood is declared unilaterally, the larger state is most likely not to intervene. In Copenhagen, the Free City of Christiania was established several decades ago on the territory of deserted army barracks, and has until relatively recently led an autonomous existence, unfettered by Danish authorities. In Italy, the ancient Principality of Seborga was re-established in the early 1960s, when a local florist Giorgio Carbone, later known as *Sua Tremendità* Giorgio I, persuaded his fellow citizens of an unbroken Seborgan historical title to independent statehood. In a 1994 referendum, the citizens of Seborga nearly unanimously voted for their independence. Italy never reacted to this secession because the citizens of Seborga never challenged Italian territorial authority over the municipality, and continued to participate in Italian political life.

These vignettes are of course no substitute for a normative argument, but they are illustrative of the common sense that generally prevails both among smaller groups asserting their political subjectivity, as well as the larger state that knows not to over-react with coercion when its authority is only symbolically challenged.

A more serious problem arises when smaller groups of people assert their sovereignty, not only symbolically, but also by excluding the larger state from the land they claim as theirs. To say in this situation that the state has a right to protect its territory is of course question begging. There is no territory as long as the question of the challenges to it is not adequately addressed. Ideally, neither the opposing side, nor third parties can justifiably invoke the desired territory to pre-empt any discussion about the scope of the territory.

We saw in the previous section that the great powers simply asserted the territory of Kosovo as a given. But we have also seen how they invoked the 'great majority' of 'the people' to justify its independence. But if it is the great majority of people that justifies the independence of Kosovo, what prevents us from pushing that number even higher, and increasing the degree of political allegiance, without physically coercing people to relocate, or to accept the state they don't prefer to live in? The answer is that any political and territorial reconfiguration ultimately must be functional. The independence of Kosovo has, therefore, been justified by its proponents it as "a realistic compromise, ensuring the functionality of Kosovo, [while] at the same time, catering to the need of the Kosovo Serb community and other minority communities."[15] If my reconstruction of the rhetoric of great powers is correct nobody *deserved* the territory of Kosovo. Instead, the territory of Kosovo is a result of a prudential calculation between maximization of

[14] *Ibid*.
[15] Accessible at http://www.america.gov/st/washfile-english/2007/March/20070321142711MVyelwarC0.6473047.html

political allegiance, minimization of political violence and the demands of functionality. But, what do we mean by 'functionality'?

3. The fear of enclaves and the meaning of functionality

Theorists of secession of all stripes generally demand that the secessionist group cumulatively fulfill three conditions for independent statehood: that they are willing to perform political functions, that their desire for an independent state is reasonably stable, and that they are "capable of maintaining a secure and just political environment." When confronted with the demands of functionality, as Christopher Wellman noted, "[t]he best we can reasonably hope for, then, must be the more modest goal of giving citizens maximal say in drawing political borders consistent with maintaining viable, territorially defined states."[16]

But theorists of secession have yet to confront the question of what would constitute functionality. In part, their reluctance is understandable. Given great differences in morphology of terrain and patterns of demographic distribution, it is impossible to offer in advance any detailed prescriptions applicable to each and every territorial conflict. However, I am assuming that normative theorists have something to say about functionality. A start would be to ask what do we generally mean by functionality of a nascent political entity. Provisionally, we can break functionality into two aspects: external and internal. From an external point of view, the shape, size, and integrity (and in some cases access to critical resources such as a coastline) of a territory are critical in making it defensible against outside attacks. For instance, after the First World War President Wilson justified granting to Czechoslovakia the administrative boundaries of Bohemia in order to contribute to its security from external attacks. According to him, to maximize preferences along Czechoslovakian Western borders, thus leaving the Sudetenland in Germany, would have "left Czecho-Slovakia so entirely defenseless as to be really incapable of independent life."[17] But historical examples show that to judge a unit to be "really incapable" of independent existence solely based on appearances is an unreliable indicator of functionality. For example, seventy years on, Croatia, with its apparently defenceless, croissant-shaped boundaries, won the war over the secessionist region of Krajina and emerged as one of the more prosperous Yugoslav successor states, in good part because it was able to garner international support in favour of its secessionist project.

From an internal point of view, one could argue that meandering boundaries of an independent state would be problematic because local criminals could transgress them easily and with impunity. A territory pockmarked with independent enclaves would provide havens for criminals on both sides, complicating the administration of criminal justice. Finally, in small republics the democratic process is easily hijacked by a strongman, or the most powerful 'faction', sidelining democracy and the protection of

[16] Christopher H. Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005) at 61.

[17] Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford and New York: Oxford University Press 1990) at 156

basic human rights.[18] These are important arguments in favour of large and contiguous territorial units even if we relativized their conclusiveness by pointing to a number of orderly micro-states, or functioning enclaves on the one hand, and a number of 'failed' large multi-national states on the other. But a pivotal question for a normative theorist clarifying the notion of functionality should rather be how to confront a demand from a small secessionist group, or a minority within such a group, that is credibly willing to attempt to "maintain a secure and just political environment." Should they be encouraged, or even coerced, to modify their political will in order to conform to the will of their political environment? Placing this issue in context, we should ask what would a normative theorist prescribe, if Serb enclaves in Kosovo desire to remain part of Serbia, and are meanwhile willing to negotiate ongoing arrangements with the surrounding state of Kosovo. Should we consider such a solution dysfunctional from the outset?

In my view, what is 'functional' is less a matter of objective fact[19], and more our judgment of the subjective animus of the political surroundings towards the nascent unit. What undermines functionality are not meandering boundaries per se, or the existence of a unit as an enclave, or a pockmarked territory, but the obstructionism, chicanery and hostility of its political environment. As a result, what on its face appears as a technical issue of functionality, will turn out to be to a normative question. To declare something (dis)functional is to already have implicit answers to questions such as: Is the non-cooperative attitude of the political environment normatively justifiable? If it is, what amount of hostility of that environment is tolerable? If it's not, what demands, if any, can we make on powerful third parties to stop hostilities, and for how long?

These questions have immediate policy implications. For example, is the decision by the Kosovo government to withhold the distribution of electricity to Serbian enclaves justifiable because Serbs living in the enclaves do not recognize the authority of the independent Kosovo state? Or is the decision of the Kosovo government to shut down Serbian Telecom communications towers because they are not licensed according to Kosovo legislation justifiable or not? Do these count as justifiable means of encouragement to join a territorially integral, 'functional' Kosovo? If not, then what are the obligations, if any, of dominant third parties to the conflict, such as the United States or United Kingdom? Should KFOR forces, in which those countries contribute, have prevented the Kosovo police force from dismantling Serbian Telecom's equipment? Should KFOR military forces continue to protect Serbian government convoys bringing power aggregates, medicines and drinking water to the enclaves? In other words, is it normatively justifiable to ask the Great Powers to spend money, and expend the lives of their soldiers in order to engage in what would look like a perpetual micro-humanitarian intervention, the effect of which would be to protect the political choices of the besieged Serbian, or some other minority?

The judgment of what entity is 'functional' and thus deserving of independent statehood could come in two variants. We may argue that temporary ghettoization of

[18] *Cf.* David Miller, "Democracy's Domain", 37 (3) *Philosophy & Public Affairs* 201, at 210 "It is important that participants should have the freedom to express a range of different views, and not be subject to social pressure to adopt the majority view (or the view of the most eloquent speakers) against their private convictions".

[19] 'Triangular' Bosnia, and a 'pentagonal' Kosovo would immediately be functional.

enclaves is, for one reason or another, normatively justifiable.[20] From there, it would be reasonable to conclude that without electricity, telephone signals, and running water, Kosovo's Serbian enclaves would be unable to create a 'just and secure political environment', and thus could not maintain their claim to remain a part of Serbia. On the other hand, even if we conclude that the hostility coming from the enclaves' hinterland is normatively unjustified, we might still conclude that recognizing Kosovo *cum* enclaves is ultimately justifiable because it is within the sovereign prerogative of dominant third parties to decide how to expend their military, political and economic resources in the process of external state-building. In other words, the perpetual protection of the political choices of the enclave Serbs would, for them, be supererogatory. In that case, we may reach a consequentialist conclusion that—given the disposition of the Great Powers—it is, all things considered, best to support an integral Kosovo, and encourage the local Serbs to participate, rather than expose them to slow political and economic degradation.

Contemporary theories of secession assume that early modern political theories have little to teach us about how to draw the boundaries of new states.[21] But Rousseau's *Social Contract* surprisingly offers a clear solution to the enclave problem similar to the one described above. For him, "lands of private persons when they are "*united and contiguous* become public property".[22] "When the State is instituted", Rousseau continues, "residence constitutes consent; to dwell within its territory is to submit to the Sovereign".[23] But it is important to realize that we don't need pre-political property rights of Kosovo Albanians to achieve a solution identical to Rousseau's.[24] The enclave-free solution is justified as a result of the triangulation between the demand for a 'vast' degree of consent (recall Dobbins and Sawyers), and the implicit assumption that a modicum of external hostility is tolerable, and/or that the Great Powers cannot be asked to intervene to protect enclaves. Both for Rousseau, and present-day state-building engineers, the "pursuit of unanimity is a luxury a would-be state cannot afford".[25]

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[20] Would a nationalist theorist of secession approve the political 'suffocation' of enclaves? On the one hand, both choice and nationalist theories of secession reject the automatic upgrade of the provincial boundaries into state boundaries in a situation where there is a politically mobilized, territorially concentrated national minority desiring to live in a different state. What both theories seem to share in most cases is a common normative denominator: maximization of political preferences in boundary-drawing. Judging only from that, nationalist theorists would support continued political existence of the enclaves.
On the other hand, nationalist theorists argue that territorial rights can only belong to a collective subject, the nation. That still does not suggest that enclaves should be abandoned. What it does suggest is that the *representatives* of a nation could legitimately abandon the enclaves, if they chose to do so. In that case—the enclave population, 'ceded' by the majority of the nation—would lose the right to exist as an independent political entity.

[21] Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumner to Lithuania and Quebec* (Westview Press, 1991).

[22] Rousseau, *The Social Contract,* at 67.

[23] *Ibid*. at 153. While a believer in natural pre-political property rights, Rousseau does not believe in 'holes in Lockean donuts'. Does this make him inconsistent?

[24] Unlike the Contact Group guidelines, however, Rousseau would probably support the partition of Kosovo that would allow Serbia to maintain control over the northern part of Kosovo, adjacent to the boundary of Serbia proper.

[25] Steven Johnston, *Encountering Tragedy: Rousseau and the Project of Democratic Order* (Cornell University Press, 1999) at 35.

In light of that, it possible to remain faithful to choice theories without submitting to the implicit calculus of violence that would nudge us toward a *Rousseauvian / functionalist* solution?

The most compelling normative argument to the contrary, consistent with choice theories yet sensitive to real life context, comes from Iris Marion Young's engagement with self-determination in the context of the Israeli/Palestine conflict and First Nation claims. [26] The theoretical traditions on which Young draws are different from the standard arguments of choice theories. Drawing on feminist accounts of relational autonomy and republican ideals of non-domination, Young argues against the single-minded application of the idea of 'self-determination as non interference' implicit in most theories of self-determination. While both 'relational autonomy' and 'non-domination' preserve the aspiration shared by choice theories of secession— "maximal pursuit of individual ends"—their application would reject the ideal of a territory as "large, homogenous, contiguous and bounded."[27] For Young, "it is possible to conceive a unit jurisdictionally constituting a self-determining people as itself not a contiguous territory but rather a set of discontiguous locales in between which lie locales that belong to other self-determining jurisdictions."[28] Both theoretical traditions upon which Young draws convey this simple message: secessionist projects don't arise in a vacuum and will very often have negative externalities to the would-be independent state's political surroundings. The constitutive part of the concept of self-determination ought to be cooperation between the self-determination units in solving these problems within an overarching framework. Institutionally, Young suggests a multinational federal framework consisting of the discontinuous territorial constituent self-determining units.

Inspired by Young, a modified plan could provide an alternative to both the Ahtisaari and the Serbian government plans for Kosovo. The main contours of this alternative would consist of four components. First, the populations of the enclaves should not be pressured to abandon their political desire to remain a part of the parent state. By the same token, the parent state should not be allowed to use coercive power to maintain sovereignty over new enclaves. The population of the enclaves should be allowed to test their preliminary choice, to see whether they 'like' being enclaves. Even in the best of circumstances, it is likely that the everyday life of 'enclaved' individuals would be marred by hardship. What is important, however, is that no politically mobilized enclave is asked to sacrifice its political choice at the altar of someone else's functionality.

Second, the government of the surrounding secessionist territory would be under the duty to enable free movement of people and goods in and out of the enclave. At this point, the 'primary' secessionists (Kosovo Albanians, in this case) would not be under a duty to provide positive support for the secessionists such as electricity or running water. But they would be under duty to allow the parent state to provide for basic needs, through import of electrical aggregates, water purifiers, medicine, etc.

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[26] Iris Marion Young, *Global Challenges: War, Self-Determination and Responsibility for Justice* (Cambridge: Polity, 2007).

[27] Ibid. at 58.

[28] Ibid. at 69.

Third, the secessionist entity would be recognized as an independent state if it proves willing to enter into agreements that would alleviate negative externalities arising out of the existence of the enclaves. At a minimum, an agreement on policing between the Serbian and Kosovo Albanian police forces would need to be made, which would prevent criminals taking refuge either in the enclaves or in the surrounding territory. Equally, as smuggling would be an obvious problem, a customs union between "Serbia with the enclaves" and independent Kosovo would likely be required. Finally, in order to avoid treating every private law dispute as a matter of conflict of laws, a solution ought to be found that would create a common civil law framework, symbolically acknowledging the existence of two separate states.

Fourth, and least controversially, the external boundary of the seceding entity would be adjusted according to the political preferences of the populations from both sides of the border. In the case of Kosovo, this would mean that the area north of the Ibar river would remain in Serbia, while the portions of Presevo Valley which are currently in Serbia proper would join newly independent Kosovo.

These four elements sketch a solution that is in tune with the precepts of maximization of political allegiances. In addition, such a solution would be face-saving for Serbia, in that it would give it partial physical control of Kosovo (enclaves including the Serbian monasteries) and would provide a principled reason to its public as to why it ought not control more. It would save face for Kosovo Albanians, because it enables them to achieve independent statehood. Second, this solution could serve as a resource for the evolution of political aspirations both among Serbs and Albanians in Kosovo. While the suggested precepts are consistent with choice theories, nothing in choice theories prevents either the secessionist groups, or the home state to rethink their preferences, abandon their initial plans, and settle for second-best, because it ultimately enables groups a more meaningful choice. Such second-guessing could go in different directions, and doesn't necessarily have to stop at the equilibrium point of multinational federalism, as Young seems to suggest. Serbs in the enclaves could reconsider their wish to remain in Serbia, and join independent Kosovo itself, in exchange for special status and economic benefits. Equally, Kosovo Albanians may accept nominal Serbian sovereignty in exchange for the Serbian government's support for an enclave-free, territorially integral Kosovo. Finally, Serbia proper may accept independent Kosovo, in it administrative boundaries, in exchange for a fully federalized Kosovo, which would symbolically recognize the constituent status of Serbs in Kosovo's identity. While all legitimate, these solutions should come about as a result of a political calculus of the Serbs and the Albanians, and not as a result of a Great Power fiat, just because the great powers are in a hurry to withdraw.

Such political arrangements would probably need protracted international support. The states that intervened in Kosovo, as well as other Great Powers would need to commit resources to uphold the solution that doesn't fully satisfy the locally dominant ethnic group. Such international presence is already envisaged under the current Ahtisaari plan, but would probably need to happen to an even larger extent. I recognize that to ask that of the Great Powers would require an additional, controversial conceptual shift, which I won't elaborate on here. The armed forces and the diplomatic apparatus of the Great powers should not be seen as tools at the discretion of external popular sovereigns but rather be conceptualized as true *pouvoirs constituants* such that they are. As such they

should be subject first to normative, and then hopefully to legal prescriptions on their behaviour.

Some concluding remarks

What are the implications of the preceding discussion on the vocabulary of rights, generally, in the context of secession? We saw in section 1 how great powers made no use of the *right* of self-determination of peoples to justify Kosovo's UDI. Many other states followed suit in the advisory proceedings before the ICJ, arguing either that Kosovo's independence is justified by the confluence of several 'factors', or that, conversely, Kosovo has no right to independence because the right to self-determination, *qua* independent statehood expired with decolonization. In section 2, I moved into the terrain of normative theory, and critiqued the idea of territorial right in the context of drawing new political boundaries. One of the reasons why is it problematic to invoke territorial rights in the context of boundary-drawing is that the final shape of a newly independent territory will depend on what is considered to be 'functional'. But, if I am right that what is functional is in good part itself a normative judgment about the justifiable degree of animus of the political hinterland towards the secessionist group.

Does this mean that we have to abandon the vocabulary of rights altogether? I don't think so. Even if we reject the invocation of territorial rights in the context of secession, and rights to self-determination, generally, we can still construct a permissive case for secession that would escape the pitfalls of territorial rights talk, and the confusion surrounding the legal treatment of self-determination. Instead of arguing that a group has a right to a particular piece of land, we should argue that a group (which doesn't need to be territorially contiguous) has a right to initiate the political process that is tendential towards maximizing political allegiance over the reconstituted territory. The duty of the government to engage in that process in good faith does not emanate from the corresponding claim-right of the particular territorial groups, but rather from the principle of maximization itself. Such rearticulation is I think intuitive: nothing can provide guarantees to individuals seeking secession that they will be included in a new state. The leadership of their political movement may, in the end, abandon them as a result of a broader political settlement. Abandoned by the majority of their co-nationals, these individuals can of course try to re-start the political process leading to their own nano-secession, from a newly independent new state. But the likelihood that the population of the smaller enclaves will have an appetite for independent existence in such a case would be extremely low.

But what if the larger state refuses to negotiate in good will towards the satisfaction of secessionists' preferences? What if the government uses functionality as a ruse, and not as a legitimate concern? Do secessionists have any rights in such a case? My intuition is that in this case they have a liberty-right to (not a duty-not-to) engage in civil disobedience, culminating in a right to try to assume political control over the area that they inhabit. But wouldn't this smuggle back in the idea of a territory, and correspondingly, some sort of a territorial right? I don't think so. A legitimate 'territory' will emerge over time, as a result of the political moves of the opposing sides. Until the situation stabilizes, the legitimate area of control of a secessionist group may shift over time, depending on the circumstances. Equally, even within the possible secessionist 'territory', say an enclave, there may be competing, but equally legitimate organizations

vying for the support of the local population. In Štrpce, the Serbian exclave bordering Macedonia, there are currently parallel municipal organizations, one loyal to Serbia, and another loyal to the independent Kosovo government. To speak of anybody's territorial rights in such a case is not only conceptually problematic, but it also misdirects our attention away from the political dynamic that legitimizes some and delegitimizes other political outcomes. At least in 'hard cases' such as Kosovo, we ought to focus on the uses and misuses of the rhetoric of functionality (and the legitimacy of the various degrees of mutual arm-twisting that accompany this trope), instead of searching for, in vain I think, the correct account of territorial rights.