

An Evaluation of the Proposed Serbia-Kosovo Land Swap Deal and its Potential Status under Applicable International Law

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Abstract

With only about half of the members of the United Nations recognizing its declaration of independence, the lack of universal consensus on Kosovo's independence in 2008 has put the country's status legal status as a legitimate state in limbo. The Serbia-Kosovo land swap deal has been proposed as a way to break the deadlock and potentially lead to the international recognition of Kosovo. This article evaluates the applicable legal standards under international law form both of the scenarios—that Kosovo is and is not a sovereign state. It explored the issues from the perspectives of purely territorial exchange, groups of people in terms of the legality of population exchanges and rights of self-determination and minority rights. It also investigates the implication of the land swap on individual human rights issues under the existing legal framework, thereby considering if the deal is compliant with international law and providing food for thought.

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1. Introduction

The idea of land swaps, which involve an exchange of land between different parties, is not new to public international law. Many states have made land swap deals, an example is India and Bangladesh signed the Land Boundary Agreement (2015) to exchange several of their respective enclaves (Ministry of External Affairs, Government of India 2015). Exchanges of land and populations between a sovereign state and what it perceives as its breakaway region, which is also a partially recognized state itself, is, however, relatively uncommon. Moreover, as Lesaffer (2016) noted, despite the demarcation of borders derived from the concept of modern sovereign states, land swaps have become increasingly rare. This can partly be explained by globalization and the increase of cross-border jurisdictions, which remove the need for hard borders and homogenous communities and territories.

The proposed land swap deal (hereafter referred to as “the deal”) between the Republic of Serbia and the partially recognized state Republic of Kosovo—which Serbia calls the Autonomous Province of Kosovo and Metohija—has generated great controversy. The deal first emerged in 2018 when their respective presidents announced they were considering border changes to reach an unprecedented peace settlement between the two entities. Kosovo President Hashim Thaçi proclaimed it was time for Kosovo to reach a binding legal agreement with Serbia and openly urged other countries not to oppose such an agreement, even if it may involve correcting borders (Gray and Heath 2018). This is mainly because it would potentially pave the way for Serbia to finally recognize the unilateral declaration of independence of Kosovo, which may, in turn, aid both their bids for European integration and lead to Kosovo being admitted to the United Nations (UN) as a Member State.

Specific details of the deal have yet to be finalized and announced publicly because negotiations were conducted behind closed doors (Gray and Heath, 2018). Although no concrete plan is known currently, it is widely believed the deal would involve transferring the land of the majority ethnic Albanian municipalities of Bujanovac and Preševo (hereafter referred to as the “Preševo Valley”) in Serbia to Kosovo; while, in return, the majority ethnic Serbian region of North Kosovo, including the municipalities of North Mitrovica, Leposavić, Zvečan, and Zubin Potok would be transferred from Kosovo to Serbia. It is rumoured that the Serbian municipality of Medveđa would also be transferred to Kosovo, but it is uncertain whether it would eventually be included in the deal because it has an ethnic Serbian majority, albeit with a considerable ethnic Albanian minority. In contrast, the majority ethnic Serbian enclaves in Kosovo proper, which constitute the “Association of Serb Majority Municipalities,” including Štrpce, Gračanica, Novo Brdo, Ranilug, Klokot, and Parteš, are believed not to form part of the deal and would instead be officially incorporated into Kosovo instead (Huszka 2018). However, as populations do reside on the land in question, redrawing borders in Kosovo almost inevitably would also lead to chaotic population exchanges (Rossi 2018). This article will be based on the deal as stated above.

It is worth noting that neither government has disclosed precise details of the deal, and the deal has been criticized and rejected by prominent world leaders like former German Chancellor Angela Merkel largely due to fear of restoking ethnic tensions and violence in the Balkans (Gray 2018). As there currently lacks any progress on the deal, it may seem that the deal is non-existent or even off the table. However, although the idea of a land swap under the deal may sound contingent and hypothetical, the idea of it as one of the principles of territorial modification is still worth discussing as a possible dispute resolution mechanism under international law using the specific example of Kosovo for illustration and future reference.

This article argues that redrawing state borders and any inevitable exchange or transfer of populations based on ethnic lines under such a deal between Belgrade and Pristina would be unlawful under international law. As populations reside on the land concerned, it would be difficult to imagine that redrawing borders in the case of Kosovo would not affect the populations in the region. However, the author does not imply that there is an element of forced population transfer or exchange connected with the deal. Nonetheless, it is worthwhile to discuss population exchange in order to consider the larger legal parameters of such a swap since this could arise under other circumstances as well. As such, apart from investigating the legality of land swaps from a purely territorial perspective, this article will also analyze the proposed deal based on the legality of population exchanges as a group, their right of self-determination, and the general human rights of all individuals involved. This article will specifically concentrate on the legality of such a deal under international law, which has been much more shallowly explored when compared to its practical and legal consequences and ramifications in literature.

In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Advisory Opinion)*, the International Court of Justice (ICJ) held that the unilateral declaration of independence in 2008 by Kosovo did not violate any applicable rule of general international law (ICJ 2010, para 122). This article does not attempt to resolve the complicated question of statehood for Kosovo, notwithstanding its recognition by Serbia may be a potential consequence of the deal because it is largely irrelevant to the legality of the deal itself. That said, this article recognizes the status of statehood would create different implications for what is and is not the relevant binding law regarding the applicable legal regimes. Thus, this article will evaluate the deal based on both scenarios that Kosovo is and is not a sovereign state, where relevant, to provide a more comprehensive legal analysis on the issue.

The main aim of this article is to explore the legality of the deal by evaluating it against relevant applicable international law and contribute to existing literature on the deal itself, such as Pavković's (2018) analysis on how likely it would materialize based on domestic constitutional hurdles in Serbia and Kosovo respectively, and Rossi (2018) who investigated the potentially dangerous ramifications of the deal and how they are undesirable (Rossi 2018). Another objective of the article is to use the deal and situation in Kosovo as a form of case study to draw out implications for and ultimately stimulate a broader debate surrounding the current status of territorial and population exchanges under international law and their compatibility with other areas of international law like human rights and self-determination overall.

2. Territorial Exchange: Legality of Land Swaps

Firstly, this article argues that territorial change through land swaps is largely permitted under international law if they purely involve an exchange of territory with no population exchanges involved. Considering Kosovo as an independent state, there are precedents supporting land swaps on an inter-state level. One example is Belgium ceded a small peninsula to the Netherlands, which gave a piece of its territory containing a water lock in return (Lesaffer 2016). Although the land exchanged was unequal in area, it helped to simplify the border and reflected the change in course of River Meuse (Reuters in Brussels 2016). However, it is important to note the land exchanged was uninhabited and small. To the extent that the territory is uninhabited, the land swap under the deal would likely be legal like the Belgian and Dutch case. The proposed deal would also involve exchanging inhabited territories across the River Ibar, separating North Kosovo from Kosovo proper, resulting in more complications because consent from its inhabitants is required, which will be discussed in detail in Part 3. Furthermore, as Alvarez-Jimenez observed, once the ICJ had held that a boundary agreement existed between the relevant parties, it would be extremely reluctant to declare it as unlawful, as evident in *Cameroon v Nigeria* and *Qatar v Bahrain*

(Alvarez-Jimenez 2012, 509). This principle would apply to territorial agreements concluded under the deal from an inter-state angle, making the land swap legal if no populations are involved.

If Kosovo is considered a part of Serbia instead, there are also relevant examples of land swaps to draw upon. Under the 1995 Dayton Peace Accords Annex 2 Article I, the two entities comprising Bosnia and Herzegovina (BiH), namely Republika Srpska (RS) and the Federation of BiH, agreed to establish the Inter-Entity Boundary Line, which involved swapping territories (OSCE 1995). Article II also stipulated that both entities can adjust the Line by mutual consent. In international law terms, the Agreement on the Inter-Entity Boundary Line was entered into force upon signature by the two entities and the BiH Government under Article VIII after endorsement by Croatia and the Federal Republic of Yugoslavia (FRY), the predecessor state of Serbia and Montenegro. This made the Agreement legally effective and created a precedent for land swaps on an intra-state level. Like Kosovo, Republika Srpska was also part of a constituent republic of the now-dissolved former Socialist Federal Republic of Yugoslavia (SFRY) rather than a constituent republic in itself. The main distinguishing factor is that a deal that finalizes territorial boundaries between Serbia and Kosovo would likely remove objections from Serbia and other states and might lead to greater international legal recognition of Kosovo as a state, whereas the Dayton Accords were designed to ensure RS remains part of BiH. However, this article is purely concerned with the legality of the deal, not its legal consequence of opening a Pandora's Box for the Balkans, nor attempts to resolve the question of Kosovo's statehood. Thus, as they both share similar starting points, there is no reason why the Serbia-Kosovo deal would be illegal purely from a territorial exchange perspective when territorial swapping under the Dayton Accords had already been permitted by the major powers.

However, Human Rights Group Al-Haq argued that land swap agreements can be illegal, as evident in agreements concluded between Israel and the Palestinian Authority due to the clear imbalance of power between the two parties involved (Al-Haq 2011). In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ held that the Fourth Geneva Convention (GCIV) Article 49 (6) regarding the prohibition of an Occupying Power from deporting or transferring "parts of its own civilian population into the territories it occupies" is absolute and cannot be derogated even for imperative military reasons (ICJ 2004, para 135). Yet the deal can be distinguished from that of Palestine concerning the applicable law. Firstly, the Palestine case does not concern land swaps without population exchanges as is discussed here. Next, although Palestine shares a similar status to Kosovo as a partially recognized state, international humanitarian law (IHL) does not apply to the deal because GCIV regarding protection of civilians in times of war only applies to situations of occupation following an international armed conflict. Serbia cannot be seen as an occupying power of Kosovo because Kosovo was, in fact, an autonomous province of Serbia before the Dissolution of SFRY based on the principle of *uti possidetis juris*² (Hasani 2003, 93). After the Kosovo War in 1999, Serbia no longer *de facto* controls Kosovo which unilaterally declared independence in 2008. Even North Kosovo, which is inhabited by a majority of ethnic Serbs, has been under the jurisdiction of the NATO-led Kosovo Force (KFOR) and the United Nations Interim Administration Mission in Kosovo (UNMIK) since 1999, not Serbia itself (UNMIK 2008). As this is not a situation of occupation, IHL is not the relevant applicable legal framework and regime to the deal. Hence, the concept of a land swap itself is likely lawful under a deal when there is only territory being exchanged and no population is involved.

² Latin for "as possess under law" in a principle of international law which provides that newly formed states should retain the internal borders that their preceding independent area had before their independence

3. Group and Peoples: Population Exchange, Minority Rights, and Self-determination

Compared to the question of territorial change which only involves exchanging uninhabited land, population exchanges are generally more controversial because they involve moving groups of people across national boundaries and the law on this issue is less clear due to its inherent complexities. Although it is established above that land swaps without population exchanges may be permitted under international law, redrawing borders under a deal inevitably would lead to chaotic population exchanges as people do live on such land (Rossi 2018). This article argues that it is very difficult to meet the required legal standard and would consequently violate their right of self-determination and minority rights, which are protected under international law.

3.1 Legality of Population Exchanges

Land swaps involving the exchange of populations, as envisaged by the deal, could be difficult to fulfill using the conditions of international law. According to the Council of Europe (CoE) Rapporteur Egidijus Vareikis, population transfers entail the permanent movement of a large group of people defined by their ethnicity or religion from one region to another (Council of Europe Parliamentary Assembly 2011, 4). This article argues that the deal would be largely illegal if it involved population transfers because it would be realistically difficult to obtain free and informed consent from the populations involved in the exchange.

There were cases where population exchanges were accepted as a lawful and legitimate way to settle ethnic conflicts, as seen in the exchange of Greek and Turkish populations after the First World War when the Ottoman Empire was dissolved (Motta 2013, 365). Under the 1923 Lausanne Convention Article 1, this exchange was compulsory, and the populations involved were banned from returning to their original country of residence (Republic of Türkiye Ministry of Foreign Affairs Ministry of Foreign Affairs 1923). Another example was the 1940 Treaty of Craiova which exchanged populations between Romania and Bulgaria when Bulgaria retook Southern Dobruja (ILC 1973, 41). Both treaties show population exchanges were historically tolerated and had even become a legally acceptable norm until the Second World War.

However, population exchanges have largely been outlawed under international law today when they are carried out involuntarily. According to the 1997 UN Draft Declaration on Population Transfer and the Implantation of Settlers Article 3 (UN Declaration), an unlawful population transfer refers to one “without the free and informed consent of the transferred and any receiving population” (ECOSOC 1997). Although this Declaration is technically non-binding, the concept of free and informed consent is widely considered vital in determining whether a population transfer would be considered lawful (Council of Europe Parliamentary Assembly 2011). Meindersma (1997) also observed that population exchanges would accord with international law only if they were “carried out voluntarily” (653). This implies obtaining consent from the populations involved is the key factor in determining whether the exchange is voluntary and, hence, lawful.

The main obstacle to traverse is how to determine what free and informed consent means precisely because there is currently no uniform definition, which is tricky and makes it highly difficult for states to fulfill this requirement. According to the UN Office of the High Commissioner for Human Rights (OHCHR), “free” consent implies there is no coercion, intimidation, or manipulation; meanwhile, “informed” consent means information is provided covering aspects including purpose, scope, and potential risks (OHCHR 2013). Although these definitions apply to the rights of Indigenous peoples, they could serve as a useful reference for the context of population exchanges. It would be difficult to ensure any content obtained

would be free from coercion in view of the underlying hostile ethnic tensions in Kosovo. As neither government has disclosed precise details of what was discussed, it is uncertain whether any consent would be informed as this depends on the amount and type of information provided and on the ability of the population to comprehend such information. When the criteria applied are opaque, the information they receive would likely be incomplete, making it difficult to satisfy the requirement of informed consent.

Turning to obtaining consent itself, referenda are usually regarded as the most democratic and straightforward method since the opinions of the wider population are considered. To achieve this, referenda under strict international supervision from the European Union (EU), the Organization for Security and Co-operation (OSCE) or UN Monitors, where the populations are asked an unambiguous question, can be considered as an adequate mechanism to obtain consent. However, the required percentage of the population for approval, 50 percent or a two-thirds supermajority, remains highly contested. The geographical scope of the hypothetical referendum is also uncertain. It could be purely limited to the relevant ethnic groups, expanded to the entire population of the affected areas or even the entire country as a unit. Furthermore, it is difficult to demarcate specifically which constituencies should be involved in the decision-making process because there is an inevitable selective bias.

This then leads to problems of who has the right to choose these criteria and the basis on which these criteria should be chosen. These problems hypothetically could be resolved by direct agreement between the governments of Serbia and Kosovo. They might also be determined through an independent third-party arbitrator like the European Commission if required. Nonetheless, these uncertainties demonstrate that obtaining consent is not straightforward at all. Another problem is to determine who would decide whether the chosen criteria fulfill the requirement of free and informed consent under international law because the Office of the United Nations High Commissioner for Human Rights (OHCHR) noted that it is difficult to verify such consent and even urged to establish new mechanisms and procedures for verification (OHCHR 2013). Regardless of who eventually became the ultimate arbiter, the criteria applied would not satisfy the wishes of all the relevant parties because it is highly unlikely everyone affected by the deal would be given a veto over this population exchange, so Serbia and Kosovo would find it hard to completely satisfy this requirement under international law.

Obtaining the necessary legal consent could also be unnecessarily challenging and long-winded. An example is the exchange of populations and territory between Tajikistan and Uzbekistan, which was completed only 16 years after signing the exchange agreement. Professor Burnashev from the Kazakh-German University explained that the process took so long because the central authorities reaching a solution does not mean that locals at the community level who live close and have relatives on both sides of the border agreed with it (CABAR 2021). Similar problems would likely surface in Kosovo when exchanging populations living in and around North Kosovo and Preševo Valley, meaning it could take a long time before the deal would be ratified in practice as legal. Furthermore, the consent of Serbs living in enclaves within Kosovo proper, which form the “Association of Serb Majority Municipalities” like Gračanica, might be completely ignored because it is rumoured that the proposed deal does not include them as part of the population exchange (Huszka 2018). They would vigorously oppose the deal because they would want to avoid being permanently trapped within the majority ethnic Albanian Kosovo, thus prolonging the time for the deal to become legal.

Frank (2017, 414), however, observed that population transfers continue to be an extreme option to resolve modern major international crises due to a lack of alternatives. According to this idea, it is necessary to uphold the distinction between voluntary and compulsory population transfers because, although it might sound artificial, the element of consent acts as the key distinguishing factor to determine the legality of

the exchange. After all, the status of Kosovo has been in limbo since 1999 despite constant talks, which has deeply hindered both sides regarding their international standing and prospects of attaining long-lasting peace. Prolonging the conflict serves the interests of neither of the parties, so while it may be an unconventional measure, one could argue that a deal that involves population exchanges could be considered as the way to break the deadlock and impasse because such a deal could potentially lead to the international recognition of Kosovo.

However, there is no guarantee peace could be obtained through this deal because population exchanges might reignite ethnic tensions. Even assuming peace would be the outcome, this does not necessarily mean the deal would be lawful, and the result might come at the expense of justice for the populations involved. As Özsü (2014, 125) argued, it is difficult to conceive that people would voluntarily submit themselves to community-wide displacement from their homeland, so the distinction between voluntary and compulsory transfers seems to be untenable, especially in the current age. This explains why even Kupchan (2018), who strongly supported the deal, conceded that this population exchange would amount to a “peaceful ethnic cleansing” due to demographic changes which would consequently occur (Kupchan 2018). International law has already developed such that individuals and groups should not be subject to population exchanges either as participants or recipients (Meindersma 1994). Thus, it remains unlikely any population exchanges under the deal could be considered lawful since it would be difficult to obtain free and informed consent.

3.2 Right of Self-Determination & Minority Rights

Next, this article argues that the deal also poses further challenges under international law when considering minority rights and the right of self-determination pursuant to UN Charter Article 1(2) and International Covenant on Civil and Political Rights Article 1, which enshrine the rights of people to freely determine their political status and to pursue their economic, social, and cultural development. As Lister (2016, 22) argued, any serious theory of self-determination must address the problem of population transfers if it aims to be comprehensive. Population exchanges are inherently linked with the concept of self-determination and minority rights because the exchange would directly affect the destiny of the respective national or ethnic populations as a group.

Having concluded above that it would be highly difficult to meet the legal standard of obtaining free and informed consent, it follows that implementing the deal would likely violate the right of self-determination for the populations to be exchanged because swapping territory without their free and informed consent means neglecting their right to determine their own fate and status. UN Declaration Article 7 stipulates that population transfers cannot be legalized by international agreements when they violate fundamental human rights norms or peremptory norms of international law, which include the right of self-determination (ECOSOC 1997). Groups required to accept the changes in territory would also likely lose their right to govern themselves without any outside political interference because they may now find themselves on the wrong side of the border and cut off from their parent state. A relevant example is the Serbs living in enclaves within Kosovo proper, who would be completely excluded from the deal, as rumoured, unlike their counterparts in North Kosovo (Huszka 2018). There is currently no indication that the deal includes the possibility of allowing them to retain their Serbian citizenship. Although they would likely be accorded relevant minority rights under ICCPR Article 27, which protects their rights to practice their own religion and use their own language, it is worth noting that Serbia and Kosovo are currently governed by transitional and hybrid regimes where the rule of law and democratic principles are weak (Freedom House 2023), so the rights of no one, let alone minorities, in both places, are fully assured. By

forcing Serbs to officially become citizens of Kosovo, their wish to remain as part of Serbia would be ignored, which in turn undermines and violates their right to self-determination.

According to the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) Article 41(1), “States shall cooperate to bring to an end through lawful means any serious breach” of an obligation arising under a peremptory norm of general international law. Under Article 40(2), a breach “is serious if it involves a gross or systematic failure by the responsible States to fulfil such obligation.” Here, the obligation refers to upholding the right of self-determination of the populations involved. Article 41(2) further stipulates that states shall not recognize situations “created by a serious breach” as lawful, “nor render aid or assistance” to maintain such situations. The ILC recently recognized the right of self-determination as a peremptory norm of general international law according to Conclusion 23 on *jus cogens*³ which was adopted by the Commission on first reading in 2019 (ILC 2019, 147). If the deal is evaluated from an inter-state perspective, both Serbia and Kosovo would be legally obliged not to mutually assist each other in any serious breaches of the right of self-determination and should also cooperate together to bring those breaches to an end. On the contrary, if Kosovo is considered as a part of Serbia instead, outside countries must also not recognize the situation created by the deal as lawful when free and informed consent of the populations is lacking.

It is true that the deal might not violate the right of self-determination if both Serbia’s and Kosovo’s governments consulted all the affected populations concerned and subsequently reached an agreement between them because this would constitute free and informed consent, making the exchange voluntary. However, as free and informed consent of the populations could unlikely be legitimately obtained, the right of self-determination remains likely to be violated consequently. One could also argue the deal is lawful because it gives effect to and even strengthens Kosovo’s right of self-determination to overcome its current lack of universal recognition. Yet it must be noted that Kosovo was not a constituent federal republic of the former Yugoslavia like Slovenia but rather an autonomous province of Serbia. This unique status means Kosovo could not itself directly be a self-determination unit when the dissolution of SFRY occurred based on the principle of *uti possidetis juris* and thus had no right to claim sovereignty, a point even noted by Dr. Hasani (2003), the Professor of International Law at the University of Pristina.

Instead, the idea of Kosovo having the right to self-determination is mostly based on the highly contested concept of remedial secession. Simon (2011, 108) argued that grave human rights violations by Serbia during the Kosovo War in 1998, such as the Ljubenić and Prekaz massacres,⁴ gave Kosovo a right to secede from its parent state (Simon 2011, 108). In the *Kosovo Advisory Opinion*, the ICJ considered it unnecessary to resolve this question because it was beyond the scope of the question posed by the UN General Assembly (ICJ 2010, para 83). The ambiguous ICJ jurisprudence indicates the legality of remedial secession remains largely unclear. As Van den Driest highlighted, remedial secession is far from being completely crystallized into customary international law (CIL) as a universally accepted ground leading to the right of external self-determination both in terms of state practice and *opinio juris*,⁵ but this topic will not be explored in detail as it is largely unrelated to the legality of the deal (Van den Driest 2013, 223). Furthermore, at the time of writing, nearly half of the 193 UN Member States do not recognize Kosovo’s unilateral declaration of independence. This number remains considerable and significant because it shows there is no universal consensus on the issue. Thus, it remains unclear if Kosovo is entitled

³ A principle which forms the norm of international law that cannot be set aside.

⁴ Ljubenic and Prekaz massacres occurred in March 1999 and March 1998 respectively when Serbia forces attacked the villages of Ljubenic and Prekaz resulting in the death of many civilians and NATO’s intervention.

⁵ Latin for “an opinion of law.”

to such a right as a matter of state practice under customary international law in the first place, let alone for it to be strengthened by the deal.

4. Individual: Human Rights

Finally, moving from group to the individual level, this article argues the deal likely would contravene the human rights obligations of both Serbia and Kosovo under existing legal frameworks, which act as additional thresholds that must be met before the deal could be considered as compliant with international law. This will be analyzed from the perspective of the European Convention on Human Rights, state responsibility for human rights breaches and the International Covenant on Civil and Political Rights.

4.1 European Convention of Human Rights (ECHR)

A relevant legal framework is the European Convention of Human Rights (ECHR) which binds Serbia, being a Council of Europe Member State but not non-member Kosovo. This could be problematic because it potentially creates a divergence from Serbia in human rights obligations. The obligations of Serbia vis-à-vis Serbia proper and Kosovo will be analyzed respectively below.

When considering Serbia proper only, conducting involuntary population exchanges under the deal would likely violate ECHR Article 8(1), which states that “everyone has the right to respect for their private and family life, home and correspondence” and Article 8(2), which stipulates there shall be “no interference by a public authority” to exercise this right barring a few legitimate exceptions. Regarding interference with the right to respect for one’s home, in *Cyprus v Turkey*, the European Court of Human Rights (ECtHR) held that forcible deportation and excursion of Greek Cypriots by Turkey to other places in Cyprus constituted an interference with their private life (ECHR 1976, para 209). Meanwhile, in *Slivenko v Latvia*, the ECtHR found that removing one from the country where they had developed uninterruptedly since birth against their own will and causing them to lose their homes through deportation orders constituted an interference with their “private life” and “home” under ECHR Article 8(1) (ECHR 2003, para 96).

Applying these cases to the deal, when free and informed consent of the individuals involved is lacking, forcing them to abide by the land swap would theoretically amount to removing them from their native homeland against their own will and causing their homes to be lost, particularly when eviction orders are issued. This not only deprives such individuals of the right to develop relationships with other ethnic groups whilst embracing their individual social identity but also could constitute deportation and expulsion were they to flee their homes, meaning ECHR Article 8 is likely breached since it constitutes an interference of their private life. Moreover, the expropriation of properties during the population exchange would likely raise restitution claims to the Serbian government for a fair and equitable outcome for the deprivation of their personal possessions.

On the contrary, when assessing the extent of Serbia’s responsibility for acts occurring in Kosovo, the legal concept of effective control applies. If it is established that Serbia has effective control over Kosovo’s territory, the obligations it needs to fulfill would consequently increase. In *Loizidou v Turkey (Preliminary Objections)*, the ECtHR held that the responsibility of a state may arise when it exercises effective control over an area as a consequence of military action and that the obligation to secure rights and freedoms in the area derives from such control, whether exercised directly through its armed forces or indirectly through a subordinate local administration (ECHR 1995, para 62). As Turkey had effective control over the self-proclaimed “Turkish Republic of Northern Cyprus” (TRNC) through occupation by its troops, the

Court concluded that acts causing Cypriot Greek refugees to lose control of their property and subsequently preventing their re-access were capable of falling within Turkish “jurisdiction” within the meaning of ECHR Article 1(1) (ECHR 1995, para 63–64). Considering the attribution and responsibility of Serbia for what happens within Kosovo, the above, however, largely does not apply here because Serbia does not have *de facto* control over Kosovo.

This point is reinforced and substantiated in *Azemi v Serbia*, in which the ECtHR held that there are objective limitations preventing Serbia from securing rights and freedoms in Kosovo because Serbia did not exercise any control over the United Nations Interim Administration Mission in Kosovo nor Kosovo’s judiciary, nor militarily, economically, or politically supported Kosovo’s institutions. The Court also held it could not point to any positive obligations Serbia had towards the applicant from Kosovo because even Serbian courts themselves confirmed that Serbia had not exercised effective control in Kosovo since 1999, so Serbia cannot be held responsible under ECHR Article 1 (ECHR 2013, para 47–49). Hessbruegge (2013) noted ECHR binds only state parties, and the ECtHR lacks jurisdiction *ratione personae*⁶ to hear complaints directed against *de facto* authorities, so it can only indirectly address them by adjudicating cases against states having influence over such authorities. Istrefi (2004) also highlighted that Kosovo remains a “no man’s land” when it comes to the application of human rights under the ECHR. Here, there is no basis to attribute the conduct of the Kosovar administration to Serbia because, unlike Turkey vis-à-vis the Turkish Republic of Northern Cyprus, Kosovo is a *de facto* breakaway territory with its own police force and military, so it cannot be seen as being controlled by Serbia directly nor pulling the strings behind. Thus, the responsibility of Serbia for human rights breaches and violations in Kosovo itself, as opposed to Serbia proper, remains limited in the Council of Europe context.

4.2 State Responsibility for Human Rights Breaches

Notwithstanding the above, the limited responsibility does not mean that Serbia can assist or encourage further human rights breaches in Kosovo. The legal basis for this can be found in ILC ARSIWA Article 16, which sets out that a state aiding or assisting another state “in the commission of an internationally wrongful act by the latter is also internationally responsible for doing so if (i) that State knows the circumstances of the internationally wrongful act and (ii) the act would be internationally wrongful if committed by that State.”

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Genocide Convention)*, the ICJ held that this provision reflects customary international law and while it mostly concerns situations characterized by the relationship between two states, it nonetheless merits consideration even when the situation is not in such context (ICJ 2 2007, para 420). This point is strengthened by Judge *ad hoc* Mahiou, who, in his dissenting opinion, stated that although the provision does not seem directly applicable since the entity in question, Republika Srpska (RS), has no international status, it follows that states which provided aid or assistance will be responsible insofar as it facilitated the commission of an internationally wrongful act (ICJ 2 2007, para 124).

Before applying the above legal principle to the deal, it is important to note the Genocide Convention, which is broad and extraterritorial in its application, is not the relevant applicable regime in this case because there is no indication that genocide would occur as a result of the deal. However, notwithstanding

⁶ Latin for “by reason of the person”—a legal term referring to the capacity of a person to possess the rights and obligations under international law.

this difference, the Genocide Convention case remains relevant to the deal because the application of ILC ARSIWA Article 16 regarding internationally wrongful acts extends beyond genocide and is applicable to other wrongful acts such as breach of human rights obligations. If Kosovo is considered an independent sovereign state, Serbia is responsible for not encouraging and triggering further human rights breaches in Kosovo because ILC ARSIWA Article 16 applies on an inter-state level, and the ICJ already held that Article 16 reflects customary international law (CIL) (ICJ 2 2007, para 420). This means it would be an internationally wrongful act if Serbia assists Kosovo in breaching its international obligations of human rights regarding respect for private and family life through the deal because signing the deal would indicate that Serbia knew the circumstances of the act. This legal principle is not limited to relations between Kosovo and Serbia; it is applicable to other countries in the world too. An example is when the US, under the Trump Administration, offered active support for the deal during the 2020 Kosovo and Serbia economic normalization agreements in order to pursue its foreign policy objectives regarding Israel, including but not limited to backing normalization agreements between Israel and several Arab nations (Walker and MacDowall 2018). This support would likely amount to aiding Serbia in committing breaches of its human rights obligations under international law, which could have made the US contravene the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) Article 16.

If Kosovo is considered an entity within Serbia, it is similar to Republika Srpska (RS) in being a constituent part of a larger territorial state. As mentioned above, the ICJ held that ARSIWA Article 16 can largely still be applied to relationships between a state and a non-state entity, so it could theoretically be applied to the relationship between Serbia and Kosovo (ICJ 2 2007, para 420). However, unlike RS, the capacity of Serbia to influence what happens in Kosovo is hugely different. Regarding the notion of “due diligence,” the ICJ held in the Genocide Convention that when assessing whether a state has duly discharged the obligation concerned, its capacity to influence effectively the actions of persons involved is relevant. This capacity to influence may vary greatly among different states depending on the geographical distance of the state from the scene of events and the strength of all links between authorities of that state and the main actors. It must also be assessed by legal criteria because it is clear every state may only act within the limits permitted by international law (ICJ 2 2007, para 430).

Here, although Kosovo geographically borders Serbia proper, the authorities of Serbia cannot control what happens in Kosovo, which *de facto* falls under the jurisdiction of the Kosovar authorities, so the strength of connection and capacity to influence are very weak. The threshold of effective control applied by the ICJ is also more stringent than that of the ECHR because, as Rooney (2015) noted, the latter is aimed at improving human rights protection. When Kosovo already fails to meet the effective control test under the ECHR, it is even more difficult for it to do so before the ICJ. One might attempt to argue that Albania has effective control over Kosovo because of their close ethnolinguistic ties and frequent cross-border exchanges between Tirana and Pristina. However, as the International Crisis Group (1998) noted, their political division for over 80 years has caused both communities to evolve very differently. There is currently no evidence to indicate Albania controls the institutions of Kosovo to the extent of Russia vis-à-vis Transnistria and Serbia vis-à-vis RS during the Yugoslav Wars. Therefore, as Kosovo is not within Serbia’s sphere of influence, the extent of responsibility and obligations of Serbia for what happens in Kosovo are incredibly limited. Hence, there is little Serbia can do to prevent human rights breaches within Kosovo proper itself directly if Kosovo is not considered an independent state. However, if it is, both Serbia and Kosovo and other countries are obliged under ARSIWA Article 16 not to assist in breaching international human rights obligations through the deal.

4.3 International Covenant on Civil and Political Rights (ICCPR)

Serbia ratified the International Covenant on Civil and Political Rights (ICCPR) on March 12, 2001, through its succession from the Federal Republic of Yugoslavia (FRY). To the extent that Kosovo is not considered an independent sovereign state, it would become bound by the ICCPR as a territorial component of Serbia. Serbia would thus be responsible for ensuring its ICCPR obligations are fulfilled throughout all its territory, including Kosovo.

However, if Kosovo was considered an independent sovereign state instead, its ratification of the relevant treaties would become crucial. So far, Kosovo has yet to independently ratify the ICCPR and become a party to it, which may indicate it is not obliged to follow the Covenant. Nonetheless, its lack of ratification does not necessarily mean Kosovo is not bound by customary international human rights law (IHRL). In his report on human rights in Transnistria, UN Senior Expert Thomas Hammarberg (2013, 4) highlighted that customary international law obligates *de facto* authorities to uphold the most fundamental human rights norms and obligations. Also, as Simmons (2009) and Stone (2012, 162) noted, the ICCPR has generally agreed to reflect CIL due to its ratification by more than 170 states indicating sufficient state practice. When the ICCPR reflects customary international law, Kosovar authorities are legally obliged to respect fundamental human rights and ensure there is no violation within Kosovo under international law.

Another relevant point on Kosovo being bound by the ICCPR concerns the law on state succession. The UN Human Rights Committee (UNHRC) took the view that protection of rights under the ICCPR devolves with the territory and continues to belong to the people accorded such protection even if there is a change in government, including dismemberment in more than one state or state succession (UNHRC 1997). When Serbia ratified the ICCPR in 2001, it intended to include the Kosovar territory, so when Kosovo unilaterally declared independence in 2008, it can be said that the rights under the ICCPR continue to apply within Kosovo because the Kosovo authorities are simply acting in the place of the Serbian government. Even if this cannot be established, the same principle applies to the United Nations Interim Administration Mission in Kosovo and the NATO-led Kosovo Force when they took control over Kosovo in 1999 from the Federal Republic of Yugoslavia (FRY) because the UNHRC considered that the ICCPR remained applicable in Kosovo (El-Khoury 2020, 347).

Aside from the rights to private and family life in the ECHR, which are also protected under the ICCPR, another relevant potential violation by the deal is ICCPR Article 12(1), which states that everyone lawfully within the territory of a state shall have the right to liberty of movement and freedom to choose their residence. Any population exchange and demarcation of new international borders between Serbia and Kosovo as a result of the deal would hinder the freedom of movement for people on both sides of the border. More importantly, the deal would effectively deny people the right to choose their residence when they need to flee their homes and be transferred to another territory through the land swap without obtaining their consent.

Hessbruegge (2013) highlighted that IHRL leaves protection gaps where *de facto* authorities operating beyond the reach of the territorial state commit human rights violations due to the state-centric nature of international law. As Kosovar authorities operate beyond the reach of Serbia, it may seem that they can violate human rights without much consequence since they are not state parties to these human rights treaties. Even if the ICCPR is said to reflect customary international law, the role of the UNHRC in monitoring the implementation of the ICCPR vis-à-vis non-state parties like Kosovo may still be limited because of the lack of jurisdiction over such cases. It is also true that according to the Vienna Convention on the Succession of Treaties 1978 Article 9, a unilateral declaration made by a successor state providing for the continuance in force of treaties vis-à-vis its territory does not mean obligations or rights under

those treaties have successfully become so for the successor state or other state parties to such treaties. However, according to Article 22 of Kosovo's own constitution, adopted following its unilateral declaration of independence in 2008, human rights and fundamental freedoms guaranteed by the ECHR and ICCPR are "directly applicable in Kosovo" and, in case of conflict, "have priority over provisions of laws and other acts of public institutions" (Constitute Project 2016). Article 22 fully demonstrates the willingness of Kosovo to be bound by both international conventions despite being a partially recognized state. By doing so, Kosovo cannot claim to be completely free from any international responsibility and would still largely need to comply with IHRL when implementing the deal.

Hence, the deal would be largely unlawful under international law when considering the human rights-based paradigm. Given the number of potential human rights violations that might occur if the deal became a reality, the forebearers of human rights law arguably have already foreseen such situations arising and seek to limit the damage caused to individual rights. Both parties should, therefore, seriously reconsider if they ever push ahead with the deal and, if so, proceed with huge caution to prevent human rights violations being committed as a result of the deal.

5. Conclusion

As has been argued throughout the article, as it currently stands, the proposed deal would be unlawful under international law when evaluated against the relevant applicable legal standards. Although it is established that redrawing borders through land swaps can be legal when no people are involved, the deal would inevitably involve population exchanges, and it is very difficult to meet the required legal threshold regarding free and informed consent due to uncertainties surrounding the definition. The lack of consent would cause the deal to likely violate the right of self-determination for both Serbs and Kosovars who live on different sides of the border. It also likely would violate the human rights of individuals, especially regarding their right to private and family life under ECHR Article 8 and under the ICCPR, since it may lead to the deportation of people. Regardless of whether Kosovo is considered an independent state, the Kosovar authorities and the Serbian government both have the responsibility to prevent potential human rights violations within their respective territories and must not assist each other in violations through the deal. By analyzing the deal through different areas of international law, this article hopes to have achieved its primary aim of evaluating its legality more holistically from multiple perspectives.

This article also seeks to provide food for thought should the deal ever proceed. The analysis conducted does not suggest that the deal needs to be completely prohibited and scrapped. After all, both sides' willingness and manifested intention to resolve a longstanding ethnic conflict deserve appreciation and should be continued. Nonetheless, this article does serve as an acute reminder for both Serbia and Kosovo that significant modifications may be required to comply with the relevant international legal standards on human rights and self-determination. This would consequently create less litigation surrounding the deal to the benefit of both governments and improve their international reputation. The parties could also come up with alternative creative solutions, such as facilitating a new freedom of movement scheme allowing people on both sides and even other neighbouring Balkan countries to cross borders without hindrance to resolve their conflict rather than purely relying on the deal itself. This would reduce the risk of contravening international law and appease negative opinions of the deal, which are already evident on the ground in both Serbia and Kosovo, especially from those involved in the exchange.

Although some may say resolving their differences through the deal can accelerate both countries' legal accession into the EU, particularly for Serbia since it has already achieved candidate status, this does not make the deal legal. With the increased globalization in the twenty-first century, the idea of redrawing

borders to create an ethnically pure community denies the desire and right of these different communities to coexist and live together as peaceful neighbors. It also goes against the trend of facilitating greater harmonization in Europe as a matter of policy objective, given that both Serbia and Kosovo aspire to eventually become members of the EU. The deal might, in fact, derail the peace process because international law generally prefers stability. While keeping the status quo is by no means perfect, it is arguably the lesser of two evils compared to enforcing a population exchange, which might disrupt the existing fragile peace that is already rare to find in the Balkans.

Looking forward, if the deal were to go ahead, it would likely create massive ramifications for Kosovo, with the possibility of destabilizing the region and reigniting old ethnic tensions. The deal might also have further knock-on domino effects for the wider Balkan region. Growing calls of Republika Srpska to secede from Bosnia and Herzegovina create the possibility for yet another land swap in the quest for statehood (Karcic 2018). Similar proposals of population transfers have also arisen in other areas of the world to resolve inter-state conflicts, such as the one between Armenia and Azerbaijan concerning the Nagorno-Karabakh region and between China and India regarding Kashmir (Shats 2019). This means the analysis conducted in this article remains relevant to the discourse surrounding land swaps in general; it is not limited to the Kosovo context and can be applied to other regions as well. Thus, it can act as an invitation for more legal research in this area. However, whether the deal will ultimately be published and how both parties can reach a political settlement within the parameters of international law are questions which only time can answer.

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