Kosovo and International Law

The ICJ Advisory Opinion of 22 July 2010

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THE KOSOVO OPINION OF 22 JULY 2010: HISTORICAL, POLITICAL AND LEGAL PRE-REQUISITES

Peter Hilpold

1. Introduction

In the past decades Kosovo has been theatre of extremely violent conflicts. At the same time this area has been a testing ground for the State Community's search for new conflict solution instruments. Many of the measures adopted had an incidental nature. To give structure to these measures and to interpret them from the viewpoint of existing international law represents a formidable challenge for international law theory and practice.

Pivotal events were the acts of repression by the Milosevic regime over a whole decade (1989–1999), NATO intervention in spring 1999, an act of humanitarian intervention engendering a never-ending political and theoretical-academic discussion,[1] the introduction of an UN-sponsored administration[2] and, finally, the measures of 18 February 2008, by which Kosovo took its destiny in its own hands and declared independence.

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[1] See in this context, for example, L. Henkin, "Kosovo and the 'Law of Humanitarian Intervention'," in: *AJIL* 93 (1999), pp. 824–828; B. Simma, "NATO, the UN and the use of force: legal aspects," in: *EJIL* 10 (1999), pp. 1–22; D. Kritsiotis, "The Kosovo crisis and NATO's application of armed force against the Federal Republic of Yugoslavia," in: *ICLQ* 49 (2000), pp. 330–359 and P. Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?," in: *EJIL* 12 (3/2001), pp. 12 *EJIL* (3/2001), pp. 437–467.

[2] See R. Wilde, "Representing International Territorial Administration: A Critique of Some Approaches," in: *EJIL* 15 (2004), pp. 71–96; B. Knoll, "From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate," in: *EJIL* 16 (4/2005), pp. 637–660; D. Shraga, "Military Occupation and UN Transitional Administration—The Analogy and Its Limitations," in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflish*, pp. 479–498; K. Daglish/H. Nasu, "Towards a True Incarnation of the Rule of Law in War-Torn Territories: Centring Peacebuilding in the Will of the People," in: *LIV NILR* (2007), pp. 81–114; C. Stahn, *The law and practice of international territorial administration*, CUP: Cambridge 2008.

This was, however, not yet the end of the tale. On the contrary, thereby the door was opened to new initiatives, to new controversies and to new academic discussions. All this led to an advisory procedure before the ICJ which was concluded on 22 July 2010. The Opinion published that day stands—together with the many further statements and documents published concomitantly or previously—at the centre of the contributions of this collective writing.

Notwithstanding the fact that the Kosovo Opinion has been the subject of much criticism there can be no doubt that this document will exert considerable influence on the interpretation of many questions of International Law (IL) and this influence goes much beyond of issues commonly associated first-hand with the Kosovo question.

It is the aim of this volume to analyse some essential questions that have come to the fore in this context. This book shall begin, however, with an analysis of the historical pre-requisites of this case.[3]

2. The Historical Development of the Kosovo Problem

It is hard to find a region in Europe where the problem of the "imagined communities"[4] with the ensuing ethnical conflicts is more pervasive than on the Balkans. At the same time historic myths are present in an unique fashion.[5] The reciprocal connection of these elements creates an explosive mixture. There are the ingredients for never-ending conflicts: If any groop looks for retribution for purported injustice suffered in different periods of time it becomes impossible to state how a fair solution for the divergent claims should look like. It does therefore make little sense to interpret the present conflict in Kosovo with reference to the battle of Kosovo of 1389. At the same time, however, it cannot be contested that this legendary event whose political and military relevance is controversially discussed among historians is of enormous relevance as a source of

[3] The respective chapter benefits much from P. Hilpold, "Das Kosovo-Problem – ein Testfall für das Völkerrecht," in: *ZaöRV* 68 (2008), pp. 779–801.

[4] See B.R. Anderson, *Imagined Communities*, Verso: London et al. 2008.

[5] See R.D. Kaplan, *Balkan Ghosts: A Journey Through History*, St. Martins Press: New York 1993; J.A. Mertus, *Kosovo: How Myths and Truths Started a War*, University of California Press: Berkely 1999; F. Bieber/Z. Daskalovski (eds.), *Understanding the War in Kosovo*, Routledge et al.: New York et al. 2003; T. Brems Knudsen, *Kosovo Between War and Peace*, Routledge: New York et al. 2007; A. Di Lellio, *The Battle of Kosovo 1389; An Albanian Epic*, Tauris: London et al. 2009.

inspiration for identity-building. This province's constitutional position in Yugoslavia and the events during the process of Yugoslavia's dismemberment had, at the other hand, a far more immediate impact on the present-day status discussion.

According to the Yugoslav constitution Kosovo had first the position of an "autonomous territory" and since 1974 that of an "autonomous province." Thereby the constitutional position of this province (and the same is true for the Vojvodina) has become close to that of a Republic, although this formal recognition has never taken place. The province of Kosovo had its own constitution, its own government, a Supreme Court, a separate territorial defense and the autonomous right to grant citizenship and to issue passports.[6] These provisions constituted a compromise between the national aspirations of an Albanian community becoming ever stronger and that of Serbia keen to defend its territorial integrity and to keep Kosovo within the Rump-Yugoslav (or, respectively, Serb) entity.[7] The constitutional status of Yugoslavia was, therefore, a rather uncertain one and the comparison of Kosovo to an autonomous republic operated only on the factual level. No guarantee was given that this special status would be maintained and in any case the autonomous province of Kosovo had no right to secession granted by the Yugoslav constitution only to the republics. As will be shown below this different constitutional classification should afterwards have far-reaching, unforeseen consequences at the international level.

In the first years, Kosovo's special status proved to be a very valuable instrument allowing for a widely autonomous development on the political, cultural and economic level within Yugoslavia and thereby also for an affirmation of the Kosovar identity. This development was, however, noted with suspicion and outright fear by Serb political circles. Soon after President Tito's death the opposition against this nation-building process in Kosovo became rampant. In the years 1989/1990 this conflict escalated. Serb President Slobodan Milosevic started actively a policy of

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[6] See N. Malcolm, *A Short History of Kosovo*, New York University Press: New York 1998; "International Crisis Group, Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis," ICG Balkans Report No 46, 9 November 1998, http://www.crisisgroup.org/library/document/report_archive/A400171_09111998.pdf (2 July 2011), p. 4ss.; J. Schmierer, "Globalisierte Welt und Außenpolitik – März 2008," in: http://www.boell.de/demokratie-2241.html (14.6.2008); C. Stahn, "Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Governemnt," in: *Leiden Journal of International Law* 14 (2001), pp. 531–561 (532ss.).

[7] See N. Malcolm, 1998, p. 128.

Serbianisation in Kosovo and promoted the cut-down of this province's prerogatives with unconstitutional measures. Counter-reactions by the Kosovars in the form of public manifestations and the proclamation of independence of Kosovo from Serbia (while at the same time advancing the claim for the status of an autonomous republic within Yugoslavia) were used by the Parliament and the Government in Belgrade as a pretext for the use of force. Recourse was taken to emergency measures and finally a new constitution was adopted according to which both the province of Kosovo and Vojvodina lost their autonomous status by all but their name.[8]

The following developments must be interpreted from the perspective of the Yugoslav dissolution process. The Serb government led by Slobodan Milosevic tried to maintain a Serb dominated socialist federal state of Yugoslavia while other republics, in particular Slovenia and Croatia, first called for a Western-style democratic order with a capitalist economic system and afterwards went the way of independence. On 25 June 1991 Slovenia declared her independence and managed to defend this independence in the so-called "10 days war." On the same day also Croatia proclaimed her independence but in this case it was far more difficult to assert this claim by military means. This was possible only after a war lasting from 1991 to 1995 which claimed many casualties. Peace was brought about by the Dayton agreement of 14 December 1995 by which also the war of Bosnia was ended—a war which had started in 1992 and which had taken a death toll of 100,000.

For Serbia (and Montenegro) these events represented disastrous political and military defeats and as a consequence Serb dominance over Kosovo was defended with even more insistence.

In this instance, however, the international community was less inclined to provide a contribution for conflict solution compared to the cases mentioned before. There were at least two reasons for this different attitude: the different constitutional qualification as a province (and not as a republic) as mentioned above and the historic importance of Kosovo for Serbia.

Already because of its regional neighbourhood the European Community has qualified the Kosovo problem from the very beginning as a problem of its own. The factual contributions offered by the EC were

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[8] See S. Hennes, *Externe Hoheitsgewalt in Krisengebieten*, Nomos: Baden-Baden 2006, p. 205 and N. Malcolm, 1998, 327.

often, however, incoherent, they were presented late in time and had in many cases little or no practical effect.[9] This experience was a worrying presage for what the EC would be able to achieve with regard to Kosovo.

On 27 August 1991 the European Community established an arbitration commission, the so-called Badiner-Commission, in order to identify appropriate means and ways to counter the Yugoslav problem.[10] The opinions presented by this commission were strongly criticized.[11] With regard to the Kosovo question the arbitrary way in which the uti possidetis principle was applied has to be highlighted.

Opinion No. 3 contains the following statement:

> The boundaries between Croatia and Serbia, between Bosnia-Herzegowina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.
>
> Except were otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initiatially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 Dezember 1986 in the case between Burkina Faso and Mali (Frontier Dispute, (1986) Law Report 554 at 565):
>
> 'Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles …'
>
> The principle applies all the more readily to the Republic since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

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[9] See also the (more positive) analysis by J. Nadoll, "Die Europäische Union und die Konfliktbearbeitung in Ex-Jugoslawien 1991–1998 – Mühl- oder Meilenstein?," in: K. Schubert/G. Müller-Brandeck-Bocquet (eds.), *Die Europäische Union als Akteur der Weltpolitik*, Leske + Budrich: Opladen 2000, pp. 81–101.

[10] See J. Verhoeven, "La reconnaissance internationale: Déclin ou renouveau?," in: *AFDI* 39 (1993), pp. 7–40; P. Hilpold, "Die Anerkennung der Neustaaten auf dem Balkan. Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen," in: *AVR* (4/1993), pp. 387–408 and M. Pomerance, "The Badinter-Commission: The Use and Misuse of the International Court of Justice's Jurisprudence," in: *Michigan Journal of International Law* 20 (1998), pp. 31–58.

[11] See, for example, P. Radan, "Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter-Arbitration Commission," in: *Melbourne University Law Review* 24 (2000), pp. 50–76.

While it is uncontested that the uti possidetis principle has become an important and highly useful instrument for the delimitation of boundaries in the colonial contest there are considerable doubts whether the same is true outside this area. While some state that function and aim, the prevention of civil war, are in both cases the same, at a closer look this may no longer prove true. In fact, it is known that the uti possidetis principle was extremely useful for the widely peaceful administration of decolonization where questions of internal self-determination, i.e. the democratic participation of the whole people of the colonial entity played little to no role.[12] The situation in Yugoslavia was totally different: The Yugoslav dissolution process did not pertain to a colonial context and neither was it possible to ignore the principle of internal self-determination and democratic participation. This holds true if one adopts a pragmatic position like it was the case for the Badinter Commission. The disregard for the interests and ambitions of the Albanian minority should, in fact, become a major factor of destabilization for Rump Yugoslavia.

At the Conference for Yugoslavia operating since 1992 the Kosovo question was qualified on this basis as a minority problem with all the ensuing consequences:

- Minority questions have to be separated from questions of (external) self-determination. Minorities are not holders of a right to an independent state.
- The existing borders have to be respected. The state in which the respective minorities reside may require respect for its sovereign powers and also enforce them if necessary.[13]

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[12] See S. Ratner, "Drawing a Better Line: Uti Possidetis and the Borders of a New State," in: *AJIL* 90 (1996), pp. 590–624 (613 ss.); G. Nesi, "L'Uti Possidetis Hors du Contexte de la Décolonisation: Le Cas de l'Europe," in: *XLIV AFDI* (1998), pp. 1–23; G. Abi-Saab, "Le Principe de l'Uti Possidetis – Son Role et ses Limites Dans le Contentieux Territorial International," in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Liber Amicorum Lucius Caflish, pp. 657–671 and J. Vidmar, "Confining New International Borders in the Practice of Post-1990 State Creations," in: *ZaöRV* 70 (2010), pp. 319–356.

[13] In the past it was even said that minorities had a duty to be loyal towards the residing state. This position begs some questions. The loyalty obligation of members of a minority is in no case stronger than that of members of the majority. See P. Hilpold, "Commentary to Art. 2 of the European Framework Convention for the Protection of National Minorities," in: M. Weller (ed.), *The Rights of Minorities*, OUP: Oxford 2005, pp. 97–105.

– The possibilities for other states or for international organizations to intervene are limited. On the one hand it is true that minority questions are surely no longer matters of a mere internal concern, even if no specific treaty norm is applicable for the respective case.[14] On the other hand, in practice it proves to be very difficult for States to intervene from outside in minority situations.[15] It seems that International Organizations are in this regard more efficient. As it is known, the European Union has employed the instrument of conditionality in a very effective way to pursue its aims in the field of human rights protection. Conditions requiring respect for fundamental human rights, for the rule of law or good governance have become necessary elements for all forms of external action by the European Union.[16]

Also the EU Enlargement process and the associated pre-accession strategy was characterized by this conditionality policy making broad reference also to minority rights.[17]

A special relationship of this kind was, however, not given between the EU and Rump-Yugoslavia at the beginning of the 1990s and Serbia showed itself rather immune in front of sanctions. "Soft sanctions" prove to be particularly effective in those cases where there are strong bilateral relations that no party wants to jeopardize or where both parties fear to lose advantages from future cooperation. For EU Members Art. 7 TEU is applicable, a provision stipulating that the European Union may determine that the values referred to in Article 2 have been

[14] Minority rights are human rights and on the basis of Article 27 CCPR they enjoy respect on a nearly universal scale. See A. Spilioupoulou Akermark, *Justifications of minority protection in international law*, Kluwer: London et al. 1997 and P. Hilpold, "UN Standard-Setting in the Field of Minority Rights," in: *International Journal on Minority and Group Rights* 14 (2–3/2007), pp. 181–205.

[15] This has become evident also in the context of the discussions about the so-called Hungarian Status Law. See P. Hilpold/Ch. Perathoner, *Die Schutzfunktion des Mutterstaates im Minderheitenrecht*, NWV et al. 2006.

[16] See P. Hilpold, "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance," in: *EFAR* 7 (1/2002), pp. 53–72 and A. Jünemann/M. Knodt (eds.), "Externe Demokratieförderung durch die Europäische Union," Nomos: Baden-Baden 2007.

[17] See P. Hilpold, "Minderheiten im Unionsrecht," in: *AVR* 39 (2001), pp. 432–471 and G. Toggenburg, "Minority Protection in a Supranational Context: Limits and Opportunities," in: G. Toggenburg (ed.), *Minority Protection and the enlarged European Union: The way forward*, LGI Books: Budapest 2004, pp. 1–36.

seriously and persistently breached by a Member State. The EU may adopt subsequently sanctions against that Member States.[18]

All these conditions were not given. A point was reached where sanctions and the traditional instruments for the implementation of International Law no longer worked. In hindsight it is difficult to state whether there was some sort of rational calculus behind the cynical abuse of power by the Serb government, taking recourse to extensive human rights violations. What can be taken as granted is the fact that the Serb government must have accepted willingly the risk of isolation from the State community. It may be the case that this attitude was engendered, to a considerable degree, by the embarrassingly bad impression the EU states had given when they proved to be unable to act during the conflict in Bosnia as well as by the conviction that there would be no majority for the deliberation of sanctions by the Security Council. By this, the Serb government misinterpreted however the overall consequences of the situation created. In fact, the human rights abuses in Yugoslavia in general and in Kosovo in particular had reached a level that was longer tolerable to a series of Western states and therefore also the possibility of an unilateral intervention, per se prohibited by international law, became a realistic option.

In the meantime intensive negotiations have taken place, with the involvement of states, groups of states[19] and international organisations.[20] Soon, a framework became visible in which any possible negotiated solution could move: Kosovo should receive a substantial autonomy while the territorial integrity of the Federal Republic of Yugoslavia should remain intact.[21] This was at least the essence of the Holbrooke-Milosevic agreement of 13 October 1998 and also the basis of the talks at Rambouillet castle which started on 6 February 1999, a last attempt to find a political solution. The draft agreement hammered out under heavy pressure by NATO states included far-reaching self-government for Kosovo while the Federal Republic of Yugoslavia should have preserved their sovereignty

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[18] See P. Pernthaler/P. Hilpold, "Sanktionen als Instrument der Politikkontrolle – der Fall Österreich," in: *Integration* 23 (2/2000), pp. 105–119 and F. Schorkopf, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, Springer: Heidelberg et al. 2001.

[19] In this context, the so-called contact group, consisting of representatives from the US, Russia, France, Great Britain, Germany and Italy has to be mentioned.

[20] Among these were the United Nations, the OSCE and the EU.

[21] See S. Hennes, (note 8), p. 215 ss.

over this territory and furthermore external representation as well as the competences in the fields of defense, monetary policy, tax policy and economic policy.[22] For the rest, the constitutional situation for this territory resembled very much that of a sovereign state. Far-reaching protective measures should ensure respect for human rights and minority rights and a sophisticated system of guarantees should ensure effective participation of all groups in political affairs. To ensure respect for these provisions an international troop ("Kosovo Force—KFOR") should be stationed in Kosovo.[23]

Both for the Serb as for the Albanian side this draft contained problematic elements. While the former aimed at total independence from Serbia, the latter had strong objections against the admission of NATO-led international troops with far-reaching prerogatives and privileges.[24] At the end, these objections were decisive for the rejection of this draft by the Yugoslav delegation. For the NATO states this conciliation attempt was ultimate, in particular in view of the massacre committed by Serb troops on the Albanian civil population in the town of Raçak on 15 January 1999. The rejection of the respective text opened the door for a military intervention. NATO bombarding began on 24 March 1999. On 10 June 1999 the defeated Serb troops withdraw from Kosovo[25] and with them a considerable part of the Serb population (about 200,000 people) left this province, either voluntarily or by force. The remaining Serb population was now subject to repressions by the Albanian group in retaliation for the discrimination suffered before.

From the viewpoint of international law NATO intervention of 1999 is highly problematic. Prevailingly the opinion is held that this act of humanitarian intervention in favour of the Albanian group in Kosovo violates international law. Even though the Security Council had affirmed the presence of "a threat to peace and security in the region" and all parties in Kosovo as well as the Federal Republic of Yugoslavia were

[22] See Chapter 1 of the draft.

[23] See Chapter 7 of the draft.

[24] For the Serb party it appeared to be totally unacceptable to allow supply for NATO troops in Kosovo via the territory of the Federal Republic of Yugoslavia.

[25] Already a day before KFOR and the governements of Rump-Yugoslavia and Serbia had concluded an agreement on the military technical details of the withdrawal. See "Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia," 9 June 1999, http://www.nato.int/kosovo/docu/a990609a.htm (25 June 2008).

urged to take a series of measures that should prevent a further escalation of the situation no authorization for the use of coercive measures was given.

At the same time, this resolution reaffirmed "to commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."

Although the basis is created for the establishment of an international civil and military presence, the consent by Yugoslavia is required.

On the other hand it cannot be contested that NATO intervention of 1999 ended the use of violence by serb forces and their allies, however at the price of a heavy blood toll and with ensuing acts of retaliation against the Serb population (and other minorities factually or purportedly allied with the Serbs). No organ of the United Nations has ever passed a final judgment on this intervention. Although the Federal Republic of Yugoslavia on 29 April 1999 filed applications instituting proceedings against ten NATO Member States (Belgium, Germany, France, Italy, Canada, the Netherlands, Portugal, Spain and the USA), denouncing i.a. the violation of the prohibition of the use of force, of the prohibition of intervention, of the genocide convention, of fundamental human rights and freedoms as well as of fundamental principles of humanitarian law the ICJ did not enter into the merits of this case as the Federal Republic of Yugoslavia, not having been recognized as a successor of the Socialist Republic of Yugoslavia by the state community, lacked standing before the ICJ.[26]

Already the intervention of 1999 has led to an intense discussion whether these measures, if they were not to be seen per se as in conformity with international law, could perhaps be qualified as a first step in the development of a respective customary law rule.[27] According to this writer's view this is to be ruled out categorically. It is not only doubtful whether it would make sense to dumb the prohibition of the use of force rule for human rights purposes but it has to be asked in the first place whether this would be possible altogether if we consider that this prohibition has a *jus cogens* quality. Furthermore it has to be stated that the

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[26] At the moment the action was filed the Federal Republic of Yugoslavia was therefore not a member of the United Nations and therefore neither a party to the ICJ Statute. See ICJ Reports, "Legality of Use of Force," Judgment of 15 December 2004.

[27] See in this sense A. Cassese, "Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?," in: *EJIL* 10 (1999), pp. 23–30.

reaction by the state community to NATO intervention clearly evidenced that such an attempt of re-interpretation of the prohibition of the use of force finds no approval.[28]

3. Resolution 1244 of 10 June 1999[29]

The UN Security Council has never give any approval to NATO intervention. By emanating Resolution 1244 this organ has, however, set the conditions for a new beginning. While the problematic causes of this situation where ignored the consequences were fully taken into consideration. NATO intervention has opened the way for the implementation of many elements of peace plans previously elaborated (or, respectively, of previous demands against Serbia). Thereby, the basis was created for the further development of peace models generally applicable in situations of such a kind.

Nonetheless, also on the legal plane it is not possible to fully ignore the relationship between the humanitarian intervention of 1999 and the ensuing peace settlements. Time and again this connection reappears and in particular in these days when autonomy is to be superseded by independence the events of 1999 return to life in a rather compromising light. Notwithstanding the humanitarian necessity of this intervention its illegality can hardly be denied.

Res. 1244 represents in many senses a landmark document in the present development of international law. Thereby, earlier endeavours to create a substantial autonomy have been taken up and further developed. It contains a far-reaching status settlement which, at the same time, is only intended to have a provisional nature. In an enormously expensive endeavour the state community has created a legal setting that was in many ways similar to a trusteeship situation even though there was no indication what development this territory should take.

From a legal point of view Res. 1244 does not impinge on Serbia's territorial sovereignty over Kosovo. The effective power over this territory is,

[28] See in detail P. Hilpold, "Humanitarian Intervention: Is there a Need for a Legal Reappraisal?," in: *EJIL* (3/2001), pp. 437–467.

[29] See also the contribution by A. Gioia in this volume. See also M. Weller, *Contested Statehood*, OUP: Oxford 2009, pp. 179 ss.

however, transferred to the United Nations. For this motive, Kosovo was also characterized as a "ward of the international community."[30]

As already foreseen in the Rambouillet Agreement, both a civil and a military presence was introduced. The former was to be exercised directly by the United Nations, while the military presence was delegated to KFOR.[31] From a technical viewpoint this was a crisis territory administrated by the UN. As it is known, over the last years the UN has acquired broad experience with such regimes (see, for example, Namibia, Cambodia, Bosnia-Herzegovina and Eastern Slavonia) but it goes without saying that the challenge the Kosovar situation posed overshadowed all previous cases.[32]

At the same time it has to be said that this experience has led to the development of common principles on how territorial administrations of this kind should be conceived. Closest to the situation in Kosovo comes that in Bosnia and the UN wanted to make use of this experience, both for good as for bad. After over a decade of supervised administration[33] Bosnia is an instructive example for the fact that it is not possible to simply command to a country to go together, if there are so large differences on the political, the religious and the cultural level. By reference to this country it is furthermore possible to demonstrate that also well-intended international activism of international organizations can lead to overlappings, ineffectivities and an outright paralysis of the state apparatus if there is no or only insufficient coordination.[34] This was to be averted for Kosovo and therefore the UN Secretary-General created a well-organized administrative system.

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[30] See B. Knoll, "Legitimacy through defiance: The UN and local institutions in Kosovo," in: *Helsinki Monitor* (4/2006), pp. 313–326 (314), referring to Strobe Talbott.

[31] At least politically it was somewhat delicate that KFOR troops came to a considerable extent from NATO states that had participated in NATO intervention of 1999 with the mission now being led by the United Nations. See E.E. Triantafilou, "Matter of Law, Questions of Policy: Kosovo's Current and Future Status under International Law," in: *Chicago Journal of International Law* 5 (1/2004), pp. 355–368 (363).

[32] See B. Schlütter, "Rechsstaatlichkeit der UN-Verwaltungsherrschaft in Kosovo," in: *Südosteuropa* 50 (7–9/2001), pp. 303–323.

[33] In this the most decisive role is exercised by the International Community's High Representative. Originally the High Representative should have participated in the exercise of state powers only for a limited time. At the beginning of 2008, however, the represenatives of the EU, the USA and Russia decided to prorogate his function *sine die*.

[34] See in this sense H.F. Kiderlen, *Von Triest nach Osttimor – Der völkerrechtliche Rahmen für die Verwaltung von Krisengebieten durch die Vereinten Nationen*, Springer: Heidelberg 2008, p. 62.

According to para. 10 of Res. 1244 the UN GS was authorized to establish an international civil presence in order to provide an interim administration which should grant the people of Kosovo a "substantial autonomy" within the Federal Republic of Yugoslavia and to oversee the development of a provisional democratic government.

This civil presence was established as "United Nation Mission in Kosovo" (UNMIK) under the direction of a "Special Representative of the Secretary-General" (SRSG). This civil administration is (was) based on four pillars for which different international organisations are responsible:

- the UNHCR for the area "humanitarian affairs;"
- the UN for the "Interim Civil Administration;"
- the OSCE for "Institution Building" and
- the EU for "Reconstruction."

The tasks of the first pillar were accomplished already after a year. At its place a new pillar for police and justice was created whose tasks had been fulfilled before within the second pillar.[35]

The aims and functions of the security presence KFOR are comprehensively regulated in para. 9 of Res. 1244. In particular, reference is here to be me made to

- deterring of renewed hostilities,
- establishment of a secure environment,
- ensuring public safety and order until the international civil presence can take responsibility for this task,
- conducting border monitoring duties.

At the same time, Provisional Institutions of Self-Government were established that should assume step by step ever broader competences. The most important components of this system of self-government are the Kosovo Parliamentarian Assembly, the government of Kosovo and the judicial system.

[35] Ibid., p. 64s.

4. Problematic Aspects of the Implementation of Res. 1244

The SRSG should assume the key role for the functioning of the civil administration. As he had to operate in a framework that was legally not clearly defined the SRSG was required to exercise his powers with great sensibility. In practice, the powers of the SRSG were interpreted, however, very extensively. UNMIK and its special representative stood at the top of all three powers. Even after local institutions have been built up in a step-by-step process and these institutions have assumed, in part, the functions of the UNMIK, the SRSG has maintained a final control function.[36] The creation of a parallel power totally exempted from local jurisdiction and from any administrative control which should at the same time promote both the build-up of a local self-administration and respect for the rule of law and human rights soon appeared to be contradictory and legally problematic.[37] On a factual level thereby a state-in-the-state was created which asked for the respect of principles the SRSG himself was not prepared to obey. The fact that the UNMIK was itself part of a system obliged to the respect for human rights and the principle of the rule of law was a weak consolation of no real avail when practical problems arose.

As it is known, the work by the SRSG did not remain totally exempted from control. To this end the institution of an Ombudsperson was created. This Ombudsperson has taken his function very seriously and has repeatedly voiced criticism. Often, however, this criticism was disregarded. After this position was transformed, in 2005, into an institution of a mere "internal" relevance, the "Human Rights Advisory Panel" should assume a similar role. This institution was, however, criticized for the fact that it was an internal administrative institution whose independence was not guaranteed.[38]

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[36] See R. Everly, "Reviewing Governmental Acts of the United Nations in Kosovo," in: *German Law Journal* 8 (1/2007), pp. 21–38 (22 s.).

[37] Ibid.

[38] Ibid., p. 34 s. See, on the whole, also the contribution by M.J. Aznar-Gómes, "Some Paradoxes on Human Rights Protection in Kosovo" and G. Nolte, "Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and their Implementation," in: P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung, Liber Amicorum Christian Tomuschat*, Engel-Verlag: Kehl am Rhein 2006, pp. 15 ss. and 245 ss. These institutions have accepted complaints until 31 March 2010.

Generally, the human rights and the minority rights situation in Kosovo is to be judged very critically. The Serb minority which in the past had a dominant position was repeatedly victim of acts of persecution and had to leave the country in great numbers. Acts of violence against the Serb population took place on a larger scale in March 2004; KFOR reacted to this violence only in an insufficient manner. Even worse was the persecution of the so-called RAE-minorities (Roma, Ashkali, Egyptians). These groups were denounced of complicity with the former Serb ruling elite—in particular in the context of aggressions against the Albanians. Now members of these groups are persecuted and driven out of the country while the security forces remain inactive and no serious attempt to prosecute these crimes can be discerned.[39]

Also economic development remains unsatisfactory. While financial aid by the state community has brought some sectors to grow no lasting development took place. Infrastructures are still in a dire state and there is a great dearth of experts and raw material. As Kosovo's economy is traditionally closely interwoven with that of Serbia now that Kosovo wants to go its own way both economies have to be dissected as otherwise also a political autonomy will not be feasible. Corruption and large scale unemployed add to this province's heavy problems.[40]

From the very beginning it was clear that an open-ended international presence in Kosovo would be sustainable neither financially nor politically. And, most important of all, it would not be in the interest of Kosovo either. The experience of Bosnia, where the ethnic groups do not really cooperate but rather live side by side set a clear warning. In any case, however, a status solution like that in Bosnia would have hardly been feasible on the legal plane. As it is known, the solution for Bosnia is based on an international treaty, the treaty of Dayton, signed by all parties involved while the status regulation for Kosovo is based on a resolution by the Security Council and this status is only of a provisional nature which should be superseded by the final regulation to be adopted at a later stage.

It was therefore inherent in the provisional nature of this solution that efforts should be undertaken to achieve a final solution that would take

[39] See C. Cahn, "Birth of a Nation: Kosovo and the Persecution of Pariah Minorities," in: *German Law Journal* 8 (1/2007), pp. 82–94.

[40] See also R. Biermann, "Zwischen Friedenskonsolidierung und Friedensschaffung," in: *Vereinte Nationen* (2/2007), pp. 133–141.

into regard all interests involved. How should a final compromise, however, look like if the Serb part wants to defend territorial sovereignty while the Albanian majority in this province demands independence? The magic formula which should bridge this gap was "standards before status." By the introduction of basic standards of civil convivence a confidence building process should be engendered and the status question should lose much of its urgency. These standards should create the basis for a multiethnic society in which democracy, tolerance, free movement and free access to judicial organs in Kosovo for all persons independently from their ethnic origin should be a normality.[41]

In this context it was also talked about "earned sovereignty."[42] The basic premise of this approach was that aid should be made conditional upon an active contribution by the respective communities. Intellectual sponsorship for this approach was provided by the conditionality policy of the EU and the World Bank institutions.

In May 2005 the UN Secretary-General called for an evaluation of this process. This evaluation was carried out by the Norwegian diplomat Kai Eide who presented his report on 7 October 2005.[43] The basic line of this report was overall positive. He acknowledged that a positive process was under way and that functioning local institutions were being built up with local leaders gradually assuming ownership of these institutions. At the same time, however, he voiced also severe criticism when he came to the conclusion that Kosovo Serbs had chosen to stay outside this process. Also with regard to the economy he came to mixed conclusions when he found at the one hand that significant progress has been made but at the other qualified the overall economic situation as bleak. Against the judicial system he voiced the severest criticism. In this deeply divided society an international presence was still necessary but the Kosovar people had to take the development of their society into their own hands. As a consequence Eide recommended the start of a status process.[44] From

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[41] See the document "Standards for Kosovo" presented by the Special Representative on 10 December 2003, http://www.unmikonline.org/standards/doc/leaflet_stand_eng.pdf (7 July 2011).

[42] See B. Knoll, "From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate," in: *EJIL* 16 (4/2005), pp. 637–660 (640).

[43] S/2005/635 of 7 October 2005.

[44] "There will not be any good moment for addressing Kosovo's future status. It will continue to be a highly sensitive political issue. Nevertheless, an overall assessment leads to the conclusion that the time has come to commence this process." Ibid., p. 4.

now on the slogan was "standards and status."[45] This report might appear to be contradictory, at least in part, but at the same it mirrors very well the situation in Kosovo. It gives clear evidence to the fact that there are no simple solutions, no sure formulas for success at hand.

5. The Athisaari Plan

Mister Eide's recommendations were taken up by the Security Council[46] and on 14 November 2005 Martti Ahtisaari was nominated as UN Special Envoy for the future status process of Kosovo. Also in November 2005 the Contact Group released "Guiding Principles" for the settlement of Kosovo's status. In this document a rather ambiguous position was taken that reflected the complexity of the conflicting positions: A return to the pre-March 1999 situation was excluded but at the same time no solution that was unilateral or resulted from the use of force was considered as acceptable. It was affirmed that the final solution should be endorsed by the Security Council. In January 2006 it was added that any final decision should be taken by the Kosovar people and that particular attention should be devoted to the protection of minorities.

In the aftermath Martti Ahtisaari conducted a series of talks with all involved parties which evidenced, however, a profound conflict of interests. In his Comprehensive Proposal for the Kosovo Status Settlement presented on 15 March 2007 to the UN Secretary-General and forwarded on 26 March 2007 to the Security Council[47] he came to the conclusion that a consensual solution was not achievable and that therefore independence—together with extensive guarantees in favour of the minorities and under initial international supervision—was the only practicable solution. By this way, the principle "standards before status" was identified as the main problem and as an obstacle for further progress:

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[45] See Ch. Pippan, "Die Herausforderungen der 'Kosovo-Frage' für die Europäische Union vor dem Hintergrund des Statusprozesses," in: G. Nolte/P. Hilpold (eds.), *Auslandsinvestitionen – Entwicklung großer Kodifikationen – Fragmentierung des Völkerrechts – Status des Kosovo*, Peter Lang: Frankfurt a.M. et al. 2008, pp. 231–258 (243).

[46] UN Doc.S/PRST/2005/51, 24 October 2005.

[47] See UN Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc.S/2007/168/Add.1.

> Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconcilitation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.[48]

UNMIK's eight-year-long administration of this territory had created an irreversible situation. A mere autonomy for this territory within Serbia was no longer realistic:

> For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia—however notional such autonomy may be—is simply not tenable.[49]

Nor was it sustainable to simply continue with UNMIK administration. According to Ahtisaari under UNMIK's authority, institutions have been created and developed that had reinforced the legitimate expectations of the Kosovo people for more ownership.[50] Regrettably, however, UNMIK had not been able to develop a viable economy.[51] Ahtisaari identified this status of international administration as the main hindrance for the evolution and the definite affirmation of an economic and societal system that should form the foundations for an independent and self-sustaining Kosovo:

> Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With

[48] Ibid., para. 4.

[49] Ibid., para. 7.

[50] See the Report of the Special envoy of the Secretary-General on Kosovo's future status, 26 March 2007, S/2007/168, para. 8.

[51] Ibid., para. 9.

> continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia.[52]

6. An Assessment of the Ahtisaari Report

The Ahtisaari Report represents a sophisticated edifice of international and constitutional provisions which should ensure the sustainability of a multiethnic state coming into life under extremely precarious conditions. Although Ahtisaari studiously avoided to make use of the term "state" he endowed this entity not only with the factual powers of a state, both on the internal as on the external plane,[53] but also with all the formal trappings proper to a state: flag, seal and anthem.[54]

The recognition of independence should be conditioned by some limitations with regard to the sovereign powers to act. According to Art. 1.8 of the Comprehensive Proposal Kosovo should have no territorial claims against, and should seek no union with, any State or part of any State.[55] Although the Ahtisaari Plan was often criticized it would be mistaken to see therein a violation of principle VI of Res. 1541(XV) of 15 December 1960. According to this principle also integration with an independent State should be considered as a legitimate expression of the right to self-determination. The only requirement presently attached to such a decision is that it should take place on the basis of a free, informed and democratic process.[56] Res. 1541 (XV) regarded, however, the colonial area. The process of self-determination envisaged by Ahtisaari was of a different nature. The main aim was the political stabilization of a

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[52] Ibid., para. 10.

[53] With regard to the external side the capacity to conclude international agreements and to become members of an international organisation have to be mentioned. Also Kosovo's obligation to assume part of Serbia's debt (Annex VI to the Ahtisaari Report) can be interpreted as a further indication that—according to this project—state succession should take place. According to M. Kohen, "Le Kosovo: Un Test Pour la Commaunté Internationale," in: V. Chetail et al. (eds.), *Conflits, sécurité et coopération, Liber amicorum Victor-Yves Ghabali*, Bruylant: Bruxelles 2007, pp. 367–381 (373).

[54] See para. 1.7 of the Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1.

[55] Ibid.

[56] See also UNGA Res. 2625 (XXV) of 24 October 1970, Principle of equal rights and self-determination of peoples, para. 4.

multi-ethnic entity. The self-determination process as an instrument to achieve this end can be made subject to conditions. This situation can be compared to that of Austria after the First World War when a prohibition of annexation was introduced by the treaty of Saint Germain and the treaty of Versailles.[57]

The Ahtisaari Plan mirrors the most recent developments in human rights and minority rights and was inspired also by developments in the fields of autonomy rights, national constitutional law and the creation of a civil administration.[58] At the same time this plan stands out for its wealth of details directed at equilibrating the rights of the majority, the rights of the minorities and those of the state as a whole. Although this plan has not found direct recognition it is very likely that it will constitute an important point of reference in case of future litigations of such a kind.

In view of the fundamental conflict between the interests involved it was obvious from the very beginning that Ahtisaari would have to stand with one side, at least with regard to the fundamental status question. This was, in the final end, the Albanian side, that is the party whose appalling humanitarian situation had prompted international intervention. The automatic consequence of this side-taking was the strict opposition to this plan by Serbia and Russia. On the other hand, it has also to be remarked that Ahtisaari had tried to readjust the balance by awarding very generous minority rights.[59] It was obvious that all these provisions would have formed a very onerous mechanism and represented a great challenge for an independent state of Kosovo. On the other hand, it becomes also clear from the factual situation which has taken shape after the declaration of independence of 18 February 2008 that there is no alternative to a balancing of interests, in whatever legal cloth it may be dressed. The ICJ Opinion of 22 July 2010 gives further confirmation to this fact.

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[57] See Art. 88 of the Treaty of Saint Germain which contained the respective obligation for Austria and Art. 80 of the Treaty of Versailles, containing the corresponding prohibition for Germany.

[58] In this field the provisions of the Dayton agreement and the special statute for Republika Srpska exercised important inspirational powers.

[59] At the centre of the attention were the single villages which were endowed with very extensive powers. They should have been empowered, for example, to establish transborder contacts with Serbia (Art. 10 of Annex III). Furthermore, in order to make minority protection effective the borders of the minority villages were drawn in a very generous manner.

7. The Declaration of Independence of 17 February 2008

Res. 1244/1999 is very clear at n. 19: The civil and military presence should last as long as the Security Council takes no different decision. The UN administration was therefore to be considered as provisional even though no time limit was set. As no consensual solution to the status question was found the Security Council was approached where, however, the approbation of Russia was needed. During the summer of 2007 the Contact Group initiated further negotiations between Belgrade and Pristina under the direction of the Troika composed of the EU, Russia and the US. Up to autumn 2007 these efforts did not bring any results. On 10 December 2007 the Troika admitted the failure of these negotiations. The diplomatic efforts had not brought about any result and now those forces began to prevail that aimed at a unilateral solution.

On 17 February 2008 109 members of the Provisional Kosovar Assembly declared the independence of Kosovo. The 17 representatives of the Serb minority did not participate at the voting. This was a decisive step towards the independence of Kosovo and the ICJ did later pay much attention to the concrete circumstances of this act when it had to evaluate the legality of the declaration of independence in the respective advisory proceeding.

If this act was to be ascribed to the Provisional Assembly the respective deliberation violated Res. 1244/1999 because also this body had to obey the resolutions of the Security Council. This is at least true if we do not consider the right to self-determination. As will be shown the ICJ found a way to bypass this very delicate question without having to examine the extremely explosive question of the right to self-determination. In fact, the ICJ qualified the declaration of independence as an act of the single members of the Provisional Assembly and not as an act of the Assembly as such. And Res. 1244/1999 did not impose or prohibit anything to the single delegates as private persons.[60]

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[60] For a critical analysis of this position taken by the ICJ see P. Hilpold, "The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443, published also in *ARIEL* 14 (2009). For a first critical commentary see also S. Yee, "Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion," in: *Chinese Journal of International Law* 9 (2010), pp. 763–782; A. Peters, "Das Kosovogutachten und die Kunst des Nichtssagens," *Juristenblatt* 65 (23/2010), pp. 116–117; A. Peters, "Does Kosovo lie in the lotus-land of freedom?," in: *Leiden Journal of International Law* 24 (1/2011), pp. 95–108. For a viewpoint

8. The Position by the EU

Some days before the Kosovo declaration of independence, on February 4, 2008, the EU Council, acting in the ambit of the Common Foreign and Security Policy, decided to adopt a Joint Action for the Rule of Law Mission EULEX Kosovo.[61] This mission, composed of 1,800 judges, policemen and customs officers should take UNMIK's place and "fulfil its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities."[62]

NATO security presence shall be continued. The new constitution of Kosovo, which was drafted with the Ahtisaari Plan as a blueprint, entered into force on 15 June 2008.

From the very beginning the EULEX mission raised doubts as to its compatibility with Res. 1244/1999 and the ICJ with the Opinion of 22 July 2010 was neither able to provide in this regard definite clarity. On the other hand, it can neither be ignored that a process has taken place by which the diverging positions have been re-interpreted and re-approached.

9. The Legal Questions to Be Solved

There can be no doubt that the ICJ Opinion of 22 July 2010 has given an important contribution to the clarification of the legal situation of Kosovo. After that date many questions that had seemed to be so pivotal before had lost much of their significance. On the other hand, next to no of these questions had been solved in the proper sense—and new questions have been added.

In the present volume it will be tried to sort out the essential questions that have characterized the Kosovo question since the declaration of independence of 17 February 2008 and to analyze them in the light of the ICJ Opinion of 22 July 2010.

Particular attention will be paid in this context to the right to self-determination.[63] As already shown the ICJ managed to essentially bypass

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approving the position by the ICJ see Gerhard Hafner and Nadia Kalb in this volume. For a different viewpoint see however Helmut Philipp Aust also in this volume.

[61] OJ L 42, 16.2.2008, p. 92.

[62] Ibid., Art. 2, para. 2 and Art. 3.

[63] See, with regard to this concept, the contributions by Helmut Philipp Aust, Peter Hilpold, Stefan Oeter and Antonello Tancredi. Helmut Philipp Aust examines the rela-

this question. Many interesting elements of such a discussion can be drawn, however, from various separate and dissenting opinions as well as from a series of governmental memoranda presented to the ICJ.[64]

A further question to which particular attention is given is recognition.[65] It is apparent that the request for an opinion was mainly prompted by Serbia's hope to place a halt to the ongoing process of recognition of Kosovo as an independent state and to bring about, at least indirectly, a condemnation of those states that have already recognized Kosovo. According to Christian Tomuschat the Kosovo recognition process should not be interpreted on the basis of the traditional criteria governing acts of recognition in the international law order of the past characterized mainly by bilateral, reciprocal relations. States should rather be

tionship of this question with that of state responsibility. Peter Hilpold, Stefan Oeter and Antonello Tancredi look into the question whether this whole debate has given further weight to the purported right to secession. See also the contribution by Anne Peters, "Das Kosovo-Gutachten und globaler Konstitutionalismus," in P. Hilpold (ed.), *Das Kosovo-Gutachten des IGH vom 22. Juli 2010, 2012*, pp. 229–258. She examines this opinion from the perspective of the constitutionalist school of thought and she explores whether this opinion is in accordance with constitutionalists principles and if these principles are further developed by the Kosovo Opinion.

[64] Very exhaustive was also the academic discussion which has taken place during the advisory procedure and in the immediate aftermath. See, for example, the "Agora" contributions in the *Chinese Journal of International Law* (1/2009), vol. 8 and, in particular, R. Müllerson, *Precedents in the Mountains: On the Parallels and Uniquiness of the Cases of Kosovo, South Ossetia and Abkhazia*, pp. 2–25; P. Hilpold, *The Kosovo Case and International Law: Looking for Applicable Theories*, pp. 47–61; P. Hilpold, "The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question," in: *ARIEL* 14 (2009); A. Tancredi, "Il parere della Corta internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo," in: *Rivista di diritto internazionale* 93 (2010), pp. 994–1052 and K. Oellers-Frahm, "Problematic Question or Problematic Answer? Observations on the ICJ'S Advisory Opinion concerning Kosovo's unilateral declaration of independence," in: *German Yearbook of International Law* 53 (2011), pp. 793–830.

As to recently published collective writings see the first edition of this book (P. Hilpold, *Das Kosovo-Gutachten des IGH vom 22. Juli 2010*, Brill: Leiden/Boston 2011) J. Summers (ed.), Kosovo: *A Precedent?*, Brill: Leiden/Boston 2011 and J. Summers (ed.), *Kosovo: a precedent? The declaration of independence, the advisory opinion and implications for statehood, self-determination and minority rights*, Martinus Nijhoff: Leiden et al. 2011.

[65] With regard to the question of recognition see generally J. Verhoeven, "La reconnaissance internationale: Déclin ou renouveau?," in: *AFDI* 39 (1993), pp. 7–40; P. Hilpold, "Die Anerkennung der Neustaaten auf dem Balkan. Konstitutive Theorie, deklaratorische und anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen," in: *AVR* (4/1993), pp. 387–408 and C. Ryngaert/S. Sobrie, "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia," in: *Leiden Journal of International Law* 24 (2011), pp. 467–490.

considered as "agents of the international community" when questions of State recognition are at issue.[66]

Of great relevance is the question whether and how far the results of the discussion on the secession of Kosovo can be generalized. Exactly because of the potentially far-reaching consequences of such a generalization it has been attempted to qualify these events as "sui generis." Michael Bothe examines in his contribution to what extent the measures taken by the Security Council in the Kosovo case can be interpreted as an expression of its broader peace-creating practice. He comes to the conclusion that this case offers no ready-to-use recipe but it confirms rather the importance of the instruments of negotiation and mediation.

Attempts to solve the Kosovo question are still under way.[67] Although there are many elements in the ICJ Opinion on Kosovo of 22 July 2010 which must provoke dissent it can neither be questioned that the ICJ has set clear points of reference for any future discussion on this subject. It has further to be recognized that on this basis the respective discussion has lost some of its emotionality. In spring 2011 EU guided, "technical" talks (on questions like the provision of energy, telecommunication and traffic) have been taken up between Belgrade and Pristina. It is hoped, in particular by Serbia, that these talks will lead to new status negotiations.[68] The ICJ has recognized, at least indirectly, that the Kosovar people has taken their destiny into their own hands. As a consequence, the Kosovar people has to bear also the respective responsibility. Rights are closely connected to obligations. It is interesting to note that also Serbia, heavily restricted in its possibilities to act by the ICJ Opinion, has amplified its capacity to act to a considerable extent by demonstrating its readiness for talks.[69] It is supposed that at the end all parties involved will have to make concessions and it could be the case that the outcome of the negotiations will resemble very much the main lines of the Ahtisaari Plan. The earlier the inevitability of a compromise is recognized by all parties the earlier the state community can withdraw from this expensive and troublesome state building process in Kosovo.

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[66] See Christian Tomuschat in this volume.

[67] See on this subject S. Richter, "The political future of Kosovo after the ICJ Opinion: Status question (un-)resolved?," in this volume.

[68] See S. Richter, "Zur Zukunft des Kosovo – Politische Entwicklungen und Szenarien," in: Uwe Halbach et al. (eds.), *Kosovo – Sonderfall mit Präzendenzwirkung?, Stiftung Wissenschaft und Politik 2011*, pp. 23–32 (pp. 23 and 26 s.).

[69] Ibid., p. 27 s.

Should it be possible to achieve this aim within a realistic time-frame (and should this find expression in a corresponding number of recognitions)[70] all these efforts, which exceeded since long the worst expectations, would have been worth their price. The resulting situation would not only be a very lucky one for the Kosovar people but also give further prove to the peace creating force of international conflict settlement mechanisms.

The other option would be again a redrawing of the borders, i.e. a further act of secession whereby the Northern part of Kosovo (North Kosovo or *Ibarian Kolashin*) would be separated from this territory and be aggregated to Serbia.

This would be a further step in a long process whereby a territory, former Yugoslavia, once renowned for its ethnic and cultural richness and variety as well as for its ability to manage cultural diversity[71] becomes more and more "ethnically pure." This would be tantamount to a triumph of the logic of nationalism and a heavy backlash for all hopes that the modern international peace order might strengthen the overall trend towards coexistence and cohabitation between nations and within nations.

Bibliography

Abi-Saab, G., "Le Principe de *l'Uti Possidetis* – Son Role et ses Limites Dans le Contentieux Territorial International," in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch*, pp. 657–671

Anderson, B.R., *Imagined Communities*, Verso: London et al. 2006

Aznar-Gómes, M.J., "Some Paradoxes on Human Rights Protection in Kosovo," in: P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung, FS Christian Tomuschat*, Engel-Verlag: Kehl am Rhein 2006, pp. 15 ss.

[70] As of 25 April 2012 90 states out of the 193 UN Member States have recognized the Republic of Kosovo.

[71] It is often forgotten that in the past, the Socialist Federal Republic of Yugoslavia was a major champion for minority rights on the international plane (although the large scale violation of human rights with regard to the Italian and the German minorities in this country in the immediate aftermath of World War II is also a sorrow fact). One of the main sponsors of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (A/Res/47/135) of 18 December 1992 was, at least in the early period, Yugoslavia. See with regard to this declaration P. Hilpold, "Minderheitenschutz im Rahmen der VN – Die Deklaration vom 18. Dezember 1992," in: *SZIER* 4 (1/1994), pp. 31–54.

Bieber, F./Daskalovski, Z. (eds.), *Understanding the War in Kosovo*, Routledge et al.: New York et al 2003
Biermann, R., "Zwischen Friedenskonsolidierung und Friedensschaffung," in: *VN* 4/2007, pp. 133–141
Brems Knudsen, T., *Kosovo Between War and Peace*, Routledge: New York et al. 2007
Cahn, C., "Birth of a Nation: Kosovo and the Persecution of Pariah Minorities," in: *German Law Journal* 8 (1/2007), pp. 82–94
Cassese, A.," Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?," in: *EJIL* 10 (1999), pp. 23–30
Daglish, K./Nasu, H., "Towards a True Incarnation of the Rule of Law in War-Torn Territories: Centring Peacebuilding in the Will of the People," in: *LIV NILR* (2007), pp. 81–114
D'Aspremont, J., "Regulating Statehood: The Kosovo Status Settlement," in: *Leiden Journal of International Law* 20 2007, pp. 649–668
Di Lellio, A., *The Battle of Kosovo 1389: An Albanian Epic*, Tauris: London et al. 2009
Everly, R., "Reviewing Governmental Acts of the United Nations in Kosovo" in: *German Law Journal* 8 (1/2007), pp. 21–38
Falk, R., Agora: "The ICJ's Kosovo Advisory Opinon—The Kosovo Advisory Opinion: Conflict Resolution and Precedent," in: *AJIL* 105 (1/2011), pp. 50–60
Frowein, J.A., "Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen," in: H.-W. Arndt et al. (eds.), *Völkerrecht und Deutsches Recht, FS Walter Rudolf*, C.H. Beck: München 2001, pp. 43–54
Henkin, L., "Kosovo and the 'Law of Humanitarian Intervention'" in: *AJIL* 93 (1999), pp. 824–828
Hennes, S., *Externe Hoheitsgewalt in Krisengebieten*, Nomos: Baden-Baden 2006
Hilpold, P., "Die Anerkennung der Neustaaten auf dem Balkan. Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzerfordernissen," in: *AVR* (4/1993), pp. 387–408
Hilpold, P., "Minderheitenschutz im Rahmen der VN – Die Deklaration vom 18. Dezember 1992," in: *SZIER* 4 (1/1994), pp. 31–54.
Hilpold, P., "EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance," in: *EFAR* 7 (1/2002), pp. 53–72
Hilpold, P., "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?," in: *EJIL* 12 (3/2001), pp. 437–467
Hilpold, P., "Minderheiten im Unionsrecht," in: *AVR* 39 (2001), pp. 432–471
Hilpold, P., "Kommentar zu Art. 2 der Europäischen Rahmenkonvention zum Schutz nationaler Minderheiten," in: M. Weller (ed.), *The Rights of Minorities*, OUP: Oxford 2005, pp. 97–105
Hilpold, P./Perathoner, Ch., "Die Schutzfunktion des Mutterstaates im Minderheitenrecht," *NWV* et al.: Wien et al. 2006
Hilpold, P., "UN Standard-Setting in the Field of Minority Rights," in: *International Journal on Minority and Group Rights* 14 (2–3/2007), pp. 181–205

Hilpold, P., "The Kosovo Case and International Law: Looking for Applicable Theories," in: *Chinese Journal of International Law* 8 (1/2009), pp. 47–61

Hilpold, P., "The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443, published also in *ARIEL* 14 (2009) (2012)

International Crisis Group, "Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis," ICG Balkans Report No 46, 9 November 1998, http://www.crisisgroup.org/library/documents/report_archive/A400171_09111998.pdf (25 Juni 2008)

Jünemann, A./Knodt, M. (eds.), *Externe Demokratieförderung durch die Europäische Union*, Nomos: Baden-Baden 2007

Kaplan, R.D., *Balkan Ghosts: A Journey Through History*, St. Martins Press: New York 1993

Kiderlen, H.F., *Von Triest nach Osttimor – Der völkerrechtliche Rahmen für die Verwaltung von Krisengebieten durch die Vereinten Nationen*, Springer: Heidelberg 2008

Knoll, B., "From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate," in: *EJIL* 16 (4/2005), pp. 637–660

Knoll, B., "Legitimacy through defiance: The UN and local institutions in Kosovo," in: *Helsinki Monitor* (4/2006), pp. 313–326

Kritsiotis, D., "The Kosovo crisis and NATO's application of armed force against the Federal Republic of Yugoslavia," in: *ICLQ* 49 (2000), pp. 330–359

Malcolm, N., *A Short History of Kosovo*, New York University Press: New York 1998

Mertus, J.A., *Kosovo: How Myths and Truths Started a War*, University of California Press: Berkely 1999

Müllerson, R., "Precedents in the Mountains: On the Parallels and Uniquiness of the Cases of Kosovo, South Ossetia and Abkhazia," in: *Chinese Journal of International Law* 8 (1/2009), pp. 2–25

Nesi, G., "*L'Uti Possidetis* Hors du Contexte de la Décolonisation: Le Cas de l'Europe," in: *XLIV AFDI* (1998), pp. 1–23

Nodall, J., "Die Europäische Union und die Konfliktbearbeitung in Ex-Jugoslawien 1991–1998 – Mühl- oder Meilenstein?," in: K. Schubert/G. Müller-Brandeck-Bocquet (eds.), *Die Europäische Union als Akteur der Weltpolitik*, Leske + Budrich: Opladen 2000, pp. 81–101

Nolte, G., "Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and their Implementation," in: P.-M. Dupuy et al. (eds.), *Völkerrecht als Wertordnung, FS Christian Tomuschat*, Engel-Verlag: Kehl am Rhein 2006, pp. 245 ss.

Oellers-Frahm, K., "Problematic Question or Problematic Answer? Observations on the ICJ'S Advisory Opinion concerning Kosovo's unilateral declaration of independence," in: *German Yearbook of International Law* 53 (2011), pp. 793–830

Pernthaler, P./Hilpold, P., "Sanktionen als Instrument der Politikkontrolle – der Fall Österreich," in: *Integration* 23 (2/2000), pp. 105–119

Peters, A., "Das Kosovogutachten und die Kunst des Nichtssagens," *Juristenzeitung* 65 (23/2010), pp. 116–117

Peters, A., "Does Kosovo lie in the lotus-land of freedom?," in: *Leiden Journal of International Law* 24 (1/2011), pp. 95–108

Peters, A., "Das Kosovo-Gutachten und globaler Konstitutionalismus," in P. Hilpold (ed.), *Das Kosovo-Gutachten des IGH vom 22. Juli 2010*, 2012, pp. 229–258

Pippan, Ch., "Die Herausforderungen der 'Kosovo-Frage' für die Europäische Union vor dem Hintergrund des Statusprozesses," in: G. Nolte/P. Hilpold (eds.), *Aulandsinvestitionen – Entwicklung großer Kodifikationen – Fragmentierung des Völkerrechts – Status des Kosovo*, Peter Lang: Frankfurt a.M. et al. 2008, pp. 231–258

Pomerance, M., "The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence," in: *Michigan Journal of International Law* 20 (1998), pp. 31–58

Radan, P., "Post-Secession International Borders: A Critical of the Opinions of the Badinter Arbitration Commission," in: *Melbourne University Law Review* 24 (2000), pp. 50–76

Ratner, St., "Drawing a Better Line: Uti Possidetis and the Borders of New States," in: *AJIL* 90 (1996), pp. 590–624

Richter, S., "Zur Zukunft des Kosovo – Politische Entwicklungen und Szenarien," in: Uwe Halbach/Solveig Richter/Christian Schaller (eds.), *Kosovo – Sonderfall mit Präzedenzwirkung?*, in: *Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit*, Berlin 2011

Ryngaert, C./Sobrie, "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia," in: *Leiden Journal of International Law* 24 (2011), pp. 467–490

Schlütter, B., "Rechtsstaatlichkeit der UN-Verwaltungsherrschaft in Kosovo" in: *Südosteuropa* 50 (7–9/2001), pp. 303–323

Schmierer, J., "Globalisierte Welt und Außenpolitik – März 2008," in: http://www.boell.de/demokratie-2241.html (14.6.2008)

Schorkopf, F., *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, Springer: Heidelberg et al. 2001

Shraga, D., "Military Occupation and UN Transitional Administrations—The Analogy and Its Limitations," in: M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch*, pp. 479–498

Simma, B., "NATO, the EU and the use of force: legal aspects," in: *EJIL* 10 (1999), pp. 1–22

Spiliopoulou Akermark, A., *Justifications of minority protection in international law*, Kluwer: London et al. 1997

Stahn, C., "Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government," in: *Leiden Journal of International Law* 14 (2001), pp. 531–561

Stahn, C., *The law and practice of international territorial administration*, CUP: Cambridge 2008

Summers, J. (ed.), *Kosovo: a precedent? The declaration of independence, the advi-*

sory opinion and implications for statehood, self-determination and minority rights, Martinus Nijhoff: Leiden et al. 2011

Tancredi, A., "Il parere della Corta internazionale di giustizia sulla dichiarazione d'indipendenza del Kosovo," in: *Rivista di diritto internazionale* 93 (2010), pp. 994–1052

Toggenburg, G., "Minority Protection in a Supranational Context: Limits and Opportunities," in: G. Toggenburg (ed.), *Minority Protection and the enlarged European Union: the way forward*, LGI Books: Budapest 2004, pp. 1–36

Triantafilou, E.E., "Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law," in: *Chicago Journal of International Law* 5 (1/2004), pp. 355–368

Verhoeven, J., "La reconnaissance internationale: Déclin ou renouveau?," in: *AFDI* 39 (1993), pp. 7–40

Vidmar, J., "Confining New International Borders in the Practice of Post-1990 State Creations," in: *ZaöRV* 70 (2010), pp. 319–356

Vitzthum, W. v., "Multiethnische Demokratie," in: C.D. Classen et al. (eds.), *FS Thomas Oppermann*, Duncker & Humblot: Berlin 2001, pp. 87–116

Wilde, R., "Representing International Territorial Administration: A Critique of Some Approaches," in: *EJIL* 15 (2004), pp. 71–96

Weller, M., *Contested Statehood*, OUP: Oxford 2009

Yee, S., "Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion," in: *Chinese Journal of International Law* 9 (2010), pp. 763–782