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The Kosovo Case and International Law: Looking for Applicable Theories

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Abstract

The Kosovo problem represents a formidable occasion to re-examine some basic tenets of international law, such as the so-called right to humanitarian intervention, the right to self-determination and the right of recognition. It will be shown here, however, that many proposals suggesting the need of a radical departure from traditional positions are ill-conceived. Nonetheless, it is the uniqueness of many facets of the Kosovo problem that requires the analyst to look for new solution. It is now up to the International Court of Justice to show the way in a politically much loaded case. In particular, the right to self-determination should find a re-interpretation corresponding to the needs of the twenty-first century.

I. Introduction

1. The developments concerning Kosovo have caught international politics by surprise. Even more so, international lawyers are trying hard to make theory fit with reality. Because of the specificity of this case, it is hard to find precedents in international law that could somehow serve as a guide. Applying traditional concepts on this situation could lead to aberrant solutions. However, if theory stands in the way of understanding, the theory may be either wrong or no more adequate to describe the actual reality.[1] Here it is argued that the Kosovo case provides important elements for a re-evaluation of basic

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1 See Ian Brownlie, General Course on Public International Law, 255 Recueil des Cours de la Academie de Droit International de La Haye (1995) 30: "[. . .] theory provides no real benefits and frequently obscures the more interesting questions."
The difficulties in reconciling theory and practice with regard to the Kosovo case have been widely noted in the literature. See, for example, Karine Ardault, Christina-Maria Arion and Marina Yetongnon, L'Administration International de Territoire à l'Epreuve du Kosovo et du Timor Oriental: La Pratique à la Recherche d'une Théorie, 39 Revue Belge de Droit International (2005), para 40, 301. See also Peter Hilpold, Der Kosovo-Fall: Ein Testfall für das Völkerrecht, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2008), 779.

institutions of international law. At the same time, caution is required when all too revolutionary changes of paradigm are presented. Although in academia it might be more rewarding, at least in a short-term perspective, to speculate on epochal changes, it will be shown that a more prudent approach designed to adapt the existing concepts to the development of practice will be ultimately more helpful.

II. The roots of the Kosovo problem: preparing the field for the specificity argument

2. As it is known, within the Socialist Federal Republic of Yugoslavia, Kosovo has never been constituted as a Republic, but only as an autonomous territory and, starting with the year 1974, as an autonomous province. There was a clear purpose behind this choice: no legal basis for a demand for self-determination (accorded by the Jugoslav constitution to the single republics) should be created. On the other hand, far-reaching rights were granted to this province (such as an autonomous government, a Supreme Court, a separate territorial defense army and the right to grant citizenship and to issue passports).[2] Short of the name, on the substantial level, this status differed very little from that of the autonomous republics. It was also clear that the precautionary measures with regard to the constitutional status of this province and the corresponding balancing concessions with regard to the factual competences of this province were only of internal relevance. At the time of Yugoslavia's dissolution, however, these measures suddenly gained external character. In a much-criticized Opinion the so-called Badinter Commission applied the principle of uti possidetis to the dissolution of Yugoslavia and therefore, for the first time, to a European situation. Thereby, internal boundaries should gain the status of external frontiers:

> 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 where 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 initially 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 December 1986 in the case between Burkina Faso and Hali (Frontier Dispute, (1986) Law Report 445 at 565):
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> > 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,

2 Noel Malcolm, A Short History of Kosovo, Macmillan 1998.

> 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.[3]

3. This sweeping generalization of very different situations of self-determination is hard to accept.[4] Nonetheless, the opinions by the Badinter-Commission were considered as authoritative and had a strong impact not only on the legal qualification of the Yugoslav dissolution process but also on the way the ensuing problems were addressed. Applying the principle of uti possidetis to Yugoslavia meant that Kosovo should have no right to self-determination; the boundaries of this province could not become external frontiers of an independent state of Kosovo. If we look at the substance of the reasons the International Court of Justice (ICJ) indicated for an extensive application of the uti possidetis principle and to which also the Badinter Commission referred they could hardly justify the coming into being of a Serb State (whatever its actual name)[5] comprising also Kosovo. In fact, it was clear from the beginning that in Kosovo there was a strong movement for independence and that the opposing interests of the Serb and the Kosovar population would be hard to reconcile. At least such a reconciliation would not take place spontaneously. Both within the Badinter Commission and in the ambit of the following peace initiatives for the former Yugoslavia, the Kosovo issue was treated mainly as a minority problem. In the end, however, even this aspect was insufficiently addressed and no substantive steps were taken. It can therefore be said that Opinion No. 3 of the Badinter Commission was not only based on rather problematic theoretical foundations[6] but also it was in itself contradictory. The application of traditional theories (or what was perceived to be as such) to a new situation led to a highly destabilizing development. The period between 1991, when the Badinter Commission was constituted, and 2008, when the Parliament of Kosovo declared the independence of this province, was marked with bloody conflicts on the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) and, in particular, on that of Kosovo. Within this period, many traditional concepts were tested on the ground but the factual development took a course which has brought

3 See Opinion No. 3 of the Badinter Commission, reprinted in 3 European JIL (1992) 184–185.

4 See Steve Ratner, Drawing a Better Line: Uti Possidetis and the Borders of New States, 90 American JIL (1996), 590 (613).

5 As it is known, the federation of Serbia and Montenegro was named "Federal Republic of Yugoslavia" when it came into being in 1992 while in 2003, in a different constitutional and political setting this entity was renamed in the "State Union of Serbia and Montenegro". In 2006, this State Union disintegrated into its two constitutive parts.

6 See also Peter Radan, Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission, 24 Melbourne University LR (2000), 50.

about a result that is, again, difficult to assess according to textbook of international law. One element, heavily contributing to this result, was the act of humanitarian intervention conducted by the NATO States in 1999. Questions relating to the legality of these measures as well as those referring to a (potential) precedential character are still being discussed. Some even argue that the illegality of this intervention would render illegal ensuing arrangements.[7]

III. Humanitarian Intervention in Kosovo: *de injuria ius oritur?*

4. As it is known, the roots of this intervention date back at least to the late 1980s when the autonomous status of this province was revoked.[8] In the following, systematic persecution of the Albanian population in public service as well as in the field of justice and administration set in. Discrimination worsened to repression and outright persecution in the 1990s, forcing hundreds of thousands of people to flee their country while ethnic Serbs immigrated. A civil war-like situation arose. After the experience in Bosnia where peace had been brought much too late through the Dayton agreement in 1995, NATO countries were determined to draw a line. In two Resolutions, the Security Council (SC) identified the FRY as the main culprit of these developments[9] stopping short, however, from a decision to take "all necessary measures" or to authorize member states to do so. NATO states began to build up troops in the regions and sent a clear message towards Belgrade that violence had to stop. Nonetheless, the Yugoslav side showed to be unimpressed by these warnings and even took recourse to more violence and committed a massacre against Albanian civilists in the village of Racak. On 24 March 1999, NATO air strikes against Serb forces began. After 11 weeks, the defeated Serb troops retreated from Kosovo. There can be no doubt that this intervention was decisive for the ending of the military conflict in Kosovo and for stopping the mass killings there. At the same time, it cannot be denied that the intervention itself caused many casualties and that it occurred in violation of the UN Charter and, in particular, in violation of the most basic principle of this document, the prohibition of the use of force. In the aftermath, many attempts were undertaken to find a legal justification for this intervention within the UN system. Partly, the respective positions were based on moral or natural law argumentations and cannot, therefore, be assessed from the

7 See, with regard to the acts of recognition of Kosovo, Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: a Unilateral Declaration of Independence in Kosovo, 12 Max Planck YUNL (2008) 1 (29). See also Srdjan Cvijc, Self-determination as a Challenge to the Legitimacy of Humanitarian Intervention: The Case of Kosovo, 8 German LJ (2007), 57 (60).

8 For a detailed account see Peter Hilpold, Humanitarian Intervention: Is There a Need for a Legal Reappraisal?, 12 European JIL (2001), 437.

9 See SC Res. 1160 of 31 March 1998 and, much more explicitly, Res. 1199 of 23 September 1998. It shall no go unmentioned, however, that violations of humanitarian law have been committed also by the Albanian side, in particular by the UCK guerilla army. SC Res. 1199 has confirmed the responsibility of both parties.

standpoint of positive law. Others, however, identified elements of a customary law rule that could—possibly—allow in the future acts of humanitarian intervention as an *ultima ratio* option.[10] The conditions set for such interventions to become legal seem reasonable and convincing at first sight.[11] At a closer look, however, they do not provide any guarantee that they are suited to avoid abuse.[12] If the reactions by the members of the Community of States following the Kosovo intervention are taken into consideration, hardly any hint can be found for an emerging opinio juris in this sense. Most revealing for the lack of such a tendency is the fact that the intervening NATO countries themselves prevailingly did not have recourse to such a principle when asked to justify their action but rather to extra-legal reasoning, the concept of self-defense or explicit authorization by the SC.[13]

5. The same day when NATO intervention came to an end, on 10 June 1999, the SC adopted Res. 1244. By this resolution, the SC claimed authority over the situation and brought the Kosovo under UN control. The authorization was given to establish a UN administration (United Nations Interim Administration Mission in Kosovo, UNMIK) as well as a NATO-led peacekeeping force. It was an attempt to respond to a grave humanitarian crisis while catering to the worries of some Permanent Members of the SC (in particular, Russia and China) to the utmost extent. In this Resolution, we find no reference to the preceding events that had brought about this situation. No element can be deduced from this document that would legalize the acts of humanitarian intervention. Nor do we find any arrangement with regard to the final status of Kosovo. The whole setting created by this Resolution is deliberately provisional in nature. Territorial sovereignty by Yugoslavia on this province is not put into question. On the other side, concrete exercise of this sovereignty is suspended—and this for an indeterminate period of time. Therefore, this Resolution has created sort of a biotope. Detachted from the original legal and political environment and with no chance to survive once the UN- and NATO-cover should be lifted a totally new

10 See, in primis, Antonio Cassese, Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 European JIL (1999), 23 (27).

11 This "conditional approach" is not new. See the "Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law", ILA Report of the Fifty-Sixth Conference (1974) 217, cited in Richard B. Lillich, Humanitarian Intervention Through the United Nations. Towards the Development of Criteria, 53 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1993) 557 (562).

12 See Peter Hilpold, Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?, in: 54 Zeitschrift für Öffentliches Recht (1999), 529.

13 See Independent International Commission on Kosovo, The Kosovo Report: "Rather than defining the Kosovo intervention as a precedent, most NATO supporters among international jurists presented the intervention as an unfortunate but necessary and reasonable exception." See also the oral pleadings by Professor Ian Brownlie who acted for the Federal Republic of Yugoslavia, in the cases concerning the Legality of Use of Force, 1999, CR 99/14, p. 36.

situation within the International Community was created.[14] It was said that a situation of wardship had arisen.[15]

6. Absent a clear date when Kosovo would come of age, the benchmarks for the "maturing" of this entity should be constituted by a series of standards in the field of good governance and human rights to be reached in the following years. Even the attainment of these standards was not associated, however, with any specific consequences as to the territorial status of Kosovo.

7. The whole process was a discontinuous one. Therefore, any attempt to build a theory based on a seamless interaction of legal facts is doomed to failure from the beginning. It is, as a consequence, fallacious to investigate whether an arrangement for Kosovo could be illegal *in radice* due to the fact that it has been made possible by an act violating jus cogens. The SC itself has taken a very pragmatic approach. It is basically forward looking thereby avoiding a judgment on the events of the recent past but at the same time the SC stops short from pre-arranging decisions that are too much conditioned by unforeseeable future developments that depend, first of all, from the parties immediately concerned.

8. The old dictum that international law is not an instrument for the revision of history finds here a particular specification. NATO intervention as such, had it ever been judged by a competent tribunal, could have been qualified as illegal. Factual consequences of this intervention with regard to the status of Kosovo cannot, however, be seen in this perspective as illegal not the least because the SC has drafted Res. 1244 as a document marking a new beginning.[16] On the other side, it would mean to go too far to sustain that the SC has ratified, thereby, the NATO intervention.[17] It was only this act of "deliberate amnesia" by the SC that opened the way for a solution in the first instance, a solution that was in the immediate humanitarian interest of the Kosovar people. The goals of the UN Charter would neither be better served by a rescission of the acts permitting such a status nor by an explicit confirmation of the intervention's legitimacy.

9. Although 10 years have passed since NATO has intervened in Kosovo and notwithstanding the fact that there has been a broad, open discussion on this issue the

14 In a broader perspective, two cases could be seen as a precedent: West New Guinea and South-West Africa. While in the latter case the vicissitudes of history have lead to a positive end result, the former case resulted in a total debacle in 1963 when the nation-building process was aborted and Indonesia gained full control of this territory. In 1969 self-determination was exercised in a form not worth its name. See Antonio Cassese, Self-determination of peoples, CUP (1995), 82 who speaks of a "substantive betrayal of the principle of self-determination" (86).

15 See extensively on this issue, Bernhard Knoll, The Legal Status of Territories Suject to Administration by International Organisations, CUP (2008).

16 It would be inappropriate to take here the recourse to a principle similar to the Stimson doctrine or, more generally, to the jus cogens-character of Art. 2 para. 4 of the UN Charter and arguing, as a consequence, that facts ensuing from acts of humanitarian intervention could not be recognized as the relationship between cause and effect is, in this situation, far more remote.

17 In this sense, however, Epaminontas E. Triantafilou, Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law, 5 Chicago JIL (2004), 355 (364).

general attitude towards humanitarian intervention has not changed fundamentally. True, intense efforts have been undertaken in the first half of the last decade to represent humanitarian intervention in a new light. As it is known, in the ambit of the last great attempt to reform the UN, it has been tried to create a "responsibility to protect" in case of grave human rights abuses.[18] The Outcome Document of 2005[19] has, first of all, confirmed the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[20] It has furthermore confirmed the right of the SC to intervene in such situations, in accordance with Chapters VI and VIII—and also Chapter VII.[21] By attributing this right to the SC (and excluding thereby a unilateral right to intervention) and by formulating it as a measure of last resort the reform process has, in the end, nothing but confirmed the prevailing opinion and practice. As decisions for collective action have to be taken on a case-by-case basis, it is assured that no general principle can come to life according to which recourse to intervention by the SC would become a near-automatism.

10. In an attempt to demonstrate that SC Res. 1244 could not change the legal status of Kosovo often a famous remark by Judge Fitzmaurice is cited:

> Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war-time occupation of a country or territory cannot operate to do that [. . .] The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a territory or piece of territory in order to restore peace and security, but it could not thereby, or as a part of that operation, abrogate or alter territorial rights, – and the right to administer a mandated territory is a territorial right without which the territory could not be governed or the mandate be operated. It was to keep the peace, not to change the world order, that the Security Council was set up.[22]

11. Apart from the fact that there is no precedent within the ICJ system and that the moral authority ICJ pronouncements undoubtedly command is significantly less extensive with dissenting opinions, such statements have always to be judged in the context of their time. In fact, in the meantime, it can be demonstrated that the SC

18 For an account of this process see Peter Hilpold, The Duty to Protect and the Reform of the United Nations – a New Step in the Development of International Law?, 10 Max Planck YUNL (2006), 35.

19 A/60/L.1

20 Ibid., para. 138.

21 Ibid., para. 139.

22 Advisory Opinion of the ICJ on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 26 January 1971, [1971] ICJ Rep. 208, paras. 112–115 (115).

does what Judge Fitzmaurice said he cannot do.[23] On the other hand, in view of the importance human rights have gained in the last decades and taking into consideration the importance SC Res. 1244 had for the preservation of peace in Kosovo, it can be said that the arrangements provided for in that documents correspond perfectly to the dictum cited: SC Res. 1244 did not change the world order (at the utmost it took notice of such a change) but it was essential to keep the peace.

12. It would, therefore, be too much to say that "de injuria ius oritur". It is rather the case that the SC in 1999 took notice of a situation that was in urgent need for regulation and that presented a concrete opportunity to make this possible. This factual situation constituted the basis for the creation of a new legal situation. Both eyes were closed as to the possible illegality of the acts conducive to this situation to make legality, based on the broadest possible consensus, possible.

IV. Self-Determination and Secession

13. The Kosovo crisis is regularly discussed also as a case of self-determination. In this context, again, an ill-conceived theory often stands in the way of proper understanding. At the same time, many strands of the self-determination discussion reveal their limits making clear that a thorough revision of this field, overburdend with moral and philosophical considerations as it is, is urgently needed.

14. Without doubt Kosovo is in many senses a self-determination issue, both the internal and the external dimensions of self-determination are here of relevance. As a matter of fact, over the time, the support for the external perspective has become stronger but at the same time new needs for the protection of those groups now constituting a minority have arisen. The many peace proposals, status initiatives and plans that have been devised since the late 1990s (see, in particular, the Rambouillet plan of 1999, SC Res. 1244 and the Comprehensive Proposal for the Kosovo Status Settlement by UN envoy Martti Ahtisaari of 2007) are all about self-determination in the broad range of its possible meanings, even though they do not explicitly mention this concept. This may be the main reason why these documents are rarely discussed from the perspective of self-determination. The situation with the declaration of independence of 17 February 2008 is different. When dealing with this event academic writers regularly make reference to the principle of self-determination. Strangely enough, the respective conclusions differ markedly. At a closer look, this reveals that the discussion on the principle (or, respectively, the right) to self-determination is far from having lead to consensual results. To ignore the inconclusiveness of this discussion may constitute the greatest problem in this context. In fact, in this area, there are several

23 See, for instance, Security Council Resolution UN Doc. S/RES/687 (1991), settling the boundary between Iraq and Kuwait as well as Security Council Resolutions UN Doc. S/RES/757 (1992) and UN Doc. S/RES/777 (1992) on the status of the Federal Republic of Yugoslavia as a successor of the FSRY, cited according to Jean D'Aspremont, Regulating Statehood: The Kosovo Status Settlement, 20 Leiden JIL (2007), 649 (652).

schools of thought that present final truths as if the development of the concept of self-determination had come to its natural end. As this is, in practice, not the case, the application of these concepts to Kosovo must lead to awkward results. In reality, the concept of self-determination has been playing, since its modern inception in the Wilsonian era, with ambiguity.[24] It thrives on the hopes it creates. It often disappoints but it can never be held responsible for failed achievements due to its vagueness. It is, on the one hand, a factor of stability as it protects the State as such against external influence. It may also be a motor of change but it does not provide, with few exceptions, an immediate entitlement for the attainment of a specific status. It grants an uncontested right to statehood only to those peoples that live under colonial (or, more generally, foreign) rule. In all other cases, the right to self-determination should be interpreted in the sense that it produces influence on the national constitutional systems requiring them to provide for participatory rights in a very broad meaning.[25] In this context, the right to self-determination becomes closely related to some specific human rights, such as the freedom of expression, the freedom of association and the right to free and genuine elections, and it comes to further the general diffusion of democracy.[26] This "internal" dimension of self-determination is still burdened with many uncertainties and open questions. The potential it offers is enormous but it stops short from considerations on border changes. As "colonial" self-determination has practically found its natural end, the internal aspect of this right has become by far its most important manifestation although the relevant discussion is often not even conducted in this terminology. In other words: in highly sensitive international power struggles, politics tends to avoid the term "self-determination" (even in its qualified, "internal" form) as otherwise there would be the risk of misunderstandings and further escalation. What about that type of self-determination that is usually meant when reference is made to this concept in practice, the right of secession? No such right exists.[27] Secession is a mere fact from which, of course, legal consequences may result. From the viewpoint of international law, secession is not illegal, nor is repression of such attempts by the government.[28] A right to "remedial secession", i.e. a right to secede when grave

24 See Hurst Hannum, Rethinking Self-Determination, 34 Virgina JIL (1993), 1; Peter Hilpold, Self-Determination in the 21th Century – Modern Perspectives for an Old Concept, 36 Israel YbHR (2006), 247.

25 See also Reference re Secession of Quebec, 115 ILR 536 (Canada 1998).

26 See Gregory H. Fox, The Right to Political Participation in International Law, 17 Yale JIL (1992), 539 and Thomas M. Franck, The Emerging Right to Democratic Governance, 86 American JIL (1992), 46. For an analysis of the contribution given by the UN to the diffusion and strengthening of democracy in Kosovo see Marc Cogen/Eric De Brabandere, Democratic Governance and Post-Conflict Reconstruction, 20 Leiden JIL (2007), 669.

27 See, extensively, Peter Hilpold, Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens, Zeitschrift für öffentliches Recht (2008), 117.

28 Of course, humanitarian law has to be respected in this context. Otherwise, both State responsibility and individual criminal responsibility may ensue.

human rights abuses, endangering the prospects of survival of the respective group, occurs, has not yet materialized, even though there is a considerable support in academic writing for such a concept.[29]

15. Leaving aside the fact that no convincing proof for the existence of such a right has been given[30] and disregarding also more practical problems such as the question when human rights abuses would qualify for the constitution of such a right to secession it still remains hard to see what would be the legal consequences if such an entitlement came into being. An obligation not to recognize the central government? An obligation to recognize the seceding unity?

IV.A. A duty to intervene?

16. This is not to question the political relevance for the concept of "remedial secession", both for the seceding group/people and for the Community of States that is interested in a peaceful settlement of every conflict, also of those of an internal nature. Without doubt extreme forms of abuses will strengthen the determination by a dissenting group to fight against the central government. It is also true that events of this kind will enhance the probability that the seceding unit will be recognized at an earlier stage.

17. If we transpose all these considerations to the Kosovo case, we see how well the present status of self-determination finds here reflection.

18. The efforts by the Community of States to mediate in the Kosovo conflict and the peace programmes and plans submitted to this avail bear witness to an intense international interest to foster internal self-determination in this region. The Comprehensive Proposal for the Kosovo Status Settlement submitted by UN envoy Martti Ahtisaari in March 2007 is in itself, first of all, a document on self-determination, where the external side is much less evolved and sophisticated than the internal one.[31] At the same time, these efforts demonstrate that the human rights situation in this region is of immediate interest to the Community of States while status issues as such are of a lesser concern. In this case, the right to self-determination, unrelated as it is with a colonial context, is not directed at granting a certain status but has the primary goal to assure the observation of minimum

29 Still the most important contribution in this sense Lee C. Buchheit, Secession: the Legitimacy of Self-Determination (1976). See also, for example, Karl Doehring, Self-Determination, in: Bruno Simma (ed.), The Charter of the United Nations (vol. I, 2nd edn., 2002), para. 29.

30 To this avail, often reference is made to the so-called "safeguard clause" in the "Friendly-Relations-Declaration" (UNGA Res. 2625 of 24 October 1970) and in the Vienna Declaration and Programme of Action of 25 June 1993 seemingly granting a right to secession to peoples victims of severe discrimination. Such a conclusion is, however, misguided as amply shown elsewhere. See Peter Hilpold, Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens, 63 Zeitschrift für Öffentliches Recht (2008), 117 (127).

31 For an evaluation of the Ahtisaari proposal see Marcelo G. Kohen, Le Kosovo: Un Test Pour La Communauté Internationale, in: Vincent Chetail (ed.), Conflits, sécurité et coopération (2007), 367; Rüdiger Wolfrum, Kosovo: Some Thoughts on Its Future Status, in: Sienho Yee/Jacques-Ivan Morin (ed.), Multiculturalism and International Law (2009), 561.

standards in the field of human rights protection and good governance. The fact that this crisis unfolds in the immediate neighbourhood of the European Union provides a further explanation why so intense efforts are undertaken to have these standards respected.

19. As a consequence, it can be said that the enormous energies spent in academia to examine whether the Kosovar people constitute a people, who is the Kosovar people, whether the human rights abuses committed by the Serb forces are extensive enough to engender a right to (remedial) secession, whether the exercise of such a right in 2008 can be justified by a reference to events of the 1990s and so on seems futile.[32] With the declaration of independence of 17 February 2008 by the Kosovar Assembly, the Kosovo seceded from Serbia as a matter of fact without being there a need to look for an objective definition of the Kosovar people[33] and without a need for such a right altogether. There is no right to remedial secession but at the same time this case has shown that States are far from being indifferent towards grave human rights abuses. As shown above, this interest and commitment find expression, first of all, in efforts to foster internal self-determination. In some cases, and the Kosovo case is an example of this kind, this commitment goes, however, beyond. When a new entity comes into being, the question whether it will assert itself is not independent from the attitude of the other members of the Community of States. There is a considerably large grey area where States can exercise an important contribution in this sense without incurring the State responsibility for prohibited intervention. An instrument of primary importance for the exercise of such an influence is the act of recognition.

V. The recognition of Kosovo

> One can hardly think of a more serious offence than that of declaring a people which abandons its mother State and tears itself away from it as absolved of its obligations and of recognising such a people free and independent.
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> Johann Christian Wilhelm von Steck, *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse*, 1783

32 See, for example, Christopher J. Borgen, Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition, 12 American Society of International Law Insights 2008, www.asil.org/insights080229.cfm (last accesses 28 December 2008). As Morag Goodwin has demonstrated convincingly to allow for past abuses to constitute a justification for secession would lead to unsolvable questions (making the extreme example of Mercia having been integrated into the English nation by the King of Wessex by force in the tenth century). See Morag Goodwin, From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrine of International Law, 8 German LJ (2007), 1 (6).

33 For the difficulties to define the people, the "self", having the right to self-determination, see, in general, Michla Pomerance, Self-Determination in Law and Practice, Martinus Nijhoff (1982), 18. She convincingly demonstrates that UN practice in this field has been hopelessly confused and politically biased.

20. This statement by Wilhelm von Steck, a famous German internationalist of his time, pertains to an epoch long gone by.[34] Nonetheless, if we look at the international reactions, the declaration of independence of 17 February 2008 and the following requests for recognition by the Kosovar Government have provoked, it appears to be surprisingly modern.[35] The "legitimist" school requiring the release of the new State by the mother State is still alive.[36] Care must here be taken not to engage in circular argumentation. It is true that regularly the seceding entity has obtained, sooner or later, the recognition by the mother State. In hindsight, it can also be said that this recognition has often been of decisive importance for the effective assertion of the new State. The case of Bangladesh, a former part of Pakistan seceding in open conflict from the mother State that persevered in its attempt to regain control over this territory, was surely an absolute exception. It is to say, however, that in most cases the departure of the respective territory could not be impeded anyway. The recognition by the mother State was, therefore, not the result of an absolutely free choice. George Scelle has noted in 1958 that there was an "obsession by States with territory".[37] This is still an important trait of international reality.[38] The causality goes, therefore, in the opposite direction: when secession appears to be effective recognition of this entity is in the ultimate interest of the mother State—thereby, however, further contributing to this effectivity. With regard to the effects of recognition, two rivalling theories have been developed: the declaratory theory and the constitutive theory of recognition. According to the former approach, recognition only takes notice of the fact that a new State has come into being while, whereas for the constitutive theory, recognition contributes directly in attributing international subjectivity to the seceding entity.

21. Viewed more closely these theories merely describe what role States are asked or, respectively, allowed to play when new States come into being. Do they have a say in when a new subject wants to join the club of the Community of States? Should they have such a say? Seen from this perspective it becomes obvious that neither of these two theories is per se right or wrong. It is rather the fact that they are more or less suited to describe the prevailing State behaviour (or, respectively, the needs of the Community of States) of a given period. In this sense, in the heyday of the Sacred Alliance (1815 until about 1830), the effects of a declaration of recognition were obviously constitutive. The members of this alliance were also willing and able to impose these effects.

34 The quotation is taken from C.H. Alexadrowicz, The Theory of Recognition in Fieri, 34 British YBIL (1958) 176 (183).

35 One reason for this may lie also in the fact that von Steck's theory on recognition has heavily influenced the following writings and was thereby kept alive up to this day. See Alexandrowicz, 184.

36 See Orakhelashvili, above n.7, p. 8 and 11, referring to James Crawford, The Creation of States in International Law, OUP (2006), 415 and Hersch Lauterpacht, Recognition in International Law, Martinus Nijhoff (1948), 8.

37 George Scelle, Obsession du Territoire, Symbolae Verzijl, CUP (1958).

38 This can be said at least insofar as it is allowed to argue in terms of an "objectivized governmental thinking".

On the other hand, in the UN system, based on the principle of sovereign equality, self-determination and, consequently, decolonization, recognition could have only declaratory effects. The ideological divide between the East and the West and the strong rivalry between the North and the South have led to a situation where it was very difficult to make recognition conditional upon the respect of certain values as this could have been seen as an illegitimate intervention. After 1989 and with the decolonization process having come, more or less, to a close, much has changed. Legitimacy is becoming, again, paramount. This form of legitimacy is, however, no more hereditary or unilaterally attributed to a transcendental will (and, therefore, necessarily abusive) but the result of a more or less consensual law-creating process whereby an—ever broader—common core of human rights, some basic elements of democracy and the principle of good governance[39] find ever-wider recognition. It shall not be denied that this process is not free of frictions and objections of unilateralism[40] but on a whole this process proceeds, in fits and starts, along a clear trajectory. In this context, recognition is playing again an important, selective role. International relations are segmented in many ways. Participation in international organizations and regional groupings becomes of decisive importance for asserting a State's capacity to act. At the same time, by making recognition conditional, States (or groups of states like those of the European Union) can make sure that certain values obtain wider diffusion. In such a system, the effects of recognition can neither be qualified as declaratory nor as constitutive. They rather lie somewhere in between.[41] While the factual elements necessary for a State to come into being[42] are still of decisive importance, there actual presence is not sufficient for a State obtaining full capacity to act. But what if there are doubts about the presence of some constitutive elements? In particular, it may be the case that the effective government and the capacity to enter into relations with other States are to be put into doubt. Recognition will play here an important role to set these doubts aside. Could such an act of recognition be seen as premature and therefore constituting an illegal intervention? This question is hard to answer in the abstract as the specific circumstances will be of decisive importance. We can speak of an illegal intervention only if the recognizing State goes manifestly beyond his powers in this field. These powers are, however, in any case rather broad due to the political nature of the act of recognition.

39 See Peter Hilpold, EU Development Cooperation at a Crossroads: the Cotonou Agreement of 23 June 2000 and the Principle of Good Governance, 7 European Foreign Affairs Review (2002), 53.

40 Such criticism was levelled, in particular, against the policy of conditionality by the European Union.

41 Peter Hilpold, Die Anerkennung der Neustaaten auf dem Balkan, 31 Archiv des Völkerrechts (1993), (para. 515), 387.

42 As it is known, these elements (permanent population, defined territory, government and capacity to enter into relations with other States) are enumerated in the Montevideo Convention on Rights and Duties of States of 1933 (165 League of Nations Treaty Series, 19; 28 American JIL Suppl. (1934), 75. See for a discussion of these elements P.K. Menon, Some Aspects of the Law of Recognition, Part II: Recognition of States, 68 Revue de Droit International (1990), 1.

VI. A final assessment

22. If we turn to the Kosovo case and try to apply the principles mentioned above, we see that the assessment cannot lead to clear-cut results both due to the political nature of the whole issue and because of the very specific situation here to be discussed.

23. It can hardly be denied that in Kosovo an effective government is established, at least in the terms of international law.

24. As it is known, the UN General Assembly, at the request of Serbia, has asked the ICJ for an opinion on the status of Kosovo. At first sight, the text of the request might surprise us:

> Is the unilateral declaration of independence by the Provisional Institution of the Self-Government of Kosovo in accordance with international law?[43]

25. As we have seen, a declaration of independence (or, respectively, an act of secession) is a mere fact. Why should the ICJ examine the compatibility of a fact with international law? Of course, this question could be related to the specific circumstances in which the declaration has been expressed. In particular, the UN has created by SC Res. 1244 a specific status for the Kosovo that is now to be terminated unilaterally. But the SC Resolution authorizes, as we have seen, only a provisional regime. It seems improbable that the Community of States wanted to assume hereby permanent tutorship over the territory of Kosovo. It is true that this specific form of trusteeship had to be terminated, in principle, the same way as it had been constituted, i.e. by a Resolution of the SC. But the UN administration had already lasted much longer than originally envisaged. There was a total impasse in the SC which has made it highly unlikely that any decision in whatever direction could have been taken. At the utmost, it could be argued that the Kosovar people have violated SC Res 1244 by claiming independence. As already shown, it can hardly be argued that the Kosovar people have a right to secession as secession is a mere fact. As a consequence, there is no need or, respectively, no possibility to take recourse to such a right. The Kosovar people have rather taken advantage of a right to self-determination within a specific UN trusteeship situation.

26. It would be wrong to make reference to colonial self-determination by the way of an analogy or to argue in terms of a right to non-discriminatory treatment between entities claiming self-determination as no such right does exist in international law.

27. In substance, two elements stand in the way for the Kosovo case falling under the traditional rules of self-determination:

(1) Effective government and the capacity to enter into international relations depend to a considerable extent on recognition.
(2) The UN status regime has been changed unilaterally.

43 UNGA A/63/L. 2.

28. The task the ICJ has been given is not an easy one. Any assessment on the legality of the declaration of independence implies also a judgment on the behaviour of the States which have already recognized Kosovo. On the whole, the decisive question will be whether the ICJ is prepared to apply the substance of the principle of self-determination on a case which is unique in history. The Nobel laureate and UN envoy Martti Ahtisaari has shown already in 2007 that no other solution than independence is possible, both from human rights viewpoints and under political and economic viability considerations.[44] The question whether this state-building process can be successful will depend, however, to not a small extend on the Kosovar people themselves. In a quest for independence that has gained most of its political legitimacy from a fight of the oppressed against human rights abuses it will be essential that yesterday's victim becomes today's model pupil in this field. Here, much is yet to be done.

29. There can be no doubt that the Kosovo case will become of paradigmatic relevance for the further development of many concepts of public international law. This development may not be, however, so straightforward as some commentators suggested. There is no need to abandon totally traditional interpretations of concepts like that of self-determination or recognition. The true challenge will be to interpret them correctly, in particular, under consideration of the rising importance of human rights. According to this approach, no new theory of secession will result but rather new insights into the concept of internal self-determination or recognition in a Community of States ever-more sensible for issues of legitimacy and good governance.

44 See the "Ahtisaari Report", S/2007/168, para. 10: "Independence is the only option for a politically stable and economically viable Kosovo. Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions."