Abstract

The author focuses on the question of the independence of Kosovo. The matter of the Kosovo’s independence has been and remains very controversial. International law is the only universally acceptable language for discussing such a controversial issue, one where the international community of states at large, as well as the smaller and closer communities of the EU and NATO member states, seem to be deeply divided. It is important to admit the failure of the UN Security Council, its subsidiary bodies, and in particular some permanent members of the SC, as well as other States which encouraged or at least made possible the legal morass by recognizing the unilateral declaration of independence by Kosovo. We can hope that the International Court of Justice, as the principle judicial organ of the United Nations, will remedy the failure of other UN bodies and bring international law back on the scene. The Court is not able to change the factual situation in Kosovo, but it can provide legal guidance for a sustainable solution.

INTRODUCTION

The subject of this conference is extremely topical. Since 17 February 2008, both the legality and the political opportunism involved in Kosovo’s declaration of independence have become highly disputed issues. Additionally, events from the last
week make this conference even more relevant. On 8 October 2008, the UN General Assembly adopted a resolution drafted by Serbia to seek an advisory opinion from the International Court of Justice on “whether the 17 February 2008 unilateral declaration of independence of Kosovo is in accordance with international law.”\(^1\)

The matter of the Kosovo’s independence has been and remains very controversial. Nevertheless after almost eight months, when legal arguments have been so used or misused in the shadows of “Realpolitik”, it is time to bring international law on the stage again. International law is the only universally acceptable language for discussing such a controversial issue, one where the international community of states at large, as well as the smaller and closer communities of the EU and NATO member states, seem to be deeply divided.

This division is evident event from the record of the vote within the UN General Assembly (GA) on the formal request for an advisory opinion of the ICJ: Seventy-seven Member States voted in favour (including 5 EU members: Cyprus, Greece, Romania, Slovakia and Spain) to six against (Albania, Marshall Islands, Micronesia, Nauru, Palau and United States), with seventy-four abstentions (including all remaining EU states).\(^2\) In spite of this close result and many statements made by the member states’ representatives in the GA, the resolution was adopted and the Court will have to deal with the question. The question, which was aimed at being as simple and politically neutral as possible, turns the mostly political problem into a real legal challenge for the International Court of Justice. Now, and for a time which could foreseeably extend for at least one year from the request, many international lawyers will have the unique opportunity to test the validity of some of the basic concepts of international law. These include such concepts as the legal criteria of statehood, the recognition of a state, the legal effects of the Security Council resolutions, and perhaps also the responsibility of international organizations.

It now rests with the distinguished judges of the ICJ to live up to the expectation that the advisory opinion will succeed in answering such questions and also provide politically neutral and judicially authoritative guidance to many countries still deliberating over their approach to Kosovo’s unilateral declaration. This modest contribution aims only at highlighting certain problems surrounding the interpretation of international legal norms relevant to the issue.

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\(^1\) See: UN doc. A/63/L.3 (2008)

\(^2\) Backing Request by Serbia, General Assembly Decides to Seek International Court of Ruling on Legality of Kosovo’s Independence, DPI, News and Media Division, New York, Sixty-third General Assembly, Plenary, 22\(^{nd}\) Meeting (DPI News).
1. PARAMETERS OF THE LEGAL ARGUMENTS IN THIS DIFFICULT CASE

There is no doubt that this issue, whether looked at as an academic debate or examined for the purpose of judicial resolution, creates a difficult case. Both advocates and opponents of the independence of Kosovo will employ teams of lawyers armed with a number of powerful arguments. It is feasible to take any stance in this debate (and most of us probably have our own personal, political and legal opinion). However, the adversarial nature of legal argument (even in a dispute of lesser importance than this one), which was quite well explained by M. Koskenniemi, calls for the combination of two possible approaches. One can be based on “pure facts”, the other on legal rules. Unfortunately, both parties in this dispute may take advantage of both sets of legal arguments. The dichotomy of facts and rules, politics and law, power and legitimacy, operates here on the inter-state level. Why? Because traditionally, both the declaration and recognition of one’s statehood have been a matter of political choice of the individual states and entities claiming the status of a sovereign state.

No matter how antagonistic the arguments of states may be in a specific case, they are able to agree (together with the doctrine) on certain minimum elements. These are recognized as criteria based on state practice or even customary international law. Even while observing these rules, however, states enjoy a wide latitude of freedom of interpretation and freedom of action. They are free to do anything that is not prohibited by law. The traditional approach towards secessions and declarations of independence of new entities in general international law may be called that of “legal neutrality” (neutralité juridique). In other words, it is not forbidden for a secessionist movement to declare unilaterally its independence and it is not forbidden (outside the context of decolonization) for the State authorities to suppress this attempt at secession.

The situation seems to be quite different, however, where other international legal entities such as the United Nations are involved. The UN as an international intergovernmental organization is created by an instrument of international law (treaty) and must act strictly on the basis of international law, in particular

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in accordance with the principles embodied in the United Nations Charter.\(^5\) In other words, any organization (including the UN) may act only within the framework of its legal powers, which arise expressly or implicitly from the rules of law. This is true also for the Security Council.\(^6\) Hence, the matter of Kosovo’s independence must be evaluated with respect to the relevant resolutions of the Security Council.

1.1. Certain generally accepted premises and legal criteria regarding statehood

As a point of departure, we can share the view that the existence of a State is a matter of fact, but it is not a mere matter of fact. As it was rightly pointed out by J. Crawford, “a State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which a treaty may be said to be a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules.”\(^7\) However, it is possible to agree that “the legal qualities which make an entity a State are principally matters of fact, from which a legal conclusion is drawn – an entity like this is a State”.\(^8\)

In other words, there is a distinction between a descriptive concept of a State (as a fact) and a prescriptive concept of a State or of statehood (as a legal status granted to an entity based on certain factual elements). It is a matter of fact whether or not an entity meets the qualifications of a State. What are the criteria of statehood, however, is a matter of law.

The widely used definition of State is provided in Article 1 of the Montevideo Convention on the Rights and Duties of States (1933): “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.”

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\(^6\) See ICTY, Decision on the defense motion for interlocutory appeal on jurisdiction, Prosecutor v. Duško Tadić, Case No. IT-94-AR72, 2 October 1995, para. 28: “The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).”


The definition of State, and in particular the first three criteria, are of an objective nature and have been considered as part of customary law. This was reflected also in the Opinion No. 1 of the Arbitration Commission of the European Conference for Peace in Yugoslavia (the so-called Badinter Commission).

A corollary but different question is that of recognition of a State. In spite of two competing theories of recognition (constitutive vs. declaratory), there is a minimum common understanding that recognition is a unilateral act of one State which recognizes an entity as State. The act of recognition is not a legal obligation of the recognizing State. On the contrary, it is an act of discretion (involving mostly political considerations) which has however very important legal consequences in both international and domestic relations.

The theory of declaratory effects seems to be the prevailing theory today (disclosure: I also adhere to this theory). It posits that the existence of State-creating elements should be established first. The recognition (a legal act) thus follows the fact of the emergence of a State. This concept of purely declaratory recognition was also asserted by the Badinter Commission in its Opinion No. 1 (1991).

However, this theory does not fully explain all situations relating to the existence and recognition of a new State. On the one hand, the recognizing States have to respect both the facts and law, otherwise their act may be considered at least unfriendly, if not illegal. In certain circumstances, “if an entity emerges onto the international scene through acts which are illegal under international law, no matter how effective it might be, its claim to statehood could not be maintained.” In such a case, States may even have an obligation not to recognize this entity as a State.

On the other hand, acts of recognition create a new situation, both in terms of fact and law. In relations between a recognizing State and a newly recognized State, the act of recognition has created a new situation. The recognizing State accepts that relations between them are governed by international law on a State-to-State basis. This also has important implications in the field of public law (e.g. citizenship, passports, visas, etc.), as well as private international law (e.g. recognition of foreign judicial decisions, etc.).

Recognition of a State may have constitutive effects even in cases where the objective criteria of statehood are not sufficient or simply absent. In particular it

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may affect the effective control of the government over the territory. This was explicitly spelled out in respect of the recognition of Bosnia and Herzegovina.  

1.2. Arguments for the statehood of Kosovo

Arguments for the statehood of Kosovo may be, and probably are, both factual and legal in nature. Both types of arguments were presented in the debate in the General Assembly both before and after the vote on the request for an advisory opinion of the ICJ. It is not surprising that the States which had already recognized Kosovo either voted against the draft resolution or abstained, advancing arguments mainly based on “facts”.

For example, the representative of the United Kingdom said that “Kosovo’s independence is, and will remain, a reality”. He also noted that Kosovo’s independence had been recognized by 22 of the 27 European Union member states.  

The representative of the United States repeated that 48 countries recognized Kosovo’s independence, including 22 of the 27 European Union members. She said that “under democratically elected Government, Kosovo was at peace. The Government in Pristina had followed a proposal developed by the Special Envoy and had enacted 41 pieces of legislation to implement that proposal.” While this has a clear political message, the last sentence is striking to an international lawyer in that it seems to undermine rather than to support the argument that Kosovo really has an independent government.

The representative of France said that Kosovo’s declaration of independence had ended the violent dismemberment of Yugoslavia. Kosovo’s independence constituted a *sui generis* case, and did not call into question territorial integrity and sovereignty issues. Again, the latter postulations may raise some doubts of a legal nature.

It is worth noting that the “sui generis” argument was also used by the representative of Albania, who said that Kosovo was a unique case, both in its historical and political developments.

Pro-recognition States also forwarded some legal arguments in favour of Kosovo’s independence. For example, both the British and French statements pointed

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11 DPI News, supra note 2, p. 4.


14 Ibidem, p. 5.
out that Kosovo’s independence was the result of the process of defining Kosovo’s status under Security Council resolution 1244 (1999). The US representative also referred to this resolution. This seems to be a purely legal argument. However, interpretation of the meaning of the resolution 1244 is highly political, as the final status process has not been completed in conformity with the SC resolution, as will be demonstrated in Chapter 3.

A mixture of both political and legal arguments appears in the statement of Albania describing Kosovo as a unique case, where the international community intervened nine years ago to put an end to an “ethnic cleansing enterprise and genocide run by the State”.

To complete the picture, one can also add arguments based on the principle of self-determination of peoples. This general principle has been embodied in several international documents, such as Article 1 (1) of the 1966 International Covenant on Civil and Political Rights or the 1970 Friendly-Relations Declaration, UN GA Resolution 2625 (XXV). The doctrine of self-determination has sometimes been labelled an “all-or-nothing proposition”. Today, however, self-determination is a concept with more than one meaning. In actual practice in the recognition of states, self-determination as a positive entitlement has been applied only to classical colonial cases.

1.3. Arguments against the statehood of Kosovo

It seems to be quite logical, in the light of the above analysis, that most arguments against the statehood of Kosovo are based on “law” rather than “facts”. Nevertheless, the framework of legal debate may also reveal some relevant arguments of a factual nature.

The opponents of an independent Kosovo claim, first of all, the principle of the sovereign equality of States. This principle, as it appears in the 1970 Declaration, postulates, *inter alia*, that “the territorial integrity and political independence of the State are inviolable”. In addition, even the principle of self-determination is not considered as an absolute principle, but involves limitations and exceptions. The establishment of a sovereign and independent State constitutes only one of several possible modes of implementing the right of self-determination by a people.

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15 Ibidem, pp. 4 and 8.
16 Ibidem, p. 5.
Since the Kosovo problem is a part of the dissolution of the former Yugoslavia, one should also emphasise the relevant documents adopted on the European level. In particular, the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975) lists among other principles the principle of inviolability of frontiers of all States in Europe and the principle of territorial integrity of States. This document also reiterates the right of peoples to self-determination, however “in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States”.

Next, it is interesting to recall that the (Badinter) Arbitration Commission in its Opinion No. 2 (1992) also rejected the claims of Kosovo (part of the Republic of Serbia) and of Krajina (part of the Republic of Croatia) as not being units entitled to self-determination. These people were to find their protection under the minority law of the new States.

Last but not least, all these legal arguments may be complemented by arguments based on facts, in particular on the lack of effective government in Kosovo. In fact this province was, in February 2008 and still is, a territory where the local Kosovar institutions have developed under the supervision of the international administration (UN Mission in Kosovo) and KFOR troops. Another new international actor present on the territory of Kosovo is the European Union Rule of Law Mission in Kosovo (EULEX). One can have serious doubts whether such entities fulfil all the criteria of statehood and entitle Kosovo to recognition as a State.

At the same time, it is not surprising that the States supporting the resolution requesting an advisory opinion of the ICJ did not present many substantive legal arguments. Instead, they stressed the right of every Member State to seek an advisory opinion from the Court, and the right of the General Assembly to grant this request. They also expressed their belief in the Court’s ability to enhance the rule of law.

Even Serbia, as sponsor of the resolution, took a politically moderate and law-oriented position. Its Minister of Foreign Affairs said that Serbia had decided to defend its sovereignty and territorial integrity through diplomacy and international law. He believed sending the question to the ICJ “would prevent the

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19 Cf. Warbrick, supra note 8, p. 257.
Kosovo crisis from serving as a deeply problematic precedent in any part of the
globe where secessionist ambitions are harboured”.21

Probably the most important legal argument was referred to in the statement
of Argentina. Its representative stated that the whole of the security system was based
on the fact that United Nations Members were bound to fulfil relevant resolutions.
The Security Council resolution 1244 (1999), which his country had voted in favour
of, had established the legal and political parameters regarding the Kosovo matter. 22

Since the legal arguments, based only on competing principles of international law as interpreted by different actors in the debate, do not seem conclusive, a specification of general principles into more concrete rules is needed. Therefore it is important to analyze the SC resolution 1244 itself and the regime of international administration arising under this resolution.

2. THE ROLE OF THE UNITED NATIONS

There can be no doubt that international territorial administration, estab-
lished in particular in post-conflict territories by the UN, is a new phenomenon
in international law. 23 This is an important reason why the problem of statehood
and the recognition of Kosovo should not be addressed only on the horizontal, inter-state level. The adoption of resolution 1244 (1999) by the UN Security Coun-
cil has created a new international regime. In order to facilitate a political process,
the Council introduced a special regime of international administration, involving
several international organizations authorized to act under the auspices of the UN.
Since the adoption of resolution 1244 on 10 June 1999, the situation in Kosovo has
been governed not under general international law principles, but by the special
regime established by the resolution. From that moment on, the powers and compet-
ences of the institutions of Kosovo arise from the legal delegation by the UN
authorities, and not on the basis of “facts” or “effectiveness”. 24

It is worth noting that this resolution has not been revoked, so it is still bind-
ing on all UN Member States. The resolution and UNMIK regulations issued on
its basis seem to provide the following legal picture:

22 Ibidem, p. 10.
23 Cf. e.g. B. Knoll, United Nations Imperium: Horizontal and Vertical Transfer of Effective
Control and the Concept of Residual Sovereignty in ‘Internationalized Territories’, 7 Austrian
24 Cf. Corten, supra note 4, p. 732.
Firstly, resolution 1244 has preserved the sovereign claim of Serbia to the territory of Kosovo, by “reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal republic of Yugoslavia and the other States of the region”. This means that the sovereign title of Serbia to the territory (dominium) has not been ceded to the United Nations.

Secondly, resolution 1244 has transferred the exercise of sovereign powers or jurisdiction (imperium) over Kosovo to UNMIK. In fact, the resolution “authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia”. Resolution 1244 and the first implementing UNMIK regulation transferred to the Special Representative of the Secretary General and UNMIK all legislative and executive authority, including the judiciary administration over the territory and people of Kosovo.

Thirdly, resolution 1244 stresses the provisional nature of the international administration it has established, and emphasizes the necessity to resolve the question of Kosovo’s future status. According to its Annex 1, this future settlement will have to take “full account of principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia”. This seems to evoke “substantial autonomy” of Kosovo within the Federal Republic of Yugoslavia rather than its independence, as was expressly stated in the operative paragraph 10 and in Annex 2 of the resolution.

Lastly, the implementation of resolution 1244 continued with the adoption of the Constitutional Framework for Self-Government by UNMIK in 2001. This document has defined Kosovo as an entity under interim international administration. The Constitutional Framework established the Provisional Institutions of Self-Government. Since the general elections in autumn 2001, UNMIK has begun to transfer administration of certain parts of its competences to local institutions. However, the Constitutional Framework leaves the issue of Kosovo’s future status unresolved.

Even the most comprehensive proposal on Kosovo’s status, the Ahtisaari Plan of 2007, fell short of expressly assigning independence to Kosovo, and included

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27 Security Council Resolution 1244, supra note 25, p. 3.
28 Ibidem, p. 5.
continued international involvement in the governance of Kosovo.\textsuperscript{30} Therefore this solution can be called “supervised independence”.\textsuperscript{31}

Just how complicated the process of transfer of powers is, and the crucial role still played by resolution 1244, can be seen by examining the problems relating to the creation, deployment, and operation of the EU mission EULEX. This mission aimed at replacing UNMIK. However, the precarious nature of the EULEX mandate—from the point of view of international law—arises from the fact that it was created at the initiative of the EU itself, and was at first only implicitly acknowledged by the Secretary-General and not initially endorsed by the Security Council. The Council endorsed the UNMIK reconfiguration only after the Secretary-General report through the Presidential Statement on 26 November 2008. In reality, because of Serbia and Kosovar Serbs, as well as some powerful members of the Security Council, EULEX is not able to act as an independent-standing mission, but only under the overall authority of the United Nations and in coexistence with UNMIK.\textsuperscript{32}

To conclude, it seems that the international legal regime under SC resolution 1244 and implementing regulations, which are based on Chapter VII of the UN Charter, has imposed important restrictions on the exercise of sovereign rights by Serbia. Nevertheless, Kosovo has not ceased to be part of Serbia. The very object and purpose of the interim administration of Kosovo is hardly compatible with a unilateral declaration of independence by Kosovo. Resolution 1244 and the subsequent legal acts aimed at reaching the future status of Kosovo by a form of devolution. Both the status of independent State or substantial autonomy would be a possible solution. It would presuppose, however, the adoption of a new binding legal instrument (agreement and/or SC resolution).

In the meantime, it is important that all Member States of the UN abstain from acting in a way which may frustrate the regime under resolution 1244. This is not only a politically advisable course of conduct, but also a legal obligation, as according to Article 103 of the UN Charter their obligations under the present Charter shall prevail over any other international agreement.

\textsuperscript{30} Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, encl. to Letter from the Secretary-General addressed to the President of the Security Council, S/2007/168/Add.1.
\textsuperscript{31} Cf. Weller, supra note 17, pp. 149–151.
\textsuperscript{32} Cf. de Wet, supra note 20, pp. 88–91.
CONCLUSIONS

It would not be fair to blame either the Kosovo Albanians (for declaring independence) or Serbia (for defending its sovereignty and territorial integrity) for the present impasse. However, it is important to admit the failure of the UN Security Council, its subsidiary bodies, and in particular some permanent members of the SC, as well as other States which encouraged or at least made possible the legal morass by recognizing the unilateral declaration of independence by Kosovo. These actions and omissions may be understandable from the point of view of politics and, in consequence, considered as good or bad according to one’s political preferences.

But even from the traditional perspective, it is at least open to doubts whether the unilateral declaration and speedy recognition of Kosovo’s independence would be in conformity with international law. In view of the fact of the massive military and civil international presence in the territory of Kosovo and the ultimate control of the UNMIK and the UN Special Envoy over all acts of the local self-government, one could certainly conclude that Kosovo, at the time of declaration (and probably up to now), has failed to satisfy the traditional legal criteria of statehood. As a consequence the recognition of Kosovo by some States can be considered as premature, and therefore as at least an unfriendly act, and even under certain conditions as arguably unlawful.  

From the point of view of modern international law, the way of reaching Kosovo’s independence is clearly detrimental to the trust in international institutions (in particular in respect of the UN administration and so-called “State-building” in post-conflict regions), as well as to the rule of law. Moreover, the case of Kosovo risks creating a dangerous precedent for separatist movements in other parts of Europe and of the world.

As proclaimed in resolution 1244 and in later UNMIK documents (namely “Standards for Kosovo”, 2003), as well as in the very title and purpose of EULEX, one of the main objectives of the international presence in Kosovo has been to restore or rather to introduce the rule of law (or l’Etat de droit). However, this noble aim should not be limited to internal (intra-state) relations. The principles of rule of law must govern also acts of international organizations within the territories under international administration, and at the international (inter-state) level.

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33 In the case where such recognition amounts to a violation of the principle of non-intervention; cf. Corten, supra note 4, pp. 751–757.

Otherwise there is a risk that the international rule of law (état de droit) could be sacrificed in the name of some presumed or desired rule of law (Etat de droit) at the internal level. And this policy can and should be, quite correctly, criticized as burdened by “manageralism”, a new version of the “civilizing mission”.

One can hope, therefore, that the International Court of Justice, as the principle judicial organ of the United Nations, will remedy the failure of other UN bodies and bring international law back on the scene. Instead of a new, fashionable language of governance and manageralism, the classical legal vocabulary of normative analysis is needed. Of course, the Court is not able to change the factual situation in Kosovo, but it can provide legal guidance for a sustainable solution. And last but not the least, it could and indeed should shine light on the shadowy area of State-building in contemporary international law.

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35 As it was expressed in the debate at the colloquium of Société Française pour le Droit International on “l’Etat de droit” in Brussels (5 to 7 June 2008).