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I. KOSOVO: THE DECLARATION OF INDEPENDENCE

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CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick and Dominic McGoldrick

- I. Kosovo: The Declaration of Independence**
- II. Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts**

I. KOSOVO: THE DECLARATION OF INDEPENDENCE

A. Background

It is true for many international disputes that where one stands today depends from where one starts. This proposition has a particular salience in the Balkans. It is not possible in this short note on the events relating to Kosovo to start 'at the beginning', even if a beginning could be agreed upon;¹ but one has to start somewhere. Since this is a cursory account and appraisal of the context of Kosovo's Declaration of Independence,² and because some States at least have called it the last act in the disintegration of the Federal Socialist Republic of Yugoslavia, I shall start with the beginning of *that* process and place the date simply somewhere in 1991. It is, though, necessary to say something about the present: Kosovo has been a part of what is now the State of Serbia. Its population of about 2 million people is ethnically distinct from that of the Serb majority in the State as a whole, being about 90 per cent ethnic-Albanian. The Serb population of Kosovo, about 200,000 people (5 per cent), has several locations in Kosovo but it is mainly concentrated in the north-east, north of the Ibar river and based on the city of Mitrovica. Kosovo is a place of great cultural significance to Serbia, in particular because of the location of sites of importance to the Serbian Orthodox Church in Kosovo.

By the end of 1991, fighting between and within provinces of the Federation had begun and outside intervention to try to influence the course of events in 'Yugoslavia' had also commenced. By the end of the year, it appeared to the EU States that disintegration could not be avoided and so diplomatic attempts were made to manage the process through the device of unilateral State recognition of entities emerging in 'Yugoslavia', fixing to the recognition decisions elaborate conditions relating to external and internal aspects of the new States.³ As part of the widening of the

¹ For a comprehensive treatment, see N Malcolm, *Kosovo: A Short History* (Papermac, London, 1998) ch 17, 'Kosovo after the Death of Tito, 1981–1997'.

² 'Kosova Declaration of Independence' *Pristina* (17 February 2008), which uses the terms 'Republika e Kosoves', 'Republika Kosova' and 'Republic of Kosovo', <<http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en>>. I shall use 'Kosovo' to refer to the territorial area and as an entity within 'Yugoslavia' (n 10) and 'Republic of Kosovo' to refer to it as a (putative) State. For extensive information, see <www.politicalresources.net/kosovo.htm>.

³ R Rich, 'Recognition of States: the Collapse of Yugoslavia and the Soviet Union' (1994) 4 *European Journal of International Law* 36.

international element of concern for events in Yugoslavia, an 'International Contact Group' of States established itself in 1994, consisting of representatives of the US, Russia, France, Germany, Italy and the UK.

The approach adopted by the EU and its members was innovatory, both substantively and procedurally—the establishment of the Badinter Commission to assess the claims for recognition by post-'Yugoslavia'⁴ entities was quite new.⁵ The law and practice of the Commission and the responses of the States have had their critics (and, given the mayhem which followed, it can hardly be regarded as an unqualified success). Nonetheless, the Commission (if not the States) did reaffirm an important principle of Statehood, maintaining the distinction between Statehood and recognition and regarding the latter as an essentially declaratory process.⁶ Among the entities which sought the Commission's endorsement were Kosovo and the Serb Krajina in Croatia. The Commission would not entertain their applications, regarding a version of the rule of *uti possidetis* as binding its hands: these two were excluded because they were not Federal States of the Socialist Federal Republic of Yugoslavia (SFRY).⁷ Later, when 'Serbia-Montenegro' called itself the Federal Republic of Yugoslavia (FRY), Kosovo had no distinct constitutional status. It is enough to say that all the original Federal States of the SFRY have eventually aspired to and achieved recognition as States and they have all accepted that they are equally successors to the SFRY.⁸ All are members of the UN and each is making its own relations with various European organizations. The process has not been uncomplicated, even taking the savage conflicts which accompanied the changes into account. Indeed, the fragility of certain of the new entities, and, in the case of Bosnia-Herzegovina, still being subject to the continuing authority of international institutions, is such that one can retain legitimate reservations about the stability and even the actuality of their Statehood. For all the Badinter Commission's adherence to the orthodoxy of the declaratory theory, some at least of the new States are the products of attempts to create States.⁹ In any event, Badinter has run its course; Serbia-Montenegro¹⁰ did not apply to it when it accepted that it too was a successor State and not the manifestation of the old 'Yugoslavia', nor did either Serbia or Montenegro undergo any validation process when they became separate States.

While Serbia-Montenegro was a single State, then still the FRY, its treatment of the ethnic Albanian population of Kosovo, never handsome, deteriorated. The Kosovan

⁴ The 'Federal Socialist Republic of Yugoslavia' (SFRY) was the name of the single State of Yugoslavia when the process of its disintegration began.

⁵ M Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Yearbook of International Law* 333.

⁶ Badinter Commission, Opinion No 1, (1993) 92 *International Law Reports* 165.

⁷ Kosovo had been a federal entity under the SFRY Constitution of 1974—a self-administering province—but its status was withdrawn by Serbia in 1989.

⁸ That is to say, Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, Serbia, and Montenegro. For the dates from when the Badinter Commission regarded them as States, see Opinion No 11, (1994) 96 *International Law Reports* 720.

⁹ C Warbrick, 'States and Recognition in International Law' in M Evans (ed), *International Law* (2nd edn, OUP, Oxford, 2006) 263–70.

¹⁰ SFRY changed its name to the Federal Republic of Yugoslavia (claiming still to be the same State). In November 2000, it relinquished that claim and was admitted to the UN under the name, 'Serbia-Montenegro'. Montenegro became independent in 2006. 'Serbia' continued as the same State as Serbia-Montenegro but under its new name.

response had an increasingly military dimension to it, the Kosovo Liberation Army escalating its activities from 1998.¹¹ Attempts by States outside 'Yugoslavia' to broker an accommodation of the situation in Kosovo failed when Belgrade refused to accept the conclusions of talks at Rambouillet, which would have granted substantial autonomy to Kosovo.¹² Ill-treatment of the Kosovars intensified and NATO commenced a bombing campaign against Yugoslavia in 1999, aimed at stopping Serbian repression and then reversing an extraordinary programme of ethnic cleansing of the Albanian population of Kosovo by the Belgrade authorities.¹³ In the face of the certain prospect of a Russian veto, authorization for the use of force was not sought from the Security Council. Instead, to the extent that legal justification was offered at all, the raids were explained as being in the right of unilateral humanitarian intervention.¹⁴ With Russian assistance, the Yugoslavs were persuaded to stop their assaults on the Kosovars, to withdraw their forces from Kosovo and to accept a Security Council-authorized scheme for the future of Kosovo.¹⁵ This plan was encapsulated in Security Council Resolution 1244 (from which China abstained). Yugoslav authority over Kosovo was effectively suspended, authority was to be exercised instead by a UN body, the United Nations Mission in Kosovo (UNMIK), responsible for the civil administration of Kosovo and for establishing local institutions capable of taking over its functions. Security was to be provided by Kosovo Force (KFOR), a Security Council-authorized force, made up mainly of contingents from NATO States. The international administration of Kosovo was an interim arrangement, while the development of Kosovan bodies was fostered and negotiations were undertaken to establish a long-term regime for the territory. In its preamble, Resolution 1244 specifically reaffirmed: 'The commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States in the region, as set out in the Helsinki Final Act and Annex 2.'¹⁶

The substance of the long-term status of Kosovo was not addressed in Resolution 1244. Instead, among the functions of UNMIK were:

- (e) facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet Accords . . .
- (f) in a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

Both Russia and China emphasized the commitment to Yugoslavia's territorial integrity in Resolution 1244 and it seems unlikely that they would have allowed the resolution to be adopted without such a provision.¹⁷ In its explanation of its vote, France underlined the Security Council's responsibility for the implementation of the peace plan—'the Security Council will remain in control'.¹⁸ None of the States

¹¹ T Judah, *Kosovo: War and Revenge* (Yale UP, New Haven, 2000) 102–120.

¹² H Kreiger (ed), *The Kosovo Crisis and International Law* (CUP, Cambridge, 2001) 261–78.

¹³ T Judah, *Kosovo: War and Revenge* (n 11) 236–84.

¹⁴ UKMIL 2000, (2000) 71 *British Yearbook of International Law* 649.

¹⁵ Before Resolution 1244 was passed, KFOR (the NATO-commanded security presence to enter Kosovo on the termination of the bombing of the FRY) entered into a military technical agreement with the FRY and the Government of Serbia, regulating the force's presence in Kosovo. See E Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status' (2003) 14 *European Journal of International Law* 999.

¹⁶ Annex 2 refers to the 'territorial integrity and sovereignty' of the FRY.

¹⁷ S/PV.4011, 7–9.

¹⁸ *ibid* 12.

participating in the proceedings in the Council looked towards even the outlines of a permanent solution to the status of Kosovo.

From 1999 to 2008, no part of the political process went smoothly, though Kosovan institutions were eventually established.¹⁹ Elections held for a local parliament and a government were set up. More fundamentally, there was no progress towards a final settlement. During this time, the FRY became Serbia and Montenegro and then Serbia, when Montenegro left to become a new State. Each side became more committed to incompatible fundamentals—on the one side, that Kosovo must remain a part of Serbia,²⁰ on the other, that the return of the Kosovars to Serbian authority was impossible. No scheme of autonomy, however sophisticated, could bridge that gap. The UN negotiators did lay down the principles upon which future Kosovan government was to be based and it was proposed that these ‘standards’ be implemented before any decisions on Kosovo’s final status—‘standards before status’.²¹ In the end, the intransigence defeated the negotiators. The Secretary General’s special representative, Martti Ahtisaari, eventually proposed in February 2007 ‘supervised independence’ for Kosovo as the least bad alternative. He wrote: ‘... I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community’. He went on:

11. While independence for Kosovo is the only realistic option, Kosovo’s capacity to tackle the challenges of minority protection, democratic development, economic recovery and social reconciliation on its own is still limited. Kosovo’s political and legal institutions must be further developed, with international assistance and under international supervision ...
13. ... I envisage that the supervisory role of the international community would come to an end only when Kosovo has implemented the measures set forth in the Settlement proposal.²²

Planning for the ‘international supervision’ by NATO and the EU appears to have started soon afterwards. NATO was prepared to retain its commitment to KFOR²³ and the EU was to take over civil administration from UNMIK through a new body—the European Union Rule of Law Mission in Kosovo (EULEX Kosovo).²⁴ Although further attempts were made to bring the parties together, by the end of 2007 all the bodies concerned decided that there was no prospect of reaching agreement, however

¹⁹ See Annual Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, of which the latest is S/2007/582 (28 September 2007).

²⁰ Serbia’s Constitution was amended in 2006 to make it clear that Kosovo was forever an integral part of Serbia.

²¹ See, ‘The Kosovo Standards Process’, <www.unmikonline.org/standards/docs/KSP2003-2007.pdf>.

²² Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council and Report of the Special Envoy of the Secretary General on Kosovo’s future status, S/2007/168 and S/2007/168/Add.1 (26 March 2007).

²³ Reaffirmed on 17 February 2008, Statement of NATO Secretary General, <www.nato.int/docu/pr/2008/p08-021e.html>.

²⁴ The EU made its decision to support Kosovo in September 2007 and decided that there were no prospects in further negotiation in December 2007. The EU details were finalized in the Council Joint Action 2008/124/CFSP (4 February 2008)—the EU Rule of Law Mission in Kosovo (EULEX KOSOVO).

long negotiations were continued.²⁵ Some States, notably Russia, and, of course, Serbia rejected both the premise—that negotiations were exhausted—and the conclusion—‘supervised independence’. If there were no prospect of the parties agreeing, nor was there any chance of a Security Council resolution to replace Resolution 1244 and provide a basis for ‘supervised independence’. At a meeting of the Security Council on 16 January 2008, this proposal was roundly condemned by Serbia.²⁶

B. The Declaration of Independence

Doubtless encouraged by indications that it would have the support of the United States and major EU States, the government of Kosovo took the initiative. On 17 February 2008, the Assembly of Kosovo issued its ‘Declaration of Independence’, in which it declared that the Republic of Kosovo was an ‘independent and sovereign State’. It accepted the principles of the Ahtisaari Plan and welcomed the continued support of the international community on the basis of Resolution 1244. Both NATO and EULEX were invited to discharge their mandates in the Republic of Kosovo. In its final clause, the Declaration says:

We hereby affirm, clearly, specifically and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including especially the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistently with the principles of international law and resolutions of the Security Council, including resolution 1244. We declare publicly that all States are entitled to rely upon this Declaration, and appeal to them to extend us their support and friendship.

A remarkable document, then—a unilateral declaration, *erga omnes*. Kosovo’s claim to Statehood was recognized by a number of States,²⁷ not always in the same terms; it was rejected by a smaller number, including Serbia, again, not always in the same terms, some of the reactions referring to the claim to Statehood as being illegal in international law.

C. Assessment

A common, though not universal, feature of the acts of recognition of the Republic of Kosovo was to say that Kosovo was ‘unique’ or ‘*sui generis*’, that its attainment of Statehood was not to be taken as a precedent which could be relied upon by any other ethnic group in a discrete territory which wished to secede from the State under the sovereignty of which it currently was and to have its own State. If it were to be a precedent (whatever that means),²⁸ then the Statehood of the Republic of Kosovo could

²⁵ The ‘Troika’ of the US, Russia and the EU concluded that negotiations would not reach a result in December 2007. ²⁶ S/PV.5821.

²⁷ The website <www.kosovothanksyou.com> contains the texts of recognition decisions communicated to the Government of Kosovo. References to the statements of individual States have been taken from this site, except where specifically indicated to the contrary.

²⁸ The concern may be simply political—that Kosovo would be cited by every potential separatist movement. In legal terms, the implication is that Kosovo is seen as the (mere) application of a general rule, capable of being applied to similar instances of claims to independence; or that it is the vindication of a general power, that somewhere in the international system is the power to deprive a State of its title (and to create a new State on the territory of which it has been dispossessed).

have a destabilizing effect on many States. That it might be called in aid in support of other secessionist projects has undoubtedly weighed with some States as they consider whether or not to recognize the Republic of Kosovo. No one factor makes Kosovo unique but a case might be made that certain of its features taken together do make it special. What these factors are depends again upon where we start. The repression of the Kosovars up to 1999 was pretty exceptional but by no means unique. It is notable that no Serb was indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) for genocide in Kosovo, though some were for crimes against humanity and war crimes. Nonetheless, it might be said that if there had not been the repression, Serbia's relationship with Kosovo would have been different. In some of the political commentary about Kosovo, there have been suggestions that Serbia is being punished for its human rights violations by losing Kosovo. Certainly, that is one element in Serbia's complaint about what has happened.²⁹ Whatever the accuracy of this as a figure of speech, it has no international legal support—and, indeed, is an example of why the International Law Commission (ILC) abandoned the 'crimes of state' provision as part of its project on State Responsibility.³⁰ More unusually, it was the unilateral use of force against Yugoslavia in response to the repression which was essential to causing Serbia to withdraw and allowing the unopposed interposition of the international presences in Kosovo.³¹ Although there are other examples of international elements in the administration of territory in the Charter period, they have been part of decolonization/self-determination projects or for the consolidation of Statehood obtained as a result of the exercise of self-determination.³² The two events together—the bombing and the administration—may create a political responsibility to produce a solution in which the position of the victims—the Kosovars—is at least no worse than when the action started. The concern of the States most involved in Kosovo seems to have been that they were not prepared to go on with this commitment forever, indeed the longer that they did so with Kosovo's status unresolved, the greater the danger of instability in the whole area.³³ The belief was that the international administration had started a process which would be effective in providing Kosovo with viable institutions, which would conduct themselves in accordance with the Ahtisaari principles, in particular, that the Serb minority in the Republic of Kosovo could remain confident that they would suffer none of the deprivations of the kind previously inflicted on the Kosovars. Such progress and such potential guarantees of entrenchment would not normally be available in cases of unilateral secession. In essence then, this is the claim of uniqueness about Kosovo—that an identified set of domestic arrangements for the new entity have been established and will be made effective by international participation in the governance of the Republic of Kosovo. Establishing these conditions has followed upon patterns of grievous human rights violations and unilateral military intervention

²⁹ See, eg, Serbia's President Tadic in the Security Council, S/PV.5821, 3. For somewhat equivocal support, see UK in Security Council, S/PV.5839, 13.

³⁰ See below, n 50 for individual criminal responsibility.

³¹ See Milano (n 15), considering whether or not the FRY's agreement to the KFOR intervention in Kosovo was obtained by the unlawful use of force.

³² Notably in East Timor/Timor-Leste, SC Resolution 1272. See J Crawford, *The Creation of States in International Law* (2nd edn, CUP, Cambridge, 2006) 560–62.

³³ Italy in the Security Council, S/PV. 5839, 9.

but these events were not the cause of the present situation, they are not of themselves the features of Kosovo's uniqueness.

The other aspect of Kosovo's specialness has been the willingness of some States to reach the conclusion that the territory's link with its State (Serbia) ought to be broken and that Kosovo should be regarded as (some kind of) a State. There are other instances where this has happened, perhaps the most prominent being the reaction of States to the claim of Statehood of Bangladesh.³⁴ Isolated cases are not regarded as 'precedents' so much as exceptional deviations from the norm, and their results can be absorbed into international practice without doing too much damage to better-established fundamentals. In contrast to the example of Bangladesh, one can point to the uniform resistance to admitting any right (or even prospect) of non-consensual secession of any entity from any of the States which emerged in Yugoslavia or from the Soviet Union, including from Russia itself.³⁵ This rejection of a right of secession is the general rule. Of course, Serbia aligns itself with this extensive practice—and having been denied what it asserts are its rights—its voice has remarkable echoes of the protests of Pakistan when Bangladesh was carved from its territory.

There are, though, other complications here. They are related. The first is the continuing authority of SC Resolution 1244, invoked both by Serbia as an endorsement of its territorial rights over Kosovo, and relied upon by the Republic of Kosovo and its supporters as the basis for the international engagement in Kosovo. Resolution 1244 is a Chapter VII Resolution and so there may be binding obligations for all Members of the UN which arise from it, so long as it remains an operative instrument.³⁶

D. The Status of (the Republic of) Kosovo

To recap, there are three separate (but possibly related questions) which need to be addressed (and not necessarily in this order):

- (1) Whatever the status of the Republic of Kosovo, does it have some international element to it?
- (2) Whatever the status of the Republic of Kosovo, does it have some element of Statehood to it?
- (3) What part do individual State decisions have in establishing the status of the Republic of Kosovo?

The Republic of Kosovo may continue to have, as Kosovo has had since 1999, some internationalized aspects to its status, elements which may (or may not) be compatible with Serbia's continued claim of sovereignty over Kosovo. If the Republic of Kosovo's status is some kind of Statehood, though, then we must be able to account for how Serbia's previous sovereign claim has been severed, given its continued assertion by Serbia. If the Republic of Kosovo's status is different after the Declaration of Independence from what it was before, it is necessary to establish the legal basis for

³⁴ See Crawford (n 32) 140–43.

³⁵ J Crawford, 'State Practice and International Law in Relation to Secession' (1998) 69 *British Yearbook of International Law* 85.

³⁶ See J Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty' (2005) 9 *Max Planck Yearbook of United Nations Law* 225, a very useful piece.

this (and where necessary, that the legal conditions have been satisfied), in particular, to make an assessment of the significance of individual State acts expressed by recognition/not recognizing decisions. It is necessary to avoid avoiding the question of how Serbia lost its title simply by postulating a new status for Kosovo which requires (but does not explain) the termination of Serbia's rights, which, it will be suggested, has been a frequent deficiency in the recognition statements.

In the following section, I make some tentative legal assessments of the Republic of Kosovo's Declaration of Independence and the events which have followed it. They are tentative for a variety of reasons but for one in particular. Expressly or by implication, the Declaration of Independence was intended to and has been followed by actions designed to *create* a State of Kosovo. What is more, it has been an attempt to create a State on the territory of another State. Despite the bold words of the Declaration, there was no State of Kosovo immediately upon its proclamation. Unless there were some rules to the contrary, the existing sovereign would be entitled to take action to try to re-establish its authority (Serbia has said that it intends to do so but that it will not resort to armed force in pursuit of that objective.)³⁷ Serbia may have obligations of this kind to the UN or KFOR but it is hard to see how it can have any to the Republic of Kosovo, since that would be to assume precisely what Serbia is contesting, that the Republic of Kosovo was a State with rights of non-intervention which Serbia must respect. While the resolve of Serbia is being tested, so must the resilience of the Republic of Kosovo be established. Even if the elements of the international presence are available and are able to take up their functions in the Republic of Kosovo, without them, the national institutions and the economic prospects for the new entity look fragile. It has already been necessary for KFOR, still there in its original guise and discharging its original mandate, to intervene to maintain order and to protect Kosovo's borders.³⁸ In short, Kosovo must be *constituted* as a State. Depending where one stands, this constitutive process must be complete in order for Statehood to be lawfully claimed—and for any recognition to be lawfully granted.³⁹ Contrarily, one may take the position that acts of recognition may contribute to the consolidation of Statehood—that is to say, that the acts of recognition do not only constitute relations between the two States but contribute to constituting the State itself. Although theoretical and practical objections may be taken to this prospectus, it has its virtues. The obtaining of Statehood may not be an instantaneous matter. Indeed, where the new Statehood is resisted by the previous sovereign, it probably never will. The effective authority of the institutions of the entity asserting its new Statehood will have to be established over time.

We should distinguish two different kinds of circumstance. First, where the new claimant acts in pursuance of a right of self-determination, then there are practical,

³⁷ eg President Tadic in the Security Council, S/PV.5839, 6. The position is similar to that taken by the British Government in the face of the 'Unilateral Declaration of Independence' by the rebel regime in Rhodesia in 1965, when the UK maintained that it was still the sovereign but that it would not use force to assert that sovereignty in fact. That they UK position prevailed was because of the considerations of the self-determination of the people of Rhodesia, considerations which do not apply to Kosovo.

³⁸ Serbs destroyed border posts between Kosovo and Serbia, requiring UN police to be replaced by KFOR troops, <<http://uk.reuters.com/article/latestCrisis/idUKHAM95844820080219>>.

³⁹ Crawford (n 32) 22–26.

though not always compelling, reasons for supporting it, for trying to help it consolidate its authority. There can be no other legitimate claimant to Statehood in this kind of case—any other would be a usurper of the rights of the people of the territory to self-determination. While, strictly, there may not yet be a State there, we know what State must be there in the end, if self-determination is to be satisfied. This is, for instance, the justification for the support given to the authorities in the Congo immediately after the Belgian exodus from its former colony in 1960. The mandate of the United Nations Operation in the Congo (ONUC), the first peacekeeping force authorized by the Security Council, was to help the weak State agencies in Congo to establish their authority over the whole of their territory.⁴⁰ Constitutive activity in these circumstances, based on the fiction of existing Statehood, serves the purposes of the international system by facilitating the effective enjoyment of the right of self-determination. The second category, which involves a transitional period between one *government* and another within a State, is different.⁴¹ The typical example will be the replacement of an authoritarian regime by a more democratic one. A process, sometimes a long one, is needed here—to draw up the legal frameworks and to implement the constitutional transition. The support of external agencies, organizational or governmental, will sometimes be an essential component in the transition. In the present context, what matters is that the identity of the State is not disputed—there is no call for recognition of any new Statehood and no space in which Statehood could be established—and, in any event, the authority of the Security Council would be required.

Now, when we return to Kosovo, the differences are manifest. Subject to what will be said in a moment about self-determination, Kosovo fits neither category. There is no State there; there is no compelling, legal reason why there ought to be a State of the Republic of Kosovo, with the same boundaries or at all (say, compared to the possibility of its absorption into Albania or its association with ethnic Albanian occupied territory in Macedonia or its partition). Even if, for some reason, Serbia can be said to have lost or abandoned its title to Kosovo, as a matter of law, it is not clear what should come next. Here, there is neither an actual nor a presumptive State to be recognized by other, individual States. Equally, the situation is not about the installation of one government to replace another in an established State, though there are ambitions that the government of Kosovo should have the same ‘good governance’ character of those supported by pro-democratic interventions.

As I have indicated, there has, though been a considerable number of such recognition statements and the authorities in Kosovo are apparently confident that there will be many more. There have been also some statements of not recognizing Kosovo, not just by Serbia, just as there were dissenters from the recognition of Bangladesh. One reiterates—Statehood and recognition are different things. States are not obliged to recognize other States but States are obliged not to recognize as States things which are not States, certainly where to do so would prejudice the right of another State. We must conclude, then, that the 30 or so States which have already recognized Kosovo as a

⁴⁰ SC Res 143, 145, 146. There were international peace and security considerations which arose out of the threat of secession *from* the Congo of the province of Katanga, whereas here, the continued place of Kosovo *in* Serbia is identified as the threat to international stability.

⁴¹ eg even if not a perfect one, Iraq.

State believe that they were entitled to do so. Normally, recognition of an entity as a State is an unequivocal act—the one State acknowledges that the other entity satisfies the criteria of Statehood and accepts that their relations are governed by international law. So long as the facts upon which the recognition is based, this commitment is unqualified. It is true that recognition sometimes appears to be granted upon conditions but any breach of those conditions goes, if it goes anywhere in terms of law, only to State responsibility and not to the status of the recognized State. Self-imposed conditions usually will go no further than confirming already binding obligations but, as the Declaration of Independence shows, a State may undertake duties in the performance of which third parties may have an interest—for instance, to the extent that the obligations with respect to minorities expressed in the Declaration of Independence do not reflect already existing obligations, the Republic of Kosovo binds itself *erga omnes* to respect the protection of its minorities set out in the Ahtisaari principles. If it fails to do so, any third State is entitled to demand only that the Republic of Kosovo lives up to its undertakings, not that the Republic of Kosovo's status as a State is thereby affected.⁴² None of the recognition statements, though several refer to Kosovo's commitments, depart from this model. That of the United States, for instance, recognizing Kosovo as 'an independent and sovereign State', refers to Kosovo's affirmation of its obligations under the Ahtisaari plan as the basis for establishing diplomatic relations (which could be rescinded if Kosovo were to fail to abide by its promises). The US formula—'independent and sovereign State'—or close variations—'independent State' (Australia⁴³, Denmark), 'independence' (UK⁴⁴)—are the most common formulations. Bulgaria, however, recognizes Kosovo's 'independence under international supervision'. Most strikingly, Sweden's recognition statement contains the following:

[It] recognizes the Republic of Kosovo as an independent State whose independence is supervised for the time being by the international community . . .

A difficult and demanding process is now being started to build a Kosovan State that meets international requirements.⁴⁵

The Swedish Government's careful words seem to me to capture most accurately what the recognizing States are purporting to do—and leaves open the possibility that the process of establishing a State 'that meets international requirements' might not be completed.

What of those States which have taken a position not to recognize Kosovo. Such postures of 'not recognizing' sometimes have to be implied because the not recognizing States have simply said nothing. For Serbia, of course, the Declaration is unlawful in its national law, besides which the international ramifications may be less significant, save in one particular instance. Because Serbia regards the Republic of Kosovo's claim to Statehood to be an illegal act, it also regards recognition of Kosovo's Statehood as unlawful and, therefore, as permitting Serbia to respond, even

⁴² Conditional recognition is to be distinguished from conditional Statehood (also a mysterious category), see above, Friedrich (n 36).

⁴³ On the Australian decision, see R Piotrowicz, 'The Decision to Recognise Kosovo' *Australian Law Journal* (forthcoming).

⁴⁴ Foreign Secretary, HC Hansard, Vol 472 col 20WS (19 February 2008).

⁴⁵ The US Under Secretary of State for Political Affairs said on several occasions in a press conference that NATO troops were needed in the Republic of Kosovo to help it establish itself, pp 2 and 4, <www.state.gov/p/us/rm/2008/100976.htm> (18 February 2008).

by counter-measures.⁴⁶ The most that it has done so far has been to sever diplomatic relations with some recognizing States. The most stringent criticism otherwise has come from Russia which has described the claim of Statehood as 'in violation of the sovereignty of States, of the Charter, of resolution 1244 and of the Helsinki Final Act'.⁴⁷ Spain has described the Declaration of Independence as 'not in accord with international law'.⁴⁸ Like several other EU States, Spain has made clear its decision not to recognize Kosovo's secession from Serbia, because they do not believe that it will not be called upon as a 'precedent' by separatist groups in their own territories.⁴⁹ For Spain, the situation in Kosovo is like cases where Spain would say that claims to Statehood would be unlawful.

These States raise obstacles other than the fact that the Republic of Kosovo does not satisfy the criteria of Statehood as the reason for their 'not recognizing' positions. It does seem difficult to see how the territorial claims of Serbia may be so easily dispensed with. Even assuming that it does lie within the power of the Security Council to reallocate territorial sovereignty, even up to the point of constituting a new State, it has not done so here. However, Resolution 1244 may be read, it surely does not bear the meaning that, in 1999, the Council authorized the separation of Kosovo at sometime in the future, even if it is true to say that it nowhere expressly excludes it. There has been no 'second resolution' which fills the gap in Resolution 1244. There is no authority for a rule of international law which allows the 'punishment' of States, especially by something as condign as a loss of territory, for breaches of the law, however severe. There were very serious violations of international law by the FRY in its treatment of the Kosovars. However, individuals have been indicted and prosecuted for criminal violations of international law in Kosovo at the ICTY.⁵⁰ To trace a right to change the status of Kosovo back to the events of 1999 does not comport with the law. There is, of course, no question of Serbia abandoning its title to Kosovo at any time.

There remains the possibility that the people of Kosovo have/had a right to self-determination, which gave them the right to secede. If so, this must be a post-colonial version of self-determination,⁵¹ and it must be something more than a right to internal self-determination which goes to a right to responsive and inclusive government within a State.⁵² It has sometimes been suggested that denial of the right to internal self-determination ultimately, and in particular circumstances, does give rise to a right of

⁴⁶ Serbia's 'Plan of Action' involves the recall of its Ambassadors from any State which recognizes the Republic of Kosovo and that it will take 'concrete measures' against such States, <www.srbija.sr.gov.yu/vesti/vest.php?id=43314>.

⁴⁷ Statement by Ministry of Foreign Affairs of the Russian Federation, 216 (17 February 2008).

⁴⁸ BBC News (19 February 2008).

⁴⁹ Three other EU States have said that they will not recognize the Republic of Kosovo—Cyprus, Slovakia and Romania.

⁵⁰ Case No IT-99-37-PT *Milutinovic et al* (Third Indictment). Ex-President Milosevic was facing charges relating to Kosovo when he died. An Indictment has been issued against Kosovar leaders for conduct in the civil war against the FRY Government, Case No IT-04-84-T *Haradinaj et al* (Fourth Indictment), without it being suggested that the rights of the people of Kosovo should in any way be diminished.

⁵¹ UNGA (Res 2625 xxv) Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the charter of the United Nations.

⁵² S Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP, Oxford, 2004) 148–51.

the oppressed people in an identifiable piece of territory to leave a State and set up their own (or join another).⁵³ It is not easy to find practice on which such an interpretation of the right of self-determination could be founded—and that is scarcely less surprising than the absence of practice to support a right of secession *simpliciter*.⁵⁴ The impact of the law of self-determination on the situation in Kosovo was given intensive consideration by Professor Tomuschat, writing in 2002.⁵⁵ He notes two things about Resolution 1244: that it nowhere mentions self-determination; and what it does speak of for the Kosovars is something much less, an entitlement to autonomy.⁵⁶ He says that the negotiations of that time, based on Resolution 1244, spoke in terms of self-government, not merely *ad interim* but as a feature of the future regime for Kosovo. In order to ensure the rights of the Kosovars, he resignedly concluded: ‘The Security Council must continue to bear the burden which it has deliberately shouldered by adopting resolution 1244’.⁵⁷ Earlier though, he had noted that the ‘ultimate remedy’ attached to the right of internal self-determination—*forfeiture of title*—was ‘replete with delicate consequences’, even for some members of the Security Council themselves: ‘Implicitly, however, the philosophy of forfeiture permeates resolution 1244, providing the only possible justification for the establishment of interim but long-term UN rule over Kosovo’ (emphasis added).⁵⁸

In a careful consideration of the possible impact of a right of secession derived from a developing right of internal self-determination, Friedrich suggested that Kosovo might be the first case in which this right is executed, but he envisaged a ‘conditional’ right of independence; conditional, that would have been, on the Republic of Kosovo providing human rights protection to its minorities. Failure to do so would have led to the forfeiture of the right to independence derived from self-determination.⁵⁹ While what has happened might accord with the first part of Friedrich’s suggestion, there is no indication that the recognizing States regard the Republic of Kosovo’s Statehood as conditional in this sense.

Although the Security Council has considered the Declaration of Independence, it did not reach a collective decision and the interventions of those States which support the Republic of Kosovo do not give any convincing account about the lawfulness of what has gone on.⁶⁰ The Security Council session held immediately after the Declaration of Independence had been proclaimed revealed the extent of the divisions within the Council. The representative of the UK said: ‘[We] meet today in unusual circumstances. A new State has been established in Europe against the wishes of its former parent State and against the wishes of a permanent member of the Council’.⁶¹ ‘Unusual’? Quite. It was not surprising that no action was taken at the end of the meeting. The Secretary General, conscious no doubt of the competence of the Council, said that the proposal of the EU to send the EULEX mission to Kosovo would have

⁵³ D Mursweik, ‘The Issue of a Right of Secession-Reconsidered’, in C Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht, 1993) 21–40. That internal self-determination includes an ultimate right of secession is denied in a recent survey of the modern law of self-determination: P Hilpold, ‘Self-determination in the 21st Century: Modern Perspectives on and Old Concept’ (2007) 37 *Israel Yearbook on Human Rights*, 246, 284. ⁵⁴ See above n 35.

⁵⁵ C Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’ in G Kreijen et al (eds), *State, Sovereignty and International Governance* (OUP, Oxford, 2002) 323.

⁵⁶ *ibid* 341.

⁵⁷ *ibid* 347.

⁵⁸ *ibid* 344.

⁵⁹ SC debate (18 February 2008) S/PV.5839.

⁶⁰ (n 32) 251–54.

⁶¹ *ibid* 12.

'significant operational implications for UNMIK' and, while they were worked out, UNMIK would work within the framework of Resolution 1244. In the absence of new instructions from the Council, he would respond to any changed circumstances, bearing in mind the need to uphold international peace and security.⁶² There were no new instructions. We have been here before. When the unity within the Security Council which had allowed the deployment of the ONUC mission to the Congo in 1960 broke down, the then Secretary General, Hammarskjöld, took it upon himself to take the decisions which were within his practical powers to do the best he could to fulfil the designated mandate of ONUC in the changed situation in the Congo. He endured considerable criticism in doing so but his interventions did make a significant contribution to such success as ONUC had in assisting in the establishment of governmental authority there.⁶³ Similar dilemmas may yet face Ban Ki-moon, unless, as seems unlikely at the moment, the permanent members can reach some common ground about the future relationship between the Republic of Kosovo and the Council. The obstacles to their doing so were apparent in the debates. Russia said that it continued to recognize Serbia 'within its internationally recognized borders'.⁶⁴ International law allowed changes to State frontiers only in accordance with the law and by peaceful means and by agreement. The Declaration of Independence was unlawful. However, Resolution 1244 remained in force and the international missions in Kosovo were obliged by its terms to return Kosovo to where it was before the Declaration. As for the EU's so-called rule of law mission, it required the authority of the Council before it could carry out its role in Kosovo. Finally, Russia was concerned about the lessons which might be drawn if the Kosovan action were not reversed. Its representative said: 'We hope that with regard to Kosovo affairs a legal, not a unilateral, solution will prevail. We are convinced that all United Nations Member States that cherish their own territorial integrity are interested in the same thing'.⁶⁵

Russia was supported by China and Viet Nam⁶⁶ and, with some qualification, Indonesia.⁶⁷ The remainder of the Council took different positions, not all exactly the same, and some of those States which did not condemn Kosovo's decision did not commit themselves on the recognition question.⁶⁸ There is not space to run through the nuances here. The EU, which, outside the Council, also was divided, enjoyed the benefit of the participation of four of its members on the Council, which all shared the same (majority) EU position. Italy said: 'Kosovo's independence is today a fact. It is a new reality which we must face and acknowledge. We intend . . . to proceed swiftly with the recognition of Kosovo's new status of *independence under international supervision*.' (emphasis added).⁶⁹

As noted above about some of the individual recognition statements, this is not the traditional language of recognition of a State. Italy notes that the international supervision will be 'intrusive'—'the international community on the ground is strong'.⁷⁰

⁶² *ibid* 3.

⁶³ E Lefeber, *Uncertain Mandate: Politics of the UN Congo Operation* (Johns Hopkins UP, Baltimore, 1967); G Abi-Saab, *The United Nations Operation in the Congo, 1960–1964* (OUP, Oxford, 1978).

⁶⁵ *ibid*.

⁶⁶ *ibid* 7–8 and 14.

⁶⁷ *ibid* 12.

⁶⁸ For instance, South Africa, *ibid* 16, conscious of the importance to African States of the principle of territorial integrity.

⁶⁹ *ibid* 10.

⁷⁰ *ibid*. In the Ahtisaari Principles, it is provided that there will be an International Civilian Representative . . . who shall be appointed by an International Steering Group [a self-selecting

The ‘fact’ of independence of which the Italian representative spoke depended precisely on that strength. It is not the way in which ‘independence’ is ordinarily understood, even where a generous view is taken about the content of both formal and actual independence.⁷¹ The matter thus arises about the legality, not just of the Republic of Kosovo’s Statehood, but of the measures the international community might take in the paradoxical causes of restraining and enhancing Kosovo’s independence at the same time—restraining it by holding it to its Ahtisaari Plan commitments, enhancing it by helping it develop indigenous capacities for maintaining internal order and protecting its international security. In addition to his explanation of the legality of what was proposed, the UK representative circulated an Annex entitled, ‘Kosovo: Legal Questions’.⁷² The paper does not refer at all to the legality of the claim to Statehood, save to say that Statehood was not ruled out by Resolution 1244. Instead, the paper proceeds from an assumption of its legality to examine the legality of the deployment of EULEX. The approach to the interpretation of Security Council resolutions closely mirrors that which the UK took to the interpretation of Resolution 1441 about the use of force against Iraq. What is not expressly excluded is permitted and there is, it is accurately then said, nothing in Resolution 1244 which rules out independence. So, it is argued that Resolution 1244 addresses only the interim status of Kosovo and the reference to the territorial integrity of Serbia must be correspondingly limited. In any event, territorial integrity is only referred to in a non-binding, perambular paragraph. Kosovo is a special case and: ‘Recognition of its independence, which is a matter for individual States to decide, is not therefore a precedent for any other situation.’⁷³

Of course, the Russian position is that the Declaration is unlawful for far more reasons than that it is contrary to Resolution 1244. It is hard to see why, even if final status does not necessarily exclude independence, it should be for individual States to determine that question (even if they would have an individual right of recognition if an independent State were to emerge as an element in the final status of Kosovo). Equally, it is not just independence but the envisaged international supervision which must be compatible with Resolution 1244, so long as it is extant. The UK paper says that EULEX will work with the UN to help in the discharge of its mandates under paragraphs 11(f) and (i) of Resolution 1244. Paragraph 11(f) refers to the supervision of the transfer of authority from Kosovo’s provisional institutions to those operating under the final settlement (now, to State organs, so far as the Republic of Kosovo and the recognizing States are concerned). Paragraph 11(i) sets the task of maintaining civil law and order, to be a function ultimately of a local police force, but in the meantime to be maintained by an international police force. It is, the UK argues, for the Secretary General to decide what the composition of the civil presence should be and his powers include invoking

group of States] who shall be the ultimate supervisory authority over implementation of the Settlement. The International Civilian Representative shall have no direct role in the administration of Kosovo, but shall have strong corrective powers to ensure successful implementation of the Settlement. Among his/her powers is the ability to annul decisions or laws adopted by Kosovo authorities and sanction and remove public officials whose actions he/she determines to be inconsistent with the Settlement. The mandate of the International Civilian Representative shall continue until the International Steering Group determines that Kosovo has implemented the terms of the Settlement.

⁷² Copy supplied by the Foreign and Commonwealth Office.

⁷³ *ibid.*

⁷¹ Crawford (n 32) 88–89.

the assistance of relevant international organizations. The UK points out that the development of UNMIK has resulted from decisions of the Secretary General, not decisions of the Council; accordingly, there is no need for a new Council decision. So long as the powers of EULEX can be brought within the mandates set out in Resolution 1244, and so long as the Secretary General is prepared to accept the contributions of the EU on the terms that they are offered, the ONUC example suggests that the paper's conclusions are sound. Indeed, it may be that the Government of the Republic of Kosovo could invite EULEX into its territory to operate as a free-standing mission, even though some duplication (and maybe friction) between UNMIK and EULEX would be inevitable. Only if the Secretary General forbade such deployment would there seem a legal reason why the EU should not respond to a request from the Kosovan authorities. It is the premise—the overall legality of the Declaration of Independence and the subsequent reactions of States—on which the paper is vulnerable.

For all that recognizing States have used the language of Statehood about the Republic of Kosovo, there does seem something unusual about what has happened. We are dealing with the *creation* of a State, not with the submission of a State to some kind of protected regime under treaty, where the legal basis of any arrangement may be traced back to the treaty of protection (and would have binding effects only for the parties and such other States as recognized the new situation). Although non-State entities may have the power to make treaties,⁷⁴ they do not have the power to make themselves a State by treaty. The Republic of Kosovo is not, in any orthodox sense, a protected State. The best answer (other than that Kosovo remains as a matter of law part of Serbia) may be that provided in the Swedish recognition document quoted above.⁷⁵ It is not only that the situation of Kosovo before the Declaration of Independence was unique but the situation afterwards. In terms of the ordinary criteria of Statehood, the Republic of Kosovo is not yet a State. Too many of the functions of a State are discharged by the international presences, bodies which have the ultimate authority in their wide areas of competence.⁷⁶ The mere fact that the Republic of Kosovo has agreed to subject itself to certain obligations, those deriving from the Ahtisaari Plan, does not detract from Statehood. There is no discrete international law source of these obligations in any case: the Republic of Kosovo is not a Member of the UN (nor will it be so long as Russia retains its objections to the Republic of Kosovo's membership) and so is not bound by any obligations which might arise out of Resolution 1244. Nor would the right of intervention the UN claims under Resolution 1244 necessarily prejudice Kosovo's Statehood. One can compare this situation with the treaty rights of unilateral intervention provided under the Zurich accords with respect to Cyprus, rights which have not precluded Cyprus from being treated as a State.⁷⁷ Cyprus was, though, an instance of decolonization and the consent of the colonial sovereign was part of the process of independence. The vice in the Republic of Kosovo's present claim is different. It is that there was no State there the moment before the Declaration and that there is nothing which has happened since which has, given the limited aspects of authority in Kosovan hands, suggested that it has anything like the qualities needed for Statehood. This is not a case like Taiwan,⁷⁸ where an

⁷⁴ eg Hong Kong.

⁷⁶ See above, n 70.

⁷⁷ Treaties of Alliance and Guarantee (1960) 164 BFSP 388, 557.

⁷⁸ Taiwan, incidentally, has recognized Kosovo.

⁷⁵ Above, n 45.

entity has (arguably) forborne from making a claim to Statehood which is available to it. So, as the Swedish statement says, work needs to be done to establish Kosovo as a State, to constitute a State, perhaps better, to constitute the facts which would make Kosovo a State, in the face of opposition from at least one of its neighbours, Serbia, which has some capacity to make the process difficult.⁷⁹ It is certain that the process could not be successful without the participation of what some States have called ‘the international community’, a shifting concatenation of States and international organizations which has involved itself in Serbia’s affairs.⁸⁰ Sometimes Russia is included within this ‘international community’—as a member of the International Contact Group—but when it disagrees with the policies of the dominant members of this coalition, the international community moves on without it, just as it did when, in the name of the international community, NATO bombed Yugoslavia in 1999. Ultimately, this is why the way in which the situation is dealt with is so important. It would be convenient and very helpful if the international system had a legislative device to deal with anomalous cases, to be able to amend the general rules to accommodate them or to provide an expressly exceptional solution; but it does not, at least not in the absence of a Chapter VII Security Council resolution. All the invocation of the authority of ‘the international community’ cannot hide what is an attempt by some States, for what they see as very good reasons, to make a world which does justice to the Kosovars (and furthers their own interests in Balkan stability) even if that cannot be done without depriving Serbia of some of its rights. Nonetheless, international lawyers know only too well that the facts can make the law—and the facts in Kosovo will eventually establish whether or not Serbian authority is to continue or a new State has conclusively emerged—but at the moment, we are still waiting on the facts to be established. The law does not seem to have much to do with that.

COLIN WARBRICK*

II. PIRACY OFF SOMALIA: UN SECURITY COUNCIL RESOLUTION 1816 AND IMO REGIONAL COUNTER-PIRACY EFFORTS

A. Introduction

Conflict in Somalia has increasingly extended its reach into the waters off its coasts, with armed groups now attacking foreign vessels not only in the territorial sea but even at distances beyond 200 nm from shore. Concerns raised in the International Maritime Organisation (IMO) have now led to two legal instruments which may play a significant role in regional counter-piracy. UN Security Council Resolution 1618 uses

⁷⁹ For instance, local elections will take place in Serbia in May 2008. The Serbian Government has announced its intention to conduct those elections in Kosovo.

⁸⁰ Serbia has protested about the creation of the ‘International Steering Group’ of 15 States which have recognized the Republic of Kosovo (the representative of which will also be the International Civilian Officer in Kosovo) because it falls outside the mandate under Resolution 1244, < www.voanews.com/english/2008-02-29-voa58.cfm >.

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