

Alexander Orakhelashvili

STATEHOOD, RECOGNITION AND THE UNITED NATIONS SYSTEM: A UNILATERAL DECLARATION OF INDEPENDENCE IN KOSOVO¹

Alexander Orakhelashvili

*LLM (Leiden), PhD (Cambridge), Lecturer, School of Law,
University of Birmingham*

I. INTRODUCTION¹

The Unilateral Declaration of Independence (UDI) in Kosovo in February 2008 has raised several fundamental questions of international law in terms of the legal status of secessionist entities, but also of the legality of certain acts and conduct in the context which is being managed by the UN Security Council in the exercise of its Chapter VII powers to maintain and restore the international peace and security.

States that have sponsored and recognised the independence of Kosovo have neither declared that this matter is outside the realm of international law because of its political nature, nor do they have, as will be shown below, developed any consistent explanation of the international legal position that would envisage or tolerate the independent state of Kosovo. The question of whether Kosovo is a state is material for a number of issues arising in international practice, before international and national courts, in terms of the aspects of recognition of the acts and transactions of this entity. These issues will no doubt be raised in due course before courts and beyond, and it may be premature to examine them at this stage.

Instead, the present contribution will cover the basic issues that pervaded the process in which independence was declared in Kosovo and debated in various international fora, and a number of recognitions were granted to this entity. The arguments raised in this process are most material and current for this contribution, as well as determinative of more specific claims and incidences of statehood that may be raised in national and international organs over the coming years. The contribution will also engage with different views regarding the statehood claims and recognition of Kosovo, especially with the argument that the existence of Kosovo is now a fact and

¹ This article reflects developments as of 1 August 2008.

part of reality.

In accordance with the above, the following Part II. will examine the facts and history of the Kosovo situation; Part III. will cover then the statehood and secession requirements and their application under international law in the case of Kosovo; Part IV. will examine the argument that the independence of Kosovo is unique and cannot establish any precedent; Part V. shall examine the legality of recognition of the independence of Kosovo; and Part VI. will cover the compatibility of the UDI and the deployment of the EU Mission EULEX in Kosovo with the relevant UN Security Council resolutions; the future prospects of resolving the Kosovo situation will be dealt with in Part VII.; and finally Part VIII. will offer some conclusions, among others on policy issues.

II. FACTS AND HISTORY OF THE KOSOVO SITUATION

Historically, Kosovo has been an autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY), until the abolition of its autonomous status in 1989. After the dissolution of the SFRY in 1991-1992, Kosovo continued as part of Serbia within the Federal Republic of Yugoslavia (FRY). In 2003, the FRY was transformed into the Federation of Serbia and Montenegro. After Montenegro declared its independence in 2006 on the basis of a referendum and with the consent of the central government, Serbia continued as the successor of the FRY.

Already from the 80s onwards, the separatist and pro-independence movement among the Albanian majority population in Kosovo has been receiving international attention. From 1998 on, the UN Security Council has been involved in dealing with this situation as a threat to international peace and security under Chapter VII of the United Nations Charter. S/RES/1160 (1998) of 31 March 1998 has been adopted condemning the activities of the Federal Forces of Yugoslavia against the Kosovo population, as well as the

terrorist attacks by the “Kosovo Liberation Army.” By S/RES/1203 (1998) of 24 October 1998 the Security Council oversaw the agreement between the OSCE and the FRY to desist from further human rights violations and permit the OSCE mission to monitor the humanitarian situation on the ground.

The treatment of Albanians in Kosovo by the FRY security forces has caused great human suffering with international implications, culminating with the 1999 attack and the air campaign by NATO against the FRY which ended with the withdrawal of Yugoslavian forces from Kosovo and the establishment of the UN Mission in Kosovo (UNMIK) by S/RES/1244 (1999) of 10 June 1999, to administer the territory, and the Kosovo Force (KFOR) to provide for order and security. By the end of the NATO intervention, the number and extent of human casualties and suffering among the Kosovo Albanians has been much higher than before the NATO intervention,

In 2007 the issue of the final status of Kosovo has been brought before the UN Security Council, on the basis of the plan submitted by the UN Rapporteur Martti Ahtisaari.² The plan envisaged the internationally supervised independence of Kosovo. This was rejected by Serbia, and accepted by the authorities in Kosovo. The presentation of the Ahtisaari Plan generated a heavy debate on the status of Kosovo, both in its legal and political aspects. As it would have been expected, the idea of the independence of Kosovo was endorsed by the United States and a number of EU Member States, and opposed by Russia, China, India,³ but also by several EU Member States. A motivation behind this objection was the need for further negotiations between Belgrade and Pristina to find a mutually acceptable agreed solution of the Kosovo status.⁴ At the end of the day, the Security Council refused to endorse the supervised independence for Kosovo based on the Ahtisaari plan, which was supported in the Council only by a substantial minority.

² Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Doc. S/2007/168.

³ P. Reynolds, “Kosovo: To Recognise or Not To Recognise”, BBC Information, 18 February 2008, available at: <www.news.bbc.co.uk> (this and all other press and website information on file with the author); see also the information “Russia, India, China Step up Solidarity”, The Hindu, 16 May 2008 available at: <www.hindu.com>, India for the first time joined Russia and China in stating categorically in the RIC (Russia, India, China) communiqué that “the unilateral declaration of independence of Kosovo is contrary to the U.N. Security Council Resolution 1244,” and calling for settling the issue “in accordance with norms of international law” and on the basis of “an agreement” and “through negotiations” between Belgrade and Pristina. The text of the RIC joint communiqué of 15 May 2008 is available on the website of the Indian Ministry of External Affairs, available at: <www.meaindia.nic.in>.

⁴ See e.g. Statement by the Russian Representative Mr. Churkin to the United Nations 14 December 2007.

The negotiations were continued within the framework of the United States, EU, Russia Troika, but during a number of meetings the Serbian and Kosovo Albanian sides failed to reach agreement, the former objecting to independence and the latter insisting on internationally supervised independence as envisaged in the Ahtisaari Plan.⁵ Against this background, the authorities in Kosovo declared the independence of the province from Serbia, and appealed to the international community for recognition on 17 February 2008.

Serbia considered this UDI illegal and stated the intention to achieve having it overturned.⁶ Recognitions followed mostly from Western states, and the opposition was voiced from the rest of the world. Currently the states having recognised Kosovo as an independent state consider the process of the determination of the status of Kosovo as a finalised affair, while Serbia and a number of other states support the idea of further negotiations to achieve the agreed settlement between the Kosovo authorities and the government of Serbia.

In the post UDI period, as well as before that, the Serbian government has come under pressure from the EU and elsewhere to accept the independence of Kosovo, possibly in exchange for the accelerated process of the integration into the EU.⁷ As can be seen from the statement of the Prime-Minister of Serbia the EU, “urged the signing of a stabilisation and association agreement between the European Union and Serbia and that Serbia’s commitment was to establish good neighbourly relations with Kosovo.” The response of the Prime-Minister was that, “Since the EU commissioner conveyed the EU stand openly, we will have to say in an equally open way that we most decisively reject [EU Commissioner] Rehn’s request that Serbia establish good neighbourly relations with itself, i.e. part of its territory.”⁸ According to the statement of the Serbian Foreign Minister, “The signing of this agreement does not imply in any way whatsoever Serbia’s position on Kosovo and Metohija, and we will never accept the unilaterally proclaimed independence of the southern Serbian province.”⁹

⁵ Troika Press Communiqué: the Baden Conference, Baden, Austria, 28 November 2007; Troika Press Statement: the Brussels Conference, Brussels, 20 November 2007.

⁶ “Kosovo Tool Kit for Separatists”, BBC Information, 20 February 2008, available at: <news.bbc.co.uk>.

⁷ “EU Offers Serbia Deal on Kosovo”, BBC Information, 14 December 2007, available at: <news.bbc.co.uk>.

⁸ Information of the Serbian Foreign Ministry, 25 April 2008, available at: <www.mfa.gov.yu/Pressframe14.htm>.

⁹ Information of the Serbian Foreign Ministry, 24 April 2008, available at: <www.mfa.gov.yu/Pressframe1.htm>.

In April 2008, the Serb population of Kosovo was entered into the list of voters in the Serbian municipal and parliamentary elections of May 2008. Elections in Serbia, including the Serb-populated regions of Kosovo, were held on 11 May, organised by the Serbian Electoral Commission.¹⁰ These regions, mostly in the northern part of Kosovo, are not under the effective control of the authorities in Pristina.

III. LEGAL MERITS OF KOSOVO'S DECLARATION OF INDEPENDENCE: THE ASPECTS OF STATEHOOD AND SECESSION

It is clear that the UDI in Kosovo has been based on the claim that Kosovo has seceded from Serbia. The validity of this claim depends on the way international law regulates secession. Whether the UN Security Council could approve the independence of Kosovo will not be examined in detail because of the abstract character of this question.¹¹ But the practice of states in relation to the attempts of secession deserves more attention.

The international legal system has witnessed several attempts of secession, successful or unsuccessful. Bangladesh (formerly West Pakistan) has seceded from Pakistan after the latter's massive human rights abuses, sometimes even characterised as genocide, the military intervention by India, widespread recognition by third states and the eventual admission to the United Nations in 1974.¹² Biafra seceded from Nigeria in the 1960s and gained few recognitions. As a consequence of civil war, it was reintegrated into Nigeria in 1970.¹³

It is doubtful whether secession played any major and original role in the settlement in the Balkans in the 1990s, after the disintegration of the SFRY. The Badinter Commission emphasised in its Opinions 1 and 8 that the recognition of the successor states of the SFRY occurred in the context of the latter's dis-

tegration as opposed to the right of secession of individual Yugoslav republics.¹⁴ At the example of Croatia it has been emphasised that the attempt to secede from the SFRY was undertaken after the Croatian representation was blocked in the highest federal organs of the government of the SFRY. In particular, the representatives of other republics declared they would take decisions without the Croatian participation.¹⁵ These events, if giving rise to secession, would be explainable in terms of denying Croatia the representation in the federal government and possibly activating the exception to the territorial integrity safeguard clause under the 1970 Friendly Relations Declaration.¹⁶ In any case, the Arbitration Commission on Former Yugoslavia strictly followed the Friendly Relations Declaration and affirmed the inviolability of all former Yugoslav republics in accordance with the principle of *uti possidetis juris*.¹⁷

In accordance with the process of the independence of successor states after the disintegration of the SFRY as opposed to secession of individual republics,

¹⁴ In Opinion No. 1 of 29 November 1991, the Commission emphasised that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution." In Opinion No. 8 of 4 July 1992, para. 4, the Commission observed that "the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists."

¹⁵ Dugard/ Raic, see note 11, 125 et seq.

¹⁶ See below note 35 and the accompanying text.

¹⁷ In its Opinion No. 3 of 20 November 1991, "The Committee therefore [took] the view that once the process in the SFRY leads to the creation of one or more independent states, the issue of frontiers, in particular those of the Republics referred to in the question before it, must be resolved in accordance with the following principles: First – All external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties. Second – The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at. Third – 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 Mali (Frontier Dispute, (1986) Law Reports 554 at 565): 'Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...' The principle applies all the more readily to the Republic since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent. Fourth – According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia."

¹⁰ Information available from <www.balkaninsight.com>; <www.msnbc.com>; <news.bbc.co.uk> of 11 May 2008.

¹¹ But for an accurate analysis see K. Wirth, "Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit", *ZaöRV* 67 (2007), 1065 et seq.; on the limits of the powers of the Security Council see A. Orakhelashvili, "The Acts of the Security Council: Meaning and Standards of Review", *Max Planck UNYB* 11 (2007), 143 et seq.; id., "The Impact of Peremptory Norms on Interpretation and Application of UN Security Council Resolutions", *EJIL* 16 (2005), 59 et seq.; id., *Peremptory Norms in International Law*, 2006, Chapters 12-14.

¹² J. Crawford, *The Creation of States in International Law*, 2006, 142 et seq.; J. Dugard/ D. Raic, "The Role of Recognition in the Law and Practice of Secession", in: M. Cohen (ed.), *Secession: International Law Perspectives*, 2006, 94 et seq. (122 et seq.); T. Musgrave, *Self-Determination and National Minorities*, 1997, 189 et seq.

¹³ For the developments and claims of and around Biafra see Musgrave, see note 11, 196 et seq.

none of the former Yugoslav republics were admitted to the United Nations until the FRY (Serbia-Montenegro) adopted in 1992 its new constitution whereby it reconstituted itself implying the renunciation of all territorial rights over those republics, and its preparedness to recognise them.¹⁸ Neither the United Nations nor the EC have proclaimed their support for the independence on the basis of secession of the entity without the consent of the parent state.¹⁹

Thus far Bangladesh has been the only entity that has seceded without the consent of the parent state and its acceptance to the United Nations has been the key to its statehood, which factor has never been present in the case of other secessionist entities that attempted seceding without the consent of their parent states. Furthermore, as Crawford emphasises, even after 1989 when twenty-one new states have emerged, the principle that no territory can secede from the state without its consent has retained its continued validity.²⁰ Thus, the principle of territorial integrity has survived the post-1989 parade of declarations of independence, and international law does not authorise the unilateral secession of the territory from the state.

Against this background, the legality of Kosovo's independence should be measured not only by reference to the factual effectiveness of its existence but also to the legal criteria of statehood. Factual criteria of statehood embodied in the Montevideo Convention – territory, population, government and capacity to enter into relations with other states – are generally accepted as part of international legal reasoning.²¹

As part of the factual criteria of statehood, *effectivité* refers to the effective exercise of state authority over the relevant territory. Under this argument, to constitute a case of effective statehood, Kosovo is supposed to have the government that effectively controls its territory and exercises effective authority over it.

The study of factual effectiveness has occupied a significant place in the doctrine of international law.

¹⁸ Fourth – According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act; it was cited by the Hague Conference on 7 September 1991 and is enshrined in the draft Convention of 4 November 1991 drawn up by the Conference on Yugoslavia.”

¹⁹ Crawford, see note 11, 416; for a similar approach on the former Soviet republics see T. Franck, *Fairness in International Law and Institutions*, 1995, 157 et seq.

²⁰ Crawford, see note 11, 415.

²¹ For the analysis of these criteria see Crawford, see note 11, 37 et seq.

But it has never been the only or even the dominant way of explaining the international legal process. It will suffice to recall that the reaction of Sir Hersch Lauterpacht to the monograph of Charles de Visscher on *Theory and Reality of Public International Law* was to denote it as a subversive work.²² The normative force of the factual (*die normative Kraft des Faktischen*) is an oxymoron as far as international law is concerned. There is hardly any area of international law where fact as such produces legal regulation or status. The substance of the principle of effectiveness is difficult to measure. The jurisprudence of the ICJ has examined the concept of factual effectiveness on multiple occasions, mostly in terms of territorial disputes, and not on a single occasion has it held that the mere factual situation influenced, by itself and without further legal requirements, the rights and duties of the relevant actors. Factual effectiveness never creates legal positions on its own, but only if coupled with agreement and consent between states. At the same time, the doctrinal works based on the premise of factual effectiveness do not accurately explain how the factual element works in the process of allocation of rights and duties in international law.²³

The opinion is expressed in doctrine that “the crucial yardstick to appraise the statehood of an entity is (the internal as well as international) *effectivité* of its governmental apparatus.”²⁴ It is suggested that the presumption should be adopted against the effectiveness of the secession and in favour of the territorial integrity of the parent state.²⁵ It is also claimed that effectiveness can be the sole basis for secession in the inter-state legal order.²⁶ This far-reaching statement effectively denies the role of law in assessing the claim of the relevant entity to statehood and reduces the whole problem to that of factual effectiveness. This approach cannot be seen as reflecting the international legal position. In fact the Turkish Republic of Northern Cyprus (TRNC) arguably possesses *effectivité*; Taiwan does too; so did Manchukuo, Biafra and North Vietnam; but none of those were states under international law, because they did not meet the legal criteria of statehood. To hold that Kosovo's independ-

²² R.Y. Jennings, “Hersch Lauterpacht, A Personal Recollection”, *EJIL* 8 (1997), 301 et seq.

²³ See for detail A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 2008, Chapter 5.

²⁴ J. D'Aspermont, “Regulating Statehood: The Kosovo Status Settlement”, *LJIL* 20 (2007), 649 et seq. (654 et seq.).

²⁵ T. Christakis, “L'état en tant que 'fait primaire': réflexions sur la portée du principe d'effectivité”, in: M. Cohen (ed.), *Secession: International Law Perspectives*, 2006, 138 et seq. (149).

²⁶ Christakis, see above, 153, also acknowledging that effectiveness contradicts the principle of *uti possidetis*.

ence is lawful because of the effectiveness of its factual existence is to misunderstand the criteria of the creation of states in international law.

The argument of according crucial importance to *effectivité* in the case of Kosovo suffers from a more important conceptual failure deriving from the fact that the independence of Kosovo is envisaged as a controlled and supervised independence and much of the burden of which is intended to be shouldered by the EU. There has never been an objectively verifiable indication if and how long Kosovo could survive on its own and without the EU/NATO supervision as an independent state. In other words, *effectivité* has never been tried or verified. In the case of Kosovo, *effectivité* belongs to the field of abstract speculation as opposed to the factual reality.

In addition, it is unclear whether effectiveness is required only at the particular time or forever. What is effective now could be destabilised into collapse, or even militarily overtaken, in a year or two. As effectiveness is inherently immeasurable, the theory and practice has not worked out its precise parameters. There is no judicial pronouncement on its role in the matter of statehood. This uncertainty is further in line with the fact that if there is a legal basis for statehood, for instance the principle of self-determination, the lack of effectiveness cannot impede the creation of the state, as was the case with the Democratic Republic of the Congo in the 1960s.

If we apply this to the problem of statehood in general and to Kosovo, this entity would hardly qualify as a state under the criteria of effectiveness, which is profoundly missing in the case of Kosovo. What the notion of factual effectiveness could at most suggest at the example of Kosovo is that, having met the factual requirements of statehood, it could potentially be a state if it were to fulfil the legal requirements of statehood. The presence of legal factors of statehood would then transform the non-state into a state.

In practice there has never been an instance where the statehood of an entity has been accepted by the international community on the basis of mere factual independence. The approach that ultimate success of secession can justify the statehood of the relevant seceding entity is contradictory. Sir Hersch Lauterpacht considered the factual success insufficient, and saw instead as a requirement that the parent state must in fact have ceased to make efforts, promising success, to reassert its authority.²⁷ In other words, unless the parent state stops objecting, the factor of

effectiveness can produce no independent effect. Although it has since long been argued that the emergence of states is a factual process and stands outside the law, currently there is wide doctrinal recognition that statehood is not merely a factual phenomenon but also governed by legal criteria.²⁸ In other words, statehood is a legal question as much as it is a factual one. Taking this as the starting-point, the ascertainment of the legal requirements that apply to the potential creation of the particular state depends on the legal context in which the statehood is claimed. In some cases the matter can be resolved consensually; in other cases, the matter may involve the issues of overriding public policy.

The legal requirements applicable to the emergence of the particular state can vary from those belonging to ordinary international law to those deriving from peremptory norms (*jus cogens*). The particular legal requirements will also vary in terms of how the relevant entity is claiming statehood: through consensual separation, dissolution of the parent state, or unilateral secession; by peaceful means or violently; with the popular assent or without it; in the colonial context or outside it. The legal criteria applicable to the statehood in terms of entities like Kosovo relate to the entity that claims statehood outside the colonial context and without the consent of the parent state. This context confirms that Kosovo is not an entity entitled to self-determination.²⁹

There are various doctrinal attempts to explain the process of secession in legal terms. The so-called “internal theory” envisages secession as an act solely of domestic concern and not governed by international law.

Hence, under this view, secession is neither legal nor illegal under international law. Musgrave argues that secession can be permitted by virtue of this “internal theory”, and adds that secession is simply a political act, although the emergence of the new state through it will necessarily produce consequences in the international legal system. But secession remains a domestic matter and a legally neutral act under international law.³⁰

There is a doctrinal argument that secession is not governed by international law, as articulated by Theodore Christakis by reference to Prosper Weil.³¹ According to Franck, secession is neither endorsed

²⁸ Cf. Crawford, see note 11, 96 et seq.

²⁹ See further below the position under the relevant UN General Assembly resolutions.

³⁰ Musgrave, see note 11, 192 et seq., 209 et seq.

³¹ Christakis, see note 24, 155 et seq.

²⁷ H. Lauterpacht, *Recognition in International Law*, 1948, 8.

nor prohibited in international law. Franck states in one place that international law does not recognise a general right to secession and in another place that it does not prohibit secession. Although Franck creates the impression to avoid the across-the-board acceptance of the right to secession, he still admits the possibility of the entity seceding without the consent of the parent state.³²

In general, international law recognises that certain activities and prerogatives are primarily matters of domestic law and jurisdiction. In the *Nottebohm* case the ICJ considered that the conferral of nationality to individuals was a matter of domestic jurisdiction. In the *Anglo-Norwegian Fisheries* case the Court held the same about the delimitation of territorial waters.³³ However, in both cases the Court was dealing with the originally “domestic” activities that could affect the jurisdiction and competence of other states. Hence, in both cases the Court pronounced that the legality of these originally “domestic” activities is measured by reference to international law. This is conceptually correct, because only those actions and processes can be domestic which do not affect the international legal relations of the state. Secession of the territory from the parent state necessarily affects not only the territorial sovereignty of the parent state, but also its legal relations to third states, and thus it cannot be a domestic act not governed by international law.

The same considerations apply to the “internal theory” of secession which essentially repeats the thesis which views effectiveness primarily or exclusively as a matter of fact or as a political matter not governed by international law. In conceptual terms, it is all the same if one portrays secession as excluded from the ambit of international law either on the basis of factual analysis, political argument or domestic jurisdiction. After all, these factors are closely intertwined in practice. At the same time, such theoretical or conceptual qualifications of secession cannot prevent it from producing consequences or having its legality assessed within the international legal system. If, thus, the legality and validity of secession can be assessed internationally, all the theoretical aspects lose their coherence and are conceptually undermined. The real answer on the legality of the particular instance of secession can be obtained not through examining various theories but on the basis

of the assessment of the international legal position accepted by the international community.

The thesis that secession is not governed by international law contradicts the thesis of the effectiveness of legal regulations as articulated in the major work of Sir Hersch Lauterpacht. According to this thesis, if the relevant matter occurs within the international legal system, there is always international law that governs it. Even if there were no specific rules related to that matter particularly, the more general legal regulation on the subject would apply to it in an effective manner.³⁴ If the reasoning of Sir Hersch Lauterpacht is followed, no issue within the ambit of international law is outside the international legal regulation, and there are no gaps in legal regulation. In more specific terms, the regulation of secession by international law is inherently implied in the thesis that the creation of states is not only a matter of fact, but also one of law. As secession is a method of the creation of states, it is definitionally governed by international law. The argument of Franck that secession is not regulated, that it is neither authorised nor prohibited by international law is inaccurate because the legality of secession cannot be judged on whether there is a specific rule of authorising or outlawing it. As soon as the principle of territorial integrity applies, it necessarily outlaws secession without the consent of the parent state. Such understanding avoids systemic inconsistency under which international law would guarantee territorial integrity yet would not prohibit secession.

Another basis articulated sometimes in doctrine in favour of the legality of secession is that of the oppression (or remedial) theory. The problem with the oppression theory is that it is not clearly defined what constitutes oppression.³⁵ The oppression theory of secession has no legal value on its own. It can be relevant only to the extent of reflecting the legal position among others as enshrined in A/RES/2625 (XXV) of 24 October 1970, the so called Friendly Relations Declaration and the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights. A so-called “remedial secession” can only be envisaged on the conditions specified under the 1970 Friendly Relations Declaration, which qualifies the territorial integrity of states only in the case where that state does not possess the government equally representing its entire pop-

³² Franck, see note 18, 159 et seq.

³³ Fisheries case (UK v Norway), ICJ Reports 1951, 116 et seq. (132); Nottebohm case, ICJ Reports 1955, 4 et seq. (22).

³⁴ H. Lauterpacht, *The Function of Law in the International Community*, 1933, 77.

³⁵ Musgrave, see note 11, 191 et seq.

ulation. The Friendly Relations Declaration does not condition the territorial integrity of the state by any other factor. The Declaration specifies that nothing in it can be interpreted,

“as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

The 1993 Vienna Declaration, although reaffirming the right of peoples to self-determination, emphasises that, “In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.”³⁶

Although these declarations are not binding as such, A/RES/2625 certainly embodies customary international law.³⁷ In addition, and independently of the customary law status, it can be safely assumed that if the entire international community proclaims a certain attitude in nonbinding declarations – in this case the attitude against secession – this mere fact, although by itself insufficient for proving the normative status of the relevant approach, it is perfectly sufficient for it to be understood that international law could hardly contain the legal regulation contradicting that attitude. The attitude expressed in a General Assembly resolution having commanded the support of the vast majority of states must be seen as embodying the fundamental policies of the international community, with the consequent presumption that, short of direct evidence to the contrary, international law contains no contrary legal regulation. In other words, even if one rejects the normative force of initially non-binding resolutions, unless one definitively proves that international law positively accepts the

right of the entities like Kosovo to secede, the presumption should be that it accepts no such right.

Against this background, it is correctly emphasised that unilateral secession is the antithesis of territorial integrity. Ethnic self-determination represents a threat to the continued existence of states and has thus been repudiated by the international community.³⁸ If territorial integrity of states means anything, secession can only be allowed with the consent of the parent state.

The United States government referred to some “special circumstances” of Kosovo, of “unprecedented” character that warrant treating Kosovo as a “special case”,

“(1) The state of Yugoslavia collapsed in a non-consensual, exceptionally violent way, creating threats to international peace and security that have obliged the UNSC to act repeatedly.

(2) Between 1993 and 1999, the U.N. Security Council (UNSC) issued seven resolutions addressing Kosovo.

(3) Amid massive human-right violations, the Milosevic government repeatedly disregarded UNSC resolutions demanding a halt to hostilities.

(4) The Milosevic regime’s actions in Kosovo and throughout the region undermined international stability and led to cross-border refugee upheavals.

(5) In 1999, NATO’s 19 allies reached the consensus decision to take collective action to remove Milosevic’s police and military forces from Kosovo.

(6) Kosovo is administered by the United Nations under U.N. Security Council Resolution (UNSCR) 1244, unanimously adopted (with China abstaining) June 10, 1999, to address Milosevic’s actions. Elements of UNSCR 1244 include: denying Serbia a role in governing Kosovo; setting up an interim UN administration; providing for local self-government; and envisioning a UN-led political process to determine Kosovo’s future status.”³⁹

Given that the legal arguments in favour of the uniqueness of statehood have been advanced, among others by the US Department of State, the merit of these assertions shall be examined. Even as all six circumstances and factors referred to by the Department of State are factually correct, none of these involve, or were at the pertinent times viewed as dealing with or prejudicing, the territorial status of Kosovo. More specifically:

³⁶ Vienna Declaration and Programme of Action, 12 July 1993, Doc. A/CONF.157/23, para. 2.

³⁷ See *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14 et seq. (100-101).

³⁸ Musgrave, see note 11, 181 et seq.

³⁹ US Department of State, “Why Kosovo Is Different”, available at: <www.state.gov>.

The collapse of the SFRY into five successor republics, of which the FRY was one, produced the situation in which the boundaries of all these republics were considered as fixed and unaffected, as governed by the principle *uti possidetis juris*. The Arbitration Commission on the Former Yugoslavia has expressly affirmed the inviolability of the borders of all five republics including the FRY.

None of the Security Council resolutions between 1993 and 1999 have raised the matter of the independence of Kosovo, or prejudiced the territorial integrity of Yugoslavia and Serbia.

There is no rule or principle of international law requiring or permitting the secession of a region or entity whose population has been subjected to serious human rights violations. The same is the case even if those serious and massive human rights violations lead to crossborder refugee upheavals.

The use of force against the FRY by NATO has never been proclaimed as aimed at disrupting the territorial integrity of the FRY, or at achieving any permanent territorial settlement. It will be recalled that in the process of adoption of S/RES/1244 and preceding deliberations, the requirement that the population of Kosovo would decide the status of Kosovo in three years on the referendum basis did not get through and was dropped.

Projecting S/RES/1244 as supportive of the independence of Kosovo is inaccurate and counterfactual. This resolution also denies the Serbian presence in Kosovo as a temporary matter, and commits both the states and the United Nations to the territorial integrity of the FRY; moreover, this Resolution envisages the FRY and *a fortiori* Serbian troops guarding the external border of the province of Kosovo.

All this certifies that the proponents of the independence of Kosovo have never, at any stage of the process, offered any consistent and wellsubstantiated position as to why Kosovo is entitled to independence. The problem with the arguments of the Department of State is that they are inspired by common sense rather than being aimed at locating the evidence that would justify them under international law.

It has to be considered how the international community has viewed its claim to statehood since the 1999 NATO intervention and the adoption of S/RES/1244 in which the territorial integrity of the FRY was reaffirmed. After the dissolution of the SFRY and later of the FRY, the entitlement of Kosovo to become an independent state has not been affirmed. In the period between the 1999 NATO attack on the

FRY and the Ahtisaari Plan, nothing in the practice of states or the United Nations has ever divulged any attitude aimed at disrupting the territorial integrity of the FRY and subsequently Serbia. The view of UNMIK has likewise been that the territorial integrity of the FRY and Serbia should be preserved.⁴⁰ Later on, by S/RES/1785 (2007) of 21 November 2007 the Council “reaffirmed its commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders.” Even in the Ahtisaari Plan, which as we shall see below the United States and other proponents of the Kosovo independence, including the parliament in Pristina,⁴¹ refer to as the basis thereof, recommended the independence of Kosovo through the revision of S/RES/1244. Thus there has been, until the UDI in Kosovo, no normative development, not even an institutional proposal that would envisage the independence of Kosovo without revising Resolution 1244. In doctrinal terms, it has been emphasised that Kosovo’s independence and secession has not been considered lawful or permissible after the SFRY’s dissolution. Kosovo has been denoted as an unsuccessful attempt of secession.⁴²

After the Ahtisaari Plan was submitted to the Security Council, both before and in the aftermath of the proclamation of independence, the views of states got divided. The United States have considered that the Ahtisaari Plan should serve as the basis for the independence of Kosovo.⁴³ According to the Russian statement, the proclamation of independence in Kosovo violated,

“the sovereignty of the Republic of Serbia, the Charter of the United Nations, UNSCR 1244, the principles of the Helsinki Final Act, Kosovo’s Constitutional Framework and the high-level Contact Group accords. Russia fully supports the reaction of the Serbian leadership to the events in Kosovo and its just demands to restore the territorial integrity of the country.” It was expected that the, “UN Mission in

⁴⁰ The UNMIK-FRY common document, adopted in Belgrade on 5 November 2001 “Promotes the protection of the rights and interests of Kosovo Serbs and other communities in Kosovo, based on the principles stated in UNSCR 1244, including the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia, as well as in the Constitutional Framework for Provisional Self-government.” Furthermore, the document “Reaffirms that the position on Kosovo’s future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the Provisional Institutions of Self-government.”

⁴¹ See the text of the UDI of Kosovo under <news.bbc.co.uk>, 19 February 2008.

⁴² Crawford, see note 11, 400, 407 et seq.

⁴³ Department of State document, “Kosovo’s Final Status: A Key to Stability and Prosperity in the Balkans”, available at: <www.state.gov> of 23 January 2008.

Kosovo and NATO-led Kosovo Force will take immediate action to fulfil their mandates as authorized by the Security Council, including voiding the decisions of Pristina's self-governing institutions and adopting severe administrative measures against them."⁴⁴

The fact that the Security Council did not take action for annulling the independence of Kosovo does not imply the approval of the independence of Kosovo. In the *Namibia Advisory Opinion*, the ICJ clearly emphasised that, "The fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed."⁴⁵

There is also a tendency to judge the legality of secession by reference to the arguments of expediency. For instance, it is contended that the international community accepts the legality of secession where there is no viable alternative to it, as was the case with Kosovo.⁴⁶ However, the criteria of expediency and reasonability are inherently subjective and can never command the legitimacy that would be acceptable for all parties involved. International law could only approve secession if the legal criteria thereof are met, and not just because in the opinion of one side in the matter there are no more reasonable alternatives.

In addition, the existence of alternatives can be a matter of appreciation and discussion. Both Serbia and some other states have clearly stated before the UDI that the potential for negotiations was not exhausted and there was still substantial room for finding the agreed solution of the status of Kosovo. The reason why this has not happened before the UDI has nothing to do with the objective situation on the ground or with any objective difficulty with finding the agreed solution, but relates only to the intransigent position of the Kosovo Albanian leadership and the Western governments that supported their aspiration for independence. A number of statements made, both by the Kosovo Albanian leaders and Western political leaders, have from the earlier stages onwards adopted the firm stance as to the inevitability of the independence of Kosovo.⁴⁷ There can thus

⁴⁴ Statement by Russia's Ministry of Foreign Affairs on Kosovo, 17 February 2008, available at: <www.mid.ru> (in English).

⁴⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16 et seq. (36, para. 69).

⁴⁶ C. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", ASIL Insight, 29 February 2008, available at: <www.asil.org>.

⁴⁷ E.g. the statement by the President of France Nicolas Sarkozy, 14 December 2007, available at: <www.nytimes.com>.

be no surprise that the Kosovo Albanian leadership could not have been encouraged to enter into real negotiations with Serbia to find the agreed and mutually acceptable solution. The prospective projection of the outcome of negotiations has undermined the reality of negotiations. It is consequently unsound to assume that there were no alternatives to the UDI; it is more correct to emphasise that these alternatives were willingly excluded by one side of negotiations through the projection of the desired result.

Given that the statehood of Kosovo cannot be seen as established on the basis of any applicable international law criteria, its status and standing should be judged by standards that apply to *de facto* regimes. A *de facto* regime can be defined as a state-like organism that satisfies the criteria of factual effectiveness of statehood but does not meet the legal requirements thereof. The study of *de facto* regimes in international law has not been as intensive as the frequency of this phenomenon in the international legal system entitles it, and certainly not much has been said on the subject since Frowein's ground-breaking study of this subject. Frowein defined a *de facto* regime as an entity which attempts separating from the parent state and even succeeds in this on a factual plane, but is not generally recognised. The key to the legal analysis of the *de facto* regime is the focus on the relations between that regime and the states which do not recognise it as a state.⁴⁸

Given that the Serbian population in Kosovo is against the independence of the province, the possibility of secession of Serb-populated parts of Kosovo from this entity has been raised. The question whether Serb-populated areas of Kosovo can secede from it is a legally moot question. The assumption that a territory can secede from Kosovo is premised on the assumption that Kosovo is an independent state under international law. Although recently the idea of partition of Kosovo has been advanced in some political circles, this is an idea incompatible with the international legal position on the matter. What matters in reality is the question whether the Serb-populated areas of Kosovo can continue under the administration of Serbia, which has to be answered in the affirmative. This implies no partition of Kosovo, unless Serbia's agreement to this effect is obtained, but only means that in certain areas of Kosovo Serbia may be able to exercise its governmental functions as a matter of fact, as confirmed, for instance, by holding Serbian elections in those areas.

⁴⁸ J.A. Frowein, *Das de facto-Regime im Völkerrecht*, 1968, 6-7.

IV. PRECEDENTIAL FORCE OF THE UDI IN KOSOVO

Given that the legal basis for the independence of Kosovo cannot be established under international law, the issue of whether it can create a precedent for other secessionist entities is hypothetical. However, due to frequent political statements to the effect of the *sui generis* character of Kosovo, it is worth examining whether, if Kosovo were validly entitled to statehood, its situation could be unique and without precedential impact for other comparable situations.

While depending for its validity on the legality of the independence of Kosovo in the first place, the argument of the uniqueness of the Kosovo situation suffers from a conceptual problem, in that it contradicts the idea of equal application of law, and a practical problem, in that it is not shared far beyond the circles of the proponents of the independence of Kosovo.

If international law upholds the special nature of the Kosovo case, then it still recognises a right to secession, albeit in these special circumstances. In the first place, one has to prove with evidence that such right exists, which as seen above is impossible. But even if it were possible to prove such right, proving its specialty would be a further challenge in the sense of demonstrating why the relevant international legal right accrues to one entity but not another one. As Franck suggests, if international law involves the right to secession, it is doubtful if that right can be fairly limited to one part of the world.⁴⁹

The proponents of the independence of Kosovo have never referred to any previous settlement of the independence of a state to justify the independence of Kosovo. They also argue that Kosovo is an unique case and does not set a precedent for any similar entity in the future. The position of the United States government is that,

“The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia’s break-up, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today.”⁵⁰

⁴⁹ Franck, see note 18, 160.

⁵⁰ Statement of Secretary of State Condoleezza Rice, “The U.S. Recognizes Kosovo as Independent State”, 18 February 2008; see also the Department of State document, “Kosovo’s Final Status: A Key to Stability and Prosperity in the Balkans”, 23 January 2008, available at: <www.state.gov>; the same approach was adopted by the Italian government through the statement of the Foreign Minister Massimo D’Alema, 18 February 2008; for the similar position of the United Kingdom, France, Germany and Italy see Reyn-

This has not been the only approach, however. Russia has expressly disagreed with the United States viewing Kosovo as a unique situation, and predicted the chain reaction that would follow it.⁵¹ The Russian Foreign Ministry doubted that, “the American thesis about Kosovo’s case being unique [is] really moral, as it implies that some are supposed to have the right to statehood while it must be denied to others.”⁵²

In general the statement on anything being *sui generis* must be taken with great caution. Such argument can only be made after articulating the material evidence supporting the special character of the relevant situation. In practice, the resort by academics, legal advisers or politicians to this Latin phrase is often motivated by the lack of anything else that could justify one’s position. The prevailing considerations of legal security, transparency and predictability require giving due consideration to the meaning of the established legal categories in which states members of the international community are used to place reliance.

The argument of Kosovo being specific is more inconsistent and problematic than any other argument advanced in this respect, because the argument of specificity necessarily implies applying international law to Kosovo differently from other entities, that is a discrimination as between the entities that aspire statehood. Thus, the idea of a *sui generis* character of Kosovo goes against not only the available evidence, but also against the non-discriminatory application of international law.

Thus, within the international community there is neither legal nor political agreement that, should the independence of Kosovo be taken as a lawful outcome, it would be a unique case without a precedential effect. Consequently, at the political level each relevant group of states should be expected to handle any future case as they deem fit, and without taking

olds, see note 2; for the similar statement of the United Kingdom Foreign Secretary David Milliband see “Split EU Meets to Debate Kosovo”, 18 February 2008, available at: <news.bbc.co.uk>.

⁵¹ Statement of the Deputy Press-Secretary of the President of Russia, 20 February 2008; Russian Foreign Minister predicted the inevitable chain reaction, cf. Reynolds, see note 2; earlier on, the Russian Foreign Minister warned that if the United States or the United Kingdom would like to see the Kosovo independence as special and tell other secessionist entities that it does not create precedent for them, this will simply not work, RIAN information, 13 December 2007, available at: <www.rian.ru>; Deputy Prime Minister Ivanov was convinced that Kosovo was a precedent and chain reaction will follow; other secessionist entities will ask why they are worse than Kosovars, 19 February 2008, RIAN information, available at: <www.rian.ru>; see also the “Observations by the official representative of the Russian Foreign Ministry”, 20 February 2008, Foreign Ministry information, available at: <www.mid.ru>.

⁵² Russian Ministry of Foreign Affairs Information and Press Department, “Commentary Regarding a Media Question Concerning Remarks of US Under Secretary of State Nicholas Burns on Kosovo”, 24 February 2008, available at: <www.mid.ru>.

into account the views of any other group of states. Those other states – in particular those which now object to viewing the case of Kosovo as precedent – may be prevented from challenging the similar treatment of other entities for the very reason that there is no agreed and commonly shared legal position as to the uniqueness of the case of Kosovo.

In terms of international law, the reason why Kosovo cannot create a precedent for other secessionist regions is that its claim to statehood is not based on the internationally valid claim to and declaration of independence. Were it otherwise, and were the legal position on this subject matter such as to allow the recognition of the statehood of the territory seceding from another state without its consent, there would be no possibility for precluding Kosovo's precedential effect. For, if international law were to allow unilateral secession of the territory from the state, it would have to allow this for all territories and entities aspiring this, in whichever part of the world. However, the coherency of the legal argument is not always perfectly obvious for the elites in secessionist entities. What they may regard as crucial is that as a matter of fact Kosovo is administered as independent from Serbia, supported by a substantial number of states and the EU. Thus, the *sui generis* strategy behind Kosovo may yet backfire to those who designed it. Independently of whether Kosovo achieves independence on terms compatible with international law, other aspirant secessionist entities may well manage consolidating beyond the point of reversal their *de facto* independence so vehemently opposed to by those who back the independence of Kosovo. Obviously Kosovo enthusiasts will challenge and disapprove such state of things; it is quite another matter how much they will be able to do to reverse it.

The essence of this problem is best expressed by the desperate but accurate statement by the Serbian Foreign Minister in response to the statement of the EU Presidency viewing the Kosovo case as unique,

“Do any of you honestly think that just by saying that Kosovo is *sui generis*, you will make it so? That there will be no consequences to the stability and security of the international system, just because you say it won't?”⁵³

This question has not received the answer so far. Given that there is no agreement as to why Kosovo should be a unique case, which the relevant Western governments no doubt realise, it has to be asked what

factors and considerations motivate them into asserting it is a unique case. In particular, what are the factors that make the governments supporting the independence of Kosovo that, given the fierce opposition to this independence by an important number of states and the consequent lack of any agreement on this point, their own view on the legality of this independence still represents international law? One of the motivations behind such stance can be related to the Euro-centrist understanding of international law.

European international law has been an idea in the 18th and 19th century presupposing the European superiority in relation to the rest of the world. It has always been an attitude, and never a reality. Its fundamental assumption has been that the European/Western attitudes are inherently better in defining and expressing international law than the attitudes of the rest of the world, and consequently the European/Western nations could impose international legal regulation on the rest of the world, or even exclude non-European nations from the ambit of international law.⁵⁴ Even over the past several decades, the idea of European international law has been an idea held and cherished by many, but hardly ever expressed in public.

Now, in relation to Kosovo, if there is no consensus across the world that the territory can be taken away from the sovereign state and declared independent, but if certain states still insist that their position that it can is in accordance with international law, their attitude must presuppose their attempt and ambition to restructure or reinterpret the foundations of international law despite the lack of agreement within the international community on this point. This suggests that the ideology of European international law may well be the one that reinforces the attitude of Kosovo enthusiasts to consolidate the legal position around Kosovo whether or not other parts of the world agree with this. Not that there is any straightforward evidence that the Western governments try to revive the ideology of European international law at the example of Kosovo (especially given the absence of the recognition of Kosovo by the EU). But it is difficult to think of any other motivation or ideology driving them.

The potential of Kosovo to entail chain reaction could be realised in several contexts. The secession of the Republika Srpska from Bosnia and Herzegovina, which is governed, along with the Bosnian government, by the High Representative on the basis of the 1995 Dayton Peace Accord, is currently not at the

⁵³ L. Kubosova, “Serbian FM says he is ashamed by EU's actions on Kosovo”, 21 February 2008, available at: <www.euobserver.com>.

⁵⁴ See the analysis in A. Orakhelashvili, “The Idea of European International Law”, EJIL 17 (2006), 315 et seq.

centre of the political agenda. However, if over the next few years there will be a relative change in political circumstances, the Republika Sprska could invoke the precedent of Kosovo and declare its independence from the government in Sarajevo. The factual success on the ground of such secession will depend on whether EUFOR will be ready to fight for keeping Bosnia and Herzegovina together and will prevail in that fight, and how much support the potential secessionist unit of the Republika Srpska would get from the outside.

That the UDI in Kosovo will certainly provoke further attempts at secession and potentially more international support for these attempts can be seen from the opinion surveys which show that the majority of Europeans consider that Tibet should not be under the Chinese rule.⁵⁵ Obviously the popular attitude does not directly translate into the governmental policy, which is perhaps even less likely given the status and power of China in international relations. While prediction may not be a profitable exercise, the fact that a majority of the population in the relevant countries tend to favour secessionism makes it more likely that in this or another case the relevant governments may be prepared to back other instances of secession.

V. THE RECOGNITION OF KOSOVO AND ITS EFFECT

The recognition of Kosovo by a number of states promptly followed the UDI in Pristina. On 18 February 2008, the United States formally recognised Kosovo as a “sovereign and independent State.”⁵⁶ Several EU Member States, including the United Kingdom, France, Germany and Italy either preceded this or followed the suit. Overall, around thirty states have given their recognition to Kosovo. Serbia recalled ambassadors from several states that recognised Kosovo.⁵⁷ Recognition was expressly withheld by a number of states, including EU Member States such as Spain, Cyprus, Portugal, Romania, Slovakia and Greece. The EU as a whole was unable to express the attitude of recognising the independence of Kosovo.⁵⁸ Some other states, such as Israel, decided not to join

⁵⁵ In Britain 53 percent favour this view, and so do two-thirds of Germans and Italians, see *Financial Times*, 17 May/18 May 2008.

⁵⁶ “US Recognizes Kosovo as Independent State”, 18 February 2008, available at: <www.pristina.usmission.gov>.

⁵⁷ “Serbia recalls ambassador from US”, BBC Information, 19 February 2008, available at: <news.bbc.co.uk>.

⁵⁸ E. Vucheva, “EU Fudges Kosovo Independence Recognition”, 18 February 2008, available at: <www.euobserver.com>.

those recognising Kosovo.⁵⁹ The principal question is if recognition by third states can influence the legality of the UDI by the seceding entity.

It has been contended that Kosovo’s declaration of independence is “coordinated with, and supported by, a significant segment of the international community. It thus stands in contrast to other claims of a “right” to secede.”⁶⁰ This argument assumes that recognition could command a decisive relevance in determining the validity of the claims of the relevant entity to statehood. The conceptual problem with this view is that it disregards the requirements of statehood if the entity that fails to meet them is nevertheless recognised by third states. At the same time, assuming that the independence of the entity that is recognised by a number of states can be unique and produce no precedential impact is conceptually unsound. Other secessionist entities can be recognised at a later date by third states and under the above thesis they would be unique too, thus producing a chain of “unique” events.

The fact that a number of states have recognised the independence of Kosovo is no doubt one of the main arguments in the arsenal of the proponents of that independence. Whatever the relevance of recognition, it is a plain matter of fact that Kosovo has not commanded the prevailing recognition by the international community. While the Security Council refused endorsing its independence, the international community is sharply divided on this point.

The concept and relevance of recognition in international law is controversial. Recognition applies to the variety of subjects of status, rights and privileges of legal persons in the international legal system. On the one hand, the significance of recognition is prompted by the absence of a centralised government in the international legal system that would pronounce on the status and rights of the relevant entities. On the other hand, some third-party judgment on those issues could be regarded as indicative of the relevant status and position. For the very reason of the lack of international government, the relevance of recognition should be seen as limited in terms of defining what the status and rights of the relevant entity are. This is even more so, as the factual and legal criteria of statehood are in place for judging whether the relevant entity has achieved statehood.

It is questionable whether recognition as such can be viewed as a magic tool for creating a state or for

⁵⁹ RIAN Information, 19 February 2008.

⁶⁰ Borgen, see note 45.

consolidating the statehood of the entity which has no entitlement to it. Recognition merely follows the lawful establishment of statehood. It is not a criterion of statehood and does not impact whether or not the relevant entity is actually entitled to it. Crawford's reasoning clarifies the non-conclusive nature of recognition, "if State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly so; otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable." This also entails that, "the test for statehood must be extrinsic to the act of recognition."

As Crawford suggests, individual state pronouncements on statehood are not constitutive of the legality of that statehood.⁶¹

The presence of recognition cannot preserve the status of the relevant entity either. To illustrate, South Vietnam had gathered several dozens of recognitions, was a member of specialised agencies of the United Nations, and over two decades endorsed by the UN General Assembly as a state eligible for the membership of the UN.⁶² But, having lasted for nearly two decades, South Vietnam disappeared subsequently without those recognitions having mattered. In a different but related context, the ICJ proclaimed East Timor as a unit of selfdetermination against the background of its annexation by Indonesia having been recognised by a number of states.⁶³

The argument that the recognition of Kosovo by third states counts as a material factor in the legal basis of its independence is premised on the thesis that recognition is constitutive. A declaratory approach to recognition would imply that secession has to be lawful and valid in the first place, and recognition by third states would then acknowledge that secession. It is incidental to this approach that recognition cannot be validly given to the entity whose independence is not compatible with international law. In other words, recognition cannot constitute an independent state.⁶⁴

⁶¹ Crawford, note 11, 21.

⁶² J.N. Moore, "The Lawfulness of Military Assistance to the Republic of Viet-Nam", *AJIL* 61 (1967), 1 et seq. (24 et seq.).

⁶³ ICJ Reports, 1995, para. 36.

⁶⁴ Although Musgrave argues that accepting the declaratory theory necessarily implies acceptance of the "internal theory" of secession (Musgrave, see note 11, 195), this is not a necessary incidence of the declaratory theory, which can be brought into play also with regard to the entities which validly secede in compliance with international law.

The constitutive theory has long been recognised as archaic and it has no visible support in state practice.⁶⁵ In terms of recognising Bosnia-Herzegovina and Croatia in 1991, the EU is seen as having attempted to refer to the constitutive theory, given that the two entities had not then fulfilled the requirements of statehood.⁶⁶ However, the Badinter Commission clearly emphasised that none of these constituted the instances of recognition of secessionist entities. On the other hand, as Frowein correctly emphasises, the declaratory theory of recognition cannot be of utility either because it cannot explain the legality of a *de facto* regime.⁶⁷ Unless one views oneself as a legislator, recognition of statehood by third states can relate to what is lawful in the first place.⁶⁸

Dugard and Raic argue that while secession is discouraged on the account of the tendency to place territorial integrity above selfdetermination, the collective recognition of the seceding entity can be granted by the European Union.⁶⁹ But according to the collective recognition some distinctive significance that individual state recognition does not possess presupposes that while individual state recognition cannot constitute the state, collective recognition can. Thus, collective recognition aspires having the legislative impact, which is a claim antithetical to the basic character of the international legal order. In reality the validity of collective recognition is governed by the same criteria as that by individual states. The opposite result would necessarily be premised on viewing regional arrangements such as the EU as elements of an international government that does not exist.

This point is anyway moot in the Kosovo context. The EU has not itself recognised Kosovo as an independent state. It is unclear whether deploying EULEX can be seen as implied recognition, as it has to work with what Kosovars consider as independent state institutions, in other words support the entity in exercising sovereign powers. The answer to this question depends on the mandate of EULEX and the type of powers and competences it possesses.⁷⁰

Given that the recognition of Kosovo cannot constitute it as a state, nor relate to what is already the state on international legal grounds, such recognition is illegal. The grounds for such illegality can be pre-

⁶⁵ Crawford, see note 11, 24 et seq.

⁶⁶ Musgrave, see note 11, 206.

⁶⁷ Frowein, see note 47, 36.

⁶⁸ It is quite another matter that the parent state can itself recognise the independence of the secessionist entity and thus waive its sovereignty and legalise what otherwise has no legal basis.

⁶⁹ Dugard/ Raic, see note 11, 134.

⁷⁰ See below under VI. 2.

ised either on the duty not to recognise illegal entities, or the refusal of the parent state to let Kosovo become independent.

Dugard has formulated the modern doctrine of non-recognition based on *jus cogens*, having subsumed within this doctrine the cases of non-recognition such as Rhodesia, Namibia, South African homelands, Palestine and the Turkish Republic of Northern Cyprus. When the practice of states and organisations refers to a certain entity or situation by using the language of “illegality”, “invalidity” or “nullity”, this is the evidence that the recognition is withheld from an entity not because that entity lacks the ingredients of statehood, but because it is illegally brought about.⁷¹ South African homeland-states arguably met the requirements of statehood laid down in the Montevideo Convention, but no state except South Africa recognised them.

Similarly, “A cluster of fundamental principles inherent in the two fundamental norms of the prohibition of the use of force and the right to self-determination provide a legal basis for the refusal of the United Nations to recognise Israel’s sovereignty over East Jerusalem.”⁷²

Jus cogens gives a new doctrinal coherence to the doctrine of nonrecognition, formulating it as follows, “An act in violation of a norm having the character of *jus cogens* is illegal and is therefore null and void. This applies to the creation of States, the acquisition of territory and other situations, such as Namibia. States are under a duty not to recognise such acts.” This is so, because,

“*Jus Cogens* is a central feature in the modern doctrine of nonrecognition as the violation of a norm having the character of *jus cogens* is a prerequisite for the illegality that results in the nullity and non-recognition.”⁷³

Non-recognition applies to situations involving nullity for conflict with *jus cogens*.⁷⁴ In all these cases the invalidity of titles as confirmed by UN organs is implementing and declaratory of the *jus cogens* nullity, not just a discretionary action.⁷⁵ The link between *jus cogens* and nonrecognition of illegal entities has been fortified in the ILC’s articles 40 and 41 on State Responsibility.⁷⁶

⁷¹ J. Dugard, *Recognition and the United Nations*, 1987, 130 et seq.

⁷² Dugard, see above, 100, 115.

⁷³ Dugard, see note 70, 132, 135, 137.

⁷⁴ J. Dugard, “Collective Non-Recognition: The Failure of South Africa’s Bantustan States”, in: Boutros Boutros-Ghali – *Amicorum Discipulorumque Liber – Peace, Development, Democracy*, Vol. I (1998), 383 et seq. (402).

⁷⁵ Dugard, see above, 400 et seq.

⁷⁶ Report of the International Law Commission on the Work of its Fiftythird

Whether the duty not to recognise applies to the unilateral declaration of independence in Kosovo depends on whether this process is seen as produced by the breach of a peremptory norm. This question is contingent on whether the armed attack by NATO states on the Federal Republic of Yugoslavia in 1999 can be seen as a breach of *jus cogens*, and also whether the armed attack in question was immediately responsible for the eventual UDI in Kosovo.

As for the first part of this question, it is clear that the claim as to the legality of “humanitarian intervention” has never been approved by the international community. The reaction of the international community to the claims that NATO states were entitled to attack the FRY on humanitarian grounds to protect the Albanian population has been to prevalingly reject the legality of humanitarian intervention.⁷⁷ Thus the NATO attack remains a breach of Article 2 (4) of the United Nations Charter, customary law prohibition of the use of force, and of *jus cogens*.

As for the second part of the question, in principle, it is difficult to see how the current factual state of things would be brought about had the NATO states not attacked the FRY in 1999. But the NATO states have never expressly claimed, in the process of the 1999 armed attack, that Kosovo should be allowed to secede from Serbia, and the principal authors of the 1999 attack have voted for S/RES/1244 which reaffirmed the territorial integrity of the FRY, and *a fortiori* of Serbia. Not until the Ahtisaari Plan did those states express themselves in support of the independence of Kosovo.

It seems that the question here is solely that of the assessment of facts. If the view is taken that the NATO attack was never originally meant to affect the territorial integrity of the FRY and thus lead to the independence of Kosovo, then the duty of non-recognition does not apply in its original version of the effect of peremptory norms. This view can be reinforced by the fact that the states which intervened against the FRY in 1999 have subsequently confirmed their commitment to its territorial integrity by voting on S/RES/1244. In such case the only factor that precludes lawful recognition of the independence of Kosovo is the objection to that by Serbia. If, however, the view is taken that the NATO attack in 1999, in breach of the UN Charter and the relevant customary international law as part of *jus cogens* is immediately responsible

Session (2001), GAOR 56th Sess., Suppl. No. 10, Doc. A/56/10.

⁷⁷ See on this A. Orakhelashvili, “Legal Stability and Claims of Change: The International Court’s Treatment of *Jus ad Bellum* and *Jus in Bello*”, *Nord. J. Int’l L.* 75 (2006), 371 et seq.

for the ultimate UDI in Kosovo, then the UDI in Kosovo is directly subject to the duty of non-recognition as envisaged in the ILC articles 40 and 41 on State Responsibility. In practical terms, which of these two options is correct does not make an essential practical difference on the ground. Given that Serbia persistently objects to the independence of Kosovo, the legality of recognition is precluded in any case. Against this background, any recognition of the independence of Kosovo is an internationally wrongful act and generates the obligation to withdraw it. The recognition of fundamental illegalities is always subject to revocation of recognition.⁷⁸

VI. COMPATIBILITY OF THE PROCESSES IN AND AROUND KOSOVO WITH UN SECURITY COUNCIL RESOLUTIONS

1. Compatibility of the Independence of Kosovo with S/RES/1244

The argument of compatibility of the independence of Kosovo with S/RES/1244 of 10 June 1999 presupposes the permissibility of multiple interpretations of this resolution. The principles of interpretation of Security Council resolutions are essentially the same as those applicable to treaties under articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.⁷⁹ Even if Security Council resolutions are not formally treaties, they are in substance agreements between states. In addition, Security Council resolutions derive their binding force from the treaty clause - Article 25 of the United Nations Charter. The link between resolutions and the treaty-based duty to obey them under Article 25 necessarily requires viewing the duty to comply with resolutions as sacred as the duty to observe treaty obligations in good faith (*pacta sunt servanda*).

Consequently, the divergence of interpretations of Security Council resolutions is as systemically controversial as the divergent mutually exclusive interpretation of the treaty. The argument that there may be two divergent interpretations of a resolution is in essence the argument that Article 25 prescribes two mutually exclusive legal outcomes, which is absurd by itself. In order not to undermine the duty to carry out the Council's resolutions under Article 25, it is necessary to interpret these resolutions in good faith and

according to the plain meaning of words used in their text.

S/RES/1244 has directly and expressly preserved the territorial integrity of the FRY. Well before the UDI in Pristina, its incompatibility with S/RES/1244 was raised, among others, by the Russian government against the background that the UN Security Council was not going to assent to the independence of Kosovo. Attention was drawn to the attempts to interpret the Security Council resolutions as if they justified the independence of Kosovo. The Russian government objected to the attempt to unilaterally interpret resolutions.⁸⁰ The US Assistant Secretary of State Rosemary Di Carlo specified that admitted that the United States and Russia "might have different interpretations" of S/RES/1244, "We agree that 1244 remains in effect. But we see 1244, as I said, as a call for a political process. We see that the status of Kosovo was left totally open and did not dictate that Kosovo should be independent or should not be independent. The resolution calls for presences – international presences – to assist Kosovo in its development."⁸¹

This statement bypasses the express preservation of the territorial integrity of Serbia under this resolution.

According to the Foreign Secretary David Miliband of the United Kingdom, S/RES/1244, "created a political process as well as establishing an international regime for Kosovo within the territory of Serbia. It was about restoring peace and security. Resolution 1244 does not determine or constrain the final status process, nor exclude outcomes. But it does envisage a final status process and it needs to be brought to a conclusion." Furthermore, he asserted that,

"It is important not to be confused by 1244's references to the 'sovereignty and territorial integrity of the Federal Republic of Yugoslavia (now Serbia)'. This is a qualified preambular reference which in its context clearly refers only to the interim phase of administration in Kosovo."⁸²

The Foreign Secretary's statement seems to argue that while the Security Council preserved the territorial integrity of Yugoslavia and Serbia then and there,

⁸⁰ Statement of Foreign Minister S. Lavrov, 10 December 2007, available at: <www.rian.ru>; a similar declaration was made by the Russian Representative in the Troika, emphasising that the proclamation of independence would contradict S/RES/1244 and in such case Russia would demand annulling it, 10 December 2007. On attempts of unilateral interpretation of Security Council resolutions in general see J.A. Frowein, "Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?" in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1999, 97 et seq.

⁸¹ Available at: <<http://www.interfax.com/17/375120/Interview.aspx>>.

⁸² D. Miliband, "Kosovo: Is it legal?", available at: <www.fco.gov.uk>, 17 February 2008.

⁷⁸ I. Brownlie, *International Law and the Use of Force*, 1963, 421 et seq.; F.A. Mann, "The Consequences of an International Wrong in National and International Law", *BYIL* 48 (1976-77), 1 et seq. (41).

⁷⁹ On the interpretation of resolutions see Orakhelashvili, see note 10, Max Planck UNYB.

it left open the option of disrupting that territorial integrity at a certain point in the future. At the same time, it is inherent in the Foreign Secretary's statement that there was no specification of who and when it should be decided whether such disruption of territorial integrity was necessary. Was it to be the Council itself, or someone else?

Leaving aside the implausibility of such interpretation in the face of the straightforward division of the Council membership views on this subject, it is also implausible that the Council would have intended something along the lines formulated by the Foreign Secretary. Even if the Council had only intended to preserve Serbia's territorial integrity for a certain period of time, having not pronounced on what is supposed to happen afterwards, the very fact of recognition that the relevant territory, *even for a certain unspecified period of time*, is part of Serbia, necessarily implies the affirmation that if that territory will ever stop legally being a part of Serbia, the latter's consent has to be obtained, for the very reason that *for the time being* Serbia remains the territorial sovereign.

But the above is just a matter for speculation. The truth of the matter is that S/RES/1244 contains no element of provisional sovereignty of Serbia over Kosovo. It just affirms what otherwise is the case under international law. No temporal limitation follows from the words used by the Security Council and none should be read in.

It should also be considered what meaning the Member States attributed to Serbia's territorial integrity when S/RES/1244 was adopted. The views of individual Member States at the time of adoption of the resolution, if compatible with the text thereof and not contradicted by other Member States, could be a valid factor in the interpretation of Security Council resolutions. Russia's view was that the resolution "clearly reaffirm[ed] the commitment of all States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."⁸³ China stood "for peaceful settlement of the question of Kosovo on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia;"⁸⁴ in addition, China explained its abstention from vetoing the resolution thus, "in view of the fact that the Federal Republic of Yugoslavia has already accepted the peace plan, that NATO has suspended its bombing in the Federal Republic of Yugoslavia, and that the draft res-

⁸³ Doc. S/PV/4011, 10 June 1999, 7.

⁸⁴ *Ibid.*, 8.

olution has reaffirmed the purposes and principles of the United Nations Charter, the primary responsibility of the Security Council for the maintenance of international peace and security and the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the Chinese delegation will not block the adoption of this draft resolution."⁸⁵

In other words, S/RES/1244 was adopted simply because it preserved the territorial integrity of the FRY and subsequently Serbia. If the resolution meant affirming Serbia's territorial integrity only for a certain time period, China would not have let it through, especially because it would have created a precedent for secession which China has more than one reasons to fear. Now, if the Foreign Secretary's approach is right, China in fact has approved the eventual secession of Kosovo, which is counterfactual. Similarly, Argentina voted for S/RES/1244 with the conviction that,

"it lays the foundation for a definitive political solution to the Kosovo crisis that will respect the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."⁸⁶

In other words, the resolution did not intend prejudicing the territorial integrity of Yugoslavia at any point of time. Against this background, no state in the Security Council, including the United Kingdom, has voiced any disagreement with this approach, having been well aware of the preservation of the FRY's territorial integrity as the cardinal condition for that resolution having ever been adopted.

As for the external evidence, S/RES/1785 of 21 November 2007, adopted around the time when the calls for Kosovo's independence got intensified, reaffirmed the Security Council's, "commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders."

In other words, it was the Security Council's intention to preserve the territorial integrity of all states including Serbia in the context of any territorial settlement adopted in the Balkans. This was in its turn reflective of the affirmation of the *uti possidetis juris* principle after the dissolution of the SFRY.

Even within the EU, there is some acceptance of the fact that the UDI is not compatible with S/RES/1244. As the Slovenian President of the EU Dimitrij Rupel

⁸⁵ *Ibid.*, 9.

⁸⁶ *Ibid.*, 19.

acknowledged, “There is concern about how to reconcile Resolution 1244 with Kosovo’s proclamation of independence.”⁸⁷

A culminating point of schizophrenia is embodied in para. 12 of the UDI adopted by the parliament in Pristina, which states that, “we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).”

2. The Legality of the EU Presence in Kosovo

The EU acknowledged, through the Council Joint Action, the need of, “ensuring a seamless transition between the United Nations Interim Mission in Kosovo (UNMIK) and the EU crisis management operation in Kosovo on the day of transfer of selected tasks from UNMIK to the EU crisis management operation following the adoption of a United Nations Security Council Resolution.”⁸⁸

This was followed by the deployment in Kosovo of the EU rule of law mission (EULEX). The EULEX mission has been established, among others, to,

- “(a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;
- (b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;
- (c) help to ensure that all Kosovo rule of law services, including a customs service, are free from political interference;
- (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

⁸⁷ Information of the Serbian Foreign Ministry 26 April 2008, available at: <<http://www.mfa.gov.yu/Pressframe15.htm>>.

⁸⁸ Council Joint Action 2007/334/CFSP, 14 May 2007, Official Journal of the European Union, 15 May 2007, L 125/29, preambular paragraph (4).

- (e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;
- (f) contribute to the fight against corruption, fraud and financial crime.”⁸⁹

These functions and powers, especially the one mentioned in para. (b) above, seem to reflect the incidences of so-called “supervised” or “controlled” independence of Kosovo. In other words, Kosovo under this model enjoys no full sovereignty. EU Commission President Jose Manuel Barroso argued that the sending of the EU mission to Kosovo had not contradicted international law in general and S/RES/1244 in particular, because the “relevant international organisations” are authorised to establish an international civil presence in Kosovo and the mission could be there unless the Security Council would decide otherwise.⁹⁰ The Serbian position has been and remains that without the authorisation of the Security Council, EULEX cannot lawfully be deployed in Kosovo. Along the similar lines, and even before the UDI and deployment of EULEX, the government of Cyprus emphasised that the deployment of the EU mission in Kosovo was not compatible with S/RES/1244.⁹¹ The same position has been repeatedly expressed by Russia, “the EU is unilaterally without any authorization from the UN Security Council sending a rule of law mission to Kosovo. It is, mildly speaking, a bitter irony in this name because the rule of law mission is being sent there in violation of supreme law, in violation of international law. We are being told that resolution 1244 is the basis for sending the EU mission, and that the unilateral proclamation of Kosovo’s independence does not run counter to this resolution because it speaks of a transition period and supposedly this transition period is over. That’s not true. Although resolution 1244 really speaks of a transition period, this transition period in accordance with this resolution should last until the parties reach, and I quote, a “final political settlement.” Everybody knows that the talks designed to reach that political settlement were artificially interrupted thanks to outside interference. The territorial integrity of Serbia was confirmed not only by resolution 1244, adopted in 1999, but also quite recently by another UNSC resolution which was adopted at

⁸⁹ Article 3, Council Joint Action 2008/124/CFSP, 4 February 2008, Official Journal of the European Union, 16 February 2008, L 42/92.

⁹⁰ Barroso calls the EU mission to Kosovo legal, 21 February 2008, Xinhua information, available at: <www.xinhuanet.com>.

⁹¹ Statement by the Foreign Minister of Cyprus, 14 December 2007.

the end of November 2007.”⁹² The Serbian Foreign Ministry too specified that, “Although Brussels made the decision to deploy its mission in the province in early February, it has not received an official invitation for this from the UN Secretary-General – necessary under Resolution 1244, that regulates any international presence in Kosovo post-1999.”⁹³

The Council Joint Action of 4 February 2008 establishing EULEX refers to S/RES/1244 as its basis.⁹⁴ The EU Council especially refers to the phrase in this resolution (op. para. 10) in which the Security Council, “Authorise[d] the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo...” But however this phrase is stretched, it refers to operations established by the UN Secretary-General, that is to say operations that are qualitatively UN operations, as opposed to the operations of other organisations that are approved, or acquiesced into, by the United Nations organs. S/RES/1244 does not include the reference to the establishment of civilian peace operations by the EU as such. When the UN Security Council intends to authorise the establishment of EU operations in Chapter VII situations, it expressly grants the requisite authorisation, as was the case with the establishment of EUFOR in Bosnia to replace the NATO-led Stabilisation Force, or the EU mission in the Democratic Republic of the Congo.⁹⁵ The truth of the matter remains that EULEX has been deployed in Kosovo without the sanction of the UN Security Council. Its presence there is not compatible with international law unless it will either be consented to by Serbia or directly approved by the Security Council.

Whether or not the EU’s reference to S/RES/1244 as the basis of EULEX is correct, in any case it constitutes the acknowledgment on the side of the EU that there has been no other legal basis for such operation. Neither general international law, nor the legal framework and competence of the EU provide for the power to establish operations like EULEX in situations like Kosovo.

The process of establishment of EULEX reveals further problems not only in terms of the status of Kos-

⁹² “Kosovo Tool Kit for Separatists”, BBC Information, available at: <news.bbc.co.uk>, 20 February 2008; Transcript of Remarks and Replies to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at a Joint Press Conference with the Turkish Minister of Foreign Affairs Ali Babajan, Moscow, February 20, 2008, available at: <www.mid.ru>.

⁹³ Serbian Foreign Ministry Information, see note 86.

⁹⁴ Council Joint Action, see note 88.

⁹⁵ See on this A. Orakhelashvili, “The Legal Framework of Peace Operations by Regional Organisations”, *International Peacekeeping: The Yearbook of International Peace Operations* 11 (2006), 111 et seq.

ovo but also the position of the EU to it. According to article 10 of the Joint Action of 4 February 2008, “The status of EULEX KOSOVO and its staff, including the privileges, immunities and further guarantees necessary for the completion and smooth functioning of EULEX KOSOVO, shall be agreed as appropriate.”

It is unclear how these privileges and immunities should be “agreed” and with whom. The EU as an international organisation enjoys no immunity unless conferred to it on the basis of the treaty with the relevant territorial state. An international organisation has no power to grant immunity to itself unilaterally. If, on the other hand, the EU concludes an agreement with the Kosovo authorities with a view to achieving this goal, this will be tantamount to the recognition of Kosovo as a state on the EU’s behalf and in its name. As mentioned above, the EU was unable to adopt a decision to recognise Kosovo and any agreement with the Kosovo authorities will be an attempt to imitate what has not been granted. Thus, while the Council Joint Action of 4 February 2008 prescribes that the privileges and immunities of EULEX should be secured, it does not specify how this should be achieved and in fact this cannot be achieved in legal terms.

3. The Legal Status of the UN Mission in Kosovo

Despite the UDI in Pristina and the EU’s deployment of the EULEX mission, the UN Interim Administration Mission in Kosovo (UNMIK) is still bound to continue its activities in Kosovo as it has been allocated this task under S/RES/1244. The EU has acknowledged that the UN will remain fully engaged in Kosovo until the end of S/RES/1244.⁹⁶

On the ground UNMIK does not seem to be discharging its responsibilities fully and seems to take attitudes under the influence of political pressure from the governments that support the independence of Kosovo. This has been evidenced by the negative attitude of UNMIK to the holding of Serbian elections in Kosovo in May 2008. According to op. para. 11 (c) of S/RES/1244, the main responsibilities of UNMIK include, “Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.”

The Head of UNMIK Joachim Rucker, being the Special Representative of the Secretary-General for Kosovo, refused to organise these elections by asserting

⁹⁶ Council Joint Action 2006/304/CFSP, 10 April 2006, Official Journal of the European Union, 26 April 2006, L 112/19.

that UNMIK was the only entity to allow elections. This follows, among others, from the attitude of the current head of UNMIK that favours the independence of Kosovo.⁹⁷ However, the above passage from the resolution does not allocate any monopoly to UNMIK in deciding to allow or not to allow the holding of elections. It has merely to organise and oversee elections.

VII. PROSPECTS FOR THE FUTURE: SETTLEMENTS OF CONFLICT

The above analysis has demonstrated that Kosovo has not made a valid case for independence under international law. Still, though illegal, Kosovo continues as a factual reality, and enjoys the support of a number of influential governments. It is thus worth focusing on the prospects of future developments of the Kosovo situation.

One option is that Serbia will, at the end of the day, recognise the independence of Kosovo and the situation will be resolved. Serbia has been pressured to do so by the EU and the government of the United States, in particular in exchange of closer relations with and possible accelerated membership in the EU. While such deal cannot be excluded, it appears highly unlikely, as currently no Serbian government can be envisaged to assent to the independence of Kosovo.

The second option is that of the protracted *de facto* situation on the ground, occasionally accompanied by local conflicts, frictions and crises.

The third option is that of the use of force by Serbia to recover the effective control over Kosovo. In this respect, it matters whether the modern *jus ad bellum* permits Serbia to use force. There have been reports of the Serbian government stating that it would not send troops into Kosovo to recover the territory.⁹⁸ This was arguably understood as the waiver by Serbia to use force in this context.⁹⁹ However, the Serbian statement only means that under current circumstances, including the unwillingness to confront in combat NATO troops, Serbia is not going to send its troops to recover Kosovo. But this statement does not mean that Serbia gives up its right to use force to

restore its territorial integrity. In general, waiver or renunciation of a right cannot be presumed, and the text allegedly containing waiver should be interpreted strictly so that nothing is presumed if not following from the text of the relevant statement.¹⁰⁰

The crucial question is whether and how far Kosovo as a *de facto* regime is legally protected from the use of force. As Kosovo legally remains part of Serbia, the use of force by Serbia to restore its government and authority over Kosovo would not in principle contradict Article 2 (4) of the UN Charter, which prohibits the use of force only in international relations. Sir Hersch Lauterpacht has observed that the territory of the unrecognised state is not protected from the invasion by virtue of the prohibition of the use of force.¹⁰¹ As Frowein emphasises, the *de facto* entity is not legally protected from the invasion of the state from which it secedes. The use of force by the latter state would not be a breach of the territorial integrity of another state.¹⁰² As such use of force would not be that in international relations of states, the *de facto* entity could not be protected by third states against its parent state.¹⁰³ Frowein also covers the issue of the use of force against the *de facto* entity with an internationalised status and admits that in such cases the prohibition of the use of force can protect such *de facto* entities,¹⁰⁴ but understandably his analysis does not cover any entity with the position comparable to that of Kosovo. In addition, the extension of the Article 2 (4) prohibition to *de facto* entities only on the basis of the rationale of this prohibition to safeguard peace is not free of problems, because Article 2 (4) is by its clear wording limited to international relations of states.

As S/RES/1244 is binding and continues being in force, Serbia presumably has no right to undermine the international administration established by the UN resolution. If, however, the UN administration were to be removed, or the factual state were to be established that would frustrate the aims of the UN presence under S/RES/1244, the deal under this resolution would collapse and Serbia could use force in response to the material breach of the resolution. To illustrate, the head of UNMIK has refused to recognise the legality of Serbian elections held in parts of Kosovo. While it is not clear at all that this situation

⁹⁷ See Rucker, "Local Election Results Will be Invalid", Serbian Foreign Ministry, 8 May 2008, <www.mfa.gov.yu>; see further Section VII. below. See also the letter of 17 April 2008 from the Serbian Minister Slobodan Samardzic to Rucker, in which the Serbian Minister observes that despite Rucker's professing of taking the neutral political stance, he did not actually remain neutral, see <www.kosovocompromise.com>.

⁹⁸ AFP Information, 14 December 2007.

⁹⁹ See the statement by the Foreign Minister of Germany Steinmeier, "Kosovo erklärt sich unabhängig – EU Außenminister beraten die Lage", 18 February 2008.

¹⁰⁰ For an analysis of the doctrine and practice on waiver, Orakhelashvili, see note 10, 2006, Chapter 11; id., see note 22, Chapter 13.

¹⁰¹ Lauterpacht, see note 26, 52.

¹⁰² Frowein, see note 47, 38.

¹⁰³ Ibid., 39.

¹⁰⁴ Ibid., 67 et seq.

calls for recognition, the refusal to recognise is clearly premised on the assumption that Kosovo is no longer part of Serbia, which attitude the UN officials are precluded from taking under S/RES/1244. Such practice, if multiplied and perpetuated, could lead to a situation that the legal position created by the resolution is no longer working on the ground; in other words, there is a material breach of this resolution. If carried through on a substantial scale, such practice could entitle Serbia at the relevant point of time to declare that S/RES/1244 is no longer in force, and in case of need proceed with the coercive action with a view to securing its territorial integrity.

In short, whether and when Serbia can use force to recover Kosovo depends on the process of the observance of S/RES/1244 on the ground, that is the compliance of the only international legal basis of the internationalisation of the Kosovo situation and opposable to Serbia and all states. In practical terms, all depends on how long the NATO troops will be able to stay in Kosovo, and in the case of possible armed confrontation, to what extent they will be willing to engage in full-scale hostilities.

VIII. CONCLUSIONS

The preceding analysis has demonstrated that the UDI in Kosovo contravenes international law and it cannot be validly recognised. Given the unrelenting opposition to the independence of Kosovo by Serbia and a number of other states, and the structure of international law being what it is, the validity of this independence can hardly be expected to consolidate. However, the argument of reality has been invoked in favour of accepting the independence of Kosovo. As US Secretary of State Condoleezza Rice put it, “if you don’t deal with that reality, you’re only going to sow the seeds of considerable discontent and considerable instability.”¹⁰⁵

But there are limits on the realist argument. As one of the fathers of political realism Henry Kissinger pointed out,

“stability... has commonly resulted not from a quest of peace but from a generally accepted legitimacy”,
which,
“means no more than an international agreement about the nature of workable arrangements and about the permissible aims and methods of foreign policy.”

Legitimacy “implies the acceptance of the framework of the international order by all major powers”, so that none of them persist with policies undermining the undesirable settlement.¹⁰⁶

To apply this reasoning to Kosovo, the current situation on the ground cannot be expected to be stable either in regional or global terms. At the regional level, Serbia remains opposed to the independence of Kosovo; at the global level, the independence of Kosovo is opposed by such major players as India, China and Russia. Thus both at regional and global level the independence of Kosovo will continue to encounter the opposition and counter-action that will adversely impact on the stability of its position. Presumably the sponsors of the Kosovo independence have understood from the outset that the entity whose independence they supported will neither gain the general recognition of the international community, nor will it be admitted to the United Nations.

The realist argument has also the potential of back-firing if the Kosovo-enthusiast states will face the secession of other entities in different parts of the world in the context over which they will have little realistic influence. In addition, if the realist argument holds the key to the problem, then the legal criteria of statehood and recognition are no longer crucial. Whatever the statehood entitlement and recognition of other secessionist entities, the use of the reality argument in favour of Kosovo’s independence inevitably paves the way for consolidating the claims of those other entities to independence. Consequently, those who use the reality argument today at the example of Kosovo, should prepare themselves to hearing the same argument in the context of other secessionist entities whose independence they do, or would, vehemently oppose. Being realistic about the reality will never do any harm.

¹⁰⁵ “Kosovo: Russian Ambitions and American Mistakes”, RIAN information, 14 December 2007, available at: <www.rian.ru>.

¹⁰⁶ H. Kissinger, *A World Restored: Metternich, Castlereagh and the Problems of Peace 1812-1822, 1957*, 1 et seq.