



Category of paper: Discussion Group Summary

Kosovo: International Law and Recognition

A Summary of the Chatham House International Law Discussion Group meeting held on 22 April 2008.

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The meeting was chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, NGOs, and government representatives.

Speakers:

- Alice Lacourt, legal adviser, Foreign and Commonwealth Office
- Ralph Wilde, Reader and Vice Dean for Research, UCL

The discussion following the presentations was held under the Chatham House Rule. The event was sponsored by Clifford Chance.

Background

Kosovo declared independence from Serbia on 17 February 2008. As David Miliband noted in his Written Ministerial Statement of 19 February 2008, the declaration proclaims Kosovo as a democratic, secular and multi-ethnic republic and states that its leaders will promote the rights and participation of all communities in Kosovo. The Declaration also contains a unilateral undertaking to implement in full the obligations contained in the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan) made by Martti Ahtisaari, UN Special Envoy for Kosovo, in February 2007, including its extensive minority safeguards. In the declaration Kosovo invited and welcomed an international civilian presence to supervise implementation of the Comprehensive Proposal, an EU rule of law and police mission and a continuation of NATO's Kosovo Force. The declaration was adopted unanimously by the members of the Kosovo Assembly that were present.

Thirty-nine States have now recognised Kosovo as a State. The United Kingdom, United States, Turkey and France recognised Kosovo on 18 February 2008, the day after its declaration of independence. Since then many States have followed suit. As at the date of the meeting two-thirds of the members of the European Union had recognised Kosovo i.e. eighteen member States. In addition, Kosovo has been recognised by all the G7 states, seven Security Council members and more than half of the Council of Europe and OSCE States.

Some significant States have, however, not recognised Kosovo. From amongst the members of the European Union Cyprus, Spain, Romania, Slovakia and Greece have not recognised Kosovo and appear unlikely to do

so in the near future. About eighteen States, for a variety of reasons, have said definitively that they will not recognise Kosovo. These include Serbia, Russia, Argentina, Cuba, Vietnam, North Korea and Libya. Most notably, Serbia has adopted legislation that purports to set aside the declaration of independence. Serbia maintains that Kosovo is still part of Serbia. In the Security Council debate on 18 February 2008 it stated that “*Serbia will never recognize the independence of Kosovo... For the citizens of Serbia and its institutions, Kosovo will forever remain a part of Serbia*”.

The meeting focused on the legal arguments for and against the recognition of Kosovo and discussed the practical and legal implications of recognition.

Alice Lacourt: The Approach of the United Kingdom

Ms Lacourt noted that in his statement to the House of Commons on 19 February 2008 David Miliband had explained that the status quo in Kosovo had proved unsustainable. This same point had also been made by the European Union, the UN Secretary General, the Contact Group and the UN Special Envoy for Kosovo himself. Uncertainty over status had been deterring investment; unemployment was high and organised crime a significant problem. Indecisive international responses to events in the Balkans had had terrible consequences in the past. After almost two years of inconclusive negotiations, the pressure in Kosovo for a decision on status had been very high.

The United Kingdom was one of the first States to recognise Kosovo and to establish diplomatic relations with what it regards as the world’s newest State. Ms Lacourt noted the tally of recognitions to date and that the United Kingdom expects more to follow in the coming months. Evidently many States are cautious about recognition. Some may see no political imperative either to take a position or to make a decision either way because, for example, they have few dealings with either Serbia or Kosovo. Other States may be biding their time in order to appraise the position taken by others in their own regional groups. Ms Lacourt emphasised that, however well-reasoned and well-merited a claim to independence may be, recognition as a state depended on the willingness of other States to let the new entity into the “club” that is the international community of States. Ultimately, whether or not to recognise Kosovo’s secession was a political question for individual States to decide.

Ms Lacourt discussed the European Union’s approach to the recognition of Kosovo. In general there had been a growing practice of EU coordination

over the recognition of States. For example, as evidenced by the Conclusions on Montenegro adopted by the EU Council on 12 June 2006, Member States had been able to agree a common approach on the timing of their individual recognitions of Montenegro when it seceded from Serbia in accordance with the terms of the constitution of the State Union of Serbia and Montenegro. A further example of EU coordinated recognition were the EU's 1991 Guidelines on the Recognition of States, which had been adopted in relation to the states emerging from the breakup of the Federal Republic of Yugoslavia (FRY) and the former Soviet Union. A different approach, however, had been taken to the recognition of Kosovo. On 18 February 2008 the General Affairs and External Relations Council of the EU had agreed, among other things, that the recognition of Kosovo was a matter for national governments to decide.

When deciding whether to recognise Kosovo the United Kingdom had applied the criteria set out in 1989 by the then Parliamentary Under-Secretary for Foreign and Commonwealth Affairs, Mr Sainsbury, in a Written Answer dated 16 November. Mr Sainsbury had said that: "*The normal criteria that we apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.*"¹ Ms Lacourt explained the United Kingdom's application of these criteria to the recognition of Kosovo.

Territory and Population

In its declaration of independence Kosovo had declared that its international borders would be as set out in Annex VIII of the Ahtisaari Plan i.e. effectively the territory of almost 11,000 km² that was administered by the United Nations Mission in Kosovo (UNMIK). Kosovo's population was about 2 million of which 88% were Kosovo Albanians, 6% Kosovo Serbs, 3% Bosniaks plus smaller minorities of Roma and Turks.

Government

The Kosovo Government, with organs already developed under UNMIK's Constitutional Framework, has full responsibility for public administration. As at the date of the meeting UNMIK remained in place under UN Security

¹ Hansard HofC Session 1988-89, column 494

Council Resolution 1244 (1999) and was headed by the Special Representative of the UN Secretary-General, Joachim R cker. Ms Lacourt noted that the newly adopted Constitution for Kosovo would, when it entered into force, effectively signal the end of the interim, transitional administration under UN auspices.

Alongside UNMIK, the EU operates an EU police and rule of law mission (EULEX), headed by Yves de Kermabon, and the EU Special Representative, Pieter Feith, is in charge of the International Civilian Office. NATO's Kosovo Force, mandated under Resolution 1244, also continues to play an invaluable role under the command of Lieutenant General Xavier de Marnhac.

Ms Lacourt explained that the fact that these international presences had been invited by Kosovo to perform the roles foreseen in the Ahtisaari Plan did not mean that Kosovo was not able to exercise independent Government. On the contrary, while the governments of nascent States are often weak, Kosovo had taken the sensible precaution of asking for support in line with the Ahtisaari Plan, in demonstration of its commitment to ensure a democratic and multiethnic society. Post-independence support had also been given on an international basis to a number of other new States, including Cambodia, Bosnia-Herzegovina, and East Timor.

Independent external relations

Arguably Kosovo's capacity to conduct international relations had been established relatively quickly. Ms Lacourt reminded the meeting of the level of recognitions and objections and that many States were still undeclared.

United Nations Security Council resolutions

Ms Lacourt discussed the application of Security Council resolutions. Resolution 1244 (1999), which was still in force, had established open-ended mandates for civil and security presences in Kosovo. The open-ended mandate of the civil presence was linked to Kosovo's status. Resolution 1244 had stated that the civil presence was to provide "*an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia*". Importantly, one aspect of the mandate was to facilitate a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (which, had they been agreed, would have set out a final status process) and, in a final stage, to oversee the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

In the introductory paragraphs of resolution 1244, the Security Council had reaffirmed the commitment of all States to the sovereignty and territorial integrity of the FRY. Ms Lacourt's view was that this reference in the resolution must be read in the context of the interim mandate for Kosovo that the Security Council was giving to UNMIK i.e. the UN presence was not of itself intended to affect Kosovo's status as part of Serbia. She noted that the elements of resolution 1244 that deal with the final status process were silent as to the outcome. While an agreed settlement would undoubtedly have been the ideal resolution, it was clearly unachievable; Serbia was prepared to offer substantial autonomy, but Kosovo would accept nothing short of independence.

The Security Council debate following Kosovo's declaration of independence showed members to be divided. Russia, a veto power, had insisted that secession should be blocked unless agreed by Serbia. However, seven other member States had been ready to recognise Kosovo. These seven formed a blocking minority and included three veto-holdings States, namely the United Kingdom, the United States and France. Attempts to impose a revised Security Council resolution framework for Kosovo were therefore stalled. Ms Lacourt explained that it was in this context, with Kosovo having declared its independence as a last resort, at the exhaustion of negotiations and on the basis of the Ahtisaari Plan, that the Foreign Secretary had considered the recognition of Kosovo to be fully justified and consistent with resolution 1244.

The independence of Kosovo had been posited by some as an example, indeed perhaps the first example, of the exercise of the right to external self-determination leading to a part of the parent territory breaking away to form a new State. Ms Lacourt considered whether, in fact, it was correct to cite Kosovo as an example of external self-determination. She noted that the 1972 United Nations Friendly Relations Declaration emphasises the importance of territorial integrity as well as the need to respect human rights and self-determination within the territory of the state. The saving clause (Article 6) then inserts a caveat: self-determination is to be achieved within the existing state which is bound to respect its population's human rights and right to participate in government.

Ms Lacourt concluded that Kosovo's independence does not fit easily within the meaning of self-determination. It was questionable whether a minority in a state could in fact be said to form a "people" for the purposes of self-determination. Certainly Kosovo had not become a separate "people" or self-determination unit by operation of the hive-off of Kosovo from Serbia/FRY for the purposes of the civil administration under resolution 1244. It would

also be highly controversial to argue that under Chapter VII the Security Council had a role in the creation of states and the legitimacy of any such purported use of Chapter VII would be questionable. Furthermore, the abuse of human rights and denial of representative participation in government of the 1990s did not necessarily give Kosovo a right to self-determination. Even if it had done at the time, it was not at all clear that the right could be said to subsist today, nine years later, and with a different regime in Belgrade.

Ms Lacourt explained that resolution 1244 could be regarded as the Security Council's unique response to the political and historical situation in the Balkans that it was faced with in 1999. Then, as now, there was a wide range of views within the Security Council as to the most stable way forward. In resolution 1244 the Security Council had provided for a final status settlement for Kosovo. Kosovo's declaration of independence as a last resort and on the basis of the Ahtisaari Plan was consistent with this. Furthermore, politically it could be seen as the best way of resolving Kosovo's status, ensuring regional stability and resolving this last remaining issue from the breakup of the former Yugoslavia.

Resolution 1244 provided that Serbia's governmental authority would not operate in Kosovo. Ms Lacourt noted that Serbia therefore has no jurisdiction to set aside the Kosovan declaration of independence. Arguably the UN Secretary General did have such power, but, because the members of the Security Council were quite evidently divided over the issue, he had not chosen to set aside Kosovo's declaration.

In addition, resolution 1244 provided for a final status solution for Kosovo taking into account the Rambouillet accords. The Rambouillet accords themselves stated that the mechanism for a final settlement should be determined on the basis of the will of the people (arguably the people of Kosovo, though this was not expressly stated), opinions of relevant authorities, each Party's efforts regarding the implementation of the Rambouillet Agreement (which had not been agreed by Serbia and therefore not implemented) and the Helsinki Final Act. Ms Lacourt explained that, in other words, a wide range of factors were to be taken into account, not only the will of the people of Kosovo or the principles in the Helsinki Final Act principles, but the whole picture, in order to trace the best and most sustainable settlement possible.

All these factors had led to the United Kingdom's conclusion that the Kosovo final status process was *sui generis* and that the solution had to be found within the operation of resolution 1244. It was a truly unique state of affairs.

The Ahtisaari Plan and the ensuing Troika process were exhaustive and had explored every possible option for a settlement. In particular, under the Troika, “unthinkable” options had been floated, such as formal partition, which both Serbia and Kosovo had expressly ruled out, a Montenegro-style federation of Serbia and Kosovo subject to a referendum to be held at a later stage and even an “agreement to disagree”. But no compromise solution could be found. For these reasons Kosovo was not a precedent for other cases such as South Ossetia and Abkhazia in Georgia.

Ms Lacourt noted that Kosovo would undoubtedly face a period of uncertainty in its early months and years. The UN was in a novel situation faced with the immediate need to establish a working framework with interlocutors in the EU, NATO and international civilian representative office, and in Belgrade, to cover its reconfiguration of its presence in Kosovo in light of events on the ground. Decisive action and close coordination between all the international presences was needed to ensure that all sides refrained from action that risked provoking or inflaming ethnic tensions at this sensitive time. The United Kingdom recognised how difficult an issue Kosovo’s independence was for Serbia. The United Kingdom had a strong relationship with Serbia, whose European Perspective it actively supported. Despite the difference of view with Belgrade on Kosovo, the UK remained, as the Foreign Secretary had made clear in his statement to the House on 19 February, committed to maintain and invest in its cooperative and warm bilateral relationship with Serbia and to assist Serbia and the other countries of the region to move towards greater EU and NATO integration.

Ralph Wilde: Kosovo - Independence, Recognition and International Law

(Some of the ideas in this presentation are also discussed in:

Ralph Wilde, International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away OUP, 2008, <http://www.oup.com/uk/catalogue/?ci=9780199274321>. The speaker expresses thanks to Dr Silvia Borelli for helpful feedback, and welcomes comments to ralph.wilde@ucl.ac.uk, www.ucl.ac.uk/laws/wilde)

Introduction

In international law, a new state may be formed from part of the territory of an existing state and its creation, and recognition by other states, will be lawful if this occurs on the basis of the consent of the 'parent' host state. So, for example, the official story told of the break-up of the USSR at the end of the Cold War is that the central government of that state and its constituent components agreed that all of the USSR's constituent components except Russia would break away, with Russia remaining as the existing state (with its UN membership) under a new name. In effect, then, a state decided to give up parts of its territory.

When the host state does not agree to such an arrangement, as was the case with Serbia and Kosovo's declaration of independence, one has to find some special legal entitlement on the part of the new entity to be an independent state, in order for the declaration of independence and any recognition of it to be lawful. Otherwise, it is a violation of the right of the territorial state to be free to determine the international legal status of its territory, a right which all other states are legally bound to respect through a general obligation of non-intervention.

Obligations to ensure self-government and the protection of particular groups of individuals within states exist in international human rights law and the law of what is called 'internal' self-determination. A state, then, is not legally entitled to persecute its people or deny minority groups autonomy. But what if these obligations are breached, as was the case with Yugoslavia in respect of Kosovo in the 1990s? Can this have any effect on the state's sovereignty over parts of its territory?

Prior to the conflict in the southern Balkans in the first half of the 1990s, Kosovo enjoyed a form of special autonomy within the Republic of Serbia, one of the six constituent republics of the Socialist Federal Republic of Yugoslavia (SFRY). This was progressively reduced from 1989 and revoked in 1990. There was a general persecution of Albanian majority in the province, leading to violence and, in 1998 and 1999, what was feared would be a genocide.

Under international law, what action to prevent such treatment are the people subjected to it, and other concerned entities, entitled to take? Might such entitlements provide a legal basis for the declaration of independence in 2008?

Self-determination

One potential remedy for persecution is the recognition of an entitlement to 'external' self-determination of the group of people who are the victim of such persecution: in the exercise of such a right, the people themselves will be entitled to decide whether or not to remain part of the state within which they are located.

In international law, a right to make this decision is not accorded to minority groups *per se*, even if they are understood to be significantly different from the majority population in their state on grounds of language, religion, ethnicity and the like. There is no legal right of external self-determination on this basis.

Why is this the position in international law? In the first place, there is a general presumption in favour of maintaining the *status quo* of territorial boundaries, at least as against non-consensual changes to them; otherwise, there would be chaos with the constant fragmentation of states, usually accompanied by war. In the second place, it is difficult to see where such a process would end: there will always be groups within groups, and this kind of self-determination—separateness based on group purity—is based on essentialist notions of racial, ethnic and religious homogeneity, with all of the problems such notions bring.

Because of these considerations, international law has only recognised a right of external self-determination in a narrow set of scenarios. One is based on a historical situation: colonial territories, and people in Mandated and Trust territories—essentially internationally-supervised colonies—were given the right because of the policy turn against the legitimacy of colonialism after the Second World War. The significance of this is largely at an end, with the Sahrawi and the Palestinians being notable cases where the right to self-determination deriving from unresolved questions related to prior colonial arrangements has yet to be implemented.

The remaining three scenarios that give rise to a right to external self-determination are based on particular factual effects occurring in relation to the population or a particular group of people in a given territory.

1. First, when a people is subject to racist/apartheid regimes or what is called 'alien domination', a vague term best understood to cover situation of foreign occupation.

2. Second, when an existing state disappears, in which case its constituent components get a right of external self-determination. This is not a situation of secession, since there is no state to break away from.

3. Third, possibly, a situation of an extreme violation of internal self-determination involving gross human rights violations.

How, then, might the situation of Kosovo fit within the three categories?

Self-determination because of alien domination?—UNMIK

It might be said that subjecting the people of Kosovo to a period of authority under the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO Kosovo Force (KFOR) might somehow itself create a right of external self-determination, and thus a right to independence, under the 'alien domination' heading. The main challenge to such an idea is that the policy basis for this category of self-determination is that people who were once free from external control had been made subject to it without any meaningful consent on their part, and that this situation has to be brought to an end unless they agreed otherwise. The problem in Kosovo is that, prior to the UN administration, the Kosovars were not free from external control—they were part of Serbia.

Self-determination as a constituent component of a dissolved state?

The second category of external self-determination—that based on the extinction of the larger state—was proposed in the context of the southern Balkan wars in the first half of the 1990s. European states took the position that the state of the SFRY had ceased to exist, and that its constituent components therefore had a right to external self-determination. The general view was that for these purposes the Republics were the constituent components. So Serbia, including Kosovo, was the external self-determination 'unit', and eventually it ended up as an independent state.

The Albanians in Kosovo had argued that the high degree of autonomy Kosovo had been given within the Serb Republic under the old SFRY made it a Republic in all but name, and that, accordingly, the province should have been treated as an external self-determination unit in the early 1990s. States did not offer general support to this position, however, and the situation of Kosovo was not addressed in the Dayton Agreements in 1995.

The problem as a matter of international law with the break up of the SFRY is that the events taking place in the early 1990s—four of the six Republics of the federal state unilaterally declaring independence—could have been regarded either as a set of unilateral secessions without the consent of the ‘parent’ state, in which case they would not have been in conformity with international law, or as events that merely precipitated the extinction of the larger state, in which case there was no state from which to break away, with each component thereby enjoying a right of self-determination.

The adoption of the latter view was a political choice taken by other states; because it was adopted generally, it was constitutive of the legal position. In the international law of statehood the recognition practice of states can be constitutive—it can itself form part of the legal framework—in borderline cases when it is, as it was here, widespread.

If this is correct, then, equally, politics can be regarded as having determined the legal situation in terms of which entities were going to be regarded as constituent components for the purposes of external self-determination: whether it would be the Republics, or the Republics and the two autonomous regions within the Serb Republic.

The determinations of States on this issue, and the decisions of an expert commission set up by European states to advise them in this regard, implicitly ruled out the notion that Kosovo had a right of self-determination as a result of the dissolution of the SFRY, because the focus was on the former constituent Republics exclusively. If the response of states generally determined the situation to be, legally, one of dissolution rather than secession, then arguably it was also legally determinative of the question of which entities were entitled to self-determination, and which were not. A choice had to be made and states made it in favour of the Republics, of course with the integrity of Bosnia and Herzegovina in mind.

Self-determination due to the end of Serb control in Kosovo?

What of the situation after 1999, when Kosovo was no longer under any control by Serb authorities? The introduction of UNMIK and KFOR in 1999 effectively removed all of the official presence of what is now called Serbia. Did this create facts on the ground that somehow effected a removal of Serbian sovereignty in terms of the enjoyment of title?

Crucially, the constituent instruments of UNMIK and KFOR asserted the continued enjoyment of sovereignty in the sense of title on the part of what was at the commencement of those arrangements called the Federal

Republic of Yugoslavia (FRY) with respect to the territory. In this regard, the preamble of Security Council Resolution 1244 reaffirmed:

. . . the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.

Repeating the formulation from the Peace Plan agreed to by the FRY, in a provision passed under Chapter VII of the UN Charter, the Security Council authorized in paragraph 10 of the Resolution

. . . an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia ...

The word 'within' implies an arrangement whereby the FRY enjoyed title over Kosovo; it could have no other meaning given that the FRY authorities were not to exercise any administrative control in the territory. Although, then, sovereignty as control was removed, sovereignty as title was affirmed, as further reflected in the consent to the international territorial administration arrangements given by the FRY in the Peace Plan.

The term protectorate in international law denotes a situation where a territorial entity is subject to some form of administrative control by a foreign actor who does not itself enjoy title over the territory, where this control is of a significance so as to place the political and legal viability of the entity into question, bearing in mind the independence and effectiveness criteria of legal statehood. As far as legal status is concerned, the word protectorate is not itself a term of art; instead, the terms 'protected state' and 'international protectorate' are relevant.

The term 'protected state' denotes an entity which is a state despite the existence of protection. An example would be Bosnia and Herzegovina, which is a state despite foreign military presence and the administrative role of the Office of the High Representative (OHR), because, arguably, of the overwhelming international commitment, through recognition and UN membership, to its enjoyment of this status.

The term 'international protectorate' denotes an entity that is distinct from the foreign actor or actors enjoying control over it, but which for some reason—usually the existence of foreign control—does not meet the legal criteria for statehood. East Timor during the period of UN administration was an international protectorate, not forming the territory of any state or of the UN, but also not declaring itself to be an independent state.

Kosovo from 1999 up until the declaration of independence was protected state territory—the affirmation of the enjoyment of title by what was in 1999 called the FRY rules out the possibility that this title was lost because of the control exercised by UNMIK and KFOR. Thus Kosovo could not claim that somehow it had ceased to form part of the host state in law and thereby enjoyed a right of external self-determination.

Self-determination on the basis of serious human rights violations?

What, then, of the third possible basis for external self-determination, arising in the context of particularly extreme serious human rights violations?

In the first place, it must be acknowledged that when this category of external self-determination has been discussed by courts and commentators, the general view adopted has been that it reflects the direction the law might be going in, rather than the position the law is in now. However, Kosovo might be a key step in such a process of norm creation. In the UN Security Council debate on Kosovo on 18th February 2008, Sir John Sawers, the UK Permanent Representative to the UN, stated that the government in Belgrade

...must accept that the legacy of Milosevic's oppression and violence has made it impossible for Kosovo to return to control by Belgrade.

As far as this potential basis for an entitlement to self-determination under international law is concerned, however, legacy is not enough if the situation has improved. Things are very different in Belgrade in 2008 when compared to 1999, as Sir John Sawers himself acknowledged when he cited the Belgrade authorities' argument that 'they should not be punished' for the crimes of President Milosevic. Even if one could argue that the situation in Kosovo at the time of the NATO bombing campaign in 1999 was such as to justify the recognition of a right to external self-determination for the majority of the population of the province on the basis of serious human rights violations, the NATO military campaign and the subsequent UN administration were of course aimed at a radical alteration to this situation, providing autonomy, self-government and the protection of human rights in the province.

Thus the factual basis for the recognition of a right to self-determination based on extreme violations of the fundamental rights of part of the population (even accepting that a right to self-determination exists in those circumstances) fell away.

The underlying rationale for the recognition of the right in these circumstances is that the entitlement to exercise self-determination in this manner serves as an exceptional device to enable a people to protect itself from destruction. The possibility of the exercise of external self-determination is not intended as a way to provide redress for long-standing grievances based on events that have passed.

Self-determination created by UN Security Council Resolution?

What about UN Security Council resolution 1244, which created the interim UN administration period running from 1999? Can it be that, even if it affirmed the sovereignty of Serbia for that period, the resolution in question somehow provided a basis for external self-determination as the end point?

The resolution anticipates the eventual determination of Kosovo's status, but leaves the options in this regard open, only requiring self-government, a concept which, the history of colonial trusteeship reminds us, is intentionally ambiguous, capable of meaning either full independence or autonomy within the existing sovereign. One end-scenario could, therefore, have been the continuance of sovereignty on the part of Serbia, on the basis of a high degree of autonomy—self-government—enjoyed by the Kosovars. The phase of UN administration could have been viewed as a period to provide interim protection pending changes within Serbia and a more reliable commitment on the part of the government of that state to protect the rights of the population of the province.

On the crucial issue of whether Kosovo was to have self-government within Serbia, or such an arrangement outside Serbia as an independent state, the resolution is silent. Although it does not rule out independence, it does not provide a legal basis for it.

Conflict resolution/prevention as a legal basis for independence?

From the issues considered so far, it would seem difficult to identify a legal basis for the declaration of independence rooted in a right of external self-determination on the part of the people of Kosovo. Indeed, the term self-determination has not played a significant role in the official statements of recognition by states. Instead, it has been suggested in such statements that maintaining the status quo was untenable, and that the situation had to be resolved one way or another. The Serbs would never have accepted independence of Kosovo as proposed under the so-called Ahtisaari plan, and the Albanians would not have accepted enhanced autonomy within Serbia.

Of course, the imperative to resolve the situation did not by itself provide a way out, because a choice still had to be made—independence or reversion back to Serbia.

Is there anything in the language of Security Council resolution 1244 on how the situation would be resolved that has implications for the choice that would be made?

Resolution 1244 uses the word ‘settlement’, not ‘agreement’, in the context of the determination of Kosovo’s eventual status. By itself, then, this language does not rule out an outcome not based on agreement. But, again, it does not provide a basis for choosing one outcome not based on agreement over another one equally lacking agreement—choosing the view of the majority in Kosovo (without the agreement of Serbia) rather than the view of Serbia (without the agreement of the majority in Kosovo). Furthermore, in being agnostic on this issue, the resolution does not affect the potential application of a more general rule of international law that might or might not require agreement.

Choosing the majority in Kosovo over Serbia

In his statement in the UK House of Commons on 19 February 2008, the UK Foreign Secretary David Milliband, whilst observing that recognizing its independence was the ‘best way of resolving Kosovo’s status’, remarked that this would ensure ‘regional stability.’ In his remarks to the UN Security Council, Sir John Sawers stated that ‘the international community cannot be a party to a settlement that is opposed by over 90% of a territory’s population: apart from anything else, it would be contrary to our overriding priority of upholding international peace and security.’

One might take these statements to suggest that the interests of peace and security required supporting the independence solution. Perhaps it is being suggested that there is a sound basis for moving beyond the mere imperative of ending the status quo, as a result of being able to conclude that one side has a better claim than the other.

The political problem with this argument is that it can be made on both sides. Security in the context of reversion to Serbia might have been guaranteed by the continued presence of NATO troops; Kosovar independence might lead to violence perpetrated against the Serb minority and also, more generally,

greater violence, as other groups in other countries look at the Kosovo situation and decide to push their claims for independence more aggressively.

As a matter of law, it might be said that the only conceivable basis for creating an entitlement of a group within a state to external self-determination in order to secure international peace and security is through the UN Security Council. Because issues of international peace and security are so contested and their consequences so grave, outside the narrow arenas of self-defence and, possibly, also extreme, impending humanitarian catastrophe, states have agreed that competence to make decisions about such issues resides exclusively in this multilateral decision-making body. Through its competence under Chapter VII of the UN Charter, the Security Council has the ability, at least potentially, to impose settlements on states, possibly even if such settlements are at variance with their ordinary legal entitlements.

But what if the Council fails to act in situations like Kosovo where the status quo cannot continue indefinitely, and where good faith efforts have been made to arrive at an agreement between the parties and, failing this, between Council members on an imposed settlement?

There is an emerging tendency to discuss the legality of Kosovo's independence declaration exclusively in terms of the framework set out in Security Council resolution 1244. As has been discussed, this seems to lead nowhere in the sense that that resolution does not itself provide a basis for the underlying choice needed to arrive at a settlement. It might be said, then, that, provided the resolution does not *rule out* one outcome over the other, then at least there is not a breach of a positive norm if that outcome is implemented, even if there is no positive legal basis for that outcome over the alternative.

The broader international law framework

The problem with such a view is that account needs to be made of the international legal framework in its totality, not just Security Council resolution 1244. That resolution was passed under Chapter VII of the UN Charter, and is therefore potentially of a greater significance than many other international legal obligations (via Article 103 of the Charter); however, given that, as has been explained, the Resolution is agnostic on the actual issue to be determined, it is necessary to turn to the broader framework.

This takes things back to the observation at the start of this paper concerning the general right of a state to respect for its territorial integrity, and the fact that the territory of the state can only be modified against its will in the context

of the exercise of a right to external self-determination or, possibly, as a consequence of a binding proscription of the UN Security Council.

As neither of these things is present, then the two possible outcomes of a non-mutually-consensual settlement are not, from a legal point of view, of equivalent value. There is no entitlement on the part of the Kosovars to external self-determination, whereas there is an entitlement on the part of Serbia to respect for its territorial integrity.

If, then, the situation has to be settled without the agreement of both sides, resolution 1244 does not operate in a normative vacuum in the sense that international law does not push in one direction or another. The default position is in favour of the preservation of the territorial integrity of Serbia.

It might be said, however, that, in creating a UN administration to govern Kosovo 'within' the FRY, the Security Council somehow rendered the entitlements of what is now Serbia over the province only temporary, being extinguished with the end of UNMIK. Quite apart from the difficult question as to whether UNMIK has actually come to an end with the declaration of independence (a question which will be addressed further below), such a view, in order to be correct, would require the resolution to somehow explicitly acknowledge such an alteration. The better view is that the reference in resolution 1244 to Kosovo being within the FRY is a reaffirmation, not a reconceptualization, of the pre-existing situation, as reflected in the preambular 'reaffirmation' of the commitment of member states to the sovereignty and territorial integrity of the FRY. The mere re-affirmation of a pre-existing situation does not itself have the effect of rendering that pre-existing situation terminated simply because the period in relation to which the re-affirmation was made has come to an end.

Legal consequences of the declaration of independence

What, then, are the legal consequences of the declaration of independence, bearing in mind what has been said about the relevant international law framework?

The Kosovars have no right to external self-determination and thus no entitlement to be a state. International law required that, were a settlement to be introduced without the agreement of both parties or a binding Security Council resolution, this had to involve preserving Serbia's sovereignty in the sense of title over Kosovo. What actually happened, the declaration of independence by Kosovo, amounts to an unlawful secession.

The United Nations mission is in a difficult position in that it has not blocked the declaration of independence and yet operates under resolution 1244, which mandates it to administer Kosovo within Serbia.

States recognizing Kosovo as an independent state are necessarily breaching their obligations to respect the sovereignty and territorial integrity of Serbia.

Legal status of Kosovo

What is the legal status of Kosovo? An entity can become a state in law even if its creation is of dubious legality. The main legal criteria for statehood concern, in essence, the practical viability of the entity concerned—whether it has a territory, population, and government, and whether it is independent from external control.

The significance of the external self-determination entitlement is that, if it is present, it can tip the balance in favour of statehood even when the entity does not meet the ordinary viability test. Examples here would be former colonial states in the period immediately following decolonization, and Bosnia and Herzegovina in the first half of the 1990s. Kosovo cannot take advantage of this bias in favour of its conformity to the international legal criteria entitlement to statehood; indeed, the other side of the coin from the presumption in favour of the territorial status quo in international law is, in the absence of special considerations arising out of a right to external self-determination, the presumption against the creation of new states.

Kosovo's main problem in relation to the legal criteria for statehood is that it is not independent from external control. It remains a ward of the UN and NATO. The problem legally is that, as a matter of Security Council Resolution 1244 and the Peace Plan agreed to by what is now Serbia, such control is exercised on the basis that Kosovo is part of Serbia, not an independent state. This is a different situation from, say, Bosnia and Herzegovina, where, although OHR exercises certain administrative prerogatives and the state is militarily controlled by EUFOR, this is done on the basis that Bosnia and Herzegovina is an independent state—indeed, its very objective is to positively support that policy.

As discussed previously, the recognition of states can play a constitutive role in terms of legal statehood, but only if it involves a significant number of states. Less than a quarter of the world's states is not enough. Indeed, an interesting enquiry would look at what, if anything, those states not

recognizing Kosovo have said are their reasons for this. Silence on the issue would be one thing; if there were a significant number of states positively refuting Kosovo's entitlement to statehood, this could itself play a constitutive role, in the negative, in relation to Kosovo's entitlement to statehood.

It is doubtful, then, that Kosovo is a state, even if it will be treated as such by those states recognizing its independence, something which puts them in breach of international law as far as their obligations to Serbia are concerned.

It then falls to be determined whether or not Kosovo remains legally part of Serbia. It is difficult to see what difference the declaration of independence makes to Kosovo's legal status. If the declaration is unlawful, and the recognition of Kosovo as an independent state a violation of Serbia's right to territorial integrity, then it would be perverse to say that nonetheless the declaration has had some negative effect on Serbia's sovereignty in the sense of title over the territory. To be sure, there is no Serb administrative presence in Kosovo, but that was the case before the declaration of independence. The only difference is the basis on which the Kosovo government administers the territory—now as an independent state—as opposed to the basis on which the UN administration mission was mandated to govern the territory—as part of Serbia. This is only significant, however, if the new basis is itself lawful, which it is not.

Kosovo is perhaps like the Republic of China, Taiwan, in that it is the territory of a state, the government of which does not enjoy administrative control over it. The difference, of course, is that in the case of Taiwan the ROC government administers the island on the basis that it, the government, is the official government of the whole of China, whereas in Kosovo the Kosovar majority government administers the territory on the basis of it being separate from Serbia. Because of the continued international involvement in the province, Kosovo remains a protectorate, and because of what has been said about its legal status, it remains a protected state territory.

Discussion

The discussion opened with a debate about the United Kingdom's *sui generis* classification of Kosovo's independence. Gibraltar, the Falklands, Northern Ireland, East Jerusalem and Northern Cyprus were cited as analogous situations that refuted the argument that Kosovo was truly unique. It was noted that these disputes had not been academically resolved but were often managed, provided that the parties did not resort to force. One participant referred to the tacit agreement between China and Taiwan under which China

refrains from military intervention on the understanding that Taiwan does not make new declarations of independence. He considered that had the EU aimed in 1999 to reach such an understanding the Kosovan situation would not have escalated in the manner in which it had done.

The meeting then considered the interplay between law and politics in the recognition of Kosovo, both in terms of justifications and consequences. Politics would always play a pivotal role in the recognition of States given that there was no right to recognition under international law. It was suggested that perhaps, because the status quo was politically untenable, Kosovo was a case of “bending the law for a good cause”. One participant advocated that, rather than contorting international law, the United Kingdom and other recognising States should justify their position in political rather than legal terms. This had been the approach in respect of the earlier interventions in Northern Iraq, to protect the Kurdish minority, and in Kosovo itself, to protect the Albanian Muslims. Neither of these interventions had been authorised by a Security Council resolution due to the threat of a Russian veto. The participant recommended that recognising Governments should simply explain that the recognition of Kosovo was just the right thing to do, rather than seeking to justify their position by building arguments skirting around resolution 1244.

It was, however, generally accepted that States should explain the legal basis for their recognition of Kosovo. Indeed, a State would often need to provide legal justification. For example, only legal arguments could rebut an accusation from another State that recognition of Kosovo was a breach of international law. Moreover, Serbia had threatened to bring an action against recognising States in the International Court of Justice. Serbia’s arguments were not yet known, but a recognising respondent State would need to formulate a legal justification. Although no participant could confirm that the United Kingdom would withdraw recognition if the ICJ found in Serbia’s favour, it was noted that the United Kingdom could be expected to follow any judgment of the ICJ on this point.

The political consequences of recognition were currently being felt by the European Union, which itself had no capacity to recognise a State. It was noted that although the EU had agreed that recognition of Kosovo would be a matter for national governments, the recognitions to date had implications beyond the bilateral. For example, the fact that one third of its members had not chosen to recognise Kosovo was hampering the EU in respect of treaties that bound EU member States. It was further noted that, subject to the Kosovan tribunals, Serbia was on track to conclude an Association

Agreement with the EU. It would be difficult to conclude an Association Agreement unless the EU and Serbia managed to reach some agreement over the status of Kosovo.

One participant noted that the United Kingdom's recognition of Kosovo wholly contradicted Robin Cook's statements in 1998 that the United Kingdom opposed full independence. It was, however, explained that this change of approach had occurred over time in the context of the gradual development of a solution, beginning in 1999 with resolution 1244 and progressing through, for example, the Ahtisaari Plan.

The meeting also discussed the inherent tension between self-determination and territorial integrity. As Ralph Wilde had already explained, international law permits external self-determination only in limited circumstances, preferring instead to resolve minority claims through autonomy within an existing State. Indeed it was to preserve territorial integrity that recognising States had purported to distinguish Kosovo as an exceptional situation and thus serve as a warning to other aspirant groups that their claims would not receive similar support. One participant enquired whether the United Kingdom would take a similar approach towards territorial integrity in respect of the Serb minorities within Kosovo. This fear of establishing a precedent also explained why certain States had refrained from recognising Kosovo. For example, Slovakia was mindful of potential claims by its Hungarian minority and Spain had similar concerns about the independence movements in its Basque and Catalan regions. It was observed that it was curious that so much effort appeared to have been made for a group which was not entitled to independence and no support had been offered to other groups which did have the right to self-determination. In this context it was noted that self-determination was a right that operated *erga omnes* i.e. not only a right to which all are entitled but, as affirmed by the ICJ in the *Advisory Opinion on the Wall being built by Israel in the Occupied Palestinian Territories*, one which States are obliged to see vindicated.

It was noted that UNMIK had not taken a position on Kosovo's independence. It had been thought that UNMIK opposition might have led to the declaration of independence having to be annulled, but this had not occurred. No participant was able to confirm whether this apparent change of heart was for legal or political reasons.

Paul Williams' idea of earned sovereignty as a means of resolving disputes about secession was introduced into the discussion. Earned sovereignty was a managed process towards independence that differed from traditional

notions. As the name suggested, under earned sovereignty independence would be neither immediate nor automatic. It had not been adopted by States to date but elements of a process akin to earned sovereignty could be seen in the developments in respect of Kosovo since 1999, for example the UNMIK standards, and it was a potentially a useful device in future.

The presentations and discussion had focused on Kosovo as primarily a European issue. One participant noted the absence of comment on the role and influence of the United States in the independence and recognition of Kosovo. It was also noted that the Kosovan Prime Minister had been invited to address the Security Council in April 2008. Although there had been pressure on the Security Council to deal solely with UNMIK after the declaration of independence, the invitation to the Kosovan Prime Minister was not as controversial as it might seem; the Security Council has the power to invite relevant people to address it, without implications for statehood.