## *Special Issue Introduction – What Future for Kosovo?*

# From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law

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### A. Introduction

The province of Kosovo – 2 million people in 11,000 square kilometres of territory nestled between Serbia to the North and Albania and Macedonia to the South – was thrust into the international limelight when Serbian actions to repress Kosovo Albanian calls for independence made it a subject of international concern at the end of the 1990s. While Kosovo is not unique in becoming well-known for suffering the repressive actions of a parent state, and while it has not even enjoyed the distinction of being the only territorial administration of its time, it appears to be unique in its (potential) impact on the doctrines of international law. On a number of levels, the international community's response to the situation created by Milosevic's actions and NATO's intervention threaten to call fundamental pillars of the post-World War II order into question. It is too early to speculate conclusively on whether the NATO action in Kosovo *sans* Security Council approval in some measure paved the way for an emerging doctrine of "humanitarian intervention" that, in turn, opened the door to the illegal invasion of Iraq. It seems not implausible to suggest that the apparent success of unauthorised military intervention in Kosovo in stopping mass human rights violations emboldened politicians on both sides of the Atlantic in opting for a moral path over the formally legal one. In any event, grounded as they are in that history, the final status talks on the future of Kosovo represent a serious challenge to the current framing of the

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international order. It is these issues that this symposium wished to raise and examine.

Thus, the starting point for this small symposium was that Kosovo has the potential to become one of the defining moments of the modern international law era; arguably it has already done so. Its impact can be viewed as occurring on three levels. The first level was the most immediately apparent to international lawyers in 1999, that of the use of force without prior Security Council authorisation.[1] What role do the current talks on the future of Kosovo play in defining any emerging doctrine of humanitarian intervention? Srdjan Cvijić's contribution examines in depth the alleged emergence of humanitarian intervention as a norm of international law and reflects on the impact that an imposed solution to the on-going impasse over Kosovo's final status will have on the legitimacy of NATO's use of force in 1999.

The second level is that of the United Nations territorial administration that followed. While not unique in this regard, post-1999 Kosovo raises fundamental issues of legitimacy and accountability, a better understanding of which is vitally important if the international community is to make a habit of such interventions. The contributions by Bernhard Knoll, Rebecca Everly and Claude Cahn all contribute to an expansion of our understanding of this. Knoll examines the legitimacy of international territorial administration. Everly and Cahn focus on the accountability of international administrators, Everly from the perspective of accountability of the international administration to the local courts and Cahn from the situation of impunity for the continuing gross violations of the human rights of minority communities within Kosovo, with a particular focus on the situation of Kosovar Roma.

The third level at which Kosovo may impact upon international law is in calling into question the prevailing balance between the principles of territorial integrity and self-determination; in expanding our understanding of Security Council powers to include the ability to impose independence, possibly through the doctrine of implied powers; and in undermining the sovereign equality of all states. The outcome of the final status talks currently underway may thus have a far-reaching impact on primary doctrines of the international legal system. While the contributors to the symposium have rightly confined themselves to points of

[1] *See* Bruno Simma, *NATO, the UN and Use of Force: Legal Aspects,* 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 1 (1999); *Compare* Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EJIL 23 (1999); *See also* Martti Koskenniemi, *The Lady Doth Protest too Much: Kosovo and the Turn to Ethics in International Law* (2002) 65 MODERN LAW REVIEW 159 (2002).

existing law, this editorial shall speculate on the possible impact upon a number of the fundamental principles of international law of an imposed solution to the Kosovo dilemma – assuming that, as looks likely, independence will be the outcome of the deadlocked negotiations underway. In order to do this, it is necessary to lay out the more plausible options for independence absent Serbian agreement that are circulating in influential international circles.

**B. Sovereignty Lost?**

One possible argument for fixing a solution for Kosovo without Serbian consent is that of forfeited sovereignty. There are two routes one could take to make this case. The first is that of the right of self-determination of the people of Kosovo; and the second relates to the principle of effective control.

*I. The Right to Internal Self-determination*

The right of a people living in a territory to freely determine the legal and political status of that territory is firmly established in the international legal lexicon. It has been repeatedly reaffirmed since its original appearance in the UN Charter, by, *inter alia*, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, common Article 1 of the twin Covenants, the 1970 Declaration on Friendly Relations and various judgments of the International Court of Justice, and should be regarded, according to the ICJ, as an essential principle of international law, possessed of an *erga omnes* nature.[2] This right allows a people to achieve self-determination in one of three ways: free association with a State, integration with a State or emergence as a sovereign independent State.[3]

However, outside of the colonial context, where the principle of self-determination clashes with that of territorial integrity, it is well-established practice that existing States are entitled to respect for their territorial integrity and political unity. Self-determination does not allow for an automatic right of secession and self-determination claims are to be realised instead through autonomy regimes and meaningful internal self-determination.[4]

Where, however, a State fails to provide meaningful autonomy, where, in the words of the 1970 Declaration, States fail "to conduct … themselves in compliance

[2] East Timor (Port. v. Austl.), 1995 ICJ para. 29.

[3] Declaration on Friendly Relations, GA Res. 2625 (1970).

[4] *Id.*; *see also* Reference re Secession of Quebec, 115 ILR 536 (Can. 1998).

with the principle of equal rights and self-determination of peoples … [being] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour",[5] it has been argued that States may forfeit their right to respect for their territorial integrity.[6] Thus, so the argument runs, where a State is oppressive or refuses to allow for any form of internal self-determination, the principle of territorial integrity might be pushed aside and the right of a people to self-determination may justify unilateral secession. The safe-guard clause formed one of the most interesting elements of the *Quebec Secesion* case.[7] However, while the Canadian Supreme Court accepted that in situations of "alien subjugation, domination or exploitation outside a colonial context [there is a] … clear case" for external self-determination, it refused to reach any conclusion concerning whether prevention of a meaningful exercise of internal self-determination justified secession as a last resort.[8] This hesitation reflects the much contested nature of such a right among international lawyers.[9]

In the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), amidst the multiple claims to self-determination that resulted, the Arbitration Commission established by the European Communities (EC) in 1991 to oversee the process (the Badinter Commission) declared *uti possidetis* a general principle of international law and rigorously applied it to the situation at hand, although not, it should be added, without controversy.[10] In Opinion No. 2 in relation to the situation in Bosnia-Herzegovina, the Badinter Commission, viewing the situation as one of the dissolution of a federal state, stated that "the right to self-determination must not involve changes to existing frontiers at the time of independence except where the States concerned agree otherwise."[11] In line with this view, the Commission was

[5] Declaration on Friendly Relations, *supra* note 3.

[6] The so-called 'safeguard clause' of the 1970 Declaration was repeated, in slightly different language, in the 1993 Vienna Declaration. United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, 32 ILM 1661, 1665.

[7] Reference re Secession of Quebec, *supra* note 4.

[8] *Id.*, 586-7, para. 132. For a less reticent ruling, however, about the ability of widespread human rights abuse to trigger self-determination-type claims, *see* Concurring Opinion of Judges Wildhaber and Ryssdal, Loizidou v. Turkey, EurCtHR (1996); available at http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/

[9] For a calm and well-reasoned discussion of the right of self-determination in the creation of new states, *see* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 107-128 (2d ed., 2006).

[10] For the establishment of the Commission, *see* Commission of the European Communities, *Declaration on Yugoslavia,* 24 BULLETIN OF THE EUROPEAN COMMUNITIES 115 (1991).

[11] Opinion No. 2 (reproduced), 3 *EJIL* 183-4 (1993).

willing to consider only claims to self-determination from the constituent republics of the SFRY and only within their pre-war borders. The claim of Kosovo to self-determination in 1991 was expressly refused and the only State to recognise the claim was Albania. If the province of Kosovo now has the right to choose independent statehood over and above the territorial integrity of Serbia, that is, the right to secession, what has changed?

The answer is, of course, the actions of Milosevic's forces in Kosovo in 1998 and 1999 that led to the NATO intervention. The fact that Serbian actions seven years ago continue to influence Kosovo's cause for independence is confirmed by the London Declaration of 31 January 2006 of the six nation Contact Group.[12] While the first part of paragraph 17 of this Declaration appears to be simply a restatement of the doctrine laid down in the 1970 Declaration that states must conduct themselves in such a manner so as to respect the internal self-determination of all its peoples – "Ministers look to Belgrade to bear in mind that the settlement needs, *inter alia*, to be acceptable to the people of Kosovo" – the second half of this same paragraph makes clear that the Contact Group holds the human rights abuse that took place prior to NATO intervention as relevant in determining final status. The paragraph continues: "Ministers recall that the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999 … must be fully taken into account in settling Kosovo's status." Arguably, it is possible to make sense of this statement only in the context of breaches of the right to internal self-determination.

However, the threshold at which a denial of internal self-determination activates the right to secession has been set very high. The Second Commission established in 1921 under the auspices of the League of Nations to consider the matter of the Aaland Islanders' desire for separation from Sweden concluded that "The separation of a minority from the State of which it forms a part … can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."[13] One could reasonably have argued that Milosevic's regime lacked the will to ensure just and effective guarantees, but it seems difficult to reach the same conclusion in respect of the democratic government currently in office in Belgrade. Indeed,

[12] The Contact Group is made up of the U.S., the U.K., France, Italy, Germany and Russia. It is working closely with the UN Special Envoy for Kosovo, Martti Ahtisaari, and providing the framework in which final status is negotiated. Statement by the Contact Group on the Future of Kosovo, 31 January 2006, available at http://www.unosek.org , the official website of the Contact Group.

[13] Bartram S. Brown, *Human Rights, Sovereignty and the Final Status of Kosovo,* 80 CHICAGO-KENT LAW REVIEW 269 (2005), *citing* Report presented to Council of the League by the Commissioner of Rapportuers, League of Nations Doc. B.7.21/68/106 (1921).

policing measures taken in respect of Vojvodina give all the appearance of a Serbian regime able and willing to ensure effective guarantees for its Kosovar-Albanian citizens; moreover, it has demonstrated that it is able to provide security and stability in the context of this territory's autonomous status.[14] The abuses reported by the Contact Group, although severe, are historical in nature and there is arguably no reason at present to suppose, should a solution short of independence be adopted, that these abuses will return. In May this year, the people of Montenegro voted for independence from its union with Serbia and, despite the apparent shock at the 55.5% vote in favour of dissolution of the bond, it was accepted in Belgrade without dispute.[15] The Serbia of Vojislav Koštunica is not that of Milosevic.

Moreover, the blatant and well-documented serious human rights violations against both the Serbian and Romani communities within the territory and the inability and unwillingness of Kosovo's administrators and would-be leaders from the Albanian community to ensure even minimum standards of protection for minority communities suggest that any recognition of the right of Kosovo to secede from Serbia on the basis of human rights abuse would justifiably be followed by similar claims from minority communities within any newly-independent Kosovo. While abuse against Romani and Serb communities is not organised as part of a government campaign, it is widespread, serious and possibly organised enough to constitute systematic abuse. It would therefore seem dangerous and not a little perverse to recognise a right of secession based upon historical human rights abuses where the situation suggests that the rights of minority communities will deteriorate further to the point that a counter-claim would have strong merit.

There is a further, more general, difficulty in allowing a claim to secession that is based upon historical abuse that is no longer existent: how far back in time is it reasonable to go in building evidence for a secessionist claim? Is ten years too remote? Is Quebec entitled to secede after all because of abuses committed fifty or sixty years ago by the English-speaking majority? The integration of Mercia into the emerging English nation at the point of the sword of the King of Wessex was probably no laughing matter, even by 10th century standards; could it be used as a basis for a claim to secede from its southern neighbours? The last example may be flippant, but the point is a serious one. The peace and security that the principle of

[14] Moreover, such an autonomous regime is accepted by the majority of the Serbian population as evidenced by the recent referendum in support of the new constitution, which includes several articles guaranteeing self-rule for, as well as minority and human rights within, Vojvodina. *See* Serbia backs draft constitution, 30 October 2006, http://news.bbc.co.uk/2/hi/europe/6097344.stm.

[15] *See* Montenegro gets Serb recognition, 15 June 2006, http://news.bbc.co.uk/2/hi/europe/5083690.stm.

territorial integrity is meant to ensure would arguably not be well-served by accepting claims to self-determination based upon historical abuse, no matter how recent the memories to the survivors.

*II. Loss of Effective Control Equals the Loss of Sovereignty*

The second argument that has been put forward by those involved in status talks, which also suggests a loss of sovereignty, is not of the forfeiture type but is based instead upon the principle of effectiveness. In order for a State to claim legal title to a particular portion of territory it needs to be able to demonstrate a certain degree of control over it. In the *Island of Palmas Case*, Arbitrator Huber concluded that sovereignty over territory is a constant series of actions – commensurate with the particular portion of the globe at issue – to guarantee its own inviolability, the rights of other States and their nationals' rights under international law.[16] The doctrine of effective control is further reflected in the third of the four criteria for statehood laid down in the Montevideo Convention (1933).[17] If the fact of sovereignty lies in its performance, where a State cannot over a period of some (considerable) time exercise effective control, it can be assumed to lose its legal title to the portion of territory in question.

For the past seven years, effective control over the territory of Kosovo has been exercised not by Serbia but by an international administration guaranteed by the NATO-led KFOR force. Under the authorisation of SC Resolution 1244, United Nations Mission in Kosovo (UNMIK) assumed all legislative and executive control, including the task of the administration of justice, and was also empowered to take control of and utilise all financial assets of the province. UNMIK has raised taxes and issued stamps for use in the postal service it runs; it has changed the currency and replaced the Serbian flag and all symbols of Serbia with UN regalia; it controls borders, issues identity documents and enters into agreements with States.[18] Serbia's control has been further reduced by the Constitutional Framework for Provisional Self-Government, declared in May 2001, which saw responsibilities in the areas of economic policy, trade, customs, education, health, the environment, agriculture and infrastructure transferred to Kosovar-run institutions. Although the Special Representative of the Secretary-General (SRSG) retains the final say in all

[16] Island of Palmas (Neth. v. U.S.) (1928), 2 R.I.A.A. 829.

[17] These four criteria – a clearly defined territory, a population, effective government and the ability to enter into relations with other States – have long been held to reflect customary international law in this area.

[18] *See* Constitutional Framework For Provisional Self-Government, UNMIK/REG/2001/9 (15 May 2001); available at http://www.unmikonline.org/.

matters decided under the Interim Administration Structure, the Constitutional Framework provides that the transfer of power to the people of Kosovo is to continue. It is thus possible to argue that the international administration of Kosovo has turned the province into a form of non-self-governing territory.[19]

International law has a history of recognising *ex-post facto* assertions of sovereignty.[20] Moreover, it can be argued that Serbia consented to the current arrangements by the terms of the Agreement on Political Principles that it entered into with Russia and the EU on 3 June 1999[21] and in the Military Technical Agreement (MTA), which was signed not just by Col. General Marjanovic of the Yugoslav Army, but also by Lt. General Stevanovic of the Ministry of Internal Affairs on behalf of the governments of the FRY and the Republic of Serbia.[22] These two agreements contain terms that Serbia could reasonably have understood as undermining its sovereign claim over the territory.

Can it reasonably be argued, therefore, that Serbia has lost sovereignty as a consequence of the international administration of Kosovo? There are a number of reasons to hesitate before advancing such a line of argumentation.

Firstly, the doctrine of effective control and its relationship to title to territory has been seriously undermined in recent years, most especially in the region of the Balkans. Recognition has been awarded to entities that cannot be understood as having achieved effective control over the territory claimed; however, one can argue that the premature recognition of Croatia and Bosnia-Herzegovina in 1992 and 1993 respectively reflected the anxious desire of the European community to shore up these entities and not a legal judgement about whether or not they had met the Montevideo criteria.[23] Although an independent Kosovo would not be

[19] Crawford asserts that territories that have been governed in such a way so as to create in effect non-self-governing territories may constitute a special category to which self-determination applies. As possible examples for this category, he cites Kosovo, Bangladesh and perhaps Eritrea. *See* CRAWFORD, *supra* note 9 at 126.

[20] For example, the widespread recognition of Bangladesh in 1971 following its secession from Pakistan, and despite the military assistance of India in resisting attempts by the Pakistani army to prevent East Pakistan from breaking away.

[21] Letter Dated 7 June 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, S/1999/649 (7 June 1999).

[22] Military Technical Agreement between the International Security Force (KFOR) and the Governments of the FRY and the Republic of Serbia, Kumanovo (FYRoM), 9 June 1999.

[23] Similarly, Crawford has suggested that the hurried recognition of the Congo can be explained by an interpretation of 'government' as comprising two elements: the actual exercise of authority and the right or title to exercise that authority. With regard to the Congo, it is the latter element that prevailed.

unique in this regard, were it to be granted independence, Kosovo would remain wholly economically dependent upon the international community – in particular the European Union – for any foreseeable future. While economic dependency does not equate with effective control, where a state is so totally dependent upon the willingness of an external actor to finance all the functions of the state, the understanding by which effective control is equivalent to independence becomes somewhat meaningless. Where the assessment of effective control becomes so subjective that it is completely absorbed within the decision of whether or not to grant recognition, the ability of this doctrine to present a balanced account of statehood is seriously undermined. The ability of states to live up to their international obligations sits at the heart of international law.

Secondly, recognising that the *de facto* separation of Kosovo from Serbia by the fact of an international administration was possible would render the pronouncements on the inviolability of Serbian territorial integrity and political unity meaningless. If *de facto* separation is sufficient to cut the cord of sovereign title, the international community will effectively have presented Serbia with a no-win situation, in which failure to accept the presence of UNMIK was read by the international community as unwillingness to recognise the autonomous status of Kosovo and thus as strengthening the demand of Kosovar Albanians for independence; while, recognition of the (temporary) presence of the international community (even with the understanding that it does not affect its territorial integrity) amounts to acquiescence in the transfer of title. Such an outcome would make it highly unlikely that the international community would be trusted in the future to administer a contested territory neutrally and without prejudice to its final status. While there is at least one recent example of transitional administration resulting in a 'return' of sovereignty to the previous title holder,[24] it seems reasonable to suggest that states would fear the precedent that Kosovo would set when making the decision about whether to authorise international administration. The ability of the international community to perform a task that has come to be seen as vital would therefore be negatively effected.

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However, this was in the context of decolonization and the uncontested nature of title. There is no agreement that Kosovo has the right to exercise sovereign governmental authority. *See* CRAWFORD, *supra* note 9 at 56-8.

[24] The Security Council established the UN Transitional Administration of Eastern Slavonia, Baranja and Western Sirmium (UNTAES) with Resolution 1037 (1996). UNTAES comprised a military and civilian component, and in addition to de-militarising the area, it provided policing, public services and organised the re-settlement of refugees. Its mandate ended on 15 January 1991, when administration was handed back to Croatia. *See* CRAWFORD, *supra* note 9 at 556-7.

Thirdly, a plain textual reading of the resolution would appear to rule out this argument. The wording of Security Council Resolution 1244 provides that the international administration is to "promot[e] the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo". It would be an odd interpretation to conclude from this clear statement of a final settlement still being pending despite the actions of the administration, that the fact of international administration can itself establish that settlement.

Furthermore, effective control is not always persuasive in determining where sovereignty lies. From the moment of its unilateral declaration of independence in November 1965 until the fall of the minority regime in 1979, Ian Smith's government of Southern Rhodesia exercised effective control over the territory to the exclusion of all other powers, and yet, it failed to gain recognition as a state.[25] Moreover, the context in which UNMIK is present in Kosovo, Security Resolution 1244 notwithstanding, is that of the illegal use of force by NATO. International law has outlawed the changing of borders by military means in Article 2(4) of the UN Charter. In Resolution 713 in relation to the situation in Iraq, the Security Council made a clear statement that "no territorial gains or changes brought about by violence are acceptable."[26] There is thus a strong presumption in international law against independence born of military force or military occupation, and the international community has taken a consistent line in the post-colonial era in refusing to grant validity to acts committed by illegal force.[27] The circumstances leading up to the current situation should be reason to urge caution upon decision-makers who are thinking of arguing that the loss of effective control equates with the loss of sovereignty.

[25] *See* S. C. Res. 216 (12 November 1965), condemning the "illegal racist minority regime" of Smith; G. A. Res. 2024 (XX), (11 November 1965); more generally, *see* CRAWFORD, *supra* note 9 at 129.

[26] S. C. Res. 713, (25 September 1991).

[27] For the application of Article 2(4) UN Charter in this regard, *see* CRAWFORD, *supra* note 9 at 131-148. According to Crawford, "where a state illegally intervenes in and foments the secession of a part of a metropolitan state other states are under the same duty of non-recognition as in the case of illegal annexation of territory." *Id.* at 148. The refusal to recognise the Turkish Republic of Northern Cyprus has been justified by some states, such as the UK, on the basis of the illegal military intervention by Turkey that established it. *Id.* at 133. Furthermore, whether or not one views Kosovo as territory occupied by the Security Council acting as the international community, the strict prohibitions of the transfer of title and people of occupied territories under Section III of Geneva Convention IV (1949) reflect the widespread unwillingness to allow the use of force to affect title.

## C. The Security Council's Power to Impose Independence

If arguments about a loss of sovereignty are unconvincing, the legal basis for an independent Kosovo without the consent of Serbia will lie with the Security Council, should it be so inclined. A number of bases have been suggested as providing authorisation for imposed independence. First, the wording of Security Council Resolution 1244 has been put forward; secondly, and most persuasively, the powers the Council holds under Chapter VII of the UN Charter.

### *I. Resolution 1244*

Security Council Resolution 1244 forms the legal basis for the UN administration in Kosovo. It, however, appears to give no basis for an imposed solution. Indeed, emphasis is given to the necessity of a negotiated agreement and the resolution is at pains to affirm "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region." This impression is confirmed by the two annexes to the resolution. Both the statement on the G8 Ministers of 6 May 1999 and the Kosovo Peace Accords agreed by Belgrade on 3 June 1999 use similar language and call for a "political process … providing for substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia." The Rambouillet Accords, whilst affording Kosovo meaningful autonomy, was to achieve this aim through negotiations between the two parties while ruling out changes to the province's borders, regardless of the rejection of the Accords by Serbia. Within the normal meaning of the term "self-government" as referring solely to control over internal affairs, the legal basis establishing the UN mission in Kosovo appears to rule out independence unless established via a consensual political process.

Of course, the Security Council is not bound by its own previous statements. Rather, its powers under Chapter VII are exceedingly broad and far-reaching.[28]

### *II. The Maintenance of Peace and Security*

Chapter VII of the UN Charter provides the UN Security Council with powers to act in respect of threats to the peace, breaches of the peace and acts of aggression. Under Article 39, it is for the Security Council itself to establish when such a

[28] Among the considerable amount of literature in this area, *see* Vera Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal System, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 277-313 (Michael Byers ed., 2000).

situation exists and what measures are necessary to maintain or restore international peace and security. Chapter VII does not, however, expressly grant the Security Council the authority to alter the territorial borders of a State without its consent. This power can be inferred, however, from the wording of Article 41. In conferring upon the Council the authority to take the measures it deems necessary to give effect to its decisions, Article 41 grants the Council exceptionally broad powers in the fulfilment of its duty to maintain international peace and security, stopping short of the use of force.[29] Further, the doctrine of implied powers, elucidated by the ICJ in reference to the extent of the scope of authority of UN organs, determines that such organs "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[30]

The Council has used Article 41 to give effect to decisions taken in pursuit of international peace and security that have had far-reaching effects upon the sovereignty of statehood. It has done so, for example, with regard to declaring illegal territorial regimes that violate norms of non-discrimination on the grounds of race, as in the decision not to recognise the declaration of independence by Southern Rhodesia in 1965.[31] Moreover, one could allege that the Security Council, on numerous occasions, has pushed aside the principle of territorial integrity, by altering territorial boundaries and/ or in granting independence to a contested territory, all in furtherance of international peace and security. For example, the implementation of the General Assembly's Resolution on the partitioning of Palestine was taken up by the Security Council under its Chapter VII powers at the request of the Assembly;[32] the Council also established an Iraq-Kuwait Boundary Demarcation Commission in the wake of the First Gulf War;[33] further, it "persuaded" Indonesia to accept the independence of East Timor following the ending of the UN Transitional Administration in East Timor.[34] All these, so it can be argued, were exceptional situations demanding of a far-reaching approach to the maintenance of peace and security.

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[29] According to the ICTY's interpretation of Article 41, the provision "provides no limits on the discretion of the Council to take measure short of force". Prosecutor v. Tadic (Jurisdiction), 1996, 35 ILM 35.

[30] Reparation for Injuries, Advisory Opinion, 1949 ICJ 182 (11 Apr.).

[31] S. C. Res. 216 (12 November 1965); S. C. Res. 217 (20 November 1965).

[32] G. A. Res. 181 (29 November 1947); S. C. Res. 42 (5 March 1948).

[33] S. C. Res. 687 (3 April 1991).

[34] S. C. Res. 1271 (25 October 1999).

That the Security Council's powers are practically unlimited, the concept of *ius cogens* notwithstanding, has not been accepted by all, however. Indeed, Judge Fitzmaurice in the *Namibia* case was categorical about the limits of the Security Council's powers, which he placed short of the ability to change territorial borders. He opined:

> Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration … This is a principle of international law that is as well established as any can be, - and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member states. The Security Council, after making the necessary determination under Article 39 … [may] order the occupation of a country or piece of territory in order to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights; … It was to keep the peace, not to change the world order, that the Security Council was set up.[35]

Judge Fitzmaurice's concern reflects the original understanding that the Security Council was accorded such far-reaching powers on the condition that it confine its actions to short-term measures to remove a threat to international peace and security; thus, definitive settlements were to be left to the parties concerned or to be dealt with by the Council under the non-coercive provisions of Chapter VI.[36] Indeed, the question remains as to whether the Security Council can side-step the non-coercive nature of its settlement dispute powers by placing such actions under Chapter VII. The drafting of Article 1(1) appears to make clear that permanent settlements, unlike enforcement action, must be made in conformity with justice and international law. The extent to which imposing a permanent alteration of its borders upon a state without its consent is compatible with the provisions of international law, such as *uti possidetis*, is rather questionable.

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[35] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 ICJ 16 (21 June).

[36] THE CHARTER OF THE UNITED NATIONS. A COMMENTARY [hereinafter CHARTER] (Bruno Simma et al. eds., 2d ed. 2002).

While the Security Council has pushed aside these confines to a certain extent in recent years, such as in Bosnia and the other examples given above, there are other possible constraints upon its freedom of manoeuvre. Even if one accepts that the Security Council possesses the authority under Chapter VII to alter permanently territorial borders, can the situation in Kosovo be reasonably said to fall under Article 39 as constituting a threat to international peace and security?[37]

It has been suggested in the course of discussions surrounding the final status talks that Kosovo has formed a site of violent struggle for much of recorded European history, and that its 600-year relationship with Serbia has frequently been one of bitter contestation.[38] The contested nature of the relationship between Serbia and Kosovo notwithstanding, there is good reason to question whether enforcing independence of Kosovo on an unwilling Serbia is more or less likely to lead to instability in the region.

The loss of Slovenia, Croatia, Bosnia, Macedonia and now Montenegro means that Serbs find themselves alone for the first time since 1918 in a state of independence that they did not ask for. This catalogue of rejection could have a profound effect upon the morale and outlooks of Serbs. The loss of Kosovo is likely, according to one well-placed commentator, to trigger a 'Trianon Syndrome'[39] within Serbia – a long-lasting bitterness and anger towards neighbours and those powers that enforced such humiliation.[40] The wave of public anger that followed the original Treaty of Trianon brought a nationalist government to power in Hungary. While a nationalist government has been in power ever since the ousting of Milosevic, the fear is that the hard-line nationalists of the Serbian Radical Party, already the largest party in parliament, will be swept to power in the elections on January 21, 2007, on the back of the "final insult" of an independent Kosovo. Whether or not

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[37] In the so-called 'Spanish Question', see the Sub-Committee's response to Polish attempts to bring the actions of the Franco regime under Article 39; the Sub-Committee found that because the activities do not at present constitute an existing threat to international peace and security, "the Security Council has no jurisdiction … under Article 40 or 42". SCOR, 47th meeting, 18 June 1946, 370-376 ; further, in the case of the Free City of Trieste, the Council was moved to justify the connection between the Trieste dispute and the maintenance of international peace and security in the face of objections from the Australian representative. SCOR, 89th meeting, 7 January 1947, 5-7.

[38] For a history of the province and its relationship with more powerful neighbours, *see* TIM JUDAH, KOSOVO: WAR AND REVENGE (2002).

[39] The 1920 Treaty of Trianon imposed upon Hungary at the end of the First World War saw millions of Hungarians left outside the new rump state of Hungary once large swathes of territory were divided up among neighbours. This "re-distribution" provoked a bitterness that is still very much part of Hungarian identity 85 years and many more upheavals later.

[40] Tim Judah, *Serbia: The Coming Storm*, THE NEW YORK REVIEW OF BOOKS, 19 October 2006.

support for the Radical Party will swell in future elections with the votes from those Serbs fleeing an independent Kosovo,[41] the unhappiness of the wider public at the prospect of an independent Kosovo was made clear in the recent referendum.[42]

The same commentator has written of his observations that the region as a whole is beginning to heal. Ordinary people are apparently reconnecting across the boundaries of the independent ex-Yugoslav republics in matters of economy and culture, crossing borders to shop, playing each other's music on the radio, buying each other's literature.[43] Imposing an independent Kosovo upon Serbia seems likely to halt this process to some degree and, with a Radical Party government in Belgrade, to lead to another period of instability in the region. Can the Security Council reasonably be accepted as acting under Article 39 where the measures adopted may lead to greater instability than the *status quo*?

There is also serious reason to doubt whether Article 39 can reasonably be applied to the current situation between Kosovo and Serbia. This issue touches again upon the utility of historical abuses and one can question whether Article 39 can reasonably be activated by a situation no longer existent. To accept that the failure to achieve independence will cause the majority Kosovar-Albanians to express their displeasure by violent means and thereby undermine international peace and security is to accept a form of blackmail that the Security Council should arguably not seek to encourage.[44]

A further limit to Security Council powers is the need for measures to be proportional.[45] The phrasing of Articles 40 and 42 as authorising "necessary" measures suggest an intention to limit the impact of enforcement measures by the

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[41] The UNHCR has made widely reported plans for what it anticipates to be a mass exodus in the wake of an independent Kosovo. However, the likelihood of this occurring is much contested, it does seem likely that some Kosovo Serbs will relocate.

[42] The main issue in the referendum was the inclusion of a provision in the constitution stating that Kosovo is an integral part of Serbia. The draft constitution was supported by 51.5% of voters, thus passing the 50% threshold necessary to validate the vote. *See* Serbia backs draft constitution, *supra* note 14.

[43] Judah, *supra* note 40.

[44] For a statement that the response of the Kosovar Albanians to disappointment will see UNMIK lose control of the province used as an argument for a swift conclusion to the talks in favour of independence, *see* International Crisis Group, *Kosovo Status: Delay is Risky* (Brussels/ Pristina, 10 November 2006) available at http://www.crisisgroup.org/

[45] CHARTER, *supra* note 36 at 711.

general principle of proportionality, although the Security Council is acknowledged to have broad discretion in its interpretation of what is proportional in the circumstances. One could suggest, however, that, given the historical nature of the abuses upon which the normative case for independence appears to be premised, as well as the existence of some doubts about the classification of an autonomous Kosovo as a threat to international peace and security, the permanent alteration of Serbia's borders without its consent would be manifestly disproportionate to the task of maintaining international peace and security.

Despite the doubts raised, there remain strong arguments to support the suggestion that the Security Council is empowered under Chapter VII to grant Kosovo independence; at least, that such action would be in line with earlier expansions of Security Council powers. However, the far-reaching nature of permanently altering borders against the express will of the state concerned, and concerns about the proportionality of such action, means that this is not a decision to be taken lightly. Despite attempts to persuade sceptical members of the Security Council that Kosovo would be a one-off situation, it would be impossible to prevent it affecting both the scope and nature of Security Council powers. Moreover, the events of the last few years make clear that there are real dangers in attempting to re-fashion the world order without the consent of those involved.

**D. Implications for international law**

At the end of the First Gulf War in 1991, Iraq was called upon by the Council to recognise the terms of the ceasefire as laid down in SC Resolution 687, despite the fact that the settlement was imposed by a victorious coalition. The Security Council appeared to feel it necessary then to acknowledge the cloak of sovereignty. What would be the consequences for the international order were the Security Council to pull aside that cloak now and expose the nakedness of the entity that resides behind it? It is, of course, impossible to know what the consequences of independence for Kosovo will be for international law. The remainder of this article will speculate nonetheless on some possible consequences of the most likely outcome of the negotiations impasse, Security Council-imposed independence.

It is worth repeating that the Security Council has not previously permanently changed borders without at least the fiction of consent of the states involved. To explicitly do so will mark a new development in its competences and extent of its authority. The move will constitute a far-reaching assault on state sovereignty, converting the incursion of territorial administration into a permanent altering of the relative dominions of states and the Security Council. While it is difficult not to sympathise with a weakening of state sovereignty as a response to gross human rights abuses, the relative shifting of power between states and the Security Council

is nonetheless dangerous because it is not likely to effect the more powerful states, in particular those that possess a veto right on that body. A situation in which weaker states can be stripped of sovereign title by the decision of a group of states acting as the Security Council would have a fundamental impact upon the doctrine of sovereign equality. Sovereign equality, while clearly problematic in a number of regards, is an important bastion protecting the position of weaker states and the peoples that they represent.[46] Indeed, it has been convincingly argued that one of the fundamental functions of international law is in providing formal equality to actors that might otherwise not get a hearing, and that it is this that forms an essential (the only?) distinction between international law and politics.[47] Thus, while international legal arguments can, of course, be mustered to support either sovereignty or imposed independence, there is a strong sense in which support for an independent Kosovo is a political choice rather than a legal one, and thus undermines the wider goal of peace and security that the law is broadly intended to serve.[48]

Moreover, as Srdjan Civic neatly observes in his contribution to this symposium, where the military actions of NATO have a permanent effect, as would be the case with the alteration of territorial boundaries without consent, they cannot be understood as falling under the developing doctrine of humanitarian intervention as so defined by Cassese.[49] Cassese's requirements for justified humanitarian intervention lay down strict conditions for the use of force, the last of which is that force be used solely to end human rights atrocities and for no other purpose. Thus by going beyond the (then-) immediate concern of ending human rights abuses in Kosovo by acting to permanently alter Serbia's borders without its consent, the Security Council would, so the argument runs, remove any plausible claim of legality for NATO's actions under the doctrine of humanitarian intervention and thus the decision for independence would be based on the occasion of an illegal use of force in contravention of the peremptory norm contained in Article 2(4) of the

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[46] *See* Benedict Kingsbury, *Sovereign and Inequality,* 9 *EJIL* 599 (1998).

[47] *See,* in particular, in Martti Koskenniemi's *The Lady Doth Protect too Much*, "against the particularity of the ethical decision, formalism constitutes a horizon of universality, embedded in a *culture* of restraint …" Koskenniemi, *supra* note 1 at 174. I am grateful to Euan MacDonald for reminding me of this passage.

[48] *See* Martti Koskenniemi, *The Police in the Temple – Order, Justice and the U.N.: A Dialectical View* 6 *EJIL* 334 (1995); *see also* Jason A. Beckett, *Rebel Without a Cause? Koskenniemi and the Critical Legal Project,* 7 GERMAN LAW JOURNAL 1045 (2006); http://www.germanlawjournal.com/pdf/Vol07No12/PDF_Vol_07_No_12_1045-1088_SI_Beckett.pdf, commenting on Koskenniemi's work in this area.

[49] *See* Cassese, *supra* note 1 and Srdjan Cvijić in this issue.

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UN Charter. The refusal to countenance changes to title of territory brought about by military action, although occasionally breached in the last sixty years, has been a highpoint of the UN-era. To accept the use of force as being indirectly capable of altering borders would introduce it as a feature of the post-1989 period rather than see it left behind as part of the process of de-colonisation. As a further consequence, welcome or not, any distinction between humanitarian intervention and the (illegal) use of force is fatally undermined by allowing the former to have permanent consequences, and the misuse of humanitarian intervention in the Kosovo situation will arguably set the continuing development of this doctrine and its use to assist people at risk around the world back considerably.[50] Moreover, as suggested above, allowing territorial administration to either sever or act as a pretext for severing the link of sovereignty will impact negatively upon the ability of the UN to fulfil its increasingly vital peace-keeping and territorial administration function. With this too, there is a strong risk that it will be the most vulnerable who will suffer as a consequence.

While an imposed solution alters the balance that exists between self-determination and territorial integrity – no bad thing in itself – it must also impact at a certain level upon the internal functioning of the principle of self-determination. While Kosovo would not be the first entity to gain the glory of independent statehood without having achieved the merits thereof – the dangers of which were considered above – at the core of self-determination is necessarily an element of boot-strapping, a moment at which a people calls itself into being. Sovereignty must be both claimed and performed.[51] There is something rather odd in accepting that sovereignty can simply be granted. Thus, in appearing to forego the *pouvoir constitué* by simply anointing the *pouvoir constituant*, there is a danger that the Security Council will undermine the mystical power of self-determination that makes the principle so fundamental to the legal order. Moreover, the Security Council may find that appearing to support the self-determination claim of the Kosovar-Albanians and being willing to use its vast powers to shift the lines on the map will aggravate existing secessionist disputes. There is no need to use dialogue to achieve peaceful resolution when one can appeal to the Security Council to take your side against a powerful adversary; in fact, it may even encourage secessionist claims to intensify the violence of a dispute so as to see it classified as a threat to international peace and security; such claims can then push for territorial

[50] While I accept that the existence of a doctrine of non-Security Council mandated humanitarian intervention is hotly disputed, it is also supported by many. Without wishing to enter this debate, it seems a wise policy to attempt to set clear limits to what appears to be an emerging doctrine, whether one agrees with it or not.

[51] *See* Neil Walker, *Late Sovereignty in the European Union, in* SOVEREIGNTY IN TRANSITION (Walker ed., 2003).

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administration and then ask the Security Council to grant their secessionist wishes.[52]

**E. Conclusions**

While there seems little reason to doubt that the Security Council can impose independence, despite the wise caution of Judge Fitzmaurice, were it to do so it would act on dubious grounds.

It seems, on balance, more likely that independence for Kosovo will create instability rather than stability. What the region appears to need most at present is a period of quiet reflection in which pre-war economic and cultural connections can re-establish themselves and not the continuing upheaval that an independent Kosovo represents. While it may not be politic in the current climate to say so, a reasonable argument can be made that the more stable solution at present is to continue to develop Kosovo as an autonomous regime whilst deferring the decision on its final status until wounds are less raw. This is the position of the Serbian government and, faced with the alternatives, it sounds like the most reasonable proposition despite the dramatic calls for urgent action from some quarters.[53]

Further, although the Security Council could argue, and most likely will argue if the permanent five can be persuaded not to veto such a resolution, that Kosovo is an exceptional case, it is unlikely that the precedent set will be able to be contained within a secure box marked "*sui generis*." Lawyers supporting the case for a Security Council resolution instituting independence use earlier Security Council interventions as evidence as to the law, despite that each, in their turn, were considered to be exceptional; it would be unrealistic to imagine that future lawyers will not use the decision about Kosovo in this way. Moreover, by explicitly stating that the decision to impose independence stands outside the normal patterns of international law, it will simply make it look vindictive to an already embittered Serbian population smarting from the rejection of all its nearest neighbours. According to James Crawford, the United Nations has not accepted for membership any seceding entity that has done so against the wishes of the state

[52] For example, one could argue that the Tamil Tiger party in the faltering cease-fire and failing peace talks in Sri Lanka would have less incentive to compromise on government demands were the Security Council to grant Kosovo independence. *See* Analysis: Sri Lanka talks fail, 30 October 2006, http://news.bbc.co.uk/1/hi/world/south_asia/6099514.stm

[53] The latest International Crisis Group report urges the Security Council to pass a resolution without delay endorsing Ahtisaari's proposals (that will be finalised at the end of January 2007) and handing over power to Kosovo's government. *See* International Crisis Group, *supra* note 44.

from which it claims to be seceding.[54] The case of Kosovo would make history, but what would it do for international law?

On a final note, one last issue that the current negotiations over Kosovo bring clearly to the fore – and what is highlighted by the contributors to this symposium – is the need for the international community to cease instigating "trusteeship" on an *ad hoc* basis and recognise instead the need for clear rules in this area. In this regard, the proposed repeal of Article 108 of the UN Charter is particularly unhelpful.[55]

If Kosovo is to claim a prominent place in the history of modern international law, I hope that it does so primarily for forcing the international community to think clearly about the implications of IGO-led territorial administrations and to develop clear guidelines for the management and legal consequences thereof. This symposium, then, is, in part, an argument in that direction.

[54] CRAWFORD, *supra* note 9 at 417. This is of course not to suggest that there have not been contested situations of secession, but that the former 'parent' state has reconciled itself to the new situation and the new state has been accepted for membership of the United Nations.

[55] *See* The Secretary-General, *Review of the Role of the Trusteeship Council: Report of the Secretary-General,* U.N.Doc. A/50/1011 (1 August 1996), supporting the repeal of Article 108 as redundant.