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# The Security Council and statehood

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## 1 Introduction

The increased use and expanded scope of United Nations Security Council (SC) power following the end of the Cold War have been widely acknowledged. This chapter focuses on two separate, but perhaps linked, examples of the exercise of SC power: the impact of the Council's authority on the creation (or otherwise) of States and its interventions into dysfunctional or 'failed'<sup>1</sup> States in the name of democracy, State- and capacity-building, governance and the rule of law. As is evident from the choice of these topics, they recall and honour two aspects of James Crawford's inestimable contribution to international law and practice: his work on the creation of States in international law<sup>2</sup> and on democracy and international law.<sup>3</sup>

The United Nations General Assembly (GA), rather than the SC, has historically been the major organ of the UN with respect to territorial disposition, in particular its responsibility for issues relating to decolonisation and achievement of the right of self-determination in accordance with Resolutions 1514<sup>4</sup> and 1541<sup>5</sup> through its Decolonisation Committee.<sup>6</sup> The

<sup>1</sup> James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), 133.

<sup>2</sup> James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006).

<sup>3</sup> James Crawford, 'Democracy and International Law', *British Yearbook of International Law*, 64 (1993), 113–33.

<sup>4</sup> GA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960.

<sup>5</sup> GA Res. 1541 (XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under article 73e of the Charter of the United Nations, 15 December 1960.

<sup>6</sup> Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

exception has been where the Security Council's primary responsibility for the maintenance of international peace and security has been called into play,<sup>7</sup> as for example in the termination of the Trusteeship Agreement with respect to the so-called 'strategic' trust territories and the creation of the Federated States of Micronesia, the Republic of the Marshall Islands and Palau.<sup>8</sup> The changed geopolitical situation following the termination of the Cold War has furthered the practice of negotiated peace agreements entailing territorial disposition being endorsed by the SC, as well as the use of the Council's 'international dispositive powers'<sup>9</sup> leading to Crawford's conclusion that where necessary 'to maintain or restore international peace and security',<sup>10</sup> transfer or otherwise disposing of territory by the SC would not be contrary to the 'structure' of the Charter.<sup>11</sup>

## 2 The Security Council and territorial disposition

This section considers SC action in two well-trodden disputes over the status of territory, primarily picking up from where the second edition of *The Creation of States* finished, that is 2005. In one case (Western Sahara) the SC has found no way to end an illegal status quo and statehood remains in abeyance, while in the other (Kosovo) it has effectively facilitated *de facto* status and regime change. The creation (and denial) of statehood 'is a matter in principle governed by international law'.<sup>12</sup> However, despite receiving often detailed factual reports from the Secretary-General on situations on its agenda, SC decisions rarely involve judicial or even quasi-judicial considerations of fact and law, but are political and inevitably subject to the interests of major powers, including those dictated by 'the brave new world of the "war against terror"'.<sup>13</sup> While its response to disparate incidents may be discounted as anomalies, without any precedential effect, the outcomes also have a destabilising potential that may have unexpected repercussions elsewhere.

<sup>7</sup> Charter of the United Nations (San Francisco, adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, Art. 24(1). The wording is deliberately chosen to recall James's liking for cricket.

<sup>8</sup> Crawford, *The Creation of States*, 581–4.      <sup>9</sup> *Ibid.*, ch. 12.

<sup>10</sup> Art. 39, Charter of the United Nations.

<sup>11</sup> Crawford, *The Creation of States*, 552. For the view that creation of states by the SC is contrary to international law see Alexander-Georg Rackow, 'The Law of Nationbuilding: Does the UN Security Council have Authority to Create New States?', available at [www.kentlaw.edu/perritt/courses/seminar/alex-rackow-finalversion.htm#.ftn45](http://www.kentlaw.edu/perritt/courses/seminar/alex-rackow-finalversion.htm#.ftn45).

<sup>12</sup> Crawford, *The Creation of States*, preface, v.      <sup>13</sup> *Ibid.*, vi.

### 2.1 *The case of the Western Sahara*

The first is the unresolved position of the Western Sahara. The Western Sahara story encompasses a leftover from colonisation (it is one of the sixteen territories remaining on the list of non-self-governing territories), a Cold War impasse, optimism for a peace settlement fostered by the weakening and subsequent end of the Cold War, and the still further undermining of the hopes of the Saharawi people in the climate of counter-terrorist priorities. Although the principles and policies applicable to the exercise of self-determination are those agreed by the GA and the situation was before that body, as advised by the International Court of Justice,<sup>14</sup> the Security Council became seised of the matter in 1975. It urged the parties to avoid any unilateral action that might escalate tension and 'deplored' the so-called 'Green March' into the territory by Morocco.<sup>15</sup> However there was no further SC Resolution on the issue for thirteen years until 1988 when the Council authorised the Secretary-General (S-G) to appoint a special representative to pursue with the Organisation of African Unity the possibility of a referendum on self-determination.<sup>16</sup> This process – undertaken precisely at the moment of the thawing of the Cold War<sup>17</sup> – bore fruit and in 1990 the SC adopted the Settlement Plan,<sup>18</sup> which proposed a referendum for independence or integration with Morocco. It was accepted by both sides but implementation was stalled by Morocco over disputes as to voter registration. The identification process had ground to a halt by 1995 and in May 1996 the SC recognised the collapse and suspended the process. An attempt to reactivate the process was made by the UN Special Envoy, James Baker, who was appointed in 1997. After failing to reactivate the 1988 Settlement Plan he pursued a new approach that shifted some distance away from the 'zero-sum game' of the Settlement Plan (independence or integration) and was presented in the 2001 Baker Plan (Framework Agreement).<sup>19</sup> The Baker Plan envisaged autonomy

<sup>14</sup> *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975), 12.

<sup>15</sup> SC Res. 379, 2 November 1975; SC Res. 380, 6 November 1975.

<sup>16</sup> SC Res. 621, 20 September 1988.

<sup>17</sup> Unlike in other crisis areas of that time (e.g. Namibia, Cambodia and Kuwait), Western Sahara did not benefit from the apparent determination to ensure the international rule of law.

<sup>18</sup> SC Res. 658, 22 June 1990 (containing the full plan); SC Res. 690, 29 April 1991; SC Res. 690, 29 April 1991 mandated MINURSO (the United Nations Mission for a Referendum in Western Sahara) to implement the Settlement Plan and to supervise the proposed referendum.

<sup>19</sup> Report of the Secretary-General concerning the Situation in Western Sahara, UN Doc. S/2001/613 annex 1, 20 June 2001.

for Western Sahara under the Moroccan Constitution for a transitional period. Morocco would have exclusive control over some attributes of statehood – foreign relations, national security and external defence. The eligible voters of Western Sahara would elect an executive body to run the territory's internal affairs, but Morocco would appoint the judges and be responsible for law and order during the transition. After four years of transition a referendum would decide the future status of Western Sahara, but with changed voter qualifications from 'peoples' (with the associated commitment to the legal right of self-determination) to 'population'.<sup>20</sup> Unlike the Settlement Plan, where voter identification rested upon the 1974 Spanish census, the Framework Agreement made Moroccan settlers who had remained in Western Sahara for more than a year eligible to vote in the referendum. Following further deadlock, the then UN Secretary-General, Kofi Annan, suggested a further change of direction by outlining a number of options to the SC that no longer required the parties' concurrence – that is, a non-consensual solution.<sup>21</sup> The SC did not accept any of these more coercive options and urged the S-G and his Special Representative to continue their efforts to find a political solution.<sup>22</sup> This led in 2003 to a modified version of the Framework Agreement, the Peace Plan for Self-determination of Western Sahara.<sup>23</sup> The Peace Plan seeks a compromise solution by attempting to bring together elements of the Settlement Plan into the Framework Agreement. It proposes that Western Sahara become a semi-autonomous region of Morocco for a transition period of up to five years, followed by a referendum in which voter identification is limited to those who have been resident in the territory since 1999. The Plan was supported (although not 'endorsed'<sup>24</sup>) by the SC 'as an optimum political solution on the basis of agreement between the two parties'.<sup>25</sup> The Resolution reaffirmed the Council's 'commitment to . . . a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara', but it also

<sup>20</sup> Toby Shelley, *Endgame in the Western Sahara: What Future for Africa's Last Colony?* (London: Zed Books, 2004), 148.

<sup>21</sup> Report of the Secretary-General concerning the Situation in Western Sahara, UN Doc. S/2003/565, 23 May 2003, paras. 44–7. One option was division of the Territory, favoured by Algeria and the *Frente Polisario*, para. 43.

<sup>22</sup> SC Res. 1429, 30 July 2002.

<sup>23</sup> Report of the Secretary-General concerning the Situation in Western Sahara, UN Doc. S/2002/565 and Corr.1, 23 May 2003.

<sup>24</sup> As had been proposed by the US but opposed by France in support of Morocco, which now rejected the plan; Shelley, *Endgame*, 162.

<sup>25</sup> SC Res. 1495, 31 July 2003.

considered that a political solution was ‘critically needed’. While Algeria and the *Frente Polisario* indicated their acceptance, the Peace Plan was not accepted by Morocco, because the possibility of independence remained as one of the options in the proposed referendum.<sup>26</sup> Baker resigned in 2004.

In his April 2006 Report the S-G considered the possibility of a ‘step back’<sup>27</sup> for the UN through direct negotiations between the parties. He suggested that what is unacceptable by imposition – a plan without the possibility of independence at least some time in the future – might not be unacceptable by political negotiation, and posited that such direct negotiations be held without any preconditions. Any compromise agreement reached would be based on ‘relevant principles of international law and current political realities’.<sup>28</sup> In April 2007 both the *Frente Polisario* and Morocco submitted proposals and further rounds of negotiation have since taken place, but without result. The SC considers ‘consolidation of the status quo’ not to be acceptable and that ‘realism and a spirit of compromise by the parties are essential to achieve progress in negotiations’.<sup>29</sup> Meanwhile the Saharawi people continue to live in refugee camps, or under occupation in Morocco. Protests are responded to by Moroccan security forces and human rights violations persist.<sup>30</sup> Morocco rejected a recommendation made through the universal periodic review process of the UN Human Rights Council for the establishment of a permanent human rights component in MINURSO,<sup>31</sup> labelling calls for

<sup>26</sup> The creation of the newest state, South Sudan, was through such a process. The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (CPA) 2005, Chapter I (Machakos Protocol), Art. 1.3 recognised the right to self-determination of the people of South Sudan ‘through a referendum to determine their future status’. The SC welcomed the CPA and mandated UNMIS to support its implementation; SC Res. 1590, 24 March 2005. The referendum took place in January 2011 and the Republic of South Sudan gained its independence on 9 July 2011 and was admitted to the UN on 14 July 2011. On innovative responses to self-determination claims see Marc Weller, ‘Settling Self-determination Conflicts: Recent Developments’, *European Journal of International Law*, 20 (2009), 111.

<sup>27</sup> Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2006/249, 19 April 2006, para. 35.

<sup>28</sup> *Ibid.*, para. 38. <sup>29</sup> SC Res. 2099, 25 April 2013.

<sup>30</sup> *Ibid.*: ‘Stressing the importance of improving the human rights situation in Western Sahara and the Tindouf camps’. Unlike UN human rights bodies, the resolution does not attribute violations to Morocco; Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2013/220, 8 April 2013, paras. 80–97.

<sup>31</sup> *Ibid.*, para. 93.

independent human rights monitoring in the territory 'an attack on its sovereignty'.<sup>32</sup>

SC action has not led to the creation of a Saharawi State. Although it has not endorsed the annexation of the territory into Morocco, it has avoided a coercive approach and urged compromise. Morocco's actions in violation of the right to self-determination have never been condemned.<sup>33</sup> The 1991 Settlement Plan was not adopted under UN Charter Chapter VII; the situation has never been designated as a threat to international peace and security and continues to be governed by UN Charter Chapter VI;<sup>34</sup> no coercive measures for non-compliance have been adopted; and the SC has not imposed an obligation of collective non-recognition.<sup>35</sup> It did take the 'very unusual step'<sup>36</sup> of seeking an opinion from the Under-Secretary for Legal Affairs and Legal Counsel of the UN on the 'legality in the context of international law . . . of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign countries for the exploration of mineral resources in Western Sahara'.<sup>37</sup> The Legal Counsel's conclusion was that while the contracts were not of themselves illegal 'if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law'. This constituted a 'very clear message with respect to the legality of the activities in question: Morocco would have to engage in proper consultations with persons authorised to represent the people of Western Sahara before such activities would be allowed'.<sup>38</sup> The Security Council has not responded to this legal opinion. In contrast, reference to the good offices of the S-G implies mediation and compromise, and emphasis on a 'political solution' indicates conciliation rather than enforcement. The SC has allowed Morocco to use delaying tactics to frustrate the voter identification process since the 1990s.

<sup>32</sup> 'US to redeploy Morocco in Western Sahara spat', BBC, 17 April 2013, available at [www.bbc.co.uk/news/world-africa-22189197](http://www.bbc.co.uk/news/world-africa-22189197).

<sup>33</sup> Thomas Franck, 'The Stealing of the Sahara', *American Journal of International Law*, 70 (1976), 694.

<sup>34</sup> Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2013/220, 8 April 2013, para. 20.

<sup>35</sup> Crawford, *The Creation of States*, 158–73.

<sup>36</sup> Hans Correll, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara' in Neville Botha, Michèle Olivier and Delarey van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case Study* (Pretoria: VerLoren van Themaat Centre, University of South Africa Press, 2010), 234. The opinion was delivered to the SC on 29 January 2002; UN Doc. S/2002/161.

<sup>37</sup> *Ibid.*, 232. <sup>38</sup> *Ibid.*, 240.

As noted by Crawford, the “failed State” problem has been vastly complicated by its relation to questions of international security and the use of force.<sup>39</sup> Western Sahara is not, of course, a ‘failed’ State since it has never attained statehood, but its uncertain status and the long-standing refugee camps in Algeria have been described as a ‘ticking time bomb’.<sup>40</sup> Security concerns have escalated since 2012 with the fighting in Mali involving ‘armed elements linked to Al-Qaida’ and fears that the violence could spill over and contribute to radicalising the refugee camps.<sup>41</sup> Condemning another generation of Saharawi – a predominantly Muslim – people to dispossession and displacement in those camps could serve as an inducement to recruitment; nor is it conducive to either their own or regional security. Kidnapping concerns are high. The vastness and isolation of the territory – geographically and politically – make border control difficult and infiltrations likely.<sup>42</sup> MINURSO, UN agencies and *Frente Polisario* have worked to co-ordinate security; Morocco however has argued that it is justified in undertaking military actions in violation of the Military Agreement because of the security challenges in the region.<sup>43</sup> That the long-standing support that Morocco has received, from permanent members of the SC, especially France but also the US, is unlikely to be changed in the current security environment is indicated by its success in persuading the US to withdraw its demand that the 2013 renewal of MINURSO include a human rights monitoring component.<sup>44</sup>

## 2.2 *The case of Kosovo*

The case of Kosovo brings forcible intervention into the picture through NATO’s military response to oppression and human rights abuses by the Federal Republic of Yugoslavia (FRY). Perceptions of the different

<sup>39</sup> Crawford, *The Creation of States*, 721.

<sup>40</sup> Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2013/220, 8 April 2013, para. 34.

<sup>41</sup> *Ibid.*

<sup>42</sup> A growing number of illegal migrants found in the territory that MINURSO lacks capacity to deal with has previously been described as adding to the tension; e.g. Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2006/249, 19 April 2006, paras. 21–3. The April 2013 Report of the Secretary-General states that ‘no irregular migrants were recorded’ in the latest reporting period, UN Doc. S/2013/220, 8 April 2013, para. 79.

<sup>43</sup> Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2006/249, 19 April 2006, para. 40.

<sup>44</sup> Morocco had called off military exercises with the US, but these were resumed. ‘Morocco Forces Change to UN Text on W. Sahara’, 23 April 2013, available at <http://reliefweb.int/report/western-sahara/morocco-forces-change-un-text-w-sahara>.

actors are interesting. In 1998 the Security Council had condemned ‘all acts of violence by any party, as well as terrorism in pursuit of political goals by any group or individual’ and supply of arms or training for terrorist activities in Kosovo.<sup>45</sup> The SC did not identify the perpetrators of terrorism, but did insist that the Kosovo Albanian leadership ‘condemn all terrorist actions.’<sup>46</sup> But by 1999, the FRY was increasingly perceived in the West as a pariah State<sup>47</sup> and NATO intervened in effect on behalf of the Kosovo Albanians. While the NATO action led swiftly to regime change and acceptance of the inevitability of status change, it was also followed by widespread attacks – systematic killings, abductions, arbitrary detentions, sexual and gender-based violence, beatings and harassment – by Kosovo Albanian armed groups against non-Albanian Kosovars.<sup>48</sup>

Although the intervention had not received SC authorisation, the Council accepted the ‘general principles on a political solution’ that were agreed prior to the SC’s adoption of Resolution 1244 and are annexed thereto.<sup>49</sup> The general principles presaged the establishment of an effective, international, transitional civil and military presence in Kosovo. Resolution 1244 simultaneously reasserted the territorial integrity and political independence of the FRY while denying the State the right to exercise related powers in Kosovo. The fiction of consent to such intervention is maintained through the SC’s welcoming of the agreement of the FRY to its stripping of authority in Kosovo.

<sup>45</sup> SC Res. 1203, 24 October 1998.

<sup>46</sup> There is no widely accepted definition of international terrorism. The Special Tribunal for Lebanon has determined that under customary international law terrorism is: ‘(i) the perpetration of a criminal act . . . or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element’. *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11–01/I, 16 February, 2011, para. 85.

<sup>47</sup> Although its president, Slobodan Milošević, had been a principal participant at the 1995 Dayton peace talks, representing the Bosnian Serbs, in US terms ‘Towards the end of the decade, the Serbian Government of Slobodan Milosevic brought ethnic cleansing to Kosovo.’ UN Doc. S/PV.5839, 18 February 2008. The International Tribunal for former Yugoslavia indicted Milošević for genocide, war crimes and crimes against humanity in May 1999, shortly before the end of the Kosovo conflict.

<sup>48</sup> Kosovo Human Rights Advisory Panel, *S.C. v. UNMIK*, Case No. 02/09, 6 December 2012.

<sup>49</sup> SC Res. 1244, 10 June 1999, Annex I, Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, and Annex II. The general principles were to be implemented ‘taking full account of the Rambouillet accords’.



The Secretary-General was authorised to establish an international civil presence in Kosovo to act as an interim international territorial administration. Accordingly, by its first Regulation all legislative and executive authority, including the administration of the judiciary, was vested in the Special Representative of the Secretary-General (SRS-G). Under the authority of the SC, the UN Interim Administration in Kosovo (UNMIK) exercised its powers through the adoption of multiple regulations and directives ranging through privatisation of socially owned enterprises, determining disputed property claims, private law, policing and taxation. In effect UNMIK had vested itself with the same powers as a State government but without regard to the democratic principle of the separation of governmental powers and the appropriate checks and balances.<sup>50</sup> This was somewhat ironic since Resolution 1244 mandated UNMIK to organise and oversee ‘the development of provisional institutions for democratic and autonomous self-government’, but as Crawford has noted, ‘certain features of international law are themselves non-democratic’.<sup>51</sup> Similarly, concerns were expressed about UNMIK’s compliance with human rights in the exercise of its powers.<sup>52</sup> This led it to establish the Human Rights Advisory Panel with jurisdiction to consider individual complaints of alleged violations of human rights treaties by UNMIK.<sup>53</sup> In this way the international administration assumed some further accoutrements of a State, accountability and responsibility for internationally wrongful acts.<sup>54</sup>

The SC had temporarily suspended ‘Serbia’s exercise of its authority flowing from its continuing sovereignty’,<sup>55</sup> by transferring the exercise of that authority to an international organisation under its supervision, but subsequently leaving the existence of Kosovo in a legal limbo. The authority of the Security Council to take such a decision is not clear-cut.

<sup>50</sup> Ombudsperson Institution in Kosovo, 2nd Annual Report 2001–2002, 10 July 2002.

<sup>51</sup> Crawford, *The Creation of States*, 153.

<sup>52</sup> UN Human Rights Committee, Consideration of country report – United Nations Interim Administration Mission in Kosovo (initial report) UN Doc. CCPR/C/UNK/CO/1, 14 August 2006; Venice Commission, *Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, Opinion no. 280/2004, 8–9 October 2004.

<sup>53</sup> UNMIK Regulation 2006/12, On the Establishment of the Human Rights Advisory Panel, 23 March 2006, as amended by Regulation 2007/3, 12 January 2007.

<sup>54</sup> For the Panel’s concern about UNMIK’s lack of public reaction to its recommendations see Kosovo Human Rights Advisory Panel, Annual Report 2012, para. 88, available at [www.unmikonline.org/hrap/Eng/Pages/Annual-Report.aspx](http://www.unmikonline.org/hrap/Eng/Pages/Annual-Report.aspx).

<sup>55</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010), 403, para. 98.

Under Article 41 of the UN Charter the Council may decide upon measures not involving the use of force to give effect to its decisions. This competence has been determined to be sufficiently broad to support, *inter alia*, the creation of the *ad hoc* international criminal tribunals,<sup>56</sup> far-reaching intrusions into national legal systems for the prevention and suppression of terrorist acts<sup>57</sup> and the overriding of treaty provisions regulating military occupation. Nevertheless it remains questionable ‘for the United Nations to administer . . . territory in a situation where (whatever may be said about territorial integrity) the issue of secession following ethnic cleansing is very much on the agenda’.<sup>58</sup>

Alongside its extensive regulatory programme, UNMIK acted quickly to establish the Provisional Institutions of Self-government in Kosovo. In 2005 efforts intensified to find a permanent solution to the issue of final status. After sustained attempts at achieving a negotiated solution, the UN Special Envoy, Martti Ahtissari, put forward a plan for independence under international supervision.<sup>59</sup> His reasoning provides an instrumentalist view of statehood in contemporary international law: the *sui generis* status of Kosovo is described as a ‘major obstacle to Kosovo’s democratic development, accountability, economic recovery and inter-ethnic reconciliation’. Uncertainty leads to ‘further stagnation, polarizing [Kosovo] communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo’s status risks challenging not only its own stability but the peace and stability of the region as a whole.’ Nevertheless the SC was split and thus unable to accept the plan. Russia, in continued support of Serbia, condemned ‘the illegal acts of the Kosovo Albanian leadership and of those who support them’ as a ‘dangerous precedent’ and noted that the deployment of EULEX did not come within the power conferred by Resolution 1244. China too was ‘gravely concerned’. EU Member States (Belgium, Italy, the United Kingdom and France) and the US recognised Kosovo’s independence to be an ‘irreversible fact’.<sup>60</sup> The response – the unilateral declaration of independence made by the ‘democratically elected leaders’ of Kosovo on 8 February 2008 – accepts fully ‘the obligations for Kosovo contained in the Ahtisaari Plan’ – that is, a form of supervised

<sup>56</sup> *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1AR72, ICTY Appeals Chamber, Judgment, 2 October 1995.

<sup>57</sup> SC Res. 1373, 28 September 2001. <sup>58</sup> Crawford, *The Creation of States*, 560.

<sup>59</sup> Report of the Special Envoy of the Secretary-General on Kosovo’s future status, UN Doc. S/2007/168, 26 March 2007.

<sup>60</sup> UN Doc. S/PV.5839, 18 February 2008.

independence.<sup>61</sup> Weller comments that the declaration was an attempt to replace the binding nature of Resolution 1244, adopted under UN Charter Chapter VII with a 'self-imposed limitation of sovereignty'. But qualified sovereignty does not necessarily deny statehood.<sup>62</sup>

As of June 2013, the International Court of Justice (ICJ) has advised that the assertion of independence is not in violation of either general international law or SC Resolution 1244<sup>63</sup> and Kosovo has been recognised by over one hundred States. UNMIK clearly no longer has either the legitimacy or the capacity to exercise executive authority and is not taken into account by the Kosovo Constitution. UNMIK has accordingly reconfigured its position and transferred much responsibility (notably in the context of the rule of law) to EULEX.<sup>64</sup> However, legally Kosovo remains subject to SC Resolution 1244. The SRS-G continues to report to the SC in accordance with the Resolution,<sup>65</sup> which can only be repealed by the SC itself ('unless the SC deems otherwise') and thus remains technically still applicable.

Some contrasts between Western Sahara and Kosovo are striking, while there are also similarities. In the former case, the SC has not adopted a normative, regulatory or administrative role by placing the territory under UN administration<sup>66</sup> as it did with Kosovo 'pending a final settlement, of substantial autonomy and self-government'.<sup>67</sup> Unlike UNMIK (and UNTAET in East Timor),<sup>68</sup> MINURSO constituted a minimalist SC response: it is a small force (213 personnel as of March 2013)<sup>69</sup> with

<sup>61</sup> Kosovo Declaration of Independence, 17 February 2008, paras. 1 and 3, available at [www.assembly-kosova.org/?cid=2,128,1635](http://www.assembly-kosova.org/?cid=2,128,1635).

<sup>62</sup> Crawford, *Brownlie's Principles of Public International Law*, 135.

<sup>63</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 403.

<sup>64</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/692, 24 November 2008; UN Doc. S/PRST/2008/44, 26 November 2008.

<sup>65</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2013/254, 30 April 2013.

<sup>66</sup> After the 2001 Framework Plan Algeria proposed that the UN should assume sovereignty over the Western Sahara in order to implement provisions that appeared identical to the 1988 Settlement Plan. The S-G and S-GSR considered this option to have no more likelihood of working than the Settlement Plan; Report of the Secretary-General concerning the Situation in Western Sahara, UN Doc. S/2003/565, 23 May 2003, para. 40.

<sup>67</sup> SC Res. 1244.

<sup>68</sup> UNTAET was established pending 'self-government' in East Timor; SC Res. 1272, 25 October 1999.

<sup>69</sup> Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2013/220, 8 April 2013, para. 37.

a limited mandate and no administrative or regulatory powers. Despite the difference between a 'light' and a 'heavy' institutional touch, in neither case has SC action led unequivocally to the creation of a new State. In the case of the Western Sahara, attempts within the UN to reach a peace settlement acceptable to all parties have failed, leaving the SC with limited options with respect to the status of the territory. In Kosovo principles for settlement of the conflict were endorsed by the SC, despite the unauthorised military intervention preceding it, and encompassing its own territorial administration. However, with the rejection of the Ahtisaari plan, there too the SC ran out of options, leaving the democratically elected leaders to take matters into their own hands. Indeed, if the SC were to repeal Resolution 1244 and UNMIK finally to withdraw, there might be debate as to whether the creation of the State of Kosovo was through secession from Serbia, or from the intervening interim administration. The options and plans put forward at different times in both cases illustrate the tension between a solution grounded in traditional principles of international law based upon self-determination and non-intervention, and one grounded in political expediency and the abdication of legal principle to the situation on the ground.

SC participation bestows a 'top-down' emphasis on determination of status. In both instances popular, armed movements resisted control by Morocco and Serbia respectively. As States, Morocco and Serbia can put their positions directly before the SC, but the opinions of the leaders of the disputed territories become mediated through those of UN Special Envoys and Representatives. While vocal in the world outside, civil society voices are not heard within the SC. In Western Sahara the right of the Saharawi people has been subordinated to the will of Morocco, while in Kosovo the objectives of the Kosovo Albanians have prevailed, albeit by way of an unwanted UN administration.

### 3 The SC and regime change

The traditional stance of the SC towards the form or ideology of internal governance was one of indifference; the rare call for collective non-recognition of an entity rested upon its creation through international illegality or 'fundamentally unlawful policies'.<sup>70</sup> However, the end of the

<sup>70</sup> Crawford, *The Creation of States*, 338.

Cold War has seen expressed SC policies in furtherance of democratically elected government, the rule of law and human rights, especially in post-conflict contexts. The SC has associated effective statehood (meaning government commitment to these values) to the maintenance of international peace and security, authorising expansive but inconsistent intrusion into the domestic jurisdiction of fragile States. Especially in the light of controversy over the NATO intervention in Kosovo and the aftermath of the terrorist attacks of 11 September 2001, issues of security, protection of human rights, capacity and development have become linked bases for intervention. This is not an issue of State creation,<sup>71</sup> but has become one of regime change. For instance, the emergent concept of the responsibility to protect<sup>72</sup> includes the responsibility to rebuild, which may be presaged on regime change: as Kosovo itself demonstrates, this may in fact entail changed status and statehood, especially where State fragility is based upon, or is exposed by, ethnic and other difference. The impact of such interventions on the creation of States remains unclear, but may in the long term require another chapter to *The Creation of States*.

The first intervention by the SC explicitly in the name of democracy was 'Operation Uphold Democracy' in Haiti. In response to the escalation of 'politically motivated violence' following a military coup against the elected government, the SC authorised the establishment of a UN Mission in Haiti (UNMIH) in September 1993,<sup>73</sup> which owing to events elsewhere was unable immediately to deploy.<sup>74</sup> In July 1994, the Security Council authorised the use of 'all necessary means' to restore democracy in Haiti and the prompt return of the legitimately elected president, Jean-Bertrand Aristide.<sup>75</sup> This brought a new dimension to post-Cold War military intervention: the overthrow of a democratically elected government was deemed to constitute a threat to international peace and security and measures were authorised to reverse it. Ten years later, in 2004, the SC again intervened for the purpose of State-building, this time against Aristide, who had been re-elected in 2000, but had 'unacceptable aspirations to shift

<sup>71</sup> While 'there is room for the insistence on general standards of human rights and of democratic institutions as an aspect of the stability and legitimacy of a new State . . . this has not matured into a peremptory norm disqualifying an entity from statehood', *ibid.*, 155.

<sup>72</sup> Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December, 2001).

<sup>73</sup> SC Res. 867, 23 September 1993. <sup>74</sup> SC Res. 873, 13 October 1993.

<sup>75</sup> SC Res. 940, 31 July 1994.

power in Haiti somewhat towards the poor and grassroots?<sup>76</sup> He was now overthrown and expelled from Haiti. Citing the ‘rapid deterioration of the humanitarian situation . . . and its destabilizing effect on the region’, the Council drew upon traditional bases for intervention; it noted Aristide’s ‘resignation’ and the ‘appeal’ of the newly installed president to the UN for assistance, and authorised the deployment of a Multinational Interim Force ‘to contribute to a secure and stable environment . . . in order to support Haitian President Alexandre’s request for international assistance to support the constitutional political process under way in Haiti’.<sup>77</sup>

But there is another story obscured by the oblique language of the SC. Critiques of coercive democratic promotion have demonstrated its association with neo-liberal capitalism and ensuing inequality.<sup>78</sup> In a petition to the Inter-American Commission on Human Rights, Haitian human rights groups alleged a ‘long-term, systematic plan’ that undermined the ‘democratically elected Haitian government through a development-assistance embargo’ and supported armed opposition groups in overthrowing the democratically elected Haitian government and replacing it with a government with no constitutional or electoral legitimacy.<sup>79</sup> The petition is brought against the United States and Dominican Republic.

US government officials are alleged to have forced President Aristide to sign a letter of resignation and to have taken him out of Haiti against his will. The US is also accused of sending guns to the Dominican Republic, ‘many of which made it into the hands of the Haiti rebels’. These events can thus be construed in two different ways: the official narrative of SC-authorized assistance in restoring constitutional order to Haiti, providing humanitarian support and promoting human rights; and the alternative narrative of the forced removal of an elected government that challenged Washington’s imperial interests and of terror in Haiti unleashed and supported by MINUSTAH.<sup>80</sup> What is unarguable is the SC authority to bestow legality upon such action, the lack of any process for review, and academic silence.<sup>81</sup>

<sup>76</sup> China Miéville, ‘Multilateralism as Terror: International Law, Haiti and Imperialism’, *Finnish Yearbook of International Law*, 19 (2008), 77.

<sup>77</sup> SC Res. 1529, 29 February 2004. This was replaced by the United Nations Stabilization Mission in Haiti (MINUSTAH) established by SC Res. 1542, 30 April 2004.

<sup>78</sup> Susan Marks, ‘What Has Become of the Emerging Right to Democratic Governance?’, *European Journal of International Law*, 22 (2011), 507.

<sup>79</sup> Complaint Regarding Violations of the Right to Participate in Representative Government, 2 February 2006, available at [www.teledyol.net/IJDH/IACHRPet.v.pdf](http://www.teledyol.net/IJDH/IACHRPet.v.pdf).

<sup>80</sup> Miéville, ‘Multilateralism as Terror’, 63. <sup>81</sup> *Ibid.*, 76.

The concept of the responsibility to protect was explicitly engaged in the case of Côte d'Ivoire. Against a complex background of social division and armed conflict between the south of the country controlled by the government and the north, held by the rebel Forces Nouvelles, in 2004 the SC mandated the United Nations Operation in Côte d'Ivoire (UNOCI) with an extensive civilian and peacekeeping mandate.<sup>82</sup> UNOCI incorporated an earlier SC-mandated political mission, an ECOWAS peacekeeping mission and French forces authorised 'to use all necessary means' to support UNOCI, in particular to contribute to general security in the area of operation of the international forces. A peace agreement was signed in Ouagadougou in 2007, although aspects of it remained unimplemented at the time of presidential elections in 2010 (delayed since 2000). The elections were held in a peaceful manner and international observers 'expressed overall satisfaction with the conduct of the election'.<sup>83</sup> As neither the incumbent president, President Gbagbo, nor the principal contender, Mr Ouattara, received an overall majority, a run-off election was arranged. Some violence followed this election. The Constitutional Court of Côte d'Ivoire determined that there had been massive electoral fraud, discounted several thousand votes for the contender, Ouattara, and thereby secured victory for the incumbent, President Gbagbo. This was contrary to the position of the Independent Electoral Commission, whose findings were endorsed by the SRS-G.<sup>84</sup> Further violence ensued and following the position of ECOWAS and the African Union (but not that of the Constitutional Court), the Security Council urged recognition of Ouattara as properly elected.<sup>85</sup> This decision legitimised the imposition of economic measures against Gbagbo and his supporters and, as no longer the legitimate government, made his consent to the deployment of UN and French peacekeepers legally irrelevant.<sup>86</sup> Multiple attempts were made, primarily through ECOWAS and the African Union, at finding a negotiated solution amidst concerns about civilian security and the potential for the commission of mass atrocities. The situation on the ground worsened and in March 2011, expressing concern about the possibility

<sup>82</sup> SC Res. 1528, 27 February 2004.

<sup>83</sup> 26th Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc. S/2010/600, 23 November 2010, para. 18.

<sup>84</sup> 27th Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc. S/2011/211, 30 March 2011, para. 16.

<sup>85</sup> SC Res. 1962, 20 December 2010.

<sup>86</sup> Alex Bellamy and Paul Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', *International Affairs*, 87 (2011), 833.

of civil war between the sides (and with intercommunal and inter-ethnic dimensions) the Security Council stressed UNOCI's mandate to protect civilians. The SC reaffirmed the primary responsibility of the State to protect its citizens and authorised UNOCI 'to use all necessary means . . . to protect civilians under imminent threat of physical violence, within its capabilities and its areas of deployment'.<sup>87</sup> Military action by UNOCI and French troops enabled Ouattara to be installed as president.

The Côte d'Ivoire situation raises questions about the extent to which authorisation of intervention for civilian protection legitimates regime change and SC intervention into domestic elections. Elections in divided countries may be a flashpoint for violence and SC support for one side may trigger State fragmentation. In this instance, reunification of the country remained fragile and with the potential for a further outbreak of civil war. In such circumstances, creation of a further State remained conceivable, but has been avoided and territorial integrity upheld. There was disagreement, even among those States that had voted for it, about whether SC Resolution 1975 extended UNOCI's protective mandate or simply reiterated the mandate as set out in earlier Resolutions.<sup>88</sup> India stressed that peacekeepers 'cannot be made instruments of regime change' and the Russian foreign minister stated that '[w]e are looking into the legality of this situation [taking the side of Ouattara against Gbagbo] because the peacekeepers were authorised to remain neutral, nothing more'.<sup>89</sup>

#### 4 Conclusion

SC decision-making with respect to territorial disposition and State governance enhances the legitimacy of the entity and simultaneously augments the Council's relevance in global politics and power. This partly explains why there has been a return to the SC after an unauthorised military action,<sup>90</sup> or following a peace agreement conducted outside its auspices. But it has also become compromised by the use of multilateral decision-making to pursue what is essentially the US political agenda behind the smokescreen of democracy, good governance and human rights. While

<sup>87</sup> SC Res. 1975, 30 March 2011.

<sup>88</sup> SC Res. 1933, 30 June 2010; SC Res. 1962, 20 December 2010.

<sup>89</sup> Cited in Bellamy and Williams, 'The New Politics of Protection?', 835.

<sup>90</sup> As with Kosovo; see also SC Res. 1483, 22 May 2003 which provided a needed façade of legality after the divisiveness within the Council caused by the invasion of Iraq.



decisions around statehood and State authority have always been subject to the interests of the great powers,<sup>91</sup> the security priorities created by fears of terrorism have added a further dimension that discounts or co-opts local choices. The SC is a variously, even simultaneously, active player, a latecomer to a prearranged outcome and a frustrated bystander to the formation and constitution of States.

<sup>91</sup> Gerry Simpson, *Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).