

2009

International Legal Responses to Kosovo's Declaration of Independence

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Jure Vidmar, International Legal Responses to Kosovo's Declaration of Independence, 42 *Vanderbilt Law Review* 779 (2021)

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International Legal Responses to Kosovo's Declaration of Independence

*Jure Vidmar**

ABSTRACT

On February 17, 2008, Kosovo declared independence. As of March 6, 2009, fifty-six states have recognized Kosovo's independence, while a number of states maintain that Kosovo's declaration of independence is illegal. There is no specific resolution calling for nonrecognition, yet whether an obligation of nonrecognition stems from UN Security Council Resolution 1244 is a highly disputed issue.

Resolution 1244 established an international territorial administration, affirmed Serbia's territorial integrity, and called for a political process leading to settlement of Kosovo's future status. Unlike in East Timor, the political process in Kosovo did not result in a prenegotiated path to independence, confirmed by a subsequent Security Council resolution.

This Article analyzes legal positions regarding Kosovo's declaration of independence and examines the significance of international involvement in the process of state creation. Despite the reference to the dissolution of Yugoslavia in the declaration of independence, Kosovo is an example of unilateral secession from Serbia. This Article concludes that international involvement implies constitutive elements of state creation and that Kosovo has some deficiencies in meeting the statehood criteria.

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I. INTRODUCTION

On February 17, 2008, the Kosovo Assembly adopted the Declaration of Independence.¹ The Declaration makes reference to, among other things, “years of strife and violence in Kosovo, that disturbed the conscience of all civilised people”² and expresses gratefulness that “in 1999 the world intervened, thereby removing Belgrade’s governance over Kosovo and placing Kosovo under United Nations interim administration.”³ It declares Kosovo to be “a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law,”⁴ welcomes “the international community’s continued support of . . . democratic development through international presences established in Kosovo,”⁵ and states that “independence brings to an end the process of Yugoslavia’s violent dissolution.”⁶

The Declaration of Independence thus draws on developments in Kosovo’s recent history: the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the human rights abuses and grave humanitarian situation in Kosovo under the Milošević regime, the military intervention of the North Atlantic Treaty Organization (NATO), and the effective situation established by UN Security Council Resolution 1244, which left Serbia with no effective control

1. KOSOVO DECLARATION OF INDEPENDENCE (2008), available at http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf.

2. *Id.* pmbl. para 7.

3. *Id.* pmbl. para 8.

4. *Id.* art. 2.

5. *Id.* art. 5.

6. *Id.* art. 10.

over Kosovo.⁷ Ultimately, it declares independence while adopting restrictions on Kosovo's sovereignty.

The Republic of Serbia insists that Kosovo remains its southern province. In an address to the Security Council on February 18, 2008, Serbian President Boris Tadić stated:

The Republic of Serbia will not accept the violation of its sovereignty and territorial integrity. The Government of Serbia and the National Assembly of the Republic of Serbia have declared the decision of the Pristina authorities [the Declaration of Independence] null and void. Likewise, we are taking all diplomatic and political measures to prevent the secession of a part of our territory.⁸

Thus, there is no doubt that Kosovo declared independence without the consent of its parent state.

A number of states support Serbia's claim to territorial integrity.⁹ As of March 6, 2009, fifty-six states have recognized Kosovo.¹⁰ When granting recognition, the recognizing states commonly refer to "special circumstances" and express the view that Kosovo's independence would contribute toward international peace, democratic and economic development, and the strengthening of human rights standards.¹¹ Further, there exists strong evidence that

7. See S.C. Res. 1244, Annex 2, ¶ 6, U.N. Doc. S/RES/1244 (June 10, 1999) [hereinafter Resolution 1244] (defining the limited permissible roles of Serbian personnel in Kosovo).

8. U.N. SCOR, 63d Sess., 5839th mtg. at 5, U.N. Doc. S/PV.5839 (Feb. 18, 2008).

9. See, for example, the statements of various states' representatives at the Security Council Meeting on February 18, 2008: *id.* at 6–7 (Russia); *id.* at 7–8 (China); *id.* at 11–12 (Indonesia); *id.* at 14 (Vietnam).

10. As of March 6, 2009, the following states have granted recognition (in alphabetical order): Afghanistan, Albania, Australia, Austria, Belgium, Belize, Bulgaria, Burkina Faso, Canada, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malaysia, Maldives, Malta, the Marshall Islands, Micronesia, Monaco, Montenegro, Nauru, the Netherlands, Norway, Palau, Panama, Peru, Poland, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovenia, South Korea, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States. Who Recognized Kosova as an Independent State, <http://www.kosovothanksyou.com> (last visited Mar. 20, 2009).

11. See, e.g., Letter from George W. Bush, President of the United States of America, to His Excellency, Fatmir Sejdiu, President of Kosovo (Feb. 18, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html> (recognition by the United States); Press Release, Austl. Foreign Ministry, Austl. Recognises the Republic of Kosovo (Feb. 19, 2008), http://www.foreignminister.gov.au/releases/2008/fa-s034_08.html (recognition by Australia); Press Release, Der Bundesregierung, Zustimmung des Kabinetts zur völkerrechtlichen Anerkennung des Kosovo (Feb. 20, 2008), http://www.bundesregierung.de/nn_1264/Content/DE/Pressemitteilungen/BPA/2008/02/2008-02-20-anererkennung-des-kosovo.html (recognition by Germany); UK to Recognise Independent Kosovo—PM (Feb. 18, 2008), <http://www.number10.gov.uk/output/Page14594.asp> (recognition by the United Kingdom).

part of the international community coordinated Kosovo's declaration of independence.¹² The involvement of the recognizing states in the creation of the state of Kosovo thus did not begin with recognition but at an earlier stage, prior to the declaration of independence.

On October 8, 2008, the UN General Assembly adopted Resolution 63/3, which requested an advisory opinion from the International Court of Justice (ICJ) regarding the legality of Kosovo's declaration of independence.¹³ The question referred to the ICJ reads: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"¹⁴ The ICJ has yet to give an advisory opinion.¹⁵

The aim of this Article is to clarify the legal issues related to Kosovo's declaration of independence and the legal significance of international involvement. Initially, the Article sketches the historical, political, and legal frameworks underlying some of the current legal claims regarding the Kosovo situation. The Article then considers whether Kosovo Albanians qualify as a "people" for the purpose of the right of self-determination and in what circumstances this right may be consummated externally. In this context, a particularly relevant question is whether Kosovo can be an example in support of the "remedial secession" doctrine.¹⁶

The Article further considers whether Kosovo meets the traditional and additional statehood criteria. Lastly, there are different views on whether there exists an obligation of nonrecognition under Resolution 1244 in light of its reference to Serbia's territorial integrity. The Article concludes by considering these divergent views and questions whether Kosovo's statehood was constituted by the recognizing states, attempting to locate the answer in a broader context of post-1991 state creations.

12. See *infra* note 181 and accompanying text (arguing that Kosovo's declaration of independence was coordinated between Kosovo's leaders on the one hand and the United States and the EU on the other).

13. G.A. Res. 63/3, ¶ 5, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

14. *Id.* ¶ 6.

15. See *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Req. for Advisory Op.) (Order of Oct. 17, 2008) ¶¶ 2–3, available at <http://www.icj-cij.org/docket/files/141/14813.pdf> (fixing the time-limit for presenting written statements to the court).

16. See *infra* Part III.B.

II. KOSOVO: HISTORICAL, POLITICAL, AND LEGAL FRAMEWORK

A. Kosovo, Serbia, Yugoslavia, and International Aspects

1. Autonomous Status Within the SFRY and Background

After the medieval Serbian state lost the Battle of Kosovo,¹⁷ the territory came under Turkish rule.¹⁸ In modern times, Ottoman Turks lost control over Kosovo in 1912.¹⁹ Kosovo thus came under the de facto authority of the Kingdom of Serbia, but the Kingdom of Serbia and the Ottoman Empire never ratified a treaty on the ceding of Kosovo, due to the outbreak of World War I.²⁰ Following the Austrian and Bulgarian occupation during World War I, Kosovo became part of the newly created Kingdom of Serbs, Croats and Slovenes in 1918—officially renamed the Kingdom of Yugoslavia in 1929.²¹ Albanians were not given full citizenship rights in this state until 1928.²²

When Serbia took control of Kosovo in 1912, most of its population was Albanian.²³ Figures from the official census are generally not trusted among historians, but estimates suggest the Serbian population in Kosovo amounted to 24% of the general population in 1919.²⁴ Due to the Serb settlement policy, the number of Albanians initially diminished, but the settlement policy proved to be ineffective and the Albanian population increased over time.²⁵

17. For more information on the Battle of Kosovo, both fact and myth, see MIRANDA VICKERS, *BETWEEN SERB AND ALBANIAN: A HISTORY OF KOSOVO 12–16* (1998) and NOEL MALCOLM, *KOSOVO: A SHORT HISTORY 58–80* (1998).

18. See VICKERS, *supra* note 17, at 16–21.

19. MALCOLM, *supra* note 17, at 252.

20. *Id.* at 264–65. The Kingdom of Serbia became a state at the Congress of Berlin in 1878. See VICKERS, *supra* note 17, at 95–99. In 1913 Albania became a state by the Treaty of London; however, Kosovo Albanians were left in Serbia against their will. For more see Miranda Vickers, *The Status of Kosovo in Socialist Yugoslavia*, in 1 BRADFORD STUDIES ON SOUTH EASTERN EUROPE 1, 5–6 (John Allcock & John Horton eds., 1994) (noting that nearly half a million Albanians were left in Yugoslavia against their will after a territorial settlement was achieved in 1926).

21. MALCOLM, *supra* note 17, at 264.

22. *Id.* at 266. This applied not only to Kosovo Albanians but also to Albanians living in other parts of the Kingdom of Serbs, Croats and Slovenes (later Yugoslavia).

23. Noel Malcolm, *Is Kosovo Serbia? We Ask a Historian*, THE GUARDIAN, Feb. 26, 2008, available at <http://www.guardian.co.uk/world/2008/feb/26/kosovo.serbia>.

24. MALCOLM, *supra* note 17, at 282.

25. The Kosovo census data for 1921, 1931, and 1939 show the following demographic situation: in 1921, Albanians 65.8%, Serbs and Montenegrins (at that time a unitary category) 21.1%; in 1931, Albanians 60.1%, Serbs and Montenegrins 26.9%; and in 1939, Albanians 54.4%, Serbs and Montenegrins 33.1%. JULIE MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR 315* (1999). After the Second World War, Serbs and Montenegrins no longer constituted a unitary category. The Kosovo census data after WWII reveal the following demographic situation: in 1948, Albanians 68.5%, Serbs 23.6%, Montenegrins 3.9%; in 1953, Albanians 64.9%, Serbs 23.6%,

When the Axis powers occupied Yugoslavia in 1941, Kosovo became part of Albania, which was itself controlled by Italy.²⁶ With the defeat of the Axis powers, Yugoslavia, then ruled by Communists led by Josip Broz Tito, regained control over Kosovo.²⁷ In the 1946 constitution, Kosovo was formally defined as an autonomous province within the Republic of Serbia²⁸ but, unlike Vojvodina, had no independent organs for the exercise of its autonomy.²⁹ At that time, even unification of Kosovo with Albania was considered—an idea that should be understood in the broader context of Tito's plans to incorporate Albania into Yugoslavia.³⁰ This plan failed after Tito's break with Stalin in 1948, while Albania remained on a pro-Soviet course.³¹ As a consequence, Yugoslav authorities mistrusted Kosovo Albanians and suspected them as potential anti-Yugoslav and pro-Albanian (which at that time also implied pro-Soviet) agents.³² In this environment, repression of Kosovo Albanians was severe.³³ In addition to physical violence, discrimination was visible in public life, as ethnic Serbs and Montenegrins, who represented 27.5% of Kosovo's population, occupied 68% of positions in public service in 1953.³⁴

The 1963 constitution defined autonomy as a right of republics "in areas of a distinct national composition or in areas of special characteristics, based on the expressed will of the people, to establish autonomous provinces."³⁵ The constitution further confirmed that Kosovo and Vojvodina were autonomous provinces within the Republic of Serbia.³⁶ The federal constitutions did not define the rights and duties or the institutional framework of the autonomous

Montenegrins 3.9%; in 1961, Albanians 67.2%, Serbs 23.6%, Montenegrins 3.9%; in 1971, Albanians 73.7%, Serbs 18.4%, Montenegrins 2.5%; in 1981, Albanians 77.4%, Serbs 13.2%, Montenegrins 1.7%; and in 1991, Albanians 82.2%, Serbs 9.9%, Montenegrins 1%. *Id.* at 316. Other categories in the censuses include Muslims, Turks, Roma, and Croats. *Id.*

26. For details on the legal status of Albania during the Second World War, see Angelo Piero Sereni, *The Legal Status of Albania*, 35 AM. POL. SCI. REV. 311, 311–17 (1941).

27. MALCOLM, *supra* note 17, at 311, 317.

28. CONSTITUTION OF THE FEDERATIVE PEOPLE'S REPUBLIC OF YUGOSLAVIA art. 2.

29. See VICKERS, *supra* note 17, at 146.

30. See, e.g., MALCOLM, *supra* note 17, at 319–20 (discussing plans to create a "Balkan Federation").

31. See VICKERS, *supra* note 17, at 148–51.

32. See MALCOLM, *supra* note 17, at 322–23 (discussing the hostility and suspicion ethnic Albanians faced since the Communist takeover).

33. *Id.*

34. *Id.* at 323; see also *supra* note 25 and accompanying text.

35. CONSTITUTION OF THE SOCIALIST FEDERATIVE REPUBLIC OF YUGOSLAVIA art. 111, para. 1.

36. *Id.* art. 111, para. 3.

provinces, leaving them to be determined by the constitution of Serbia.³⁷

Ethnic Albanians, unhappy with this situation, demanded change in 1968, for the first time openly calling for the creation of a separate republic of Kosovo, within the framework of socialist Yugoslavia.³⁸ Following conciliatory developments between Yugoslavia and Albania in early 1960s, the position of ethnic Albanians had improved. Albanian symbols were allowed in public life, the Albanian language featured more prominently in public, and the University of Pristina opened, with both Serbian and Albanian as languages of instruction.³⁹ Increasingly more ethnic Albanians were also admitted to public service.⁴⁰ During this period of improving rights for ethnic Albanians, a new federal constitution adopted in 1974 reflected these changes.

According to its 1974 constitution, the SFRY was a federation of six republics and two autonomous provinces, Kosovo and Vojvodina, within the Republic of Serbia.⁴¹ The constitution further adopted a distinction between "nations" and "nationalities." The term "nation" applied to the people attached to a certain republic, while "nationality" applied to the people attached to one of the two autonomous provinces.⁴² It can be said that the constitution was an expression of internal self-determination,⁴³ whereby federal units were given wide powers for the exercise of effective control over their respective territories⁴⁴ and even had some limited competencies in the conduct of foreign policy.⁴⁵ Such competencies were not confined to the republics but were extended to the two autonomous provinces.⁴⁶ Further, autonomous provinces had representatives in the federal organs.⁴⁷ Such a widely conceived autonomy within the federal constitution in many respects elevated the powers of the autonomous provinces to the level of powers vested in republics.

37. *Id.* art. 112, para. 2.

38. MALCOLM, *supra* note 17, at 325.

39. *Id.* at 326.

40. In 1971 Serbs and Montenegrins represented twenty-one percent of Kosovo's population and occupied "only" fifty-two percent of public service posts, a visible improvement from the situation in 1953. *Id.* at 326.

41. USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA] (1974). For an English version of the 1974 Yugoslav Constitution, see Constitution of the Socialist Federal Republic of Yugoslavia, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, at 47 (Albert P. Blaustein & Gisbert H. Flanz eds., 1986).

42. CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA art. 1.

43. For more on self-determination, see *infra* Part III.A.1.

44. CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA arts. 268, 273 (1974).

45. *Id.* art. 271.

46. *Id.*

47. See *id.* art. 291 (regulating the assembly); *id.* art. 348 (regulating the federal government); *id.* art. 381 (regulating the constitutional court).

According to the preamble to the Constitution of the SFRY, only nations were entitled to the right of self-determination, and this right extended to secession.⁴⁸ Yet, a specific constitutional provision enabling the exercise of the right to secession inherent to nations was missing. Thus, it was not entirely clear how much broader was the scope of a nation's rights than the scope of a nationality's rights.

The wide autonomy given to the provinces did not entirely satisfy the demands of Kosovo Albanians. Open demands for the creation of the Kosovar republic, within the constitutional framework of the SFRY, continued even after they received autonomous status.⁴⁹ When Slobodan Milošević began his rise in the Serbian Party and government politics, the status of Kosovo in the 1980s was centrally important for his transformation to a nationalist leader.⁵⁰ In 1989, with Milošević already firmly in power in Serbia,⁵¹ a process of revision of Kosovo's autonomous status within the federation began.

2. Suspension of Autonomous Status and Aftermath

Because Kosovo's autonomy was established within the federal constitutional order,⁵² Serbia could not alone interfere with this status. At the same time, Kosovo was constitutionally defined as an autonomous province within the framework of the Republic of Serbia, and, consequently, the latter retained some competencies in matters otherwise under the jurisdiction of Kosovo's autonomous organs.⁵³ In

48. *Id.* pmb., General Principle I.

49. MALCOLM, *supra* note 17, at 327–28.

50. For a detailed analysis of Milošević's rise to power with the help of ethnic conflict in Kosovo, see *id.* at 341–44.

51. *Id.*

52. See *supra* note 41 and accompanying text.

53. This relationship was expressed in the Constitution of the Socialist Autonomous Province of Kosovo from 1974. See CONSTITUTION OF THE SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO (1974), translated in HELSINKI COMMITTEE FOR HUMAN RIGHTS IN SERBIA, KOSOVO: LAW AND POLITICS, KOSOVO IN NORMATIVE ACTS BEFORE AND AFTER 1974, at 41, 45 (1998). Article 1 of the Constitution provides:

The Socialist Autonomous Province of Kosovo is an autonomous, socialist, democratic socio-political and self-managing community of working people and citizens, equal Albanians, Montenegrins, Muslims, Serbs, Turks, and members of other nations and nationalities and ethnic groups The Socialist Autonomous Province of Kosovo is a part of the Socialist Republic of Serbia and the Socialist Federal Republic of Yugoslavia.

Id. art. 1. Article 301 provides, *inter alia*:

As the principal subject of the rights and duties of the Province, the Assembly shall directly and exclusively: 1. decide on amendments to the Constitution of S.A.P. Kosovo and approve the amendments to the Constitution of the S.F.R.Y. and the Constitution of the SR Serbia; . . . 18. consent to the alteration of the territory of the S.A.P. Kosovo; 19. elect and relieve of office the delegation of the

accordance with its powers, the Serbian Assembly prepared constitutional amendments in 1989 that aimed significantly to limit the powers of Kosovo's autonomous organs. Essential elements of effective government, exercised independently by the autonomous organs of Kosovo, would be transferred to the organs of Serbia.⁵⁴ However, an inherent element of the autonomous status of Kosovo was the constitutional provision requiring any amendment interfering with this status to be confirmed by Kosovo's Assembly by a two-thirds majority.⁵⁵

On March 23, 1989, Kosovo's Assembly was met with a heavy presence of police forces and Serbian politicians who were not members of Kosovo's Assembly.⁵⁶ Reportedly, some of those nonmembers eventually took part in the vote.⁵⁷ The amendments were approved by a majority of those who voted, though they did not reach the prescribed two-thirds threshold.⁵⁸ Regardless, the Serbian Assembly accepted the amendments as adopted by Kosovo's Assembly and formally confirmed them in a vote on March 28, 1989.⁵⁹ Kosovo's autonomy was thus effectively terminated. Federal provisions regarding institutions created for the exercise of Kosovo's autonomy (e.g., representation in the federal presidency) stayed in place but were now under the direct control of Serbia.⁶⁰

Ethnic Albanians in Kosovo responded to this effective abolishment of autonomy with protests and the creation of parallel state institutions. On July 2, 1989, 114 out of 123 Albanian members of Kosovo's Assembly gathered in front of the Assembly building, which they were not allowed to enter, and adopted a resolution declaring Kosovo "an equal and independent entity within the framework of the Yugoslav federation."⁶¹ This declaration did not meet procedural requirements to be legally relevant,⁶² but neither had the vote on constitutional amendments that effectively abolished Kosovo's autonomy.⁶³ The Serbian response was that both Kosovo's

Assembly of the S.A.P. Kosovo to the Chamber of Republics and Provinces of the Assembly of the S.F.R.Y.; 20. elect and relieve of office the member of the Presidency of the S.F.R.Y. from the S.A.P. Kosovo.

Id. art. 301.

54. *See id.* art. 49.

55. MALCOLM, *supra* note 17, at 344; *cf. supra* note 53 and accompanying text (describing the autonomous status of Kosovo under the 1974 Constitution).

56. MALCOLM, *supra* note 17, at 344.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See* CONSTITUTION OF THE SOCIALIST AUTONOMOUS PROVINCE OF KOSOVO (1974), *supra* note 53, at 75.

61. MALCOLM, *supra* note 17, at 346.

62. *Id.*

63. *See supra* text accompanying note 58.

Assembly and government—its organs of self-government—were dissolved.⁶⁴

Albanian members of Kosovo's dissolved Assembly met again in a secret meeting on September 7, 1989, and proclaimed the Constitutional Act of the Republic of Kosovo.⁶⁵ This was not a declaration of independence. The Act adopted by this group aimed at creating a republic of Kosovo within the framework of the SFRY. After 1989, the underground political life of Kosovo Albanians became increasingly vivid. The political elite grew and recruited beyond the former Communist representatives in Kosovo's suspended self-governing organs.⁶⁶ In this environment, a moderate Democratic League of Kosovo became the dominant political party.⁶⁷

With the dissolution of the SFRY, which began in 1991⁶⁸ and was completed in 1992,⁶⁹ the political demands of Kosovo Albanians changed. Because the SFRY no longer existed, the demand of ethnic Albanians for Kosovo to become one of its constitutive republics no longer corresponded to reality. At the same time, not even the possible status of a third republic in the association of Serbia and Montenegro seemed to be a realistic option.⁷⁰ The dissolution of the SFRY thus resulted in the push by ethnic Albanians for Kosovo to become an independent state.⁷¹ On September 22, 1991, the underground parliament of Kosovo Albanians proclaimed the Resolution on Independence and Sovereignty of Kosovo.⁷² The decision was subsequently confirmed at an underground referendum held between September 26 and 30 of the same year.⁷³ A reported 87% of the electorate voted in the referendum, and 99.87% of the votes cast were in favor of independence.⁷⁴ Following the referendum, the underground parliament declared independence on

64. MALCOLM, *supra* note 17, at 346.

65. *Id.* at 347.

66. *Id.* at 347–48.

67. *Id.* at 348.

68. See *infra* note 431 and accompanying text.

69. See *infra* note 432 and accompanying text.

70. On April 27, 1992, Serbia and Montenegro created the Federal Republic of Yugoslavia (FRY). See generally CONSTITUTION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA, available at http://www.worldstatesmen.org/Yugoslav_Const_1992.htm (establishing the Federal Republic of Yugoslavia). Notably, when the FRY was established, a federal status of Kosovo equal to that of Serbia and Montenegro was neither offered to nor demanded by Albanians.

71. See VICKERS, *supra* note 17, at 251.

72. *Id.*

73. *Id.*

74. *Id.*

October 19, 1991.⁷⁵ Only Albania recognized Kosovo's independence.⁷⁶

On May 24, 1992, Kosovo held elections for its underground assembly, and the Democratic League of Kosovo won overwhelming support.⁷⁷ The League supported a peaceful revolt against oppression, tried to internationalize developments, and created parallel institutions of the putative Republic of Kosovo.⁷⁸ Meanwhile, the oppression of ethnic Albanians by Serbian forces continued—by direct and indirect measures—attempting to change the demographic picture of Kosovo. These measures included administrative rules that virtually prevented ethnic Albanians from acquiring property⁷⁹ and a settlement policy that included the settlement of Serb refugees coming from conflict areas in Croatia and Bosnia-Herzegovina.⁸⁰ Access to healthcare services for ethnic Albanians was also hampered.⁸¹ Writing in 1998, Noel Malcolm observed:

To produce an adequate survey of the human rights abuses suffered by the Albanians of Kosovo since 1990 would require several long chapters in itself. Every aspect of life in Kosovo has been affected. Using a combination of emergency measures, administrative fiats and laws authorizing the dismissal of anyone who had taken part in one-day protest strike, the Serb authorities have sacked the overwhelming majority of those Albanians who had any form of state employment in 1990. Most Albanian doctors and health workers were also dismissed from the hospitals; deaths from diseases such as measles and polio have increased, with the decline in the number of Albanians receiving vaccinations. Approximately 6,000 school-teachers were sacked in 1990 for having taken part in protests, and the rest were dismissed when they refused to comply with a new Serbian curriculum which largely eliminated teaching of Albanian literature and history.⁸²

In this environment, Kosovo Albanians organized not only parallel political institutions but also parallel systems of education and healthcare.⁸³ Kosovo thus became an entity of two parallel societies in which the majority population faced discrimination in virtually all segments of life due to its ethnic background.

75. *Id.* at 252.

76. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 408 (2d ed. 2006).

77. The Democratic League of Kosovo won 96 out of 130 seats in the underground parliament. *See* VICKERS, *supra* note 17, at 260.

78. MALCOLM, *supra* note 17, at 348.

79. *See* *Zakon o Posebnim Uslovima Prometa Nepokretnosti* [Law on the Restriction of Real Property Transactions], Official Gazette of the SR Serbia No. 30/89, translated in *KOSOVO: LAW AND POLITICS, KOSOVO IN NORMATIVE ACTS BEFORE AND AFTER 1974*, *supra* note 53, at 59.

80. *See* VICKERS, *supra* note 17, at 250–52.

81. MALCOLM, *supra* note 17, at 349.

82. *Id.*

83. *Id.*

3. The Rambouillet Accords, the NATO Intervention, and Their Repercussions

In November 1995, the United States sponsored peace talks at Dayton, Ohio, that led to the settlement of the conflicts in Bosnia-Herzegovina and Croatia under the so-called Dayton Peace Accords.⁸⁴ Some have argued that disappointment over the fact that Kosovo was not included in this settlement was the turning point in the attitude of Kosovo Albanians toward the settlement of the Kosovo question.⁸⁵ After years of peaceful resistance by the Democratic League of Kosovo,⁸⁶ the militant Kosovo Liberation Army (KLA) now emerged.⁸⁷ Serbian oppression escalated in response.⁸⁸ The UN addressed the situation in Kosovo with Security Council Resolutions 1160,⁸⁹ 1199,⁹⁰ 1203,⁹¹ and 1239.⁹² The first three were adopted under the authority of Chapter VII of the UN Charter.⁹³ The resolutions called for a political solution to the situation in Kosovo;⁹⁴ condemned the violence used by organs of the Federal Republic of Yugoslavia (FRY), as well as violent actions taken by Kosovo Albanians (the latter were called "acts of terrorism");⁹⁵ and, affirming the territorial integrity of Serbia,⁹⁶ expressed support for "an enhanced status of Kosovo which

84. For more information on the Dayton Peace Accords see CRAWFORD, *supra* note 76, at 528–30.

85. See, e.g., VICKERS, *supra* note 17, at 287.

[T]he Kosovars were both surprised and bitterly disillusioned by the outcome of the Dayton Agreement, which made no specific mention of Kosovo It now became apparent to all that as long as there appeared to be relative peace in Kosovo, the international community would avoid suggesting any substantive changes.

Id.

86. See *supra* notes 77–78 and accompanying text.

87. See VICKERS, *supra* note 17, at 292–97.

88. *Id.* at 297–300.

89. S.C. Res. 1160, pmb. para. 3, U.N. Doc. S/Res/1160 (Mar. 31, 1998).

90. S.C. Res. 1199, pmb. para. 6, U.N. Doc. S/Res/1199 (Sep. 23, 1998).

91. S.C. Res. 1203, pmb. para. 8, U.N. Doc. S/Res/1203 (Oct. 24, 1998).

92. S.C. Res. 1239, pmb. para. 3, U.N. Doc. S/Res/1239 (May 14, 1999).

93. U.N. Charter ch. VII; S.C. Res. 1203, *supra* note 91, pmb. para. 16; S.C. Res. 1199, *supra* note 90, pmb. para. 15; S.C. Res. 1160, *supra* note 89, pmb. para. 8.

94. S.C. Res. 1203, *supra* note 91, ¶¶ 1–2, 5; S.C. Res. 1199, *supra* note 90, ¶¶ 3–5; S.C. Res. 1160, *supra* note 89, ¶¶ 1–2, 5.

95. S.C. Res. 1203, *supra* note 91, ¶¶ 3–4; S.C. Res. 1199, *supra* note 90, ¶¶ 1–2; S.C. Res. 1160, *supra* note 89, ¶¶ 2–3;

96. References to territorial integrity of the FRY appear in the preambles of S.C. Res. 1203, *supra* note 91, pmb. para. 14; S.C. Res. 1199, *supra* note 90, pmb. para. 13; and S.C. Res. 1160, *supra* note 89, pmb. para. 7. The preamble to Resolution 1239, S.C. Res. 1239, *supra* note 92, pmb. para. 7, comprehends a more general reference to "the territorial integrity and sovereignty of all States in the region."

would include a substantially greater degree of autonomy and meaningful self-administration."⁹⁷

While the violence in Kosovo continued, negotiations between the FRY and Kosovo Albanians began in February 1999 at Rambouillet, France, with the aim of achieving a political settlement.⁹⁸ On February 23, 1999, the Rambouillet Accords on Interim Agreement for Peace and Self-Government in Kosovo were drafted.⁹⁹ The document sought to establish conditions for the termination of hostilities in Kosovo¹⁰⁰ and foresaw meaningful self-government for Kosovo based on democratic principles.¹⁰¹ In this context, the Rambouillet Accords included a constitution for Kosovo¹⁰² that established self-governing organs with far-reaching powers.¹⁰³ The document further foresaw NATO peacekeeping¹⁰⁴ and a withdrawal

97. S.C. Res. 1160, *supra* note 89, ¶ 5.

98. CRAWFORD, *supra* note 76, at 557.

99. Rambouillet Accords on Interim Agreement for Peace and Self-Government in Kosovo, Kosovo-Serb.-Yugo., Feb. 23, 1999, available at <http://www.commondreams.org/kosovo/rambouillet.htm> [hereinafter Rambouillet Accords]. The draft was prepared by the Contact Group composed of the United States, the United Kingdom, Russia, France, and Italy. Eric Herring, *From Rambouillet to the Kosovo Accords: NATO's War Against Serbia and Its Aftermath*, 4 INT'L J. HUM. RTS. 225, 225 (2000). Herring further argues: "The Contact Group proposal was effectively a NATO proposal as Russia was in many ways a dissenting voice within the Contact Group." *Id.* at 226. The Rambouillet Accords were designed for signatures by the FRY, Serbia, and representatives of Kosovo Albanians. The signatures of the United States, the EU, and Russia were anticipated as witnesses. Rambouillet Accords, *supra*, ch. 8, art. II.

100. Rambouillet Accords, *supra* note 99, framework, art. II, ¶¶ 1-2.

1. Use of force in Kosovo shall cease immediately. In accordance with this Agreement, alleged violations of the cease-fire shall be reported to international observers and shall not be used to justify use of force in response.
2. The status of police and security forces in Kosovo, including withdrawal of forces, shall be governed by the terms of this Agreement. Paramilitary and irregular forces are incompatible with the terms of this Agreement.

Id.

101. *Id.* framework, art. I, ¶ 4.

Citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial, and other institutions established in accordance with this Agreement. They shall have the opportunity to be represented in all institutions in Kosovo. The right to democratic self-government shall include the right to participate in free and fair elections.

Id.

102. *Id.* ch. 1.

103. Organs established by the proposed Constitution were: the Assembly, *id.* ch. 1, art II; President of Kosovo, *id.* ch. 1, art. III; Government and Administrative Organs, *id.* ch. 1, art. IV; and Judiciary, *id.* ch. 1, art. V.

104. The United Nations Security Council is invited to pass a resolution under Chapter VII of the Charter endorsing and adopting the arrangements set forth in this Chapter, including the establishment of a multinational military implementation force in Kosovo. The Parties invite NATO to constitute and lead a military force to help ensure

of Serbian military and police forces from Kosovo.¹⁰⁵ The Rambouillet Accords stressed the territorial integrity of the FRY in both the preamble¹⁰⁶ and the operative articles.¹⁰⁷

The Rambouillet Accords notably anticipated a comprehensive arrangement for the exercise of the right of self-determination by Kosovo Albanians, while avoiding the use of this term.¹⁰⁸ At the same time, unequivocal references to the territorial integrity of the FRY excluded the possibility of a new state creation.¹⁰⁹ Further, despite the wide powers of the self-governing organs in Kosovo, clear links were established between those organs and their federal counterparts.¹¹⁰ Kosovo was thus meant to be an entity with a very high degree of self-government but still legally anchored within the international borders of the FRY.

The Accords were signed by representatives of Kosovo Albanians on March 18, 1999, while the FRY and Serbia refused to sign.¹¹¹ Following this refusal, on March 24, 1999, NATO started a military campaign against the FRY.¹¹² A full discussion of the legality of the NATO intervention is outside of the scope of this Article. Suffice it to recall that, given the absence of the authorization of the use of force in relevant Security Council resolutions,¹¹³ the NATO intervention is generally perceived to be in breach of the UN Charter.¹¹⁴ However,

compliance with the provisions of this Chapter. They also reaffirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY).

Id. ch. 7, art. I, ¶ 1(a).

105. *Id.* ch. 7, arts. IV, VI.

106. *Id.* pmb. para. 4 (“Recalling the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.”).

107. *Id.* ch. 7, art. I, ¶ 1(a).

108. See, e.g., *supra* note 101.

109. See *supra* notes 106–07.

110. See Rambouillet Accords, *supra* note 99, ch. 1, art. II, ¶ 5(a)(ix) (calling for “[c]ooperating with the Federal Assembly, and with the Assemblies of the Republics, and conducting relations with foreign legislative bodies” as among the powers of the Assembly under the proposed constitution); see also *id.* ch 1, art III, ¶ 2(vi) (including “[m]eeting regularly with the Federal and Republic Presidents” as among the powers of President of Kosovo under the proposed constitution).

111. CRAWFORD, *supra* note 76, at 557–58.

112. Dino Kritsiotis, *The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT’L & COMP. L.Q. 330, 330 (2000).

113. See generally S.C. Res. 1239, *supra* note 92 (containing no authorization to use force); S.C. Res. 1203, *supra* note 91 (same); S.C. Res. 1199, *supra* note 90 (same); S.C. Res. 1160, *supra* note 89 (same).

114. The action of NATO countries radically departs from the Charter system of collective security, which hinges on a rule (collective enforcement action authorized by the Security Council) and an exception (self-defence) . . . In the present instance, the member

attempts have been made to situate it within the scope of international law outside of the UN Charter. As has been observed:

[T]he prevailing opinion amongst member States of the organisation [NATO] was that, since the resolutions of the Security Council were not able to provide sufficient legal cover for the application of armed force against the FRY, an alternative rationale in international law would need to be found, and that this rationale was located in the right of humanitarian intervention in customary international law.¹¹⁵

This argument does not suggest that humanitarian intervention outside of the UN Charter accommodation (i.e., not authorized by the Security Council under Chapter VII) is *lex lata*, but perhaps it is *lex ferenda*.¹¹⁶ In this context, the NATO intervention might have laid a foundation for the development of a new customary rule of humanitarian intervention without an explicit Chapter VII resolution, but this was not a customary rule at the time of intervention, nor did it create such a rule.¹¹⁷

The NATO intervention brought an end to the grave humanitarian situation in Kosovo and, therefore, may well be justified on ethical grounds.¹¹⁸ However, the action was in breach of the UN Charter, and, in absence of a customary rule allowing for use of force regardless of circumstances, it is impossible to conclude that the NATO intervention was legal under international law as it currently stands.

The end of hostilities between NATO and the FRY was achieved on June 9, 1999, by the signing of the Military Technical Agreement

states of NATO have not put forward any legal justification based on the United Nations Charter: at most, they have emphasized that the Security Council had already defined the situation in Kosovo as a "threat to peace."

Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 24 (1999).

115. Kritsiotis, *supra* note 112, at 340.

116. Cassese, *supra* note 114, at 25–26.

117. See *id.* at 28 ("[I]t is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*.").

118. How can I, as an advocate of human rights, resist the assertion of a moral imperative on States to intervene in the internal affairs of another State where there is evidence of ethnic cleansing, rape and other forms of systematic and widespread abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?

Christine Chinkin, *Kosovo: A 'Good' or 'Bad' War?*, 93 AM. J. INT'L L. 824, 843 (1999); see also Cassese, *supra* note 114, at 25 ("[F]rom an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is contrary to *current international law*." (emphasis added)).

at Kumanovo, Macedonia.¹¹⁹ The Agreement reaffirmed “deployment in Kosovo under UN auspices of effective international civil and security presences” and noted that “the UN Security Council is prepared to adopt a resolution, which has been introduced, regarding these presences.”¹²⁰ It anticipated a “phased withdrawal of all FRY forces from Kosovo to locations in Serbia outside of Kosovo”¹²¹ and provided that:

[T]he international security force (“KFOR”) will deploy following the adoption of the UNSCR [United Nations Security Council Resolution] . . . and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission.¹²²

The Military Technical Agreement thus severely limited the sovereign powers of the FRY (particularly Serbia) in Kosovo and echoed the spirit of the Rambouillet Accords.¹²³ Given the use of force against Serbia,¹²⁴ one might argue that Serbia was coerced into signing this Agreement. However, similar provisions were adopted and further developed by Resolution 1244.

B. From Resolution 1244 to the Declaration of Independence

1. Resolution 1244 and the Effective Situation

Resolution 1244 was adopted under Chapter VII of the UN Charter on June 10, 1999.¹²⁵ The preamble to Resolution 1244

119. Military-Technical Agreement, KFOR-Yugo.-Serb., June 9, 1999, <http://www.nato.int/kosovo/docu/a990609a.htm> (last visited Feb. 20, 2009); Laura Rozen, *Among Kosovo's Disappeared, the Lucky Are in Serb Prisons*, INDEPENDENT (London), Aug. 13, 1999, available at <http://www.independent.co.uk/news/world/among-kosovos-disappeared-the-lucky-are-in-serb-prisons-1112398.html>.

120. Military-Technical Agreement, *supra* note 119, art. I, para. 1.

121. *Id.* art. II, para. 2.

122. *Id.* art. I, para. 2; see also *id.* app. B (stating similar language).

123. See *supra* notes 99–110 and accompanying text (describing the Rambouillet Accords).

124. See *supra* note 112 and accompanying text (discussing the NATO military campaign against Serbia).

125. Resolution 1244, *supra* note 7, at 2. Resolution 1244 refers to the FRY but now applies to Serbia. The FRY was transformed into the State Union of Serbia and Montenegro in 2003. See CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO art. 60. The Constitution created a mechanism for secession of either Serbia or Montenegro and provided for Serbia to continue the international personality of this state. In this context, Resolution 1244 was expressly mentioned in paragraph 4, as well as the following language that appeared in article 60: “In case of secession of the state of Montenegro from the State Union of Serbia and Montenegro, international documents referring to the Federal Republic of Yugoslavia, especially

reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2."¹²⁶ Yet, the Resolution's operative paragraphs created a situation that is not easily reconciled with the principle of territorial integrity.

The Resolution initially demanded "that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable."¹²⁷ The Resolution allowed for the return of "an agreed number of Yugoslav and Serb military and police personnel"¹²⁸ after the withdrawal. However, as follows from Annex 2 (to which the commitment to territorial integrity expressed in the preamble refers) this return was merely symbolic,¹²⁹ and the number of personnel returned was severely limited.¹³⁰

The Resolution further called for the deployment of "international civil and security presences,"¹³¹ authorized "the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence,"¹³² and called upon "Member States and relevant international organizations to establish the international security presence in Kosovo."¹³³

In accordance with Resolution 1244, the Special Representative of the Secretary-General promulgated a document which vested broad authority in the UN Interim Administration Mission in Kosovo (UNMIK). Section I of the regulation (entitled "On the Authority of the Interim Administration in Kosovo") provides:

Resolution 1244 of the Security Council of the United Nations, shall apply to the state of Serbia as the successor." *Id.* art. 60 (translation from Serbian is the Author's own).

126. Resolution 1244, *supra* note 7, pmbl. para. 10.

127. *Id.* ¶ 3.

128. *Id.* ¶ 4.

129. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions: Liaison with the international civil mission and the international security presence; [m]arking/clearing minefields; [m]aintaining a presence at Serb patrimonial sites; [m]aintaining a presence at key border crossings.

Id. annex 2, ¶ 6.

130. *Id.* annex 2, n. 1 ("Return of personnel for the four functions specified above will be under the supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands).").

131. *Id.* ¶ 5.

132. *Id.* ¶ 6.

133. *Id.* ¶ 7.

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.
2. The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations issued by UNMIK.¹³⁴

The regulation specified that the applicable laws in Kosovo were those in force prior to March 24, 1999.¹³⁵ There was, however, an important limitation to this general proclamation, as the laws could be overridden by internationally recognized human rights standards, as well as by powers of UNMIK stemming from Resolution 1244 and subsequent regulations issued by UNMIK.¹³⁶

Resolution 1244 does not make an express reference to the right of self-determination. However, it invokes several principles associated with the exercise of this right. In this regard, the Resolution spelled out that the international civil presence in Kosovo was established

in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.¹³⁷

The Resolution identifies “promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo”¹³⁸ and “[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections”¹³⁹ as the main responsibilities of the international civil presence.

Drawing authority from Resolution 1244, the Special Representative promulgated the document entitled “Constitutional Framework for Provisional Self-Government.”¹⁴⁰ The chapter on basic provisions of the Constitutional Framework provides:

134. On the Authority of the Interim Administration in Kosovo, UN Mission in Kosovo Reg. 1999/1, § 1, UNMIK/REG/1999/1 (July 25, 1999), available at http://www.unmikonline.org/regulations/1999/re99_01.pdf.

135. *Id.* § 3.

136. *Id.*

137. Resolution 1244, *supra* note 7, ¶ 10.

138. *Id.* ¶ 11(a).

139. *Id.* ¶ 11(c).

140. For more information on the Constitutional Framework for Provisional Self-Government in Kosovo, see UN Mission in Kosovo Reg. 2001/9, pmb1,

- 1.1 Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.
- 1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities.
- 1.3 Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo.
- 1.4 Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions in accordance with this Constitutional Framework and UNSCR 1244(1999).
- 1.5 The Provisional Institutions of Self-Government are:
 - (a) Assembly;
 - (b) President of Kosovo.¹⁴¹

By repeatedly invoking “self-government” and noting the “unique historic, legal, cultural and linguistic attributes” of the people of Kosovo, the Constitutional Framework clearly adopted self-determination language.¹⁴² Further, it also created an institutional framework for the exercise of self-government.¹⁴³ In regard to representation in these institutions, the Constitutional Framework enacted an electoral system based on democratic principles¹⁴⁴ and stipulated the protection of human rights.¹⁴⁵ The institutions of self-government were vested with powers over the territory of Kosovo comparable to those of authorities of sovereign states; however, their independence remained limited by their subordination to UNMIK authority.¹⁴⁶

UNMIK/REG/2001/9 (May 15, 2001), available at <http://www.unmikonline.org/regulations/2001/reg09-01.htm> [hereinafter UN Mission in Kosovo Reg. 2001/9].

141. *Id.* ch. 1.

142. *Cf. infra* Parts III.A.1–2 (discussing the limits of self-determination and whether in fact the people of Kosovo are a “people” for purposes of self-determination).

143. *See* U.N. Mission in Kosovo Reg. 2001/9, *supra* note 140, ch. 9 (outlining the “Provisional Institutions of Self-Government”).

144. *Id.* ch. 9.1.3.

145. *Id.* ch. 3.

146. The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG [Special Representative of Secretary-General] to ensure full implementation of UNSCR [United Nations Security Council Resolution] 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or this Constitutional Framework.

The Constitutional Framework did not foresee the organs of the FRY or Serbia having any authority over the decision making of Kosovo's self-governing institutions. Thus, although Resolution 1244 states that the aim of the interim administration is that "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,"¹⁴⁷ the situation in fact implies Kosovo's autonomy within the interim administration. Indeed, "UNMIK [had] assumed what [was] effectively (though not in name) the federal-type role of the Serb and FRY authorities, because these authorities failed to perform that role in the past."¹⁴⁸ Kosovo thus became an internationally administered territory without being put under the international trusteeship system of Chapter XII of the UN Charter.¹⁴⁹

2. The Political Process, the Ahtisaari Plan, and the Declaration of Independence

According to Bothe and Marauhn, "The establishment of more or less comprehensive, interim administrations in Kosovo and East Timor with a mandate by the UN Security Council has given rise to an interesting debate on the concept, legality and limitations of such UN involvement in internal conflicts."¹⁵⁰ An analysis of these controversies is outside of the scope of this Article.¹⁵¹ It is of note, though, that international organizations' involvement in territorial administration "has a long history, stretching back to the start of the League of Nations,"¹⁵² and territories have been put under international administration in response to two types of problems: first, in response "to a perceived sovereignty problem with the presence of local actors exercising control over the territory,"¹⁵³ and

147. Resolution 1244, *supra* note 7, ¶ 10. *But see* WILLIAM O'NEILL, KOSOVO: AN UNFINISHED PEACE 30 (2002) ("No one knew what the terms 'substantial autonomy' and 'meaningful self-administration' really meant. What united all Kosovo Albanians, regardless of their political party loyalties, was full independence from Serbia and what was left of the FRY. They did not want to hear about autonomy, however defined.").

148. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 595 (2001).

149. The Security Council acted under Chapter VII, while Kosovo was obviously not a situation in which Chapters XII and XIII could apply. *See, e.g.*, Michael Bothe & Timo Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 217, 230–35 (Christian Tomuschat ed., 2001).

150. *See id.* at 217.

151. *Id.*; *see also* Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, 50 INT'L & COMP. L.Q. 613 (2001) (examining administration of territories by international organizations).

152. Wilde, *supra* note 148, at 583.

153. *Id.* at 587.

second, in response “to a perceived governance problem with the conduct of governance by local actors.”¹⁵⁴ Given the violations of human rights and the humanitarian situation in the time of the Milošević regime, Kosovo offers a clear example of a governance problem.¹⁵⁵

While establishing international administration, Resolution 1244 did not define the future territorial status of Kosovo but instead called for a political process leading toward a final settlement.¹⁵⁶ However, during this period of uncertainty regarding Kosovo’s future, the international administration that was established to solve the governance problem ended up “affecting [sic] or creating a sovereignty problem.”¹⁵⁷ The political process that was supposed to produce a final settlement was thus greatly influenced by several factors: Kosovo’s unclear status, the presence of international administration, and the fact that Serbia had no sovereign powers over Kosovo.

On December 12, 2003, the Security Council endorsed the “Standards for Kosovo,” a document that was produced under the auspices of the Special Representative upon an initiative of the informal contact group for Kosovo, composed of the United Kingdom, the United States, Russia, France, Germany, and Italy.¹⁵⁸ The document spelled out eight standards to be implemented in Kosovo prior to the determination of its status.¹⁵⁹ The “standards before status” policy, however, did not lead to the anticipated results. The report on the situation of Kosovo by the Special Envoy of the UN Secretary-General, submitted on November 30, 2004, acknowledged as much:

The current “standards before status” policy lacks credibility. The implementation of a highly ambitious set of standards before status talks begins is seen as unachievable. The implementation of the standards should be seen as an integral part of a wider policy and

154. *Id.*

155. *See id.* at 599 (describing governance problems that existed prior to the NATO campaign in Kosovo).

156. *See supra* Part II.B.1 (discussing Resolution 1244 and the Effective Situation).

157. Wilde, *supra* note 148, at 605.

158. Statement by the President of the Security Council, at 1, U.N. Doc. S/PRST/2003/26 (Dec. 12, 2003).

159. *See id.* The document invoked the following standards: “[D]emocratic institutions; rule of law; freedom of movement; returns and reintegration; economy; property rights; dialogue with Belgrade; and the Kosovo Protection Corps.” *Id.* The Security Council further urged “the Provisional Institutions of Self-Government to participate fully and constructively in the working groups within the framework of the direct dialogue with Belgrade on practical issues of mutual interest, to demonstrate their commitment to the process.” *Id.*

continue to guide efforts to bring Kosovo closer to European standards even after the conclusion of future status negotiations.¹⁶⁰

In his subsequent report on October 7, 2005, the Special Envoy stated that “[t]he risks that would follow from a continued ‘wait and see’ policy—in terms of increasing political, economic, and social frustration—could soon be far greater than the risks related to a future status process.”¹⁶¹ Consequently, the commencement of the process intended to lead toward a final status was proposed.¹⁶² On October 24, 2005, the Security Council expressed its support for the commencement of the political process:

The Security Council agrees . . . that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999). The Council reaffirms the framework of the resolution, and welcomes the Secretary-General’s readiness to appoint a Special Envoy to lead the Future Status process.¹⁶³

Former Finnish President Martti Ahtisaari was appointed Special Envoy of the UN Secretary-General on Kosovo’s status talks.¹⁶⁴

After more than a year of unproductive negotiations and occasional outbursts of ethnic violence,¹⁶⁵ the UN Secretary-General addressed a document to the President of the Security Council on March 26, 2007, entitled “Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status” (the Ahtisaari Plan),¹⁶⁶ in which he recommended independence supervised by the international community.¹⁶⁷ Special Envoy Ahtisaari observed that

160. Letter from Kofi Annan, Sec’y Gen., United Nations, to the President, United Nations Sec. Council, at 4, U.N. Doc. S/2004/932 (Nov. 30, 2004).

161. Letter from Kofi Annan, Sec’y Gen., United Nations, to the President, United Nations Sec. Council, ¶ 10, U.N. Doc. S/2005/635 (Oct. 7, 2005) (attaching the report of the Secretary General’s Special Envoy on Kosovo affairs).

162. *Id.* ¶¶ 62–72.

163. Statement by the President of the Security Council, at 1–2, U.N. Doc. S/PRST/2005/51 (Oct. 24, 2005) (discussing Kosovo’s future status).

164. See, e.g., Security Council Report, Kosovo Historical Chronology, entry for Nov. 1, 2005, <http://www.securitycouncilreport.org/site/pp.aspx?c=glKWLeMTIsG&b=2693009&printmode=1> [hereinafter Kosovo Historical Chronology] (listing pertinent events in the run-up to Kosovo’s declaration of independence).

165. *Id.* entries for Nov. 20, 2006, June 19, 2006.

166. Letter from Ban Ki-moon, Sec’y Gen., United Nations, to the President, United Nations Sec. Council, U.N. Doc. S/2007/168 (Mar. 26, 2007) (attaching The Special Envoy of the Secretary-General on Kosovo, *Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, Delivered to the Security Council*, U.N. Doc. S/2007/168 (Mar. 26, 2007) [hereinafter The Ahtisaari Plan]).

167. Letter from Ban Ki-moon, Sec’y Gen., United Nations, to the President, United Nations Sec. Council, ¶ 2, U.N. Doc. S/2007/168 (Mar. 26, 2007); see also The Ahtisaari Plan, *supra* note 166, ¶ 13 (using similar language).

“both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of independence.”¹⁶⁸ In his view, “the negotiation’s potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted.”¹⁶⁹ He described the effective situation in the following terms:

For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia—however notional such autonomy may be—is simply not tenable.¹⁷⁰

Consequently, the effective situation suggested that the only alternative to independence was to maintain the status quo. However, the latter was rejected by Special Envoy Ahtisaari:

Uncertainty over its future status has become a major obstacle to Kosovo’s democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its 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.¹⁷¹

Serbia and Russia rejected the Ahtisaari Plan, and Russia made it clear that it would veto any draft Security Council resolution expressing support of Kosovo’s independence.¹⁷² As a result, the Ahtisaari Plan was not endorsed by the Security Council.¹⁷³

In August 2007, the troika made up of the EU, the United States, and Russia was given a 120-day period to broker talks between Serbia and Kosovo Albanians on the future status of Kosovo.¹⁷⁴ The troika was expected to report to the UN Secretary-General on the outcome by December 10, 2007.¹⁷⁵ In the course of the talks, Serbia proposed the so-called Aaland Islands Model for Kosovo, which would be put in place for twenty years.¹⁷⁶ Once again, it

168. The Ahtisaari Plan, *supra* note 166, ¶ 2.

169. *Id.* ¶ 3.

170. *Id.* ¶ 7.

171. *Id.* ¶ 4.

172. See Kosovo Historical Chronology, *supra* note 164, entry of July 20, 2007.

173. *Id.*

174. *Id.* entry of Aug. 2007.

175. *Id.*

176. Press Release, Ministry of Foreign Affairs of the Republic of Serb., Belgrade’s Proposal Freezes Kosovo Status for 20 Years (Nov. 20, 2007),

became clear that Kosovo Albanians were not willing to accept anything but independence. Subsequently, the troika wrote in its press communiqué:

The EU/U.S./Russia negotiating Troika has completed an intensive conference with the delegations from Belgrade and Pristina to discuss Kosovo's status. The Troika brought together leaders of both sides in Baden, Austria, for nearly three days of intense talks. The Baden Conference marks the end of Troika-sponsored face to face negotiations. Over the course of the talks, the Troika urged the parties to consider a broad range of options for Kosovo's status. The Troika explored together with both sides every reasonable status outcome for Kosovo to determine where there might be potential for a mutually-acceptable outcome. Regrettably, the parties were unable to reach an agreement on Kosovo's future status.¹⁷⁷

The additional round of negotiations merely reaffirmed Special Envoy Ahtisaari's observation that a mutual agreement on the future status of Kosovo was not achievable and, therefore, that the political process called for by Resolution 1244 had failed.¹⁷⁸ Despite initial warnings by the EU to Kosovo leaders against a unilateral

http://www.mfa.gov.yu/Policy/CI/KIM/211107_6_e.html. The press communiqué summarizes the Aaland Islands Model in the following terms:

Serbia's sole jurisdiction in the case of Kosovo would be in the sphere of the foreign policy, control of the borders, protection of the Serb religious and cultural heritage. Serbia would solely be in charge of defence and this would not be applied in Kosovo Kosovo would be solely in charge of its budget, economic policy, agriculture, the media, education, protection of the environment, youth, sports, fiscal policy, internal affairs, health care, energy, infrastructure and employment. Kosovo would independently elect and develop its institutions, and Serbia would not interfere in this. Kosovo would have legislative powers in the spheres of its sole jurisdiction and in other cases determined by the agreement. Serbia could not change and abolish laws in Kosovo, Kosovo would have executive powers, an independent and complete judicial system in charge of disputes in the sole jurisdiction of Kosovo and in other cases determined in the agreement. Belgrade's proposal calls for a transitional period under EU monitoring and the presence of international judges. In keeping with the example of Finland and the Aland Islands, in the case of Kosovo Serbia is the subject of international law and Kosovo is offered as its exclusive jurisdiction the negotiating of agreements with other states and international organizations. Kosovo prepares agreements in consultations with Serbia, while Belgrade formally signs the agreements along with the signature with Kosovo and Metohija.

Id.

177. Press Release, U.S.-E.U.-Russ. Troika, Troika Press Communiqué: The Baden Conference (Nov. 28, 2007), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/97300.pdf.

178. See *supra* notes 165–66 and accompanying text (discussing the failure of negotiations and the promulgation of the Ahtisaari Plan).

declaration of independence,¹⁷⁹ U.S. and EU officials soon expressed a general willingness to recognize Kosovo as an independent state.¹⁸⁰ Ultimately, Kosovo's declaration of independence on February 17, 2008, came as no surprise. Indeed, media reports in weeks prior to the declaration suggested that the latter was coordinated between Kosovo officials on the one hand and the EU and the United States on the other.¹⁸¹ It thus became obvious that the EU and the United States had decided to implement the Ahtisaari Plan without a Security Council resolution. On February 16, 2008 (one day prior to the declaration of independence), the EU Council launched the European Union Rule of Law Mission (EULEX) in Kosovo, which aimed "to support the Kosovo authorities in their efforts to build a sustainable and functional Rule of Law system."¹⁸² As its mission goals expressly held: "Meanwhile the United Nations Mission in Kosovo (UNMIK) will continue to exercise its executive authority

179. See, e.g., Dan Bilefski, *Europe Warns Kosovo on Separation*, N.Y. TIMES, Nov. 20, 2007, at A12 (reporting on reservations on the part of European countries regarding Kosovo's independence).

180. See, e.g., Dan Bilefski & Nicholas Wood, *Talks on Kosovo Hit a Dead End, Rice Says*, N.Y. TIMES, Dec. 8, 2007, at A6 (citing willingness of world leaders to move to "the next phase" following the failure of negotiations); Dan Bilefski, *U.S. and Germany Plan to Recognize Kosovo*, N.Y. TIMES, Jan. 11, 2008, at A9 (noting that both the U.S. and Germany planned to recognize Kosovo and would be urging the rest of Europe to do so as well).

181. See *supra* note 180 (citing articles in the press suggesting the likelihood of Kosovo's declaration of independence); see also Roger Cohen, Op.-Ed., *Here Comes Kosovo*, N.Y. TIMES, Feb. 14, 2008, <http://www.nytimes.com/2008/02/14/opinion/14cohen.html?scp=57&sq=kosovo&st=nyt> (discussing the likelihood of other countries recognizing Kosovo soon after it declares independence); Protocol, Unknown Official, Foreign Ministry of Slovn. (Dec. 24, 2007) (on file with author) (proving that Kosovo's declaration of independence was coordinated between Kosovo's leaders on the one hand and the United States and the EU on the other). The following notes are especially instructive:

The prevailing view in the EU is that independence of Kosovo needs to be declared after the elections in Serbia (20 January [2008] and 3 February [2008]) The session of the Kosovo Parliament, at which declaration of independence would be adopted, should take place on Sunday, so [the Russian Federation] has no time to call for the meeting of the [United Nations Security Council]. In the mean time the first recognitions could already arrive The United States . . . after Kosovar authorities declare independence, will be among the first to recognize Kosovo. The United States strives for recognition of Kosovo by as many non-EU states as possible. The United States is lobbying determinately with Japan, Turkey, Arab states, that have showed readiness to recognize Kosovo without hesitation The United States is currently drafting a constitution with Kosovars. The situation on the ground is favorable. The United States hopes that Kosovars are not going to lose self-confidence, as this could result in United States' loss of influence.

Id. (translations from Slovene are the Author's own).

182. Press Release, The Eur. Union Eur. Sec. and Def. Policy, EU Rule of Law Mission for Kosovo (June 2008), http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/sede250608factsheetkosovo/_SEDE250608FactsheetKosovo_en.pdf.

under UN Security Council Resolution 1244. EULEX Kosovo will not replace UNMIK but rather support, mentor, monitor and advise the local authorities.”¹⁸³

The Declaration of Independence, proclaimed by the Kosovo Assembly on February 17, 2008,¹⁸⁴ refers to the democratic legitimacy of the Assembly, which thereby declares independence in the name of the people of Kosovo and notes Kosovo’s commitment to the Ahtisaari Plan. Article 1 of the Declaration of Independence provides: “We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.”¹⁸⁵

By adopting the Ahtisaari Plan,¹⁸⁶ Kosovo expressed its commitment to democracy and human rights,¹⁸⁷ a prolonged international presence in its territory,¹⁸⁸ the inviolability of its

183. *Id.*

184. KOSOVO DECLARATION OF INDEPENDENCE pmbl. (2008).

185. *Id.* art. 1.

186. *Id.* arts. 1, 4–5, 8, 12. The commitment to the Ahtisaari Plan was also expressed in article 3 (“We accept fully the obligations for Kosovo contained in the Ahtisaari Plan.”), article 4 (“The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.”), article 5 (“We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council [R]esolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.”), article 8 (“Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations”), and article 12 (“We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan.”).

187. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

Id. art. 4.

188. We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned

borders,¹⁸⁹ and rights and duties previously accepted on its behalf.¹⁹⁰ Kosovo also accepted significant restraints on its sovereignty. When the Constitution of the Republic of Kosovo entered into force on June 15, 2008, it also unilaterally subscribed Kosovo to the Ahtisaari Plan and further affirmed restraints on Kosovo's independence.¹⁹¹

to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

Id. art. 5.

189. With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

Id. art. 8.

190. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

Id. art. 9.

191. Notwithstanding any provision of this Constitution, the International Military Presence has the mandate and powers set forth under the relevant international instruments including United Nations Security Council Resolution 1244 and the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. The Head of the International Military Presence shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in theatre regarding interpretation of those aspects of the said Settlement that refer to the International Military Presence. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in this Article.

III. KOSOVO AND SECESSION

A. *The Right of Self-Determination and Kosovo Albanians*

1. The Right of Self-Determination and Territorial Integrity

The right of self-determination is expressed in the first article of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹⁹² Further, this right “has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.”¹⁹³ The right was initially applied in colonial contexts, in which colonies could opt for “emergence as a sovereign independent state,” “free association with an independent state,” “integration with an independent state,” or “any other method chosen by the people.”¹⁹⁴ In the colonial context, the right of self-determination thus became a legal norm that enabled the creation of new states, which could override even the effectiveness rule.¹⁹⁵

Outside the colonial context, the right of self-determination had its own genesis. In colonial situations, “the only territorial relationship to be altered was that with the metropolitan power,” so that “[a]chieving independence . . . did not come at the expense of

192. See International Covenant on Civil and Political Rights art. 1, 999 U.N.T.S. 171, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, 933 U.N.T.S. 3, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

ICESCR, *supra*, art. 1.

193. Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 858 (1994).

194. *Id.* at 189; see also Declaration on the Granting of Independence to Colonial Countries and Peoples princ. VI, G.A. Res. 1514 (XV), U.N. GAOR 15th Sess., U.N. Doc. A/Res/1514 (XV) (Dec. 15, 1960).

195. See Antonello Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 171, 175 (Marcelo G. Kohen ed., 2006).

another sovereign state's territory or of that of an adjacent colony."¹⁹⁶ In non-colonial situations, the right of self-determination collides with the territorial integrity of states. As the Declaration on Principles of International Law expressed:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹⁹⁷

This provision makes two relevant points. First, it attempts to use territorial integrity as a limit on the right of self-determination. Second, it may be understood to suggest that, under certain circumstances, the territorial integrity limitation on the right of self-determination may not always be applicable. The latter has been referred to as the "safeguard clause."¹⁹⁸

The territorial integrity limitation effectively divorces the right of self-determination from the notion of a right to secession, thus establishing a distinction between internal and external self-determination.¹⁹⁹ Yet, this distinction fails to entirely clarify the ambiguities associated with the applicability of the right of self-determination in non-colonial contexts. There is no single mode prescribed for exercising the right of self-determination internally. Indeed, "[t]he exercise of this right can take a variety of forms, from autonomy over most policies and laws in a region or part of a State . . . to a people having exclusive control over only certain aspects of policy . . ." ²⁰⁰ Further, it is still unclear when the right of self-determination may be exercised externally—when secession is justified. Raič has noted that secession may occur if the constitution of a parent state allows for secession.²⁰¹ Further, in the absence of an

196. Gregory Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 736 (1994) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)).

197. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, Annex, § 1, U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law].

198. See generally CRAWFORD, *supra* note 76, at 118–21 (discussing the safeguard clause and various instances in which it has arisen).

199. See, e.g., Fox, *supra* note 196, at 734–36 ("The legitimacy of an internal right to self-determination is as yet uncertain, in particular it is to be regarded as wholly supplanting the traditional conception of an external right rather than merely coexisting as an alternative means of achieving political autonomy.").

200. McCorquodale, *supra* note 193, at 864.

201. DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 313–14 (2002).

express constitutional provision, secession may occur upon the approval of a parent state, which may be granted before or after the declaration of independence.²⁰² However, in the absence of a relevant constitutional provision or specific approval by a parent state, the question of secession is much more disputable.

The following Part of this Article next discusses whether Kosovo Albanians qualify as a people for the purpose of the right of self-determination. Subsequently, it will consider whether Kosovo Albanians are entitled to externally consummate this right.

2. Are Kosovo Albanians a People for the Purpose of the Right of Self-Determination?

Wording of the right of self-determination suggests that this right only applies to peoples.²⁰³ This leads to the problem of distinguishing between those groups who qualify as a people and those who do not. During an investigation of the events in East Pakistan in 1972, the International Commission of Jurists made the following remark in regard to peoples and the right of self-determination:

If we look at the human communities recognized as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be:

- historical,
- racial or ethnic,
- cultural or linguistic,
- religious or ideological,
- geographical or territorial,
- economic,
- quantitative.

This list, which is far from exhaustive, suggests that none of the elements concerned is, by itself, either essential or sufficiently conclusive to prove that a particular group constitutes a people. Indeed, all the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous group of persons, having less in common, may nevertheless constitute a people.

To explain this apparent contradiction, we have to realize that our composite portrait lacks one essential and indeed indispensable

202. *Id.* at 314–16.

203. *See supra* note 192 and accompanying text (showing that the language of self-determination is tied to the concept of a “people”).

characteristic—a characteristic which is not physical but rather ideological and historical: a people begin to exist only when it becomes conscious of its own identity and asserts its will to exist . . . the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.²⁰⁴

Although not of direct legal relevance, this definition provides some guidance as to what criteria should be applied when considering whether a group qualifies as a people, but these criteria are subjective, noncomprehensive, and not entirely clear.²⁰⁵ Further, there is an important distinction between peoples and minorities. This distinction emerged at the end of World War I, simultaneously with the development of the principle of self-determination and served to suggest that only peoples are entitled to self-determination. Consequently:

The creation of the minorities treaties regime was, in one respect, an attempt of the Allies to prevent those ethnic groups which had been separated from their respective nation-states as a resolute of the [Paris Peace] Conference [in 1919] from claiming a right to self-determination by categorizing them as minorities.²⁰⁶

In the UN Charter era, the distinction between peoples and minorities is reflected in the separate elaborations of the right of self-determination and minority rights, the former being expressed in the common Article 1 of the ICCPR and ICSECR²⁰⁷ and the latter in Article 27 of the ICCPR.²⁰⁸ In addition to the ambiguity surrounding the definition of people, there are also questions of how minorities are to be distinguished from peoples and when members of a minority group can constitute a people and thereby become beneficiaries of the right of self-determination.

In a report for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Francesco Capatorti defined a minority in the following terms:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a

204. INT'L COMM'N OF JURISTS, THE EVENTS IN EAST PAKISTAN 49 (1972).

205. See generally THOMAS MUSGRAVE, SELF DETERMINATION AND NATIONAL MINORITIES 154-67 (1997) (elaborating on "the ethnic definition").

206. *Id.* at 167.

207. See *supra* note 192 (quoting the text of the ICCPR and ICSECR).

208. See ICCPR, *supra* note 192, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.").

sense of solidarity, directed towards preserving their culture, traditions, religion or language.²⁰⁹

This frequently quoted definition points out the problem of how difficult it is to distinguish between minorities and peoples.²¹⁰ Further, “[m]inorities appropriate the vocabulary of self-determination whether governments or scholars approve or not.”²¹¹ Based on the initial reason for the distinction between peoples and minorities,²¹² it appears that a minority that is comprised of people of the same ethnic, linguistic, and religious background as people of another state cannot qualify as people for the purpose of the right of self-determination. Yet, if the original limitation of the scope of “people” was a result of the fear that recourse to self-determination could lead to secessions from parent states,²¹³ the subsequent development of internal self-determination has severely diminished this fear; as a result, the reason for the distinction between peoples and minorities may have also become less potent.

On one view, “a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist.”²¹⁴ This definition supports the notion that identities might be only recently realized. As such (for present claims to the right of self-determination), it may be impossible to establish objectively when a group is no longer a minority but has become a people.²¹⁵ Further, a shared ethnic linguistic and religious background does not necessarily imply the same identity.²¹⁶ Different historical and political developments, which may indeed be very recent, can

209. Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, at 96, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78XIV.1 (1991).

210. Cf. INT’L COMM’N OF JURISTS, *supra* note 204, at 49 (elaborating factors which help define a group as a “people”).

211. Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT’L & COMP. L.Q. 867, 868 (1989).

212. See MUSGRAVE, *supra* note 205, at 167 (discussing the historical significance of the distinction).

213. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 349 (1999) (“It is evident that the political underpinning of this position [to distance minorities from the right of self-determination] is the fear that minorities, by invoking self-determination, might claim a right to secession. This is because self-determination is still primarily conceived of as a means for achieving independent statehood.”).

214. INT’L COMM’N OF JURISTS, *supra* note 204, at 49.

215. See CRAWFORD, *supra* note 76, 220 (“Whether or not there was [a people of Taiwan] in 1947, the experience of a half century of separate self-government has tended to create one.”).

216. See, e.g., AMARTYA SEN, IDENTITY AND VIOLENCE 18–21 (2006) (describing society’s often limited thinking on how to characterize loyalty to and affiliation with a minority group).

construct separate identities and differentiate peoples from individuals with shared backgrounds.²¹⁷

Given the difficulty and arbitrariness of the distinction between minorities and peoples, as well as the virtual confinement of the right of self-determination to its internal mode,²¹⁸ one scholar has suggested that groups traditionally qualified as minorities should be regarded as peoples and consequently become beneficiaries of the right of self-determination.²¹⁹ Arguably, the Badinter Committee adopted such a position when asked to decide on whether the Serbian populations in Bosnia-Herzegovina and Croatia had the right of self-determination.²²⁰ The Badinter Committee implicitly answered this question by applying common Article 1 of the Covenants,²²¹ while at

217. In Germany and Austria, historical and political developments led to the creation of two distinct peoples who are not only allowed to have separate states but are actually precluded from unification. See *State Treaty for the Re-Establishment of an Independent and Democratic Austria*, art. 4, July 27, 1955, T.I.A.S. No. 3298 (prohibiting either "political or economic union between Austria and Germany"); see also G.A. Res. 2672 (XXV), pt. C, ¶ 1, U.N. Doc. A/Res/2672 (XXV) (Dec. 8, 1970) (affirming "that the people of Palestine are entitled to equal rights and self-determination" despite the linguistic, ethnic, and religious similarities of Palestinians with other Arab peoples). Recently constructed identities in South Africa offer another example. See Robert McCorquodale, *South Africa and the Right of Self-Determination*, 10 S. AFR. J. HUM. RTS. 4, 16 (1994).

[T]he apartheid era categorised every individual according to her/his colour, race and/or tribal affiliation, with this determination being made by the white South African administrators These policies, cemented in legislation and administrative practice, created (or reinforced) the self-identity for most inhabitants of South Africa, such as Xhosa, Sotho, Zulu, Tswana, etc.—and were not part of a wider South African people Added to this, the history of the Afrikaner has meant that they perceive themselves as a separate group.

Id. at 16.

218. See CASSESE, *supra* note 213, at 349 (discussing the fear that minorities might opt for secession).

219. Minorities must be considered as people. They must live also in a territory or they must have been living in a territory which is now occupied; they must have cultural or religious characteristics; they must be politically organized so that they can be represented; and they must be capable of an economic independence. It does not depend on governments as to how they are describing an entity as a people; it depends on objective and subjective criteria of a group. It depends also on the self-consciousness of identity.

Felix Ermacora, *The Protection of Minorities Before the United Nations*, in 182 RECUEIL DES COURS 247, 327 (1983).

220. See Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 4 (Jan. 11, 1992), reprinted in SNEŽANA TRIFUNOVSKA, YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 474 (1994) (noting that the Serbian population in both places were "entitled to all the rights accorded to minorities and ethnic groups under international law"). For more on the Badinter Committee, see *infra* note 409.

221. *Id.* ¶ 3.

the same time referring to the Serbian populations in Bosnia-Herzegovina and Croatia as minorities.²²² The Committee also expressly held that Serbs in Bosnia-Herzegovina and Croatia could not exercise their right of self-determination in the external mode and that the right was limited by the *uti possidetis* principle.²²³ However, this does not diminish the significance of the right of self-determination being applied in this situation because, as a general rule, this right would normally be consummated internally anyway.²²⁴ Thus, it remains significant that, in the Badinter Committee's view, the shared ethnic, religious, and linguistic background of Serbs from Bosnia-Herzegovina and Croatia with Serbs in Serbia obviously did not preclude them from being considered a people and, as such, beneficiaries of the right of self-determination.

In the case of Kosovo, separation from Albania,²²⁵ a struggle for autonomy,²²⁶ the 1974 constitutional arrangement within the

222. *Id.* ¶¶ 2, 4.

223. *Id.* ¶ 1. The *uti possidetis* principle was first applied in colonial situations to upgrade administrative colonial borders to international borders. The principle was explained in Case Concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22):

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions of colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.

Id. at 566. The position that the *uti possidetis* principle also applies outside of colonial situations was expressed by the Badinter Commission. Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 2 (Jan. 11, 1992), reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 479. Yet, such a view has not been adopted by all writers, and the Badinter Committee remains criticized for the application of the *uti possidetis* principle in a situation that was not a matter of decolonization. See generally Tomaš Bartoš, *Uti possidetis. Quo Vadis?* 18 AUSTL. Y.B. INT'L L. 37 (1997) (attempting to delineate what precisely *uti possidetis* means); Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J INT'L L. 31 (1998) (discussing the potential misuse of ICJ jurisprudence in the Commission's attempt to forge peace in Yugoslavia); Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50 (2000) (arguing that the Badinter Commission's promulgated principles are questionable because they rest on dubious legal arguments); Steven Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996) (re-examining the appropriateness of using *uti possidetis* in conceptions of state unity).

224. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 126 (Can.).

225. See *supra* Part II.A.1 (describing the history of Kosovo).

226. See *supra* Part II.A.1.

SFRY,²²⁷ and a decade of gross human rights violations²²⁸ contributed toward the development of a distinct identity among Kosovo Albanians. Further, a constitutional arrangement for internal self-determination was applied to Kosovo Albanians in the 1974 Constitution of the SFRY²²⁹ and was *mutatis mutandis* revived under international administration.²³⁰ In his address to the Permanent Council of the Organization for Security and Co-operation in Europe on February 19, 2008, Serbian Foreign Minister Vuk Jeremić stated that an independent Kosovo would establish a precedent that “transforms the right to self-determination into a right to independence.”²³¹ This statement might imply that, even in view of Serbia, Kosovo Albanians qualify as a people for the purpose of the right of self-determination.

Although Kosovo Albanians might qualify as a people for the purpose of the right of self-determination, the applicability of this right does not per se suggest that secession can be justified. At the same time, given the effective situation in which Serbia exercises no sovereign authority over Kosovo,²³² a shift of sovereign powers back to Serbia without consent of Kosovo Albanians might violate the applicable right of self-determination.

B. Secession: “Remedial” and Unilateral Aspects

Unilateral secession is not an entitlement under international law. As the Supreme Court of Canada established in the *Quebec* case:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.²³³

227. See *supra* notes 41–44, 46, and accompanying text (discussing the contours of the 1974 SFRY Constitution).

228. See *supra* Part II.A.2 (describing human rights violations committed against Kosovo Albanians).

229. See *supra* notes 41–47 and accompanying text (describing the right to self-determination in the SFRY Constitution).

230. See *supra* notes 146–47 and accompanying text (discussing the Provisional Self-Government and the meaning of Kosovo’s autonomy).

231. Vuk Jeremić, Minister of Foreign Affairs of the Republic of Serb., Address to the Permanent Council of the Organization for Security and Co-operation in Europe 3 (Feb. 19, 2008), available at http://www.osce.org/documents/pc/2008/02/29767_en.pdf [hereinafter Address by Vuk Jeremić].

232. See *supra* notes 147–48 and accompanying text (discussing Kosovo’s substantial autonomy within the FRY).

233. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 126 (Can.).

The reference to “the most extreme cases” justifying a unilateral secession must be read against the background of the provision on self-determination and territorial integrity expressed in the Declaration on Principles of International Law.²³⁴ The provision allows for an interpretation that a state that does not comply with “the principle of equal rights and self-determination of peoples” and whose government does not represent “the whole people belonging to the territory without distinction as to race, creed or color”²³⁵ might not be entitled to limit the right of self-determination of the oppressed people under the territorial integrity principle. In this context, the Supreme Court of Canada held that “[t]he other clear case where a right to external self-determination accrues [apart from colonial situations] is where a people is subject to alien subjugation, domination or exploitation outside a colonial context.”²³⁶

The Court also identified a possible link between denial of the right of self-determination in its internal mode and unilateral secession:

[T]he right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.²³⁷

The Court observed that “it remains unclear whether this third proposition actually reflects an established international law standard”²³⁸ and held that, in the *Quebec* case, clarification of the issue was not important because a violation of this kind was not in question in the particular situation of Quebec.²³⁹ Yet, this question may be important in other situations, such as Kosovo.

Secession of oppressed peoples, also referred to as remedial secession, generally has wide support among writers,²⁴⁰ but it

234. *Id.* ¶¶ 127–28.

235. Declaration on Principles of International Law, *supra* note 197, Annex, § 1, at 123.

236. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 133 (Can.).

237. *Id.* ¶ 134.

238. *Id.* ¶ 135.

239. *Id.*

240. For a detailed account on the academic support for remedial secession, see Tancredi, *supra* note 195, at 175–77 & n.13 and Loizidou v. Turkey, 23 Eur. Ct. H.R. 513 (1996) (Wildhaber, J., concurring).

In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.

remains somewhat unclear what exactly creates the circumstances in which remedial secession becomes an entitlement. The Second Commission of Rapporteurs in the *Aaland Islands* case pointed out that a shift of sovereignty as an "exceptional solution" may only be considered as a "last resort."²⁴¹ The latter condition is also adopted in modern writings and is interpreted narrowly—secession should be the only means for preventing systematic oppression.²⁴²

Despite the significant support for remedial secession in academic writings, there is an acute lack of state practice in support of this doctrine. The only examples of support in the UN Charter era might be the creation of Bangladesh²⁴³ and possibly the dissolution of the SFRY.²⁴⁴ In the case of Kosovo, it has been established that internal self-determination was denied to ethnic Albanians after 1989²⁴⁵ and gross human rights violations took place²⁴⁶—the circumstances that arguably make remedial secession justifiable.

Loizidou v. Turkey, 23 Eur. Ct. H.R. 513, 535 (1996) (Wildhaber, J., concurring).

241. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the *Aaland Islands* Question, League of Nations O.J., Spec. Supp. No. 3, at 21 (1920) [hereinafter *Aaland Islands Case*].

242. See, e.g., CRAWFORD, *supra* note 76, at 120 ("[E]xternal self-determination may sometimes be justified as the only method of preventing systematic oppression of a people within a State."); Tancredi, *supra* note 195, at 175 ("[S]ecessionist self-determination' model" has been confined to the "specific case of decolonization" but that some proponents "affirm that contemporary international law also recognises this function in cases of 'extreme persecution.'"); see also Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 134 (Can.) ("The *Vienna Declaration* requirement that governments represent 'the whole people belonging to the territory without distinction of any kind' adds credence to the assertion that . . . a complete blockage [of a people's right to exercise self-determination internally] may potentially give rise to a right of secession.").

243. See CRAWFORD, *supra* note 76, at 393 (arguing that Bangladesh did not become a member of the UN before Pakistan recognized it as a state, and, thus, the approval of a parent state for secession was subsequently granted). However, even before its admission to the UN, Bangladesh was widely recognized as a state (despite the Indian intervention). *Id.* Crawford argues that the secession of Bangladesh could be understood as "remedial," i.e., as a means of ending of the oppression conducted by the central government of Pakistan, or possibly, that "the acceptance of its secession following the withdrawal of the Pakistan Army . . . merely produced a *fait accompli*, which in the circumstances other States had no alternative but to accept." *Id.*

244. See McCorquodale, *supra* note 193, at 880 ("After the recognition by the international community of the disintegration as unitary States of the Soviet Union and Yugoslavia, it could now be the case that any government which is oppressive to peoples within its territory may no longer be able to rely on the general interest of territorial integrity as a limitation on the right of self-determination."). In the case of the SFRY, the secessions of Slovenia and Croatia were initially in question. However, this process later became referred to as dissolution. See Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (Nov. 29, 1991), reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 415.

245. See *supra* Part II.A.2.

246. See *supra* note 82.

However, this situation was put to an end by the NATO intervention²⁴⁷ and subsequent adoption of Resolution 1244,²⁴⁸ which reestablished self-governing institutions in Kosovo and ended the oppression of ethnic Albanians.²⁴⁹ In regard to the final settlement for the status of Kosovo, Serbia has been willing to accept a high degree of self-government in Kosovo.²⁵⁰ Further, the end of the Milošević regime in Serbia and democratic change in 2000 arguably gave reasonable assurances that the situation resolved in 1999 would not be repeated.²⁵¹ Consequently, it is difficult to perceive Kosovo's secession in 2008 as a last resort for preventing oppression. At the same time, however, one cannot deny that human rights violations and oppression led to the effective situation established in 1999.²⁵² Thus, there is a tenable argument that the entitlement of Kosovo Albanians to remedial secession was born in the years of oppression but was exercised with a delay. However, even with this interpretation the crucial element of remedial secession—the last resort—seems to be missing.²⁵³

A more persuasive argument in favor of remedial secession might be made if secession were in question in 1999. This was not the case, however, and even Resolution 1244 only describes an interim administration and a political process leading toward a final settlement—without providing an independence clause, should this process be unsuccessful.²⁵⁴ Two further observations on remedial secession: (1) some states recognizing Kosovo arguably still resort to

247. See *supra* Part II.A.3.

248. See *supra* Part II.B.1.

249. See *supra* note 125 and accompanying text.

250. See *supra* note 176 and accompanying text.

251. See KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT, *supra* note 149, at x. Writing in 2002, Tomuschat asked whether it was possible to overturn the Security Council Resolution 1244, since democracy seemed to be established in Yugoslavia and the end of the Milošević regime brought an opportunity for negotiations. *Id.* The political reality is, however, expressed in O'NEILL, *supra* note 147, at 30.

A change in regime in Belgrade was . . . not sufficient; some Albanians said that Mahatma Gandhi, if he were alive, could become the president of Yugoslavia and they would still want independence. This overwhelming sentiment was confirmed . . . when Vojislav Kostunica became president of Yugoslavia, ousting Milosevic. The Albanian leadership and press in Kosovo virtually ignored the momentous change in Belgrade in October 2000, maintaining that whatever happened in Serbia had no bearing at all in Kosovo.

Id.

252. See *supra* Part II.B.

253. Cf. *supra* note 241 and accompanying text (describing how secession is viewed as a "last resort").

254. See S.C. Res. 1244, *supra* note 7. For an analysis of Resolution 1244, see Part II.B.1.

the language of remedial secession;²⁵⁵ and (2) even if Kosovo is not a clear example of remedial secession, this does not mean that its secession was per se illegal.

As previously established, there is no right to unilateral secession under international law.²⁵⁶ On the other hand, the absence of such a right does not imply that unilateral secession as such is an illegal act: "The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."²⁵⁷ In regard to the position of unilateral secession in international law, the Supreme Court of Canada in the *Quebec* case made the following observation:

Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.²⁵⁸

Based on the *Quebec* case, the next Part examines what criteria are applied when states decide to grant recognition and under what circumstances collective nonrecognition applies. Subsequently, the Article examines the role of recognition in the creation of new states when unilateral secession is in question and applies these findings to Kosovo.

IV. KOSOVO AND STATEHOOD CRITERIA

A. The Traditional Statehood Criteria and Kosovo

The Montevideo Convention on Rights and Duties of States in its Article 1 provides: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states."²⁵⁹ These provisions have acquired the

255. See *infra* notes 396–98 and accompanying text.

256. See *supra* Part II.A.3.

257. CRAWFORD, *supra* note 76, at 390.

258. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155 (Can.).

259. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

status of customary international law.²⁶⁰ However, “the question remains whether these criteria are sufficient for Statehood, as well as being necessary.”²⁶¹ There is no doubt that Kosovo has a permanent population, as well as a defined territory in its historic borders.²⁶² More problematic may be the criteria of government and the capacity to enter into relations with other states.

The criterion of government has been described as “the most important single criterion of statehood, since all the others depend upon it.”²⁶³ This is so because “[g]overnmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial.”²⁶⁴ The government of a state not only needs to exist as an authority but also needs to exercise effective control within the territory of the state and operate independently from the authority of governments of other states.²⁶⁵ In this regard, the International Commission of Jurists held that the Finnish Republic during 1917 and 1918 did not become a sovereign state “until the public authorities had become strong enough to assert themselves throughout the territories of that State without the assistance of foreign troops.”²⁶⁶

Resolution 1244 and the Constitutional Framework established Kosovo’s government.²⁶⁷ Further, based on Resolution 1244, Serbia

260. The [Montevideo] Convention is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law. There is some evidence, however, to suggest that these requirements, which are concerned solely with the effectiveness of the entity claiming the rights and duties of a state, have recently been supplemented by others—*independence achieved (i) in accordance with the principle of self determination, and (ii) not in the pursuance of racist policies.*

DAVID HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 99 (2004).

261. MARTIN DIXON & ROBERT MCCORQUODALE, *CASES AND MATERIALS IN INTERNATIONAL LAW* 137 (2003).

262. See *supra* Part II.A.1. The Article leaves discussion of the problem of the Serbian secessionist movement in the northern part of Kosovo after the declaration of independence for a later date.

263. CRAWFORD, *supra* note 76, at 56.

264. *Id.*

265. See ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 136–37 (2005) (“There must be a central government operation as a political body within the law of the land and in effective control over the territory The government must be sovereign and independent, so that within its territory it is not subject to authority of another state.”); see also RAIĆ, *supra* note 201, at 75 (defining independence of a state as possessing “the *legal capacity* to act as it wishes, within the limits given by international law”).

266. Aaland Islands Case, *supra* note 241, at 8–9.

267. See *supra* notes 140–41 and accompanying text.

effectively lost its control over Kosovo.²⁶⁸ Consequently, one could say that Kosovo has a government independent of Serbia. Yet, under the statehood criterion of government, independence of all other governments—not only of one particular government—is required.²⁶⁹ Because Resolution 1244 remains in force even after Kosovo's declaration of independence—there is still international territorial administration present²⁷⁰—it is questionable whether Kosovo really has such a government.²⁷¹

Kosovo is not the only example of a state put under international administration with significant powers in internal decision making, whereby international administration might override the decisions of state authorities.²⁷² Despite the extensive power of the international administration, it is not disputed that Bosnia-Herzegovina is a state. Kosovo may thus qualify as a protected state, and its status could indeed be regarded as similar to that of Bosnia-Herzegovina.²⁷³

As to restraints on independence, Charlesworth and Chinkin argue that they do not infringe upon statehood if they are accepted voluntarily.²⁷⁴ Further, statehood criteria are considered during the process of the creation of a new state. Once a state has acquired statehood, it is difficult to lose, even when the effectiveness-based criteria are no longer met. A clear example of such a state is Somalia, which continues to be recognized as a state, although its government does not exercise effective control over its territory.²⁷⁵ Differences between the voluntariness of restraints on independence in Bosnia-Herzegovina bear a closer look.

Bosnia-Herzegovina first obtained recognitions after the declaration of the results of the referendum on independence on March 6, 1992,²⁷⁶ and was admitted to the UN on May 22, 1992.²⁷⁷ The current federal arrangement for Bosnia-Herzegovina, however, was established by the General Framework Agreement for Peace in

268. See *supra* notes 147–49 and accompanying text.

269. See *supra* note 265 and accompanying text.

270. See KOSOVO DECLARATION OF INDEPENDENCE arts. 1, 5 (2008).

271. For more on the relationship between the Kosovo authorities and the international administration, see Part II.B.1.

272. See *supra* text accompanying notes 136–39.

273. For more on the status of Bosnia-Herzegovina, see CRAWFORD, *supra* note 76, at 528–30.

274. See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 134 (2000) (“[A] fully sovereign entity can only voluntarily accept restraints on its activities.”).

275. CRAWFORD, *supra* note 76, at 91–92.

276. The EC member states recognized Bosnia-Herzegovina on April 6, 1992. *Id.* at 398.

277. See G.A. Res 46/237, ¶ 3, U.N. Doc. A/RES/46/237 (May 22, 1992). Recognition of Bosnia-Herzegovina was not without controversy since the central government was obviously not in effective control over the territory of the state. For more information, see, for example, RAIĆ, *supra* note 201, at 414–18.

Bosnia and Herzegovina, signed in Dayton, Ohio, on November 21, 1995.²⁷⁸ The parties to this agreement were the Republic of Bosnia-Herzegovina, the Republic of Croatia, the FRY, the Federation of Bosnia and Herzegovina, and the Republika Srpska.²⁷⁹ This arrangement also foresaw the institution of the High Representative, which severely limited sovereign powers of the authorities of Bosnia-Herzegovina.²⁸⁰ Thus, the limitation on the independence of its government was accepted by Bosnia-Herzegovina voluntarily and after it had already become a state. In contrast, Resolution 1244 and the Constitutional Framework were adopted before Kosovo declared independence.²⁸¹ Provisions of both remained in force after Kosovo's declaration of independence, which implies that Kosovo did not accept restrictions to independence on its government voluntarily but in order to comply with the preexisting legal arrangements governing its territory.²⁸² Thus, Kosovo's meeting of the independent government criterion for statehood might be considered deficient.

The criterion of the capacity to enter into relations with other states also poses a problem for Kosovo. Such a capacity is a corollary of the sovereign and independent government, which exercises jurisdiction on the territory of the state,²⁸³ and thus "a consequence of statehood, not a criterion for it."²⁸⁴ This criterion is thus self-fulfilling: Kosovo has the capacity to enter into relations with states that have recognized it as a state. However, it does not have this capacity vis-à-vis those states that have not recognized it. Since these issues are inherently associated with the question of recognition, they are more thoroughly examined in the next Part.

B. *The Additional Statehood Criteria and Kosovo*

1. The Additional Statehood Criteria: General Doctrine

The Montevideo criteria are commonly criticized for being "essentially based on the principle of effectiveness,"²⁸⁵ as nineteenth-

278. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, *Bosn. & Herz.-Croat.-Yugo.*, 35 I.L.M. 75, available at http://www.ohr.int/dpa/default.asp?content_id=379 [hereinafter Dayton Accords].

279. *Id.*

280. *Id.* annex 10.

281. See *supra* Part.II.B.1.

282. See Resolution 1244, *supra* note 7, ¶ 5.

283. See, e.g., CHARLESWORTH & CHINKIN, *supra* note 274, at 133 ("Sovereignty means both full competence to act in the external arena, for example by entering into treaties or by acting to preserve state security, and exclusive jurisdiction over internal matters."); see also AUST, *supra* note 265, at 136-37 (arguing that capacity to enter into relations with other states is a corollary of a sovereign and independent government).

284. CRAWFORD, *supra* note 76, at 61.

285. *Id.* at 97.

century international law was ready to acknowledge statehood of any entity fulfilling the traditional statehood criteria and showing sufficient durability of its existence.²⁸⁶ In contemporary international law, there exists evidence that effectiveness is no longer the only principle governing the law of statehood.

The criteria commonly described as “additional” go beyond effectiveness and do not originate specifically in the law of statehood but have developed in other fields of international law that also impact the law of statehood. Commonly identified additional criteria include: prohibition of the illegal use of force, respect of the right of self-determination, and prohibition of racial discrimination.²⁸⁷

Article 2(4) of the UN Charter expresses the prohibition of the use of force.²⁸⁸ Crawford writes that the protection of states accorded in this article

extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness [However,] [t]he question is whether modern law regulates the creation of states to any greater degree than this, in a situation involving illegal use of force.²⁸⁹

Accordingly, international law protects existing states from their international personality being extinguished, although this might be contrary to a state’s effective situation.²⁹⁰

286. See RAIC, *supra* note 201, at 57.

287. See Gerald McGinley, *The Creation and Recognition of States*, in PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 193 (Sam Blay, et al. eds., 2005). See generally CRAWFORD, *supra* note 76, at 107–55 (discussing several criteria commonly considered additional criteria for statehood and self-determination). It needs to be noted that the concept of the additional statehood criteria has not been accepted by all authors. For a critical perspective on the additional statehood criteria, see generally Stefan Talmon, *The Constitutive Versus the Declaratory Doctrine of Recognition: Tertium Non Datur?*, 75 BRIT. Y.B. INT’L L. 101 (2005) (arguing that the additional statehood criteria are in fact recognition requirements).

288. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

289. CRAWFORD, *supra* note 76, at 132.

290. See S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990). S.C. Res. 662 proclaimed as null and void the Iraqi annexation of Kuwait, which may serve as an example of nonrecognition of an effective situation because of a prior illegality. The Security Council (1) decided that

[A]nnexation of Kuwait by Iraq under any form has no legal validity, and is considered null and void; [(2) called] upon all States, international organizations and specialized agencies not to recognize the annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation; [and (3) further demanded] that Iraq rescind its actions purporting to annex Kuwait.

The question remains of how the prohibition of the use of force relates to entities wishing to become states. The issue relates to both the traditional statehood criteria and the right of self-determination. If an entity is established in the territory of one state as a consequence of the illegal use of force by another state, the entity might not really be independent of any other state. Statehood can thus be denied based on the traditional criteria. An example of such an entity in the UN Charter era is the Turkish Republic of Northern Cyprus (TRNC), which is regarded as nothing but "the consequence of Turkey's invasion and continued occupation of Cyprus."²⁹¹ Further, the Security Council resolutions²⁹² affirmed that the TRNC was created as the result of an illegal use of force, and states were consequently called upon not to recognize this entity as a state, despite the effective situation of a *de facto* partitioned island. Although none of the Security Council Resolutions were adopted under Chapter VII, virtually full compliance was achieved, with Turkey remaining the only state that has recognized the TRNC.²⁹³

According to one argument, the right of self-determination in the law of statehood has softened the traditional criterion of effective government: "The evolution of self-determination has affected the standard necessary as far as the actual exercise of authority is concerned, so that it appears a lower level of effectiveness, at least in decolonization situations, has been accepted."²⁹⁴ While the right of self-determination may justify creation of a new state even when effectiveness-based criteria are not met (as was the case in colonial situations), self-determination might also override effectiveness in the other direction—if statehood can be denied to an effective entity created in violation of the right of self-determination.

Examples of such violations are Southern Rhodesia and the South African "Homelands."²⁹⁵ In the example of Southern Rhodesia, the white minority government—not representative of the entire

291. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 110 (1987).

292. See S.C. Res. 550, U.N. Doc. S/RES/550 (May 11, 1984) (condemning all "secessionist actions" and declaring them "illegal and invalid"); S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983) (noting that the "attempt" to create TRNC was "invalid").

293. See RAIČ, *supra* note 201, at 125.

294. MALCOLM SHAW, *INTERNATIONAL LAW* 183 (2003); see also *id.* at 1843–84 (providing examples of the Congo and of Guinea-Bissau). The Congo became an independent state on June 30, 1960, although the province of Katanga declared its secession. The central government did not exercise effective control and there even existed two competing factions claiming to be the government of the Congo. Guinea-Bissau declared independence on September 24, 1973, which was accepted by a majority of states in the General Assembly, although the rebel forces controlled between two-thirds and three-quarters of the territory. *Id.*

295. These situations are not only examples of entities created in breach of the right of self-determination but also of entities created in pursuance of racist policies.

population—declared independence.²⁹⁶ An effective entity was established while the right of self-determination was denied to the black majority.²⁹⁷ The situation was addressed in several resolutions of the Security Council²⁹⁸ and the General Assembly,²⁹⁹ which affirmed the breach of the right of self-determination and the pursuance of racist policies by the government of Southern Rhodesia. After Southern Rhodesia proclaimed itself a republic³⁰⁰ on March 18, 1970, the Security Council, acting under Chapter VII, adopted Resolution 277, in which it called this declaration illegal and called for states not to recognize the entity as a state.³⁰¹ Hillgruber argues that violation of the right of self-determination meant an “[unhealable] failure at birth” that was determinant for the entity—it never became a state.³⁰²

In the example of the South African Homelands, territorial entities were created in order to prevent self-determination of a larger unit.³⁰³ Despite the effective situation, none of these entities were at any point considered a state.³⁰⁴ The General Assembly³⁰⁵ and Security Council³⁰⁶ adopted several resolutions that condemned

296. RAIČ, *supra* note 201, at 128–34.

297. CRAWFORD, *supra* note 76, at 129.

298. See S.C. Res. 277, U.N. Doc. S/RES/277 (Mar. 18, 1970) (calling upon Member States to refrain from assisting the regime); S.C. Res. 217, U.N. Doc. S/RES/217 (Nov. 20, 1965) (calling upon the UK to “quell this rebellion of the racist minority”); S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965) (condemning the declaration of independence by an “illegal racist minority” and calling on all states not to recognize this regime); S.C. Res. 202, U.N. Doc. S/RES/202 (May 6, 1965) (instructing the UK not to transfer “any of the powers or attributes of sovereignty”).

299. G.A. Res. 2024 (XX), U.N. Doc. A/2024 (Nov. 11, 1965); G.A. Res. 2022 (XX), U.N. Doc. A/2022 (Nov. 5, 1965).

300. Southern Rhodesia proclaimed itself a republic on March 2, 1970. DUGARD, *supra* note 291, at 92. Southern Rhodesia otherwise adopted the Universal Declaration of Independence (UDI) on November 11, 1965, but at that time it aimed to remain within the Commonwealth. See *id.* at 90. Both the General Assembly and the Security Council adopted a number of resolutions calling for nonrecognition after the UDI, but none of these Security Council resolutions were adopted under Chapter VII. See G.A. Res. 2024 (XX), *supra* note 299, ¶ 1 (condemning the “unilateral declaration of independence made by the racist minority”); S.C. Res. 217, *supra* note 298, ¶ 1 (noting that the situation resulting from the illegal declaration of independence is “extremely grave”); S.C. Res. 216, *supra* note 298, ¶ 2 (calling upon all States not to recognize the regime and to refrain from rendering any assistance to it).

301. S.C. Res. 277, *supra* note 298, ¶¶ 1–2.

302. CHRISTIAN HILLGRUBER, DIE AUFNAHME NEUER STAATEN IN DIE VÖLKERRECHTSGEMEINSCHAFT [THE ADMISSION OF NEW STATES IN THE INTERNATIONAL LAW COMMUNITY] 601 (1998).

303. CRAWFORD, *supra* note 76, at 128.

304. DUGARD, *supra* note 291, at 101.

305. See G.A. Res. 31/6, art. A, U.N. Doc. A/RES/31/6 (Oct. 26, 1976); G.A. Res. 2775 (XXV), U.N. Doc. A/RES/2775 (Nov. 29, 1971); G.A. Res. 2671 (XXV), art. F, U.N. Doc. A/RES/2671 (Dec. 8, 1970).

306. See S.C. Res. 417, ¶¶ 1, 6, U.N. Doc. S/RES/417 (Oct. 31, 1977) (condemning the racist South African regime and noting that all of the South African people as a whole have a right of self-determination).

the creation of the South African Homelands as a means of preventing a larger territory from exercising the right of self-determination.³⁰⁷ None of the Security Council resolutions were adopted under Chapter VII of the UN Charter; nonetheless, the resolutions gained full compliance of third-party states.³⁰⁸

It can be concluded that there exists a practice of states and UN organs suggesting that an effective entity cannot become a state if its creation is in violation of the right of self-determination.³⁰⁹ The right of self-determination thus plays an important role in the creation of a state. Indeed, "the exercise of the right of [self-determination] will either create a state or it will be a determinant in the creation of a state."³¹⁰

2. The Additional Statehood Criteria: Does Kosovo Meet Them?

Kosovo Albanians, who represent roughly ninety percent of the Kosovo population, probably qualify as a people for the purpose of the right of self-determination.³¹¹ According to the Constitutional Framework, Kosovo's Parliament is elected according to democratic principles.³¹² Consequently, when Kosovo's parliament declared independence,³¹³ it acted as a representative of the people of Kosovo.

An argument could be made that no popular consultation on the change of the legal status of Kosovo was held in the era of the effective situation established by Resolution 1244. A popular consultation took place in September 1991 under significantly different circumstances.³¹⁴ The legality of the referendum, which was part of an underground political activity of Kosovo Albanians, is a matter of dispute.³¹⁵ Due to its underground nature, its results may formally be unreliable, and it may also be argued that the procedures at that time were not carried out by competent constitutional organs.

307. See, e.g., RAIČ, *supra* note 201, at 134–41.

308. See DUGARD, *supra* note 291, at 102–03 ("[T]he creation of the homeland States violates norms of international law dealing with self-determination and human rights . . . and that States are under a general legal obligation to withhold recognition of such an illegality.").

309. See CRAWFORD, *supra* note 76, at 131.

310. McCorquodale, *supra* note 193, at 287. McCorquodale adds a caveat that a possible restriction affecting people's choice in the exercise of the right of self-determination might be the principle of *uti possidetis juris*, initially applied in colonial situations but later adopted even by the Badinter Commission in the territory of the former SFRY. *Id.* He, however, does not endorse the *uti possidetis* limitation. *Id.*

311. See *supra* Part III.A.2.

312. See *supra* note 144 and accompanying text.

313. See *supra* note 184–85 and accompanying text.

314. See *supra* text accompanying note 76 (noting that only Albania recognized the results of the referendum).

315. *Id.*

Yet, the suspension of Kosovo's autonomy was itself carried out in breach of the constitutional order and in breach of the right of self-determination.³¹⁶ Despite these procedural objections, there exists no doubt that independence is the wish of virtually all ethnic Albanians in Kosovo and thus of roughly ninety percent of Kosovo's population.³¹⁷ As follows from the reasoning of the ICJ in the Western Sahara Advisory Opinion³¹⁸ and the Badinter Commission in the opinion on Bosnia-Herzegovina,³¹⁹ there might exist circumstances in which the will of people is obvious and a public consultation is not necessary. Kosovo might be such an example, as there indeed exists no doubt regarding the will of Kosovo Albanians.

In the context of the use of force, it must be considered whether the creation of the state of Kosovo is a result of the NATO intervention. As argued above, the NATO intervention was a violation of the applicable norm of international law on the use of force, although legitimacy arguments based on ethical grounds are available.³²⁰ Consequently, it remains an open question whether the illegality of the NATO intervention can determine the illegality of the creation of the state of Kosovo.

On one argument, the NATO intervention did not cause Kosovo's declaration of independence.³²¹ If it did, it may have been justified as remedial secession supported by external use of force and would, as such, draw parallels to Bangladesh.³²² Instead, based on the authority of Resolution 1244, the international administration and self-governing organs were established.³²³ Ultimately, these self-

316. See *supra* Part II.A.2.

317. The Ahtisaari Plan, *supra* note 166, ¶ 2; see also *supra* text accompanying note 168.

318. Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16). The ICJ held that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned." *Id.* at 32. The Court, however, continued:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.

Id. at 33.

319. See Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member States, ¶¶ 3-4 (Jan. 11, 1992), reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 486.

320. See *supra* notes 114-17 and accompanying text.

321. See *supra* note 252-53 and accompanying text.

322. See *supra* note 243-44 and accompanying text.

323. See *supra* Part II.B.2.

governing organs proclaimed independence.³²⁴ The declaration of independence thus arose from the legal arrangement put in place by Resolution 1244, which enabled Kosovo Albanians to consummate the applicable right of self-determination.³²⁵

Consequently, the creation of the state of Kosovo can only be attributed to the post-conflict legal arrangement established by Resolution 1244 and the exercise of the right of self-determination. The conclusion that follows is that the illegality of the NATO intervention does not influence the question of legality of the creation of the state of Kosovo. The legality of the state creation of Kosovo is, therefore, not disputable under the additional statehood criteria.

V. KOSOVO AND RECOGNITION

A. Recognition Theories, Collective Nonrecognition, and Kosovo

1. Constitutive and Declaratory Theories

According to Shaw, recognition is “a method of accepting factual situations and endowing them with legal significance, but this relationship is a complicated one.”³²⁶ Indeed, the relationship between factual situations and the creation of legal rights by the act of recognition remains a controversial issue in international law, because the act has legal consequences while it is “primarily based on political or other non-legal considerations.”³²⁷

Traditionally two theories of recognition were developed: constitutive and declaratory. The constitutive theory perceives recognition as “a necessary act before the recognized entity can enjoy an international personality,”³²⁸ while the declaratory theory perceives it as “‘merely’ a political act recognizing a preexisting state of affairs.”³²⁹

In regard to the constitutive theory of recognition, the question of “whether or not an entity has become a state depends on the actions [i.e., recognitions] of existing states.”³³⁰ However, the situation in which one state may be recognized by some states, but not by others, is an evident problem and thus a great deficiency of the constitutive

324. See *supra* notes 184–85 and accompanying text.

325. Cf. *supra* Part II.B.2.

326. SHAW, *supra* note 294, at 185.

327. McGinley, *supra* note 287, at 193.

328. DIXON & MCCORQUODALE, *supra* note 261, at 154.

329. *Id.*

330. THOMAS GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 2* (1999).

theory.³³¹ In the absence of a central international authority for granting of recognition, this would mean that such an entity at the same time has and does not have an international personality.³³²

Most writers have adopted a view that recognition is declaratory.³³³ This means that a "state may exist without being recognized, and if it does exist, in fact, then whether or not it has been formally recognized by other states, it has a right to be treated by them as a state."³³⁴ According to this view, when recognition actually follows, other states merely recognize a preexisting situation. However, this answer is not entirely satisfactory, as it is not evident why the act of recognition is still important. Indeed:

It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognising it as such. If it were to acquire this legal status before and independently of recognition by the existing states . . . this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state.³³⁵

As a result there would be virtually no consequences of nonrecognition. As Hillgruber further argues: "Legal personality under international law, which non-recognition was intended to prevent, would already have been acquired, and non-recognition would then in a sense be futile . . . without this flaw [of non-recognition] having any significant legal consequences under international law."³³⁶ Thus, despite the general perception of recognition as declaratory, it sometimes has constitutive elements because international personality depends on recognition.³³⁷

As the *Quebec* case indicated, in the examples of unilateral secession, recognition might have constitutive effects.³³⁸ Further, Crawford argues that

in many cases, and this is true of the nineteenth century as of the twentieth, international action has been determinative [for new state creations]: international organizations or groups of States—especially the so-called 'Great Powers'—have exercised a collective authority to supervise, regulate and condition . . . new state creations. In some cases the action takes the form of the direct establishment of the new State: a constitution is provided, the State territory is delimited, a head

331. JAMES BRIERLY, *THE LAW OF NATIONS* 138 (1963).

332. *Id.*

333. See HARRIS, *supra* note 260, at 144–45 ("The better view is that the granting of recognition to a new state is not a 'constitutive' act but a 'declaratory' act; it does not bring into legal existence a state which did not exist before.")

334. BRIERLY, *supra* note 331, at 138.

335. Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491, 494 (1998).

336. *Id.*

337. *Id.*

338. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155 (Can.).

of State is nominated. In others it is rather a form of collective recognition—although the distinction is not a rigid one. Alternatively, various international regimes have been established for particular territories or groups of territories, with eventual independence in view—in particular, the Mandate and Trusteeship systems, and the procedures established under Chapter XI of the [UN] Charter.³³⁹

Crawford rejects the constitutive theory;³⁴⁰ however, this observation implies that collective state creations are not only a matter of direct multilateral efforts such as, for example, at the Congress of Berlin³⁴¹ or settlements after both world wars.³⁴² Collective recognition can also have constitutive effects, and it is sometimes difficult to distinguish it from collective state creations. This is especially the case when the territorial status of an entity is unclear or there exists a competing claim to territorial integrity by a parent state.

2. The Doctrine of Collective Nonrecognition and Kosovo

The doctrine of collective nonrecognition of illegally created effective entities has been developed in the practice of the UN and possibly even originates in the practice of the League of Nations.³⁴³ There exists extensive practice of both the General Assembly and the Security Council calling for collective nonrecognition; in the case of Southern Rhodesia, the Security Council acted under Chapter VII.³⁴⁴ While one argument offers that such a “resolution or decision makes the obligation [of nonrecognition] definitive,”³⁴⁵ nonrecognition has also been practiced “in a number of other situations without a formal United Nations resolution to that effect (e.g., East Timor).”³⁴⁶ This means that, in the absence of a special resolution or treaty, the obligation of nonrecognition can also apply under customary international law.³⁴⁷ However, in the absence of a resolution in which “the incidents of non-recognition will normally be spelt [sic] out

339. CRAWFORD, *supra* note 76, at 501.

340. *Id.* at 27.

341. *Id.* at 509.

342. *Id.* at 516–522.

343. The example of nonrecognition of Manchukuo is often invoked as such an example in the era of the League of Nations. For more on Manchukuo, see DUGARD, *supra* note 291, at 27–35.

344. For further information on the Southern Rhodesia case, see *supra* notes 298–301 and accompanying text; for discussion of the TRNC situation, see *supra* note 291 and accompanying text; for information on the South African “Homelands” circumstances, see *supra* notes 305–06 and accompanying text.

345. McGinley, *supra* note 287, at 197.

346. CRAWFORD, *supra* note 76, at 159.

347. *Id.* at 162.

in the instruments,”³⁴⁸ it is open for debate which circumstances trigger collective nonrecognition under customary international law.

Dugard has suggested that the obligation to withhold recognition applies when an effective entity is created in breach of *jus cogens*:

An act in violation of a norm having the character of *jus cogens* is illegal and is therefore null and void. This applies to the creation of States, the acquisition of territory and other situations, such as the case of Namibia. States are under a duty not to recognize such acts.³⁴⁹

The duty of nonrecognition of an effective entity created in breach of *jus cogens* also stems from Articles 40 and 41 of the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts. Article 40 provides:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systemic failure by the responsible State to fulfill the obligation.³⁵⁰

Further, according to Article 41, “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance maintaining that situation.”³⁵¹

This raises the question of whether recognition may be granted in situations of secession where *jus cogens* is not breached and nonrecognition is not owed *erga omnes*. In this regard Crawford argues: “[R]ecognition of an unlawful situation is not necessarily forbidden by international law. A State directly affected may waive its rights in a particular matter, or other States may waive any interest they may have in observance of the rule in question.”³⁵²

Once again, as the Supreme Court of Canada observed in the *Quebec* case regarding unilateral secession: “The ultimate success of such a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession”³⁵³ Reference to legality might imply that, in situations where a peremptory norm is not breached and

348. *Id.*

349. DUGARD, *supra* note 291, at 135.

350. Responsibility of States for Intentionally Wrongful Acts, G.A. Res. 56/83, Annex art. 40, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001) [hereinafter ILC Articles on Responsibility]. These articles have not been codified in a form of a treaty; however, they are influential in practice. See HARRIS, *supra* note 260, at 63–64 (arguing that the draft articles “have been already cited by both the I.C.J. and the International Tribunal on the law of the Sea” and that that ILC’s texts may be regarded as sources of international law “at least in the category of writings of the more qualified publicists”) (quoting 1 INTERNATIONAL LAW: COLLECTED PAPERS OF HERSCH LAUTERPACHT 445 (Elihu Lauterpacht ed., 1970)).

351. ILC Articles on Responsibility, *supra* note 350, annex, art. 41, ¶ 2.

352. CRAWFORD, *supra* note 76, at 158.

353. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 155 (Can.).

nonrecognition is not owed *erga omnes*, states may consider recognizing a secession stemming from a violation of the territorial integrity of a parent state. Reference to the legitimacy of secession suggests that in situations in which the obligation of nonrecognition does not apply, states may still resort to nonlegal criteria when deciding whether to grant of recognition.

Since it has been established that the creation of the state of Kosovo is not attributable to the NATO intervention, it cannot be argued that it was established as a result of an unlawful use of force.³⁵⁴ Likewise, it has been established that the state of Kosovo was not created in violation of the right of self-determination.³⁵⁵ Given the number of recognitions,³⁵⁶ it should be concluded that collective nonrecognition is not applicable here.³⁵⁷ Further, the Security Council has not passed a resolution calling for collective nonrecognition of Kosovo, and, given the fact that three permanent members of the Security Council have already granted recognition,³⁵⁸ such a resolution cannot be expected. However, dispute remains as to whether the obligation of nonrecognition applies under Resolution 1244.

B. Resolution 1244, Secession, and Recognition

1. General Observations

It has been argued that territorial integrity is explicitly invoked in the preamble to Resolution 1244, while the operative articles are more ambiguous.³⁵⁹ Under the main responsibilities of the international civil presence, the Resolution invokes “[f]acilitating a political process designed to determine Kosovo’s future status, taking

354. See KOSOVO DECLARATION OF INDEPENDENCE art. 1 (2008) (detailing the unilateral declaration of Kosovo as an independent state); *supra* Part IV.B.2 (discussing the legality of the establishment of Kosovo as an autonomous province).

355. See *supra* note 317 and accompanying text (addressing the fact that the independence of Kosovo was the desire of the large majority of the population); *supra* Part IV.B.2 (describing the manner in which the creation of the state of Kosovo did not violate the right of self-determination).

356. See *supra* note 10 and accompanying text (listing the states recognizing Kosovo).

357. Reference to the number of recognitions does not imply that a certain number of recognitions would constitute statehood. Rather, this suggests that in the context of Kosovo—unlike the examples of Southern Rhodesia, the South African Homelands, and the TRNC—nonrecognition is not universally practiced. See *supra* Part IV.B.1 (discussing statehood criteria).

358. See *supra* note 10 and accompanying text.

359. See *supra* Part II.B.1 (addressing the treatment of territorial integrity in Resolution 1244).

into account the Rambouillet accords”³⁶⁰ and “[i]n a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement.”³⁶¹ These provisions do not expressly exclude any particular solution in advance. It may be argued that a possible limitation of the choice of the future status is set by a reference to the Rambouillet Accords, which foresaw Kosovo’s self-government within the FRY and Serbia.³⁶² Yet, the formulation “taking into account the Rambouillet accords” seems to be relatively mild if it aimed to confine the political process leading to the determination of the degree of Kosovo’s autonomy within Serbia. Thus, one can say that the Resolution stipulated for an open-ended political process leading toward a final settlement.

At the same time, the political process leading toward a final settlement was not defined as a process of leading Kosovo into independence or of establishing the right of Kosovo Albanians to secession.³⁶³ The question, therefore, is whether Resolution 1244 allows for a negotiated creation of the state of Kosovo but precludes recognition of a unilateral secession, particularly in light of references to territorial integrity in the preamble.³⁶⁴ Competing views on this question are discussed in the following Part.

2. Serbia and Russia

Prior to Kosovo’s declaration of independence, the government of the Republic of Serbia, on February 14, 2008, adopted a decree that proclaimed Kosovo’s Declaration of Independence null and void in advance.³⁶⁵ A day after the Declaration of Independence was adopted, on February 18, 2008, the government’s decree was confirmed by the National Assembly of Serbia.³⁶⁶ The decree

360. Resolution 1244, *supra* note 7, ¶ 11(e).

361. *Id.* ¶ 11(f).

362. See *supra* notes 108–09 and accompanying text (addressing the right to self-determination in the Rambouillet Accords).

363. Cf. Resolution 1244, *supra* note 7, ¶¶ 9–10 (describing the aims of the Security Council as largely concentrated on ensuring a safe and secure environment, while respecting the sovereignty of the Federal Republic of Yugoslavia and other states in the region).

364. See *supra* note 126 and accompanying text.

365. Odluka o Poništavanju Protivpravnih Akata Privremenih Organa Samouprave na Kosovu i Metohiji o Proglašenju Jednostrane Nezavisnosti [Decision on the Annulment of the Illegitimate Acts of the Provisional Institutions of Self Government in Kosovo and Metohija in their Declaration of Unilateral Independence] [hereinafter *The Decree*], *translation available at* <http://www.mfa.gov.yu/Facts/annul.html>.

366. Odluka Narodne Skupštine Srbije o Potvrđivanju Odluke Vlade Republike Srbije o Poništavanju Protivpravnih Akata Privremenih Organa Samouprave na Kosovu i Metohiji o Proglašenju Jednostrane Nezavisnosti [The Decree on Confirmation of the Decree of the Government of the Republic of Serbia on the

annulled those acts of the self-governing organs in Kosovo that proclaimed Kosovo's independence,³⁶⁷ confirmed that Kosovo is an integral part of Serbia,³⁶⁸ confirmed that all citizens of the autonomous province of Kosovo are considered equal citizens of Serbia,³⁶⁹ declared the willingness of the government of Serbia to extend Serbian legal order to Kosovo,³⁷⁰ and demanded that all states respect the sovereignty and territorial integrity of the Republic of Serbia.³⁷¹

The annulment of acts by Kosovo's organs declaring independence has, however, no legal effect because organs of Serbia have no authority over Kosovo.³⁷² Thus, while Serbia has the right, under international law, to oppose the secession of Kosovo with all legal means,³⁷³ the legal arrangement for Kosovo under Resolution 1244 severely restricts the means that Serbia has at its disposal and leaves Serbia without any effective measure under its constitutional law. Nevertheless, the decree is an express pronouncement of the fact that the parent state did not consent to Kosovo's secession. Further, the decree makes specific references to Resolution 1244, purporting that the Resolution prohibits Kosovo's secession.³⁷⁴

In his statement to the Security Council on February 18, 2008, Serbian President Boris Tadić referred to the illegality of Kosovo's succession based on Resolution 1244:

Annulment of Illegal Acts of Interim Organs of Self-Government in Kosovo and Metohija on the Unilateral Declaration of Independence], *translation available at* <http://www.srpskatelevizija.com/index.php?option=content&task=view&id=627&Itemid=>

367. The Decree, *supra* note 365, ¶ 1.

368. *Id.* ¶ 2.

369. *Id.* ¶ 3.

370. *Id.* ¶ 4.

371. *Id.* ¶ 8.

372. *See supra* notes 139–40, 146 and accompanying text (describing the outline for provisional self-government in Kosovo). The view that Serbia's annulment had no legal effect was also implied in the Decree itself, which stated Serbia's willingness to extend its legal order to Kosovo. The Decree, *supra* note 365, ¶ 4. The Decree thus acknowledged that Serbian legal order carried no force in Kosovo. By extension, organs of the Republic of Serbia do not exercise any powers in matters regarding the independence of Kosovo. Further, the call of Serbian president Boris Tadić to the Special Representative to annul the declaration of independence implicitly acknowledged that constitutional organs of the Republic of Serbia have no legal powers in the territory of Kosovo and cannot take legal action against Kosovo's independence under Serbian constitutional law. *See infra* note 376 and accompanying text.

373. *Cf.* CRAWFORD, *supra* note 76, at 388–91 (describing the emergence of the principle of territorial integrity as a significant limitation in post-colonial cases of unilateral secession).

374. The Decree, *supra* note 365, ¶¶ 1, 5, 7–8.

This illegal declaration of independence by the Kosovo Albanians constitutes a flagrant violation of Security Council resolution 1244 (1999), which reaffirms the sovereignty and territorial integrity of the Republic of Serbia, including Kosovo and Metohija

My country requests that the Security Council take effective measures in order to ensure that all the provisions of the Charter of the United Nations and of Council resolution 1244 (1999) are fully respected.³⁷⁵

President Tadić further stated:

We request the Secretary-General, Mr. Ban Ki-moon, to issue, in pursuance of the previous decisions of the Security Council, including resolution 1244 (1999), a clear and unequivocal instruction to his Special Representative for Kosovo, Joachim Rucker, to use his powers within the shortest possible period of time and declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void. We also request that Special Representative Rucker dissolve the Kosovo Assembly, because it declared independence contrary to Security Council resolution 1244 (1999). The Special Representative has binding powers, and they have been used before. I request that he use them again.³⁷⁶

The Serbian position was expressly supported by Russia, whose representative in the Security Council held:

The Russian Federation continues to recognize the Republic of Serbia within its internationally recognized borders. The 17 February declaration by the local assembly of the Serbian province of Kosovo is a blatant breach of the norms and principles of international law—above all of the Charter of the United Nations—which undermines the foundations of the system of international relations. That illegal act is an open violation of the Republic of Serbia's sovereignty, the high-level Contact Group accords, Kosovo's Constitutional Framework, Security Council resolution 1244 (1999)—which is the basic document for the Kosovo settlement—and other relevant decisions of the Security Council.³⁷⁷

375. U.N. SCOR, 63d Sess., 5839th mtg. at 4–5, U.N. Doc. S/PV.5839 (Feb. 18, 2008) [hereinafter Security Council Meeting on Feb. 18, 2008].

376. *Id.* at 5.

377. *Id.* at 6.

3. The European Union and the United States

Representatives of the EU member states³⁷⁸ and representatives of the United States made the following points which are of special relevance for this Article:

(1) In regard to Resolution 1244, the representative of the United Kingdom expressed the view that provisions referring to the final settlement must be read independently from the provisions regulating the interim administration.³⁷⁹ The representative of the United Kingdom concluded: "Resolution 1244 (1999) placed no limits on the scope of that status outcome, and paragraph 11(a) of the resolution is clear that the substantial autonomy which Kosovo was to enjoy within the Federal Republic of Yugoslavia was an interim outcome pending a final settlement."³⁸⁰

(2) The support for the Ahtisaari Plan came from all EU member states that were represented at that time in the Security Council.³⁸¹ The representative of Belgium held: "Belgium has always felt that the Ahtisaari plan was the only realistic and viable option."³⁸² The representative of Italy noted:

We have long argued, and we continue to believe, that if the status quo remains unsustainable, with no room for a negotiated solution, the United Nations Special Envoy's proposal for Kosovo's internationally supervised independence is the only viable option to deliver stability and security in Kosovo and in the region as a whole. Kosovo's

378. At the time of the discussion in the Security Council, four EU member states were members of this body: the United Kingdom and France as permanent members as well as Belgium and Italy as non-permanent members. However, not all EU member states have granted recognition to Kosovo, and some expressly oppose the creation of the state of Kosovo (e.g., Cyprus, Romania, Slovakia, and Spain). *Saying 'No' to Kosovo Independence*, BBC NEWS, Mar. 5, 2008, <http://news.bbc.co.uk/2/hi/europe/7265249.stm>; see also Security Council Meeting on Feb. 18, 2008, *supra* note 375, at 1 (detailing the members of the Security Council). Nevertheless, it is significant that the four EU member states represented in the Security Council not only supported recognition of Kosovo in their own names but in their statements invoked the EU as a whole. Further, the EU acted as a whole when deploying the EULEX mission. See *supra* notes 182–83 and accompanying text (describing the EU Council's efforts to support Kosovo authorities through the EULEX mission).

379. Security Council Meeting on Feb. 18, 2008, *supra* note 375, at 13.

380. *Id.* The representative of the United States expressed a similar position, but without offering reasoning to support the conclusion that secession is not prohibited by Resolution 1244. *Id.* at 18 ("Kosovo's declaration of independence is a logical, legitimate and legal response to the situation at hand. Kosovo's declaration is fully consistent with resolution 1244 (1999) and expressly recognizes that that resolution will remain in force.")

381. Security Council Meeting on Feb. 18, 2008, *supra* note 375, at 9, 11, 13, 20.

382. *Id.* at 9.

independence is today a fact. It is a new reality that we must face and acknowledge.³⁸³

The representative of the United Kingdom expressed the following position:

The international community cannot be party to a settlement that is opposed by more than 90 per cent of the territory's population. Apart from anything else, that would be contrary to our overriding priority of upholding peace and security. My Government is convinced that the proposal of the United Nations Special Envoy for supervised independence, which the Kosovo Assembly has embraced and committed itself to implement, is the only viable way forward.³⁸⁴

(3) The understanding that Kosovo is a situation *sui generis*, which creates no precedent, was most clearly expressed by the representative of the United States: "My country's recognition of Kosovo's independence is based upon the specific circumstances in which Kosovo now finds itself. We have not, do not and will not accept the Kosovo example as a precedent for any other conflict or dispute."³⁸⁵ The representative of the United Kingdom expressed a similar position and suggested Kosovo's unique circumstance legitimized its secession:

It is not ideal for Kosovo to become independent without the consent of Serbia and without consensus in the Council. My Government believes that the unique circumstances of the violent break-up of the former Yugoslavia and the unprecedented United Nations administration of Kosovo make this a *sui generis* case that creates no wider precedent—a point that all EU member States agreed upon today.³⁸⁶

(4) Arguably, the United Kingdom and the United States also advanced the remedial secession arguments. The representative of the United Kingdom argued:

At the heart of today's controversy is [Resolution 1244]. In that resolution, the Council took an unprecedented step: it effectively deprived Belgrade of the exercise of authority in Kosovo. It did so because the then regime in Belgrade had not just unilaterally deprived Kosovo of its powers of self-government . . . it had tried in 1999 to expel the majority population from the territory of Kosovo. Hundreds of thousands of men, women and children were driven from Kosovo by the State security forces of Slobodan Milosevic. People being herded onto trains provoked images from the 1940s. The events of 1999 shape the events we see now.³⁸⁷

And the representative of the United States:

Towards the end of the decade [1990s], the Serbian Government of Slobodan Milosevic brought ethnic cleansing to Kosovo. Responding to

383. *Id.* at 10.

384. *Id.* at 13.

385. *Id.* at 19.

386. *Id.* at 14 (emphasis added).

387. *Id.* at 12.

that humanitarian disaster and clear threats to international peace and security, NATO led a military intervention that stopped the violence and brought peace to Kosovo. The Security Council solidified that peace by adopting resolution 1244... an unprecedented resolution that provided for an interim political framework and circumscribed Serb sovereignty in that territory, and that called for the determination of Kosovo's final status.³⁸⁸

While remedial secession arguments may be found in these two statements, they were employed in order to clarify the origins of the effective situation and in the context of pointing out the *sui generis* character of the situation. Statements of the representatives of the United Kingdom and the United States otherwise clearly refer to Resolution 1244, which did not grant the right to secession to Kosovo Albanians.³⁸⁹ This suggests that, in their perception, the human rights and humanitarian situation prior to the adoption of Resolution 1244 did not directly lead to the right to secession but rather created an effective situation that ultimately legitimized secession.

(5) The commitment to Resolution 1244 was expressed by all states that have either granted or announced recognition of Kosovo. In this regard the EU member states expressed the view that the EULEX Mission in Kosovo was part of this commitment.³⁹⁰ The representative of Belgium held:

In recent days the European Union has taken important decisions, in full conformity with resolution 1244 (1999). These unambiguously show that the EU itself is ready to shoulder its responsibilities and work alongside the Kosovar authorities on their important commitments towards the international community. The new European Union Rule of Law Mission in Kosovo (EULEX) is concrete testament to that.³⁹¹

The representative of France expressed a similar position:

The European Union, as it has already announced, will assume its responsibilities in helping to settle this issue. In particular, it has decided to send, in full accordance with international law and within the framework of resolution 1244 (1999), a substantial police and justice mission to Kosovo. The presence of the European Union will allow us to supervise the emergence of a Kosovo that is genuinely multi-ethnic and democratic, pursuant to the provisions of the Ahtisaari plan.³⁹²

388. *Id.* at 18.

389. *See supra* note 254 and accompanying text (noting the limits of Resolution 1244).

390. *Cf. supra* note 182 (describing the aims of the EU Council regarding EULEX).

391. The Security Council Meeting on Feb. 18, 2008, *supra* note 375, at 9; *see also id.* at 10 (detailing Italy's view that the aims of the EULEX mission were consistent with Resolution 1244).

392. *Id.* at 20.

4. Commentary on State Practice

Serbia and Russia refer to the text of the preamble to Resolution 1244 invoking the territorial integrity of the FRY and, thus, of Serbia³⁹³ and interpret the reference to territorial integrity as an inherent part of the Resolution as a whole and not only applicable to the language establishing international administration.³⁹⁴ In their view, the right to the territorial integrity of Serbia was doubtlessly affirmed by Resolution 1244.³⁹⁵ As a consequence, the observance of this right cannot be waived by other states. A unilateral secession is, therefore, illegal, and other states are obligated not to recognize this illegality.

The EU and the United States understand references to territorial integrity in the context of interim administration but not necessarily in the context of the final status.³⁹⁶ They believe that the final settlement was meant to be an open-ended process. However, with references to the Ahtisaari Plan,³⁹⁷ they make clear that the open-ended nature of this process did not give Kosovo Albanians a self-executing right to secession. The latter instead became legitimate after the political process failed. Under the view of the Ahtisaari Plan, Kosovo's status needed to be settled in order to enable democratic and economic development.³⁹⁸ The recognizing states accepted this as an aim that could legitimize secession. It can thus be said that, although the Ahtisaari Plan was not endorsed by the Security Council in a subsequent resolution, it significantly shaped policies of some states in regard to the issue of state creation. Further, the Assembly of Kosovo has adopted the Ahtisaari Plan as a foundation of the state of Kosovo.³⁹⁹ Implicitly, the recognizing states have also adopted the view that this document is now part of Kosovo's constitutional order and has thereby become legally relevant. The recognizing states maintain that Resolution 1244 is still in force and

393. See *supra* Part V.B.2. (describing Serbia's view of the invocation of "territorial integrity" in Resolution 1244 as confirmation of Serbia's sovereignty).

394. See *supra* note 374 and accompanying text (describing the view that Resolution 1244 prohibits secession).

395. See *supra* note 375–76 and accompanying text (referring to statements by President Tadić).

396. The position of the United Kingdom, in particular, clearly establishes the reach of "territorial integrity" in Resolution 1244. See *supra* note 379 and accompanying text.

397. See *supra* notes 381–83 and accompanying text (describing EU support for the Ahtisaari Plan).

398. See *supra* note 171 and accompanying text (describing Ahtisaari's view that delaying resolution of status risked destabilizing the region).

399. See KOSOVO DECLARATION OF INDEPENDENCE art. 3 (2008) (describing the acceptance of obligations under the Ahtissari plan by the leaders of Kosovo).

that, according to the Ahtisaari Plan, Kosovo's sovereignty is restricted.⁴⁰⁰

The recognizing states invoked special circumstances and a *sui generis* situation in Kosovo, arising from the current situation, which was put in place in response to gross human rights violations, and in which Serbia does not exercise effective control over Kosovo.⁴⁰¹ The *sui generis* nature is also invoked in regard to international territorial administration. Such a situation was created by a Chapter VII Resolution 1244 and is thus different from other situations in which secessionist entities exercise effective control over their respective territories—the loss of Serbia's effective control over Kosovo stems from Resolution 1244 and not from unconstitutional activities of secessionists. At the same time, the vast majority of the population of Kosovo opposes any return of Serbia's authority.⁴⁰² Thus, if the status of Kosovo is to be determined in accordance with the wishes of its population, the only possibilities are independence and the status quo. The Ahtisaari Plan, however, suggests that the status quo is not a viable option.⁴⁰³

The following conclusions can be drawn as to state practice in the Kosovo recognition situation: (1) There are strong indicators suggesting that it is generally not disputed whether the right of self-determination applies to Kosovo Albanians—even Serbia seems to have acknowledged that it does.⁴⁰⁴ (2) The dispute surrounds the question of whether Kosovo Albanians may exercise this right in its external mode. (3) Although Kosovo is not a clear case of remedial secession, the position that follows from the statements of recognizing states is that previous breaches of human rights and the grave humanitarian situation that led to the effective situation established by Resolution 1244 softened Serbia's claim to territorial integrity. (4) Yet, Resolution 1244 makes references to territorial integrity, and states denying recognition argue that the state of Kosovo was created illegally; thus, they maintain that collective nonrecognition should apply. (5) States granting recognition interpret Resolution 1244 as a legal instrument that does not automatically preclude secession, so that, consequently, the obligation of collective nonrecognition does not

400. See The Ahtisaari Plan, *supra* note 166, ¶16 (detailing Ahtisaari's settlement proposal, following exhaustion of options contemplated in Resolution 1244); *supra* notes 391–92 (noting the view of recognizing states that Kosovar independence pursuant to the Ahtisaari plan was not in tension with Resolution 1244).

401. See *supra* notes 385–88 and accompanying text (characterizing the particular circumstances as *sui generis*).

402. See *supra* note 170 and accompanying text.

403. See *supra* note 171 and accompanying text.

404. See Address by Vuk Jeremić, *supra* note 231, at 3 (noting that the declaration of independence by Kosovo effectively “transforms the right to self-determination into a right of independence”).

apply. In this context they also invoke the effective situation in Kosovo and the Ahtisaari Plan, which arguably legitimize secession.

Recalling the *Quebec* case, the success of a unilateral secession ultimately depends on recognition by foreign states.⁴⁰⁵ Is it then possible to say that Kosovo's statehood was constituted by the recognizing states? Prior events imply significant involvement of the recognizing states in the process of Kosovo's declaration of independence.⁴⁰⁶ The following Part examines this involvement in light of post-1991 practice of state creations with an aim to understand the constitutive effects in the creation of the state of Kosovo.

5. The Practice of Post-1991 State Creations and Kosovo

a. The Dissolution of the SFRY

In the case of the dissolution of the SFRY, the international community became involved in the process after Slovenia and Croatia had already declared independence on June 25, 1991.⁴⁰⁷ On August 27, 1991, the European Community (EC) and its member states founded the Conference on Yugoslavia, under the auspices of which the Arbitration Committee was established.⁴⁰⁸ The President of the French Constitutional Court, Robert Badinter, chaired the Arbitration Committee.⁴⁰⁹

The scope of the legal issues that the Badinter Committee dealt with was relatively broad. Indeed, "[m]inority rights, use of force, border changes, the rule of law, state succession, and recognition all eventually fell within the Commission's brief."⁴¹⁰ The opinions of the Badinter Committee were not legally binding, even for the EC

405. See *supra* note 258 and accompanying text (describing the manner whereby recognition can transform an unconstitutional declaration of secession into de facto secession).

406. See *supra* notes 180–81, 188, 190–91 and accompanying text.

407. RICHARD CAPLAN, *EUROPE AND THE RECOGNITION OF NEW STATES IN YUGOSLAVIA* 15 (2005).

408. CRAWFORD, *supra* note 76, at 396.

409. This Arbitration Committee is hereinafter styled the "Badinter Committee." "Badinter Commission" and "Badinter Committee" are used interchangeably; therefore, references to the "Commission" in secondary sources should be understood as synonyms for "Committee." The other four members of the Committee were the Presidents of the constitutional courts of Germany and Italy, the President of the Court of Arbitration of Belgium, and the President of the Constitutional Tribunal of Spain. Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 *EUR. J. INT'L L.* 178, 178 (1992).

410. GRANT, *supra* note 330, at 156.

member states.⁴¹¹ Nevertheless, this was a body of a strong legal persuasiveness and its decisions significantly shaped state practice.

At the Council of Ministers meeting on December 16, 1991, the EC adopted two documents in which it expressed its recognition policy in regard to the new states emerging in the territories of the SFRY and the Soviet Union, respectively.⁴¹² The first document was entitled "Guidelines for the Recognition of New States in Eastern Europe and in the Soviet Union,"⁴¹³ while the second one dealt specifically with the situation in the disintegrating SFRY and was entitled "Declaration on Yugoslavia."⁴¹⁴ The Guidelines invoked "the normal standards of international practice and the political realities in each case"⁴¹⁵ when recognition was to be granted. This may be understood as a reference to the Montevideo criteria.⁴¹⁶ Further, the Guidelines invoked "the principle of self-determination,"⁴¹⁷ "rights of ethnic and national groups and minorities,"⁴¹⁸ and "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement."⁴¹⁹ The Guidelines were also explicit that "[t]he Community and its Member States will not recognize entities which are the result of aggression."⁴²⁰

The Declaration established the procedure for collective recognition. Yugoslav Republics⁴²¹ wishing to "become states"⁴²²

411. Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66, 70 (1993).

412. See HARRIS, *supra* note 260, at 147–52 (providing excerpts and various comments on those documents).

413. Guidelines for the Recognition of New States in Eastern Europe and in the Soviet Union (EC), Dec. 16, 1991, *in* Letter from Paul Noterdaeme, Permanent Representative of Belgium to the United Nations et al., to President, United Nations Sec. Council, Annex 2, U.N. Doc. S/23923 (Dec. 17, 1991) [hereinafter EC Guidelines]; see also STEVE TERRET, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION 80 (2000) ("[A]s the dissolution of the SFRY coincided with [the dissolution of the Soviet Union,] many of the same issues were raised in relation to both cases."). Notably, the EC became much more involved in the dissolution of the SFRY—a source of instability in close geographical proximity to a number of the EC member states.

414. Declaration on Yugoslavia (EC) (Dec. 16, 1991), *in* Letter from Paul Noterdaeme, Permanent Representative of Belgium to the United Nations et al., to President, United Nations Sec. Council, Annex 1, U.N. Doc. S/23923 (Dec. 17, 1991) [hereinafter EC Declaration].

415. EC Guidelines, *supra* note 413, ¶ 3.

416. See HARRIS, *supra* note 260, at 148 ("The Guidelines have in mind the Montevideo Convention requirements of statehood when they refer to the 'normal standards of international practice and the political realities in each case.'").

417. EC Guidelines, *supra* note 413, ¶ 3.

418. *Id.* ¶ 4(2).

419. *Id.* ¶ 4(3).

420. *Id.* ¶ 5.

421. EC Declaration, *supra* note 414, ¶ 2. Since Kosovo was not a republic in the SFRY, it was not given a chance to apply for recognition in accordance with EC Declaration.

were invited to apply for recognition.⁴²³ Their applications were referred to the Badinter Committee for consideration, and January 15, 1992, was set as the date when the decision would be implemented.⁴²⁴ According to one argument, "Vesting an arbitration panel with authority to study and advise on recognition is not the same as vesting such an organ with authority to recognize."⁴²⁵ The Badinter Committee was thus not established as a body to grant recognition but rather a body that "to some extent . . . influenced state practice."⁴²⁶ Importantly, the influence on state practice reached beyond the EC member states and was virtually universal.⁴²⁷

The Badinter Committee expressly held that recognition is declaratory and that it did not perceive itself as a body that creates states. Such a position is obvious from the reasoning in Opinion 11, in which the committee held that Slovenia and Croatia became states on October 8, 1991 (the day of the expiry of the moratorium on their respective declarations on independence).⁴²⁸ Such a conclusion implies a pure declaratory theory of recognition; however, it was made subsequently for state succession purposes and is not unproblematic.⁴²⁹

When the Badinter Committee delivered its Opinion 11 on July 16, 1993, Slovenia and Croatia had already been recognized as independent states and were members of the UN.⁴³⁰ Further, on July 16, 1993, there already existed the authority of the Badinter Committee's previous opinions holding that the SFRY was in the

422. EC Declaration, *supra* note 414, ¶ 3(1).

423. *Id.* ¶ 4

424. *Id.* ¶ 2-4.

425. GRANT, *supra* note 330, at 168.

426. *Id.*

427. *See id.* at 165-66 (noting that the EC, the member states and even the U.N. Security Council endorsed the Commission).

428. Opinion No. 11 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 4, (July 16, 1993), *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 1017 [hereinafter Opinion 11]. The three-month moratorium on the respective declarations of independence of Slovenia and of Croatia was part of an Agreement signed at Brioni, Croatia (The Brioni Agreement). The Agreement was brokered by the EC after the outbreak of hostilities between Slovenia and the Yugoslav National Army (YNA) after Slovenia's and Croatia's respective declarations of independence on June 25, 1991. The Brioni Agreement was signed on July 7, 1991, by representatives of the EC, federal organs of the SFRY, representatives of Slovenia and representatives of Croatia. *See* Brioni Agreement, Annex 1, ¶ 4, July 7, 1991, *available at* http://www.uradni-list.si/dl/vip_akti/1991-02-0001.pdf (describing a three-month moratorium).

429. In Opinion 11, the Badinter Committee dealt with questions of secession after the dissolution of the SFRY had been completed. As a result, the Committee had to establish critical dates on which the SFRY's former republics became independent states. Opinion 11, *supra* note 428, ¶ 3.

430. *See supra* note 428 and accompanying text.

process of dissolution (Opinion 1)⁴³¹ and that this process was completed (Opinion 8).⁴³² In its Opinion 11, the Committee ascribed great importance to these findings:

[T]he demise of the Socialist Federal Republic of Yugoslavia, unlike that of other recently dissolved States (USSR, Czechoslovakia), resulted not from an agreement between the parties but from a process of disintegration that lasted some time, starting, in the Commission's view, on 29 November 1991, when the Commission issued opinion No. 1, and ending on 4 July 1992, when it issued opinion No. 8.⁴³³

On October 8, 1991, there was not yet authority recognizing that the process of dissolution was underway in the SFRY. When the Badinter Committee issued Opinion 1, four of the SFRY's six constitutive republics had declared independence.⁴³⁴ However, on October 8, 1991, Bosnia-Herzegovina had not yet declared independence,⁴³⁵ while Macedonia's declaration was fairly recent.⁴³⁶ The prevailing view on October 8, 1991, was that Slovenia and Croatia sought unilateral secession.⁴³⁷ In such circumstances, the acquisition of statehood is much more questionable and, arguably, essentially depends on recognition.⁴³⁸

Slovenia's and Croatia's unilateral secessions would ultimately depend on recognition by the international community that would

⁴³¹ Opinion 1 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 3, (Nov. 29, 1991), *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 415 [hereinafter Opinion 1].

⁴³² Opinion 8 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 4, (July 4, 1992), *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 634 [hereinafter Opinion 8].

⁴³³ Opinion 11, *supra* note 428, ¶ 2.

⁴³⁴ Opinion 1, *supra* note 431, ¶ 2.

⁴³⁵ Bosnia-Herzegovina declared independence on October 14, 1991. *Id.*

⁴³⁶ Macedonia declared independence on September 17, 1991. DECLARATION ON THE SOVEREIGNTY AND INDEPENDENCE OF THE REPUBLIC OF MACEDONIA pmb., art. 1 (Sept. 17, 1991), *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION, *supra* note 220, at 345.

⁴³⁷ See GRANT, *supra* note 330, at 152–53.

Though the United States, the Soviet Union, and various West European states and organizations stated their disapproval of Croat and Slovene unilateral declarations of independence, Germany quickly began to suggest that it would extend recognition to the putative states. As early as August 7, 1991, the German government expressed support for the secessionists.

Id.; see also RAIČ, *supra* note 201, at 354 (noting that on October 8, 1991, Croatia prepared an application for independence based on the right to secession based on the remedial secession doctrine).

⁴³⁸ Cf. *supra* note 258 and accompanying text (describing the bearing recognition has on likely success of secession).

take legality and legitimacy criteria into consideration.⁴³⁹ However, recognition on October 8, 1991, was not certain. Caplan argues that “[a]s much as the Slovenes may have wished and hoped for EC recognition, it was really not until the EC Council of Ministers meeting of 16 December [1991] that they would be assured of it.”⁴⁴⁰ In other words, it was not before the adoption of the Guidelines and Declaration that it became clear that Slovenia and Croatia would be recognized as independent states.⁴⁴¹

The Guidelines and Declaration did not explicitly find the SFRY to be in the process of dissolution. However, the Guidelines established that “[t]he Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris”⁴⁴² and subsequently expressed a willingness to recognize the new states emerging in the territories of the SFRY and of the Soviet Union.⁴⁴³ Since the Final Act of Helsinki affirms the inviolability of existing borders⁴⁴⁴ and the territorial integrity of states,⁴⁴⁵ it would be difficult to reconcile an attachment to this document with recognition of the new states if it were perceived that there still existed a legitimate claim of the SFRY to territorial integrity. Thus, the only plausible explanation is that the Guidelines reflected the view that the SFRY was in the process of dissolution.

It should be concluded that the authority of the Badinter Committee’s Opinion 1 changed the perception that Slovenia and Croatia were seeking unilateral secession. Consequently, the respective acts of recognition of states emerging in the territory of the SFRY may have been declaratory, but previous involvement of the EC had constitutive effects. Although the Badinter Committee expressly held that it did not see itself as a body that created states,⁴⁴⁶ its

439. A remedial secession argument could, possibly, be advanced. See *supra* Part III.B, for a discussion of remedial secession.

440. CAPLAN, *supra* note 407, at 105–06.

441. See *supra* notes 407–12 and accompanying text (describing the adoption of the EC Guidelines and Declaration and the events that took place before the adoption).

442. EC Guidelines, *supra* note 413, ¶ 3.

443. *Id.* ¶¶ 1–3.

444. Conference on Security and Cooperation in Europe: Final Act, § 1(a)(III), Aug. 1, 1975, 14 I.L.M. 1292, available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf (addressing the inviolability of frontiers). The Final Act of Helsinki was signed in 1975 by the following states: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Soviet Union, the United Kingdom, the United States, and Yugoslavia. See The Organization for Security and Co-operation in Europe—Participating States, <http://www.osce.org/about/13131.html> (last visited Mar. 21, 2009) for a list of signatory states to date.

445. Conference on Security and Cooperation in Europe: Final Act, *supra* note 444, § 1(a)(IV).

446. See *supra* note 428 and accompanying text.

observation that the SFRY was in the process of dissolution crucially changed legal circumstances by removing the claim to territorial integrity.

b. Eritrea, East Timor, Montenegro, and International Involvement

In the cases of Eritrea and East Timor, state creations occurred with involvement of the UN. In Eritrea, a referendum was held under the auspices of the UN in April 1993, at which overwhelming (99.8%) support was given for independence.⁴⁴⁷ On December 16, 1992, the General Assembly adopted Resolution 47/114, in which it observed “that the authorities directly concerned have requested the involvement of the United Nations to verify the referendum in Eritrea”⁴⁴⁸ and supported “the establishment of a United Nations Observer Mission to verify the referendum.”⁴⁴⁹ The Transitional Government of Ethiopia, which otherwise came to power after a military victory over the previous military regime, accepted Eritrean independence.⁴⁵⁰ The approval of the parent state for secession was obtained without international involvement. Eritrea was admitted to the UN on May 28, 1993.⁴⁵¹

While UN involvement in Eritrea was limited to the supervision of the referendum, in the case of East Timor, involvement of the UN in the state creation was more significant. On August 30, 1999, upon an agreement between Indonesia and Portugal,⁴⁵² a referendum was held on the future status of East Timor. The referendum, supervised by a UN mission,⁴⁵³ would either confirm the autonomy of East Timor within Indonesia or set the course toward independence.⁴⁵⁴ The rejection of the autonomy arrangement and the choice of independence by the people of East Timor led to an outbreak of violence, initiated by Indonesian forces.⁴⁵⁵ Subsequently, the Security Council, acting under Chapter VII, adopted Resolution 1264, which authorized

the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia

447. CRAWFORD, *supra* note 76, at 402.

448. G.A. Res. 47/114, pmb., U.N. Doc. A/Res/47/114 (Apr. 5, 1993).

449. *Id.* ¶ 2.

450. *See id.* pmb. (noting the commitment of authorities concerned to respect the outcome of the referendum).

451. G.A. Res. 47/230, U.N. Doc. A/Res/47/230 (May 28, 1993).

452. *See CRAWFORD, supra* note 76, at 560–62, for a detailed account of the developments in East Timor.

453. S.C. Res. 1236, ¶¶ 3–4, 8, U.N. Doc. S/Res/1236 (May 7, 1999).

454. *See CRAWFORD, supra* note 76, at 561 (describing the vote by the East Timorese to reject autonomy within Indonesia).

455. *Id.*

conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to take all necessary measures to fulfil this mandate.⁴⁵⁶

On October 25, 1999, the Security Council, acting under Chapter VII, adopted Resolution 1272, through which it established “a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.”⁴⁵⁷ This arrangement can be compared to that put in place in Kosovo by Resolution 1244.⁴⁵⁸ The preamble of Resolution 1272 also reaffirmed “respect for the sovereignty and territorial integrity of Indonesia.”⁴⁵⁹

In the subsequent Resolution 1338, adopted on January 31, 2001, East Timor’s course to independence was affirmed. The Resolution requested

the Special Representative of the Secretary-General to continue to take steps to delegate progressively further authority within the East Timor Transitional Administration (ETTA) to the East Timorese people until authority is fully transferred to the government of an independent State of East Timor, as set out in the report of the Secretary-General.⁴⁶⁰

Thus, unlike in the case of Kosovo, the political process in East Timor led to an internationally predetermined (UN-sponsored) independence. East Timor was ultimately admitted to the UN on September 27, 2002.⁴⁶¹

In the case of Montenegro, there was no UN involvement—the transitional State Union of Serbia and Montenegro was brokered by the EU.⁴⁶² The constitution of this state established a mechanism for

456. S.C. Res. 1264, ¶ 3, U.N. Doc. S/Res/1264 (Sept. 15, 1999).

457. S.C. Res. 1272, ¶ 1, U.N. Doc. S/Res/1272 (Oct. 25, 1999).

458. See Bothe & Marauhn, *supra* note 149, at 228; *supra* Part II.B.1. Writing in 2002, Bothe and Marauhn made the following observation: “Legislation promulgated by the UN in Kosovo and East Timor is law derived from the powers of the UN. The Special Representatives as well as UNMIK and UNTAET may be considered to be subsidiary organs of the Security Council or of the UN as a whole.” *Id.*

459. S.C. Res. 1272, *supra* note 457, pmbl.

460. S.C. Res. 1338, ¶ 3, U.N. Doc. S/Res/1338 (Jan. 31, 2001). Notably, this resolution was not adopted under Chapter VII of the UN Charter.

461. G.A. Res 57/3, U.N. Doc. A/Res/57/3 (Sep. 27, 2002).

462. The EU worked very hard to counter, or at least postpone, any prospect of Montenegrin independence, which it felt would have a negative spillover effect on Kosovo. . . . Javier Solana, the EU’s High Representative for Common Foreign and Security Policy, applied strong and sustained pressure on Montenegro’s politicians to obtain

secession⁴⁶³ that was triggered by the expressed will of the Montenegrin people at an EU-sponsored referendum.⁴⁶⁴ Montenegro's declaration of independence was thus not unilateral but in accordance with the constitution of the parent state.⁴⁶⁵ Consequently, recognition of Montenegro as an independent state was expressly declaratory; however, the declaration of independence itself was supervised by the EU with broader approval of the international community. Montenegro was admitted to the UN on June 28, 2006.⁴⁶⁶

The general pattern of state creations in East Timor and Montenegro is one of collective involvement of the international community in the process of state creation prior to the declaration of independence, not a collective response to the question of recognition, as was the case with the dissolution of the SFRY. In this process, consent of a parent state is achieved and recognition after the declaration of independence is declaratory, while significant international involvement prior to the declaration of independence implies constitutive elements in the state creation itself. The declaration of independence is thus an internationally coordinated act, and the international involvement attempts to produce the emergence of a new state.

Consent of the parent state essentially means that the claim to territorial integrity is removed. The claim to territorial integrity was also removed by international involvement in the process of the creation of new states in the territory of the SFRY. This involvement did not lead to consent of the parent state but to a universally adopted view that dissolution of the SFRY was underway. Because it

their agreement to remain in an awkward construct with Serbia that permitted both republics de facto independence in nearly all spheres. In return they were promised they could engage in a more rapid EU accession process.

INT'L CRISIS GROUP, MONTENEGRO'S INDEPENDENCE DRIVE 1 (2005), *available at* <http://www.crisisgroup.org/home/index.cfm?l=1&id=3823>.

463. CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO art. 60.

464. The referendum resulted in a turnout of 86.49%, with 55.53% of the total number of valid votes cast for independence. INT'L CRISIS GROUP, MONTENEGRO'S REFERENDUM 6 (2006), *available at* <http://www.crisisgroup.org/home/index.cfm?id=4144>. Notably, the EU imposed a formula according to which independence could only be established if 55% of those who voted supported independence, a move some described as a political gamble. *Id.*

465. *Cf.* Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 111–12 (Can.) (noting that “international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part” and that Canada’s Constitution did not provide for secession).

466. G.A. Res 60/264, U.N. Doc. A/Res/60/264 (June 28, 2006).

was widely perceived that the parent state no longer existed, its right to territorial integrity was also extinguished.

c. Kosovo in light of post-1991 practice

In the case of Kosovo, there was no dissolution of a previous state, and the Republic of Serbia continues to have the same international personality.⁴⁶⁷ Serbia's right to territorial integrity is thus not removed, by analogy to the process of dissolution of the SFRY. Further, the declaration of independence was evidently coordinated between Kosovo Albanian leaders on the one hand and members of the international community (the EU and the United States) on the other.⁴⁶⁸ Yet, unlike in the examples of Eritrea, East Timor, and Montenegro, the parent state did not consent. Further, international involvement and coordination of the declaration of independence did not enjoy overwhelming support. Thus, unlike in the previous instances of post-1991 successful state creations, the secession of Kosovo was unilateral from a legal point of view, although it was politically coordinated among a number of states. This involvement did not take place through an institutionalized international body but on an ad hoc basis without universal consent.

If one concludes that recognition of Kosovo is constitutive, it is impossible to avoid the questions of whether fifty-six recognitions (including three permanent members of the Security Council) are enough for the creation of statehood and whether Kosovo is a state in the view of recognizing and nonrecognizing states, respectively. One is then trapped by the deficiency of the constitutive theory.⁴⁶⁹ At the same time, it is obvious that without the previous involvement of a number of recognizing states in the process of the declaration of

467. In contrast, the FRY did not continue the international personality of the SFRY. G.A. Res. 47/1, ¶ 1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992); S.C. Res. 777, ¶ 1, U.N. Doc. S/Res/777 (Sept. 19, 1992); S.C. Res. 757, pmb., U.N. Doc. S/Res/757 (May 30, 1992); see also Opinion 8, *supra* note 432, at 636, ¶ 4 (noting that, upon dissolution, the SFRY ceased to exist); Opinion 9 of the Arbitration Commission of the Peace Conference on Yugoslavia, ¶ 1, (July 4, 1992), *reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION*, *supra* note 220, at 637 (noting that successor states have replaced the former SFRY); Opinion 10 of the Arbitration Commission of the Peace Conference of Yugoslavia, ¶ 5, (July 4, 1992), *reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION*, *supra* note 220, at 639 (concluding that the FRY makes up a new state and, as such, "cannot be considered the sole successor to the SFRY"). Ultimately, the FRY applied for admission to the UN as a new state and was admitted on November 1, 2000. G.A. Res. 55/12, U.N. Doc. A/RES/55/12 (Nov. 1, 2000).

468. See *supra* notes 180–82 and accompanying text.

469. See *supra* notes 328, 330–32 and accompanying text (addressing the constitutive theory of recognition).

independence, Kosovo would not have become a state.⁴⁷⁰ Indeed, Kosovo might not have actually declared independence without such involvement. This suggests that international coordination and approval of the declaration of independence were more determinative for Kosovo's statehood than recognition. Therefore, Kosovo's statehood was not constituted by recognition, but rather Kosovo is an example of a post-1991 model of collective state creations. However, Kosovo is also a notable deviation from this model because international involvement did not lead to removal of the claim to territorial integrity.

VI. CONCLUSION

Although Kosovo's declaration of independence is often referred to as the last step in the dissolution of the SFRY, from the perspective of international law, the case of Kosovo constitutes unilateral secession from Serbia. Such an act is not illegal *per se*; however, its success in the UN Charter era is very unlikely and depends on the legality and legitimacy of such state creations as well as on international recognitions.

Kosovo has significant deficiencies in meeting the traditional statehood criteria. Unlike Bosnia-Herzegovina, Kosovo did not accept restraints on its sovereignty voluntarily and therefore does not meet the independent government criterion. Less problematic is Kosovo's satisfaction of the additional statehood criteria. The right of self-determination does apply to Kosovo Albanians; however, this does not imply that there existed a right to secession. In this context, the Article examined whether Kosovo could be a case in support of the remedial secession doctrine. Despite grave human rights violations in the 1990s and references to these circumstances made by a number of recognizing states, secession in 2008 could not be interpreted as the last resort for ending oppression. Indeed, oppression had already ended by the effective situation put in place in 1999. As follows from the Ahtisaari Plan, secession was rather perceived as the last resort for Kosovo's democratic and economic development. Accepting these arguments as remedial would, however, significantly stretch the otherwise narrowly defined remedial secession doctrine.

Nevertheless, the oppression in the 1990s played a significant role in the creation of the state of Kosovo. It motivated a Chapter VII resolution creating a legal arrangement under which Serbia exercises

470. See *supra* note 181 and accompanying text (describing the coordination between Kosovo officials, the EU, and the United States that led to the adoption of the Ahtisaari Plan).

no sovereign powers in the territory of Kosovo. Resolution 1244 put Kosovo under international administration and stipulated a political process leading toward a final settlement of the status question. However, the legal arrangement put in place by Resolution 1244 inherently determined the settlement of the status question. The real question was not whether Serbia would transfer its sovereign powers to another authority—Serbia had already done that in 1999—but whether it would regain its sovereign powers. It became clear during the political process that Kosovo Albanians were not willing to accept any settlement under which any degree of control would be transferred back to Serbia. Such a transfer against their wishes would mean a violation of the applicable right of self-determination.

The political process did not lead to Serbia's consent to secession. Kosovo, therefore, did not follow the East Timor model, in which international administration led to prenegotiated independence agreed to by the parent state and affirmed by a subsequent Security Council resolution. Yet, the Ahtisaari Plan, which rejects the status quo and proposes a supervised independence, significantly shaped state practice regarding the creation of the state of Kosovo, although not endorsed by the Security Council. The recognizing states refer to the Ahtisaari Plan, which provides for Kosovo's development in the areas of democracy, human rights, and economy. The recognizing states perceive the effective situation and circumstances that led to its establishment, as well as the Ahtisaari Plan and its objectives, as the necessary legitimacy background for secession.

The creation of the state of Kosovo is not directly attributable to NATO intervention but to the legal arrangement that derives authority from Resolution 1244. Not even states expressly opposing the legality of this particular state creation use the NATO intervention in their arguments. The legality of the creation of the state of Kosovo is commonly disputed under Resolution 1244, which, while allowing for a consensual secession, may well prohibit a unilateral secession. Some members of the international community hold that an obligation of nonrecognition stems from Resolution 1244, while others take the view that such an obligation does not apply and that, in the given circumstances, observance of the territorial integrity may be waived. Significantly, a specific Security Council resolution that would call for nonrecognition is absent and cannot be expected.

Customary international law also embraces the practice of collective nonrecognition. However, previous instances of collective nonrecognition involved virtually universal compliance. Collective nonrecognition of Kosovo's independence was far from universal. In this regard it remains unclear as to what degree recognition in international law remains subject to mere political considerations and to what degree it has become an act governed by law. While it has become partly law governed when the obligation of nonrecognition is

in question, the case of Kosovo proves that the limits of the obligation of nonrecognition remain unclear in the absence of a resolution of a UN body specifically calling for nonrecognition.

The constitutive theory of recognition would lead to the conclusion that Kosovo simultaneously is and is not a state. Kosovo thus confirms the deficiency of this theory. Recognition ought to be perceived as declaratory, but this does not mean that there are no constitutive elements in the state creation itself. The creation of the state of Kosovo partially followed the post-1991 pattern of collective state creations, where international involvement resulted in a removal of the claim to territorial integrity. While the international involvement in the dissolution of the SFRY began after Slovenia and Croatia had already declared independence, in subsequent situations it began prior to respective declarations of independence, and the latter act only took place after broad international approval. In such situations recognition is ultimately an expressly declaratory act, while international involvement has the effect of a collective state creation. However, in the case of Kosovo, the approval for the state creation was not universal and consent of the parent state was missing. Thus, Kosovo's statehood was indeed collectively constituted by a number of recognizing states. However, it was not constituted merely by the acts of recognition but—even more significantly—through their involvement prior to the declaration of independence and the preliminary approval of this act.
