ARTICLES
SPECIAL ISSUE – WHAT FUTURE FOR KOSOVO ?

Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo

*By Srdjan Cvijic**

A. Overview

The fall of the Berlin Wall and the end of the Cold War were greeted by many as an important step in the unstoppable development of human civilization. Francis Fukuyama even announced, in his celebrated essay of the same name, the "end of history" and the triumph of the liberal democratic model, which, according to him, was soon to become the most dominant, if not the only, form of organized human community.[1]

The hope that the United Nations and its "constitutional" system would play a crucial role in the solidification of the new liberal world order was reinforced by the joint involvement of the United Nations Security Council (UNSC) and the United States-led coalition in response to the 1990 Iraqi invasion of Kuwait.[2] The UNSC

* Srdjan Cvijic is an expert in democratisation and human rights at the Stability Pact for South Eastern Europe. He holds a PhD from the Department of Law of the European University Institute Florence (Italy). The views expressed in this article are his own and do not represent the views of the Stability Pact. I would like to express my gratitude to Bernhard Knoll, Euan McDonald and Ryan Schroeder whose critique and suggestions greatly contributed to the finalization of this article. Email: srdjan.cvijic@iue.it.

1 "What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalisation of Western liberal democracy as the final form of human government." *See* Francis Fukuyama, *The End of History?*, THE NATIONAL INTEREST (1989). For a remarkable critique of Fukuyama's thesis, *see* JACQUES DERRIDA, SPECTRES OF MARX - THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL (1994).

2 The UNSC, acting under Articles 39 and 40 of the Chapter VII of the Charter of the United Nations (hereinafter the Charter), reacted swiftly, passing Resolutions 660 and 661, which condemned the invasion, demanded an immediate withdrawal of Iraqi troops and placed economic sanctions on Iraq. *See* S.C. Res. 660 (August 2, 1990); S.C. Res. 661 (August 6, 1990). Resolution 661 determined that Iraq had failed to comply with paragraph 2 of Resolution 660 demanding its immediate and unconditional withdrawal from Kuwait's territory, and as a consequence imposed economic sanctions on Iraq. Unyielding, Iraq ignored a long series of UN Security Council and Arab League resolutions related to the conflict. One of the most important was UNSC Resolution 678 (S.C. Res. 678 (November 29, 1990)), passed under Chapter VII of the Charter, giving Iraq a withdrawal deadline of 15 January 1991 and authorizing member states to use "all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area." As a result of Iraq's failure to comply with the UNSC conditions, a US led coalition launched a massive air campaign codenamed Operation Desert Storm, which was followed by a ground offensive (Operation Desert

role in the so-called first Gulf War presented a textbook example of the application of the Charter's normative framework for the protection of territorial integrity and sovereignty of a country and the use of enforcement measures under Article VII of the Charter.

In the 1990s, the belief in the inexorable advent of the global liberal democratic order and the gradual disappearance of the non-democratic regimes was to fade in light of an increasingly anarchic world arena, the rise in the number of interethnic wars, the emergence of failed states, and so on. In a similar manner, the semblance of the triumph of international law in the aftermath of the first Gulf War and the appearance of a unified and vigorous UNSC able to protect international peace and security were to be shattered by a sequence of crises in which the use or threat of the veto power rendered the Council increasingly passive. After the end of the first Gulf War, a series of international events unfolded in such a manner as to bring about an important change in international relations, and arguably in public international law. As a consequence of the break-up of the Soviet Union in 1991, the U.S. and its NATO allies became the dominant global military, political and economic force, with the ability to significantly impact the interpretation of the normative framework regulating world affairs.

The dispute over the legality of the no-fly zones (NFZ) in Iraq provided the legal contours of what was later to be referred to as a doctrine of humanitarian intervention.[3] These were characterized by the unilateral[4] interpretation of UNSC Resolutions and the use of force bypassing the UNSC altogether. These practices continued in the case of Iraq[5], and in the 1998 bombing of Afghanistan and Sudan in *Operation Infinite Reach*.[6] Humanitarian intervention against the FRY in 1999, and

---

Sabre), finally resulting in Iraq's military defeat and withdrawal from Kuwait. S.C. Res. 686 (March 2, 1991) and S.C. Res. 687 (April 3, 1991) regulated the aftermath of the conflict. Parallel to these military operations, the coalition conducted Operation Desert Shield aimed at defending Saudi Arabia from Iraqi invasion.

3 The no-fly zones (hereinafter NFZs) were proclaimed by the United States, United Kingdom and France (the last of these later withdrew from the operation) after the Gulf War of 1991 within the framework of Operation Provide Comfort, aimed at protecting the Kurds in the north and Shiite Muslims in the south against the repression of Saddam Hussein's regime. While some argued in favour of the legality of such operations, others criticized the view that Resolution 688 gave the US, UK and France implied authorization to militarily enforce the NFZ, claiming that the Resolution was not passed under Chapter VII and consequently that it did not authorize the use of force. *See* the following for a view opposing the legality of the established NFZs: Robert Dreyfuss, *Persian Gulf-or Tonkin Gulf? Illegal no-fly zones could be war's trip wire*, 13 THE AMERICAN PROSPECT (2002); Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EJIL (2002).

4 One can distinguish two types of unilateral acts: individual unilateral acts that express the will of only one subject of international law, or collective unilateral acts where a single group of subjects acts collectively. *See* Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EJIL 20, 19-29 (2000).

5 For example, Operation Desert Fox in 1998, and other instances of aerial raids of Iraq within the period 1991-2002.

6 Retaliatory attacks for the bombings of US embassies in Kenya and Tanzania against the alleged facilities of the perpetrators of the terrorist attacks and their support networks.

the circumvention of the UNSC that it entailed, represents a further challenge to the entrenched understanding of peremptory norms of international law.[7] The NATO military intervention of the FRY in 1999 temporarily suspended Serbian sovereignty in Kosovo. The legal framework of this suspension was UNSC Resolution 1244 (1999), which gave a Chapter VII mandate to the international civilian administration and NATO-led military force.

Today, seven years after the NATO intervention against the FRY and Slobodan Milosevic's regime, Kosovo is run by an UN-mandated international administration still formally regulated by UNSC Resolution 1244 and related documents. Currently, Serbia and the representatives of the Provisional Institutions of Self Government of the Kosovo Albanians are engaged in the UN-led negotiations on the future status of the province. The positions of the two sides seem irreconcilable. While the Kosovo Albanians do not seem ready to accept any solution other than full independence of the province from Serbia, the Serbian negotiating team has offered the formula "more than autonomy, less than independence," which grants "substantial autonomy" to the province but refuses to accept the secession of this part of its territory.[8] The violent riots against minorities in the province on 17 March 2004 suggest there is much to fear for minority groups in an independent Kosovo.[9] Some have argued that the reason for the poor political and economic situation[10] in the province lies in the prolongation of the *status quo* and that the only way to resolve the situation is for the US and the EU to impose independence on the Serbian side, preferably through a UNSC Resolution:

[d]esirably, to give it complete legal as well as political effect, the Accord would also be endorsed by the UN Security Council. Kosovo's de jure sovereignty, if not achieved by Serbian agreement or Security Council resolution, should be

---

7 Whereas NATO claimed legal justification for these operations in Article 51 of the Charter, as in the later cases of the 2001 war in Afghanistan after the 9/11 terrorist attacks on the US and arguably for the 2003 second Gulf war, the justification for the 1999 war against the Federal Republic of Yugoslavia (hereinafter FRY) was grounded upon the doctrine of humanitarian interventions. *See* The Attorney General Lord Goldsmith, *The Goldsmith memo*, (March 7, 2003), http://tomjoad.org/goldsmithmemo.pdf, for an overview of possible legal justifications for the aforementioned actions and for a factual assessment of their points in common and differences.

8 The Serbian Government has adopted a decision to add its stance on Kosovo to the new Serbian Constitution. According to the decision, the draft of the new Serbian constitution will grant Kosovo in its preamble "a substantial autonomy" but it will unambiguously assert that Kosovo remains under the sovereignty of the Republic of Serbia. *See* http://www.b92.net/eng/news/politicsarticle.php?yyyy=2006&mm=09&dd=14&nav_category=92&nav_id =36558.

9 *See* Claude Cahn in this symposium for an account of the continuing violence against Roma in Kosovo.

10 The World Bank Kosovo Country Brief (2006), http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KOSOVOEXTN/0,,contentMDK:20629286~pagePK:141137~piPK:141127~theSitePK:297770,00.html.

recognized by the whole international community, or at least such of its member states (including the US and EU members) as are prepared to do so.[11]

This paper disagrees with this position and will argue that it is impossible to decide on the legality of the possible self-determination of Kosovo without firmly linking this question to the debate on the nature and legality of the 1999 humanitarian intervention. The UN-mediated negotiating process on the future status of this southern Serbian province, as well as the legal origin of the UN-mandated administration in Kosovo (UNMIK), represent a continuation of the original military and political involvement of NATO and the entire international community six years ago.

This paper will argue that the doctrine of humanitarian intervention, if carried out without the mandate of the UNSC, remains illegal under public international law. However, such action can aspire over time to become legal – provided that it does not go beyond its original limited scope (i.e. to prevent humanitarian catastrophe within a sovereign state). In this way, the imposition of self-determination of Kosovo on Serbia by the international community, by bypassing the UNSC, in the case of a potential Russian or Chinese veto, will represent not only a revolutionary challenge to established fundamental international norms, but also de-legitimize the original intervention, and, more importantly, compromise the future legal and practical development of the doctrine of humanitarian intervention. Such a political and legal development would be a radical departure from the slow evolutionary adaptation of international law to the new geopolitical situation, and amount to a fundamental shift in the post-WWII order that none of the major international players involved in the negotiating process on the future status of Kosovo (including the US and NATO) desires.[12]

This article does not preclude, however, the possibility of the permanent members of the UNSC (in a situation in which Russia and China do not use their veto power)

---

11 International Crisis Group, *Kosovo: Toward Final Status*, Europe Report 161 (January 24, 2005).

12 Rosemary DiCarlo, US Deputy Assistant Secretary for Europe and Eurasian Affairs, in an interview with the Russian *Kommersant* daily (18th January 2006), sketched the US position on the future status of Kosovo: "We believe that the situation in Kosovo and Kosovo itself are a unique phenomenon." She also added that the example of Kosovo (implying possible independence without Serbia's agreement) is not to be used as a precedent for other areas in the World. Vladimir Putin, the President of the Russian Federation, said during his 31 January 2006 press conference broadcasted live on Russian state television that there is a need for "universal principles" to settle "frozen" conflicts such as the one in Kosovo or those in Abkhazia and South Ossetia: "We need common principles to find a fair solution to these problems for the benefit of all people living in conflict-stricken territories.... If people believe that Kosovo can be granted full independence, why then should we deny it to Abkhazia and South Ossetia? I am not speaking about how Russia will act. However, we know that Turkey, for instance, has recognized the Republic of Northern Cyprus…I do not want to say that Russia will immediately recognize Abkhazia and South Ossetia as independent states, but such precedent does exist." *See* http://www.rferl.org. The Russian President also announced a possibility of vetoing any eventual decision by the UNSC recognizing the independence of Kosovo. *See* Interview with Vladimir Putin, THE FINANCIAL TIMES, September 10, 2005, http://www.ft.com/cms/s/76e205b2-40e5-11db-827f-0000779e2340.html.

reaching a unified position favourable to the future independence of Kosovo.[13] Since a legal interpretation granting the UNSC the right to trump the territorial integrity of a state is ambiguous due to the fact that such a situation has never occurred outside of the context of decolonization, one cannot forget that the very ethos of '*pouvoir constituant*' of the post-WWII international legal order was heavily marked by such an example (i.e. the allied partition of Germany). Should the *de facto* or *de jure* independence of Kosovo be recognized by the entire UNSC, Serbia would probably remain among the few states (if not the only one) that would still hold Kosovo to be an integral part of its territory. Nevertheless, this paper examines the scenario in which one or more of the permanent members of the UNSC decide to use their veto power against the imposition of independence for Kosovo against the Republic of Serbia, where Serbia refuses to give its explicit consent to such an outcome.

In the first section, this article analyses the legality of the doctrine of humanitarian intervention, concentrating on the case of Kosovo and FRY in 1999. It will then link this debate to the discussion on the legality of the independence of Kosovo without the consent of Serbia and without a UNSC decision, including a very brief analysis of the pro-independence legal arguments. Finally, it will suggest an alternative approach to the Kosovo future status negotiations, attempting to contextualize the entire process in the context of an evolutionary vs. revolutionary adaptation of international law to the post-Cold War geopolitical realities.

B. Humanitarian Intervention and Public International Law

Before debating the legality of humanitarian intervention without Security Council backing in general, and the legal status of the NATO intervention in FRY in particular, it is necessary to offer a working definition of the phenomenon. Sean Murphy defines humanitarian intervention as the

…threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.[14]

13 Although the President of the Russian Federation announced that Russia would use its veto should other permanent members of the UNSC move to recognize the independence of Kosovo, the experience of the 1990s ex-Yugoslav wars shows that, at the end of the day, Russia will, albeit grudgingly, align with the position of the West. Whether this will reoccur in the case of the independence of Kosovo remains to be seen. Arguably, Russia's negotiating position vis-à-vis the US and the rest of NATO is more powerful today than it was in the 1990s.

14 SEAN D. MURPHY, HUMANITARIAN INTERVENTION: UNITED STATES IN AN EVOLVING WORLD ORDER, 11-12 (1996).

While a rigid interpretation of post-WWII international law would argue against humanitarian intervention by invoking Article 2(7) of the Charter prohibiting the UN from intervening "in the domestic jurisdiction of any state" and Article 2(4) of the Charter that prohibits the "threat or use of force against the territorial integrity or political independence of any state,"[15] there are two principal exceptions to this general prohibition. The first is the right of states to use force in self-defense or collective self-defense under Article 51 of the Charter. The UNSC also has the right, under Article 42, to authorize the use of force "to maintain or restore international peace and security." In the 1990s, the UNSC intervened on several occasions in the internal affairs of sovereign states in cases of grave humanitarian crises, even where such crises have been purely domestic in nature. Moreover, even in cases where internal conflicts have had internationally destabilizing effects, the UNSC, in justifying its decision to override the sovereignty of the states concerned, has not always made reference to Article 42 of the Charter.[16] The majority of international legal scholars agree that a UNSC mandated or approved humanitarian intervention is widely recognized as legal under international law.[17]

The status of unilateral or unauthorized humanitarian intervention, in which a state or a group of states act against the sovereignty and territorial integrity of another state in order to prevent a grave humanitarian crisis on its territory, remains controversial. Such was the case in the 1999 war in Kosovo.

The situation in Kosovo has been one of political instability ever since Milosevic's regime was abolished in 1989 and autonomy established under the 1974 Communist Constitution. Kosovo Albanians conducted peaceful activities against the regime until late 1997/ early 1998, at which point armed resistance began. The response of the Serbian regime and its police forces was violent. There were numerous instances of what could be branded as the disproportionate and indiscriminate use of force by Serbian police officers. In March 1998, based on a statement of 9 March 1998 by the Contact Group for the Former Yugoslavia,[18] the UNSC reacted to the situation by passing a Resolution under Chapter VII, but did

15 Confirmed in the International Court of Justice (hereinafter ICJ) ruling in the Corfu Channel Case (1949) and Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986); http://www.icj-cij.org.

16 The Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (December 7, 1999).

17 MURPHY, *supra* note 14, at 287-288; Ruth Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEXAS INTERNATIONAL LAW JOURNAL 48 (1996); Catherine Guicherd, *International Law and the War in Kosovo*, 41 SURVIVAL 40 (1999).

18 The Contact Group is composed of the United States, the United Kingdom, France, Germany, Italy, and Russia. It was first created in response to the war and the crisis in Bosnia in the early 1990s. The Contact Group includes four of the five Permanent Members of the UN Security Council and the countries that contribute the most in troops and assistance to peace-building efforts in the Balkans. Representatives of the EU Council, the EU Presidency, the European Commission and NATO generally attend Contact Group meetings.

not expressly state that the situation in the Serbian southern province amounted to a threat to international peace and security.[19] Based on the mandate of the UNSC, the Contact Group imposed sanctions on the FRY in April 1998. In September 1998, the UNSC adopted Resolution 1199, which did determine that the situation in Kosovo constituted "a threat to peace and security in the region."[20] The UNSC demanded the immediate cessation of violence, and a commitment on both sides (the Serbian state and the Kosovo Albanians) to engage in negotiations. The Resolution concluded by empowering the Contact Group, "should the concrete measures demanded in this resolution and resolution 1160 not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region."[21] Despite the resolution, Russia was not ready to engage in the use of force against the then-Serbian regime. NATO decided to take action on its own and threatened to use force against Serbia if compliance with the aforementioned resolutions was not forthcoming. Milosevic's regime sought to temporarily relieve the international pressure and agreed to the establishment of an OSCE Kosovo Verification Mission on 16 October 1998, as well as the NATO air verification mission over Kosovo. As a consequence of increasing violence at the beginning of 1999, NATO resumed its threat to use force and the Contact Group called for an international conference to be held at Rambouillet in France. This, and a subsequent conference, did not produce the results NATO had expected and, as a result, in order to prevent a humanitarian catastrophe from taking place in the province, NATO launched its bombing campaign against the FRY in March 1999.

I. The Legality of Unauthorized Intervention in Kosovo

International scholarship is divided on the issue of the legality of the Kosovo War. On one hand, there are strong proponents of unilateral or unauthorized humanitarian interventions who argue that:

The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations' purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a *necessary* primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore *not* a use of force inconsistent with the purposes of the United Nations.[22]

---

19 S.C. Res. 1160 (March 31, 1999).

20 S.C. Res. 1199 (September 23, 1998).

21 *Id.*

22 FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 173-174 (1997).

These authors nevertheless remain a minority; most international scholars believe there is a *ius cogens* prohibition on the unilateral and unauthorized use of force.

The most authoritative scholarship on the legality of NATO's war against the FRY, written at the time of the intervention and in its immediate aftermath, remains the work of Bruno Simma and Antonio Cassese.[23] This section draws heavily on their work.

As far as the prohibition on the use of force and interference in the internal affairs of a sovereign state without the authorization of the UNSC is concerned, Simma has no doubts that the provision contained in Article 2(4) is part of *jus cogens*.[24] Hence, such a rule permits no derogation and can be modified only by a "subsequent norm of general international law having the same peremptory character."[25] Concerning the obligation of states and the international community to react in the case of a humanitarian crisis in a particular state, Simma argues that it is beyond doubt that such matters are of "international concern",[26] and that in the case of breaches of human rights states may take countermeasures against a sovereign state committing these crimes. Nevertheless, he affirms his position that under international law in force since 1945, countermeasures "must not involve the threat of use of armed force."[27]

While Simma does concede that in situations of genocide, "the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation," he goes on to argue that the situation in Kosovo, as of early March 1999 when NATO action began, did not amount to genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[28]

---

23 Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EJIL 1-22 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EJIL 23-30 (1999); Antonio Cassese, *A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EJIL 791-800 (1999).

24 Simma, *supra* note 23, at 3.

25 Vienna Convention on the Law of Treaties art. 53, 1155 U.N.T.S. 331.

26 Simma, *supra* note 23, at 3.

27 *Id.* at 2.

28 *Id.* Some authors disagree on this factual point, arguing that "it is not certain" that the actions of the Serbian armed forces and police did not amount to genocide under the 1948 Convention. *See* Comment of Kai Ambos in *NATO, the UN and the Use of Force: Legal Aspects*, http://www.ejil.org/journal/Vol10/No1/coma.html. With the benefit of hindsight, it appears that the media reports at the time grossly exaggerated the level of violence. *See* Steven Erlanger, *Early Count Hints at Fewer Kosovo Deaths*, N.Y. TIMES, 1999, at A6. The total number of Albanian dead is generally claimed to be around 10,000 although several foreign forensic teams were unable to verify the exact amount. *See* Patrick Ball, Wendy Betts, Fritz Scheuren, Jana Dudukovich & Jana Asher (eds.), *Killings and refugee flow in Kosovo March-June 1999, A Report to the International Criminal Tribunal for the Former Yugoslavia*, (January 3,

Chapter VII of the Charter does, of course, provide for the possibility of the UNSC authorizing a particular country, coalition of states or regional organization to enforce international peace and security in a given context.[29] Yet, in the absence of actions amounting to genocide, it seems reasonable to conclude that unauthorized actions of regional organizations, such as NATO in the case of Kosovo, remain illegal.

Further, Simma has argued that the failure of the UNSC to condemn regional military action does not amount to tacit authorization.[30] In the absence of UNSC authorization, countries and regional coalitions can cite the self-defense exception of Article 51 in justification of their actions against a particular state, but only in cases in which a localized violent conflict provokes a humanitarian crisis that crosses the borders of the state in question. The exodus of refugees, even as numerous as in the case of Kosovo, does not constitute a breach of Article 2(4), and thus cannot be used as grounds for invoking Article 51. Here Simma refers back to the 1986 *Nicaragua* judgment, concluding that "the use of force could not be the appropriate method to monitor or ensure…respect [for human rights]."[31] In similar terms, it has been argued that the "doubtful benefits [of unauthorized humanitarian interventions are] heavily outweighed by its costs in terms of respect for international law."[32] Further, many scholars have argued that the introduction of a practice of unauthorized *de facto* franchising out of what is essentially considered to be the authority of the UNSC would take us back 100 years, when all wars were lawful.

Despite the fact that Simma confirms the essential illegality of humanitarian intervention, he does recognize that, in the case of a passive UNSC, there remains a pressing need for the international community to react effectively to grave humanitarian crises, such as those in Rwanda or Srebrenica. Russia had made it clear that it was not ready to support military intervention against Serbia. In order to resolve such a morally dubious situation, he leaves some room for the legalization of humanitarian intervention:

2002). The International Criminal Tribunal for the former Yugoslavia, in its cases against Serbian political and military officials, has yet to decide whether the actions of the Serbian police in Kosovo amounted to genocide.

29 *See, e.g.*, S.C. Res. 794 (December 3, 1992) on Somalia; numerous S.C. resolutions related to Bosnia; S.C. authorization for the intervention of the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone, *etc.*.

30 Simma, *supra* note 23, at 4.

31 *Id.* at 5.

32 Mark Littman, *Kosovo: Law and Diplomacy*, CENTRE FOR POLICY STUDIES 4 (1999).

…in any instance of humanitarian intervention a careful assessment will have to be made of how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get "as close to the law" as possible. Such analyses will influence not only the moral but also the legal judgment in such cases.[33]

Simma thus asks the question whether the sequence of UNSC Resolutions related to the NATO involvement in Kosovo can be considered an "implicit authorization" of NATO's attacks.[34] He quotes UN secretary General Kofi Annan's remarks on the eve of the war (29 January 1999), who spoke directly to NATO regarding their role in the Balkans, "[h]ow you define your role, and where and how you decide to pursue it, is of vital interest to the UN."[35] Reportedly, notes Simma in his article, Annan said at a press conference in Brussels, when asked about the legality of a possible military intervention against the FRY, "normally a UN Security Council Resolution is required."[36]

Of utmost importance in regard to the Kosovo intervention is whether or not the *ex-post facto* UNSC mandate for the NATO-led international military presence in Kosovo can be considered as legitimizing its initial involvement.[37] Simma indeed argues that there is a "thin red line" dividing NATO's intervention in Kosovo from illegality, but concludes that "humanitarian impulses" should not be allowed to change the rules on which the present international order relies. He supports the view that the Kosovo War should be regarded as an exception (one that from a moral point of view was extremely difficult to avoid) and that "we should not set new standards only to do the right thing in a single case. The legal issues presented by the Kosovo crisis are particularly impressive proof that hard cases make bad law."[38]

Many high ranking representatives of NATO countries, although of the opinion that NATO's actions in Kosovo remain legal from the point of view of international law, support Simma's line, making it clear that the monopoly on the use of force of

---

33 Simma, *supra* note 23, at 6.

34 *Id.* at 10.

35 *Id.*

36 *Id.* at 8.

37 S.C. Res. 1244 (June 10, 1999) ended the war in Kosovo and established an international military and civilian presence to govern the Province.

38 Simma, *supra* note 23, at 14.

the UNSC should be maintained and that the decision of NATO in the case of FRY, "must not be a precedent."[39] For example, Massimo D'Alema, Italian Prime Minister during the Kosovo War and a current Foreign Minister of the Italian Republic, argued along these lines:

…the Atlantic Alliance had to act alone in the first phase, given the paralysis of the UN, in order to confront a serious humanitarian emergency. The humanitarian crisis justified the intervention; but it is an exception, not a precedent on which to construct the world order.[40]

D'Alema thus argued that NATO was compelled to act due to the paralysis in the UNSC.[41] Moreover, in several of his speeches in the aftermath of the war, the Secretary General of the UN, although stopping short of explicit recognition of the legality of the NATO intervention in Kosovo, criticized the passivity of the UNSC. In this way, during the UN General Assembly session in September 1999, he argued, "[i]f the collective conscience of humanity…cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice."[42] During his Millennium Report to the General Assembly of the UN he made a similar argument: "… if a humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica…."[43]

Antonio Cassese generally subscribes to Simma's argument, although there is some disagreement between the two. Simma considers humanitarian interventions illegal from the point of view of international law, but he also leaves room for viewing the intervention in Kosovo as a necessary exception (because of the gravity of the humanitarian situation and the inaction of the UNSC). Cassese disagrees with Simma on the point that there is a "thin red line" separating NATO action from illegality. He writes, "[t]he action of NATO countries radically departs from the Charter system for collective security…respect for human rights and self-

39 Klaus Kinkel, German Foreign Minister at the time, Comments during Parliamentary Debate on the Eve of the War in the Deutscher Bundestag (October 16, 1998), in Plenarprotokoll 13/248 at 23129. Most NATO governments or parliaments have engaged in a political and policy oriented assessment of the intervention in Kosovo. *See* Littman, *supra* note 23; Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

40 MASSIMO D'ALEMA, KOSOVO: INTERVISTA DI FEDERICO RAMPINI, 58 (1999).

41 *Id.* at 145.

42 Evans & Sahnoun, *supra* note 39, at 2.

43 *Id.* at 2.

determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy."[44]

This, however, does not mean that Cassese does not recognize the importance of humanitarian intervention. While Simma essentially considers that such actions can be illegal but necessary, he fails to offer a "recipe" for future actions in case of humanitarian crises where the UNSC is paralyzed. On the other hand, Cassese considers humanitarian intervention to be absolutely illegal at the present time, yet he recognizes that the 1990s saw a trend in the international community towards gradual acceptance of the doctrine, arguing that "under certain conditions… [it] may gradually become justified."[45] This is because, the author argues, "it is not an exceptional occurrence that new standards emerge as a result of a breach of *lex lata*."[46]

II. Legitimating Intervention Ex-Post Facto

If, as seems likely, we can conclude that NATO's intervention represents a challenge to the existing norms on the prohibition of the use of force, to what extent can military action be justified *ex-post facto*?

According to Cassese, in order for individual cases of humanitarian intervention to become gradually justified from the point of view of international law, it is necessary to respect strict conditions. The author lists the following six. First, that the humanitarian crisis is substantially serious, amounting to "crimes against humanity"[47], and that the sovereign state on whose territory these crimes occur is either the perpetrator or is unable or unwilling to prevent the violence. Second, if the crime is a result of anarchy in a sovereign state, there must be evidence that the central authority is unable to prevent these crimes before any intervention can take place. If, on the other hand, the state itself is the perpetrator, then force must remain the last resort. Third, unilateral intervention can only occur in the case of a paralyzed UNSC. Fourth, all peaceful avenues must be exhausted before any intervention. Fifth, it must be carried out by a group of states, and not by a "single hegemonic power, however strong its military, political and economic authority, nor such a power with the support of a client state or an ally."[48] Cassese is arguing

44 Cassese, *supra* note 23, at 24-25.

45 *Id.* at 27.

46 *Id.* at 30.

47 *Id.* at 27.

48 *Id.*

that, in the present world order, the US cannot conduct a humanitarian intervention alone or with its allies individually (e.g. the UK), but would have to reach a consensus within NATO before carrying out such action. Thus, arguably, the intervention in the case of Kosovo would fulfill this condition, whereas in the case of the NFZs in Iraq (at least, after the withdrawal of France) would not.

The sixth condition is the most relevant to this article, as here Cassese argues that the gradual legalization of humanitarian intervention can occur only where the future instances of such unauthorized involvement are strictly confined to the "limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose."[49] The report of the International Commission on Intervention and State Sovereignty[50] is even clearer with regard to the "permissible" goal and outcome of humanitarian interventions:

…the responsibility to protect is fundamentally a principle designed to respond to threats to human life, and not a tool for achieving political goals such as *greater political autonomy, self-determination*, or *independence* for particular groups within the country (though these underlying issues may well be related to the humanitarian concerns that prompted the military intervention). The intervention itself should not become the basis for further separatist claims.[51]

Bearing in mind that the current international military and civilian administration in Kosovo is a direct result of the NATO intervention of 1999, it would, in this view, be unacceptable for NATO countries to impose the independence of Kosovo on Serbia. It is only the potential approval of the UNSC that could allow for the possibility of imposing Kosovo's independence on Serbia.[52] The aforementioned

---

49 *Id.* Of course, the intervention would have to be proportionate to the breaches of human rights on the ground and would, like any military conflict, need to respect international norms regulating the use of force. Having this condition in mind, many international legal scholars would consider NATO's intervention in the FRY in 1999 to be illegal. As Littman argued in the case that the FRY brought to the ICJ against the NATO counties, the latter preferred using procedural caveats to contest the claims, rather than engaging with the substance of the case brought against them. "…[T]he UK could have waived this objection and accepted the Yugoslav challenge to have the legality of the bombing tested before the Court. The Government thus deprived the British public of the opportunity of an authoritative decision on this crucial matter…Given the weight of opinion and legal authority against the NATO position, the paucity of evidence in its favour and the reluctance of the UK to test its view before the ICJ, it is difficult to avoid the conclusion that the NATO action was illegal." *See* Littman, *supra* note 23, at 6-7. Moreover, numerous international human rights organizations judged certain aspects of the NATO intervention as being in breach of international legal norms related to situations of war and military conflict. For example, Kenneth Roth, Executive Director of Human Rights Watch, stated, "Once it made the decision to attack Yugoslavia, NATO should have done more to protect civilians. All too often, NATO targeting subjected the civilian population to unacceptable risks." *See* http://www.hrw.org/press/2000/02/nato207.htm.

50 The International Commission on Intervention and State Sovereignty was founded by the Government of Canada, together with a group of major foundations in 2000.

51 International Development Research Centre, *The Responsibility to Protect* 43 (2001) (emphasis mine).

52 It is even doubtful that the S.C. (assuming no Russian or Chinese veto) has legal basis to separate territory from a sovereign country. This has no precedent outside of the colonial context, where the application of a people's right to self-determination remains unambiguous. Still, regarding the recognition of independence for

report unambiguously states: "Yugoslavia could be said to have temporarily had its sovereignty over Kosovo suspended, though it has not lost it *de jure*."[53]

Indeed, UNSC Resolution 1244 reaffirmed the commitment "of all Member States to the sovereignty and territorial integrity of the FRY and the other States of the region, as set out in the Helsinki Final Act…"[54] Moreover, Article IV allows for the possibility of the return of "an agreed number of Yugoslav and Serb military and police personnel" to the province, who could, "perform the functions in accordance with Annex 2 [of the Resolution]."[55] This means that the Serbian police would be allowed to perform "liaison" functions with the international civil (UNMIK) and military (KFOR) mission in Kosovo, mark and clear minefields, as well as be present "at Serb patrimonial sites" and "at key border crossings". The Resolution, in Annex 1 and in Article VIII of Annex 2, also contains provisions regarding the future status of the province providing for a "political process" that would lead to "an interim political framework agreement" as well as "substantial self-government for Kosovo and Metochia [sic]."[56] Yet the drafters of the Resolution were careful to ensure that, regardless of the process, the "principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region" are affirmed.[57]

Resolution 1244 also took "full account of the Rambouillet accords" in the context of the political process leading to "substantial self-government" for the province.[58] These accords, in Chapter I, Article 1, defined the future structure of Kosovo's self-government, leaving Serbian authority in the fields of territorial integrity, common market within the FRY, monetary policy, defense, foreign policy, customs services, "federal" taxation, "federal" elections, and other areas specified in the Agreement.

Kosovo by the entire S.C., it would be difficult to contest such an outcome bearing in mind "the doctrine of effectivity" (which besides other elements argues that recognition of a new state by other countries would validate the separation. *See* 2 S.C.R. 217 (1998), reference regarding secession of Quebec. In the event that both Russia and China endorse a S.C. Resolution amounting to the recognition of the independence of Kosovo, the disruptive effect of such a precedent would be somehow mitigated. Hence, one could argue that in some sense international law would thus remain on an evolutionary course towards a new geopolitical reality, avoiding a slide into an outright revolution.

53 International Development Research Centre, *supra* note 51, at 44. The report develops the concept of temporarily suspended sovereignty even further in the theoretical sense: "Sovereignty issues necessarily arise with any continued presence by the intervener in the target country in the follow up period. Intervention suspends sovereignty claims to the extent that good governance – as well as peace and stability – cannot be promoted or restored unless the intervener has authority over a territory. But the suspension of the exercise of sovereignty is only de facto for the period of the intervention and follow-up, and not de jure."

54 S.C. Res. 1244 (June 10, 1999).

55 *Id.*

56 *Id.*

57 *Id.*

58 Interim Agreement for Peace and Self-Government In Kosovo, February 23, 1999.

In the above-quoted interview, published in the aftermath of the bombing, D'Alema reflected the political spirit of the time, placing the potential independence of Kosovo in political context. Asked why the Italian position, both before and after the war, limited itself to the autonomy of Kosovo, not its independence, he responded, "…because independence would mean, most probably, a new conflict in Yugoslavia within [a] few years."[59]

Before delving into the analysis of arguments in favour and against the self-determination of Kosovo, it is important to clarify the main argument of this paper. Having stated that imposing the self-determination of Kosovo on Serbia would present a serious challenge to the international order and threaten the future of the doctrine of humanitarian intervention, it cannot be argued that Kosovo should regain the autonomous status it held under the 1974 Communist Constitution suspended by Milosevic. Both UNSC Resolution 1244 and the Serbian government acknowledge a measure of "substantial self-government" that clearly goes beyond the scope of the autonomy of 1974.

The Serbian state has been without this part of its territory for seven years, and so it is difficult to argue that Serbia can realistically aspire to govern Kosovo again in some form. Let us consider these arguments in more detail and propose alternative solutions for the resolution of the contested status of Kosovo.

C. Testing the Legal Arguments for the Independence of Kosovo

There are several legal arguments in favour of the independence of Kosovo: some stem from certain interpretations of the "municipal law" of the Socialist Federative Republic of Yugoslavia (SFRY), while others concentrate mainly on arguments related to public international law. Often external and internal arguments for the independence of Kosovo are mixed.

In the constitutional set-up of the SFRY of 1974, Kosovo had the status of an autonomous province within Serbia. The Constitutions distinguished between two different legal categories: *narodi* (nations) and *narodnosti* (nationalities).[60] There is a widespread argument that, following the example of the Soviet Union, the opening

---

59 D'ALEMA, *supra* note 40, at 24.

60 A term somewhat difficult to translate, one could argue that narodnost reflects the term national minority in European constitutionalism. In fact, while each nation had a constituent status (Serbs, Croatians, Muslims, Montenegrins, Macedonians and Slovenians) in SFRY, other nationalities, for example, Albanians and Hungarians, had a different status in the Constitution etc. Their constitutional status was somewhat lower, at least as far as the constitutional provision of the right to secede was concerned.

paragraph of the Constitution SFRY guaranteed the right to secede from Yugoslavia to nations: it began, "Nations [*Narodi*] of Yugoslavia, taking into account the right of every nation to self-determination, including a right to secede…" [61]

In the early 1990s, in order to deal with the legal and political implications of the imminent breakdown of the SFRY, the international community set up the Arbitration Commission on the former Yugoslavia (the so-called Badinter Commission). In 1991, the Badinter Commission concluded that the former Yugoslav republics were eligible to become independent in the process defined in the EC "Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union".[62] In its opinion number 3, it concluded, on the basis of their interpretation of the legal status of the *uti possidetis* rule, that "except where otherwise agreed, the former boundaries [of the SFRY Republics] become frontiers protected by international law."[63] The Commission rejected the request of the Kosovo Albanian political leadership for the recognition of Kosovo. The rationale was related to the status of Kosovo as an autonomous province of Serbia.

This decision by the Badinter Commission has been criticized by authors who claim that the status of Kosovo under the 1974 Constitution amounted to that of a republic, bearing in mind the vast array of authority accorded to autonomous provinces. It has thus been argued that the Badinter Commission should have recognized Kosovo's internal borders with Serbia as full international boundaries.[64] This argument, however, seems unconvincing for two reasons: first, the constitutional difference between republics and autonomous provinces under the 1974 SFRY Constitution did have a legal and political sense and it cannot be argued that the two were essentially coterminous;[65] and secondly, no member of NATO ever, either before or after the 1999 Kosovo War, seriously invoked this argument as a justification for intervention or for the independence of Kosovo.

---

61 1974 Ustav Socijalističke Federativne Republike Jugoslavije [Constitution] (Yugoslavia), http://www.arhiv.sv.gov.yu.

62 *Guidelines on the Recognition of New States*, 31 ILM 1486 (1992).

63 *Id.* at 1500.

64 Dajena Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, *The Report for the NATO Office of Information and Press*, 37, June 16, 2001.

65 *See* Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EJILS (1993). While the author does not contest the decision of the Badinter Commission in the case of Kosovo, his argument in general runs along the lines suggested by the opening sentence: "According to what is probably still the predominant view in the literature of international law, recognition of states is not a matter governed by law but a question of policy." On the other hand, Danilo Türk defends the importance of legal reasoning in general and the decision of the Badinter Commission in particular. *See* Danilo Türk, *Recognition of States: A Comment*, 4 EJILS (1993). *See also* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW (2002) and SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTING WORLD: THE ROLE OF UTI POSSIDETIS (2002).

However, a provision of the Rambouillet Accords – namely, Ch 8, Art 1(3) – does mention a "final settlement of Kosovo, on the basis of the will of the people."[66] There is thus grounds on which Kosovo Albanians have a basis to argue for independence, particularly when bearing in mind that UNSC Resolution 1244 specifically refers to the conclusions of the Rambouillet Accord. Yet, even if one were to interpret this provision and the subsequent mention of the Rambouillet Accord in Resolution 1244 as providing a basis for a referendum on the independence of Kosovo in the future, this does not imply that negotiations should be side-stepped and that secession should be imposed on Serbia.[67] Moreover, all the aforementioned considerations militate against the adoption of extreme measures such as the imposition of the independence of this province on Serbia.

A second argument in favour of Kosovo independence stems from certain understandings of international legal norms and interpretations of the right to self-determination of peoples. While the right of self-determination has a great appeal, it is very controversial to apply this rule – if understood as a fundamental right of all to secede and establish independent states – outside of the context of decolonization. Even if we were to accept such a position however, we are immediately confronted with another dilemma, best understood through the interplay of the two legal categories of "people" and "territory." Zoran Oklopcic argues that:

[T]he case of the self-determination of peoples is a classical example of the chicken and egg dilemma. "The people" is, supposedly, the agent that creates the state while on the other hand the people itself is delineated by the recourse to some *territory*. For example, some argue that there exists the right of the people of Kosovo to external-self determination. This however presupposes the territory of Kosovo as a relevant unit, which is supposed to delineate the particular people that have the right to self-determination. The issue then is about the legitimacy of that particular

66 "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures."

67 Here one is advised to go back to the opinion of the Supreme Court of Canada on the legality of the secession of Quebec (in case of a successful referendum) under international and Canadian municipal law. Asked whether unilateral secession is possible under the Canadian Constitution, the Court answered that "Self determination was expected to be exercised within the framework of existing states" and that Federal government "is obliged to negotiate" secession with Quebec. Thus secession was not to trigger independence automatically. *See* 2 S.C. Res. 217 (1998) reference regarding secession of Quebec.

unit, and not about some purported will of the people, which is the construction of the legal arrangement that delineated the territorial boundaries of Kosovo.[68]

In this way we come back to the first argument related to the interplay of arguments between "municipal" SFRY law and international law. It is important to point out that this argument is not widely used among the important players in the international community that, at the political level, tend to be supportive of Kosovo's independence. This is probably related to the fact that no major international player is at this moment ready to politically support the transformation of international law in the direction of the recognition of the right to self-determination (as a right to independent statehood) beyond the colonial context. As previously noted, US foreign policy representatives have argued that they "believe that the situation in Kosovo and Kosovo itself are a unique phenomenon."[69] Thus, responding to Russian President Putin's provocative remarks on the effect of forcing Kosovo independence on various other conflicts in other parts of the world, they insist that recognizing a right to secede in the case of Kosovo does not set a precedent in the case of north Ossetia, Abkhazia, Transdniestria in Moldova, etc. The only difference between these cases is that Kosovo is governed by an international, UN mandated administration, which is itself a direct result of the 1999 intervention.

This line brings us back full circle to the argument of "disowned sovereignty" supporting the legitimacy of secession in the case of Kosovo. A territory has a right to exercise self-determination in cases where the population in the territory was subject to serious and protracted human rights abuse by the state. This argument finds basis in the concept of human security as the source of the legitimacy of state power. Put briefly, this aspect of the paradigm of human security holds that the state's purpose is to protect its citizens and if the state fails to do so it loses a right to govern them. Milosevic's regime certainly misgoverned Kosovo, but one can justifiably ask why the Serbian democratic government should have to pay the price of the abuses of Milosevic's authoritarian regime. The post-Milosevic Serbian democracy, and its police and military forces, proved in the conflict against the Albanian guerrilla groups in South Serbia in 2001 that they were able to maintain law and order without excessive and indiscriminate use of force, according to NATO standards, and in cooperation with that organization.[70] Further, is it worth

---

68 *See* Zoran Oklopcic, *What's in a Name: Five theses on the Self-Determination of Peoples*, http://transatlanticassembly.blogspot.com/2006_02_01_transatlanticassembly_archive.html. *See also* Karen Knop, *Diversity and Self-Determination in International Law*, CUP (2002).

69 *See* Cahn, *supra* note 9.

70 International Crisis Group, *Southern Serbia: In Kosovo's Shadow*, 43 EUROPE BRIEFING (2006). "Southern Serbia's Albanian-majority Presevo Valley is a still incomplete Balkan success story. Since international and Serbian government diplomacy resolved an ethnic Albanian insurgency in 2001, donors and Belgrade have

highlighting that should one use the argument that Serbia has lost the right to govern Kosovo as a result of its abuses of power, one must also apply the same judgment to the Kosovo Albanians and their own widespread abuse of minority communities in the last seven years.[71] The circularity of such an argument is indefinite.

Unsurprisingly, this argument has never explicitly been raised by the negotiating parties, the representatives of the UN or Contact Group countries, or indeed by any other states involved in the negotiating process.[72] Implicitly, however, there have been suggestions that Milosevic's policies should remain a burden for Serbia's young democracy, and that the current Serbian state and people will have to pay the consequences for the wrongdoings of the past. Martti Athisaari, the United Nations Special Envoy of the Secretary-General leading the talks on the determination of the final status of Kosovo, reportedly delivered a recent statement along these lines. The Serbian government protested against Athisaari's statement precisely because it appeared to imply that the Serbian people are guilty as a nation for what occurred in Kosovo, and that, as a consequence, they have to pay the consequences of the crimes committed in the past and must thus reconcile themselves to the possibility of losing Kosovo. In response, the office of UN Special Envoy has since denied that these represent accurate interpretations of his words.[73]

---

invested significant resources to undo a legacy of human rights violations and improve the economy. Tensions are much decreased, major human rights violations have ended, the army and police are more sensitive to Albanian concerns and there is progress, though hesitant, in other areas, such as a multi-ethnic police force, gradual integration of the judiciary, and Albanian language textbooks. Ethnic Albanians appear increasingly intent on developing their own political identity inside Serbia and finding a way to cohabit with Serbs, something that should be encouraged and supported." *See also* International Crisis Group, *Peace in Presevo: Quick fix for a long term solution?*, Europe Report 116 (August 10, 2001). In this report they argued, referring to the Serbian-NATO police action against the Albanian rebels, that "Operating from the Ground Safety Zone, the UCPMB attacked police and other state targets with virtual impunity… NATO dashed rebel hopes by taking Belgrade's side. The alliance negotiated a phased reoccupation of the GSZ by FRY forces that occurred between 14 March and 31 May 2001. Contrary to many expectations, the reoccupation went smoothly."

71 Kai Eide, Special envoy of the Secretary General for the Comprehensive review of Kosovo, *Comprehensive Review of the Situation in Kosovo in its Report* (June 13, 2005), http://operationkosovo.kentlaw.edu/kai-eide-report-N0554069.pdf#search=%22Kai%20Eide%20report%22: "with regard to the foundation of a multiethnic society the situation is grim." *See also* Human Rights Watch, *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004*, 16 (July 2004). *See also* Cahn, *supra* note 9.

72 The Contact Group, *Statement on the Future of Kosovo* (January 31, 2006) alludes to the notion of 'disowned sovereignty': "Ministers recall that the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under UNSCR 1244, must be fully taken into account in settling Kosovo's status. UNSCR 1244 remains the framework for the ongoing status process…Ministers look to Belgrade to bear in mind that the settlement needs, inter alia, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems." *See* http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1136909612032. While it is clear that certain member states of the contact group share a political belief that Serbia, due to the past violence of Milosevic's regime, lost its legitimacy to govern Kosovo, their statement would have to be a great deal more explicit before presuming any legal import. It is unlikely that the Contact group would ever reach agreement on such a position.

73 Ahtisaari's chief spokesperson Hua Jiang told that Ahtisaari would not apologise for his statements because he not referred to the collective guilt of the Serbian people. "The statement was taken out of context and poorly presented. He never mentioned the collective guilt of the Serbian people. Ahtisaari spoke of the historical legacy, that every nation should have the courage to face its own past. There is no reason for Ahtisaari to offer an apology and that is not going to happen." *See* http://www.b92.net/eng/news/politics-article.php?yyyy= 2006&mm=08&dd=31&nav_id=36405.

There are few, if any, other examples of an argument of this type being made in the post WWII international legal order; as such, historical guilt is usually combined with an invocation of political pragmatism, which in itself is a powerful argument. Currently Serbia has neither political nor military influence in Kosovo (beyond the enclaves in the south and in the North Mitrovica and the surrounding area confining Serbia), and can hardly impose its will on its southern province. But this argument of effective control is also applicable to the claims of the Kosovo Albanians, who lack control of the Serbian enclaves (especially the North of Kosovo beyond the Ibar River). It is only the international military presence that keeps this part of Kosovo from integrating back into Serbia. The situation is more complex for other Serbian enclaves scattered within Kosovo further from the borders of Serbia proper, but the lack of Albanian control remains an issue. Charles Kupchan takes this argument to the extreme arguing for the independence of Kosovo, but simultaneously for its partition:

Many in the international community insist that the partition of Kosovo along ethnic lines would send a dangerous signal, condoning ethnic segregation and fuelling fragmentation elsewhere in the Balkans. This argument is not without merit. It would have been best if the peoples of the former Yugoslavia had been able to live together amicably in a unitary state. The breakup of Yugoslavia certainly violated the civic values on which multiethnic society rests – as would the independence and partition of Kosovo. But when the best outcome proves impossible to achieve, the imperatives of stability ultimately require compromising the principle of multiethnicity. Just as these imperatives provide a compelling rationale for Kosovo's separation from Serbia, so might it be necessary for Kosovo itself to be partitioned in order to bring peace to the region… Furthermore, Kosovo's situation is unique: its independence, and even its partition, is unlikely to trigger further unraveling in the Balkans.[74]

In 1999 NATO, with the UNSC having *de facto* legitimized the military intervention on the FRY, assumed a twofold responsibility towards Kosovo and Serbia. On one hand it promised to stop ethnic violence and end the humanitarian catastrophe in the province. This task certainly had its successes (mainly by ending the suffering of the Kosovo Albanians under Milosevic), but also failures, such as the inability of the international civilian and military administration to stop violent retaliations and the consequent flight of Serbs, Roma and the others from the province in the aftermath of the intervention.[75] On the other hand, it ventured into illegality under

74 Charles A. Kupchan, *Independence for Kosovo*, 84 FOREIGN AFFAIRS (2005).

75 Recently, the UK House of Commons' Foreign Affairs Committee issued a report entitled "The Western Balkans" on February 23, 2005. This report suggests that independence might be the most realistic solution for Kosovo, but is much more prudent as far as the strategy of reaching that goal is concerned. Based on an interview

international law by striving to achieve a pressing moral duty: stopping the violence of Milosevic's regime. This responsibility extended to the process of determining the future status of Kosovo, and assuring that the democratization and economic progress in the province continue after the heavy international engagement there. Both the political stability of the wider region of the Balkans, and the continuing future development of international law in the direction of further protection of the individual and away from the present order dominated by state sovereignty, depend on the resolution of the Kosovo issue.

D. Conclusion: Shared Sovereignty as a Compromise Solution

International law must adapt to the changing climate in world affairs, since it is unrealistic to expect that in the situation of tectonic changes, such as the end of the Cold War and the dissolution of the Soviet Union, law can pretend to maintain the *status quo*. The case of Kosovo and humanitarian intervention demonstrates this both in a political and moral sense. Russia and China continue to play the part of classical *status quo* powers, and their role in the UNSC is consequently related to their interests.[76] On one hand, they desire to maintain the formal structure of the UNSC and to leave its powers unchanged. On the other, on matters such as, for example, the case of Kosovo, regardless of their foreign policy interests, they tend to accept the outcome of NATO intervention in a fairly acquiescent manner. As long as the conditions of the legality of unauthorized humanitarian intervention, described in section 2 of this paper, are respected, there is hope that an international consensus on the political and geographical extent of legal humanitarian intervention can be reached – even if this happens unwillingly as far as the interests of Russia and China, for example, are concerned. The doctrine of humanitarian intervention, if conducted in line with Cassese's six conditions could represent a pillar of the evolutionary adaptation of international law to the new political realities. Provided that it respects the strict rules of engagement, one can hope that it can be applied in the future in order to prevent widespread human suffering, such as in the sorry cases of Rwanda and Srebrenica.

---

with the Norwegian ambassador to NATO, Kai Eide (*see supra* note 63), the report predicted that, if the final status of Kosovo is not resolved soon, Albanians could plunge into violence against the Serbs and other minorities one more time. It was argued in the Report: "final status…could see an exodus of the Serbian minorities heading back towards Belgrade." One UK MP quoted in the report argued that "we are damned if we do and damned if we do not" resolve the status of Kosovo. Misha Glenny – one of the contributors to the report and an expert on the region's history and politics – argues that "going [to Belgrade] now and telling Serbian politicians that they have to support the idea of a final status which is likely to result in independence of Kosovo is turkeys voting for Christmas. It is no good asking Serbian politicians to do that." Glenny is convinced that this would bring about the electoral rise of the extreme-nationalist forces in Serbia, an outcome that could possibly have disastrous effects on the region as a whole. *See* http://www.publications.parliament.uk/pa/cm/cmfaff.htm.

76 *See* HENRY KISSINGER, A WORLD RESTORED (1957) for a definition of a status quo and revolutionary power.

Kosovo is a litmus test for the successfulness of the doctrine of humanitarian intervention. If the US and the EU take an active role in imposing the independent status of this province on Serbia, the doctrine of humanitarian intervention would suffer a significant blow. If, on the other hand, the international community looks to exert pressure on both sides to reach a negotiated agreement, NATO's original involvement may, after seven years, end in success.

A truly worrying scenario would be if Kosovo's independence were imposed on Serbia in a process that entirely bypasses the UNSC. An alternative to such a solution would be to use the remainder of the negotiating process to broker and impose a compromise on both sides. The international community could thus recognize the legitimacy of, but not forcefully formalize, Kosovo's claim to independence. This could be achieved by offering a formula of shared sovereignty for the province in the mid-term future.[77]

By recognizing realities on the ground while simultaneously refusing to go beyond the limited scope of the doctrine of humanitarian intervention that was used to justify international involvement there, Kosovo should enjoy all the privileges and powers of an independent state, with the exclusion of a seat in the UN General Assembly. Such a solution is not without political advantages. First, such a solution stands a much greater chance of being acceptable to a Serbian government that needs to be able to demonstrate to its population that it did not lose Kosovo. Secondly, the Kosovo Albanians would hopefully accept this outcome as a *de facto* independence that may be formalized in the future. The province could be separately represented in international institutions and organizations other than the UN, and it could establish bilateral relationships with sovereign states. Full independence of the province would be deferred until the time of Serbia's and possibly Kosovo's accession to the EU, where, dependent upon the level of respect of minority rights and human rights more generally, the population of Kosovo (provided that it does not by itself fulfill the criteria for EU accession) could decide through a referendum on the issue of full independence (comprising a UN seat). Until that moment, Serbia would represent Kosovo in the UN.

77 Some proposals on the future status of Kosovo suggested a similar outcome. *See* International Commission on the Balkans, *The Balkan in Europe's Future*, April 12, 2005, http://www.balkan-commission.org. The main argument of the Report boils down to the strategy of independence for Kosovo in stages, whereby Kosovo would be granted "independence without sovereignty" in 2005/2006 meaning that Kosovo would legally be a protectorate of the UN (or, preferably, the EU). In the following stage, the report calls for "guided sovereignty" where Kosovo starts accession negotiations with the EU. Finally, the Province would move towards full (and the report adds "shared") sovereignty, which would be reached only at the moment when Kosovo enters the EU. The principal difference between the proposal of this article and the proposal of the aforementioned report is the readiness of the International Commission to deprive Serbia of sovereignty over Kosovo without its prior consent.

As far as the Serbian enclaves in the province, as well as religious sites are concerned they should receive a high degree of institutional protection and autonomy in conducting their own affairs.[78]

The purpose of this paper has been to demonstrate that the entire doctrine of humanitarian intervention would be fundamentally imperiled if NATO or any of its member states decided to impose the independence of Kosovo on Serbia. It is important to recognize, however, that further delay in deciding the future status of the province is untenable both politically and in terms of security. The unwillingness of the Albanian population to reintegrate into the constitutional system of Serbia must be taken into account, while also recognizing the legitimacy of the claim of a sovereign state to refuse to relinquish a large portion of its territory that continues to include a sizeable population that wishes to remain a part of it (at least without a UNSC mandate). This paper has suggested that the international community needs to facilitate a compromise rather than an ultimatum.

Since the dissolution of the Soviet Union, international law has been undergoing an evolutionary adaptation to the new balance of powers in the world. The doctrine of humanitarian intervention could become one of the major pillars of the new system. The right of nations to exercise self-determination in the expression of an outright secession from the territory to which it is a constituent part is far from being recognized as a rule of international law (outside of the post-colonial context). To accept Kosovo as an exception, and were its independence to be forced on Serbia without a formal decision of the UNSC, would amount to a revolutionary challenge to established international law. Moreover, it would create a precedent for which no state in the international community seems willing to take responsibility.

78 *See* Dusan Janjic, Srdjan Cvijic, Nenad Djurdjevic & Danijela Nenadic, *White Paper: Why is Decentralization Important for Kosovo status talks?, Nato Parliamentary Assembly Special Seminar – Kosovo: Decentrlization as the key to future status negotiations*, October 28, 2005, http://www.nato-pa.int/Default.asp?SHORTCUT=820, for a proposal on the future internal organization of Kosovo that could present sound basis for the effective protection of minorities.