

Preventing the Emergence of Self-Determination as a Norm of Secession:

An Assessment of the Kosovo 'Unique Case' Argument

James Ker-Lindsay

London School of Economics

European Institute, London School of Economics and Political Science, Houghton Street, London

WC2A 2AE

+44 20 7955 6815 (Tel) / +44 20 7955 6497 (fax)

j.ker-lindsay@lse.ac.uk

Abstract

When Kosovo declared independence, in February 2008, it was stated that the move was not an act of self-determination. Instead, the key states that supported the decision insisted that the case for statehood arose from a unique set of circumstances. Kosovo was not a precedent; it was a *sui generis* case in international politics. This article considers the arguments underpinning this claim to exclusivity and argues that, taken either individually or collectively, the main justifications used to support Kosovo's 'unique' statehood – such as the abuse of human rights - in fact have serious consequences for other separatist conflicts elsewhere.

Introduction

On 19 December 2007, Sir John Sawers, the then permanent representative of the United Kingdom to the United Nations made one of the most extraordinary statements of modern British diplomacy. Emerging from a meeting of the Security Council, which had been discussing efforts to find a final status settlement for Kosovo, the diplomat stated: ‘You have the principle of territorial integrity. You also have the principle of self-determination. There are times when those principles are in tension with one another, and the principle of territorial integrity is qualified by the principle of self-determination.’¹ This was an astounding statement. A senior British official appeared to be contradicting the long-standing principle of international relations sanctifying the territorial integrity of states, and endorsing the right of a group of people, albeit under certain conditions, to pursue secession and independence. However, it quickly became clear that the statement was not an announcement of a revolutionary change in British foreign policy. Just days later, officials from the Foreign and Commonwealth Office made it clear that there was no change of policy whatsoever and that the esteemed ambassador had in fact misspoken. As one official explained, ‘we are avoiding the term self-determination at all costs.’² Rather, the official line was that Kosovo was a unique case in international politics, deriving from the break up of Yugoslavia, the events of 1999 and the period of UN administration that followed. It could not in any way, shape or form set a precedent for others.³

This strong reaction to the ambassador’s apparent ‘mistake’ highlights a deep-seated and long-standing opposition to the idea of self-determination within international politics.⁴ In modern terms, and certainly since the end of the Second World War, the notion of self-determination has generally been

¹ ‘Media Stakeout: Informal comments to the Media by the Permanent Representative of the United Kingdom, Ambassador Sir John Sawers KCMG, on the situation in Kosovo and other matters’, Webcast, *UN Website*, 19 December 2007.

² British official, conversation with author, December 2007. In fact, the official stated that they were rather pleased that the specific comment had appeared to have gone ‘unnoticed’. Certainly, it did not get any coverage in the international media at the time.

³ British official, conversation with author, December 2007.

⁴ For an overview of ways in which states have approached self-determination in the context of state recognition over the course of the past two hundred years, see Fabry (2010).

subordinated to the principle of the territorial integrity of states. Except in cases of decolonisation, or in the event of the break up of a state, the right of peoples to self-determination leading to independence has been heavily circumscribed. Instead of statehood, self-determination has been conceived of in terms of a right to self-government within the existing boundaries of a country. And so it was, originally, in the case of Kosovo. However, as this article shows, despite having argued during the 1990s that Kosovo did not have a right to independence, the United States and leading EU members eventually faced no alternative but to accept its statehood (Ker-Lindsay, 2009a). The question then became how to do this without upsetting established principles of international law and in such a manner that would not allow it to become a precedent for other territories and groups seeking statehood. The answer was to construct the above-cited argument that Kosovo in fact represented a *sui generis* case in international politics. The problem is that this argument has failed to gain universal international approval. Although Kosovo has been recognised as independent by over 90 countries (as of November 2012),⁵ including the United States and the majority of the European Union, its claim to statehood is still not accepted by a majority of the members of the United Nations, including China, Russia, India and Brazil (the BRICs). Kosovo remains, therefore, a contested state in international politics.⁶

This article examines why the unique case argument has been rejected by so many states and observers. In doing so, it explains the deep-seated objections to self-determination in international politics before examining the specific case of Kosovo. As will be shown, the view that Kosovo is a unique case in international politics does not hold up to scrutiny. Each of the key arguments is open to challenge. At the same time, the decision by the United States and leading EU members to pursue independence for Kosovo has come to be seen as an unacceptable redefinition of international principles designed to extricate these countries from a ‘mess’ of their own making, while denying other peoples the right to apply the same principles elsewhere.

⁵ The exact number is unclear as several claimed recognitions, such as Oman and Nigeria, are disputed. For an analysis of the methods of, and problems relating to, recognition see Ker-Lindsay (2012).

⁶ The term contested state is itself contested in International Relations. Other similar terms used include *de facto*-states, unrecognised states and, confusingly, quasi-states – a term that is more usually used to describe recognised states that have ceased to function effectively as states.

Statehood and secession in international politics

Any territory wishing to gain recognition should first meet the formal attributes of statehood. These were laid down in the Montevideo Convention as follows: it must have a defined territory, a settled population, effective governance and the means to enter into relations with other states.⁷ Although the Montevideo Convention provides important guidance as to the key features of statehood, and thus help to provide a basic – but non-binding – framework as to whether a territory or entity should be recognised as a state, other factors also play an important role in the process of recognition or the decision not to recognise. The way in which a state emerges has also become, at least since the middle of the twentieth century, extremely important. As Fabry (2010, p.9) notes, ‘since the 1950s, the determining factor in admission of new members into the society of states has been whether an entity has a prior right to independence, rather than whether it is independent.’ For instance, territories that meet the criteria of a state but have been created through acts of aggression are widely considered to be illegitimate.⁸ But the use of force in the process of state creation is by no means the only consideration. There are also other vital factors that play a decisive role in shaping the decision of a state whether or not to recognise an entity as a state. In the modern era, and especially since the end of the Second World War, perhaps the most powerful of these is the injunction against recognising states that have come about through unilateral acts of secession from an established and recognised state.

Underlying this reluctance to recognise acts of secession is the principle that states shall respect the territorial integrity of one another. Traditionally, the call for the respect for territorial integrity of states is taken to be a prohibition of military action by one state against another. For example, article 2, paragraph 4, of the Charter of the United Nations provides that: ‘All Members shall refrain in their

⁷ For a discussion of these principles see Crawford (2006, pp.45-89).

⁸ The first significant articulation of this principle was at the start of the 1930s. Following Japan’s invasion of Chinese Manchuria, in 1931, which led to the establishment of Manchukuo, the Manchu State, Washington announced that it would not recognise the territory as a state. For more on this decision, and the implications it has had on recognition practices since then, see David Turns, ‘The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law’, *Chinese Journal of International Law*, Volume 2, Number 1, 2003, pp.105-143.

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.’ However, it has also come to be regarded as a demand that states refrain from actions that may in other ways diminish or infringe on the territorial integrity of one another. Perhaps the most important statement to that effect can be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was agreed by the UN General Assembly in 1970. This states that, ‘any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter (United Nations, 1970). Likewise, the principle of territorial integrity has also formed the basis of key regional agreements. Most notably, it was enshrined in the Helsinki Final Act, which has played a seminal part in shaping peace and security in Europe (Helsinki Declaration, 1975). Mutual respect by states for the territorial integrity of one another has therefore emerged as a bedrock principle of the modern international system – even if some (such as Clapham, 1998) have argued that there is a need to adopt a more flexible understanding of statehood in international politics that recognises a more subtle variance between entities. As Abdul Koroma, a judge of the International Court of Justice, has put it:

The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain. The principle of respect for territorial integrity is enshrined in the Charter of the United Nations and other international instruments. (Koroma, 2010, para.21)

For obvious reasons of self-interest, states have proven to be extremely reluctant to challenge this principle (Fierstein, 2008; Weller, 2005). The problem, however, is that the principle of territorial integrity runs into direct confrontation with another key principle of international politics: the right of self-determination of peoples. As with territorial integrity, this has been enshrined in many of the key documents regulating international relations since 1945. It is, for example, explicitly stated in the UN

Charter, the UN Declaration on Friendly Relations (1970),⁹ as well as the Universal Declaration on Human Rights (1948), the Anti-Colonial Declaration (1960), and the Helsinki Final Act. Naturally, entities claiming statehood will inevitably emphasise the right of self-determination in support of their case for independence and recognition.

In practice, however, this claim has come to be seen as having little validity when it comes to statehood. Despite the fact that the principle is explicitly recognised within the Charter of the United Nations, and has since been elucidated in international treaties and agreements, in reality its application has been very limited. Since the end of the Second World War, the notion of self-determination resulting in the creation of new states has been viewed extremely narrowly. Primarily, it has come to be regarded as a right applicable to cases of European decolonisation (Koskenniemi, 1994, p.241), or to other limited cases where a territory is under military occupation. But even in the context of decolonisation, the right of self-determination has been understood to be applicable only at the point of

⁹ Declaration on Principles of International Law: Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations: ‘Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security, Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality’. However, as Judge Koroma (2010, para.22) stated, ‘Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent. According to the above-mentioned Declaration [Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations], “[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country”. The Declaration further emphasizes that “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.” (Emphasis added.) The Declaration thus leaves no doubt that the principles of the sovereignty and territorial integrity of States prevail over the principle of self-determination.’

decolonisation or military withdrawal. Thus a new state created by an act of decolonisation is, from the very moment of its creation, subject to the very rights of protection that apply to other sovereign states.

In non-colonial settings the principle of self-determination has come to be regarded rather differently. In these cases, it is seen as being wholly subordinate to the principle of territorial integrity. In this context, self-determination is not about a right to independence. Rather, self-determination has come to be more generally seen as a right to self-administration and self-governance within an existing state (Archibugi, 2003). No matter how much a population may desire independence, and even if that decision is taken democratically, the general rule is that unilateral secession, as an act of self-determination, is a violation of the territorial integrity of a state and is therefore contrary to the international law. In a view that echoes the position of other observers,¹⁰ Crawford states:

In international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more “peoples” in the ordinary sense of the word. In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity. (Crawford, 1997)

This significance of this elevation of the principle of the territorial integrity of states over and above that of self-determination was clearly seen throughout the Cold War when a number of territories

¹⁰ Again, this prohibition on the right to secede was explicitly raised by Judge Koroma in the Kosovo ICJ case, when he stated: ‘International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State’s consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms.’ (Koroma, 2010, para.4).

sought independence. Katanga's effort to secede from the Congo, in 1961, was one notable failure. But perhaps the most famous of these cases was the attempt by the Nigerian province of Biafra to proclaim independence. This was eventually put down after a brutal and bloody civil war. Indeed, the only new state to successfully emerge and gain widespread recognition outside of the confines of the principle of the non-recognition of secessionist entities was Bangladesh, which seceded from Pakistan in 1971. In this case, recognition was brought about by a particular confluence of factors; not least of all was Pakistan's military defeat by India and its decision to withdraw its forces from the territory (see Musson, 2008). But even in this case, Bangladesh was only admitted to the UN after it was recognised by Pakistan, in 1974 (Fabry, 2010, p.5).

Although the principle of self-determination leading to independence came to be narrowly defined in terms of the process of decolonisation, the end of the Cold War threw up a number of new examples of states emerging outside of this context. However, the collapse of the Soviet Union, the dissolution of Czechoslovakia and the turmoil surrounding the break-up of Yugoslavia did not fundamentally alter the way in which the international community approached the question of secession; although Serbia, the key republic in the Yugoslav federation, sought to keep the federation united, or at least to ensure that Serbs living in the other republics retained a link to Serbia (Pavlowitch, 2003, pp.68-69). However, the underlying principles guiding recognition nevertheless remained similar. A committee of jurists led by Robert Badinter, the president of the French Constitutional Court, examined the issue and decided that the six republics recognised under the 1974 Yugoslavia constitution – Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia – all had a right to independence. This right did not, however, extend to the national minorities as such – in other words the Serbs, Croats and others as distinct peoples did not have a right of secession. Nor did it extend to the two autonomous Serbian provinces of Vojvodina and Kosovo, which, under the 1974 Constitution, were accorded many of the rights of the six republics but did not have a notional right of secession (for more on the Commission, see Pellet, 1992). As John McGarry (2004, p.ix) has put it:

Recognition was forthcoming in the case of the three communist federations because there was no central government willing to resist break-up. Both Prague and Moscow (eventually) assented to the break-up of Czechoslovakia and the Soviet Union. Yugoslavia, as the Badinter

Commission pointed out, was breaking apart, i.e. was not simply a matter of a regions seceding. Even then, the Commission made clear, only Yugoslavia's federal republics had the right to secede, and not the regions within those republics, such as Republika Srpska or Kosovo.

Even, the independence of Eritrea and East Timor, the two non-European states that emerged in the period, did little to challenge the accepted norms of state formation. This was for two reasons. In the first instance, both were granted independence by the parent state. Secondly, again in both cases, the formal claim of the parent state had in any case been somewhat suspect. Both Eritrea and East Timor had been separate colonies prior to becoming part of Ethiopia and Indonesia respectively. In this sense, it could be argued that their right to external self-determination, to full independence, had in fact been curtailed. Therefore, neither could truly be regarded as a case of unilateral or even contested secession (McGarry, 2002, p.ix).

Thus the end of the Cold War, while apparently creating challenges to notions of sovereignty and territorial integrity, actually served to reinforce the traditional views on secession. As Crawford (1998, p.114) has noted, states are still reluctant to recognise new states formed outside of the colonial experience: 'this practice has not changed since 1989, despite the emergence during that period of 22 new states. On the contrary, the practice has been powerfully reinforced.' Although some have called for the right to self-determination leading to independence to be extended beyond the colonial states,¹¹ this has not been accepted by states. Indeed, as Pegg (1999, p.122) has stated: 'from the standpoint of de facto states, what is important is not the mere existence of this conservative consensus on territory but its continued strength and effectiveness.'

The Case of Kosovo

In light of this deep-seated rejection of the principle of self-determination in international politics, and the clear rules concerning the recognition of new states, the question is why did Kosovo not follow the same rules and gain some form of internal self-determination in the form of autonomy (for more on the background to Kosovo, see Malcolm, 2002; Vickers, 1998; Judah, 2002; and Judah, 2008). The simple

¹¹ This view was in fact stated to the author by Martti Ahtisaari in September 2008.

answer is that this was in fact the original intention. As noted already, the break up of Yugoslavia led to a clear-cut acceptance of the right of the six formal republics to gain formal independence. However, this right was not extended to other units, namely Kosovo and Vojvodina, both of which were defined as autonomous provinces under the 1974 Yugoslav constitution, or to the constituent nations and nationalities within Yugoslavia. Throughout most of the 1990s, there was little wish to tackle the question of Kosovo, which became seen as an internal Yugoslav matter. This remained the case even though the Kosovo Albanians lobbied heavily for the question to be considered as part of the Dayton peace process, which led to the resolution of the conflict in Bosnia (Clark, 2001, p.65).

It was as a result of this opposition on the part of the international community to consider Kosovo's claim to statehood that prompted a number of Kosovo Albanians to break with the peaceful attempts to gain independence – an effort led by Ibrahim Rugova – and instead turn to violent methods. Thus the Kosovo Liberation Army (KLA) came into existence (for more on the emergence of the KLA see Perritt, 2008 and Pettifer, 2012). Over the course of 1996 and 1997, the KLA gradually built up its forces, aided in large part by political instability in neighbouring Albania, which allowed large quantities of arms to cross the border. By the start of 1998, the violence in the province was starting to get out of hand and attracting international attention. At this stage, though, the clear intention was to pursue a settlement that would maintain Kosovo within the boundaries of Yugoslavia, a state that now incorporated just Serbia and Montenegro.¹² The call went out for Kosovo Albanians and Serbia to engage in formal negotiations leading to 'an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration'¹³ Even the United States, which would later emerge as the key supporter of Kosovo's independence, states that it favoured an agreement that would grant Kosovo a very high degree of self-rule, but would not allow it to formally

¹² Moreover, at this stage, the KLA was widely seen as an illegal insurgency. Speaking in Pristina, Robert Gelbard, the US special envoy for the Balkans, famously described the KLA as a terrorist organisation. 'The KLA - terrorists or freedom fighters?', *BBC News*, 28 June 1998.

¹³ 'Statement on Kosovo adopted by the members of the Contact Group, meeting in London on 9 March 1998', S/1998/223; and 'Statement on Kosovo issued by members of the Contact Group in Bonn on 25 March 1998', *UN Security Council Document*, S/1998/272. UN Security Council Resolution 1160(1998), 28 March 1998.

secede. As Madeleine Albright, the US Secretary of State, explicitly stated, in October 1998, ‘We have made it clear to Milošević and Kosovars that we do not support independence for Kosovo, that we want Serbia out of Kosovo, not Kosovo out of Serbia.’¹⁴

In early 1999, the conflict in Kosovo took a drastic turn for the worse following the discovery of a number of bodies in the small Kosovo hamlet of Račak. As a result, a peace conference was convened in the French town of Rambouillet, just outside Paris. There the two sides were forced to negotiate over a proposed plan to end the fighting in the province. In the end, however, no final agreement was reached. The Yugoslav government, led by Slobodan Milošević refused to accept a protocol of the agreement that would allow NATO forces free access across the entire territory of his country (Judah, 2002, p.220).¹⁵ In response, NATO launched an air campaign against Serbia. 78 days later, Milošević had no choice but to capitulate and remove all Serbian force from Kosovo. Kosovo was placed under indefinite UN administration. Nevertheless, officials were clear that this did not open the way for formal independence. For example, a G8 statement, issued at the time of the bombing, made it clear that a settlement based on autonomy was the preferred solution.¹⁶ Likewise, UN Security Council

¹⁴ ‘In Balkans Again, Promises, Promises’, *New York Times*, 14 October 1998.

¹⁵ As noted, Milošević believed that NATO forces could be used either to detach Kosovo from Serbia, or to depose him. While this issue has often been cited as the main reason why Milošević rejected the agreement, many have viewed it as little more than a smokescreen to disguise his overall opposition to the deal. Whatever the truth of the argument, in a review of the events surrounding Kosovo, the Foreign Affairs Committee of the British House of Commons concluded that, ‘whatever the actual impact of the Military Annex of the Rambouillet proposals on the negotiations, NATO was guilty of a serious blunder in allowing a Status of Forces Agreement into the package which would never have been acceptable to the Yugoslav side, since it was a significant infringement of its sovereignty’ (House of Commons, 2000, para.65).

¹⁶ Specifically, the intention would be to establish, ‘a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region’. Annex 1, UN Security Council Resolution 1244 (1999), 10 June 1999.

Resolution 1244, which established the UN Interim Administration in Kosovo (UNMIK), 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.’¹⁷ While it has been claimed subsequently that Resolution 1244 paved the way for Kosovo to become an independent state, it is in fact clear that most countries did not regard this as the case. Certainly, British officials have been clear that the intention at the time was still to pursue some form of autonomy for Kosovo. As they saw it, following a suitable cooling off period, and once Milošević had been forced from power, a peace process could begin that would give Kosovo meaningful self-rule within Yugoslavia.¹⁸ Indeed, apart from a few stalwart advocates of independence for Kosovo within the US State Department,¹⁹ the international community appeared to have little appetite for an independent Kosovo state.

¹⁷ Paragraph 5 of Annex 2 states: ‘Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to 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 in Kosovo.’

¹⁸ British official, conversation with the author, 2007. This was subsequently, and separately, confirmed to the author by other British officials, even as recently as 2010.

¹⁹ For instance, John Bolton, who had served as the US permanent representative to the UN throughout 2006, noted on several occasions the deep-rooted anti-Serbian attitudes within the State Department and argued that the United States should not recognise a unilateral declaration of independence. Such comments were made in an interview with Voice of America in October 2007. He had also made the same comments about State Department bias and the dangers of recognising UDI and in an interview with the Serbian service of the BBC a few months earlier. ‘SAD za nezavisno Kosovo’ [USA for an Independent Kosovo], *BBC Serbian Service*, 11 May 2007. See also, Lyons, 2008. Admiral Lyons was commander in chief of the U.S. Pacific Fleet and senior U.S. military representative to the United Nations.

The problem was that this formulation was wholly unacceptable to the Kosovo Albanians. As far as they were concerned, the NATO intervention had opened the way for independence.²⁰ They would not accept anything less. The situation was made all the worse by lack of international attention paid to Kosovo in the aftermath of the intervention. Rather than trying to work with the Kosovo Albanians and Serbia, following the fall of Milošević in October 2000, the attention of the international community was focused elsewhere. The terrorist attacks of 11 September 2001, followed by the invasions of Afghanistan and Iraq shifted the focus onto the Middle East. The Balkans became a forgotten backwater. And so it remained until March 2004, when major riots broke out in Kosovo. For the international community, the violence represented a watershed moment. The level of Kosovo Albanian frustration at the lack of status could no longer be ignored. However, it also became all too apparent that there was absolutely no way in which they would accept any solution that would see Kosovo remain a part of Serbia, no matter how loosely this relationship would be defined. Indeed, any attempt to do so would be vigorously resisted. This raised the all too real prospect that should a solution short of statehood be foisted upon the Kosovo Albanian population, international forces and administrators could come to be regarded in the same way as Serb forces once were: as an occupying colonial power. Kosovo would thus return to violence, this time aimed at the countries that had, just a few years earlier, fought for the liberation of those who had now turned against them.²¹ As Daniel Fried, the US Undersecretary of State for European and Eurasian Affairs, put it with regard to discussions over the status process: ‘wavering would lead to disaster, beginning with riots by Kosovars that risked turning KFOR into an occupying force and could led to the very radicalization we had successfully avoided so far.’²² The implications of such a radicalisation on Western public opinion would be catastrophic. How could policy makers explain to their populations why people they had fought to protect had turned on them?²³ Given that any attempt to simply abandon the province would lead to anarchy and a power

²⁰ As one leading political figure stated, the Kosovo Albanian leadership, ‘understood that Serbia cannot just get out, and the process of independence for Kosovo cannot be initiated without the presence of NATO, the EU, and the OSCE. A Western protectorate, and later independence through a referendum, is the national strategy of the Albanians of Kosova’ (Shala, 2000, p.187).

²¹ This was stated to the author by two US State Department Officials in 2005.

²² ‘US embassy cables: Litvinenko - did Putin know?’, *The Guardian*, 1 December 2010.

²³ US official, conversation with the author, 2005.

vacuum within the Western Balkans, and that handing it back to Belgrade's control would simply reignite a civil war, there appeared to be only one possible solution to the problem that had emerged: accede to the wishes of the Kosovo Albanians for statehood. The problem was that this would undermine the principle of the territorial integrity of states.

The unique case argument

In the end, the attempt to resolve this problem was built on two arguments. First of all, an attempt was made to show that there was simply no way in which to reintegrate Kosovo back into Serbia and that all efforts to reach a negotiated solution had failed. This was achieved through a status process held under the auspices of Martti Ahtisaari, the UN special envoy for Kosovo. Starting in late 2005, the talks ran through until March 2007, when Ahtisaari presented his proposals for supervised independence for Kosovo (for more on this process, see Weller, 2009; Ker-Lindsay, 2009b; and Perritt, 2009). The problem was that this process was undermined by Ahtisaari's clear commitment to independence from the very outset. Rather than pursue open negotiations between the two sides that would investigate a wide variety of options for Kosovo, he in fact decided from the outset that there was no alternative to statehood.²⁴ He thus decided that the talks should be aimed at the modalities of this arrangement. In effect, the talks were loaded from the start.²⁵ As a result, Belgrade rejected the proposal for supervised independence put forward by Ahtisaari in early 2007. Likewise, Russia also refused to endorse the proposals. Thereafter, a further set of negotiations was held in the second half of 2007 under the auspices of the United States, Russia and the European Union – the Troika. While

²⁴ Martti Ahtisaari, conversation with the author, September 2008. Ahtisaari also supplied the author with a paper that he had distributed to Britain, France, Germany, Italy, the United States and Russia – the so-called Contact Group – outlining the way in which they could contribute to the process. This specifically included a statement that they should convey to Belgrade that Kosovo was lost.

²⁵ The weakness of this approach has been recognised by a number of observers. As one high-level diplomat closely involved with the Kosovo status process, who has since spoken strongly in favour of independence, told the author, in his handling of the talks, Ahtisaari had, 'made a mistake, an avoidable tactical mistake.'

certainly more open than the previous talks,²⁶ these discussions were effectively undermined by claims from the United States,²⁷ and key EU states,²⁸ that the final outcome would be independence. This eliminated any reason for Pristina, which was absolutely resolute in its demand for independence, to engage with the process constructively. Under these circumstances, no progress was made towards an agreed settlement acceptable to the two sides. Therefore, once again, deadlock in the Security Council prevailed. Crucially though, supporters of Kosovo's independence were now able to argue – at the very least incorrectly, at worst deceitfully – that a sincere, open and fair attempt to reach a solution had taken place but that there was no possibility of reaching an agreed solution (see, for example, Jordan's presentation before the ICJ, CR 2009/31, p.30). However, as has been shown, this was clearly not the case. As Romania subsequently argued before the ICJ, the fact that the Kosovo Albanians had admitted that they had been prepared only to discuss independence from the very start of the status process meant that they had failed to negotiate in good faith. To this extent, the argument that all means of reaching a negotiated solution had been tried was obviously incorrect (ICJ CR 2009/32, p.24).

Secondly, in addition to trying to show that there had been no possibility of reaching a negotiated solution, it was important to stress that Kosovo was *sui generis*. It represented a unique case in international politics that could not be applied to other situations. This was seen as vital to winning over international support for independence and was therefore heavily cited throughout the status

²⁶ This was even recognised by Serbia. 'Policy of peace Serbia's goal – Tadić', *B92*, 1 December 2007; 'Jeremić, Rupel discuss SAA, Kosovo', *B92*, 12 January 2008.

²⁷ On 10 June, during the first visit to Albania by a serving US president, Bush announced that his administration was committed to statehood, regardless of the current deadlock. As he told cheering crowds, 'at some point in time, sooner rather than later, you've got to say enough is enough, Kosovo is independent. And that's the position we've taken' (United States, 2007).

²⁸ For example, during a UN Security Council debate on the subject of Kosovo's status, Karen Pierce, the British representative, insisted that as the Kosovo Albanians would not accept anything other than independence, it was pointless for Belgrade to offer anything else. 'Ban urges action on Kosovo's political future', *DPA*, 22 June 2007; 'Russia Digs In Heels Against West's Kosovo Plan', *Reuters*, 22 June 2007.

process, as well as in the period after its declaration of independence.²⁹ Indeed, it was even incorporated into Kosovo's unilateral declaration of independence.³⁰ Although there have been a number of different interpretations put forwards about what makes Kosovo unique, in essence the argument is centred on three specific elements, as cited by the United States in its presentation before the International Court of Justice (ICJ CR 2009/30, p.23): 'the disintegration of Yugoslavia; the human rights crisis within Kosovo; the United Nations response.'

The status of Kosovo within Yugoslavia

A primary argument repeated time and time again to justify Kosovo's claim to a special status in international politics was its status within Yugoslavia and that, as a result of the process of the disintegration of Yugoslavia, it should have a right to independence. Certainly, Kosovo had a special position within the structure of Socialist Federal Republic of Yugoslavia (SFRY) under the terms of the 1974 constitution. That is not in question. The problem with the argument that this special status gives Kosovo a right to independence is that it clearly neglects the fact that international jurists had already specifically addressed this issue and found that it had not. As noted earlier, the Badinter Commission had expressly stated that the right of independence lay with the republics. The Commission did not extend this out to the two key autonomous provinces that sat on the federation council alongside the republics: Kosovo and Vojvodina. Secondly, and as also highlighted earlier, western policy makers deliberately sought to keep an independent Kosovo off the agenda throughout the 1990s when Yugoslavia was collapsing. Indeed, no one had an appetite for an independent Kosovo even after the NATO intervention. Therefore, it was only when it was obvious that the Kosovo Albanians would not accept anything less than independence that the argument that it held a special position within Yugoslavia that entitled it to independence, rather than a return to autonomy, emerged as a key element in the argument. It was therefore quite clearly created to serve a specific political need. Thirdly, if Kosovo has a right to independence on these grounds, then surely that right must surely extend also to

²⁹ See, *inter alia*, 'Kosovo case unique, says Miliband', *BBC News*, 19 February 2008; 'The Case for Kosovo', US State Department (Last accessed 11 January 2010).

³⁰ The preamble of the declaration states, *inter alia*, 'Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation'.

Vojvodina, which also enjoyed the same status as Kosovo within the SFRY. However, the international community has roundly rejected this view.³¹

Moreover, this line of reasoning also has wider ramifications for ethnic conflicts and peace process elsewhere. If a right to independence can be based on the existence of a particular administrative structure that does not have a notional right to sovereignty under the constitution of a state, then it raises the possibility that other sub-state units will in future declare that they too had enough of a special status as to merit formal independence.

The consequences of human rights abuses

The argument that Kosovo's independence is permitted on the grounds of human rights violations has also been cited as a primary justification for Kosovo's right to secede from Serbia (European Parliament, 2008).³² It is important to note that there is no doubt that Serbian forces committed serious acts of violence and brutality in Kosovo. This much is not in doubt. It has been amply cited in the UN resolutions preceding the NATO air campaign and well-documented elsewhere since, including in the prosecution and conviction of Serbian political and military leaders at the International Criminal Tribunal for the Former Yugoslavia (see, for example ICTY, 2009). The trouble is that if this argument can be ventured as a justification for independence in the case of Kosovo then why is it not equally valid in other cases of ethnic conflict? Why should it be the case that the oppression of the Kosovo Albanians should provide them with an opportunity to attain statehood, when severe and prolonged human rights abuses are not considered to be valid reasons for recognising the statehood of other oppressed peoples? In practically all other ethnic conflicts confronted by the international community,

³¹ For example, in April 2007, a political storm erupted when the German ambassador in Belgrade suggested that if Kosovo did not become independent it could lead to problems in Vojvodina and the Sandžak (a region of southern Serbia). The comments provoked an outcry, and even led the German parliament to call for an explanation. The ambassador was forced to backtrack very quickly. 'Zobel apologizes, government sends protest', *B92*, 27 April 2007.

³² The role of violence in the decision to recognise Kosovo is also explored in this volume by Philippe Roseberry, 'Suffering and Recognition: Mass Violence and the Recognition of Kosovo' [INSERT FINAL REFERENCE TO THIS VOLUME].

the underlying principle the respect for the territorial integrity of states has led international mediators to focus on forms of internal self-determination, expressed as autonomy. The Kurds of Iraq, who suffered extensive human rights abuses under the regime of Saddam Hussein have not been granted a right to independence. Nor have the Turkish Cypriots or the Tamils of Sri Lanka had a right to statehood recognised on the basis of past abuses. Likewise, Croatia's 'Operation Storm' to retake the separatist region of Krajina, which led to the expulsion of 200,000 ethnic Serbs,³³ has not given the Serbian community in the country an ex post facto claim to statehood. If Kosovo Albanians can be granted independence on the grounds of human rights abuses then it must follow that other groups that have sustained similar treatment must have the same rights; or is it the case that the suffering of Kosovo Albanians should be elevated above other groups? If so, this line of moral balancing is, naturally, extremely troubling. However, if this notion, which was accepted in the case of Kosovo, can be applied more widely, could it be the case, as suggested by Kuperman (2008), that this would actually run the risk of encouraging groups to engage in potentially 'suicidal' rebellions in order to try to encourage outside intervention and thus set in train a series of events as happened in Kosovo?

Furthermore, the argument that it can somehow be regarded as a case of remedial secession, as some have suggested,³⁴ is also weak. For a start, there is no compelling argument that the Kosovo Albanians face any existential threat from Belgrade any longer. Milošević is no longer in power – indeed, he is no longer alive – and the government in Belgrade has openly eschewed any use of military force to pursue its claims over Kosovo.³⁵ But even if had not publicly disavowed the use of force, it is unlikely that Serbia would want to provoke another confrontation with NATO, which would be almost inevitable if Belgrade staged a military invasion to retake the province. The fact that Serbia is also on the course to EU accession would have made any return to violence or the persecution of the Kosovo Albanians extremely unlikely. Ultimately, if a process of remedial secession could ever have been justified –

³³ 'Evicted Serbs remember Storm', *BBC News*, 5 August 2005.

³⁴ As noted, this argument came up in the ICJ case on Kosovo's declaration of independence (see, for example, the Dutch and Albanian presentations). A call for the right of remedial secession to be examined was therefore made by Judge Bruno Simma (2010) in his separate declaration. However, the other judges explicitly stated that they did not want to tackle this thorny issue (ICJ, 2010, para.82).

³⁵ 'Kosovo Declares Its Independence From Serbia', *New York Times*, 18 February 2008.

although its legality would have been extremely questionable under current international law – it would have been appropriate to have taken this action in 1999, as some suggested.³⁶ Such an argument is rather more questionable, and much more difficult to justify, under the conditions that prevailed in 2008, when Kosovo declared independence (Vidmar, 2010). As Sir Ivor Roberts (2007), the former British Ambassador in Belgrade, stated, ‘It is hard to explain to Serbs why, when Milošević was still in power, a settlement was imposed which left Kosovo legally and formally part of Serbia. But having overthrown Milošević and lived according to the rules of the international community for the last seven years, the Serbs now face being punished by losing nearly 20 per cent of their territory.’

The period of UN administration

The third argument cited to justify statehood is that Kosovo has been under international administration for a prolonged period of time (European Parliament, 2008). According to this line of reasoning, the lengthy period Kosovo had spent as an international protectorate had made any attempt to return it to Belgrade’s rule, no matter how loose this rule might be, impossible. Kosovo therefore had no option but to go its own way. This line of reasoning is problematic for several reasons. For a start, even under UN administration, Kosovo had been recognised as Serbian territory. Belgrade simply had had no effective control over the province. To this extent, a model of autonomy could quite easily provide the same level of self-rule, while allowing Serbia to maintain nominal sovereignty over the province. Indeed, the Serbian government frequently called for a solution based on, ‘more than autonomy, but less than independence’, and suggested that it would be willing to accept Kosovo having significant external relations, including membership of the World Bank and IMF, and separate representation in sporting and cultural bodies. To this extent, it was unclear why UN administration had made Kosovo’s case for independence, rather than autonomy, so strong.

³⁶ Paddy Ashdown, comments made during an interview on *Sky News*, 9 December 2007. Another observer put the case more harshly: ‘Fault for the war, originally, lies with local actors on the ground. However, fault for this perverse non-peace and for much of the nonsense that has prevailed within it belongs to the international actors who waged a war without the guts to dictate clear terms afterwards’ (Jansson, 2007).

A far more problematic element of this argument was the implications that this would have on attempts to manage conflicts elsewhere. If it were the case that Kosovo should have a right to independence on the basis of UN administration, it would make any future efforts to introduce UN administration in other conflicts that much harder to achieve. This argument was specifically tackled by the Cypriot delegation participating at the hearings of the International Court of Justice on the legality of Kosovo's unilateral declaration of independence. In their oral presentation, the team stated:

What hope is there that States will be persuaded to accept international administration or other interim arrangements for dealing with crises of the kind that arose in the Balkans, if they know that they risk being told that the powers that they have temporarily shared with, or temporarily lent to, another body, have been irrevocably taken from them? It is like handing a child to someone to look after for a while; and then being told that you will never have the child back. What will that do to efforts in the United Nations, or the African Union, or the OSCE to bring an end to killing and to find peaceful settlements to international problems? (ICJ, CR 2009/29, p.45)

As an aside to this, it is perhaps worth noting that, in the context of the ICJ's consideration of the legality of Kosovo's declaration of independence, the Cypriot delegation also produced the strongest rationale as to why the judges should not seek to engage with the unique case argument during the course of their deliberations:

If the Court were once to say that it could in effect suspend the operation of the law in relation to one case because of its particular characteristics, it would establish, in the clearest possible terms, a precedent for suspending the operation of the law in relation to any case because of its particular characteristics...Moreover, it is unlikely that the Court could confine the effect of its opinion to the specific case of Kosovo. Some of the characteristics which have been alleged in statements before the Court to lead to the conclusion that Kosovo is a sui generis case exempt from the application of international law could in the hands of any skilful advocate or manipulative politicians be generalized so as to be applicable to many other situations...If the Court were to base its opinion on a characterization of Kosovo as a situation

sui generis, it would cease to be a court of law and would take on the role of the other principal organs of the United Nations – that of deciding how a particular situation should be handled politically. (ICJ, CR2009/29, p.49)

Other occasionally cited elements of the unique case argument

In addition to the three primary reasons for claiming that Kosovo is a unique case, several other factors have been put forward. For example, another justification that has often been cited as a reason for Kosovo's right to independence is that this is the overwhelming wish of the people of Kosovo. This was explicitly raised by the United States in its oral presentation before the ICJ (CR 2009/30, p.23). It has not, however, been frequently cited by others as a justification for its independence as it so obviously rests on the self-determination argument that is being avoided at all costs by many other countries. If Kosovo's unique character were to be based on the will of a dominant ethnic group, it would all but ensure that the majority of the international community would remain steadfastly opposed to recognition. Likewise, the argument that Security Council Resolution 1244 did not explicitly prohibit independence, a point stressed by many interested parties (such as Britain, the United States and Slovenia) in their oral presentations before the ICJ,³⁷ is also likely to have a disruptive effect. In future more care will have to be taken in the drafting of resolutions specifically to preclude certain undesirable outcomes on the part of certain interested actors. This will inevitably make drafting such resolutions that much more difficult and may well ensure that an element of constructive ambiguity, so necessary when trying to engage in peace processes, is removed. This could potentially serve to prolong armed conflict.

The sum of the parts argument

Leaving aside the shortcomings of the various individual arguments that have been put forward to claim that Kosovo is a unique case, it is also important to consider whether the sum of the whole is greater than the sum of the parts. According to this view, while each individual element is perhaps not a reason for regarding Kosovo as sui generis, when taken together they represent a powerful

³⁷ In contrast, Russia, China, Brazil and Argentina, all of which were on the Security Council in 1999, and were involved in the deliberation over 1244, argue that the resolution is quite clear in reaffirming the territorial integrity of Yugoslavia and thus precluded independence as a final status.

justification of this perspective. Obviously, there are problems with this line of reasoning. For a start, given that each of the individual arguments can be challenged and proven to be either false or have a wider destabilising effect, combining them all together does not suddenly make them all right or acceptable. Secondly, two of the arguments – namely those relating to human rights abuses and UN administration – would apparently almost always run hand-in-hand. One does not have international administration, at least in the context being described here, in situations where all is fine and well. The existence of the latter is therefore a direct consequence of the former. Likewise, it is perfectly conceivable that in many other circumstances the removal of some degree of autonomy could be a justification for insurrection against the central government that sets in train the latter developments. In this sense, Kosovo certainly cannot be seen as unique in and of itself. To be sure, it may be unique inasmuch as it is perhaps the first time we have seen the confluence of these various factors in a particular situation. This does not, however, mean that it can be presented as existing within some sort of legal bubble that sets it against any other case that is likely to arise in the future. This brings us to the next element of the *sui generis* argument.

The unique case argument and a right to independence

While there are good reasons to cast doubt on each of the elements of the *sui generis* argument as a justification for statehood, it is important to note that the concept of a ‘unique case’ has not been rejected out of hand by many states. Indeed, a number of countries facing separatist threats of their own have been willing to accept that Kosovo is *sui generis*, if only to ensure that a link cannot be made to the specific circumstances that they face. For instance, all five of the EU member states that still reject Kosovo’s independence,³⁸ were willing to agree to a joint text produced at the time of the declaration of

³⁸ The five EU members that have not recognised Kosovo are Cyprus, Greece, Romania, Slovakia, and Spain. For an analysis of their respective positions, as well as Serbia and Bosnia, see Kosovo Foundation for Open Society and British Council, ‘Kosovo Calling: International Conference to Launch Position Papers on Kosovo’s Relation with EU and Regional Non-recognising Countries’, 2012. Also see Zsuzsa Csergő, ‘Kosovo and the Framing of Non-Secessionist Self-Government Claims in Romania’, [INSERT FINAL REFERENCE TO THIS VOLUME] and Katarína Macarieová, ‘The notion of Kosovo as precedent: The impact of the Hungarian minority issue on Slovakia’s policy towards Kosovo’s Independence’ [INSERT FINAL REFERENCE TO THIS VOLUME].

independence that specifically referred to the sui generis nature of the developments in Kosovo (European Union, 2008). However, and crucially, these states have argued that this does not mean that the unique confluence of elements that arose in the case of Kosovo could provide a pretext for independence. For example, during the ICJ case, the Vietnamese government stated, 'Respect for the principle of sovereignty and territorial integrity is the basis to international peace and security and the peace and security in the Balkans region. It is, therefore, important that a solution to the Kosovo situation must be in accordance with the principle of territorial integrity.' (ICJ CR 2009/33, p.19) To this extent, many countries, while accepting that Kosovo was unique, were unwilling to endorse the view that the unique circumstances in Kosovo were sufficient as to allow them to recognise the declaration of independence. This position was perhaps most clearly elucidated by Marcos Kyprianou, the Cypriot Foreign Minister, following a meeting with his Serbian counterpart, Vuk Jeremic:

Cyprus does not recognise Kosovo. For us, it is a question of principles, a question of preserving and safeguarding the territorial integrity of both countries. This is a principle of the United Nations, the Helsinki Final Act, a principle of international law and on the basis of these principles, we will never recognise Kosovo...We are also striving to maintain the territorial integrity of our country and even though we know the position that Kosovo is a sui generis case and does not create a precedent, nevertheless it does violate the same principles of international law.³⁹

Notably, even after the International Court of Justice's advisory opinion on Kosovo, the position of many countries appears not to have changed. Indeed, the Court's decision may have served to make further recognition harder to achieve. Although supporters of Kosovo's independence argue that the decision has in fact reinforced the claim that Kosovo is a unique case,⁴⁰ the Court did not support this

³⁹ 'Cyprus will never recognise Kosovo', *Cyprus Mail*, 8 April 2008.

⁴⁰ As one Kosovo Albanian official stated, 'We are making lots of efforts to 'convince' these states that Kosovo does not set a precedent. It is a sui generis case, with very specific historical and political circumstances. Those member countries that haven't recognised us so far have internal problems, thus they think recognition of Kosovo can reflect negatively in their inner political realm. We will tell them

position. Rather, in taking a very narrow view of the question, the Court in fact proclaimed that a unilateral declaration of independence is not, as a mere statement, contrary to general international law. Although the judges were adamant that they were not taking a stand on whether Kosovo had a right to secede, or whether or not it was now a state (ICJ, 2010, para.52), their opinion reinforced the view that Kosovo's actions could in fact serve as a precedent for others; rather than confirm the argument that Kosovo, in all its salient aspects, is unique and cannot be compared to other situations and circumstances. Under these circumstances, it was perhaps hardly surprising that the opinion was quickly endorsed by a number of other secessionist, or potentially secessionist territories.⁴¹

Russian objections to the unique case argument

Lastly, the unique case argument was to have significant ramifications in terms of how it would affect Russian perceptions of the situation. Without Moscow's support, the hopes of Kosovo's independence gaining approval from the UN Security Council, which in turn was a requisite for UN membership, would be impossible. In this context, the unique case argument was in fact wholly counterproductive inasmuch as it was necessarily predicated on the view that, if Kosovo is *sui generis*, then the principles applied in support of its statehood could not be applied elsewhere or to other states. In other words, a large part of the reason why the current mess exists is precisely because the key states that supported Kosovo's independence were unwilling to allow Russia to exercise the same rights in its own sphere of influence. Although many have argued that Russia's intransigence on Kosovo was driven by malign

that this is not the case and the ICJ ruling has proven that further.' 'Next step for Kosovo is UN membership': Ambassador', *Euractiv*, 26 July 2010.

⁴¹ For example, the foreign ministry in Transdnier welcomed the 'landmark' decision, viewing it as providing a 'model' (*RFE/RL*, 28 July 2010). At the same time, Milorad Dodik, the prime minister of Republika Srpska, one of the two entities that make up Bosnia-Herzegovina raised the possibility that the Bosnian Serbs would follow the Kosovo Albanian lead and declare independence (*Radio Srbija*, 24 July 2010.) Likewise, in Turkey and northern Cyprus there was considerable speculation that the opinion could open the way for the recognition of the TRNC. Also see Nina Caspersen, 'After Kosovo: Renewed Independence Hopes in the Caucasus?' [INSERT FINAL REFERENCE TO THIS VOLUME]

motives,⁴² this is too simplistic an explanation. Clear warnings were issued to senior US officials, including Secretary of State Condoleezza Rice,⁴³ that the Russian public would not accept an independent Kosovo.⁴⁴ Even if the Russian government was inclined to accept the sui generis argument, the Russian public would want to know why Kosovo, a western project, was allowed to have independence with the acceptance of the Russian Government, but those states in the South Caucasus that were in Russia's sphere of interest were not. This situation was then made even worse by the decision by the states that supported Kosovo's independence to bypass the Security Council when it became clear that Russia would not accept the Ahtisaari proposals.⁴⁵ No matter what the apparent justifications for doing so, the Security Council could not be circumvented in this manner. As Russia stressed in its presentation before the ICJ, the Security Council needed to endorse a solution (CJ, CR 2009/30). The decision to simply ignore the Council because Russia was willing to exercise its legitimate right to cast a veto amounted to a very public humiliation for Moscow.

In other words, there is a strong case to suggest that the sui generis argument was rejected by Russia because it effectively constituted a political insult – rather than because it simply disagreed with Kosovo independence. While the United States and key EU members believed that they could work around international law and the Security Council for its own interests, they had simultaneously made it clear that others could not follow the same path. Under these circumstances, it came as little surprise to many observers when, just six months later, Russia chose to exercise its own power on the international stage, and appease Russian public opinion, by recognising South Ossetia and Abkhazia

⁴² For example, many saw it as a chance for Moscow to seek revenge for its humiliation in 1999, when it had been unable to prevent the NATO bombing of Yugoslavia. 'Wisner: Russian Opposition to Kosovo Independence 'Unbelievably Regrettable'', *Council on Foreign Relations*, February 12, 2008; 'A Russian puzzle', *Guardian Unlimited*, 29 March 2007; 'Analysis-Kosovo offers Russia a chance to avenge 1999 defeat', *Reuters*, 12 February 2008.

⁴³ 'Rice, Putin talks end, EU-Russian summit announced', *DPA*, 15 May 2007.

⁴⁴ For example, some observers believed that Russia was not serious in its threat to block Kosovo's independence. See Holbrooke, 2007.

⁴⁵ A number of attempts were made over the course of several months to persuade Moscow to accept the document. 'Putin to push for more Kosovo talks', B92, 29 June 2007.

following a short war with Georgia. Perhaps unsurprisingly, the Kosovo precedent was openly cited as a justification for this decision by the Russian president, Dimitry Medvedev. Replying to a question from the press, he stated:

You were right in asking if the Ossetians and Abkhazians can and want to live within Georgia. This is a question for them to ask of themselves and it is they who will give their own clear answer. It is not for Russia or any other country to answer this question for them. This is something that must take place in strict accordance with international law. Though, over these last years international law has given us numerous very complicated cases of peoples exercising their right to self-determination and the emergence of new states on the map. Just look at the example of Kosovo. (The Kremlin, 2008)

As far as Russia was concerned, Kosovo would not, and could not, be *sui generis*.

Conclusion

For sixty years, the international community has sought to regulate and limit the right of self-determination. Rather than allow peoples to secede from established states, the argument has been made that self-determination should, except in limited cases associated with processes of decolonisation, be defined in terms of autonomy and self-government within existing states. This thinking applied as much to Kosovo as to any number of territories within states that sought to break away and gain full independence. The problem was that the decision to intervene in 1999 made a continuation of this policy untenable. While there was certainly a wish that Kosovo would be able to remain a part of Serbia, albeit with a very high degree of self-rule, this became all but impossible to achieve. To have tried to do so would have led to renewed violence. Likewise, any attempt to try to ignore the problem was doomed to failure. Rather than be seen as saviours, NATO and the UN administration in the province ran the risk of becoming seen as 'occupiers'. Under these circumstances, it became clear in many western capitals that the only solution was to let Kosovo declare independence and recognise it as such. However, realising that this would open the way for other groups to claim independence, it was claimed that Kosovo could not be a precedent. It was, instead, a unique case deriving from a unique set of conditions.

The problem is that this argument failed to gain universal, let alone general, international support. Taken separately, each of the key argument used to justify the unique case of Kosovo is subject to challenge. Taken together, even if Kosovo does represent a hitherto unseen coming together of various factors, these factors do not create a justification for setting aside the principles and norms of international relations in entirety. Moreover, many states have come to regard the argument as a means by which the West is trying to extricate itself from a mess of its own making, while preventing other states from being able to apply the same rationale in circumstances of their own. In other words, it was perceived as a case of the West creating one rule for itself while demanding that everyone else continue to follow established principles.

For all these reasons, it hardly seems surprising that the unique case argument failed to gain universal acceptance on the world stage and open the way for Kosovo's full integration into the international community. Although the political rationale for supporting independence may have been sound, the arguments presented to justify the decision were flawed; not only in terms of the long-standing prohibition against secession, but also in terms of the consequences that they would have on peace processes elsewhere. Moreover, it was simply too easy for other powers, most notably Russia, to present the unique case argument as an example of Western hypocrisy. Lastly, many countries simply felt uncomfortable with the claim that Kosovo was not a precedent. By accepting that Kosovo was a unique case, the way would be opened for other 'unique cases' to emerge in the future according to circumstances. As Timothy Garton Ash (2008) neatly put it at the time Kosovo declared independence, 'Kosovo is unique, and there will be more Kosovos.'

References

Archibugi, Daniele (2003), 'A Critical Analysis of the Self-Determination of Peoples: A Cosmopolitan Perspective', *Constellations*, Volume 10, Number 4, pp.493-499.

Caspersen, Nina 'After Kosovo: Renewed Independence Hopes in the Caucasus?' [INSERT FINAL REFERENCE IN THIS VOLUME]

Clapham, Christopher (1998) 'Degrees of Statehood', *Review of International Studies*, Volume 24, Number 2, pp.143-157.

Clark, Wesley (2001), *Waging Modern War* (New York: Public Affairs)

Crawford, James A. (1997), 'State Practice and International Law in Relation to Unilateral Secession', *Report to Government of Canada Concerning Unilateral Secession by Quebec*, 19 February.

Crawford, James A. (1998) 'State Practice and International Law in Relation to Secession', *The British Yearbook of International Law*, Volume 69.

Crawford, James (2006), *The Creation of States in International Law*, 2nd Edition (Oxford: Oxford University Press)

Csergő, Zsuzsa 'Kosovo and the Framing of Non-Secessionist Self-Government Claims in Romania', [INSERT FINAL REFERENCE TO THIS VOLUME]

European Parliament (2008), 'Kosovo: A special case say MEPs', External Relations, 28 February.

European Union (2008), 2851st Council meeting, General Affairs and External Relations, External Relations, 18 February.

Fabry, Mikulas (2010), *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford: Oxford University Press)

Fierstein, Daniel (2008), 'Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications', *Boston University International Law Journal*, Volume 26, Number 2.

Garton Ash, Timothy (2008) 'This dependent independence is the least worst solution for Kosovo', *The Guardian*, 21 February.

Helsinki Declaration (1975), The Final Act of the Conference on Security and Cooperation in Europe, 14 I.L.M. 1292, 1 August.

Holbrooke, Richard (2007) 'Back to the Brink In the Balkans', *Washington Post*, 25 November.

House of Commons (2000), 'Kosovo', Select Committee on Foreign Affairs, House of Commons, 4th Report, Session 1999-2000.

International Court of Justice (ICJ) (2010), 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', Advisory Opinion of 22nd July.

International Criminal Tribunal for the Former Yugoslavia (ICTY) (2009) 'Five Senior Serb Officials Convicted of Kosovo Crimes, One Acquitted', Press release, 26 February.

Jansson, Eric (2007) 'The Wages of War as Waged by Wimps', *Balkan Insight*, 6 December.

Judah, Tim (2002), *Kosovo: War and Revenge*, 2nd Edition, (New Haven: Yale University Press)

Judah, Tim (2008), *Kosovo: What Everyone Needs to Know* (Oxford: Oxford University Press)

- Koroma, Abdul (2010), Dissenting Opinion of Judge Koroma, International Court of Justice, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', 22 July.
- Koskenniemi, Martti (1994), 'National Self-Determination Today: Problems of Legal Theory and Practice', *International and Comparative Law Quarterly*, Volume 43.
- Ker-Lindsay (2009a) 'From Autonomy to Independence: The Evolution of International Thinking on Kosovo, 1998–2005', *Journal of Balkan and Near Eastern Studies*, Volume 11, Issue 2, pp.141-156
- Ker-Lindsay, James (2009b) *Kosovo: The Path to Contested Statehood in the Balkans* (London: I.B.Tauris)
- Ker-Lindsay, James (2012) *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (Oxford: Oxford University Press)
- Kosovo Foundation for Open Society and British Council, 'Kosovo Calling: International Conference to Launch Position Papers on Kosovo's Relation with EU and Regional Non-recognising Countries ', 2012.
- Kremlin, The (2008) 'Press Statement following Negotiations with French President Nicolas Sarkozy', Moscow, 12 August.
- Kuperman, Alan J. (2008) 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans', *International Studies Quarterly*, Volume 52, pp.49-80
- Lyons, James (2008) 'Kosovo train-wreck warnings', *The Washington Times*, 2 January.
- Macarieová, Katarína 'The notion of Kosovo as precedent: The impact of the Hungarian minority issue on Slovakia's policy towards Kosovo's Independence' [INSERT FINAL REFERENCE TO THIS VOLUME].
- Malcolm, Noel (2002) *Kosovo: A Short History*, 2nd Edition (London, Pan Books)
- McGarry, John (2004) 'Foreword', in Tozun Bahceli, Barry Bartman and Henry Srebrnik (editors), *De Facto States: The Quest for Sovereignty* (London: Routledge)
- Musson, Janice (2008), 'Britain and the Recognition of Bangladesh in 1972', *Diplomacy and Statecraft*, Volume 19, Number 1, pp.125-144.
- Pavlowitch, Stevan K. (2003), 'Serbia, Montenegro and Yugoslavia', in Dejan Djokic (editor), *Yugoslavism: Histories of a Failed Idea, 1918-1992* (London: Hurst and Company)
- Pegg, Scott (1999) *International Society and the De Facto State* (Aldershot: Ashgate)

- Pellet, Alain (1992) 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', *European Journal of International Law*, Volume 3, Number 1, pp.178-185.
- Perritt, Henry H. (2008) *Kosovo Liberation Army: Inside Story of an Insurgency* (Illinois: University of Illinois Press)
- Perritt, Henry (2009) *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (Cambridge: Cambridge University Press)
- Pettifer, James *The Kosova Liberation Army: Underground War to Balkan Insurgency, 1948-2001* (London: Hurst, 2012)
- Roberts, Ivor (2007), 'Partition is the best answer to the Kosovo question', *The Independent*, 5 December.
- Roseberry, Philippe, 'Suffering and Recognition: Mass Violence and the Recognition of Kosovo' [INSERT FINAL REFERNCE TO THIS VOLUME]
- Shala, Blerim (2000) 'Because Kosovars are Western, There Can be No Homeland without a State', in William Joseph Buckley (editor), *Kosovo: Contending Voices on Balkan Interventions* (Cambridge: Eerdmans)
- Simma, Bruno (2010), Declaration of Bruno Simma, 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', International Court of Justice, Advisory Opinion of 22nd July.
- Turns, David (2003), 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', *Chinese Journal of International Law*, Volume 2, Number 1.
- United Nations (1970), Official Records of the General Assembly, Twenty-fifth Session, resolution 2625 (XXV) of 24 October.
- United States (2007), 'President Bush Participates in Joint Press Availability with Prime Minister of Albania, Dr. Sali Berisha, Courtyard Council of Ministers, Tirana, Albania', *Office of the Press Secretary*, June 10.
- Vickers, Miranda (1998) *Between Serb and Albanian: A History of Kosovo* (New York: Columbia University Press)
- Vidmar, Jure (2010), 'Remedial Secession in International Law: Theory and (Lack of) Practice', *St Antony's International Review*, Volume 6, Number 1.

Weller, Marc (2005), 'The Self-Determination Trap', *Ethnopolitics*, Volume 4, Number 1.

Weller, Marc (2009) *Contested Statehood: Kosovo's Struggle for Independence* (Oxford: Oxford University Press)