

Secession and Statehood:

The International Legal Status of Kosovo

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TABLE OF CONTENTS

INTRODUCTION.....	4
CHAPTER ONE: KOSOVO'S DISPUTED PAST	7
A. The Competing Claims Concerning Kosovo's Historical Significance.....	7
B. The Consolidation of Serbian Sovereignty over Kosovo.....	8
C. Kosovo as an Internationalised Territory	12
CHAPTER TWO: THE STATUS OF UNILATERAL SECESSION AT INTERNATIONAL LAW.....	14
A. Serbia's Objections to Kosovo's Declaration of Independence	14
B. International Conventions, United Nation Resolutions and the Right of Self-Determination	17
C. State Practice and Secession	20
CHAPTER THREE: STATE RECOGNITION	29
A. De jure and De facto Independence.....	29
B. Theories of State Recognition and State Practice.....	30
C. Recognition of Kosovo's Independence	38
CHAPTER FOUR: KOSOVO AS AN EXCEPTIONAL CASE OF SECESSION	41
A. Kosovo as an Exceptional Case	41
B. Kosovo as a Precedent.....	45
C. Russia's Motives for Recognising Abkhazia and South Ossetia.....	47
CHAPTER FIVE: THE FUTURE.....	49
A. Serbia's Request for an Advisory Opinion	49
B. Kosovo's Admission to the United Nations.....	52
C. The Future	54
CONCLUSION.....	56
Bibliography	58
Appendix	71
Appendix One: Kosovo Declaration of Independence	71
Appendix Two: Map of Kosovo	75
Appendix Three: Map of the Central Balkan Region	76
Appendix Four: United Nations Security Council Resolution 1244	77
Appendix Five: The Report of the Special Envoy of the Secretary-General on Kosovo's future status	85

INTRODUCTION

State secession is inherently difficult to reconcile with the contemporary new world order. It is a sensitive and indeterminate facet of international law which remains shrouded in controversy. Yet on the 17 February 2008, the international community was forced to confront this phenomenon head-on after the Assembly of Kosovo unilaterally proclaimed the Republic of Kosovo (“Kosovo”) to be an independent and sovereign State, irrespective of the existing claims of the Republic of Serbia (“Serbia”) to sovereignty over this autonomous province.¹

This act has been the catalyst for wide debate as to whether international law supports the emergence of new independent entities created through the separation of part of the territory and population of an existing State, without the consent of the latter.² Prior to this declaration, the prevailing view amongst many legal commentators was that international law neither explicitly prohibits nor recognises the right of an ethnic group to unilaterally secede from a parent State.³ The situation appears none the clearer in the wake of this declaration, with international legal scholars still unable to offer a uniform answer to the question of whether this secession is in accordance with law.⁴ Kosovo inevitably constitutes a “quintessential “tough case””.⁵

The legal indeterminacy has been further exacerbated by the fragmented and uncoordinated response of the international community. Although support for and recognition of Kosovo’s secession has been readily forthcoming from a significant proportion of the international community of States, other States have declared that the secession is contrary to international

¹ See Kosovo Declaration of Independence, Appendix One.

² Marcelo G. Kohen ‘Introduction’ in Marcelo G. Kohen (ed) *Secession: International Law Perspectives* (Cambridge University Press, 2006) 3.

³ See Peter Malanczuk *Akehurst’s Modern Introduction to International Law* (7th Revised ed, Routledge, 1997) 78; Rein Müllerson *International Law, Rights and Politics – Developments in Eastern Europe and the CIS* (Routledge, 1994) 83; Bartram S Brown ‘Human Rights, Sovereignty, and the Final Status of Kosovo’ (2005) 80 *Chi.-Kent l. Rev* 235, 236; John Dugard and David Raič ‘The role of recognition in the law and practice of secession’ in Kohen, above n 2, 102; Antonello Tancredi ‘A normative ‘due process’ in the creation of States through secession’ in Kohen above n 2, 188; James Crawford *The Creation of States in International Law* (Second Edition, Oxford University Press, 2006) 5.

⁴ Colin Warbrick, ‘Kosovo: The Declaration of Independence’ (2008) 57 *International and Comparative Law Quarterly* 675, 675.

⁵ Christopher Borgen *ASIL Insight: Kosovo’s Declaration of Independence: Self-determination, Secession and Recognition* (2008) American Society of International Law 29 February 2008 <<http://www.asil.org/insights/2008/02/insights080229.html>> accessed 17/03/2008.

law and a violation of Serbia's sovereignty and territorial integrity.⁶ Furthermore, within six months of the declaration of independence, Kosovo's secession has already been cited as a precedent for two subsequent secession attempts. Ascertaining legal clarity is therefore crucial.

It is not possible to determine the legality of this secession without first acknowledging that the genesis of Kosovo's secession stems from two competing nationalistic claims to territory. Both Kosovar Albanians and Kosovar Serbs have inhabited this territory for many centuries and both purport to have their own legitimate claims to sovereignty. Chapter One will provide a historical analysis of significant events in Kosovo's past in order to establish why the retention of Kosovo is regarded as a central aspect of the Serbian historical identity and why Kosovar Albanians insist on nothing short of full independence.⁷

Against this backdrop, Chapter Two will examine the relevant international conventions, United Nations ("UN") Resolutions and State practice to ascertain whether or not international law currently supports the legality of Kosovo's unilateral secession. Ultimately, this chapter will demonstrate that since international law cannot provide a definitive answer to this question, Kosovo's independence cannot be construed as the exercise of any legal right or entitlement to secession.

Given this continued legal uncertainty, debate abounds as to whether international law may nevertheless adapt to acknowledge this secession as a fact through the process of State recognition. Chapter Three will delineate the theoretical doctrines underpinning the process of State recognition and demonstrate the influence of recognition on Kosovo's current independent status. Chapter Three will also pursue the question of whether or not Kosovo can now be regarded as a 'State'.

⁶ As of 1 October 2008, 47 of the 192 United Nations members have recognised Kosovo. *Who Recognized Kosova as an Independent State? The Kosovar People thank you!* (1 October 2008) <www.kosovothankyou.com> accessed 1/10/08. On the 18 February 2008, the Serbian National Assembly declared Kosovo's declaration of independence to be null and void, and contrary to the UN Charter, Security Council Resolution 1244, the Helsinki Final Act and the norms of international law on which the world order resides. National Assembly of Serbia, 'First Extraordinary Sitting of the National Assembly of the Republic of Serbia in 2008' (18/02/08) <www.parlament.sr.gov.yu/content/eng/aktivnosti/skupstinske_detalji.asp?Id=1251&t=A> accessed 26 /04 /08.

Russia has also described the claim of statehood as being "in violation of the sovereignty of States, of the Charter, of resolution 1244 and of the Helsinki Final Act". Statement by the Ministry of Foreign Affairs of the Russian Federation, 17 February 2008 in Warbrick, above n 4, 685.

⁷ Miranda Vickers *The Albanians: A Modern History* (I.B.Tauris, 1995) 97.

Chapter Four will examine why a large number of States have unilaterally recognised Kosovo, notwithstanding the absence of any explicit support for this secession at international law. In doing so, it will identify the exceptional factual circumstances which led the Assembly of Kosovo to unilaterally declare independence and which subsequently prevent Kosovo from serving as a precedent for other unresolved conflicts.

Chapter Five will depict Serbia's relentless bid to reclaim sovereignty over Kosovo and its persistent attempts to illustrate that the secession is contrary to international law. Ultimately, it will be demonstrated that these objections will not thwart the consolidation of Kosovo's sovereignty within the existing international community of States.

CHAPTER ONE: KOSOVO'S DISPUTED PAST

*“In Kosovo, history is war by other means”*⁸

In determining the legality of Kosovo's unilateral secession, the weight to be afforded to events in Kosovo's past cannot be underestimated. Both Kosovar Serbs and Kosovar Albanians have conflicting theories regarding the historical significance of Kosovo, and how such nationalistic claims translate into questions of sovereignty. This chapter will provide a historical overview of significant events in Kosovo's past, to establish why Serbia has remained unflinching in its commitment to the retention of Kosovo, and why the Kosovar Albanians are so determined to secede.

A. The Competing Claims Concerning Kosovo's Historical Significance

According to the Serbian view, the history of Kosovo is central to the development of Serbian national and religious consciousness and the formation of the Serbian identity.⁹ Medieval Kosovo is readily referred to as the 'cradle of Serbia', as it was the centre of the last medieval Serbian Kingdom and home to the Serbian Orthodox Church following the fall of Constantinople in 1204.¹⁰ Furthermore, Serbs maintain that had it not been for the famous Serbian defeat at the Battle of Kosovo Polje in 1389, which ultimately resulted in the incorporation of Kosovo into the Turkish-Ottoman Empire, Serbs would have retained control of Kosovo and held an overwhelming majority until only a few generations ago.¹¹

Albanians, on the other hand, claim the right of first possession to Kosovo. According to Albanian historians, Albanians descend from the ancient Illyrian and Dardanians who lived in Kosovo long before the Slav invasions of the sixth and seventh centuries.¹² Albanians also claim that, historically, there has been a greater number of Albanians to Serbs inhabiting the

⁸ Tim Judah *Kosovo War and Revenge* (Yale University Press, 2000) 3.

⁹ Carl K. Savich *The Kosovo Crisis: Origin and History* (2000) Serbian National Defense Council of America www.snd-us.com/history/savich_kosovo-origins.htm, accessed 26/ 6/ 2008.

¹⁰ Miranda Vickers *Between Serb and Albanian: A History of Kosovo* (London, 1998) 6, in Dick Leurdijk & Dick Zandee *Kosovo: From Crisis to Crisis* (Ashgate Publishing Ltd, 2001) 5.

¹¹ Tony Weymouth & Stanley Henig *The Kosovo Crisis: The last American War in Europe* (Pearson Education Limited, 2001), 17.

¹² Judah, above n 8, 2.

region. In 1690, an estimated 400,000 to 500,000 Serbs migrated from Kosovo, radically altering the ethnic composition of the region.¹³ Since then, the strong Albanian presence in the region has been reinforced by the remarkably high Albanian birth rate which, during the twentieth century, reached a rate of 2.3 per cent per year, compared with the 0.9 per cent per year average for Yugoslavia proper.¹⁴

Of all the Balkan subject peoples, it was the Albanians who were most inclined to convert to Islam and consequently prospered during the period of Ottoman rule.¹⁵ Albanians could, and did, rise to the highest positions in the Empire.¹⁶ They were also encouraged to expand into lands vacated by Christians in the plain of Kosovo-Methohija.¹⁷ However, Serbs counted for little during the “allegedly dark Ottoman ages”.¹⁸ Their political and administrative autonomy was broken.¹⁹ This period also inspired further divisions between the Serbs and Albanians, with Serbian nationalists proclaiming that the Serbian people were being suppressed by the Ottomans, with the Albanians as their collaborators.²⁰ Significantly, with the growth of Serbian and Albanian nationalism during this period, contrasts between both people arose, but until that time they lived together in relative harmony.²¹

B. The Consolidation of Serbian Sovereignty over Kosovo

The genesis of the modern dispute over Kosovo arose following the collapse of the Ottoman Empire during the Balkan Wars of 1912 and 1913. At the conclusion of the first Balkan war, major European powers awarded the victorious Balkan allies, including Serbia, large areas of Albanian-claimed territory. Although Albania’s independence was formally recognised by the Treaty of London in May 1913, it was accepted that Kosovo did not form part of this new

¹³ Noel Malcolm *Kosovo: A Short History* (New York University Press, 1998), 140.

¹⁴ Leurdijk and Zandee, above n 10, 17.

¹⁵ Vickers, above n 7, 17.

¹⁶ Judah, above n 8, 11.

¹⁷ Vickers, above n 7, 13.

¹⁸ Alexander Bayerl ‘Serbia and the Albanian Question in the Context of European History’ in Dieter Mahncke (ed) *Old Frontiers –New Frontiers: The Challenge of Kosovo and its Implications for the European Union* (Peter Lang AG European Academic Publishers, 2001) 38.

¹⁹ Ibid.

²⁰ Leurdijk and Zandee, above n 10, 7. However, evidence suggests that the Ottomans were rather tolerant of the different cultures within their Empire, and permitted an unprecedented flourishing of ecclesiastical architecture and the establishment of many Serb monasteries in Kosovo during this period. See Bayerl, above n 18, 38.

²¹ Leurdijk and Zandee, above n 10, 7.

Albanian state.²² Similarly, following the conclusion of the Second Balkan War, the Great Powers assigned Kosovo to Serbia under the Protocol of Florence in December 1913.²³ There was strong Albanian dissatisfaction with this outcome, as the agreement implied that more than half of the Albanian population would remain outside the new State of Albania.²⁴ Kosovo Albanian separatists argue to this day that this incorporation with Serbia was illegal.²⁵ Regardless of such claims, Serbia's sovereignty over Kosovo was formally recognised at this time.

Serbia's sovereignty over Kosovo was reinforced at the 1918 Paris Peace Conference, in which the Entente Powers rewarded Serbia for its contribution to the Allied victory in the First World War. Kosovo was assigned to the new Serbian-dominated 'Kingdom of Serbs, Croats and Slovenes' (known as Yugoslavia after 1929), despite the 1921 consensus suggesting that Albanians constituted 64.1 per cent of the population in Kosovo.²⁶ In 1944, the Communist Party of Yugoslavia, under Marshall Josip Broz Tito, again assigned Kosovo to Serbia, which itself became one of the six republics within the new Socialist Federal People's Republic of Yugoslavia ("SFRY") after 1945.²⁷ According to historian Miranda Vickers, Tito refused to discuss the return of Kosovo to Albania as he did not want to antagonise the Serbs, Yugoslavia's largest ethnic group.²⁸

In 1974, Tito adopted a new constitution which granted Serbia and the five other republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro and Slovenia, the right of "self-determination, including the right of secession".²⁹ Kosovo, on the other hand, was defined as an autonomous province within the republic of Serbia, a status nearly equivalent to that of the republics yet, significantly, without the right to secede.³⁰ This arrangement gave the Kosovar Assembly the power to "directly and exclusively" make amendments to the Kosovo constitution and to approve amendments to the constitution of the Socialist Republic of

²² Vickers, above n 7, 70.

²³ Leurdijk and Zandee, above n 10, 12.

²⁴ Vickers, above n 7, 70.

²⁵ James Headley 'The way opened, the way blocker: Chechnya and Kosovo' in Peter Radan and Aleksandar Pavokic (eds), *On the Way to Statehood* (Aldershot: Ashgate, forthcoming 2008) 8.

²⁶ Leurdijk and Zandee, above n 10, 14.

²⁷ Ibid 15.

²⁸ Vickers, above n 7, 165.

²⁹ Headley, above n 25, 3.

³⁰ Heike Krieger 'The Kosovo Conflict and International Law: An analytical Documentation 1974-1999' (2001) *Cambridge International Document Series* 11, xxxi.

Serbia.³¹ After the death of Tito in 1980, the stability of the SFRY dissipated, particularly with the rise of Slobodan Milošević to President of the Serbian League of Communists in 1987.³² This marks the point at which the Kosovar Albanians began demanding the status of a republic.

Kosovar Albanian demands intensified in 1989 when Kosovo's autonomy was essentially revoked, after the Serbian military applied enormous pressure on the Kosovar Parliament to vote in favour of a constitutional amendment, which effectively handed Kosovo back to Serbia's control and removed the legal basis for Kosovo's autonomy.³³ In response, the elected representatives of Kosovo issued a formal declaration of independence on 22 September 1991.³⁴ Support for this declaration was confirmed in an underground referendum, in which 99.8 per cent of Kosovars, excluding the Kosovar Serbs who boycotted the event, voted to endorse Kosovo as a "sovereign and independent state".³⁵ The Democratic League of Kosovo ("DLK"), under the leadership of Ibrahim Rugova, subsequently established an underground shadow government.³⁶

However, recognition of this shadow government was not forthcoming. Declared illegal by Belgrade, this shadow government was only officially recognised by Albania. The Arbitration Commission of the Conference on Yugoslavia (the "Badinter Arbitration Commission") declined to even consider Kosovo's request for diplomatic recognition on the formal grounds that recognition would only be afforded to those entities with former republic status under the SFRY constitution.³⁷ In spite of this non-recognition, the Rugova government continued to function as an underground shadow state, advocating peaceful resistance against the Serbian state while coordinating its own system of parallel administration for Kosovar Albanians who, at this stage, constituted 82.2 per cent of the Kosovar population.³⁸ Continued suppression and systematic discrimination committed by

³¹ Ibid 1.

³² Marc Weller 'The Crisis in Kosovo 1989-1999' (1999) *Centre of International Studies University of Cambridge International Documents and Analysis*, 1, 25.

³³ Leurdijk and Zandee, above n 10, 174.

³⁴ Krieger, above n 30, 2.

³⁵ Leurdijk & Zandee, above n 10, 21.

³⁶ Krieger, above n 30, 2.

³⁷ Brown, above n 3, 264.

³⁸ 1991 Consensus, Estimate of the Federal Institute for Statistics, in Judah, above n 8, 313.

the Serbian authorities ultimately led to the formation of the Kosovo Liberation Army (KLA) and the abandonment of tactics for non-violent resistance.³⁹

In 1998, Kosovar Albanian civilians became the primary casualties in the major armed conflict which erupted between the KLA, regular army units of the Yugoslav Army and regular Serbian police.⁴⁰ The atrocities committed during this Milošević-led Serbian campaign are well-documented. In February 1998, the Serbian paramilitary police started ethnic cleansing operations in the Dreniça Valley, in which some 80 Kosovar Albanians were killed.⁴¹ Similarly, on 15 and 16 January 1999, 45 civilians were executed by Serbian Security Forces in Racak.⁴² In total, an estimated 10,500 Kosovar Albanians were killed during this conflict, while 860,000 people were forcefully deported, and over 90 per cent of Kosovar Albanians were displaced from their homes.⁴³ In Resolution 1199, the Security Council affirmed that the situation constituted a “threat to peace and security in the region” and demanded that the Federal Republic of Yugoslavia (“FRY”) “cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression”.⁴⁴ Failure to comply with numerous Security Council demands and continued Serbian atrocities prompted the North Atlantic Treaty Organization (“NATO”) to begin a bombing campaign against military targets in the FRY on the 24 March 1999. However, at the conclusion of the NATO bombings, the Security Council reaffirmed “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia”,⁴⁵ although not explicitly affirming that the FRY held sovereignty over Kosovo. This seemed to confirm that the FRY (known as Serbia and Montenegro from 2003 and Serbia from 2006) retained its legal title over Kosovo, despite the atrocities committed against Kosovo’s inhabitants.

³⁹ Krieger, above n 30, xxxi.

⁴⁰ Ibid.

⁴¹ Leurdijk and Zandee, above n 10, 23.

⁴² Krieger, above n 30, xxii.

⁴³ The Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000) 307ff (Annex 1: Documentation of Human Rights Violations) in Arne Johan Vetlesen “The logic of genocide and the prospect of reconciliation” in Tonny Brems Knudsen and Carsten Bagge Laustsen (eds), *Kosovo between War and Peace: Nationalism, Peacebuilding and International Trusteeship* (Routledge, 2006) 43.

⁴⁴ *United Nations Security Council Resolution 1199*, UN Doc. S/Res/1199 (23 September 1998).

<www.un.org/peace/kosovo/98sc1199.htm> accessed 7/5/2008.

⁴⁵ *United Nations Security Council Resolution 1244*, UN Doc. S/Res/1244 (10 June 1999). See Appendix Four.

C. Kosovo as an Internationalised Territory

At the conclusion of 78 days of NATO bombing, Kosovo was placed under the interim administration of the UN by Security Council Resolution 1244, which called for the “establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo”.⁴⁶ Since 1999, Kosovo has functioned as a *de facto* protectorate under the administration of the United Nations Mission in Kosovo (“UNMIK”), assisted by the European Union (“EU”), the Organization for Security and Co-operation in Europe (“OSCE”), and the UN Human Rights Commission for Refugees.⁴⁷ Although this arrangement did not interfere with Serbia’s official sovereignty over Kosovo, it did effectively curtail Serbia’s ability to govern the province.

Despite this overwhelming international presence, ethnic tension continued to run high. In March 2004, UNMIK and The Kosovo Force (“KFOR”) temporarily lost control during the outbreak of ethnically motivated mass riots throughout the province, which resulted in the deaths of 19 people and the destruction of Serbian homes, schools and orthodox sites.⁴⁸ Such ethnic tension continued throughout the eight year period of international administration, despite Kosovar Albanians constituting over 90 per cent of Kosovo’s total population in 2006.⁴⁹ Nonetheless, eight years of political separation had not weakened Serbia’s commitment to the retention of Kosovo, as the 2006 Serbian Constitution affirms that Kosovo remains an “integral part” of Serbia.⁵⁰

In 2007, the UN Secretary General Special Envoy on Kosovo, Martti Ahtisaari, released the Comprehensive Proposal for the Kosovo Status Settlement (“the Ahtisaari Plan”), which recommended that Kosovo become a fully sovereign and independent state following a period of supervision by the international community.⁵¹ However, in August 2007 negotiations between the Government of Serbia and Kosovar Albanians, regarding the

⁴⁶ Ibid.

⁴⁷ Krieger, above n 30, xxxii.

⁴⁸ Tim Judah “Divorcing Serbia: The Western Balkans in 2006” 30-SUM *Fletcher Forum of World Affairs* 213, 214.

⁴⁹ Ibid.

⁵⁰ Headley, above n 25, 13.

⁵¹ United Nations Security Council *Report of the Special Envoy of the Secretary-General in Kosovo’s future status* UN Doc. S/2007/168 (26 March 2007) <www.unosek.org/unosek/en/statusproposal.html> accessed 20 / 5 / 2008, 2. See Appendix Five.

⁵² See Malanczuk above n 3, 78; Müllerson above n 3, 83; Brown, above n 3, 236; Dugard and Raič, above n 3, 102; Tancredi, above n 3, 188; Crawford above n 3, 5.

implementation of this final Settlement Status proposal, broke down. Consequently, Kosovo's political future was clouded in uncertainty prior to the 2008 declaration of independence. To this day, Serbia continues to demand that Kosovo's autonomy be exercised within Serbia, while the Kosovar Albanian Government insists on nothing short of independence.

Two tentative conclusions can be drawn from this historical analysis. Firstly, Serbia still officially held sovereignty over Kosovo prior to the declaration of independence. This was repeatedly reinforced throughout the twentieth century and has not been disputed by any other state, aside from Albania. Secondly, Serbia is no longer in a position to resume responsibility for the effective governance of the province. Serbia's past conduct towards Kosovo's Albanian inhabitants, coupled with Kosovar Serbs small demographic representation in Kosovo today, suggests that reintegration into Serbia is no longer a realistic or viable option. Although these two preliminary findings seem somewhat contradictory, one further conclusion becomes abundantly clear: there is no simple or clear-cut legal answer for determining the legality of Kosovo's attempted unilateral secession from Serbia.

CHAPTER TWO: THE STATUS OF UNILATERAL SECESSION AT INTERNATIONAL LAW

The prevailing view espoused by many legal commentators is that international law neither explicitly prohibits nor recognises the right of an ethnic group to unilaterally secede from a parent State.⁵² However, this vague formulation is not overly helpful in establishing whether Kosovo's declaration of independence is contrary to international law, or whether Kosovo has now achieved the status of statehood. Therefore, this chapter will scrutinise the relevant international conventions, UN resolutions and State practice, in order to determine whether international law supports the legality of Kosovo's unilateral secession.

A. Serbia's Objections to Kosovo's Declaration of Independence

On the 18 February 2008, the Serbian National Assembly declared Kosovo's declaration of independence to be null and void, and contrary to the UN Charter, Security Council Resolution 1244, the Helsinki Final Act, and the norms of international law on which the world order resides.⁵³ For the purposes of outlining Serbia's objections to this declaration, this chapter will begin from the provisional assumption that Serbia held sovereignty over Kosovo on the date that independence was declared, and then proceed to consider whether the assumption is justified.

There is nothing in the UN Charter which anticipates the taking of territory from one State and awarding it to a new one.⁵⁴ To the contrary, Article 2 (2) affirms the "sovereign equality" of all UN members, while Article 2 (4) stipulates that "all members shall refrain ... from the threat or use of force against the territorial integrity or political independence of any State".⁵⁵ Irrespective of the fact that Kosovo has not sought UN membership, if Kosovo is a State, then it is bound by these principles which have evolved into peremptory norms of customary international law.⁵⁶

⁵³ National Assembly of Serbia, above n 6. Spain has also described the declaration as "not in accord with international law". BBC News (19 February 2008), in Warbrick above n 4, 685.

⁵⁴ Brown above n 3, 256.

⁵⁵ Charter of the United Nations (1945), Article 2 (4) <<http://www.un.org/aboutun/charter/>> accessed 20/07/08.

⁵⁶ As suggested by the International Court of Justice in the *Nicaragua* Case, the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the UN Charter and the principle of non-intervention in

There is no credible evidence suggesting that the UN has acted contrary to Article 2 (7), by intervening in matters which are essentially within the domestic jurisdiction of Serbia.⁵⁷ Thus far, the UN “has maintained a position of strict neutrality on the question of Kosovo’s status”.⁵⁸ Furthermore, even with a very broad interpretation of Article 2 (6), it is difficult to maintain that the UN had a duty to compel Kosovo’s compliance with these principles for the sake of maintaining international peace and security.⁵⁹ There is no credible evidence suggesting that this declaration has generated any widespread destabilising violence either within or outside of Kosovo.⁶⁰

Two norms of international law are directly relevant to Serbia’s objections. According to the principle of sovereign equality of States, Serbia is entitled to jurisdiction over the territory and permanent population of Kosovo,⁶¹ and to expect that no other State intrudes on this territory.⁶² The principle of non-intervention in the internal or external affairs of other States also requires States to refrain from instigating, organising, or officially supporting the organisation on their territory of activities prejudicial to foreign countries.⁶³ An examination of Resolution 1244 is required to establish whether Serbia is entitled to exclusive enjoyment of these sovereign rights.⁶⁴

Considerable ambiguity surrounds the proper interpretation of Resolution 1244. The EU and many commentators have taken the position that Resolution 1244 is not a bar to Kosovo’s

the affairs of other States, exist at customary international law. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports 1986, p. 14, at para. 189 and 202.

⁵⁷ Article 2 (7) stipulates that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State, but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

⁵⁸ Borgen, above n 5.

⁵⁹ Article 2(6) states that “the UN shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”.

⁶⁰ International Crisis Group *Kosovo’s First Month Europe Briefing* N° 47 , Pristina/Belgrade/Brussels, 18 March 2008, <<http://www.crisisgroup.org/home/index.cfm?id=5335&l=1> > accessed 16/08/08, 1.

⁶¹ Ian Brownlie *Principles of Public International Law* (5th ed, Clarendon Press Oxford, 1998), 289.

⁶² Antonio Cassese *International Law* (Oxford University Press, 2001) 89.

⁶³ *Ibid* 98.

⁶⁴ Serbia repeatedly cites that Kosovo has acted contrary to the provisions of the *Final Act of the Conference on Security and Co-operation in Europe 1975* (henceforth referred to as “the *Helsinki Final Act*”). Article 1 of the Helsinki Act stipulates that “[t]he participating States will respect each other’s sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty”. Though not a treaty, the provision is generally accepted as declaratory of customary international law and is therefore binding on the ‘State’ of Kosovo.

independence.⁶⁵ It is argued that Resolution 1244 contemplated only the formal retention of sovereignty by Serbia during the period of UN administration and clearly contemplated some other sovereign arrangement for Kosovo's final status.⁶⁶ Support for this proposition is derived from the annexes of Resolution 1244, which called for the establishment of an "interim administration to provide transitional administration while establishing ...provisional democratic self-governing institutions".⁶⁷ Against that, however, other legal commentators support Serbian and Russian contentions that Resolution 1244 unambiguously provided for the full restoration of sovereignty in Serbia if some other final status was not agreed to by Serbia or formally mandated by the Security Council.⁶⁸ Reliance is placed on the preamble of Resolution 1244 which reaffirms the "sovereignty and territorial integrity" of the FRY.⁶⁹

Leaving aside this division, it is clear that the Resolution 1244 did not expressly revoke the FRY's sovereignty over Kosovo. Therefore, by virtue of the FRY's reconstitution as the Republic of Serbia in 2006, it can be conceded that Serbia officially held sovereignty over Kosovo at the date of independence.⁷⁰ The focus must now shift to ascertaining whether, in law or in fact, Serbia's sovereignty has been displaced in the period subsequent to this declaration of independence.

⁶⁵ Borgen, above n 5.

⁶⁶ Henry H. Perritt, 'Final Status for Kosovo' (2005) 80 *Chicago-Kent Law Review* 3, 10.

⁶⁷ Resolution 1244, above n 45, Annex 2 (5). Resolution 1244 also calls for the establishment of an "interim political framework agreement providing for a substantial self-government for Kosovo" while taking into account the territorial integrity of FRY. Resolution 1244, above n 38, Annex 1.

⁶⁸ Perritt, above n 66, 10.

⁶⁹ Resolution 1244, above n 45, Preamble. In 2003, when the FRY transformed into the Union of Serbia and Montenegro, the Constitutional Charter of the State Union stipulated that upon dissolution of the Union, all duties having belonged previously to the FRY, especially with respect to Resolution 1244, would be transferred to Serbia as the successor State. Viola Trebicka, 'Lessons from the Kosovo Status Talks: On Humanitarian Intervention and Self-Determination' (2007) 32 *The Yale Journal of International Law* 255, 255.

⁷⁰ The Federal Republic of Yugoslavia (FRY) reconstituted in 2003 as the State Union of Serbia and Montenegro, which in 2006 became the Republic of Serbia after the secession of Montenegro. Jean d'Aspremont 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 *Leiden Journal of International Law*, 649, 653.

B. International Conventions, United Nation Resolutions and the Right of Self-Determination

“Essentially, Kosovo is witnessing the clash of two rights under international law: Kosovo Albanian self-determination and Serbia’s territorial integrity”⁷¹

It is common to speak of the principle of self-determination as consisting of two components. Under the principle of internal self-determination, all people have the right to determine the political and social regime under which they live, to pursue economic development and to solve all matters under their domestic jurisdiction.⁷² The principle of external self-determination encompasses the right of a people to pursue their political, cultural and economic wishes without the interference or coercion of outside States.⁷³ In theory, the right of external self-determination may be exercised through State dissolution, State union or merger, or through secession.⁷⁴ In practice, States have opposed any exercise of the right to self-determination through secession.⁷⁵

The UN Charter requires that all members must respect the “principle of equal rights and self-determination”.⁷⁶ However, it is unclear whether this principle translates into a positive legal right, given that “[n]ot every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations”.⁷⁷ Antonio Cassese argues that the debates preceding the adoption of Article 1 (2) confirms that the principle of self-determination did not include the right of a minority ethnic or national group to secede from a sovereign country.⁷⁸

Since the Charter’s formation, member States have been reluctant to acknowledge the right of external self-determination or secession, because this entitlement would compromise the ‘sovereign equality’ and ‘territorial integrity’ of existing members.⁷⁹ While subsequent

⁷¹ Judah, above n 48, 216.

⁷² Zejnullah Gruda, ‘Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, the Ethic Principle, and Self-Determination’ (2005) 80 *Chicago-Kent Law Review* 353, 381.

⁷³ Lee C. Buchheit *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978) 14 .

⁷⁴ David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002), 289.

⁷⁵ Gruda, above n 72, 381.

⁷⁶ Articles 55 and 1(2) of the UN Charter, above n 55.

⁷⁷ Malcolm Shaw *International Law* (5th ed, Cambridge University Press, 2003) 226.

⁷⁸ Antonio Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995), 42.

⁷⁹ Articles 2 (1) and 2 (4) UN Charter, above n 55.

General Assembly Resolutions have acknowledged that “all peoples have the right to self-determination”,⁸⁰ they have also stipulated that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations”.⁸¹

There is also uncertainty as to which ‘peoples’ are entitled to benefit from the right of self-determination and whether such a right is applicable to minorities within existing States. Given that there are approximately 8,000 identifiable cultures and languages in the world,⁸² but fewer than 200 states currently in existence, if every conceivable ethnic, religious or linguistic subgroup claimed statehood, then in theory, there would be no limit to the fragmentation of existing States.⁸³ Kosovar Albanians undoubtedly constitute an overwhelming majority of the population of Kosovo and a “territorial cohesive and distinct group”.⁸⁴ Yet within the State of Serbia, they are perceived as a minority ethnic enclave.⁸⁵ Common Article 1 of the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”) state that “[a]ll peoples” have the right to self-determination.⁸⁶ However, Article 1 does not define “peoples”, while minorities are afforded specific protection under Article 27 of the ICCPR.⁸⁷ The Supreme Court of Canada in the *Reference re Secession of Quebec* (the “Quebec Case”) sought to clarify this ambiguity by affirming that “a people” may include only a portion of the population of an existing state.⁸⁸ Therefore, on this ruling, Kosovar Albanians qualify for the right of internal self-determination.

⁸⁰ Article 2 *1960 Declaration on the Granting of Independence to Colonial Countries and Peoples*: G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (14 December 1960). Article 2 stipulates that “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

⁸¹ *Ibid*, Article 6. Article 6 declares that “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.”

⁸² Müllerson, above n 3, 83.

⁸³ Brown, above n 3, 249.

⁸⁴ Helen Quane ‘A Right to Self-Determination for the Kosovo Albanians?’ (2000) 13 *Leiden Journal of International Law* 219, 219.

⁸⁵ Borgen, above n 5.

⁸⁶ Common Article 1 of the UN’s *1966 International Covenant on Civil and Political Rights* 993 U.N.T.S. 3 (16 December 1966) and the *International Covenant on Economic, Social and Cultural Rights* 999 U.N.T.S. 171 (19 December 1966) .

⁸⁷ Article 27 *ICCPR* states that “In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

⁸⁸ *Reference re Secession of Quebec* [1998] 2 S C R 217; 37 ILM, 1998, 1342, at para 124. In this case, the Supreme Court of Canada was asked to determine whether “there is a right to self-determination under

The only international instruments which contain a reference, and even then only implicit, to a right of secession are the 1970 Friendly Relations Declaration⁸⁹ and the 1993 Vienna Declaration.⁹⁰ The Friendly Relations Declaration declares that “[b]y virtue of the principle of equal rights and self-determination of peoples ... all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development”. Antonio Cassese argues that this text suggests that secession may be permitted when very stringent requirements have been met, namely, when “the central authorities of a sovereign State persistently refuse to grant participatory rights to a people, grossly and systematically violate their fundamental rights, and deny the possibility of a peaceful settlement within the framework of the existing State”.⁹¹ Conversely, this declaration does not explicitly recognise an unlimited right to secession, and instead affirms that this declaration “shall not 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”.⁹² While recognising that “[a]ll peoples have the right of self-determination”, the Vienna Declaration also discourages actions that would dismember or impair the territorial integrity of sovereign States.⁹³

The principle of self-determination has evolved into a part of positive international law. In the *East Timor (Portugal v Australia) Case*, the ICJ recognised that the right of peoples to self-determination “has an *erga omnes* character” and “is one of the essential principles of contemporary international law.”⁹⁴ However, it is equally clear that international law expects

international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally”.

⁸⁹ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States* (G.A Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (24 October 1970))

⁹⁰ 1993 *Vienna Declaration and Programme of Action, World Conference on Human Rights* (1993) 32 ILM 1661, 1663 (25 June 1993)

⁹¹ Cassese, above n 78, 119.

⁹² Principle 5, para 7, 1970 *Friendly Relations Declaration*, above n 82.

⁹³ Principle 2, paragraph 3 of the 1993 *Vienna Declaration* provides that “In accordance with the Declaration on Principles of international Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations ... [the right of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind”.

⁹⁴ *East Timor (Portugal v Australia)* [1995] ICJ Reports, 102. In 1991, Portugal instituted proceedings against the Australia alleging that Australia had failed to observe the obligations to respect the duties of Portugal as the

this right to be exercised “within the framework of existing sovereign states and consistently with the maintenance of territorial integrity”.⁹⁵

The implementation and exercise of the right to self-determination by “peoples” in the past further supports this view, given that the application of this right has been confined primarily to the colonial context and within the process of decolonisation. Although 70 colonial territories achieved independence through exercising the right of self-determination between 1945 and 1979,⁹⁶ it is clear that the exercise of the right in this context was not, strictly speaking, secession.⁹⁷ While Kosovo Albanians may be eligible for a right to internal self-determination, it is doubtful whether this entitlement extends to the right of external self-determination or secession, given Kosovo’s status as an autonomous province within Serbia prior to the declaration. Moreover, in the absence of any clear right to secession outside the colonial context, or an explicit recognition of the right within any of the above international conventions or resolutions, Kosovo’s independence cannot be construed as an exercise of a legally valid right of external self-determination.

C. State Practice and Secession

The next inquiry is to ascertain whether State practice supports the contention that Kosovar Albanians are legally entitled to secede unilaterally from Serbia. This inquiry is not to determine whether State practice is sufficient to amount to evidence of a norm of customary international law, but to query whether there is evidence of a precedent of successful cases of unilateral secession in the past.

The first modern case of a successful exercise of the secessionist self-determination occurred on March 26 1971, when East Pakistan unilaterally declared independence from Pakistan. There were many extraordinary factual circumstances prompting this secession, the first of which was that East Pakistan was geographically separated from its parent State, West

administering power of East Timor and the right of the people of East Timor to self-determination. *East Timor (Portugal v Australia) Case*, 94-95.

⁹⁵ *Quebec Case*, above n 88, para 122.

⁹⁶ H. Gros Espiell, Special Rapporteur, *Implementation of United Nations Resolution Relating to the Right of People under Colonial and Alien Domination to Self-Determination*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations, New York, 1980, in Cassese, above n 78, 75.

⁹⁷ Müllerson, above n 3, 72.

Pakistan, by 1200 miles of Indian Territory.⁹⁸ Adding to this territorial anomaly were the cultural, ethnic and linguistic distinctions between the Bengalis and the West Pakistanis, as well as the extremely marked political and economic disparities between East and West Pakistan.⁹⁹ Yet the immediate trigger for this secession was West Pakistan's large-scale military operation in East Pakistan on the 25 -26 March 1971,¹⁰⁰ during which the Pakistani Army was responsible for widespread violations of human rights and the deaths of over one million Bengalis.¹⁰¹

Following the failure of successive political negotiations between East and West Pakistani leaders to agree on measures to make the Federation of Pakistan workable, the secession of East Pakistan was arguably a measure of last resort.¹⁰² Moreover, the success of the Bengali claim to independence must be attributed to the international community's eventual support for this outcome. India also had a decisive effect on the success of this secession by launching a massive land and air attack in East Pakistan in support of the Bangladesh liberation forces.¹⁰³ International support for independence was also readily forthcoming, with some 100 States recognising Bangladesh by September 1973. Ultimately, Bangladesh was admitted to the UN in 1974.¹⁰⁴

The status of secession in international law still remains problematic despite Bangladesh's successful secession. There were many extraordinary extenuating circumstances within this particular case which made independence the only realistic option for Bangladesh's future status. Significantly, the cultural disparities between Kosovar Serbs and Kosovar Albanians, Serbia's poor human rights record in Kosovo, and the extent of international support accorded to Kosovo's secession thus far, underscore important similarities between the

⁹⁸ Raič, above n 74, 335. Since the arbitrary partition of India in 1947 by the departing colonial ruler, Great Britain, Pakistan consisted of two distinct territorial units.

⁹⁹ Joshua Castellino *International Law and Self-determination* (Martinus Nijhoff Publishers, 2000) 153. After twenty-one years of independence, East Pakistani's occupied a mere fifteen per cent of the central government services, while eighty per cent of Pakistan's budget was spent in West Pakistan. These figure are based on a survey by a Pakistan economist, quoted in Ray, 'Web of Bourgeois Politics', (1971) 6 *Economic & Political Weekly* 1222, in Ved P. Nanda, 'Self-Determination in International Law: The Tragic Tale of Two Cities – Islamabad (West Pakistan) and Dacca (East Pakistan)' (1972) 66 *The American Journal of International Law* 321, 330.

¹⁰⁰ Raič, above n 74, 339.

¹⁰¹ Dugard and Raič, above n 3, 121.

¹⁰² M. Rafiqul Islam 'Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh' (1985) 22 *Journal of Peace Research* 211, 216.

¹⁰³ Ibid 218.

¹⁰⁴ Dugard and Raič, above n 3, 121.

Bengali and Kosovar Albanian claims to independence. This confirms that one cannot discount the possibility that Kosovo's secession may be exceptional in its own right.

In 1961, the Security Council reaffirmed the proposition that international law does not explicitly recognise the right of unilateral secession, after it declared Katanga's secession from the Republic of Congo illegal.¹⁰⁵ At the time, it was disputed whether this attempt, conducted with the support of foreign mercenaries, actually represented the true wishes of the majority of the Katangese people, especially in light of the Katangese tribal and regional diversities.¹⁰⁶ Similarly, the UN and the Organization of African Unity categorically rejected the Biafran claim for independence in 1967, despite reports of human rights violations committed against the seceding population.¹⁰⁷ UN Secretary-General U Thant affirmed that "the United Nations has never accepted and does not accept ... the principle of secession of a part of its Member State."¹⁰⁸

In certain circumstances, international law allows for changes to State boundaries through consensual instances of State dissolution, merger, or union. Article 2(1)(b) of the Vienna Convention on Succession of States in respect of Treaties 1978 and Article 2(1)(a) of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983, contemplate lawful instances of State succession, or the "the replacement of one State by another in the responsibility for the international relations of territory". However, Articles 6 and 3 of the 1978 and 1983 Vienna Conventions respectively state that these conventions apply "only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."¹⁰⁹ The Charter's embodiment of the principle of "sovereign equality" of member States confirms that a distinction is to be drawn between instances of State *succession* and instances of unilateral *secession*.

¹⁰⁵ Raič, above n 74, 334.

¹⁰⁶ Islam, above n 102, 215.

¹⁰⁷ Rafiqul Islam cites evidence of gross discrimination conducted by the Nigerian Federal government, including mass slaying of the seceding Ibo tribe, one year prior to the Biafran declaration of independence. Ibid 216.

¹⁰⁸ UN Monthly Chronicle, 1970, no. 2, 2, in *ibid* 218.

¹⁰⁹ Article 6 *Vienna Convention on Succession of States in respect of Treaties 1978*; Article 3 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983*.

In 1990 and 1991, the Baltic States of Lithuania, Estonia and Latvia declared their independence from the USSR.¹¹⁰ However, evidence suggests that these declarations, which occurred during the dissolution of the USSR, are to be regarded as instances of revived statehood, as opposed to cases of unilateral secession. In 1940, the formerly independent States of Estonia, Latvia and Lithuania were incorporated into the USSR in violation of the then existing norms of international law.¹¹¹ Furthermore, recognition by the international community of these declarations occurred only after the Soviet Union State Council unanimously voted to recognise the independence of the Baltic States in September 1991.¹¹² Therefore, these cases are distinguishable from Kosovo's secession by the fact that the international community did not regard Kosovo's incorporation into Serbia in 1912-1913 as an illegal annexation of territory, and because Serbia has never consented to this secession.

Christian Tomuschat argues that the independence of Croatia, Slovenia, Macedonia and Bosnia-Herzegovina cannot be regarded as assertions of a general right of secession under general international law.¹¹³ Following the death of Tito in 1980, tensions were exacerbated between the five Yugoslav Republics after Serbia and its allies blocked the installation of the Croatian candidate for the collective Presidency, in a bid to gain control over the key organs of the Federation. On 25 June 1991, both Croatia and Slovenia proclaimed their independence.¹¹⁴ Although a short period of violence took place in Slovenia, the Yugoslav National Army ("YNA") withdrew.¹¹⁵ However in Croatia, independence was more fiercely resisted by both the YNA and the Serb irregulars. Total war erupted in August, accompanied by widespread violations of human rights and "ethnic cleansing".¹¹⁶ Macedonia and Bosnia-Herzegovina subsequently declared independence in the continuing wake of ethnic cleansing, indiscriminate bombing and other atrocities committed by the Serbian leadership and military.¹¹⁷ In September 1991, the Security Council confirmed that the "continuation of this

¹¹⁰ Lithuania declared its independence on 11 March 1990, followed by Estonia and Latvia on the 20 and 21 of August 1991. See Photini Pazartzis 'Secession and international law: the European dimension' in Kohen, above n 2, 363.

¹¹¹ Müllerson, above n 3, 65.

¹¹² Crawford, above n 3, 97.

¹¹³ Christian Tomuschat 'Secession and self-determination' in Kohen, above n 2, 32.

¹¹⁴ Dugard and Raič above n 3, 124.

¹¹⁵ Ibid.

¹¹⁶ Raič, above n 74, 350.

¹¹⁷ Müllerson, above n 3, 131. Macedonia proclaimed independence on 17 September 1991, followed by Bosnia-Herzegovina's declaration on 14 October 1991.

situation constitutes a threat to international peace and security”.¹¹⁸ On 8 October 1991, Croatia reasserted its independence. Following the adoption of the Declaration on the Guidelines on the Recognition of new States in Eastern Europe and the Soviet Union (the “Guidelines on Recognition”), the Badinter Arbitration Commission duly recognised the independence of these four republics.¹¹⁹

Academic opinion appears divided on whether the independence of these four republics are instances of State secession or dissolution. The Badinter Arbitration Commission’s first advisory opinion concluded that the SFRY was “in the process of dissolution”.¹²⁰

Alternatively, John Dugard and David Raič argue that the federal republics seceded from the SFRY without consent of the SFRY and before the Federation had officially dissolved.¹²¹

Yet, even if this secessionist interpretation is preferred, the exceptional circumstances associated with these secessions ensure they do not create a precedent for other conflicts. Immediately prior to the declarations, the Federation’s constitutional order had completely broken down, while the SFRY was undergoing a large-scale and unrelenting ethnic conflict.¹²² Furthermore, international recognition was limited to these four republics, and did not amount to an acceptance that entities within the constituent republics, including the autonomous province of Kosovo, had any right to secede.¹²³ The Badinter Arbitration Commission also flatly denied external self-determination to the Serbian population of Bosnia-Herzegovina, despite the latter’s proclamation of independence and the purported creation of the Republika Srpska in January 1992.¹²⁴

¹¹⁸ *United Nations Security Council Resolution 713*, UN Doc S/Res/713 (25 September 1991) in Müllerson, above n 3, 131.

¹¹⁹ On the 15 January 1992, the EC and its members proceeded with the recognition of Slovenia and Croatia. The EC’s recognition of Bosnia-Herzegovina was withheld until 7 April 1992, after a referendum was held in which over majority of the population of Bosnia-Herzegovina expressed its will to become an independent and sovereign State. Macedonia’s recognition was also delayed until December 1993 due to political problems with Greece and the latter’s objection to the name of this new State. See Dugard and Raič, above n 3, 128 and Müllerson, above n 3, 132.

¹²⁰ Opinion No. 1, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, 92 ILR 162, in Pazartzis, above n 110, 365.

¹²¹ Dugard and Raič, above n 3, 121.

¹²¹ Raič, above n 74, 128.

¹²² Crawford, above n 3, 105.

¹²³ *Ibid* 103.

¹²⁴ By January 1992, the Serbian population of Bosnia-Herzegovina, which accounted for approximately thirty four per cent of the total population of Bosnia, had constituted their own parliament and conducted a plebiscite. Nevertheless, their claim to independence was not recognised by any other State. Crawford, above n 3, 406.

The creation of the Czech Republic and Slovakia in 1993 also does not amount to a precedent for secession. Their independence was the result of a straightforward process of consensual dissolution, achieved by parliamentary process under the Constitution Act of 1992, rather than a secessionist referendum.¹²⁵ On 31 December 1992, the State of Czechoslovakia ceased to exist.¹²⁶ The secession of Montenegro from the Union of Serbia and Montenegro in 2006 occurred after a majority of over 55 per cent of the population voted in favour of independence.¹²⁷ Since this referendum was part of the Belgrade Agreement of 14 March 2002, in which Serbia had formally consented to the terms by which Montenegro could seek independence, again Montenegro's independence does not constitute a precedent for secession.¹²⁸

The independence of Eritrea in 1993 is also best viewed as a consensual exercise of State formation. In December 1950, General Assembly Resolution 390 A(V) established Eritrea as “an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown”, with its own “legislative, executive and judicial powers in the field of domestic affairs”.¹²⁹ In 1962, civil war broke out after the Ethiopian Emperor Haile Sellassie I set aside Eritrea's autonomy and unilaterally dissolved the regional parliament.¹³⁰ The conflict was not resolved until 1993, after Ethiopia recognised the legitimate claims of the Eritreans, who were awarded the right to hold a plebiscite under UN auspices, in which they voted overwhelmingly in favour of national independence.¹³¹ The eventual creation of Eritrea occurred with the explicit consent of the Ethiopian government and with UN approval, thereby distinguishing it as a precedent for unilateral secession. Similarly, East Timor's independence from Indonesia occurred only after the Indonesian President, Bacharuddin Habibie, agreed to grant independence if a majority of East Timorese voted for independence in a UN-supervised referendum.¹³² Furthermore, the East Timor instance cannot be regarded

¹²⁵ Ibid, 106.

¹²⁶ Ibid.

¹²⁷ Rick Fawn ‘The Kosovo –and Montenegro – effect’ (2008) 84 (2) *International Affairs* 269, 276.

¹²⁸ Ibid. Serbia continued as the successor State of Serbia-Montenegro but under its new name of Serbia.

¹²⁹ United Nations General Assembly Resolution 390 A (V) (2 December 1950) para 1 and 2.

¹³⁰ Tomuschat, above n 113, 28.

¹³¹ Castellino, above n 99, 71.

¹³² Hilary Charlesworth *The Constitution of East Timor, May 20, 2002* (2003) 1 (2) Oxford University Press and New York University School of Law <<http://etan.org/etanpdf/pdf2/constfnen.pdf> accessed 30/07/2008> accessed 20/04/08, 326. In August 1999, approximately 98 per cent of East Timorese voted, 78.5 per cent of which voted for independence. Jarat Chopra ‘The UN's Kingdom in East Timor’ (2000) 42 *Survival* 3, 28 in Beth DeFelice ‘International Transitional Administration: The United Nations in East Timor, Bosnia-Herzegovina, Eastern Slavonia, and Kosovo – A Bibliography’ (2007) 35 *International Journal of Legal Information* 63, 64.

as a case of secession, given that East Timor's incorporation into Indonesia was a direct result of the 1975 unlawful invasion and annexation of this former non-self governing territory.¹³³

The lack of recognition afforded to Chechnya's unilateral declaration of independence from the Soviet Union in 1991 confirms that there is no identifiable precedent for secession.¹³⁴ International recognition was not forthcoming, despite clear evidence that the Chechen people had been the targets of serious human rights violations committed by Russian forces during the Russian-Chechen wars of 1994 and 1999.¹³⁵ Concerns over the rise of Chechen terrorist groups and Chechnya's inability to establish any viable State institutions during its two-year period of *de facto* independence after this declaration, prompted the international community to support Russia's right to defend its territorial integrity.¹³⁶ Yet, the merits of Kosovo's secession are readily distinguishable from this conflict given the absence of any credible evidence implicating the government of Kosovo in any terrorist activity and the fact that institutions of self-government have been established in Kosovo under international supervision.¹³⁷

The failed secession attempts in Chechnya, the Republika Srpska, Biafra and Katanga are not isolated occurrences. Other unsuccessful unilateral secession attempts include Tibet's attempted secession from China, Bougainville's attempted secession from Papua New Guinea, Kashmir's attempted separation from India, and both Abkhazia's and South Ossetia's unilateral secession attempts from Georgia.¹³⁸ In all these cases, the international community has favoured the sovereignty and territorial integrity of the parent State, even where the secession was triggered by human rights violations by that State.¹³⁹

Despite this body of evidence, John Dugard and David Raič argue that “[a] qualified *right* of secession comes into being ... when a people forming a numerical minority in a State, but a

¹³³ Gino Naldi ‘The East Timor case and the role of the International Court of Justice in the evolution of the right of peoples to self-determination’ (1999) 4 *Australian Journal of Human Rights* <<http://www.austlii.edu.au/au/journals/AJHR/1999/4.html>> accessed 18/08/2008.

¹³⁴ For over a thousand years the Chechen people have accounted for an overwhelming majority of the citizens living within the Republic of Chechnya. Raič, above n 74, 373.

¹³⁵ Crawford, above n 3, 409.

¹³⁶ Raič, above n 74, 375.

¹³⁷ United Nations, *United Nations Mission in Kosovo Home* (2001) www.unmikonline.org/civiladm/index.html accessed 28/08/08. These provisional institutions of self-government include a 120 seat Assembly, a judicial system, and an executive branch of government.

¹³⁸ Crawford, above n 3, 108.

¹³⁹ Ibid.

majority within the particular part of the State, are denied the right of internal self-determination or subjected to serious and systematic suppression of human rights”.¹⁴⁰ The authors derive judicial support for this claim from the suggestion of the Supreme Court of Canada in the *Quebec Case*, that a right of secession arises where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms part.¹⁴¹

This assertion of a *right* to unilateral secession in international law is problematic. Having failed to identify any explicit recognition of this right within international covenants or UN resolutions, the right must therefore constitute either an existing or emerging norm of customary international law. In the *North Sea Continental Shelf Case*, the ICJ stipulated that in order to prove the existence of a norm of customary international law, “[s]tate practice, including those States whose interests are specifically affected, should have been both extensive and virtually uniform...and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved” (*opinio juris*).¹⁴²

However, State practice “is totally lacking as far as the suggested rule is concerned”.¹⁴³ This conclusion “is confirmed by a search for clues as to the existence of a corresponding *opinio juris*”.¹⁴⁴ Aside from the exceptional case of Bangladesh, there has been no other successful case of non-consensual unilateral secession outside the context of colonialism or State dissolution since 1945. Consequently, international law does not explicitly recognise a right for the Kosovar Albanians to secede unilaterally from Serbia.

State practice also casts doubts about the validity of two widely discussed theories concerning State secession. According to the historical grievance theory, a secessionist claim to independence is only convincing if the secessionist group can prove that their territory was unlawfully annexed into the parent State.¹⁴⁵ In this respect, secession is viewed as re-appropriation by the legitimate owners of stolen property.¹⁴⁶ Support for this theory is

¹⁴⁰ Dugard and Raič, above n 3, 134.

¹⁴¹ *Quebec Case*, above n 81, para 154.

¹⁴² *North Sea Continental Shelf case*, ICJ Reports (1969), para. 74 in Cassese, above n 62, 119.

¹⁴³ Tomuschat, above n 113, 34.

¹⁴⁴ *Ibid.*

¹⁴⁵ Lea Brilmayer ‘Secession and Self-Determination: A Territorial Interpretation’ (1991) 16 *Yale Journal of International Law* 177, 178.

¹⁴⁶ Allen Buchanan ‘Towards a Theory of Secession’ (1991) 101 *Ethics* 322, 330.

derived from the unlawful incorporation of the Baltic States and the successful restoration of their independence in 1990-1991.¹⁴⁷ Yet, the fact that the international community did not regard Kosovo's incorporation into Serbia as an illegal annexation of territory precludes the applicability of this abstract theory to Kosovo's secession.

According to the second theory of remedial secession, where a people have been subjected to serious and persistent human right violations, "international law recognises a continuum of remedies ranging from protection of individuals, to minority rights ending up with secession as the ultimate remedy".¹⁴⁸ However, aside from the exceptional case of Bangladesh, one can rarely cite a case in which the scheme of remedial secession has been concretely applied.¹⁴⁹ Furthermore, at no stage has the international community recognised that the Kosovar Albanians are legally entitled to secede, as a remedy for Serbia's past human rights violations.

Both theories are, therefore, of little practical value to Kosovo. Yet significantly, Kosovo's independence has not been construed by its supporters as the sanction for Serbia's previous wrongdoings.¹⁵⁰ It is instead "the outcome of a pragmatic reflection that has led the international community of states to support collectively the option of independence as the only viable option to ensure stability in the region".¹⁵¹ The framing of Kosovo's secession in this manner is essential, because there is no legal right or precedent within international conventions or State practice supporting this unilateral secession. Instead, the position taken by the Supreme Court in the *Quebec Case* remains true even today; "[i]nternational law neither specifically grants component parts of sovereign states the legal right to secede unilaterally from their "parent" state, nor denies such a right".¹⁵² However, Chapters Three and Four will establish that the absence of any positive legal right does not preclude Kosovo's independence from becoming "accepted as legal in the eyes of international law".¹⁵³

¹⁴⁷ Brilmayer, above n 145, 190.

¹⁴⁸ Buchheit, above n 73, 94.

¹⁴⁹ Tancredi, above n 3, 184.

¹⁵⁰ d'Aspremont, above n 70, 658.

¹⁵¹ Ibid.

¹⁵² *Quebec case*, above n 88, para 433. In doing so, the Court concluded that Quebec does not, under the Constitution of Canada or international law, have the right to effect the secession of Quebec from Canada unilaterally.

¹⁵³ C. Haverland 'Secession' (1987) 10 *EPIL* 384 in Malanczuk, above n 3, 78.

CHAPTER THREE: STATE RECOGNITION

The absence of any positive legal right of unilateral secession at international law does not necessarily mean that Kosovo's secession is illegal. Nor does it prevent international law from having any subsequent role in determining Kosovo's statehood. Chapter Three will demonstrate that the process of individual State recognition may have the effect of accepting this secession as a fact.

A. De jure and De facto Independence

In the *Quebec Case*, the Supreme Court of Canada acknowledged that “[a]lthough there is no legal right, under the Constitution or at international law, to unilateral secession ... this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession”.¹⁵⁴ The Court suggested that the ultimate success of such secession would depend on the recognition of the international community, having regards to the merits of the case.¹⁵⁵ This distinction between *de jure* secession - secession “[e]xisting by right or according to law” - and *de facto* secession - secession “existing in fact”, is highly relevant to the determination of whether the former province of Kosovo is now a State.¹⁵⁶

The suggestion that international law may “adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation” draws some support from previous State practice.¹⁵⁷ From 1971 Bangladesh existed as a *de facto* State and was acknowledged as such, given its recognition by over 100 States by September 1973.¹⁵⁸ In regards to the secession of the republics from the former SFRY, Antonello Tancredi argues that EC States were recognising the inevitability of a *de facto* process which was already underway and would have produced the dissolution of the SFRY in any case.¹⁵⁹ Finally, Australia accorded *de facto* recognition of the illegal incorporation of East Timor into Indonesia, after concluding that “it would be unrealistic to continue to refuse to recognize *de*

¹⁵⁴ *Quebec Case*, above n 88, para 449.

¹⁵⁵ *Ibid.*

¹⁵⁶ Bryan. A Garner. *Black's Law Dictionary* (8th ed, Thomson West, 2004) 448 and 458.

¹⁵⁷ *Quebec Case*, above n 88, para 141.

¹⁵⁸ Tomuschat, above n 113, 30.

¹⁵⁹ Tancredi, above n 3, 185.

facto that East Timor is part of Indonesia, given Indonesia's control is effective and covers all major administrative centres of territory".¹⁶⁰

Since 1 October 2008, 47 States have recognised Kosovo.¹⁶¹ The implication is that by doing so, these States are also recognising Kosovo's independence. Consequently, the following inquiry into State recognition is crucial for establishing why these States have acknowledged Kosovo's *de facto* secession from Serbia, and also to determine when Kosovo independence will become *de jure*.

B. Theories of State Recognition and State Practice

The law on recognition of States is a largely unsettled aspect of international law. It is treated by most legal commentators as an irreconcilable theoretical dispute between the constitutive and declaratory doctrines of State recognition.

According to the constitutive theory, it is through recognition exclusively that a State becomes an international person and a subject of international law.¹⁶² Recognition has a constitutive effect because it is a necessary pre-condition for the establishment of the State concerned.¹⁶³ In its extreme form, the constitutive theory maintains that the very legal personality of a State depends on the political approval and recognition of other States.¹⁶⁴

Numerous criticisms can be raised against the validity of this theory. A common contention is that it gives existing States the arbitrary power in deciding whether or not to recognise an entity as a State, and that it does not explain how some entities can be regarded as a State by some existing States and a non-State by others.¹⁶⁵ This second criticism is highly relevant to the current recognition of Kosovo, since over 140 States are yet to recognise Kosovo's statehood. Moreover, this doctrine suggests that an unrecognised State may not be subject to the burdens and obligations imposed by international law.¹⁶⁶ Yet non-recognition of Israel by

¹⁶⁰ *East Timor* case, above n 94, para 17.

¹⁶¹ *Who Recognized Kosova as an Independent State*, above n 6.

¹⁶² Oppenheim, *International Law* (8th edn, Vol I, London, 1955) para 71 in D. J Harris *Cases and Materials on International Law* (5th ed, Sweet & Maxwell, 1998) 145.

¹⁶³ Malanczuk, above n 3, 83.

¹⁶⁴ Brownlie, above n 61, 88.

¹⁶⁵ Dugard and Raič, above n 3, 100.

¹⁶⁶ Malcolm Shaw *International Law* (4th ed, Cambridge University Press, 1997), 297.

the Arab States has not prevented the latter from repeatedly accusing Israel of having violated the international norms and provisions of the UN Charter concerning the prohibition against the use of force during the Middle Eastern Wars.¹⁶⁷ It is also inconceivable that non-recognising States currently view Kosovo as exempt from rules of international law.

On the other hand, the declaratory school asserts that an entity becomes a State on meeting the factual requirements of statehood, and that recognition by other States simply acknowledges, or declares ‘as a fact’, something that has hitherto been uncertain.¹⁶⁸ Consequently, recognition does not bring into legal existence a State which did not previously exist.¹⁶⁹ In 1991, the Badinter Arbitration Commission gave credence to this doctrine by suggesting that “the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory”.¹⁷⁰ Adherence to this view suggests that those States which have recognised Kosovo have taken the view that Kosovo satisfies the criteria of statehood.

The source most frequently cited as constituting the criteria of statehood is Article 1 of the Montevideo Convention on the Rights on the Rights and Duties of States 1933, which states that, “[t]he State as a person of international law should possess ... a permanent population; a defined territory; government; and capacity to enter into relations with other states”.¹⁷¹ According to Ian Brownlie, the criterion of permanent population connotes a stable community.¹⁷² With a population of about two million people, Kosovo has a stable community despite recent Kosovar Serb emigration from the area.¹⁷³ Kosovo also controls a sufficiently identifiable territory defined by the 1974 SFRY Constitution.¹⁷⁴ The fact that Serbia also has a competing claim to this territory will not preclude Kosovo’s satisfaction of this criterion, because international practice affirms that a new State may exist despite

¹⁶⁷ Raič, above n 74, 46.

¹⁶⁸ J. L. Brierly *Law of Nations* (6th ed, Oxford University Press, 1963) 139 in Dugard, Raič, above n 3, 97.

¹⁶⁹ Brierly, *ibid* 145 in Harris, above n 162, 145.

¹⁷⁰ Opinion 1, above n 120, 162.

¹⁷¹ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19. The Convention was ratified by the United States and certain States in Latin America: it is still in force. See Crawford, above n 3, 46.

¹⁷² Brownlie, above n 61, 71.

¹⁷³ Warbrick, above n 4, 675.

¹⁷⁴ Hajredin Kuçi ‘The Legal and Political Grounds For and the Influence of the Actual Situation on, the Demands of the Albanians of Kosovo for Independence’ (2005) 80 *Chicago-Kent Law Review* 331, 348.

competing claims to its territory.¹⁷⁵ Israel, Kuwait, the Islamic Republic of Mauritania and Belize are countries that exist in fact and in law despite competing claims to their territory.¹⁷⁶

James Crawford suggests that the criterion of government requires a government possessing the actual exercise of authority.¹⁷⁷ Colin Warbrick argues that Kosovo does not satisfy this criterion, because too many of the functions of a State are being discharged by international missions, including UNMIK, the European Rule of Law Mission in Kosovo (“EULEX”) and NATO, which remain in Kosovo even after the declaration of independence.¹⁷⁸ Even so, in June 2008, “the Constitution of the Republic of Kosovo” came into force, granting the Assembly of Kosovo sole legislative powers and transferring responsibility for the implementation of laws and state policies to the government of Kosovo.¹⁷⁹ The Constitution did not envisage a real role for UNMIK, although Kosovo’s leaders have welcomed the continued presence of the UN in Kosovo for some time.¹⁸⁰

The Montevideo Convention affirms that a State must possess the capacity to enter into relations with other States. However, as Peter Malanczuk observes, the standard is the *capacity* to enter into foreign relations, not the *actuality* of this fact.¹⁸¹ Through the assistance of the international community, Kosovo possesses its own competent diplomatic machinery for entry into foreign relations.¹⁸²

No multilateral instrument has been produced to replace or formally supplement the Montevideo Convention criteria. Nevertheless, numerous suggestions for further criteria have been formulated. Crawford argues that independence is the central criterion for statehood.¹⁸³ To prove lack of real independence, Brownlie suggests that it must be shown that the entity is

¹⁷⁵ Crawford, above n 3, 48.

¹⁷⁶ Ibid 49.

¹⁷⁷ Ibid 57.

¹⁷⁸ Warbrick, above n 4, 689. In March 2008, the International Crisis Group reported that the inexperienced Kosovar government is dependent on the continued administrative support of UNMIK, as well as the assistance of EULEX, which was established in February 2008 to ‘monitor, mentor and advise on all areas related to the rule of law in Kosovo’ and NATO, which provides policing assistance to the Kosovo Police Service. International Crisis Group, above n 60, 2.

¹⁷⁹ *The Constitution of the Republic of Kosovo* 15 June 2008 <<http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>> accessed 14/08/08.

¹⁸⁰ See United Nations Security Council *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* UN Doc. S/2008/458 (15 July 2008).

¹⁸¹ Malanczuk, above n 3, 79.

¹⁸² Kuçi, above n 174, 350.

¹⁸³ Crawford, above n 3, 62.

subject to foreign control, overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so on a permanent and systematic basis.¹⁸⁴ The passage of the 2008 Constitution and the current transfer of effective authority to the Kosovar government affirms that Kosovo is independent.

Although recognition is of great importance to Kosovo attaining statehood, recognition is not in itself a condition of statehood in international law.¹⁸⁵ Similarly, while an inability or unwillingness to observe international law may constitute grounds for refusing State recognition, it is not often mentioned as a criteria for statehood.¹⁸⁶ Equally, failure to comply with peremptory norms of international law will not preclude the statehood of an entity otherwise qualified.¹⁸⁷ It is instead argued that “the question must be whether the illegality is so central to the existence ... of the entity in question that international law may justifiably treat an effective entity as not a State”.¹⁸⁸ In the absence of any UN resolution reaffirming Serbia’s sovereignty or condemning Kosovo’s declaration as unlawful, Kosovo’s existence as a State does not appear contrary to the norms of international law.

D J Harris argues that the categorical rejection of Southern Rhodesia’s declaration of independence in 1965 confirms that the requirement that independence be achieved in accordance with the principle of self-determination has evolved into a criterion for statehood.¹⁸⁹ In 1965, Southern Rhodesia’s government sought to continue the white minority rule in Rhodesia by declaring the independence of this self-governing colony.¹⁹⁰ The Security Council called upon States not to recognise the illegal white minority regime, in light of its denial of the majority’s right to self-determination.¹⁹¹ Kosovo’s declaration of independence may be incompatible with the principle of self-determination, by virtue of the fact that this principle is subject to respect for Serbia’s territorial integrity.¹⁹² However, the absence of any UN resolution declaring the illegality of Kosovo’s secession greatly

¹⁸⁴ Brownlie, above n 61, 72.

¹⁸⁵ Crawford, above n 3, 93.

¹⁸⁶ Brownlie, above n 61, 75.

¹⁸⁷ Crawford, above n 3, 105.

¹⁸⁸ Ibid.

¹⁸⁹ Harris, above n 162, 111.

¹⁹⁰ Ibid.

¹⁹¹ *United Nations Security Council Resolution 211* (9 April 1966). The General Assembly similarly called upon “all States not to recognise any form of independence in Southern Rhodesia without the prior establishment of a government based on majority rule in accordance with the General Assembly Resolution 1514 (XX)”. See G.A Res 2379, G.A.O.R., 26th Sess., Supp. 18, 57 (1968) 7 I.L.M. 1401 in Harris, above n 162, 111.

¹⁹² See Article 6, *GA Res. 1514(XV)*, above n 80; principle 5, para 7, 1970 *Friendly Relations Declaration*, above n 89; and principle 2, para 3 1993 *Vienna Declaration*, above n 90.

undermines this argument. Consequently, Kosovo appears to fulfil all necessary criteria for statehood and State recognition, granted in accordance with the declaratory doctrine.

Although the declaratory theory seems to correspond best with State practice, it is clear that neither the constitutive nor declaratory theories satisfactorily explains modern practice.¹⁹³ Practice concerning the recognition of new States during the twentieth century suggests that recognition plays more than an evidentiary role.¹⁹⁴ Undoubtedly, the recognition of Bangladesh by more than a majority of existing States by 1974 had a decisive effect on the consolidation of Bangladesh's *de facto* statehood and prompt admission to the UN. The more plausible view is that "[r]ecognition, while declaratory of an existing fact, is constitutive in its nature, at least so far as concerns relations with the recognizing state".¹⁹⁵ Politically, recognition is constitutive because the act of recognition is a condition for the establishment of formal diplomatic relations with the new State.¹⁹⁶ If Kosovo's statehood had gone totally unrecognised, then the absence of diplomatic relations would have hampered Kosovo's ability to exercise its rights and duties as a State and its ability to attract international economic assistance.¹⁹⁷

Malcolm Shaw points out that this does not imply that the act of recognition is also legally constitutive, because State rights and obligations do not arise automatically as the result of recognition.¹⁹⁸ Equally, Shaw argues that if an entity went totally unrecognised, this would not amount to a decisive argument against statehood.¹⁹⁹ Legally, recognition must be declaratory of statehood already achieved otherwise. With the support of only 47 States, Kosovo would currently be a non-State and unable to assume responsibility for any of its rights and obligations under international law. The 2008 Constitution confirms that the Kosovo government has already assumed responsibility for prerogative powers associated with States.

¹⁹³ Crawford, above n 3, 5.

¹⁹⁴ Thomas Grant *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger Publishers, 1999) 22.

¹⁹⁵ L. Oppenheim *International Law*. (9th edn, Vol. 1: Peace. 'Introduction' and Part I, Harlow, Longman, 1992) 133.

¹⁹⁶ Brownlie, above n 61, 89.

¹⁹⁷ Kosovo's dependency on international economic assistance will be comprehensively addressed in Chapter Four.

¹⁹⁸ Shaw, above n 166, 298.

¹⁹⁹ *Ibid.*

Preference for the declaratory theory may have also been negated by the Badinter Arbitration Commission's recognition of the new States emerging from the SFRY. Recognition of these new States by EC members was given only if these entities complied with certain conditions stipulated in the Guidelines on Recognition, including respect for democracy, human rights and the rule of law.²⁰⁰ In doing so, some argue that "the European Community and its member States have returned to the constitutive theory, in the sense that they (collectively) determine which new State will be admitted into the community of States, and on what conditions".²⁰¹ However, as Harris explains, these conditions were political *conditions* intended to achieve political objectives, not additional legal requirements or *criteria* of statehood.²⁰²

Jean d'Aspremont argues that the Ahtisaari Plan's stipulation that Kosovo be "democratic and self-governing" and have respect for "the rule of law" and "the highest level of internationally recognized human rights and fundamental freedoms", also imposed constitutive elements.²⁰³ With its assertion that Kosovo will "[a]ccept fully the obligations for Kosovo contained in the Ahtisaari Plan", the 2008 declaration also appears to contain these same constitutive elements. However, while recognition of Kosovo's independence appears to be conditional on self-imposed conditions, if Kosovo fails to adhere to these obligations, third States will only be entitled to demand that Kosovo lives up to its undertakings, not that Kosovo's status is thereby affected.²⁰⁴

The impact of recognition will vary according to the uncertainty surrounding the situation. Peter Malanczuk argues that where facts surrounding an entity's satisfaction of the criteria for statehood are clear, the evidentiary value of recognition or non-recognition will not be strong enough to affect the outcome, and in such cases recognition is declaratory.²⁰⁵ But in borderline cases where the facts are unclear, the evidentiary value of recognition can have a decisive effect, and in such circumstances recognition is semi-constitutive.²⁰⁶ Given Serbia's

²⁰⁰ *Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union* U.K.M.I.L. (1991) 62 B.Y.I.L. 559 in Pazartzis, above n 110, 365.

²⁰¹ Jan Klabbbers, Martti Koskenniemi, Olivier Ribbelink & Andreas Zimmermann (eds.) *State Practice Regarding State Succession and Issues of Recognition* (Kluwer Law International, 1999) 44.

²⁰² Harris, above n 162, 149.

²⁰³ d'Aspremont, above n 70, 654.

²⁰⁴ Warbrick, above n 4, 684.

²⁰⁵ Malanczuk, above n 3, 84.

²⁰⁶ *Ibid.*

continued claim to sovereignty over Kosovo, current recognition is undoubtedly having a decisive effect in affirming Kosovo's statehood.

Certain limitations may be imposed on State recognition. Since international law does not explicitly recognise any right to unilateral secession, it is argued that States cannot recognise cases of unilateral secession without violating the principle of non-interference in the internal affairs of another State.²⁰⁷ In such circumstances, this illegality is followed by a duty of non-recognition under general international law.²⁰⁸ Similarly, when a seceding entity claims statehood, but does not satisfy the criteria of statehood, third State recognition is premature and a violation of the prohibition against non-intervention.²⁰⁹ Frequently cited instances of such premature recognition include Croatia and Bosnia-Herzegovina, where the traditional criteria of statehood were not fully satisfied.²¹⁰ Neither restriction appears to be applicable to the recognition of Kosovo. During the eight-year period of international administration, it was highly doubtful that decisions regarding Kosovo's future status were purely internal matters for the Serbian government to decide. Moreover, the rule against premature recognition is of little relevance given Kosovo's satisfaction of the criteria for statehood.

A further component of State recognition is the doctrine of collective recognition and collective non-recognition. Collective recognition occurs when a group of States recognises the existence of a new State directly, by an act of recognition, or indirectly, by the admission of the State to the organisation in question.²¹¹ Thus far, the UN has maintained a neutral position on the question of Kosovo's status, despite 47 of its members having decided unilaterally to recognise Kosovo's independence.²¹² Kosovo's future admission into the UN is also problematic given Russia's objections to the secession and its power of veto on the Security Council.²¹³

²⁰⁷ Müllerson, above n 3, 83.

²⁰⁸ Tancredi, above n 3, 198.

²⁰⁹ Raič, above n 74, 83.

²¹⁰ At the time of recognition, the government of Croatia and Bosnia and Herzegovina did not exercise full control over their respective territories. See Müllerson, above n 3, 130 and Shaw, above n 166, 309.

²¹¹ Dugard and Raič, above n 3, 97.

²¹² Report of the Secretary-General, above n 180, 9.

²¹³ Article 4 (2) of the UN Charter states that "The admission of ... States to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council". Article 27 affirms the permanent members power of veto by stating that "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". The possibility of Kosovo's future admission to the UN will be addressed in Chapter Five.

Recognition by EU member States is significant for Kosovo's future status. According to the International Crisis Group, "[r]ecognition by EU members is essential to confirm the legitimacy and political room for manoeuvre of the current EU mission in Kosovo, to give Kosovo a clear perspective of eventually joining the EU, and to confirm the realism of the EU's plan to make major financial and political investment in Kosovo's development".²¹⁴ EU members have elected to unilaterally recognise Kosovo's independence, and since 1 October 2008, 21 of the 27 EU members have done so.²¹⁵ EU support is crucial given that independence has thus far gone unrecognised by three of Kosovo's four directly neighbouring States.²¹⁶

The duty of States not to recognise an act in violation of a general principle of international law also applies to the creation of States, given that any unlawful secession is likely to violate the principles of non-interference and the sovereign equality of existing States.²¹⁷ On several occasions, the UN has directed its members not to recognise the independence of claimant States. In Resolutions 541 (1983) and 550 (1984), the Security Council called on States not to recognise the "legally invalid" secession of the Turkish Republic of Northern Cyprus ("TRNC") from Cyprus in 1983.²¹⁸ This call for collective non-recognition was prompted by Turkey's illegal invasion and continued occupation of Cyprus, which was recognised as a clear violation of the prohibition on the use of force.²¹⁹ Significantly, there has been no UN resolution calling for the collective non-recognition of Kosovo, or declaring this declaration to be unlawful. This omission lends further credence to the argument that, even though Serbia held sovereignty immediately prior to the declaration, Kosovo's independence has not been established illegally.

²¹⁴ International Crisis Group, above n 60, 16.

²¹⁵ Wikipedia *International reaction to the 2008 declaration of independence by Kosovo (26/08/2008)* <http://en.wikipedia.org/wiki/International_reaction_to_the_2008_Kosovo_declaration_of_independence> accessed 1/10/08

²¹⁶ As of 1 October 2008, Serbia, Montenegro and Macedonia have withheld recognition for the Republic of Kosovo. See *Who Recognized Kosova as an Independent State?*, above n 6. See the Map of the Central Balkan Region, Appendix Three.

²¹⁷ Dugard and Raič, above n 3, 100.

²¹⁸ *United Nations Security Council Resolutions 541*, UN Doc S/Res/541 (18 November 1983) and *United Nations Security Council Resolution 550*, UN Doc S/Res/550 (11 May 1984) in *ibid*, 133.

²¹⁹ John Dugard *Recognition and the United Nations* (Grotius Publications Limited, 1987) 110.

C. Recognition of Kosovo's Independence

“[T]he international community does not have a clearly defined and coordinated response” to Kosovo’s declaration of independence.²²⁰ In the absence of any established legal right of secession, and given that over 140 States have not accorded recognition, it is difficult to conclude that the current recognition of Kosovo’s independence is sufficient to amount to confirmation of Kosovo’s *de jure* statehood. Rather, all that can be concluded from the degree of current recognition is that Kosovo has accomplished a unilateral *de facto* secession from Serbia. Italy’s recognition text corroborates this view, declaring that “Kosovo’s independence is today a fact. It is a new reality which we must face and acknowledge”.²²¹

States also appear to have granted recognition on the premise that they were entitled to do so.²²² For instance, the United States formally recognised Kosovo as a “sovereign and independent state” on the basis that “independence is the only viable option to promote stability in the region”.²²³ Similarly, Germany formally recognised the Republic of Kosovo on the ground that further negotiations would not have resulted in a breakthrough.²²⁴ Given that recognition is legally declaratory, this suggests that recognising States are acknowledging Kosovo’s fulfilment of the criteria of statehood and its *de facto* independent status. Since recognition is politically constitutive, those States that have refused to recognise Kosovo are affirming that they will not establish diplomatic relations with this new State. Although it is highly improbable that Kosovo will ever receive universal recognition, the case of Israel suggests that this will not thwart Kosovo’s progression towards *de jure* statehood.

On 14 May 1948, the State of Israel unilaterally declared its independence from Palestine. Israel’s claim to statehood was premised on General Assembly Resolution 181, in which the General Assembly had given its approval to the termination of the Mandate for Palestine, and for the partition of Palestine into separate Arab and Jewish States.²²⁵ During the 1948 Israel-Arab war, Arab States vehemently contested the illegitimacy surrounding Israel’s creation.

²²⁰ International Crisis Group, above n 60, 2.

²²¹ Italy’s recognition text in Warbrick, above n 4, 687.

²²² Ibid 684.

²²³ Condoleezza Rice *U.S Recognizes Kosovo as Independent State* (18 February 2008) U.S Department of State, <<http://www.state.gov/secretary/rm/2008/02/100973.htm>> accessed 20/03/08.

²²⁴ *Germany recognises Kosovo* (20/02/2008) REGIERUNGonline, Federal Government, <http://www.bundesregierung.de/nn_6562/Content/EN/Artikel/2008/02/2008-02-20-deutschland-erkennt-kosovo-an_en.html> accessed 20/03/08.

²²⁵ Dugard, above n 219, 60.

On 11 May 1949, Israel was admitted to the UN by a General Assembly vote of 37 in favour, 12 against and 9 abstentions, without the recognition of any Arab States.²²⁶ While this admission did not give political legitimacy to Israel's claim, relationships under international law, premised on the existence of their respective statehoods, were established between Israel and the Arab States.²²⁷

Significantly, the Arab States refusal to recognise Israel's independence has not affected Israel's position as a State within the international community, entitled to the benefits and subject to the burdens of international law.²²⁸ This has been repeatedly demonstrated by the frequency with which both the non-recognising Arab States and Israel have invoked claims against each other based on international law.²²⁹ It can also be maintained that in the absence of any confirmation of Serbia's sovereignty, Kosovo cannot be regarded as a non-State free from the obligations of international law.²³⁰

However, it is also clear that Kosovo will not achieve *de jure* independence until a sufficient number of States recognise it as such.²³¹ Precisely how many recognising States are required to achieve this is uncertain. A comparison between the recognition granted to Kosovo and to Bangladesh following their respective declarations of independence, confirms that Kosovo's progression to a *de jure* State is promising. Prior to January 1972, only Bhutan and India had recognised Bangladesh's independence.²³² Following the surrender of the Pakistani Army in December 1971, Bangladesh was recognised by some 70 States between January and May 1972, and by over 100 States by September 1973.²³³ With 45 States having already recognised Kosovo's independence six months after its declaration, it is quite possible that Kosovo's independence will come to be accepted as *de jure* in the foreseeable future.²³⁴

²²⁶ Israel was formally recognised by Egypt in 1979 and by Jordan in 1995. Raič, above 74, 46.

²²⁷ Dugard, above n 219, 63. Recognition of Israel's independence is distinguishable from Kosovo's by the fact that none of these non-recognising Arab States were permanent members of the Security Council with the ability to veto Israel's admission into the UN. The likelihood of Kosovo's future admission into the UN will be addressed in Chapter Five.

²²⁸ Ibid 62.

²²⁹ For instance, the Arab States claimed that Israel's attack on Egypt, Jordan and Syria in 1967 was contrary to UN Charter Article 2(4), while Israel justifies her action as self-defence under Article 51 of the UN Charter. See Dugard, above n 219, 62.

²³⁰ Shaw, above n 166, 317.

²³¹ Perritt, above n 66, 19.

²³² Dugard and Raič, above n 3, 121.

²³³ Ibid 122.

²³⁴ *Who Recognized Kosova as an Independent State?* above n 6.

Finally, international recognition will not serve to validate the claim that Kosovo's independence has been achieved as of legal right. As affirmed by the Canadian Supreme Court, international recognition occurs after a territorial unit has been politically successful in achieving secession, and this cannot serve retroactively as a source of a "legal" right to secede in the first place.²³⁵ Although international recognition has served to affirm Kosovo's *de facto* statehood, and may in time ensure Kosovo's progression into a *de jure* State, it does not prove that "secession was achieved under colour of a legal right".²³⁶

²³⁵ *Quebec Case*, above n 88, para 142, in Patrick Dumberry 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Kohen, above n 2, 443.

²³⁶ *Quebec Case*, above n 88, para 144.

CHAPTER FOUR: KOSOVO AS AN EXCEPTIONAL CASE OF SECESSION

In the Bangladesh case, a combination of extraordinary factual circumstances prompted a majority of States to unilaterally recognise this case as a *de facto* secession, notwithstanding the absence of any affirmatively established legal right of unilateral secession.²³⁷ Similarly, it can be surmised that those States, which have thus far recognised Kosovo, have done so on the premise that Kosovo's unilateral secession from Serbia is now a fact and exceptional in its own right. Chapter Four will account for the factual circumstances which have made this case an exception to the long list of failed secession attempts cited in Chapter Two, and demonstrate that Kosovo cannot serve as a precedent for other unresolved conflicts.

A. Kosovo as an Exceptional Case

The foundation of Kosovo's claim to exceptional status is historic. Both Serbs and Albanians have constructed their own nationalistic myths concerning the historical significance of Kosovo. Furthermore, both vehemently challenge the opponents' claim that Kosovo was, first, the cradle of Serb/Albanian civilization, and second, that their own nationality was historically the largest group in Kosovo.²³⁸ The persecution of the Kosovar Albanians up until 1999 was exceptional, but did not automatically give rise to a legitimate secessionist claim. The essence of Kosovo's claim to being an exceptional case instead follows from the response of the international community and the effective transformation of Kosovo into an "internationalised territory".²³⁹

Security Council Resolution 1244 is peculiar by virtue of its vagueness on the issue of Kosovo's final status. In effect, it left open all possible options, ranging from independence right through to the restoration of Serbian authority.²⁴⁰ It also provided ample justification for UNMIK to assume responsibility for the administration of the province, whilst denying

²³⁷ These factors include East Pakistan's geographic separation from its parent States, economic and cultural disparities between East and West Pakistan and the degree of suffering endured by the Bengali's during the Western Pakistani's military campaign. See Chapter Two.

²³⁸ Weymouth and Henig, above n 11, 17.

²³⁹ Carsten Stahn 'Constitution without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government' (2001) 14 *Leiden Journal of International Law* 531, 540.

²⁴⁰ Gruda, above n 72, 353.

Serbia any subsequent role in Kosovo's governance. In line with Resolution 1244's stipulation for the creation of "democratic self-governing institutions", UNMIK facilitated the election of a municipal government and the appointment of central authorities to assume responsibility for most of the day-to-day responsibilities of government.²⁴¹ In 2007, independence appeared unavoidable amongst widespread agreement that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status [was] exhausted".²⁴² The only unresolved issue was the manner by which independence was to be implemented.

Further evidence that Kosovo is an exceptional case stems from the blueprint for independence set out for Kosovo by the Ahtisaari Plan. Significantly, the plan envisaged Kosovo becoming independent after a 120-day period of international supervision.²⁴³ Responsibility for implementation of this blueprint was assigned to NATO with its commitment to KFOR, UNMIK and EULEX.²⁴⁴ But Russia's persistent objections to Kosovo's independence and its power of veto on the Security Council ensured that both the Ahtisaari Plan and the EULEX mission did not receive Security Council backing.²⁴⁵ This in turn prompted the frustrated Kosovar Albanian government to abandon its faith in an internationally supervised solution, and to execute independence unilaterally and prematurely. This can be contrasted with the experience in East Timor where planned independence was achieved in accordance with the UN mandate set forth in Resolution 1272.

Indonesia's unlawful annexation of East Timor in 1975 and President Habibie's acquiescence in a UN-supervised referendum, ensures that East Timor's independence cannot be construed as a case of unilateral secession. Even so, this case bears strong resemblance to the present case by virtue of the dominant role played by the UN in each territory's respective programmes for independence. In response to the eruption of violence which ensued after the referendum, the United Nations Transitional Authority for East Timor ("UNTAET") was deployed to assume "overall responsibility for the administration for East Timor" and to

²⁴¹ Perritt, above n 66, 15.

²⁴² Report of the Special Envoy, above n 51, 2.

²⁴³ Ibid 8. The Ahtisaari Plan stipulated that "Kosovo [would] become a multi-ethnic society, governing itself democratically with full respect for the rule of law and the highest level of internationally recognized human rights and fundamental freedoms". The Plan also included "extensive decentralization provisions ...to promote good governance", specific provisions for the promotion of "sustainable economic development ...with substantial international involvement", and provision for the creation of a justice system that could "reflect the multi-ethnic character of Kosovo". See the Report of the Special Envoy, Appendix Five.

²⁴⁴ Warbrick, above n 4, 678.

²⁴⁵ International Crisis Group, above n 60, 14.

“support the capacity-building for self-government”.²⁴⁶ UNTAET gave effect to this comprehensive mandate by facilitating the establishment of local self-governing institutions.²⁴⁷ In the absence of any external interference, the Security Council carried out the planned transfer of power to the independent State of East Timor in May 2002 and UNTEAT was subsequently disbanded.²⁴⁸

UNMIK’s role in Kosovo was profoundly more complex by virtue of Serbia’s continued claims to sovereignty. Nevertheless, the similar emphasis on the creation of ‘self-governing institutions’ in both Resolutions 1244 and 1272 confirms that the international administrations established in each territory were merely temporary. Furthermore, given the “growing consensus among the Timorese people to seek independence by the end of 2001”,²⁴⁹ and open acknowledgment that the “international administration of Kosovo [could not] continue”,²⁵⁰ it was clear from a practical standpoint that independent statehood was the only viable outcome for both territories. It was only in the case of East Timor that the UN was able to make a relatively clean exit.²⁵¹

By 2007, the political situation in Kosovo “did not appear to offer any realistic alternative to secession”.²⁵² Most of the options raised for Kosovo’s future status in the 2000 Report of the Independent International Commission on Kosovo were simply unsustainable.²⁵³ By March 2007, Martti Ahtisaari had rejected the option of continued international administration of Kosovo on the grounds that this “uncertain political status [had] left it unable to access international financial institutions, fully integrate into the regional economy or attract foreign capital”.²⁵⁴

²⁴⁶ *United Nations Security Council Resolution 1272*, U.N. Doc. S/RES/1272 (25 October 1999) in DeFelice, above n 132, 65.

²⁴⁷ These institutions included the East Timorese Transitional Administration, a National Council and an eight-member Constitutive Assembly. See Charlesworth, above n 132, 327.

²⁴⁸ Gruda, above n 72, 362.

²⁴⁹ *United Nations Security Council Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period 27 July 2000 to 16 January 2001)* UN Doc. S/2001/42 (16 January 2001) < <http://www.un.org/Docs/sc/reports/2001/sgrep01.htm> > accessed 30/07/08.

²⁵⁰ Report of the Special Envoy, above n 51, 3.

²⁵¹ Perritt, above n 66, 3.

²⁵² Borgen, above n 5.

²⁵³ The possibilities cited in this report included the indefinite continuation of Kosovo as an international protectorate, partition of the province either by means of a canton arrangement or by setting up a new border along the Ibar River and *de facto* separating the Albanian and Serbian populations, autonomy within Serbia and Montenegro, conditional independence and full independence. The Independent International Commission on Kosovo *The Kosovo Report* (Oxford University Press, 2000) 9, in Knudsen and Laustsen, above n 43, 162.

²⁵⁴ Report of the Special Envoy, above n 51, 3.

The suggestion of reintegration with Serbia was “simply not tenable”.²⁵⁵ According to Martti Ahtisaari, the return of Serbian rule would have been greeted with violent opposition in Kosovo.²⁵⁶ Tim Judah also argues that “Serbian leaders [knew] that there [was] no way they could reabsorb two million ethnic Albanians into Serbia’s body politic”.²⁵⁷ The suggestion of partitioning the three heavily Serbian-populated municipalities of Zvecan, Zubin Potok and Leposavic, as well as Mitrovica north of the Ibar River, and returning these areas to Serbia also appeared unfeasible.²⁵⁸ It is clear that the Kosovar Albanians opposed this suggestion which would have entailed the loss of one fifth of Kosovo’s territory.²⁵⁹ Full independence therefore remained the only realistic option for Kosovo’s future status.

Kosovo can also be regarded as an exceptional case by reason of the response of the international community and the willingness of some States to conclude that Kosovo’s link with Serbia ought to be broken.²⁶⁰ Martti Ahtisaari endorsed this view for the sake of regional stability, suggesting that delay or denial of a resolution concerning Kosovo’s final status would pose the greatest risk to the peace and stability of Kosovo and the region as a whole.²⁶¹ Independence was also considered necessary for the sake of Kosovo’s future economic viability, in light of predictions that Kosovo would have a greater chance of attracting foreign investment as a fully independent State.²⁶² Finally, full independence was characterised as the option most favourable to ensuring respect for the rule of law and effective protection of minority rights, because it would compel Kosovo’s democratic institutions to become “fully responsible and accountable for their actions”.²⁶³ In conjunction, these exceptional factual circumstances which led to secession make it extremely difficult to cite Kosovo as a precedent for other unresolved conflicts.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Judah, above n 48, 215.

²⁵⁸ Adrian Toshev and Gregory Cheikhameguyaz “The European Union and the Final Status for Kosovo” (2005) 80 *Chicago-Kent Law Review* 273, 294. Refer to the Map of Kosovo, Appendix Two.

²⁵⁹ Trebicka, above 69, 256.

²⁶⁰ Warbrick, above n 4, 681.

²⁶¹ Report of the Special Envoy, above n 51, 1.

²⁶² Perritt, above n 66, 22. Subsequent to the declaration of independence, Kosovo’s transgression into an economically viable State has already received substantial support from the EC, which has allocated €395.1 million to Kosovo until 2011 and the United States, which has pledged to increase its bilateral aid to \$335 million for 2008. International Crisis Group, above n 60, 16.

²⁶³ Report of the Special Envoy, above n 51, 4.

B. Kosovo as a Precedent

Notwithstanding the foregoing analysis, in February 2008 President Vladimir Putin warned:

*“The Kosovo precedent is a terrifying precedent. It in essence is breaking open the entire system of international relations that has prevailed not just for decades but for centuries. And without a doubt will bring on itself an entire chain of unforeseen consequences”.*²⁶⁴

On the 26 August 2008, Russia acted on this warning by citing Kosovo as justification for recognising the independence of Abkhazia and South Ossetia, two entities which had proclaimed independence from Georgia in the early 1990s, though without achieving any State recognition.²⁶⁵ The main rationale for this comparison was premised on the Russian belief that since “Western countries rushed to recognise Kosovo’s illegal declaration of independence”, it would be impossible to “tell the Abkhazians and Ossetians ... that what was good for the Kosovo Albanians was not good for them”.²⁶⁶

In 1992, the autonomous Republic of Abkhazia unilaterally declared its independence from the Georgian Soviet Socialist Republic.²⁶⁷ With no outside recognition forthcoming, war broke out in Abkhazia between the Abkhazia militia and the Georgian National Guard.²⁶⁸ The ensuing peace talks, convened under the auspices of the UN, failed to resolve the hostilities after Abkhazian authorities categorically rejected all proposals submitted by the UN Special Envoy reaffirming the territorial integrity of Georgia.²⁶⁹ Abkhazian authorities instead sought to reassert their independence and facilitate the forced expulsion of over thirty thousand Georgian citizens from Abkhazia, a move widely condemned as an act of ‘ethnic cleansing’.²⁷⁰ Prior to this act, Abkhazians had accounted for a mere eighteen per cent of

²⁶⁴ International Herald Tribune in International Crisis Group, *Russia vs Georgia: The Fallout* (22 August 2008) Crisis Group Europe Report N° 195 – 22 < <http://www.crisisgroup.org/home/index.cfm?id=5636>> accessed 20/09/08.

²⁶⁵ Wikipedia, above n 215.

²⁶⁶ Dmitry Medvedev ‘Why I had to recognise Georgia’s breakaway regions’ Financial Times (August 26, 2008) http://www.ft.com/cms/s/0/9c792-7395-11dd-8a66-0000779fd18c.html?nclick_check=1 accessed 14/09/08.

²⁶⁷ Noelle M. Shanahan Cutts “Enemies Through the Gates: Russian Violations of International Law in the Georgia/Abkhazia Conflict” (2008) 40 *Case Western reserve Journal of International Law* 281, 288.

²⁶⁸ Dugard and Raič, above n 3, 115.

²⁶⁹ Ibid 116.

²⁷⁰ *OSCE Istanbul Summit Declaration* OSCE Doc. SUM.Doc/2/99 (1999) para 17, in *ibid*.

Abkhazia's total population.²⁷¹ Until August 2008, Abkhazia's persistent claims to statehood had been overlooked in favour of the international community's commitment to the "sovereignty and territorial integrity of Georgia".²⁷²

In 1992, the autonomous region of South Ossetia also unilaterally declared independence from Georgia. Yet, this attempted secession is peculiar in its own right, given the notable absence of any significant tensions exhibited between the Ossetian and Georgian populations residing within either Georgia or South Ossetia.²⁷³ Ethnic tensions only became overtly sensitive in 1989 when armed conflict broke out between Georgians and Ossetians. This conflict resulted in the deaths of over one thousand people and encouraged Ossetian nationalists to begin advocating secession as the only possible solution.²⁷⁴

The merits of Kosovo's secession are readily distinguishable from both of these cases on several grounds. During the 1998-1999 conflict in Kosovo, Kosovar Albanians became the principal targets of the Serbian authorities' deliberate and premeditated ethnic cleansing operations. By contrast, it is difficult to maintain that Abkhazians were the outright victims of the 1989-1992 war, as evidence suggests that both Georgia and Abkhazia were "responsible for gross violations of international humanitarian law".²⁷⁵ Throughout the smaller South Ossetian conflict, both sides were responsible for atrocities, while Georgians in Ossetian villages also became the principal targets for Ossetian paramilitaries.²⁷⁶ During the 2007 political negotiations, Martti Ahtisaari openly praised Kosovo authorities' cooperation with Belgrade to reach some mutually agreeable outcome for Kosovo's final status.²⁷⁷ Both Abkhazians and South Ossetians have been unwilling to exhaust all peaceful remedies before

²⁷¹ Whereas Georgians accounted for 46 per cent of Abkhazia's population, and Russians accounted for 16 per cent. Ibid 113.

²⁷² See *United Nations Security Council Resolution 1065*, UN Doc S/Res/1065 (12 July 1996) and *United Nations Security Council Resolution 1287*, UN Doc S/Res/1287 (31 January 2000) para 5.

²⁷³ This lack of any significant tension existing between Ossetians and Georgians was affirmed by 1989 Georgian consensus which highlighted that 60 per cent of Ossetians had elected to reside throughout Georgia, as opposed to residing within the South Ossetian autonomous province. Ketevan Tsikhelaskvili and Natasha Ubilava "Case Study of the Conflict in South Ossetia" in Marc Weller and Barbara Metzger (eds.) *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers, 2008) 351.

²⁷⁴ Fawn, above n 127, 273.

²⁷⁵ Human Rights Watch, Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict, 7 Human Rights Watch Arms Project 1, 5 (March 1995) in Cutts, above n 259, 289.

²⁷⁶ Nikola Svetkovsky *The Georgian-South Ossetia Conflict*, Danish Association for Research on the Caucasus, <<http://www.caucasus.dk/publication5.thm>> in International Crisis Group, above n 264, 7. These atrocities included the decapitation of infants, execution in front of family members, and rape.

²⁷⁷ International Crisis Group *Kosovo's Status: Delay is Risky* Europe Report No 177, in Trebicka, above n 69, 258.

claiming secession.²⁷⁸ Finally, the swift recognition of Kosovo's independence, compared with Abkhazia's and South Ossetia's inability to obtain any recognition whatsoever, prior to August 2008, provides ample proof that their respective cases for independence possess few of the exceptional factual circumstances associated with Kosovo's secession.

C. Russia's Motives for Recognising Abkhazia and South Ossetia

Russia's recognition of Abkhazia and South Ossetia appears to belie an ulterior motive. As affirmed by the International Crisis Group, the conflict is no longer between Georgia and the ethnic Ossetians and Abkhazians, but rather between Georgia and Russia.²⁷⁹ Despite its small size, Russia attributes significant strategic importance to Georgia because of its location between Russia and the Black Sea and its ability to curtail Russia's economic and strategic interests in the Black Sea region. It is alleged that Russian officials are deliberately citing Kosovo's independence in order to pave "the way for a Russian land grab, or at least the creation of smaller nations more willing to 'work' with Russia".²⁸⁰

This conflict is also evolving into a battle between Russia and the West, with Russia purporting to reserve the same right to rule on the claims of these entities as the United States, the EU and NATO have done in relation to Kosovo.²⁸¹ Since 2001, Georgia has emerged as a high-value ally to the Bush Administration and a strong supporter of the Global War on Terror.²⁸² In return, the United States has become the principal champion of Georgia's accession to NATO membership.²⁸³ Given its deep opposition to NATO's eastward expansion, Russia's recognition can be construed as an attempt to punish Georgia for its NATO ambitions and to warn the Ukraine not to go down the same path.²⁸⁴

²⁷⁸ This claim has been evidenced by the Abkhazians increasingly unwillingness to enter into good faith negotiations with Georgia in recent years, and South Ossetian authorities' unwillingness to secure any full-scale solution before the Abkhazia issue is resolved. See Dugard and Raič, above n 3, 118 and Tsikhelaskvili and Ubilava, above 273, 366.

²⁷⁹ International Crisis Group, above n 264, 7.

²⁸⁰ Cutts, above n 267, 287.

²⁸¹ International Crisis Group, above n 264, 9.

²⁸² David L. Phillips 'Restoring Georgia's Sovereignty in Abkhazia' (2008) The Atlantic Council of the United States Policy Paper July 2008, 6.

²⁸³ International Crisis Group, above n 264, 11.

²⁸⁴ Ibid.

Thus, Russia's motives for citing Kosovo to justify its recognition of the conflicts in Abkhazia and South Ossetia, appear to lack both credibility and any logical correlation to the assertion that Kosovo's independence has set a precedent for other unresolved conflicts. As with the long list of failed secession attempts cited in Chapter Two, the factual circumstances associated with the Abkhazian and Ossetian secession claims are by no means exceptional. Consequently, the position taken by the U.S Secretary of State, Condoleezza Rice, remains true:

*“The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia’s breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today”.*²⁸⁵

²⁸⁵ Rice, above n 223.

CHAPTER FIVE: THE FUTURE

*“When it comes to defending our sovereignty and territorial integrity that means making sure that our Constitution and our territory is intact. Serbia will be making no compromise ... Serbia will not concede a millimetre of ground”.*²⁸⁶

In a bid to recapture international recognition of its sovereignty over Kosovo, Serbia continues to emphatically reject Kosovo’s claim to independence. Serbia is also seeking to undermine Kosovar rule by the most authoritative means possible, through a request for an advisory opinion from the International Court of Justice (“ICJ”) over the legality of Kosovo’s declaration of independence. Chapter Five will delineate Serbia’s bid to regain sovereignty and ultimately demonstrate how Serbia’s objections will not thwart Kosovo’s current and future progression towards *de jure* statehood.

A. Serbia’s Request for an Advisory Opinion

On the 22 August 2008, Vuk Jeremic, Minister for Foreign Affairs of the Republic of Serbia, delivered to the Deputy Secretary-General of the United Nations, a “[r]equest for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law”.²⁸⁷ On behalf of Serbia, the explanatory memorandum stated that “the most principled, sensible way to overcome the potential destabilizing consequences of Kosovo’s unilateral declaration of independence is to transfer the issue from the political arena to the juridical arena”.²⁸⁸ If the Court decides that it

²⁸⁶ Statement by Vuk Jeremic, Minister for Foreign Affairs of the Republic of Serbia, 22 July 2008 in European Commission, *Enlargement Newsletter* (1 August 2008) <<http://ec.europa.eu/enlargement/press-corner/newsletter/index-en.htm>> (accessed 12/09/08).

²⁸⁷ UNGA Request for the inclusion of a supplementary item in the agenda of the sixty-third session, UNGA A/63/195 (22 August 2008) <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=12200K638K561.73531&profile=bib&uri=full%3D3100001~!871200~!0&booklistformat=#focus>> accessed 14/09/08. This request is to be included in the agenda of the sixty-third session of the General Assembly which commenced on the 23 September 2008. On day one of the sixty-third session, Serbia’s President Boris Tadić declared that “the unilateral, illegal and illegitimate declaration of independence” by the ethnic Albanian authorities of Kosovo has set a “dangerous precedent”. Tadić also warned that “there are dozens of Kosovos throughout the world, just waiting for secession to be legitimized”. 63rd annual debate of the United Nations General Assembly (24/09/2008) Jolt Online Gaming 1999-2008 <<http://forums.jolt.co.uk/showthread.php?t=566891>> accessed 26/09/2008.

²⁸⁸ UNGA A/63/195, *ibid*.

has the jurisdiction to consider Serbia's request, this advisory opinion may have profound implications on the lingering ambiguity surrounding Kosovo's current *de facto* statehood.

In the *Legality of the Threat or Use of Nuclear Weapons* case (the “*Nuclear Weapons Case*”), the ICJ reaffirmed that before giving an advisory opinion, it first must consider whether it has jurisdiction to give a reply to the request and whether, should the answer be in the affirmative, there was any reason the Court should decline to exercise such jurisdiction.²⁸⁹

The Court derives its jurisdictional competence in respect of an advisory opinion from Article 65 (1) of the Statute of the ICJ which states that “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.²⁹⁰ This provision is paralleled by Article 96 (1) of the UN Charter which prescribes which organs of the United Nations, including the General Assembly and the Security Council, are authorised to request an advisory opinion on “any legal question”.²⁹¹

Having tabled this request for inclusion in the agenda of the forthcoming sixty-third session of the General Assembly, Serbia's request must receive the support of a majority of States present and voting at that session. However, there appears to be some uncertainty surrounding precisely what kind of General Assembly majority is required to approve such a request. Article 18 (2) UN Charter states that “Decisions of the General Assembly on important questions shall be made by two-thirds majority of the Members present and voting”. Yet, a request for an advisory opinion from the ICJ is not included among the non-exhaustive list of “important questions” listed in Article 18 (2).²⁹² Furthermore, there are no special provisions in the Rules of the Court stipulating the majorities required to pass a

²⁸⁹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 266, para 10.

²⁹⁰ According to the ICJ, Article 65, (1) “is more than an enabling provision” that “leaves a discretion as to whether or not it will give an advisory opinion requested of it, once it has established its competence to do so”. *Ibid*, para 14.

²⁹¹ Article 96 (1) of the United Nations Charter states that “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question”.

²⁹² Article 18(2) states that “Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions”.

resolution to submit a question to the ICJ.²⁹³ In 1946, a proposal for an amendment to the Charter requiring that requests for advisory opinions must have the support of two-thirds of all members present and voting, failed to receive the support of a simple majority for endorsement.²⁹⁴ In 1949, the then President of the General Assembly affirmed that a request only requires the support of a simple majority.²⁹⁵ It is also clear that the advisory opinion in the *Nuclear Weapons Case*, having only received 78 votes in favour, but 43 votes against and 38 abstentions, clearly “did not reflect a meaningful consensus of the member States of the United Nations”.²⁹⁶ Accordingly, it seems that a simple bare majority of General Assembly members present and voting is all that is required before Serbia’s request can be adopted for submission to the ICJ.

In accordance with Article 65, the Court must also be satisfied that it has a ‘legal question’ before it.²⁹⁷ This legal question must be one “framed in terms of law and rais[ing] problems of international law” and “susceptible of a reply based on law”.²⁹⁸ It is therefore probable that Serbia’s request concerning the *legality* of Kosovo’s declaration will be deemed to be a question of a legal nature.²⁹⁹ Moreover, the ICJ has previously declared “that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion”.³⁰⁰

As Shabtai Rosenne explains, the case law taken as a whole shows that only one circumstance has been recognised as requiring the Court to exercise its discretion and refrain from giving the opinion requested.³⁰¹ This arose in the *Eastern Carelia Case* where the

²⁹³ Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002), 1183.

²⁹⁴ Leland Goodrich, Edvard Hambro and Anne Simons *Charter of the United Nations: Commentary and Documents* (3rd ed, Columbia University Press, 1969) 566.

²⁹⁵ *Ibid.*

²⁹⁶ *Nuclear Weapons Case*, above n 289, dissenting opinion of Judge Oda, para 13.

²⁹⁷ Shabtai Rosenne *The Law and Practice of the International Court 1920-1996: Volume II Jurisdiction* (Martinus Nijhoff Publishers, 1997) 999.

²⁹⁸ *Western Sahara*, I.C.J Reports 1975, 18 para 15 in *Nuclear Weapons Case*, above n 281, para 13.

²⁹⁹ Serbia has requested this opinion because it believes that the declaration of independence is contrary to international law by virtue of its violation of Security Council Resolution 1244, the Charter of the United Nations, the Helsinki Final Act and the norms of international law. Margaret Besheer *Serbia Requests ICJ Opinion on Legality of Kosovo Independence* (15/08/08) VOA News < <http://www.voanews.com/english/2008-08-15-voa58.cfm> > accessed 25/08/08. Refer to Chapter Two for a more detailed discussion of Serbia’s objections.

³⁰⁰ *Nuclear Weapons Case*, above n 289, para 13.

³⁰¹ Rosenne, above n 297, 1027.

Permanent Court of International Justice declined to give an advisory opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties.³⁰² At the same time, it also raised a question of fact which could not be determined without hearing both parties.³⁰³ In the present context, two States could be said to be in the same position - Serbia by virtue of its continued claims to sovereignty and the 'State' of Kosovo. However, were the Court to decline to exercise its jurisdiction on this ground, then by implication, it could be assumed that the Court considers that Kosovo does in fact constitute a 'State' in accordance with international law. This would also go a long way to dispelling any remaining uncertainty about Kosovo's present status.

If the Court elects to consider the request, the legal implications of the opinion will be limited. When exercising its advisory jurisdiction, "the Court cannot legislate".³⁰⁴ Instead, the Court's role is to give advice as to the current state of law to the organ requesting the opinion.³⁰⁵ These pronouncements do not possess binding force *per se*, nor do they attract the formal obligation of compliance.³⁰⁶ Nevertheless, this advisory opinion may well have a profound impact on Kosovo's progression towards *de jure* statehood, by virtue of the persuasive effect it may have – one way or another – on those States yet to recognise Kosovo.

B. Kosovo's Admission to the United Nations

As stipulated in Article 4 (1) of the UN Charter, "Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations". In light of Kosovo's satisfaction of the Montevideo Convention criteria for statehood, and provided Kosovo can demonstrate that it satisfies the requirements of Article 4 (1), Kosovo

³⁰² *Troisième Session Ordinaire (Eastern Carelia Case)* [1923] PCIJ. This case arose after the Council of the League of Nations requested the PCIJ to give an advisory opinion on the question of whether "Articles 10 and 11 of the Treaty of Peace between Finland and Russia ... and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?".

³⁰³ *Ibid*, 29.

³⁰⁴ *Nuclear Weapons Case*, above n 289, para. 18.

³⁰⁵ Rosalyn Higgins *Problems & Process: International Law and How We Use It* (Clarendon Press, 1994) 198.

³⁰⁶ Rosenne, above n 297, 98.

may qualify for admission to the UN.³⁰⁷ Hans Kelsen has argued that an entity which claims to be a State, but is not recognised as such by all UN members, can still be admitted to the UN since it is possible to interpret the decision of the General Assembly on whether to admit a new State, upon the recommendation of the Security Council required by Article 2 (4), as implied recognition by the UN members of the entity's statehood.³⁰⁸ Kelsen's view is supported by Israel's admission to the UN in 1949, notwithstanding the objections raised by Arab States concerning the legitimacy of Israel's creation. The real point of contention is whether the Security Council's recommendation is subject to the veto of any permanent member of the Security Council.

Article 27(2) of the Charter declares that "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members". However, Article 27(3) stipulates that "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". Therefore, it is important to establish whether a membership recommendation is to be construed as a 'procedural matter' or a 'decision' requiring the concurring vote of all permanent members. Academic opinion appears to endorse the view that the admission of a new member under Article 4 is to be regarded as a non-procedural decision, subject to the veto under Article 27(3).³⁰⁹ Accordingly, Russia could veto Kosovo's future admission.

Henry Schermers and Niels Blokker maintain that such a resolution requires the explicit approval of the five permanent members or their abstention from voting.³¹⁰ Since 1946, practice has been uniform confirming that an abstention by a permanent member is to be interpreted as a concurring vote (or at least not a negative vote).³¹¹ Indeed, Bangladesh's

³⁰⁷ On 24 September 2008, Albanian President Bamir Topi announced to the General Assembly at the 63rd annual debate of the UN General Assembly that Kosovo deserves to be a United Nations member State. President Topi also declared that such admission "would be a regressive move against foreign investments and progress which we need so direly". At present, Kosovo has not made a formal request to the UN for its future admission. *Kosovo should become a UN member State – Albanian President* (24/09/08) UN News Centre <http://www.un.org/apps/news/story.asp?NewsID=28247&Cr=general+assembly&Cr1=debate> accessed 26/09/08.

³⁰⁸ Hans Kelsen *The Law of the United Nations* (The London Institute of World Affairs, 1951) 79. Article 4 (2) states that "The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon recommendation of the Security Council".

³⁰⁹ Simma, above n 293, 484. Goodrich, Hambro and Simons also affirm that the concurring vote of the permanent members is required for the adoption of this recommendation. See above n 294, 94.

³¹⁰ Henry G. Schermers and Niels M. Blokker *International Institutional Law*, (Martinus Nijhoff Publishers, 2003) 88.

³¹¹ Simma, above n 293, 499.

admission into the UN in 1974 only occurred after China eventually abstained from voting.³¹² Consequently, if Russia eventually abstains from voting in future years, then it is possible that Kosovo may be admitted to membership of the UN. Admission will be a significant step towards Kosovo's progression into a *de jure* State.

C. The Future

*"Today we see relative stability in Kosovo."*³¹³

With international support, Kosovo is currently demonstrating that it has the competence to function as an independent State. Under the executive authority of UNMIK, Kosovo continues to consolidate its democratic governance institutions, to advance economic growth, and to move towards a future in Europe as part of the Western Balkans.³¹⁴ In July 2008, Secretary-General Ban Ki-moon reported that Kosovar authorities had instituted measures to effectively assume UNMIK's powers, including the passage of the Constitution of the Republic of Kosovo, laws covering decentralisation and borders, and the creation of a Kosovo Foreign Ministry and Intelligence Service.³¹⁵ The government has also made positive gestures towards the Serb minority by calling on Serbs to take up their full rights as citizens.³¹⁶ The EU is also set to have a prominent future role in Kosovo, following the signing of a memorandum between UNMIK and the EU signalling the transfer of power over law and order responsibilities from UNMIK to EULEX.³¹⁷ This continued international support ensures that Kosovo can function as an independent State, even without universal recognition or explicit acknowledgment from the UN of its current statehood.

Serbia continues to attempt to undermine Kosovo's statehood by actively encouraging Kosovar Serbs to boycott Kosovo's institutions and by implementing a sophisticated policy of strengthening parallel administrative institutions in heavily-populated Kosovar Serb

³¹² Tomuschat, above n 113, 30.

³¹³ European Commission, above n 286.

³¹⁴ In light of Kosovo's increasing integration into the regional economy, the International Monetary Fund recently forecasted a real GDP growth of about 5 per cent per annum for Kosovo over a five-year period. Report of the Secretary-General, above n 180, 10.

³¹⁵ In June, the Kosovo Assembly adopted a national anthem, while the Kosovo Government authorised the establishment of nine "embassies" in Member States that have recognised Kosovo. *Ibid*, 2.

³¹⁶ International Crisis Group, above n 60, 1

³¹⁷ Balkansight.com *UNMIK, EULEX Sign Kosovo Memorandum* (19 August 2008) <<http://balkaninsight.com/en/main/news/12465/>> (accessed: 8/09/08)

areas.³¹⁸ In August 2008, Serbia's Prime Minister, Mirko Cvetkovic, dispelled any misconceptions surrounding the price Serbia would pay for EU membership, by declaring that if Serbia had to choose between joining the EU and keeping Kosovo, it would choose the latter.³¹⁹ This was despite Serbia's ratification of a Stabilisation and Association Agreement with the EU in May 2008.³²⁰

Indications from other States that further recognition of Kosovo is likely to be forthcoming ensures that Serbia's persistent attempts to undermine Kosovo's statehood will not prejudice Kosovo's progression towards *de jure* statehood. Countries expected to recognise Kosovo in the near future include Bangladesh, Haiti, Qatar and Saudi Arabia.³²¹ Recognition is also expected from one of Kosovo's direct neighbours, after the Macedonian government declared that "soon it will officially recognise [Kosovo's] independence".³²² Moreover, recognition is not contingent on a formal statement of recognition, for it may also be implied through State conduct and the establishment of diplomatic relations with Kosovo. This appears to reflect the New Zealand Government's position on recognition, given Prime Minister Helen Clark's suggestion that "[o]ver time the way in which we deal with those who govern in the territory will I suppose imply whether there is recognition but we are not intending to make a formal statement".³²³ The likelihood of further recognition, coupled with Kosovo's current demonstration of its capacity to function as a *de facto* independent State, reinforces the proposition that Kosovo's statehood will ultimately become accepted as *de jure*.

³¹⁸ International Crisis Group, above n 60, 2

³¹⁹ *Serbia ready to sacrifice EU membership over Kosovo* (29 August 2008) EurActiv.com <<http://www.euractiv.com/en/enlargement/serbia-ready-sacrific-eu-memebership-kosovo/article-174960>> accessed 14/09/08.

³²⁰ International Crisis Group, above n 264, 22. On 17 July 2008, the EU announced developments in a series of assistance projects for Serbia, including €4 million investment in industrial and regional development in the Banat region of Serbia and € 5 million project to repair major regional roads in eastern Serbia. European Commission, above n 286.

³²¹ See Wikipedia, above n 215 and *Who Recongized Kosova as an Independent State?* above n 6. In June 2008, Kosovo's Foreign Minister, Skender Hyseni stated that the United Arab Emirates, Yemen, Bahrain and Omen representatives at the UN have assured him that "they will recognize the new country". *Kosovo to receive more recognition* (June 30 2008) New Kosova Report <http://www.newkosovoreport.com/200806301003/Politics/Kosovo-to-receive-more-recognition.html> accessed 14/09/08.

³²² *Macedonia 'Close to recognising Kosovo* (28 August 2008) BalkanInsight.com <<http://www.balkansinsight.com/en/main/news/12709/>> accessed 14/09/08.

³²³ Helen Clark, *Kosovo: PM explains why no formal statement from NZ*, The New Zealand Herald (18 February 2008) http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10493183> accessed 24/03/08. Helen Clark also confirmed that "[i]t's never been the New Zealand Government's position to recognise in such circumstances".

CONCLUSION

Kosovo's declaration of independence has revealed that the doctrinal debate concerning the legality of secession is still very much a live and contentious issue at international law. Aside from Bangladesh, there is no precedent of unilateral secession in State practice. Nor is there any evidence that international law explicitly supports the non-consensual emergence of new States created on the territory of an existing State. All that an examination of the relevant international conventions and UN Resolutions reveals is that international law neither recognises nor prohibits secession.

But against this indeterminacy, the world has witnessed the emergence of the new State of Kosovo through a successful unilateral secession from Serbia. Moreover, exceptional factual circumstances have prompted a significant number of States to recognise the fact that Kosovo is now an independent State, irrespective of Serbia's competing claim to sovereignty. Prior to the secession, Kosovo was an internationalised territory with a comprehensive blueprint for independence drafted by the UN Special Envoy and supported by a significant proportion of the international community. It was only after all attempts to find international consensus to implement this plan in accordance with a UN mandate were exhausted, that the frustrated Kosovar Albanian leadership elected to bring about this planned independence unilaterally and prematurely.

This exceptional outcome does not mean that Kosovo's secession was illegal. As the Supreme Court of Canada acknowledged in the *Quebec Case*, the absence of any positive legal entitlement to secession does not exclude the possibility of the international community recognising a *de facto* secession. Indeed, the international community of States has the capacity to recognise instances of successful secession in exceptional circumstances, as it did in the exceptional case of Bangladesh and as a significant proportion of the international community is currently doing in the case of Kosovo.

This does not mean that these two cases have set a secessionist precedent for Abkhazia and South Ossetia. The latter cases clearly lack the exceptional attributes required to attract widespread international recognition. However, what this does mean is that Kosovo and

Bangladesh have set a template for the recognition of exceptional cases of *de facto* secession in the future. Indeed, the possibility of further exceptional cases cannot be discounted.

As for Kosovo, its statehood is now a fact. In due course, the continued momentum of international recognition will ensure that Kosovo becomes a State in accordance with law. In this exceptional context, Kosovo's secession can be reconciled with the contemporary new world order.

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APPENDIX

Appendix One: Kosovo Declaration of Independence

Kosovo Declaration of Independence

Assembly of Kosovo,

Convened in an extraordinary meeting on February 17, 2008, in Pristine, the capital of Kosovo,

Answering the call of the people to build a society that honors human dignity and affirms the pride and purpose of its citizens,

Committed to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,

Dedicated to protecting, promoting and honoring the diversity of our people,

Reaffirming our wish to become fully integrated into the Euro-Atlantic family of democracies,

Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,

Grateful that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration,

Proud that Kosovo has since developed functional, multi-ethnic institutions of democracy that express freely the will of our citizens,

Recalling the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status,

Regretting that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders,

Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo

with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,

Determined to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of our society,

Honoring all the men and women who made great sacrifices to build a better future for Kosovo,

Approves

KOSOVA DECLARATION OF INDEPENDENCE

1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.
2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.
3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.
4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.
5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

6. For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

7. We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.

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

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

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

11. We express, in particular, our desire to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future. We shall continue our efforts to contribute to relations of friendship and cooperation with the Republic of Serbia, while promoting reconciliation among our people.

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with

principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

D- 001

Pristina, 17 February 2008

President of the Assembly of Kosova

Jakup KRASNIQI

Appendix Two: Map of Kosovo



Appendix Three: Map of the Central Balkan Region



Appendix Four: United Nations Security Council Resolution 1244

*Appendix Five: The Report of the Special Envoy of the Secretary-General
on Kosovo's future status*