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## The Kosovo Status Process and the Prospect of Sovereignty<sup>1</sup>

*“The advantages of recognition taking place by some collective international act, or through the medium of an international institution cannot be denied. It would obviate the present embarrassments due to unilateral acts of recognition.”<sup>2</sup>*

### Introduction

Up until its declaration of independence in February 2008, Kosovo had, for over eight years, been a territory in limbo.<sup>3</sup> Notwithstanding the deep modernist grounding of the “standards before status” approach fashioned by the United Nations Interim Administration Mission in Kosovo (UNMIK) after policies of conditionality and the idea of “earned sovereignty”, the international community had operated, for half a decade, in naive denial of the continued relevance of self-reliant statehood.<sup>4</sup> In effect, it reinforced a climate of heightened insecurity, in which the conflict remained frozen rather than resolved. Ever since the publication of the (first) “Eide Report”,<sup>5</sup> resolving the international legal status of Kosovo had become a priority on the international agenda. This process culminated in the report of the UN Secretary-General’s Special Envoy, Martti Ahtisaari, in March 2007. The international community, so it seemed, had finally understood that it needed to close the sovereignty gap that had opened up when it assumed transitional governance functions in 1999 for an unspecified period of time. This contribution reflects upon the status process as it unfolded in 2006 and speculates on some of the implications that Kosovo’s independence will have in public international law, especially with a view to the forthcoming International Court of Justice (ICJ) Advisory Opinion on the matter.

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- 1 The views expressed in this contribution are the author’s own. The author would like to thank Michael Weiner of the Austrian Development Agency, Dr Christian Pippan of the University of Graz, and Verena Ringler of the International Civilian Office in Priština for commenting on an earlier version of the article, as well as a number of former UNOSEK officials for sharing background material.
  - 2 Joseph Starke, *Introduction to International Law*, London 1984, p. 132.
  - 3 For a discussion of Kosovo’s international legal status under Security Council Resolution 1244 of 10 June 1999, see generally Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations*, Cambridge University Press, 2008 (Chapter V).
  - 4 Cf. Bernhard Knoll, From Benchmarking to Final Status? Kosovo and the Problem of an International Administration’s Open-Ended Mandate, in: *European Journal of International Law* 4/2005, pp. 637-660.
  - 5 *The Situation in Kosovo*. Report to the UN Secretary-General, undertaken pursuant to the UN Secretary-General’s Reports of 30 April 2004, S/2004/348, and 6 August 2004, S/2004/932 of 20 November 2004.

*Statehood or Stasis? UNOSEK and the Contact Group*

*“Belgrade is in denial and fragile. We need to find ways to make them accept what they must accept.”<sup>6</sup>*

At the outset of diplomatic efforts to start the Kosovo Status process stood a larger design, according to which mediation efforts conducted by a third party would ideally result in an endorsement, by the Security Council, of a general plurilateral (or limited multilateral) treaty<sup>7</sup> between the parties in a resolution based on Chapter VII of the UN Charter. Parties to the determination of the future permanent political boundaries of the territory of Kosovo had to include Serbia, the holder of a reversionary title to the exercise of sovereign powers, as well as Kosovo’s local institutions, supported in some form or other by UNMIK. Such an accord, concluded under the auspices of the Contact Group and a UN mediation body, could have effectively ended the status of the “international trust” and resolved the sovereignty puzzle.

On 14 November 2005, the UN Secretary-General appointed the former Finnish President Martti Ahtisaari as Special Envoy, after the Security Council had “welcomed”<sup>8</sup> this proposal. Ahtisaari had maximum leeway to “start a political process to determine Kosovo’s future status”, as it was up to him to determine the pace and duration of the process on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground.<sup>9</sup> Only the most basic framework was established to guide the efforts of what was termed the Office of the Special Envoy of the Secretary-General of the United Nations for the Future Status Process for Kosovo (UNOSEK). Indeed, the Contact Group’s ten Guiding Principles annexed to the letter confirming Martti Ahtisaari’s appointment as Special Envoy<sup>10</sup> outlined merely that a settlement was to promote stability,

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6 Condoleezza Rice, quoted by a UNOSEK official (in a personal interview with the author) who was present at the meeting between Special Envoy Ahtisaari, Secretary of State Rice, and Under Secretary Nicholas Burns, Washington, DC, 11 May 2006.

7 Cf. Article 20 (2) of the *Vienna Convention of the Law of Treaties*, Vienna, 23 May 1969.

8 Cf. Letter of Ambassador Andrey Denisov, President of the Security Council, to Secretary General Kofi Annan, 10 November 2005, S/2005/709, 10 November 2005. The modalities leading to the appointment of the Special Envoy were chosen with care, since Russia had earlier insisted on a formal Security Council Resolution requiring unanimity. An alternative approach could have involved the Security Council’s utilization of Rule 28 of its Provisional Rules of Procedure, allowing for the appointment of “a commission or committee or a rapporteur for a specified question”, *Provisional Rules of Procedure of the Security Council*, S/96/Rev.7 (1983), p. 6. The basis for this rule is found in Article 29 of the UN Charter: “The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions”.

9 Cf. *Terms of Reference for the Special Envoy of the Secretary General for the future status process for Kosovo*, annexed to a Letter from the Secretary-General to the President of the Security Council, Ambassador Mihnea Ioan Motoc, S/2005/689, 31 October 2005, para. 3.

10 The *Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo* were finalized at the meeting of Contact Group Political Directors in Washington, DC, on 2 November 2005 (in attendance: Special Envoy Ahtisaari and his Deputy Rohan), sub-

non-partition, multi-ethnicity, democracy, and human rights. They represented the first in a series of messages that the Contact Group planned to send to the parties with the intention of steering the process and focusing it on key priorities. Importantly, the Contact Group emphasized that the settlement must “conform with European standards and contribute to realise the European perspective of Kosovo”.<sup>11</sup> At that time, the Contact Group had already defined its own role in the status negotiations and had agreed that it would actively support the UN-led process by identifying substantive status issues<sup>12</sup> and providing technical expertise.

The *modus operandi* of the Contact Group that cranked into action after several years of inactivity following NATO’s intervention in the spring of 1999<sup>13</sup> was for each meeting to focus on a set of issues to be introduced in a discussion paper. Meetings were held approximately once a month between foreign ministry western Balkans division heads, political directors, or ministers, and regularly involved representatives of NATO, the European Commission, and the EU Presidency (the “extended” Contact Group) as well as UNOSEK and UNMIK. The figure below lays out the flexible organizational arrangements that were put in place at the end of 2005 and lasted until the Contact Group-initiated EU-USA-Russia Troika took over the process in August 2007 following the failed attempts to pass a Security Council Resolution on the basis of Ahtisaari’s *Comprehensive Proposal*.

The Contact Group’s main occupation consisted in planning the future international presence and merging its civil and military tracks. Already at the outset of the status negotiations, it had become clear that the Vienna Process had to be accompanied by a “dual transition” in Priština: Although it was considered to be imperative that UNMIK maintain its responsibilities until a new civilian presence was mandated and found its role, the transfer of authority had to be outlined and the EU had to take on responsibility for operational planning.<sup>14</sup> Second, the Contact Group assumed a key role in the dis-

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mitted to the Security Council on 7 November, and politically endorsed in the UN framework by the letter of UN Security Council President Ambassador Denisov to the Secretary-General, cited above (Note 8).

11 Ibid., Principle 2.

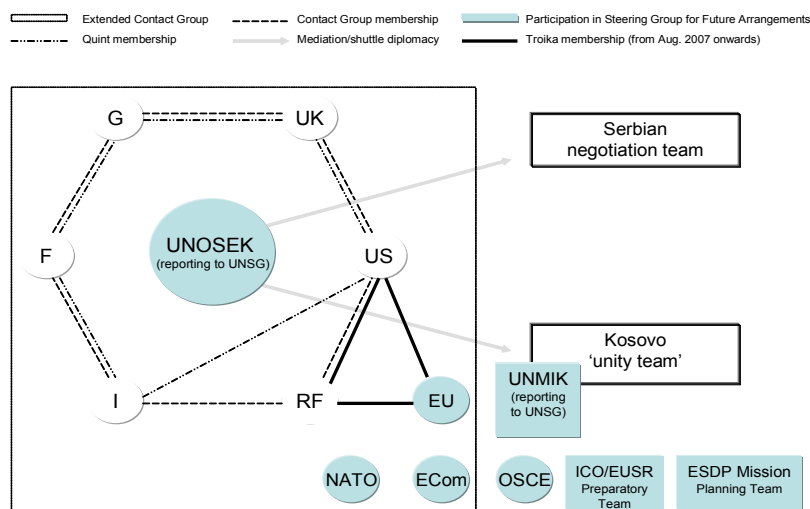
12 Thirteen core issues ranging from cultural heritage, decentralization, and the economy to minority and property rights and returns were first grouped together by the USA and suggested to the Contact Group at its 2 November meeting in Washington, DC.

13 For an original insight into the Contact Group’s attempts at resolving the Kosovo crisis between 1997 and 1999, see Chapter VII.2.1 of Jochen Prantl’s *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* Oxford 2006, pp. 222ff.

14 In this regard, see Annex 1.1 (Elements of Cooperation between UNMIK and ICO in the Transition Period) of the International Civilian Office – European Union Special Representative (ICO/EUSR) Preparation Team’s *Second Report to the Political and Security Committee* of 20 February 2007. Early on, UNMIK contributed its own book-length strategy for mapping out the transition to a successor arrangement (*Executive Report: Informal technical needs assessment for future international engagement in Kosovo*, February 2006), which formed the basis of the work of the Steering Group on future international arrangements chaired by the UNMIK Special Representative of the Secretary-General (SRSG) – an informal planning body that provided technical input to the status process.

cussions about the phasing-out of UNMIK, particularly concerning the transfer of rule of law-related competencies to Kosovar institutions and the reform of the security sector.<sup>15</sup>

*The Contact Group in the Kosovo status process, January 2006-December 2007*



Following Special Envoy Ahtisaari's first visit to the region at the end of November 2005, the parties were encouraged to set up negotiation teams, provide an outline of their positions, and agree on common platforms.<sup>16</sup> As the Kosovar negotiation team struggled to devise a strategy while domestic politics threatened the team's unity, Serbia's propositions were from the start characterized by two mostly reinforcing currents. Within the Serbian body

Participation in the Group – UNOSEK, EU Council Secretariat, Commission, NATO, OSCE, UN DPKO – overlapped with membership of the extended Contact Group (see figure).

- 15 In Pristina, preparations for the transfer of authority to the Provisional Institutions of Self-Government (PISG) following a status resolution started in earnest in October 2006. The Strategic Group on Transition (SGT) was chaired by the ICO/EUSR Preparatory Team and UNMIK. Annexed to it were three non-technical working groups (elections, public messaging, and pre-constitutional groups), which included the head of the ICO/EUSR Preparatory Team, the SRSG, representatives of the Planning Team for an ESDP Rule of Law Mission, KFOR, the European Commission, the OSCE, and the Unity Team. Five technical working groups were assembled under the PISG-chaired Technical Group on Transition which also referred issues to the SGT. The technical working groups covered the areas of rule of law, governance, civil administration, legal transition, and economy and property. See the *Report of the UN Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 9 March 2007, S/2007/134, para. 21.
- 16 Both the Kosovo PISG platform and that of the Serbian negotiation team are reprinted in *Kosovo Perspectives Weekly Bulletin* (VIP News Service), 17 February 2006, pp. 8-11 and 14-15, respectively.

politic, energies were focused on using the status process as a means of galvanizing the electorate in support of the government and the “moderate nationalism” it exhibited in order to counter the threat from the far-right Serbian Radical Party (SRS) and the revanchiste Socialist Party of Serbia (SPS). Outside Serbia’s “black box”, its government took uncoordinated soundings to gauge the extent to which international opinion could be mobilized in its support. While the legendary rivalry between President Boris Tadić and former Prime Minister Vojislav Koštunica in matters of foreign affairs was chiefly responsible for the chaos, Serbia and Montenegro was also unfortunate to be represented by a foreign minister whose exuberance and charisma were matched only by his comic inconsistency. Vuk Drašković’s prime foreign policy instrument was the art of allegory. Why, he maintained, would the international community rush into building a roof for the common house of Kosovo (status), if its foundations (standards) had not even been laid? The Kosovo Albanian approach was a recipe for failure, he declared, like demanding a university diploma before starting to study.

Second, he excelled in utilizing parallels devoid of similarity to the case under consideration. His first policy pronouncement after the initiation of the status process openly contradicted the President’s suggestion to constitute Kosovo as two entities within the Serbian state, itself a simulacrum of the Dayton model.<sup>17</sup> Minister Drašković offered “real sovereignty” and “internal independence” to Kosovars based on the internationally brokered peace plan for Croatia (Zagreb-4, Z-4) of early 1995, which foresaw the incremental inclusion of the “Republika Srpska Krajina” (RSK) into Croatia’s jurisdiction.<sup>18</sup> His reference to the failed attempts of the mini-Contact Group to integrate an irredentist community into a Croat state at war with Serbia was, of course, a dreadful way of advertising his “more than autonomy, less than independence” solution for Kosovo. His offer, designed along the same lines as the Z-4 plan, came a decade too late and suffered from a number of flaws. Comparing the position of RSK renegades under Milan Martić with that of a population that had been governed under the “sacred trust” of the international community and which already enjoyed a much larger measure of self-government than the Krajina Serbs would have gained under the Z-4 arrangement, displayed extraordinary frivolity, particularly in failing to propose

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17 Cf. *Beta Week* No. 500, 24 November 2005, p. 2.

18 Minister Drašković, quoted in *Frankfurter Rundschau*, 16 November 2005. See also his comments to the Tanjug news agency, 2 June 2005: “That what Z-4 guaranteed to the Serbs in Krajina, now it would guarantee to Albanians. What it guaranteed to the Croats, it should now guarantee to the Serbs in Kosovo”. The “Zagreb-4 Plan” (1995 draft Agreement on Krajina, Slavonia, Southern Baranja and Western Sirmium), formally designed as an agreement between Zagreb and Knin, but containing substantial constitutional provisions of a future autonomous RSK, was drafted by representatives of Russia, the USA, the EU, and the UN and would have assured the irredentist Serbian community of substantial autonomy while peacefully re-integrating the territory into Croatia’s sovereign jurisdiction. Neither Slobodan Milošević nor the collegium of Krajina Serbs could agree to the plan. The territory was forcefully integrated into Croatia in summer 1995 in Operation Oluja (“storm”) in the course of which approximately 200,000 people were expelled.

how a Kosovo entity could exercise its substantial autonomy within, and partake of, the Serbian state and its institutions.<sup>19</sup>

The weeks preceding the commencement of direct negotiations were the time to build a case. While the Kosovo Albanians mourned the death of their President and icon, Ibrahim Rugova, the Serbian government mobilized its public relations machinery in Brussels and Washington. But January 2006 was also the time when the international community resolved to carry things forward. First, it decided to follow Special Envoy Ahtisaari's suggestion to deliver clear "private messages" on the status process in its bilateral contacts with the parties, urging them to start preparing the public opinion of the people they represented. This was held to be particularly important for Serbia, to which the first of Ahtisaari's "private messages" was addressed: "The unconstitutional abolition of Kosovo's autonomy in 1989 and the ensuing tragic events resulting in the international administration of Kosovo have led to a situation in which a return of Kosovo to Belgrade's rule is not a viable option."<sup>20</sup> While the Russian Contact Group representative refused to carry this message to Belgrade, he did not object to its use by other Contact Group members, and underlined the need for a united approach.

Second, and just a few weeks before the beginning of direct technical talks, the Contact Group, this time in ministerial formation, delivered a statement at the London Afghanistan Conference whose significance can hardly be overstated. It stressed that "the character of the Kosovo problem, shaped by the disintegration of Yugoslavia and consequent conflicts, ethnic cleansing and the events of 1999, and the extended period of international administration under UNSCR 1244, must be fully taken into account in settling Kosovo's status". Further, and even more importantly, the Ministers reminded Belgrade that "the settlement needs, inter alia, to be acceptable to the people of Kosovo. The disastrous policies of the past lie at the heart of the current problems."<sup>21</sup> In Priština, this statement was received enthusiastically as it clearly tilted the balance to the Kosovar side. But it also heightened the role of the Contact Group in laying the foundations for UNOSEK's engagement in the months to come.

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19 The inclusion of Kosovo Albanian politicians in Serbia's central government was "not envisaged", said the deputy head of Serbia's negotiation team, cf. Leon Kojen, *Kosovos Zukunft aus serbischer Sicht [A Serbian View of Kosovo's Future]*, in: *NZZ*, 1 June 2006. Indeed, the Serbian negotiation platform, cited above (Note 16), did not include an offer of participatory rights at the "central" level. For the opinion of the Venice Commission on Serbia's 2006 constitution and its "guarantee" of autonomy, see below (Note 130).

20 UNOSEK's suggested private messages from Contact Group representatives on the Kosovo status process were discussed at the Contact Group meeting in Vienna on 16 January 2006. The messages did not stay private for long. See the public statements a former Political Director of the British Foreign Office, John Sawers, made during his visit to Kosovo and Belgrade on 6 and 7 February 2006: *British Diplomat Sparks Serb Protest over Kosovo*, *AFP*, 7 February 2006; *Unbequeme Wahrheiten für Serbien [Uncomfortable Truths for Serbia]*, in: *NZZ*, 9 February 2006, p. 3.

21 FCO Press Release, *Statement by the Contact Group on the Future of Kosovo*, London, 31 January 2006, paras 6 and 7.

On the practical side, the Contact Group set itself the task of finalizing a conceptual blueprint of the new international presence by June 2006 that included its mandate and competences, structure, funding, and transition strategy. The discussions revealed a tentative consensus that the future presence should have a light footprint and might, in implementing the eventual settlement, make use of corrective powers. Its substitution powers would be restricted to a necessary minimum to allow for a high degree of local ownership. Governance functions were to be formally separated from capacity-building, while the ICO presence was to assume a strong co-ordination mandate to ensure coherence and efficiency in the latter field. Deputy Envoy Albert Rohan summed up the preferences of UNOSEK and the EU Council Secretariat as follows: “as light as possible, as heavy as necessary”. Agreement was also reached regarding the need to base the new international presence on a new Security Council Resolution and to institute a steering group comprising key stakeholders to support and guide the presence.

### *Miscalculations and Flawed Premises*

Progress in the deliberations of the Contact Group was, however, not replicated in the “bottom-up approach” that UNOSEK pursued with the parties. A number of structural factors contributed to the extraordinarily slow progress on issues such as minority rights and decentralization.<sup>22</sup> First, the proximity talks and technical negotiations could not be clearly separated from the larger status question. UNOSEK’s insistence that the four negotiation tracks<sup>23</sup> revolve around issues that required a solution regardless of the direction in which Kosovo’s international legal status tilted was a means of focusing the parties’ attention on technicalities. Nonetheless, it was clear that a number of

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22 Ever since Ambassador Kai Eide’s second report (*A Comprehensive Review of the Situation in Kosovo*, annexed to Letter from the Secretary-General addressed to the President of the Security Council, S/2005/635, 7 October 2005) and the recommendations contained therein, “deep” decentralization was seen as the key to “unlocking” the status process as a whole with the potential to accommodate the range of legitimate concerns and aspirations shared by the minority communities in Kosovo. Mediators tried to reach agreement in principle on four inter-related areas. This concerned, first and foremost, the transfer of additional competencies to municipalities (“own” competencies) and the delegation of further powers from the centre (mainly healthcare, education, public utilities, social policy, culture, and, most controversially, justice and police). The second focus was on introducing i) new local revenue sources, ii) a mechanism for sharing central income tax revenue, and iii) preferential treatment for financial subsidies from Belgrade to increase municipal financial sustainability. Third, UNOSEK was to facilitate negotiations over the redrawing of municipal boundaries to moderately increase the number of Serb majority municipalities. Fourth, functional co-operation among municipalities, including cross-boundary co-operation, was deemed a significant means of providing for cohesion and unity of purpose among Serb-majority entities (and, crucially, for securing Belgrade’s influence over them). In total, eight meetings related to decentralization were held in Vienna, all of them on the basis of substantive UNOSEK option papers.

23 (1) decentralization; (2) cultural heritage and holy sites; (3) standards, minority rights, and returns; (4) economy and property issues.

solutions found could be realistically implemented only within a sovereign state – a conclusion that enraged Serbia’s government.<sup>24</sup>

The international community’s battle plan also relied on a set of flawed premises concerning its dealings with Belgrade, and on the success of messages to Priština. As Special Envoy Ahtisaari put it at the outset of the negotiations, Belgrade had to accept that Kosovo would not return to its control; and Kosovars would have to understand that they had to “earn” their objective by moving forward on standards:

While today’s democratic leadership of Serbia cannot be held accountable for the policies of the Milosevic regime, [it] must come to terms with Milosevic’s legacy [...] Milosevic’s dark past can neither hold them prisoner nor should it prevent them from demonstrating political courage and the vision necessary to come forward with *realistic proposals* for the future of both Kosovo and Serbia [...] In Kosovo it is the responsibility of the Kosovo Albanians to ensure that conditions and foundations are created for a sustainable and multi-ethnic, democratic society [...] The results achieved in [...] implementation of standards will be a *decisive factor in determining the pace of the political process* designed to settle Kosovo’s future status.<sup>25</sup>

As to the first premise, Belgrade simply did not play along, maintaining throughout the negotiations that a change in regional borders would not only work against their interests, but would also bring Serbian radicals to power and present risks for neighbouring countries. The belief that Serbia would be co-operative and come forward with “realistic proposals” (diplomatic speak for agreeing to Kosovo’s sovereign statehood), encouraged by the promise of a strategic partnership – bilateral initiatives, Partnership for Peace-related activities, and a concrete perspective for EU integration – was rooted more in the realm of wishful thinking than in a realistic appraisal of the state of Serbian politics. In particular, Serbia refused to take part in a barter that required it to exchange Kosovo for fast-track integration into Euro-Atlantic structures. Assuming that it would, which Brussels and Washington largely did, was a serious misjudgement that over-rated the “soft power” of the prospect of ac-

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24 Cf. the joint letter by President Boris Tadić and then Prime Minister Vojislav Koštunica to Special Envoy Ahtisaari: “We entered into the negotiations believing that discussion of concrete issues before addressing the central question of future status might help build confidence and thus pave the way to a mutually acceptable solution. So far, our proposals on decentralization have been met with scant respect for the genuine fears of the Serb community. In fact, the Pristina delegation in Vienna has shown little interest in discussing matters in the status-neutral way you have urged, and this has blocked the talks and made it difficult to explore the possibilities of compromise.” Serbian Presidential Administration archive number 06-00-01549/2006-01, 18 May 2006.

25 *Statement of the Special Envoy*, EU Foreign Ministers Gymnich meeting, 11 March 2006, paras 4-6 (emphasis added).



cession.<sup>26</sup> Serbia's leadership neither took advantage of the opportunity to place the blame for the loss of Kosovo on Slobodan Milošević and Tomislav Nikolić of the SRS, the government's main challenger, nor did it educate the Serbian public on "realistic" scenarios. In short, the incentive structure provided by the Quint – forward-looking and designed to assist a "country in denial" to move forward along the trajectory of European integration – was simply less tangible than, and outweighed by, the one provided by Russia – and the latter was obstructive, fixed on the status quo, and largely ignorant of its wider implications for Serbia's future.

The messages sent to Priština in the course of the negotiations were, on the other hand, not devised in good faith, and consequently gave rise to expectations that could not be fulfilled as the process came to a close. The Contact Group's prioritization and "deadlinization" of certain standards<sup>27</sup> was intended to make the Kosovo Albanian public trust that tangible progress in standards implementation would bring them closer to their objective. However, both UNOSEK and Contact Group envoys understood perfectly well that the resolution of Kosovo's status and the process designed to yield it were separate issues from whether or not Kosovo's Provisional Institutions of Self-Government (PISG) moved standards implementation into the centre of their activities. As the UNMIK Special Representative of the Secretary-General (SRSG) noted with concern, the causality also worked in the opposite direction: "It is important to acknowledge that further progress on standards implementation, and the sustainability and consolidation of what has been achieved thus far, will require both a sustained momentum in the future status process and concrete prospects for a conclusion of the process."<sup>28</sup> The re-employment, by Western diplomats, of the notion of "earned status",

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26 Cf., for instance, the testimony of Under Secretary of State Nicholas Burns to the U.S. Congress: "We have been explicit with Belgrade: constructive engagement in the Kosovo status process [...] and a constructive regional role [...] would help clear the path to EU and NATO membership", *Kosovo: Current and Future Status, Hearing before the Committee on International Relations, House of Representatives*, 18 May 2006, Washington 2006, p. 15. This message, namely that Serbia would be judged on how much it adopted a "realistic approach" and a "constructive attitude", had been amplified by EU officials ever since the status negotiations had opened. In response, Serbia's Foreign Minister, Vuk Jeremić, maintained that "there have been messages to Serbia from some quarters to choose between Europe and Kosovo [...] This is an unacceptable choice and an indecent offer, to say the least, in 21st century Europe", *VIP Daily News Report*, 30 August 2007.

27 In co-ordination with UNMIK, the Contact Group identified a list of priority action items ranging from the passing of "internationally accepted laws" on languages and cultural heritage, via the completion of a public transportation strategy for minorities and the reconstruction of commercial property damaged during the 2004 riots, to the allocation of funds for returns. The list was handed over to Kosovo's former Prime Minister, Agim Çeku, on 9 June 2006. Requests (including one to support the inclusion of Kosovo Serbs into Kosovo institutions) were simultaneously delivered to Belgrade. Since Kosovo's government was not in a position to report on progress on priority standards directly in key sessions of the Security Council, regular updates were delivered in writing. See, e.g., the paper on Key Recent Achievements annexed to the letter of Prime Minister Çeku to Ambassador Ellen Margrethe Løj (Denmark), President of the UN Security Council (No. 130/06), 16 June 2006.

28 *Report of the UN Secretary-General S/2007/134*, cited above (Note 15) para. 23.

which had already caused confusion in the period during which UNMIK devised government benchmarks,<sup>29</sup> may have convinced their capitals that pressure on the Kosovo negotiation team would be maintained. Yet there was no automatic assurance that a positive assessment of governance indicators would lead to a favourable determination by the Security Council; this was a political process open to spoilers who could, at a stroke of a pen, veto any resolution endorsing an eventual settlement emerging from the process.

Those structural deficiencies in the UN-led process did not cause the Kosovo Albanians to adopt unconstructive positions; quite the opposite: Buoyed by the private messages of diplomatic envoys, their negotiation team's attitude remained constructive.<sup>30</sup> Yet the lack of a credible incentive structure for Priština – a firm link between standards implementation and a favourable Security Council Resolution – led Quint diplomats and UNOSEK officials to over-promise on a number of occasions. Their faith that a multi-lateral solution would eventually be found that would endorse the Special Envoy's proposal of an independent Kosovo restrained by a new civil and military presence was not merely a diplomatic ruse to prod the Kosovo Albanian delegation into showing more flexibility; more worryingly, it was based on a miscalculation as to the motives and strategies underlying Russia's actions. Russia had, through its Contact Group envoy, Ambassador Alexander Botsan-Kharchenko, walked a long way with the Quint and, despite his criticism of the envisaged "artificial" negotiation deadline of end-2006, his continued insistence on a negotiated solution, and his cursory references to the precedent that Kosovo's independence might set, had at no point signalled outright objection to any of the issues discussed under the Contact Group's work plan.

### *Spoiling the Party*

Discussions in the first half of 2006 furthered a collective understanding on the part of the Quint that Ahtisaari's end product would be subject to a political trade-off with Russia on other international issues prior to its endorsement by the Security Council. As US Under Secretary Nicholas Burns noted in a meeting with Special Envoy Ahtisaari, Russia "will be unhelpful in the

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29 The latest version of the "Kosovo Standards Implementation Plan" (KSIP) comprised 120 pages. For its endorsement by the UN Security Council see *Security Council Reiterates that Kosovo Standards Plan Should Be Basis for Reassessing PISG*, UN/PR/SC/8082, 30 April 2004.

30 The disappointment with Belgrade's obstructionism is palpable in the Contact Group Statement of 24 July 2006 following the first round of direct talks between President Tadić and Prime Minister Koštunica, on the one side, and President Fatmir Sejdiu and the Kosovo Unity Team, on the other. It noted that "Prishtina has shown flexibility in the decentralisation talks. However, Prishtina will need to be even more forthcoming on many issues before the status process can be brought to a successful conclusion [...] Belgrade needs to demonstrate much greater flexibility in the talks than it has done so far. Belgrade needs to begin considering reasonable and workable compromises for many issues under consideration, particularly decentralisation."

Contact Group and the UNSC. Although we have a commitment that they will not block a Security Council Resolution on the status, they will make it very difficult throughout the process”.<sup>31</sup> Half-way into UNOSEK’s efforts to produce a settlement, this was a general perception shared by Quint governments. One of their ambassadors, for instance, reported from a lunch with Russian Foreign Minister Sergey Lavrov that, while one should be wary about his intentions of applying aspects of Kosovo’s anticipated independence to the frozen conflicts, “we are receiving hints that they may attempt to extract a price elsewhere. Provided we do everything we can to play their sensitivity about being treated as a member of a club, a serious power who should be fully involved in negotiating the eventual outcome, the thing should be doable.”<sup>32</sup>

Such were the opinions held in the wake of a series of *démarches* in all Quint capitals in which Russian diplomats made clear their serious dissatisfaction with the direction the status process was taking. They criticized the tendency to lay the blame for the lack of progress in the negotiations squarely on Belgrade; they insisted firmly on the priority of a negotiated solution and refused to accept a settlement imposed upon Belgrade; they urged the abandonment of a deadline to the negotiations, and demanded that UNOSEK’s “favourable treatment” of the Kosovo Albanian side should cease. Slowly, Russia backtracked from its earlier declared intention to maintain unity within the Contact Group, distanced itself gradually from Ahtisaari’s ideas, and began to reveal its true face: an escalating rhetoric in uncompromising support of Serbia’s position,<sup>33</sup> which the latter used as a cover for its inflexibility. This stance hardened further in the course of the following year. The West, however, maintained its belief that Russia could be prodded into at least abstaining from a vote in the Security Council, as China had on 10 June 1999 when Resolution 1244 was passed. As we know with the benefit of hindsight, this is not what happened.

The Quint had, shortly before the beginning of the “political” status talks in July 2006, adopted a firm position on a “limited sovereignty” of Kosovo under the working assumption that no negotiated settlement would be reached between the parties. But to the surprise of the USA and the EU, Russia challenged the axiom that Kosovo represented a *sui generis* case devoid of precedent in international law. Moscow’s lingering opposition to the Western standpoint was not a mere face-saving exercise for a Slav cousin in

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31 Burns quoted by a UNOSEK official present at the meeting on 11 May 2006, cited above (Note 6).

32 Personal interview with a senior Quint official, Moscow, 8 June 2006.

33 Russian Ambassador Vitaly Churkin’s stance at the 13 December 2006 Security Council meeting was illustrative in this regard. He chided the former UNMIK SRSG Joachim Rucker for having gone beyond his mandate by advocating a quick status decision, defended Belgrade against the criticism that it was unconstructive and inflexible, and insisted that only a negotiated solution would pass the Council; cf. transcript of the 5588th Meeting, *Kosovo Envoy Tells Security Council Delay of Status Proposal Raised Tension*, SC/8900, 13 December 2006.

need. It represented a high-point in Russia's new global assertiveness. As one commentator wrote at a time when it had already become clear that Russia had little incentive to seek a compromise with the West on this issue: "Moscow has assumed the role of a judge: a guarantor of international law, protector of human rights and commentator who bears no direct responsibility for the current and future situation on the ground."<sup>34</sup> In the guise of defending the principle of territorial integrity, it asserted two coveted yet underrated factors in the psychology of international relations: respect for its status as a major power that could not be ignored, and revenge – in this case for the humiliation over Russia's failure to prevent the NATO bombing of Serbia in 1999.

As a consequence of the Quint's miscalculation of Moscow's intent, all five draft resolutions tabled in the Security Council during June and July 2007 had to be withdrawn following the credible threat of a Russian veto.<sup>35</sup> The EU had at this point not realized that this was one of the moments in which it had to demonstrate unity and vision if it were to be a credible external actor, particularly with regard to the stability of the Balkans and the region's European future. Torn between two contradictory positions taken by the USA and Russia, this principal regional stakeholder adopted one of its favourite tactics when faced with international difficulties: calling for an extended period of time in which negotiations should be resumed.

### *The Troika*

The 120-day deliberations that followed were led by Contact Group-mandated negotiators (representing the EU, the USA, and Russia, respectively) and aimed to "facilitate a period of further discussions between the parties".<sup>36</sup> Essentially, the "Kosovo Troika", as it was called, repeated the shuttling between capitals that was witnessed when UNOSEK led the process, and provided for six additional occasions for face-to-face negotiations. At all of the joint sessions, probably to distance itself from the methodology employed by Special Envoy Ahtisaari, the Troika reiterated that it was not making proposals of its own, but was merely asking questions to ensure that all options were being examined by the parties. The Troika had indeed no intention of

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34 Oksana Antonenko, Russia and the Deadlock over Kosovo, in: *Survival* 3/2007, pp. 91-105, here: p. 101.

35 The deadlock in the Security Council is briefly described in ICG, *Breaking the Kosovo Stalemate: Europe's Responsibility*, Europe Report No. 185, 21 August 2007, pp. 2-3.

36 *Statement of the Contact Group Ministers*, New York, 27 September 2007. See also the UN Secretary General's *Statement on the New Period of Engagement on Kosovo*, SG/SM/11111, New York, 1 August 2007. The Troika's negotiation method is recounted in ICG, *Kosovo Countdown: A Blueprint for Transition*, Europe Report No. 188, 6 December 2007, pp. 2-5.

imposing a solution; “instead, the burden was on each party to convince the other side of the merits of its position”.<sup>37</sup>

Such fresh idealism could not conceal the true purpose of the trilateral effort: to buy time, from August 2007 onwards, in which a “critical mass” of EU member states could assemble to recognize an independent Kosovo following the eventual failure of the talks.<sup>38</sup> Of the myriad diplomatic initiatives that have accompanied the protracted dissolution of the former Yugoslavia since 1991, the Kosovo Troika may indeed stand out as the most futile. In hindsight, the Troika’s attempts at brokering an agreement at any price, however implausible, and “to leave no stone unturned”<sup>39</sup> in the process at times bordered on the comic: Its initial resistance to ruling out the option of partitioning the territory,<sup>40</sup> its proposals on a temporary “neutral status”<sup>41</sup> and on a “loose confederation” between Serbia and Kosovo,<sup>42</sup> and the consideration it gave to adapting the one-state-two-systems “Hong Kong model”, proposed by Belgrade to secure its long-term claim to sovereignty,<sup>43</sup> all sent confusing messages that threatened to undermine efforts undertaken by European and UN actors.

Take, for instance, the Troika’s treatment of Kosovo’s “European perspective”, which the European Commission and UNMIK tried hard over the years to secure and turn into a concrete and tangible promise. While Kosovo’s international administration had, with varying degrees of success and despite its misguided “standards before status” policy, kept the territory on track with regard to its obligations assumed under the Stabilization and Association Process, the Troika’s chief envoy, Ambassador Wolfgang Ischinger, managed to implicitly turn these aspirations against the PISG when he established an explicit linkage between the imperative of concluding a horizontal status agreement with Belgrade and Kosovo’s further integration into European structures: “In absence of such an agreement the European door will not be as open as I’m sure everyone here in this region would hope it to be.”<sup>44</sup>

Overall, the opening of status negotiations in late 2005 certainly was a political prerequisite for what a former German political director called the

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37 *Report of the European Union/United States/Russian Federation Troika on Kosovo*, 4 December 2007, attached to a letter of the UN Secretary-General to Ambassador Marcello Spatafora, President of the UN SC, 10 December 2007, para. 6.

38 The Troika-led negotiations eventually failed in November 2007. Cf. *Contact Group Troika Press Communiqué*, The Baden Conference, Baden, 28 November 2007.

39 *Troika Press Statement*, Vienna, 5 November 2007.

40 Cf. Diskussion um eine Teilung Kosovos [Discussing the Partition of Kosovo], in: *NZZ*, 17 August 2007, p. 3, and: Kosovo Drifts towards Partition, in: *Balkan Insight* (BIRN) No. 104, 20 September 2007.

41 Cf. “Neutral status” proposal drawing negative reaction, in: *B92*, 15 November 2007.

42 Cf. Lippenbekenntnisse im Kosovo-Streit [Paying Lip Service in Kosovo Dispute], in: *NZZ*, 2 October 2007, p. 6.

43 Cf. *Go slow on Kosovo?* Economist Intelligence Unit Briefing, 3 October 2007.

44 Wolfgang Ischinger, quoted in *EU Pressures Rivals to Reach Kosovo Deal*, in: *International Herald Tribune*, 13 August 2007, p. 3.

creation of a sustainable political foundation for the future of the territory.<sup>45</sup> The two years of negotiations were characterized by the intensified use of informal groups that conducted crisis management at times autonomously from the Security Council. Due to the impasse there, the process as designed by the UN Secretary-General and the Contact Group could not deliver the results: a multilateral endorsement of a status solution as devised by UNOSEK, as discussed below. At key points, the process allowed politicians and diplomats to over-promise, both regarding the speed with which it had to be brought to an end and, more importantly, with regard to the outcome. UNOSEK's emphatic distancing from both Serbian and Albanian nationalisms may have facilitated the elaboration of a decentralization concept, which the mediators pursued with scientific zeal and, as some may claim, naive optimism. However, the mandate that UNOSEK and the Kosovo Troika both had to facilitate direct negotiations, table summaries, identify mutual standpoints, and report their findings to the UN Secretary-General proved insufficient to make up for the unavailability of a compulsory dispute-settlement mechanism for statehood questions and the inherent difficulties in applying the general criteria of statehood.<sup>46</sup>

#### *UNOSEK's Settlement Proposal*

*"It's the wrong question to ask whether we need a robust or a light presence; we need robust policies."*<sup>47</sup>

Half-way through UNOSEK's direct technical talks, in his one of his regular reports to the UN Secretary-General on the progress in the negotiations on decentralization, Ahtisaari remarked candidly:

In recent expert-level discussions with the sides, Pristina representatives have adopted a largely constructive approach, and seem ready to discuss concrete options. [...] Belgrade representatives have, instead, focused more on the process itself – with an emphasis on the format of the talks and the modalities for the way forward – and have declined to discuss practical proposals related to specific locations of possible new municipalities. They have raised the issue of the “slow pace of the talks so far” (rather incon-

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45 Cf. Michael Schaefer, German Foreign Policy and the Western Balkans, in: Johanna Deimel/Wim van Meurs (eds), *The Balkan Prism. A Retrospective by Policy-Makers and Analysts*, Munich 2007, pp 65-80, here: p. 70.

46 Cf. Colin Warbrick, States and Recognition in International Law, in: Malcolm D. Evans (ed.), *International Law*, New York 2006, pp. 217-75, here: p. 241.

47 EU official, quoted in ICG, *Kosovo Status: Delay is Risky*, Report No. 177, 10 November 2006, p. 8.

sistently, since they carry at least part of the responsibility for delays), and of insufficient room being allowed for negotiations as such (here, also, they share responsibilities [...]). Belgrade's attitude has so far been to unduly prolong the talks on the practical issues by, *inter alia*: i) not concretely focusing on specifics of the territorial delineation of new municipalities; ii) by preventing an early May meeting on religious sites; iii) by not yet having delivered an overview of their claims in the economic field; and iv) by objecting to a meeting devoted to minority protection. This approach goes hand in hand with its repeated calls to move the talks immediately to status, thereby suggesting that the "bottom-up" approach has failed, while clearly disregarding its own role in the procrastination.<sup>48</sup>

From the start of the status process, it had been evident even to peripheral observers of Kosovo affairs, that an agreement between Belgrade and Priština would not be attainable.<sup>49</sup> From Ahtisaari's point of view, Belgrade's refusal to be part of any constructive negotiations demonstrated a deeper unwillingness to enter into a novel arrangement that would enable the various ethnic communities to co-exist. It allowed itself, and by extension the international community, to be held hostage by retrograde political forces on the basis of short-term political calculations. Although Ahtisaari also criticized Priština's focus on unnecessary details and noted a tendency for the ethnic Albanian side to say what UNOSSEK officials wanted to hear without following up with action, he reproached Belgrade for having become *the* key obstacle to improving the situation in Kosovo through preventing Kosovo Serb participation in the PISG – a charge that did not go down well with Russia.

Shortly before delivering his "package" to the UN Secretary-General, he added an even gloomier note, observing that "there has been a lot of talk about reaching a compromise. In practice, however, compromise has meant that *you* want the other side to accept *your* position. No amount of delays and meetings will bring a change to this behaviour."<sup>50</sup> Yet despite the unproduct-

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48 UNOSSEK, Code Cable, *Overview of recent developments*, 24 April 2006, paras 2, 3, and 6.

49 Cf., for instance, the two diametrically opposed resolutions of the Kosovo Assembly of 17 November 2005, para. 9: "The Assembly of Kosovo confirms the will of the people of Kosovo for independence which is non-negotiable", and of the Serbian Parliament of 21 November 2005, Resolution of the Mandate for the Talks on the Future Status of Kosovo, para. 2: "The Parliament of the Republic of Serbia confirms that it [...] is unacceptable to alter the internationally recognized borders of a democratic country against its will" (unofficial translation of both resolutions reprinted in: *VIP Daily News Report* No. 3210, 16 November 2005). These resolutions provided the democratic foundation for, and source of legitimacy of, both sides' negotiating teams.

50 *Statement of the Special Envoy, Meeting of the OSCE Permanent Council*, Vienna, 20 February 2007, p. 5 (emphasis in the original). In his final speech as Special Envoy to the Security Council on 3 April 2007, he added: "No additional talks – no matter how long they last, and no matter the format in which they are conducted – will change this. This is a fact one has to accept".

ive negotiations he facilitated in over a dozen meetings in various Viennese baroque palaces, he believed that the parties had indicated options for rapprochement of their irreconcilable and mutually exclusive positions. They are contained in UNOSEK's *Comprehensive Proposal*, which Ahtisaari submitted through the UN Secretary-General to the Security Council in March 2007.<sup>51</sup> Whether the unilateral commitment to the tenets of the *Comprehensive Proposal* that accompanied Kosovo's request for bilateral recognition<sup>52</sup> will enable it to become the basis of the country's long-term stabilization cannot yet be answered conclusively. However, two of its aspects, the proposed scope of international power and the entrenchment of a range of constitutional values, are of considerable interest here.

### *The Question of International Powers*

In the course of 2005, a consensus had emerged between the Contact Group, the European Council, and the European Commission<sup>53</sup> that a single personality should draw together the various threads of a post-status international civilian presence in Kosovo. The *Comprehensive Proposal* enshrined this consensus, designating the International Civilian Representative (ICR) as the final authority on questions of interpretation of the settlement's "civilian" components. The range of his powers and their limitations are, however, poorly defined, and enforcement mechanisms remain unidentified.<sup>54</sup> The tone was set by the open-ended formulation in Annex IX of the *Proposal* that recognized that "fulfilling Kosovo's responsibilities under this Settlement will require a wide range of complex and difficult activities".<sup>55</sup>

The Annex further proposed that the ICR monitor and intervene where necessary to ensure the implementation of Kosovo's settlement obligations and stipulated that the ICR may annul laws or decisions adopted by Kosovo

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51 *Comprehensive Proposal for the Kosovo Status Settlement*, annexed to the *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, 26 March 2007, S/2007/168/Add.1; on the same day, Secretary-General Ban Ki-moon conveyed the proposal, with his full support, to the President of the UN Security Council, Ambassador Dumisani Kumalo.

52 The Kosovo Assembly had already accepted the *Comprehensive Proposal* and committed to its full implementation in its declaration of 5 April 2007. For a discussion of the *Proposal*, see Jean d'Aspremont, *Regulating Statehood: The Kosovo Status Settlement*, in: *Leiden Journal of International Law* 3/2007, pp. 649-68. His conclusion that Kosovo's statehood will be recognized on the basis of an evaluation of the conditions laid down by Ahtisaari (p. 656) proved to be premature.

53 See the two joint papers by Secretary-General/High Representative Javier Solana and Commissioner Olli Rehn, *The Future EU Role and Contribution in Kosovo* of 7 June 2005 and *Joint Paper on Kosovo* of 6 December 2005, Chapters 4 and 3, respectively. In 2006, the discussions within the extended Contact Group on the question of a follow-up presence (both civil and military) were conducted on the basis of a number of options papers presented by France, the UK, the USA, UNOSEK, NATO, the European Commission, and the EU Council Secretariat.

54 Cf. ICG, *Kosovo: No Good Alternatives to the Ahtisaari Plan*, Europe Report No. 182, 14 May 2007, p. 17.

55 *Comprehensive Proposal*, cited above (Note 51), Annex IX, Article 1.



authorities, as well as sanction or remove officials from public office.<sup>56</sup> Tucked away among provisions defining the powers of the European Security and Defence Policy (ESDP) mission EULEX<sup>57</sup> that was to operate under the authority of the ICR in his second identity of EU Special Representative, the international mission has been authorized “to reverse or annul operational decisions taken by the competent Kosovo authorities, as necessary, to ensure the maintenance and promotion of the rule of law, public order and security”.<sup>58</sup> A clear definition of which “operational decision” made by which authority could be affected by such annulment is not provided. Although the ICR’s powers and the frequency of ICR interventions are to be gradually wound down, the proposal established no clear benchmarks and does not contain a “sunset” provision. It effectively leaves it to the ICR to recommend the criteria to the International Steering Group for Kosovo (ISG), which is to review the powers of the ICR within two years of his appointment.<sup>59</sup>

At first sight, the ICR mandate appears to arrogate the virtually unlimited powers that have made the Office of the High Representative (OHR) in Bosnia the subject of so much criticism.<sup>60</sup> As in Bosnia, over-stretching the role of the new civilian presence will, at some point in the future, run counter to the principles of partnership and co-operation that underlie the Stabilization and Association Process and eventual enlargement.<sup>61</sup> As one official within the ICO/EUSR Preparation Team stressed at a time when it was not clear under which authority the Office would be deployed, if at all: “We should avoid coming in a position where we have to implement 1244; this is not our mandate and would assure us a considerably hostile reception in Kosovo whereas for now people are looking forward to us coming in.”<sup>62</sup> Falling prey to the temptation of authoritarianism may create a situation incompatible with European values and norms.<sup>63</sup> It may also undermine the long-run

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56 Cf. *ibid.*, Article 2.1 (c, d).

57 European Union Rule of Law Mission in Kosovo, see Council Joint Action 2008/124/CFSP and Council Joint Action 2008/123/CFSP, both of 4 February 2008.

58 *Comprehensive Proposal*, cited above (Note 51), Annex IX, Article 2.3 (f). The UN Secretary-General’s June proposal to accommodate EULEX under a “UN umbrella” reporting at least nominally to New York under Resolution 1244 has, however, contributed to its separation from the ICR/EUSR; cf. ICG, *Kosovo’s Fragile Transition*, Europe Report No. 196, 25 September 2008, p. 9.

59 *Comprehensive Proposal*, cited above (Note 51), Annex IX, Article 5.1. The ISG for Kosovo had its inaugural meeting in February 2008 in Vienna and was initially comprised of 15 states that had recognized Kosovo’s independence; cf. ISG Press Statement, 28 February 2008.

60 For a “neo-Burkean” critique of the interventionist paradigm interpreted as imperialism in disguise, see Gerald Knaus/Felix Martin, *Travails of the European Raj: Lessons from Bosnia and Herzegovina*, in: *Journal of Democracy* 3/2003, pp. 60-74.

61 Cf. Michael Karnitschnig, *The United Nations and the European Union in Kosovo*, in: Jan Wouters et al. (eds), *The United Nations and the European Union*, The Hague 2006, pp. 323-351, here: p. 346.

62 ICO/EUSR PT, *Note on the Status Process*, Priština, 24 July 2007.

63 That Kosovo’s future status must be fully compatible with European norms and values was one of the conclusions of the June 2005 European Council, cf. *Presidency Conclusions: Declaration on Kosovo*, Brussels, 16/17 June 2005, Annex II.

development of Kosovo institutions under the new constitution, key elements of which were outlined by the *Comprehensive Proposal*.

*Building Legitimacy: A New Constitution*

The political transition to post-status Kosovo was to end with the adoption of a constitution following an inclusive and transparent process.<sup>64</sup> To this end, the external process of status determination was accompanied by attempts to build deliberative legitimacy from within; the new status framework was to be backed by a deep commitment to international law. By including strong pre-commitment devices, UNOSK followed the tradition of international efforts to resolve nationalist conflict and its aftermath, but departed from its illustrious precursors – the regime for Upper Silesia, the International Governing Commission for the Saarland, and the OHR as mandated by the Dayton Peace Accords – in significant ways. In the absence of a horizontal status settlement, Special Envoy Ahtisaari's settlement proposed only key elements of a new constitutional structure, around which local institutions were to frame a locally owned text. This was felt to be especially relevant for measures to enhance minority protection and representation. As Tom Ginsburg observes with regard to post-First World War minority regimes in Poland and Czechoslovakia, the entrenchment of commitments within a new constitution is meant to reassure minorities and thus reduce the probability of their resisting the new government structures.<sup>65</sup> While the constitutional process was not limited to issues such as decentralization and minority protection that were discussed in Vienna and elsewhere, the settlement imposed clear limits on the constitutional imagination of Kosovars and their ideas about political organization.

At the level of applicable law, the draft settlement stipulates that all UNMIK-promulgated legislation, including Administrative Directions and Executive Decisions, are part of the new sovereign legal order and should remain in force “until their validity expires, or until they are revoked or replaced by legislation regulating the same subject matter in accordance with the provisions of this Settlement”.<sup>66</sup> As James Pettifer rightly observed in one of the first analyses of Ahtisaari's proposal, this may be the key paragraph of the entire document; were the proposal to be implemented, the panoply of post-crisis-period administrative regulations would remain in place for an in-

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64 Cf. OSCE Mission in Kosovo, *Parliamentary and Expert Roundtable on Constitutional Issues*, Skopje, 20-22 July 2006, executive summary. The “Constitution of the Republic of Kosovo” came into effect on 15 June 2008.

65 Cf. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, in: *New York University Journal of International Law and Politics*, 4/2006, pp. 707-759, here: p. 732. Cf. also Annex 1 of the 2007 *Comprehensive Proposal*, cited above (Note 51), which stipulates that the constitution shall incorporate a large number of minority rights and standard which “shall be directly applicable in Kosovo” (Article 2.3).

66 *Ibid.*, Article 15.2.1 (main text).

determinate period.<sup>67</sup> In the same spirit, UNOSEK suggested limiting local competencies in the area of external relations in an apparent departure from the post-colonial rule of *tabula rasa*. In concrete terms, UNOSEK's settlement proposed that "Kosovo shall continue to be bound [...] by all international agreements and other arrangements in the area of international cooperation that were concluded by UNMIK for and behalf of Kosovo".<sup>68</sup> The proposal's explicit reference to a speedy accession to the Council of Europe and its instruments<sup>69</sup> was designed to predetermine the new sovereign state's choices, emulating recent practice in Eastern Europe that clearly confirmed the trend of automatic succession to human rights treaties.<sup>70</sup>

Like its predecessor, the 2001 Constitutional Framework imposed by UNMIK,<sup>71</sup> the new Kosovo constitution is a hybrid regime, combining indigenous elements and those guaranteed by the *Comprehensive Proposal*. The two components were merged with the intention of reducing the obvious tensions between ethnic decentralization and the unified jurisdiction of the nascent state; between representation in the legislature based on ethnicity and universal suffrage; between the rights of "communities" and individual rights; between the imperative of creating conditions for a stable political landscape and the need to build and sustain democratic opposition; and between empowerment of local actors and limitations on the same as prescribed by the settlement – in particular between the expanded jurisdiction of the local executive branch and its international oversight in key areas. Accordingly, the establishment of a Constitutional Commission, mandated to draft the document in consultation with the international community<sup>72</sup> was intended to build broad local ownership around a number of issues: minority representation in the legislature<sup>73</sup> and within the executive branch;<sup>74</sup> the extent of – and limits to – decentralization;<sup>75</sup> the type of electoral system and the composition of the new Central Election Commission;<sup>76</sup> and the concept and content of "community rights".<sup>77</sup>

Grounding the legitimacy of the entire new state structure on a set of international values that are to be incorporated in the document will naturally pose problems with regard to the relationship between external and local

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67 Cf. James Pettifer, *The Ahtisaari Report – Totem & Taboo*, Conflict Studies Research Centre, Defence Academy of the United Kingdom, No. 07/08, February 2007, p. 3.

68 *Comprehensive Proposal*, cited above (Note 51), Article 15.2.2.

69 Cf. *ibid.*, Article 2.1.

70 Cf. Pierre-Marie Dupuy, *Droit International Public*, Paris 2006, para. 57(a).

71 Cf. *On a Constitutional Framework for Self-Government*, UNMIK/REG/2001/9, 15 May 2001.

72 Cf. *Comprehensive Proposal*, cited above (Note 51), Article 10.4. The Constitutional Commission, subdivided into ten working groups, was established in June 2007 by the President of Kosovo.

73 Cf. *ibid.*, Annex I, Article 3.2, as well as Annex II, Article 4.

74 Cf. *ibid.*, Annex I, Article 5.

75 Cf. *ibid.*, Annex III.

76 Cf. *ibid.*, Annex I, Article 7.

77 Cf. *ibid.*, Annex II, Article 3.

actors, between foreign and domestic solutions, and between outside and inside arrangements.<sup>78</sup> For one, pre-determining boundaries within which a constitution – which should itself produce boundaries to the exercise of majoritarian rule – is to be framed appears designed to confiscate the right to internal self-determination from a freshly liberated people *before* they have constituted themselves in freedom. More pragmatically, a complex heterogeneous construction such as the new constitution of Kosovo may attempt to fulfil too many functions at once: a promise of a reasonable balance of power between the international community and those that lived for almost a decade under its tutelage, an international guarantee extended to minority communities, and a social contract among the citizens of a new polity with respect to their security, welfare, and representation, regardless of their ethnicity. Developments in this area are, in any case, likely to add further layers of precedent, for they may demonstrate that the social and cognitive aspects of norm-building by an international agent are enduring enough to resist, in the short run, local attempts to reconfigure international transplants.

#### *Wider Implications for Public International Law*

*“If a government is concerned about its ‘territorial sovereignty’, then it must demonstrate that it makes every effort to protect the individuals that reside in its territory. A government that demonstrates with credibility that it undertakes all efforts possible to this end will command respect.”<sup>79</sup>*

On 10 June 1999, the Security Council “disaggregated” sovereignty over the territory of Kosovo into formal title (left with Serbia as *nudum ius*<sup>80</sup>), material interest (accorded to a people with “unique historical, legal, cultural and linguistic attributes”<sup>81</sup>) and governing power (vested in UNMIK). Its decision to suspend a territorial dispute for almost a decade reflected one of the chief dilemmas of a post-colonial legal system that upholds two sets of contradictory concepts: rights associated with territorial possession claimed by and on behalf of a sovereign, on the one hand; and claims to sovereignty framed by and on behalf of a “people”, on the other. This process of “desovereigniza-

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78 For a recent discussion of external influence on constitution-making see Philipp Dann/Zaid Al-Ali, *The Internationalized Pouvoir Constituant*, in: Armin von Bogdandy/Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law 2006*, pp. 423-463, as well as Armin von Bogdandy et al., *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations*, in: *ibid.*, pp. 579-613.

79 Hans Corell, *From Territorial Sovereignty to Human Security*, Address to the Canadian Council of International Law (1999 Annual Conference), Ottawa, 29 October 1999.

80 For the concept of *nudum ius*, see, more generally, Bernhard Knoll, *United Nations Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in “Internationalized” Territories*, in: *Austrian Review of International and European Law* 7/2002, pp. 3-52.

81 *Constitutional Framework*, cited above (Note 71), sections 1.2 and 1.1.

tion” was accompanied by the investiture of a fiduciary bond between the United Nations and the people under its temporary tutelage who were to be pushed towards “European standards”. June 1999 was merely the latest instance in which the institution of an international trust served to temporarily suspend state sovereignty while shying away from identifying a unit of self-determination that could, in time, be entitled to formulate and exercise its own claim to the disputed territory.

Whatever the motives for eventually placing Kosovo on the trajectory to statehood and the underlying political-normative choices, there are ample opportunities for international lawyers to exploit what is a very ambiguous case in the history of state creation. While the argumentative basis for two of the strongest claims for self-determination in the case of Kosovo will be examined further below, it is pertinent to recall that the mere creation of UNOSEK was not the only option at the disposal of the Security Council.

### *The Option of “Status Imposition”*

The importance of a *negotiated* solution to the Kosovo situation has been abundantly emphasized, most prominently in the Guiding Principles of the Contact Group. But could the Security Council have conveyed sovereign title in the absence of a negotiated solution? Under Article 33 of the Charter, parties to a dispute shall “first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. Yet beyond the principle of peaceful settlement, the UN Charter contains far-reaching provisions, not all of which are so sensitive to sovereign sentiment. The United Nation’s competencies in matters of territorial administration have been shaped by an expanding interpretation of the powers accorded to it in the Charter. In this respect, the powers of the Security Council are of particular importance, as it may adopt binding enforcement measures. In doing so, it is bound to act “in accordance with the Purposes and Principles of the United Nations”, among which the Charter includes bringing about “by peaceful means, and in conformity with principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace”.<sup>82</sup>

It is indeed pertinent to ask whether an explicit territorial status determination would have fallen within the Security Council’s powers. If, notwithstanding the sustained operation of an international mediation mechanism, the holder of the *nudum ius* cannot muster the political will to take on new legal obligations, the Security Council could have deemed a territorial determination necessary to the maintenance of international peace and security. From the perspective of the law of international organizations, and in

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82 Article 24(2) and 1(1) of the UN Charter.

particular regarding the scope of its implied powers, this would have certainly represented the most interesting, though daring, course of action.

Aside from the political impasse in which the Security Council was locked on the issue, such a decision would have found no precedent in public international law.<sup>83</sup> Two additional arguments, one of a general nature and the other pertaining to the specific situation under consideration, stood between the Security Council and a conveyance of sovereign title. First, the UN Charter does not explicitly vest the United Nations with the power to prescribe changes in the international territorial order; “it was to keep the peace, not change the world order, that the Security Council was set up.”<sup>84</sup> Second, and more specifically relating to Kosovo, the Charter does not authorize the Security Council to take Chapter VII action in the absence of a real threat: “It is the removal of the threat or restoration of peace that is and must be the object of the Council’s decision under Chapter VII.”<sup>85</sup> Whether the mere possibility of a re-emergence of civil conflict would have sufficed is open to question, especially because it would have suggested that UNMIK had ostensibly failed in its efforts to create a sustainable peace.

Politically, a status imposition by the Security Council would have implied that it could draw the contours of state frontiers and grant title over territory to an entity that UN member states would, at a later stage, recognize as a self-determination unit – clearly, a revolutionary concept. The Security Council could also have chosen the fallback option, according to which it would have subscribed, under Chapter VII of the Charter, to Ahtisaari’s settlement proposal and mandated a new civil and military presence, while essentially remaining silent on the question of sovereignty. Under this option, it could have removed the major obstacle of Resolution 1244 and thus allowed individual states to recognize a unit that had emerged during eight years of international administration. Had the Security Council endorsed Ahtisaari’s *Comprehensive Proposal*, it would have chosen to give up the

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83 The closest the Security Council has previously come to imposing territorial boundaries on a state was its decision to demarcate the Iraq-Kuwait boundary under its Resolution 687, SCOR (XLV), 3 April 1991, S/INF/47 (1991), paras 2-4, reprinted in: *International Legal Materials*, 1991, pp. 847ff. There, the Council merely undertook to give precision to the boundary already concluded between the two states; see the Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, 4 October 1963, Kuwait-Iraq, in: *United Nations Treaties Series* (1964).

84 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *ICJ Reports* (1971), p. 294. Judge Fitzmaurice’s remarks referred to a territorial unit that was earmarked for self-determination and may therefore not adequately reflect a situation in which a capacity to abrogate or convey territorial rights were to be utilized in support of the maintenance of international peace and security.

85 Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era*, Leiden 2006, pp. 42-43. For the prerequisite that there shall be “at a minimum” a threat to international peace before the Security Council takes binding decisions under Chapter VII, cf. also Alan Boyle/Christine Chinkin, *The Making of International Law*, Oxford 2007, p. 232.

politics of ambiguity in favour of the politics of clarity. It could have simultaneously provided a first indication that the international community held itself to be competent to establish not merely the conditions for empirical statehood within a certain territory by assuming transitional authority but, furthermore, to design the conditions under which a polity acquires the outer trappings of a sovereign state.<sup>86</sup> This result might have spurred a remarkable departure from an international legal tradition, since no state formed since 1945 outside the colonial context has been admitted to the United Nations without some sort of accommodation with the government of the predecessor state.<sup>87</sup>

The protracted negotiations over a new resolution within the Security Council and their eventual collapse in mid-2007 have opened new possibilities. Regardless of whether Kosovo's statehood is consolidated through continued waves of bilateral recognitions, one conclusion is certainly appropriate: There would have been room for conceiving the deployment of international law in new and more ambitious ways. Having exhausted all efforts to achieve a consensual settlement, the Security Council should have been presumed to have broad and flexible authority to act effectively in a situation that could, if not addressed, have turned into a threat to peace.<sup>88</sup> Practice has amply shown the readiness of international organizations to exercise dispositive powers, especially where broad community values are at stake. Imposing a permanent change in Kosovo's political status based on a new Chapter VII resolution, would have undoubtedly expanded the Security Council's powers in a post-conflict administration context. Had it mustered the commensurate political will, the Security Council could have deemed itself competent to direct changes in political boundaries if such competencies were exercised in good faith and observant of the Charter principles.<sup>89</sup> That such a measure was

86 For an enumeration of features contained in Ahtisaari's proposal rewarding Kosovo with the "building blocks" of sovereignty see Note 133 below.

87 Cf. James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, in: Anne Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned*, The Hague 2000, pp. 31-61, here: pp. 53 and 57.

88 See, in general, Oscar Schachter, *The Development of International Law through the Legal Opinion of the United Nations Secretariat*, in: *The British Journal of International Law* 1948, pp. 91-132, here: pp. 96-98. Cf. also the specific reference in Special Envoy Ahtisaari's final report: "[...] denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole", *Report of the Special Envoy*, cited above (Note 51), para. 4.

89 Cf. Michael Matheson, *United Nations Governance of Postconflict Societies*, in: *American Journal of International Law* 1/2001, pp. 76-85, here: p. 85. He takes this extensive interpretation from a reading of Article 41, which recites a list of possible measures that may be employed by the Security Council to give effect to its decisions. He argues that the list, clearly being exemplary and non-exhaustive, would not limit the Council in deciding on different steps or instruments. In effect also assuming such wide Security Council competencies, cf. Enrico Milano, *Unlawful Territorial Situations in International Law*, Leiden 2006, pp. 225 and 228. Specifically on the powers of the Security Council to recommend the establishment of diplomatic relations should the status negotiations fail, see the presentation by Christian Pippan in: Helmut Philipp Aust/Carla Thies, *Die Zukunft des Kosovo – Bericht vom 31. Österreichischen Völkerrechtstag [The Future of Kosovo – Report from the 31st Austrian Congress of Public International Law]*, in: *Archiv des Völkerrechts* 2/2007, pp. 258-275, here: p. 262. Contra: Ian Brownlie, *Principles of Public*

“necessary” could have been presupposed given that the reintegration of a territory into its pre-conflict state structure could have triggered insurgency and further civil conflict, which, by itself, would have posed a grave threat to regional stability.

All in all, the resolution of Kosovo’s status will not revolutionize the law of international organizations, mainly as a result of Russia’s recalcitrance. It may, however, contribute to the further development of the right to self-determination and accessory claims based on the concept of “remedial secession”. A second, related claim is more foundational in nature. It pertains to the need to respect established facts, to the “protected” status of Kosovo under international law, as well as to the duties that the international community assumes under it.

#### *The Future of Self-Determination Claims*

The first claim treats territorial integrity as a rebuttable presumption that may be invoked by states that comport themselves in accordance with the principle of self-determination and equal rights. The claim is seen to acquire legitimacy from conditions that deviate from the substantive elements of internal self-determination – essentially, a meaningful share in public life – which has given rise to remedial prescriptions beyond those applicable to decolonization regimes. This interpretation had been at the core of the Supreme Court of Canada’s dictum on the right of Quebec’s secession from Canada. It held that outside the colonial context, a right to secession may possibly accrue where a people “is denied any meaningful exercise of its right to self-determination within the state of which it forms part”.<sup>90</sup> Relying heavily on the reinterpretation of the safeguard clause contained in the 1970 *Declaration on Principles of International Law Concerning Friendly Relations*,<sup>91</sup> the

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*International Law*, Oxford 1979, p. 163, Eckart Klein, *Statusverträge im Völkerrecht* [Status Agreements in Public International Law], Berlin 1980, p. 107, Carsten Stahn, Constitution without a State? In: *Leiden Journal of International Law* 3/2001, pp. 531-561, here: p. 541, and Terry Gill, Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, in: *Netherlands Yearbook of International Law* 1995, pp. 33-138, here: p. 86.

90 Judgments of the Supreme Court of Canada, Reference re Secession of Quebec [1998], 20 August 1998, 2 S.C.R. 217, reprinted in: *International Legal Materials* 6/1998, pp. 1340ff., here: para. 154.

91 United Nations General Assembly, A/RES/2625 (XXV), 24 October 1970, UN Doc. A/8028 (1970), Principle V, stating that nothing (in the section on self-determination) shall be construed as authorizing or encouraging the dismembering or impairing of the territorial integrity of states “conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour”. The formulation had initially meant that a state possessing a representative government that grants equal access to political institutions and decision-making processes to the entire population within its territory is presumed to satisfy the principle of equal rights and self-determination as regards those peoples. The reinterpretation of this provision implied that states that do not so conduct themselves accordingly would not be protected by



International Commission on Intervention and State Sovereignty also suggested that people are legitimately implementing their right to self-determination following instances of grave and systematic human rights violations.<sup>92</sup> Affirming that each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, the *Summit Outcome*<sup>93</sup> followed the recommendations of the High-Level Panel and the UN Secretary-General's report, which had endorsed "the collective international responsibility to protect" as an "emerging norm"<sup>94</sup> that may encompass a commensurate obligation to rebuild and prevent a return to violence once peace has been consolidated.<sup>95</sup>

It would be difficult to argue that this appeal for political and, ultimately, moral responsibility corresponds to a concrete international legal obligation arising under the law of state responsibility. It does, however, reinforce some of the considerations that pertain to the application, *in concreto*, of the idea of forfeited sovereignty, to the case of Kosovo. If a state breaches its obligation to guarantee the life, security, and welfare of its people, it not only fails in its role as domestic governing institution, but also in its function as an executive agent of international legal obligations. As James Crawford notes with his trademark succinctness, current practice suggests that the principle of self-determination also applies to territories forming distinct political-geographical areas whose inhabitants have been arbitrarily excluded from any share in the government of the state to which they belong, with the result that the territory has become in effect non-self-governing.<sup>96</sup>

Kosovo's eventual statehood could therefore be seen as the first case confirming that, as part of the law on self-determination, the basis for maintaining sovereignty is increasingly shifting from an inviolable right to internal forms of governance based on international standards of democracy and human rights. The claim of a group would thus begin to outweigh the oppressor state's claim to the preservation of its territorial integrity. In extremis, a claim to secession may thus acquire legitimacy if participatory rights are trampled on in an irredeemable way. This nexus has been reinforced by Contact Group Ministers who, in early 2006, explicitly referred to the abuses

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the principle of territorial integrity. Cf. Malcolm Shaw, Peoples, Territorialism and Boundaries, in: *European Journal of International Law* 3/1997, pp. 478-507, here: p. 483.

92 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, 2001.

93 United Nations General Assembly, *2005 World Summit Outcome*, A/RES/60/1, 24 October 2005, para. 139.

94 *Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565, 2 December 2004, para. 203. See also the reference to that document in the *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 21 March 2005, para. 135.

95 Cf. the UN Secretary-General's 1992 Agenda for Peace report, *Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Docs. A/47/277 and S/24111 [1992], which identified post-conflict peacebuilding as separate component to the maintenance of international peace and security (paras 21, 55-9).

96 James Crawford, *The Creation of States in International Law*, Oxford 2006, p. 127.

of the Milošević regime in Kosovo and to the “people of Kosovo” to whom a settlement must be acceptable.<sup>97</sup>

The effects of Kosovo’s statehood may, on the other hand, be seen as a recognition that territorial conflict is no longer to be settled with habitual reference to the law inherited from decolonization, which strongly links self-determination and territorial integrity. Rather, the resolution of such conflicts could be embedded in the wider legal context of maintaining international peace and security. The extension of a partial subject of international law governed by an international administration in the interim into a fully fledged subject may be interpreted as part of the international community’s obligation not only to establish “autonomy” and “self-government” but also to provide for the *effectiveness* of governance – an indispensable principle in international law. These obligations are, really, two sides of the same coin: Departing from the principle of effectiveness may render new states incapable of guaranteeing respect for international law.<sup>98</sup> In turn, ineffective and unstable territorial situations are intrinsic threats to international peace and security.

The transformation of an autonomy regime into the assumption of sovereign responsibilities can therefore be interpreted as a way of ensuring that democratic institutions continuously and effectively guarantee the enforcement of international law, and particularly minority-protection mechanisms, within the territory – a project at which Serbia under Milošević undoubtedly failed with regard to its ethnic Albanian population. From this vantage point, a change in borders is merely a reflection of the change in the nature of a political unit and the need to guarantee the effectiveness of its government supported by an international institution-building mandate. In Special Envoy Ahtisaari’s words, Kosovo’s protected status under Resolution 1244 and the eight years in which it was governed in complete separation from Serbia “is a reality one cannot deny; it is irreversible”.<sup>99</sup>

An argument that sees territorial title as extinguishable through norm-creating facts is neither new nor original, but it seems even more appropriate since international law may attribute consequences to the occurrence of international administration. This dovetails with the line of thought that the exigencies of maintaining international peace may take priority over respecting the sovereign equality of states, should such interference in legally protected positions be necessary, proportionate, in pursuit of a legitimate end, and based on a separate title.<sup>100</sup>

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97 *Statement by the Contact Group on the Future of Kosovo*, cited above (Note 21), para. 7. That the “realistic outcome” of the status talks should be “acceptable to the people of Kosovo” was repeated in the Contact Group Ministerial Statement in New York, 20 September 2006.

98 Cf. Gerard Kreijen, *State Failure, Sovereignty and Effectiveness*, Leiden 2004, pp. 224-225.

99 *Report of the Special Envoy*, cited above (Note 51), para. 7.

100 Cf. Christian Schaller, *Peacebuilding und “ius post bellum”*, *SWP Studie* No. 11, Berlin, April 2006, p. 6.

The lack of explicit authorization from the Security Council and of a separate title, however, clearly weakens the line of reasoning developed above. Indeed, the wave of bilateral recognitions of Kosovo in the absence of a new Security Council Resolution has raised a further set of problems. Sidelining the United Nations may not only have negative implications for future conflict resolution in the long term, involving the risk that those states recognizing Kosovo's statehood may be unable to control the consequences of their novel interpretation of a Security Council Resolution that is based on Chapter VII of the UN Charter. It may also create serious challenges for Kosovo's accession to international organizations in the short and medium run.<sup>101</sup>

#### *The Declaration of Independence and the ICJ's Advisory Opinion*

The internationalized status of Kosovo rested on a multilateral instrument that temporarily suspended the exercise of Serbia's sovereign rights. Its claim to formal sovereignty, however, remained unaffected and continues as a *nudum ius* as long as Security Council Resolution 1244 is deemed to remain in effect.<sup>102</sup> While this arrangement cannot be interpreted as having "guaranteed" Serbian sovereignty over Kosovo in the hiatus of an international territorial administration, the over fifty acts of bilateral recognition since February 2008 have arguably challenged Article 25 of the UN Charter, which obliges member states *erga omnes* to carry out decisions of the Security Council, and thus its Resolution 1244. It is, as Colin Warbrick recently wrote, "necessary to avoid avoiding the question of how Serbia lost its title simply by postulating a new status for Kosovo which requires (but does not explain) the termination of Serbia's rights, which [...] has been a frequent deficiency in the recognition statements".<sup>103</sup> The view that "there is no reason why any state should feel inhibited by the continued existence of Resolution 1244

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101 For instance, Kosovo requested membership of the IMF and the World Bank on 10 July 2008. The Governor of Serbia's National Bank objected to the move in a letter to the IMF Secretary General, noting Belgrade's position that Kosovo's declaration of independence contravenes Resolution 1244. See, however, the surprising finding of the IMF that "it has been determined that Kosovo has seceded from Serbia as a new independent state and that Serbia is the continuing state", IMF Press Release No. 08/179, 15 July 2008 (emphasis added).

102 See the *Report of the UN Secretary-General* of 28 March 2008: "Since Kosovo's declaration of independence, UNMIK continues to operate on the understanding that resolution 1244 (1999) remains in force, unless the Security Council decides otherwise", S/2008/211, para. 29. The UN Secretary-General also gave this assurance to Serbian President Boris Tadić in his letter of 12 June 2008, cf. *Report of the UN Secretary-General* of 12 June 2008 (Annex 1), S/2008/354. This is in line with para. 19 of Resolution 1244 which stipulates that "the international civil and security presences are established for an initial period of 12 months, to continue after, unless the Security Council decides otherwise".

103 Colin Warbrick, Kosovo: The Declaration of Independence, in: *International and Comparative Law Quarterly* 3/2008, 675-690 (2008), here: p. 682.

from recognising Kosovo's independence"<sup>104</sup> is therefore accurate only if one deems Kosovo's declaration of independence<sup>105</sup> to have been passed in conformity with international law – a question currently being considered by the ICJ.<sup>106</sup>

The fact that this question also involves political aspects does, as the Court stated in its Advisory Opinion on the *Threat or Use of Nuclear Weapons*, “not suffice to deprive it of its character as a ‘legal question’”.<sup>107</sup> On the contrary, “in situations in which political considerations are prominent it may be particularly necessary [...] to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate”.<sup>108</sup> Yet rather than itself pronouncing on the contested issue of secession in international law, or on the “emerging norm” of the collective responsibility to protect and a putatively corresponding right to self-determination following instances of grievous human rights violations, the Court can be expected to investigate whether the political pronouncement of the Kosovo Assembly was in line with the international legal regime that the Security Council had imposed on the territory in 1999. More specifically, the Court could entertain the question of whether, and under which circumstances, the international legal authority entrusted with overseeing Kosovo institutions could have annulled the declaration of independence, in accordance with Resolution 1244.

It is in this regard pertinent to recall that the SRSG, who was empowered to oversee the PISG, its officials and agencies, even as they operate in their respective fields of “transferred” powers, has been explicitly authorized to take “appropriate measures” whenever their actions are inconsistent with Resolution 1244.<sup>109</sup> Exercising his unlimited power to review the constitutionality of and annul acts adopted by the local legislature, the SRSG can

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104 ICG, *Kosovo Countdown*, cited above (Note 36), p. 16.

105 Made on 17 February 2008, reprinted in *Security and Human Rights 2/2008*, pp. 113-115.

106 Cf. General Assembly Resolution A/63/3, “Request 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”, 8 October 2008. The General Assembly voted 76-6 to send the request to the ICJ (74 abstentions).

107 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports* (1996), p. 234, para. 13. The Court has moreover confirmed 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; *ibid.*

108 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *ICJ Reports* (1980), p. 87, para. 33.

109 Cf. Chapter XII of the Constitutional Framework, cited above (Note 71). Cf. also the wide-ranging interpretation by the UN Secretary-General of the SRSG's legislative powers: In exercising the authority vested in UNMIK, the SRSG “may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civilian administration”, *Report of the Secretary-General* of 12 July 1999, S/1999/779, para. 39.

be said to have acted, in the past decade, as a “negative legislator”.<sup>110</sup> In practice, it has not been uncommon for him to intervene in the legislative process of the PISG and refuse to promulgate laws that, upon advice from UN Headquarters in New York, were deemed to be in violation of the Constitutional Framework and Resolution 1244.<sup>111</sup> Powers of intervention were exercised through executive decisions to set aside inter-ministerial agreements with other states<sup>112</sup> as well as decisions of municipalities<sup>113</sup> and decisions of the local executive taken within the scope of their competence.<sup>114</sup>

The SRSG has, in the past, also nullified “statements” and “resolutions” of the Kosovo Assembly – political pronouncements that would not have had any direct legal consequences within Kosovo’s legal order – which he considered to have been passed *ultra vires*. Most relevant in this regard had been the draft “Resolution” of the Assembly of 17 November 2005 that reconfirmed “the political will of the people of Kosovo for an independent and sovereign state of Kosovo”. It was immediately declared null and void by the SRSG.<sup>115</sup>

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110 Adapted from Hans Kelsen, *General Theory of Law and State*, New York 1961, pp. 268-269. For an investigation into the SRSG’s role in Kosovo’s legislative process see Bernhard Knoll, *Beyond the “Mission Civilisatrice”*: The Properties of a Normative Order within an Internationalised Territory, in: *Leiden Journal of International Law* 2/2006, pp. 275-304.

111 E.g. the Law on Higher Education, adopted by the Assembly on 25 July 2002. The law was not promulgated by the SRSG pursuant to his authority under the Constitutional Framework, which provides that “laws [passed by the Assembly] shall become effective on the day of their promulgation by the SRSG, unless otherwise specified” (section 9.1.45). See OSCE Mission in Kosovo, *Spot Report on the Monitoring of the Assembly of Kosovo*, 4 April 2003.

112 E.g. *Memorandum of Understanding between the Ministry of Economy and Finance of Kosovo and the Ministry of Economy of Albania*, 30 May 2002, declared void by SRSG Michael Steiner in a letter to Kosovo’s Prime Minister on 25 June 2002.

113 Based on section 47(2) of UNMIK/REG/2000/45 *On Self-Government of Municipalities in Kosovo*, 11 August 2000, the SRSG has the authority to set aside any decision of a municipality which he considers to be in conflict with Security Council Resolution 1244 or the applicable law or which does not take sufficiently into account the rights and interests of “communities” (i.e. minorities); cf. e.g. UNMIK/ED/2004/8 *On Setting Aside Provisions in the Municipal Regulation No. 2000/1 of the Municipal Assembly of Mitrovicë/Mitrovica of 20 February 2004*, 8 April 2004.

114 In a case that aroused considerable excitement, the SRSG, in late 2004, cancelled the decision of the Telecommunication Regulatory Authority (TRA) to select the Slovenian company Mobitel as Kosovo’s second cell phone operator after a tender process that it had conducted under the authority explicitly delegated to it; cf. UNMIK/ED/2004/25, 20 October 2004.

115 Three additional examples confirm the SRSG’s role in providing checks to the competencies of the Kosovo Assembly: First, the Assembly’s “Resolution” on the “Territorial Integrity of Kosovo” (23 May 2002), which challenged the border agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia, was annulled by the SRSG, who declared that it violated the Constitutional Framework. The UN Security Council issued a strong condemnation; cf. *Security Council Deplores Kosovo Assembly’s Resolution Concerning the Province’s ‘Territorial Integrity’*, UN/PR/SC/7413, 24 May 2002. Second, following the refusal of the SRSG to promulgate the Law on Higher Education (cited above, Note 111), the Assembly issued a “Statement” calling on government, the Ministry of Education as well as the University to implement the provisions of the draft law. This “Statement” was immediately declared null and void

In the case in question – the Kosovo Assembly’s “declaration” of 17 February 2008 – neither the UNMIK SRSG nor the Security Council issued any statement as to its compatibility or not with Kosovo’s Constitutional Framework or Resolution 1244. In order to grasp the significance of this omission, it is pertinent to recall that a subsidiary organ such as a UN mission under the leadership of an SRSG is regularly mandated to execute certain tasks on behalf of the organization to which it remains directly responsible. UNMIK’s leadership remains accountable to the Secretary-General who exercises control over all acts.<sup>116</sup> As the Secretary-General is acting through his Special Representative as his subsidiary organ, a UN mission’s exercise of power is limited to the same extent as the initial Security Council’s delegation of power to the Secretary-General.

The competence to annul such an act of wide-ranging political and legal significance could have found its basis in para. 11(a) of Resolution 1244, in which the responsibilities of the international civilian presence are defined as including the promotion of “the establishment, pending a final settlement, of substantial autonomy and self government in Kosovo”. An act of self-determination by a local institution could have been interpreted as an attempt to defy the *raison d’être* of UNMIK (as its task of promoting the “establishment of substantial autonomy” would presumably be overtaken by an unchallenged declaration of independence and corresponding acts of recognition), and could therefore even have triggered the suspension of the Assembly by the SRSG.<sup>117</sup> This position had been repeated and confirmed by generations of SRSGs, notably by Hans Hækkerup, who, in a document signed with Belgrade representatives (later endorsed by the Security Council) explicitly stated that “the position on Kosovo’s future status remains as stated in UNSCR 1244, and that this cannot be changed by any action taken by the [PISG]”.<sup>118</sup>

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by the SRSG, see *OSCE Mission in Kosovo Weekly Report* 14/2003, 2-8 April 2003, just like the Assembly’s “Resolution” on the “Values of the Liberation War of Kosova” of 15 May 2003; cf. Franklin de Vriese, *Building Parliamentary Democracy in Kosovo*, in: *Security and Human Rights* 2/2008, pp. 121-136, here: p. 130.

116 Cf. Santiago Torres Bernárdez, *Subsidiary Organs*, in: René-Jean Dupuy (ed.), *Manuel sur les organisations internationales*, The Hague 1988, pp. 100-146, here: p. 141. For a comprehensive discussion of the legal considerations relating to the delegation of powers by the Security Council to the Secretary-General to establish UN peacekeeping forces as subsidiary organs, and the limitations to their exercise by the Secretary General, cf. Danesh Sarooshi, *The Role of the United Nations Secretary-General in United Nations Peace-Keeping Forces*, in: *Australian Yearbook of International Law* 1999, pp. 279-297.

117 Chapter VIII of the Constitutional Framework, cited above (Note 71), gave the SRSG the (“reserved”) power to dissolve the Kosovo Assembly and to call for new elections “in circumstances where the [PISG] are deemed to act in a manner which is not in conformity with UNSCR 1244 (1999), or in the exercise of the SRSG’s responsibilities under that Resolution” (section 8.1.b). The Framework also defined it as outside the responsibility of the PISG to exercise “powers of an international nature in the legal field” (section 8.1.c).

118 Para. 5 of the UNMIK-FRY Common Document of 5 November 2001. See also the Statement by the President of the Security Council welcoming on behalf of the Council the signing of the Common Document, S/PRST/2001/34, 9 November 2001.

It is therefore clear that the SRSG would have been under an obligation, especially when under an instruction of the Secretary-General, to annul the declaration of independence had he considered it in breach of Resolution 1244, from which he derives his own mandate, in accordance with past practice. No such instruction appears to have been given. It is also of considerable relevance that the Security Council has not – after the conclusion of UNOSEK’s and the Troika’s efforts,<sup>119</sup> and even within a year of the occurrence of the independence declaration – pronounced itself on the issue in accordance with Articles 24.1 and 34 of the Charter, including “in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”.

Since the only authority that could have declared, within Kosovo’s normative order, the declaration null and void remained silent on the matter – despite the formal request of Serbia to the UN Secretary-General<sup>120</sup> – its omission of annulment can be interpreted as tacit consent to or, at a minimum, acquiescence in the course of action taken by Kosovo’s legislature.<sup>121</sup> It may therefore be presumed that the Declaration was passed in line with Resolution 1244.

### *Challenges to Serbia’s Position*

Whichever side of the status debate one finds oneself on, Serbia’s proposal to vest Kosovo with “more than autonomy, less than independence” never seemed to gain support among the powers (excluding Russia) that were effectively arbitrating Kosovo’s fate. Indeed, the forcible reincorporation of two million hostile Kosovo Albanians into a 7.5 million-strong Serbian polity had always appeared to them as running against the latter’s true interests. What should we have made of Serbia’s own argument that it was entitled to the protection of its territorial integrity under international law? Could one

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119 As mentioned earlier, all five draft resolutions tabled in the Security Council during June and July 2007 had to be withdrawn following the credible threat of a Russian veto.

120 A *Decision on the annulment of the illegitimate acts of the provisional institutions of self-government in Kosovo and Metohija on their declaration of unilateral independence* was adopted by the Serbian government on 14 February 2008. It demanded that the UNMIK SRSG “undertake all actions at his disposal under [...] Resolution 1244 [...] in order to prevent violation of the United Nations Charter and [...] Resolution 1244 and immediately annul all the acts and actions whereby the Province’s unilateral independence is illegitimately declared”. See also Foreign Minister Jeremić’s Address to the OSCE Permanent Council on 19 January 2008: “We have called on the Secretary-General [...] to instruct his Special Representative to our southern province to make swift and full use of his reserved powers, as enumerated in the Constitutional Framework [...] by proclaiming this illegitimate declaration of independence null and void. He must also be instructed to dissolve the Kosovo Assembly on the grounds that declaring independence is not in conformity with Resolution 1244.” Speech reprinted in *Security and Human Rights 2/2008*, pp. 116-120, here: p. 117.

121 Cf. also Wolfgang Benedek, *Implications of the Independence of Kosovo for International Law*, manuscript to be published in: Isabelle Buffard, et al. (ed.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, The Hague 2008.

not give credence to the Serbian government's intention to invite its estranged Kosovo Albanian cousins back into its state, based on equality and non-discrimination, in recognition of their cultural identity, and on the basis of full respect for their internal autonomous arrangements? Could the pre-requirements for the true need to secede have faded away with the evolution of events and the passage of time, as Judge Higgins once suggested?<sup>122</sup> After all, NATO's bombing campaign relieved the Kosovo Albanian population from the threat of persecution and, possibly with it, weakened their claim to external self-determination.<sup>123</sup> Notwithstanding its stale references to the inviolability of its borders, Serbia was never able to make a persuasive case that a population should be part of and pay allegiance to a state that has treated them the way it had. Beyond the reliance on the notion of remedial secession that may only tentatively reflect an international legal standard, Serbia's argument was open to challenge on two grounds. The first is historical, the second concerns more recent developments.

The protracted history of decolonization – from which the idea of remedial action springs – suggests that historical patterns of injustice have promoted corresponding remedial measures in the sphere of self-determination. It allowed constitutional processes to be judged retrospectively in light of self-determination values.<sup>124</sup> By the same token, remedies to redress historical violations like those addressed by the ministers of the Contact Group<sup>125</sup> are to be developed in accordance with present-day aspirations of the aggrieved group.<sup>126</sup> This line of reasoning was already established by the three jurists who had to evaluate the self-determination claim of the Åland Islanders in 1920. They concluded that the “fact that Finland was eventually reconstituted as an independent State is not sufficient to efface the conditions which gave rise to the aspiration of Åland Islanders and to cause the conditions to be regarded as if they had never arisen”.<sup>127</sup>

Serbia's argument was, secondly, subject to challenge on grounds of its current constitutional choices. Had Serbia been serious in its intention to

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122 Judge Rosalyn Higgins, *Self-determination and Secession*, in: Julie Dahlitz (ed.), *Secession and International Law*, The Hague 2003, pp. 21-38, here: p. 37.

123 The argument is neatly summarized by Srdan Cvijić, *Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo*, in: *German Law Journal* 1/2007, pp. 57-79, here: p. 74: “Milosevic's regime certainly misgoverned Kosovo, but one can justifiably ask why the Serbian democratic government should have to pay the price for the abuses of Milosevic's authoritarian regime.” With reference to the “historical nature” of abuses and the high threshold at which a denial of internal self-determination activates the rights to secession, the claim is repeated by Morag Goodwin, *From Province to Protectorate to State?*, in: *German Law Journal* 1/2007, pp. 5-7.

124 Cf. S. James Anaya, *Indigenous Peoples in International Law*, New York 2004, p. 107.

125 Cf. *Statement by the Contact Group on the Future of Kosovo*, cited above (Note 21).

126 Cf. also Christian Tomuschat, *Ein anerkannt zerrüttetes Verhältnis* [A relationship whose breakdown has been acknowledged], in: *Tagesspiegel*, 24 February 2008.

127 Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question, in: *League of Nations Official Journal Special Supplement* 3, October 1920, p. 12.



grant “Kosovo and Metohija” the widest possible range of autonomous rights within its state, as announced by then Prime Minister Koštunica in the wake of the status process,<sup>128</sup> it could have entrenched them in its 2006 constitution. But it did nothing of the sort. The new constitution, whose preamble defines Kosovo as integral part of Serbia, provides for the possibility of autonomous rights being severely restricted, by means of ordinary legislation, in the fields of territorial boundaries, human and minority rights, the management of provincial assets, levels and kinds of central taxation, etc. Its contents further convinced the West that Serbia could not at this stage genuinely commit to a comprehensive autonomy regime. In an apparent tangent to the second Commission that addressed the Åland Island question in 1921,<sup>129</sup> the Council of Europe’s Venice Commission opined in 2007 that Serbia’s constitution “does not at all guarantee substantial autonomy for Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realized or not”.<sup>130</sup>

### Conclusion

One of the key suggestions in Special Envoy Ahtisaari’s 2007 proposal consisted in endowing Kosovo with the capacity to enter into contractual relations with other subjects of international law.<sup>131</sup> The proposal thus attempted to expand upon a presumed capacity that is traditionally seen as a consequence of statehood.<sup>132</sup> While remaining silent on the question of “external independence”, the settlement proposal provided one of its key constitutive building blocks.<sup>133</sup>

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128 Cf. *Statement by the Prime Minister of the Republic of Serbia at the Security Council Meeting on 24 October 2005*, p. 6: “[...] our political efforts will be directed to defining a specific and viable form of substantial autonomy for Kosovo and Metohija, whereby legitimate interests of Kosovo Albanians will be fully acknowledged”.

129 “The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees”. *Report of the Commission of Rapporteurs Presented to the Council of the League*, League of Nations Document B.7.21/68/106, 16 April 1921 (emphasis added).

130 European Commission for Democracy through Law, *Opinion on the Constitution of Serbia*, No. 405/2006, 70th Session, Venice, 17-18 March 2007, para. 8.

131 The right to negotiate and conclude international agreements and to seek membership in international organizations features among the proposal’s General Principles (Article 5). Indeed, the proposal expected Kosovo to take all necessary measures towards ratifying the European Convention of Human Rights (ECHR) and its Protocols (Article 2.1). The first in a series of Commission/Council papers on the future EU’s role in Kosovo already advocated that a post-1244 Kosovo would be endowed with treaty-making powers under a settlement, so that it could benefit optimally from its involvement in the Stabilization and Association Process; cf. *The Future EU Role and Contribution in Kosovo*, cited above, (Note 53), chapter 4.

132 Cf. Crawford, *The Creation of States in International Law*, cited above (Note 96), pp. 61-62.

133 Other building blocks included: the right to establish a security force under the auspices of the International Military Presence (Annex VIII, Article 5); the assumption of external

There are a number of ways to make sense of current developments, the first of which may be termed an “anti-Franckian” reading of events.<sup>134</sup> Should one give credence to a claim formulated on grounds of remedial secession, Kosovo’s sovereignty may be seen as the nadir of a development that has attempted to detach the essence of self-determination from its territorial significance and has to that end advocated the mediation of such claims with reference to broad participatory rights and, more generally, to a presumed “right to democratic governance”. Following Kosovo’s achievement of independence, the territorial aspects of a claim to self-determination will appear over-pronounced. If the status process does leave a legacy in international conflict management, it will be one of maximalist positions along the following lines: “Why shall we, as a community, accept an offer of self-government and a decent share in *imperium* in the common polity, if we can have *dominium* all along?” Whether those maximalist claims will eventually be recognized, is, of course, an altogether different question, which depends on the extent to which the specificity of the Kosovo situation will resist, or be amenable to, transformation into precedent.

Irrespective of whether Kosovo will be containable in a secure box marked “*sui generis*”, or serve as a precedent for the resolution of “frozen conflicts”, or as an inspiration for a wider group of disgruntled minorities, the status process has already left a number of reference points for the future resolution of territorial conflict. The statements of the Contact Group clearly hinted at the Federal Republic of Yugoslavia’s minimal state responsibility for policies affecting its citizens. In this light, the notion of supreme state authority appears severely circumscribed by performance criteria. Such minimal responsibility places an obligation upon the state to ensure the physical security of the political community. This in turn can be understood to limit the state’s monopoly on the legitimate use of force domestically. An understanding of sovereignty as reflecting performance criteria implies that a target state may forfeit its jurisdiction over territory when it does not meet the latter.

Overall, the effective abrogation of Serbia’s residual title over the territory, if it were to occur, would enrich the notion of an international authority that assumes the role of a supreme arbitrator in attempting to resolve a territorial dispute. International law has clearly come a long way since Sole Arbitrator Max Huber’s enunciation, in 1928, of the importance of the effective display of state activities for the determination of sovereignty over a terri-

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debts (Annex VI); air space control (Annex VIII, Article 7); the right to have a flag, seal, and anthem (General Principles, Article 1.7); the right to obtain Kosovo citizenship (Annex I, Article 1.6); the obligation to invite an international mission (General Principles, Article 1.11). In addition, the proposal provides no restrictions as to the conduct of foreign affairs, which suggests that it be treated as a competence to be transferred to local authorities in due course.

134 Cf. e.g. Thomas M. Franck, Legitimacy and the Democratic Entitlement, in: Gregory H. Fox/Brad R. Roth (eds), *Democratic Governance and International Law*, Cambridge 2000.

tory.<sup>135</sup> International authority has acted, in 1966,<sup>136</sup> as arbiter between two similar claims: one, brought forward by the Mandatory, South Africa, who, having disavowed the promise of promoting the “sacred trust”, intended to prolong its territorial control; and a second claim by a different, injured (and putative) entity, the “people” of South-West Africa, who looked to the international community for assistance in their progress towards the goals for which the “sacred trust” was instituted and, more concretely, towards the fulfilment of the permanent promise of popular sovereignty.

If anything, the resolution of Kosovo’s status has to be seen in the context of a decreasing reliance on the international norm that has protected the territorial integrity of established states ever since the Committee of Jurists concluded in 1920 that the Åland Island question should not, under public international law, be left entirely to the domestic jurisdiction of Finland. The jurists introduced the term “transitional situation” to deal with circumstances of transformation and dissolution of a state in which the right to dispose of territory may be limited, and in which the principle of self-determination “may be called into play”.<sup>137</sup> Consequently, the Commission found that the Council of the League of Nations was competent to make recommendations, which it deemed just and proper in the case.<sup>138</sup>

This development may, however, also be considered in terms of practice before the advent of the system of collective security and corresponding institutions claiming normative competencies with a global reach. In the long story of colonial expansion, the task of jurists had been to develop a taxonomy according to which every entity encountered in the scramble for territory could be properly categorized. The legal capacity of each entity was to be “objectively” established by the “degree of civilization” it had attained before the metropolitan power bestowed recognition upon it.<sup>139</sup> The methodology of standardizing progress along an axis of “civilization” was carried over into League of Nations practice as colonial territories were transformed into sovereign states under the protection of the Mandate system and later the Trusteeship system.

Today’s organized international community has conscientiously built upon this practice. The “move to institutions” helped expand legal and ad-

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135 Cf. *Island of Palmas case (Netherlands, USA)*, in: *Reports of International Arbitral Awards*, 4 April 1928, pp. 829-871, here: p. 831.

136 Cf. United Nations General Assembly, A/RES/2145 (XXI), 27 October 1966, UN Doc. A/6316 (1966).

137 Cf. recently Oliver Diggelmann, *The Aaland Case and the Sociological Approach to International Law*, in: *European Journal of International Law* 1/2007, pp. 135-143, here: p. 137.

138 Cf. Markku Suksi, *Keeping the Lid on the Secession Kettle*, in: *International Journal on Minority and Group Rights*, 2-3/2005, pp. 189-226, here: p. 217. The solution found for the Åland Islanders by the Commission of Rapporteurs in 1921, i.e. that they should to conditionally remain under the sovereignty of Finland, does not distract from the findings above; as opposed to conditions prevailing in Kosovo in 1998/99, the Commission of Rapporteurs did not find evidence of any gross violations of the rights of Åland Islanders.

139 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2005, pp. 77-78, with reference to Westlake and Lorimer.

ministrative techniques so that they could operate and intervene in a way that does not merely assess but *transforms* the inherent capacities of an entity that exists in the twilight of international personality. The eventual marginalization of the Security Council in the management of Kosovo's status does not necessarily diminish this role, or precipitate a "crisis" of Article 24, which arrogates to the Security Council the "primary responsibility for the maintenance of international peace and security". Quite the contrary. The overarching leadership of the Security Council-mandated Contact Group provided an effective interface between unilateral temptation and multilateral commitment. Before Russia's isolation in this context became apparent and the interplay between the Security Council and the Contact Group reached a dead-end in July 2007, the latter had set remarkable standards for its involvement in self-determination issues. Its pronouncement that a settlement must be acceptable to the "people of Kosovo" was nothing less than revolutionary. Secondly, the Contact Group narrowed down the range of possible outcomes in negotiations and decided upon successive arrangements that would limit the future state's range of domestic competences. This further demonstrated that the concept of "earned sovereignty", emphatically postulated by some as a panacea to problems associated with self-determination, has not significantly influenced the way in which an entity may *itself* contribute to the finalization of its status. The ward, after all, may mature into statehood only by parental decision, not by reaching certain benchmarks.<sup>140</sup>

In this polyphonic narrative, in which participating voices vie for equality and independence, the case of Kosovo may well represent a *contrapunctus*: an event that stands out in its specificity, but which may in due course integrate itself into the laws of harmony and its progressions. For one, it demonstrated how ethical and moral imperatives, in an apparent tangent to the novel "responsibility to protect", may help a non-state territorial entity to emerge as a full-blown personality. Special Envoy Ahtisaari's report accompanying UNOSEK's *Comprehensive Proposal* of March 2007 neatly sums up the motivations underlying his recommendation – a *mélange* of (1) a recognition of past injustice; (2) the territory's protected status and the realities flowing from it; (3) the communal responsibility to thwart threats to international peace and security; and (4) the pursuit of all conceivable avenues that could have yielded a horizontal settlement in line with a traditional understanding of Article 2(7) of the UN Charter:

My recommendation of independence [...] takes into account Kosovo's recent history, the realities of Kosovo today and the need for political and economic stability in Kosovo. My Settle-

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<sup>140</sup> See the letter accompanying the *Report of the Special Envoy*, cited above (Note 51), here: para. 16, whose recommendation for Kosovo's independence does not, in any way, make reference to the efforts of local institutions and UNMIK's Kosovo Standards Implementation Plan.

ment Proposal [...] builds upon the positions of the parties in the negotiation process and offers compromises on many issues to achieve a durable solution.<sup>141</sup>

The recognition of Kosovo's statehood by a large "coalition of the willing" in the aftermath of Kosovo's declaration of independence – which remains unchecked by the UNMIK SRSG – confirmed what had long been conventional wisdom: that Resolution 1244 was no longer a guarantee but had rather become an obstacle to the maintenance of international peace and the security of the region. The international community's support of Kosovo's aspirations transformed it from a territory under international administration into a "state *in statu nascendi*". Not only was this the most pragmatic course of action available.<sup>142</sup> It must also be seen from the vantage point of modern international law's devotion to furthering social goals and the current needs of present-day society – a principal trait which, in the tradition of American International Law, has been termed the "sentiment of solidarity".<sup>143</sup> Indeed, it is extraordinary to observe that a policy stratagem that sought to achieve regional security and stability increasingly became a vehicle for coalescing international concern for the essentially autonomous character of local government structures – a concern that, via a messy chain of bilateral recognitions, may extend to the point of enjoining a territorial entity to yield sovereignty. In the case of Kosovo, considerations of morality were clearly injected into the process by cosmopolitan organizations, which, by recognizing the collective desire of a political community to withdraw from the constitutional authority of a state, subscribed to a theory of international law based on principles of justice.

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141 *Report of the Special Envoy*, cited above (Note 51), here: para. 16.

142 For this heightened sense of pragmatism, cf. Special Envoy Ahtisaari's final report, which proclaims that "economic development in Kosovo requires the clarity and stability that only independence can provide [...] Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for its actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk", *ibid.*, paras 9 and 10.

143 Cf. Alejandro Alvarez, Latin America and International Law, in: *American Journal of International Law* 3/1909, pp. 269-353, here: p. 270.