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Kosovo's Independence from the Perspective of the Right to Free Determination

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Summary

The political situation in Kosovo grew more complicated as the deadline approached for agreeing on a statute to define its future. First, Serbia and Russia managed to delay the presentation of the statute from November 2006 to February 2007, arguing it might influence the Serbian elections in January 2007. But once the draft by the UN special envoy Martti Ahtisaari was unveiled on 2 February 2007, both the new Serbian parliament and Russia rejected it outright, on the grounds that it granted *de facto* independence to Kosovo. The rest of the parties involved were divided. While a diplomatic troika composed of the US, Russia and the EU worked to bring the Serbian and ethnic Albanians of Kosovo towards a shared interpretation of Ahtisaari's proposals, the different positions became more radical. Intense debate is guaranteed because whatever solution is agreed for Kosovo's status will serve as a precedent for similar cases in Europe and elsewhere.

On the one hand, Russian opposition is blocking progress on a decision in the UN Security Council, the Contact Group and the G-8, which played a mediating role in 1999. On the other hand, Serbia refused to give up a province that International law recognises as its own, even though the members of the Quintet have tried to persuade it to stop resisting a *fait accompli* in exchange for being able to participate in NATO's Partnership for Peace and join the EU. Meanwhile, after winning the elections in November 2007, the government of Kosovo threatened to make a unilateral declaration of independence that would satisfy its grassroots supporters. These days, the backers of that independence –the US and most members of the EU– are trying to come up with a formula that would allow Kosovo to fit into the international community and let the latter 'supervise' Kosovar independence.

This Working Paper analyses Kosovo's independence in terms of the right to self-determination. The problem is part of a debate over whether a right conceived for colonial peoples can be applied to so-called national peoples. While the former are recognised as having this right –external self-determination– the latter have only been recognised as having the right to autonomy, or internal self-determination, which keeps them from being persecuted or excluded from the government. A lack of this autonomy is what prompted NATO to bomb Serbia into granting it. The proposals of the Rambouillet Conference, the Kosovo Declaration and Resolution 1244 of the UN Security Council call for autonomy within the Yugoslav state, now Serbia. However, a legal solution for the status of Kosovo is hardly compatible with a political situation in which Serbia has lost all ability to exert influence over its own territory, the international community wants to shed this capacity as soon as possible, minority Serbs refuse to assume it and the ethnic Albanian majority in Kosovo will settle for nothing short of unconditional independence.

This Working Paper evaluates all the legal and political options for ending this institutional limbo, both from the point of view of international law and the proposals made by the special envoy Ahtisaari. The analysis shows the utter clash between law, which backs the position of a democratic Serbia granting Kosovo autonomy that borders on independence, and politics, in which the realist perception of the US and most EU members that the Albanian majority in Kosovo cannot stand being part of Serbia inclines those countries to yield to secessionist pressure. Finally, we will look at the options that would arise from Kosovo declaring independence and for its international recognition, and the applicability of Resolution 1244 to the international presence in Kosovo, as changing it seems unfeasible due to opposition from Russia.

The Right of Self-determination

It is clear that the principle which establishes the right to free determination, applied extensively and intensively to colonial peoples since the 1960s, has become the norm in positive international law. Indeed, the norm and customary, because it brings together the two elements necessary for something to become a custom: numerous UN resolutions adopted unanimously, with no votes against or by wide margins on specific cases and on problems or approaches to the issue; and the practice of States with colonies to abide by these resolutions and decolonise their possessions. The second element is the incorporation of some of the dispositions stemming from the right to determination into international treaties that are universally 'consented to'. Taken together, these facts show the existence of a practice which is general, uniform and constant (material element) and carried out in the belief that it is legally mandatory (element of spirit, or *opinio iuris*). On the one hand, an interpretation of this nature is boosted considerably because it is backed by a broad majority of the legal community which has analysed this practice. Meanwhile, and above all, the International Court of Justice has ratified the legal and customary nature of the right of colonial peoples to free determination.[1]

What is more, today no one doubts that this norm is part of imperative international law, as it is of fundamental importance for the international community as a whole. The ICJ and the International Law Commission have stated so clearly.[2] Among other consequences, this means that a grave violation of the norm means the perpetrator will be held responsible as per the *Draft Articles on State Responsibility for Internationally Wrongful Acts*, which were approved by the Commission in August 2001 and endorsed by the UN General Assembly in December of that same year[3] for those who commit such illicit acts.[4]

Of course, there are recent elements which raise the question of whether the norm that confirms the right of colonial peoples to free determination is losing steam. The resistance of some states, apparently interested (as in the case of the US and France) in seeing that free determination not be applied to the Western Sahara in the same way it has been applied elsewhere since 1960, is not the only source of frustration. One can also mention the incongruence of the ICJ in describing this principle, in the *East Timor case* (1995), as an *erga omnes* obligation but then not drawing the pertinent procedural consequences;[5] and possibly others, connected to 'modulations' introduced at the last minute in the draft articles that the International Law Commission had approved in relation to crimes against peace and the safety of humanity and in relation to the responsibility of the State for internationally illicit acts.[6]

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[1] Consultative ruling of 21 June 1971, issue of Namibia, paragraph 52 (*CIJ Recueil 1971*, p. 31); consultative ruling of 16 October 1975, issue of Western Sahara, paragraphs 54-58 (*CIJ Recueil 1975*, p. 31-33).

[2] Sentence of 5 February, 1970, paragraphs 33-34, issue of Barcelona Traction, *CIJ Recueil 1970*, p. 32; sentence of 30 June 1995, paragraph 29, issue of East Timor, *CIJ Recueil 1995*, p. 102. As for the International Law Commission, commentaries 4 and 5 on article 40 of its draft articles on state responsibility for internationally wrongful acts, *Report of the ILC on its 53rd period of sessions (23 April to 1 June, and 2 July to 10 August 2001). Official Documents of the General Assembly, 56th period of sessions. Supplement nr 10 (56/10*), New York, 2001, p. 306-307.

[3] Resolution 56/83, 12 December 2001.

[4] For a detailed analysis, see C. Gutiérrez Espada (2005), *La responsabilidad internacional (consecuencias del hecho ilícito)*, Diego Marín Librero-Editor, Murcia.

[5] *Vid*. C. Gutiérrez Espada (2002), '*¿Actio popularis* en Derecho Internacional?', *Estudios de Derecho Internacional en Homenaje al Profesor Ernesto J. Rey Caro*, Editorial Marcos Lerner-Editora Córdoba, editing by Drnas Zlata-Lerner Marcelo and coordination by Drnas Zlata, Córdoba (Argentina), volume I, pp. 568 and ff.; Id., *La responsabilidad*… cit., pp. 155 and ff.

[6] P. Andrés Sáenz de Santamaría (1997), 'La libre determinación de los pueblos en la nueva sociedad internacional', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, I, pp. 160-165.

Given what appears to be the politicisation and wearing out of the principle, what we are asking is if this is going to have an effect on the application of the principle (the future of the norm is at stake) to other peoples that are seeking it.

The Right of What Peoples?

Are there peoples other than colonial ones? The answer is yes, of course. These would be those groups which live within a sovereign and independent state but stand apart from the rest of the population, or from the rest of its peoples, if there are any, because of their language, race or religion. These are unifying elements which have instilled in this Group, or most of it, a feeling of having 'their own personality', a feeling of being a nation. They can basically be divided into two groups: one that draws its roots from the past, in history (these are indigenous peoples); another looks to the future (national peoples). We will not address the case of *indigenous peoples* because the dispute surrounding them is more concrete, different from that of other peoples we will look at and, perhaps, less objectively important, but mainly because Kosovo is not one of them. However, we might recall that Spain recently joined the Convention on Indigenous and Tribal Peoples in Independent Countries (1989). This convention addresses and presents a basic legal status for this kind of people. It recognises the 'aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live'.[7]

International law grants national peoples living in a sovereign state the right to free determination, but with content different to that of colonial peoples:

- The law grants these national peoples, if they so desire, independence. They can fight, and both request and receive help from friendly States in that fight, if they are denied the right to exercise their independence. For some, this can be summarised by saying the right of free determination assures colonial peoples *external self-determination.*

- The right to free determination of non-colonial, national peoples protects them from being excluded from the government of the State or persecuted for reasons of race, creed or colour. Therefore, they have neither independence[8] nor an autonomy arrangement but rather the right to be treated strictly as equals alongside the rest of the population of the State. We feel the term is wrong, but some say that national peoples living in a sovereign state have the right to *internal self-determination* but not external self-determination. If the Belfast peace accord (1998), which seeks the reconciliation of the two Irelands can be said to have had a certain success, it is due precisely to the fact that it establishes the full exercise of Northern Ireland's right to *internal* self-determination, but in no way the right to external self-determination.[9]

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[7] Paragraph 5 of its Preamble (Convention number 169 of the International Labour Organisation, signed in Geneva on 27 June 1989 and ratified by Spain on 29 January 2007, *BOE* 8/III/1989). With regard to the current situation of indigenous peoples, see S. Torrecuadrada García-Lozano (2001), *Los pueblos indígenas en el orden internacional*, Dykinson, Madrid 2001; J.D. Oliva Martínez (2003), *El Fondo para el Desarrollo de los Pueblos Indígenas de América Latina y el Caribe*, Foro Indígena, La Paz (Bolivia); F.D. Mariño Menéndez and J.D. Oliva Martínez (eds.) (2004), *Avance en la protección de los derechos de los pueblos indígenas*, Madrid.

[8] We are not the only ones: a majority doctrine based on the practices of States is against a right to secession of non-colonial peoples under Resolution 2625 (XXV) (*vid. ad ex*. A. Cassese (1996), *Self-determination of Peoples. A Legal Reappraisal*, Grotius Publications, Cambridge University Press, Cambridge, 2nd printing, p. 123-124; P. Andrés Sáenz de Santamaría (1997), 'La libre determinación...' cit. (note 4), p. 187; A. Remiro Brotons (2001), 'Desvertebración del Derecho internacional en la sociedad globalizada', *Cursos Euromediterráneos Bancaja de Derecho Internacional*, V, p. 110-120; M. Eudes (2006), 'Retour sur une reussite passée inaperçue: L'Accord de Belfast et la nouvelle lecture du droit à l'autodétermination', *Révue Générale de Droit International Public*, nr 3, p. 633 and ff.; and A. Mangas Martín (2007), 'El plan Ibarretxe se estrella contra el Derecho internacional', *El Mundo*, 10/X/2007.

[9] *Vid*. Eudes (2006), cit., p. 631-646.

Having said that, we must acknowledge that there have been countries in Europe in which peoples who spent decades living in a sovereign State (Yugoslavia) used force to break their links with it and are today sovereign, independent states themselves. This raises the question of whether international law is changing with regard to this norm and its application to national peoples that form part of a State. We do not believe that the international recognition which some countries granted so quickly to Croatia and Slovenia had anything to do with wanting to apply the right of self-determination to those peoples from a strictly legal standpoint, as was the case with colonial peoples. Rather, it was politics and pragmatism at work.[10]

But in any case there is a phenomenon that demands greater attention and is directly related to our question because Kosovo was –and still is– one of the peoples of Yugoslavia. Because of those people and what they endured, NATO went to war with Yugoslavia in 1999.

The Status Agreed for Kosovo in 1999

The war in Kosovo and its corollaries served as an important warning that the international community should not dismiss the presence amongst us once again of the spectre of nationalism. We will discuss the importance of finding once and for all a clear and firm legal answer to it on the basis of reformulating, if necessary, the principle of free determination of peoples.

The 'Kosovo war' stems from the desire of self-determination of the Kosovar people, who were repressed by the State of which they were part. Whereas for Professor Ghebali the affair began in 1989 when the Belgrade government revoked (on 23 March) the statute that granted autonomy to Kosovo,[11] for the man who at the time was the international community's representative for Bosnia-Herzegovina the issue was also clear:

'Kosovo is behind the first violent repression of a nationalist demand – the Kosovar demonstration seeking status of a Republic in 1981 (...) The (other) two big events in the Kosovo problem (are) July 1990 and September 1991 (elimination of political institutions in the province and proclamation of a 'Republic of Kosovo') and February 1996 (the first attacks by the Kosovo Liberation Army (ELK)'.[12]

Martti Ahtisaari, the UN Secretary General's special envoy for Kosovo, acknowledged in his Report (2007) that the seed of this conflict lies in 'Milosevic's policies of oppression' and his 'reinforced and brutal repression'.[13]

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[10] 'In order to try to control this new area of political instability' (E. Chadwick, *Self-determination, Terrorism and International Humanitarian Law of Armed Conflict*, M. Nijhoff, The Hague-Boston-London, 1996, p. 61); Antonio Cassese feels the European community encourages the recognition of former Yugoslav republics only 'when it becomes clear that the process of secession is unstoppable', which means therefore 'it can be described as a revolutionary process which took place beyond the rules of positive international law that are in force' (*Self-determination of Peoples. A...* cit. [note 8], p. 360 and 270); and with terminology that is essentially analogous, F.Mª Mariño Menéndez (1996), 'Naciones Unidas y el derecho de autodeterminación', in F.Mª Mariño Menéndez (Ed.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación*, Universidad Carlos III de Madrid-BOE, Madrid, p. 100-101; and P. Andrés Sáenz de Santamaría (1997) has referred to 'on-the-spot responses' among us, 'La libre determinación...' cit. (note 6), p. 179-182.

[11] V.-Y. Ghebali (1999), 'Le Kosovo entre la guerre et la paix', *Défense Nationale*, August-September, p. 63. And lest any doubt remains we refer to a statement written by a Serbian author who linked (and justified, it seems) the elimination of the territory's autonomy to the Yugoslav Government's goal of 'strengthening its sovereign rights over all of its territory' (R. Petkovic, 'Yugoslavia versus Yugoslavia', *European Affairs*, I, February-March 1991, p. 75).

[12] C. Westendorp (1999), 'Kosovo: las lecciones de Bosnia', *Política Exterior*, XIII, July-August, nr 70, p. 45.

[13] *Report of the Special Envoy of the Secretary General on Kosovo's Future Status (S/2007/168, 26 March, 2007)*, paragraph 6.

And what lessons are there to be learned from the Kosovo war in relation to the principle of the free determination of peoples? Our point of departure is the oft-repeated point that NATO attacked Yugoslavia because the government would not recognise a broad statute of autonomy for Kosovo within Yugoslavia as a sovereign state,[14] to the point where Belgrade had to yield on this point as a condition for NATO to stop bombing.

At the Rambouillet Confence, the Contact Group offered the two sides a 10-point plan that included these two clauses: respect for the territorial integrity of Yugoslavia and a high degree of autonomy for Kosovo.[15] Reluctantly, the two sides accepted these principles: the ethnic Albanians of Kosovo wanted independence, or at least a referendum on self-determination after a three-year transition period, but ended up signing the peace plan, and the Yugoslav government accepted autonomy for Kosovo but always in vague terms. In the end, Yugoslavia refused to sign the Rambouillet plan, rejecting some of its principles (the most important one was the presence in Kosovo of an international security force).

So NATO attacked, and made known it would continue to attack until Belgrade accepted the peace plan, which said that Kosovo would remain part of Yugoslavia but with a statute granting it broad autonomy. As events unfolded later it was clear those two points were present throughout the crisis:

- At the NATO summit in Washington in April 1999, with the attacks under way, the *Kosovo Declaration* approved at the meeting offered an approximation of what would be the future status of the territory: to become a sort of 'protectorate' under international administration, then later 'as a region with 'substantial autonomy' within Yugoslavia'.

- On 3 May, 1999 the Belgrade government unveiled a four-point proposal to end the conflict. The third of these points called for the opening of 'a political process and the defining of a broad autonomy for Kosovo within the framework of Serbia, based on the principle of equality among all citizens and equality among national communities'.

- In the second week of May, the G-8, meeting in Bonn, presented a proposal to end the war in Kosovo. It called for the UN Security Council, which had nothing whatsoever to do with the NATO intervention, to approve a resolution with seven general principles. The sixth of these urged the opening of a 'political process aimed at establishing an interim political framework agreement which foresees considerable autonomy for Kosovo, takes into account the Rambouillet accords and the *principle of sovereignty and territorial integrity of Yugoslavia and the other countries of the region* [italics added], and the demilitarisation of the Kosovo Liberation Army'.

- On 10 June 1999 the Council approved Resolution 1244, by 14 votes in favour and with the abstention of China:

'under Chapter VII of the Charter of the United Nations, 1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2'.

[14] The preference for giving Kosovo autonomy as opposed to independence goes back several years, at least to 1994, and was the position of the United Nations, the OSCE, the Council of Europe and the European Union (*vid. ad ex* references and documents provided by J. González Vega (1999), 'La protección internacional de las minorías en Europa', *Cursos de Derechos humanos de Donostia-San Sebastián*, I, Universidad del País Vasco, p. 101).

[15] The other eight: a cease-fire in the territory, the start of peace talks between the two sides, agreement on a three-year transition period for Kosovo, no unilateral suspension or modification of said accord, respect for all national groups in Kosovo, free elections in the province supervised by the OSCE, amnesty for political prisoners and the presence of international security forces (a synthesis of the agreement ran in *El País* on 4/III/1999; also P.M. De La Gorce (1999), 'The secret story of the Rambouillet negotiations', *Le Monde diplomatique*, May, p. 16).

Annex 1 reproduces the Statement published by the chairman of the meeting of foreign ministers of the G-8, held at the Petersberg Center on 6 May 1999.[16] The statement's sixth principle is the one we have stated earlier.

The first question that arises from all of this is: in order to comply with the principle of free determination of peoples, does international law oblige Yugoslavia to grant a 'broad statute of autonomy' to one of its peoples? We all thought that in the case of non-colonial peoples (ones not subject to foreign occupation or a racist regime), the right of peoples to free determination only gave them the right to participate on equal terms in the running of the *res publica*, without discrimination on the basis of race, creed or colour. A State which respects this abides by international law in terms of the free determination of its minority peoples, under paragraph 7 of the principle of free determination of peoples in the Statement annexed to resolution. 2625 (XXV) of 24 October 1970.[17] It was practically repeated by Resolution 50/6 of 24 October 1995 of the General Assembly (Statement marking the 50th anniversary of the UN). A State thus sees its territorial integrity protected by this clause safeguarding against the possibility of secession.[18]

This kind of interpretation, which has been defended vigorously from the standpoint of legal doctrine,[19] seems to be confirmed by the Supreme Court of Canada in its statement on 20 August 1998 with regard to Quebec. This decision cites the passage of resolutions 2625 and 50/6 that are mentioned in this article, and accepts that peoples who do not suffer discrimination from the government and are represented in the same way as others that make up the State are thus enjoying the right to self-determination. The territorial integrity of the state is thus guaranteed. Therefore, this rules out a unilateral right to secession or independence, which would exist only in the case of colonial peoples or those suffering oppression (from a foreign military occupation or a racist regime) and, perhaps, peoples who are subjected to discrimination and are not represented in the government of the State without any kind of distinction.'[20] Professor Cassese says the safeguard clause that concludes paragraph 7 of the principle of free determination as spelled out in resolution

[16] On the same issue, *vid. ad ex.* 'Chronique des faits internationaux', under the direction of L. Balmond and PH. Weckel, *Revue Générale de Droit International Public*, p. 739 and ff.

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

[18] In its paragraph 1 on the issue of *peace*, the Declaration reaffirms the right of self-determination of peoples and repeats paragraph 7 of this principle in the Declaration from 1970 (*supra* earlier note), changing only the end: 'of a Government representing the whole people belonging to the territory without distinction of any kind'.

[19] Such as, without trying to be exhaustive, Cassese (1996), *Self-determination...* cit. (note 8), p. 119 and ff.; Mariño (1996), 'Naciones Unidas...' cit. (note 10), p. 105; J. Castellano (2000), *International Law and Self-determination*, M. Nijhoff, The Hague-Boston-London, p. 40.

[20] Supreme Court of Canada: Reference to secession of Quebec, August 20, 1998, paragraphs 126-139 (in *International Legal Materials*, XXXVII, 1998, nr 6, November, p. 1,371-1,374); note the doubts that the Supreme Court of Canada expresses with regard to the third case (see especially paragraphs 135 and 138 of its declaration, *ILM* cit, p. 1.373). On this decision *vid. ad ex***.** J. Rodríguez-Zapata Pérez (1999), 'Autodeterminación y Constitución', *Revista General de Legislación y Jurisprudencia*, III period, nr 1, January-February, p. 37-38, 43 and ff.; D.P. Haljan (1998), 'Negotiating Québec Secession', *Révue Belge de Droit International*, XXXI, nr 1, pp. 198-199); A.F. Bayefsky (2000), *Self-determination in International Law. Québec and Lessons Learned*, Kluwer, The Hague. It is well-known that the 'doctrine' established by the Supreme Court of Canada has been adopted by the Government in the so-called 'clarity law'. Doubts on the right to secession of 'peoples (who are) in independent States' show up even in some authors who have pointed out that the right of 'all' peoples to free determination is in some way an offshoot of the use of armed force as carried out by certain national liberation movements (such as E. Chadwick [1996], *Self-determination...* cit. [note 10], p. 61) or who are citizens of sovereign States which are very young, such as Croatia, which were part of Yugoslavia: thus Budislav Vukas says the principle of territorial integrity of sovereign and independent States must in principle be respected. He says this principle can be ignored in certain cases only 'if human rights and fundamental freedoms are violated, or the position of a people can be described as being under 'foreign domination', that is, under the domain of another people' (Budislav Vukas [1999], 'States, Peoples and Minorities', *Recueil des Cours*, 231, 1999-VI, Nijhoff, Dordrecht, p. 422-423).

2625 (XXV) requires three distinct conditions for a people living within a State to be able to make a legitimate claim to secession:

'Thus, denial of the basic right of representation does not give per se the right of secession. In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a possible solution within the existing State structure'.[21]

Notice, then, if this interpretation is correct, that international law does not appear to require States to grant any kind of 'autonomy statute', much less a 'broad and considerable one'; if this is true, is this content changing? If so, then, it should be perceived clearly and one must be alert to what happens in actual practice.

The case of Kosovo and its outcome seem to back up reductionist theses which questioned the recognition of a right to unilateral secession for minority peoples, even in the case where they are not represented with any kind of distinction in the Government of the State. The Supreme Court of Canada says it is 'not very clear that this third proposal currently reflects a standard that is well established in international law'.[22] Given the circumstances of the case, if the measures that the Milosevic regime took against the Kosovar people did not amount to treating them differently from the Serbs and alienating them from the Government of the State, what then should be done with a people for this condition to be considered applicable?[23] In this case shouldn't NATO have supported independence openly? Contrary to what some of us believed, does the right to free determination perhaps not carry with it a right to secession even in extreme cases?[24]

This is the conclusion to which the Kosovo issue leads, at least for some authors, who jump on the bandwagon to go against what has come to be known as the 'secession-remedy' hypothesis, which they believe is not admitted under positive law.[25] One must admit that many of us based our thinking on the idea that an interpretation of Resolution 2625 (1970) and later Resolution 50/6 (1995), favouring recognition of the right to secession for peoples within a Nation who are systematically and generally mistreated and alienated from public life,[26] is seriously called into question when in a case like Kosovo (Government of a Nation which imposes an utterly discriminatory regime on one of its peoples, fierce repression that borders on genocide, exhaustion of all attempts to reach a peaceful solution...), the Nations that decide to react against such a state of affairs run into an all-out defence of a status of autonomy for Kosovo but always as part of Yugoslavia. In light of this, Olivier Corten is right when he says this case '*constitue certainement*

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[21] E. Chadwick (1996), *Self-determination...* cit. (note 8), p. 119-120.

[22] Declaration cit., paragraph 135 (*ILA* cit., p. 1,373).

[23] C. Hillgruber does feel that the Albanian minority suffers persecution from the government as a people or ethnic group; and he is consistent with his conclusion, as he is among the few who say that on the basis of these circumstances Kosovo has the right to secede (C. Hillgruber [1998], 'The Admission of New States to the International Community', *European Journal of International Law*, 9, p. 509).

[24] *Vid. ad ex***.** C. Gutiérrez Espada (1995), *Derecho internacional público*, Trotta, Madrid, p. 212-213; B. Vukas (1999), cit. (note 20), loc. cit.; Th. Christakis (1999), *Le droit de l'autodétermination en dehors des situations de décolonisation*, La Documentation Française, Paris, p. 296 and ff.; G. Abi-Saab (1987), 'Cours Général de Droit International Public', *Recueil ds Cours*, 207 (VII), p. 402-406; E. Jiménez de Aréchaga (1978), 'International Law in the Past Third of Century', *Recueil des Cours*, 159 (I), p. 110.

[25] O. Corten (1999), 'A propos d'un désormais 'classique'*: Le droit à l'autodetermination en dehors des situations de décolonisation*, de Théodore Christakis', *Revue Belge de Droit International*, XXXII, nr 1, p. 340-344; expressing the same opinion, M.G. Kohen (1999), 'L'emploi de la force et la crise de Kosovo: Vers un nouveau désordre juridique international', *Révue Belge de Droit International*, XXXII, nr 1, p. 127-129.

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

un prècedent que témoigne de l'opposition des Etats à la consécration d'un nouveau droit à la 'secession-remède'.[27]

From this point of view, one might add that in any case, even if this latter thesis is accepted, NATO would not have been able to use it to justify its *direct armed intervention* against Yugoslavia with the argument that the legitimacy of peoples' fight and request for military assistance is based on the *right to self-determination*, as opposed to *legitimate defence*.[28]

After all that has happened, can there be anything less than independence for Kosovo? Is a statute possible that forces Serbs and ethnic Albanians to live together? It is not surprising that some sectors in the US and Europe are pressuring for recognition of independence: in the end, why should Kosovo be treated so differently from Bosnia or Macedonia?

In any case, international law has always been wary of granting independence. One might even say it has shown 'a natural tendency',[29] characteristic of a legal system created by sovereign States, to

[27] Corten (1999), 'A propos...', cit. (note 25), p. 344.

[28] When the UN General Assembly passes Resolution 1514 (XV) in 1960 and accepted the inalienable right of all colonised peoples to free determination, the Nations that emerged from that process of decolonisation worked tenaciously to establish this right in several ways. One of them, as far as they were concerned, involved admitting that, if a colonial people had the right to free determination, the administrating power's refusal to make this possible gave that people the right to fight through any means to achieve it, and to request and receive aid from friendly states for this purpose. In the Declaration of Principles annexed to Resolution 2625 (XXV) of 1970, a compromise formula was reached between countries of the Third World and 'socialist' countries, on the one hand, and the 'western' group, on the other, according to which: 'Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter' (principle of equal rights and self-determination of peoples, paragraph 5). In the case of the definition of aggression, annexed to Resolution 3314 (XXIX) of 14 December 1974 there is insistence on this issue with a disposition that I feel adds little that is new ('Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration. [article 7]). The conclusion on the current state of affairs might be the following: (1) *a minority sector of international society, which includes member of the former 'western' group,* agrees that under the right of free determination a colonial people can fight against the colonising State which represses its right through force and even request and receive help from third-party States, but this 'foreign' support cannot be of a military nature, neither direct nor indirect. Judge Egon Schwebel, an American who sat on the International Court of Justice, expressed this position perfectly: 'In other words, it is lawful for a foreign State or movement to lend moral, political o humanitarian assistance to a people fighting for free determination, but is not lawful for a foreign movement or State to intervene in that fight through force, or provide weapons, supplies or other logistical support during the prosecution of the armed rebellion. This is true regardless of whether the fight is proclaimed to prosecute the process of decolonization or against colonial domination'. Dissenting opinion, paragraph 180, issue of military and paramilitary activities in Nicaragua and against it [background], *CIJ Recueil 1986*, p. 351). (2) A majority of international society, including a certain sector of the 'western' doctrine, holds the view that political, financial and humanitarian support as well as indirect military aid (supplying of arms, use of territory, logistical support…) conform with contemporary international law. What is thus rejected is what had been the Third World's most radical thesis: that the fight of colonial peoples was one of legitimate defence and therefore, in application of collective, legitimate defence, friendly States could employ both direct and indirect force against the colonial State (A. Cassese [1985], 'Article 51', in J.P. Cot and A. Pellet (Dir.), *La Charte des Nations Unies. Commentaire article par article*, Paris-Brussels, p. 786-787). Prestigious international commentators from Third World countries have acknowledged at least that the thesis of legitimate defence in this issue is far from widely accepted: for example, G. Abi-Saab (1987), 'War of National Liberation and the Laws of War', in F.A. Snyder and A. Satharithai (Eds.), *Third World Attitude Toward International Law. An Introduction*, Dordrecht, p. 131 and 139 (and note 19 of this article).

[29] T.M. Franck (1998), 'Personal Self-determination: The Next Wave in Constructing Identity', *Legal visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, A. Anghi and S. Sturgess (Eds.), Kluwer Law International, The Hague-London-Boston, p. 256.

oppose the secessionist ambitions of nationalists. A world of 2,000 nation-States would probably not be a good place in which to live because it would not be particularly peaceful, and therefore governable, nor would it match the progress that we have achieved in the past 50 years towards democracy and respect for human rights; as democracy tends to flourish amid diversity, which requires mutual respect and accommodation of varying interests, the dissolution of plurinational States with their diverse units would make it difficult to reach this necessary balance. The comment by Franck[30] is very similar to the proposal of Carlos Westendorp[31] who said that, despite everything, it was necessary to push for autonomy rather than independence. The idea is to make a very careful effort to keep Kosovo from repeating a division into 'ethnic' political entities, which would be tantamount to saying Milosevic was right and confirm a separation between Serbs and ethnic Albanians, as if they could never again live in the same territory.

In any case it is worth pointing out that the autonomy envisioned at one point for Kosovo was very broad. More than one commentator in the press has said that the Rambouillet Accords granted Kosovo autonomy 'bordering on independence'. In 1997, the European Council itself reached the conclusion that the definition of 'a large degree' of or 'considerable' autonomy for Kosovo 'should aim for a fair legal framework going beyond the respect of minority rights'.[32]

The Independence of Montenegro is a Case of Secession (Constitutionally Allowed), Not one of Free Determination

On Sunday 21 May 2006 Montenegro held a referendum in which 55.5% of voters opted for independence and breaking away from Serbia. Turnout was a stunning 86.3% of registered voters. On 23 May, the Central Electoral Commission of Montenegro confirmed that the pro-independence forces had won, through a statement from its President, Frantisek Lipka. The percentage of 'yes' votes surpassed the minimum threshold of votes (55%) and turnout (more than 50%) which the EU had set as conditions for recognising the new State.[33]

With this decision Montenegro, which was part of the unified state of Serbia and Montenegro, gained independence as a sovereign State or, as some prefer to say it,[34] regained its independence. Montenegro, ruled by the Ottoman and Byzantine empires, gained *de facto* independence in the late 18th century and formally in 1878. It was in that year, at the Berlin Congress, in which the small Balkan principality was recognised by the major European powers of the day. In 1918, after World War I, it became part of the Serbian-Croatian-Slovene State, and later, in 1921, of the 'Country of the Slavs of the South', in other words Yugoslavia. And it was still part of it when, in the early 1990s, the Federal Socialist Republic of Yugoslavia fell apart with the successive independence of Slovenia, Croatia, Macedonia and Bosnia-Herzegovina.

With the independence of Montenegro, the disintegration of the former Yugoslavia is one step away from completion.[35] Still pending is the definitive status of Kosovo, an autonomous province of the former Republic and part of Serbia, even though since the war in 1999 it has been under international administration. One does not need to have read Nostradamus to see that the issue we

[30] 'Personal self-determination...', cit., p. 255.
[31] 'Kosovo: Las lecciones de Bosnia', cit. (note 12), p. 55.
[32] Conclusions of the European Council of 29 April, 1997, *Bulletin of the European Union*, 1997, nr 4, p. 146 (cursive in the text is ours).
[33] Spanish daily *El País* of Tuesday, 23/V/2006 (*http://www.elpais.es/internacional.html*), and its print edition of Wednesday 24/V/2006 (p. 32-33).
[34] For an interesting analysis of the process that led Montenegro to independence and of its consequences see María José Cervell Hortal (2006), 'Montenegro: bienvenido Estado número 192', *Revista Española de Derecho Internacional*, LVIII (2006), nr 2, p. 1057-1065.
[35] The report of the Special Envoy for Kosovo uses very similar terms ('the conclusion of this latest episode of the dissolution of the former Yugoslavia…', S/2007/1968 cit. [note 13], paragraph 15 *in fine*).

are commenting on favours those in Kosovo who want to break away from Serbia. But we shall come back to this later on.

Montenegro had been trying for years to gain full independence. But the decisive moment came on 26 October 2001 at a summit between the Serbian and Montenegrin leaders. The people with political and legal decision-making power reached the conclusion that the countries' positions were not compatible, and there was no avoiding a referendum in Montenegro on whether to remain within a unified State. The EU tried to prevent yet another secession from what remained of the former Yugoslavia. The EU wanted to halt the process of disintegration once and for all. The idea was not just to avert new sources of instability in the region, but also to avoid calling into question the delicate status of Kosovo, the hornet's nest which the international community was just barely managing to keep calm.

The EU's top official for foreign and security policy, Javier Solana Madariaga, took an active role in the issue by proposing an agreement between Serbia and Montenegro that would preserve the federal union between the two republics. It should come as no surprise that once this accord was signed the European Council 'welcomed the agreement reached in Belgrade on 14 March on the principle of a single constitutional arrangement for Serbia and Montenegro'.[36]

So, on 14 March 2002 an Agreement in Principle on Relations between Serbia and Montenegro within the Union of a State[37] was signed in Belgrade by the President of the Federal Republic of Yugoslavia and its Deputy Prime Minister, by the President of the Republic of Montenegro and the Prime Ministers of Serbia and Montenegro. Solana served as a witness. Yugoslavia became be known as Serbia and Montenegro, comprising both States, which are so described, and the autonomous Serbian provinces of Voivodina and Kosovo. A very simple, shared structure was created, and one highlight was the importance attached to economic issues and the EU's involvement in them. The agreement called for a single market between the two states that assured the free movement of persons, goods, services and capital. One basic goal was to adopt 'solutions that allow swifter integration in the European Union', which has the duty of 'helping with compliance' with the economic objectives of the accord and 'supervising the process in a regular way.'[38] The Belgrade Accord also foresaw the adoption of a Constitutional Charter which would be the 'highest-ranking legal text of the unified State of Serbia and Montenegro'.

One of the essential aspects of the Accord was what it called the *disposition on reconsideration.* This allows States belonging to the Union to 'begin proceedings for a change in the statute of the State, in other words, withdrawal from the unified State… once a period of three years has gone by' since the accord took force. This period ended in 2006. The disposition states that if Montenegro withdraws, the issue of Kosovo and the territory of the province will fall under the jurisdiction of and remain part of the successor state, which will be Serbia.

[36] European Council of Barcelona (15-16/III/2002), Conclusions of the Presidency (EU Bulletin 3-2002 [es], I.1 *http://europa.eu/bulletin/es/200203/*...]).

[37] Text in Spanish at *http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/ES/declarations/73448.pdf* . A commentary on it by Mª.I. Torres Cazorla (2003), 'El último cambio de Yugoslavia: de la República Federativa de Yugoslavia [Serbia y Montenegro] a la Unión de Serbia y Montenegro', *Revista Española de Derecho Internacional*, LV, nr 1, p. 487-492.

[38] The European Commission prepared a working paper spelling out the reforms that both States had to carry out in order to join the EU. (Commission Staff Working Paper [2005], *Report of the Preparedness of Serbia and Montenegro to Negotiate a Stabilization and Association Agreement with the European Union*, Brussels, 12/IV/2005, SEC, 478 final).

In January 2003 the *Constitutional Charter of the Union of Serbia and Montenegro* and the *Law on Implementing the Constitutional Charter of the Union of Serbia and Montenegro* were passed.[39] Article 60 of the Constitutional Charter included the *disposition on reconsideration* of the Belgrade Accord.[40]

Back in May 2005 the authorities in Montenegro decided to hold a referendum on seeking independence from the Union, and it was duly held on 21 May 2006. One factor which influenced the decision was the fact that Montenegro's prospects for joining the EU would be greater if it went its own way. Some economic figures confirmed this: for years, inflation in Montenegro had been below 3% (in Serbia it was around 15%), the unemployment rate in Montenegro (20%) was still 10 points below that of Serbia and Montenegro already used the euro as its currency (while Serbia uses the dinar).

Note, therefore, that Montenegro's withdrawal from the unified State of Serbia and Montenegro was an agreed one. It was allowed under the 'constitutional' texts of the Union, and in practice it unfolded in line with the legal procedures stipulated in the internal law of the State of which it was a part. This explains why the President of the unified State, the Serbian Boris Tadic, upon learning from the electoral commission that the pro-independence camp had prevailed, quickly put out a statement saying he accepted the results and would make good on a promise to be the first leader to visit Montenegro to congratulate the winners.[41]

And Now What?: An Independent Kosovo?

Montenegro's secession might be used, incorrectly from our point of view, by 'nationalist' activists in the old Europe –including those of Spain– as a model to imitate and a sort of recognition of the right of all of them to free determination. But beyond this, the independence of this small country might turn into a torpedo that will inexorably end up aimed at the Kosovo water-line, the big pending problem of a dwindled and apparently still dwindling Yugoslavia. Kosovo has been in institutional limbo since 1999 because it is not in fact a province of anything, nor a sovereign state, and those who administer it do not want to call it a protectorate.[42]

From this perspective, four theoretical alternatives are being considered as to the future status of Kosovo:[43]

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[39] To see both texts, in Serbo-Croatian and an English translation, see *http://www.gov.yu/start.php?je=e8.id=34* (and *link pdf size* 532 Kb).

[40] The Constitutional Charter says: '*Upon the expiry of a 3-year period, member states shall have the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro. The decision on breaking away from the State union of Serbia and Montenegro shall be taken following a referendum. The law on referendum shall be passed by a member state bearing in mind the internationally recognized democratic standards. Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor. A member state that implements this right shall not inherit the right to international personality and all disputable issues shall be separately regulated between the successor state [note that its name, Serbia, has been mentioned] and the newly independent state. Should both member states vote for a change in their respective state status or for independence in a referendum procedure, all disputable issues shall be regulated in a succession procedure just as was the case with the former Socialist Federal Republic of Yugoslavia*'.

[41] *ABC*, Wednesday, 24/V/2006, p. 32.

[42] The terms within quotation marks come from J.F. Blanco Viñas, a member of the Spanish military who has served in Kosovo for some time (J.F. Blanco Viñas, *Kosovo, un status jurídico por resolver*, an unpublished research paper, Instituto Universitario Gutiérrez Mellado, Madrid, n.d., p. 109). The report by Ahtisaari also says that the status of Kosovo 'cannot remain in limbo' (S/2007/168 cit. [note 13], paragraph 4).

[43] Among others (*vid*. Blanco [s.f.], *Kosovo*... cit., p. 119-124).

(1) Turn it into another province of Serbia. According to some politicians and jurists (D. Cosic and A. Despic) the carrying out of administrative reforms with an eye to a new regionalisation of the State would allow the inclusion of Kosovo, divided into two regions (Kosovo and Metohija), as another Serbian province in which there would be special institutions to represent the ethnic Albanians. Neither Serbia nor the current Kosovo have accepted this idea.

(2) Grant Kosovo, as part of the Serbian State, a new statute of autonomy with more self-rule than that provided for in the 1989 arrangement. The leaders of Kosovo and its main political forces have rejected this option. They say they already had autonomy for a long time and it did not mean the Albanians saw their fundamental rights guaranteed.

(3) It was considered until quite recently –but as we shall the idea is now history– that Kosovo could be converted into a sovereign State within the Union of Serbia and Montenegro, which would then become the Unified State of Serbia, Montenegro and Kosovo. This solution might have pleased the international community, which worked so hard to keep intact the borders of the former Yugoslavia, but, aside from other considerations, the rupture of the Union as a result of Montenegro's independence has shot it down.

(4) The idea of independence for Kosovo seems to be gaining clear momentum. The ethnic Albanians of Kosovo want it and of course Serbia does not. Without a doubt, the alternative carries with it risks: new borders in the area and, even more seriously, the prospect of Kosovo merging with the motherland, Albania, which could trigger even greater destabilisation.

On the one hand, the recent secession of Montenegro stirs pro-independence sentiment in Kosovo and pushes it further away from Serbia. But at the same time it has an effect on the authorities in Belgrade: having lost everything, they are bent on winning this one last battle and keeping the province as a part of Serbia.

So at this point it is evident that one of the pending issues in the case of Yugoslavia is Kosovo. If Montenegro or Macedonia are independent today, why can't Kosovo seek the same status, given the fact that the dissolution of Yugoslavia, except in the case of Montenegro, was carried out through wars, pressure and other political elements that were outside the law? Thus is the sad dilemma of Kosovo: to be or not to be equal to the other peoples and territories of the former Yugoslavia. It comes as no surprise that from a legal and political standpoint this issue has been a focus of the international community since the war of 1999, even though, as we have stated, Resolution 1244 of the Security Council states that the province is part of Serbia.

Given these circumstances, and without ignoring the evolution of the conflict, it is only natural for the UN to be worried. It came as no surprise that in November 2005 the UN designated Martti Ahtisaari, a former Finnish President with much experience in conflict-resolution, to be a special envoy to Kosovo with the mission of devising a status that would end the crisis. It should be noted that Ahtisaari played an important role in the successful negotiations that led to Namibia's independence from South Africa. Success has been elusive this time, at least for the time being. But it should be borne in mind that the circumstances are different: here there is a conflict not just between Kosovo and Serbia, but also between Russia and China on the one hand and the US and certain EU countries on the other, including France and the UK.

After 14 months of negotiation, Ahtisaari sent the Security Council a report on 26 March 2007 in which he recommended independence for Kosovo, supervised by the international community. We feel these are the key points of the report:

(a) The possibility that the negotiations would reach an agreement acceptable to both sides has been exhausted: 'no amount of additional talks, no matter what the format, will overcome this impasse'.[44]

(b) Finding a definitive solution to Kosovo's status is urgent because uncertainty surrounding it 'has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation'.[45]

(c) In light of what happened under the Milosevic regime and the years that have gone by since the UN Mission in Kosovo (UNMIK) took over all legislative, executive and judicial powers in the territory –a period during which Serbia has not exercised any governing authority whatsoever– the special envoy believes 'a return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia… is simply not tenable'. But continued international administration of Kosovo is not an option either because UNMIK 'has not been able to develop a viable economy'.[46]

(d) The only viable option is independence for Kosovo supervised and supported by international civilian and military presences with 'strong' powers:[47]

- The International Civilian Representative, who shall be double-hatted to represent the EU and be appointed by the International Steering Group, will have no direct role in the administration of Kosovo but will have strong corrective powers (such as to 'annul decisions or laws adopted by the Kosovo authorities and sanction and remove public officials whose actions he/she determines to be inconsistent with the Settlement').

- The International Military Presence will be a military mission led by NATO, and the OSCE will also be asked to lend its assistance in applying the Settlement.[48]

(e) Once the Settlement takes effect, there will be a 120-day transition period and within nine months of the entry into force of the agreement, general and local elections will be held.[49]

Aside from other observations we shall make further on, it should be noted that the agreement on the status of Kosovo is complex. All it takes is a careful reading on issues such as communities, decentralisation aimed at promoting good governance, transparency, fiscal efficiency and sustainability (in a region saddled with organised crime) and the justice and security systems to get a sense that what the UN envoy is proposing comes more from the heart than from cold, hard calculation. Here, let us recall the Central European saying that the Germans think with their head, the Austrians with their heart and the Swiss with their wallet. We feel that in his report Mr Ahtisaari

[44] S/2007/168 cit. (note 13), paragraph 3.
[45] *Ibidem*, paragraphs 4 and 5.
[46] *Ibidem*, paragraphs 7 and 9.
[47] S/2007/168 cit. (note 13), paragraph 13.
[48] *Ibidem*, paragraphs 11, 13-14 of the Annex (Main Provisions of the Comprehensive Proposal for the Kosovo Status Settlement).
[49] Paragraphs 15 and 18 of the Annex.

has acted more like an Austrian than a German and not at all like a Swiss: all signs are that if it plan is implemented, it will first require a major 'euroduct' of assistance for Kosovo.

As was to be expected, the plan devised by the former President of Finland ran into opposition from Russia and China on the UN Security Council. The Contact Group[50] had to take over the negotiations, naming a troika of mediators made up of the US, Russia and the EU, with the idea of continuing the talks for another 120 days. This period ended on 27 November with no agreement between Serbia and the ethnic Albanians of Kosovo. So what will be the future status of Kosovo?

There seems to be a majority of analysts who have examined the various options and concluded that independence for Kosovo is not only a possible outcome but also the most realistic alternative,[51], given the political context in which we live. But what is also clear is that this independence might be achieved not by a dramatic, meaningless gesture but through a unilateral declaration by the authorities of Kosovo. And we must be clear on this: except for Montenegro, all the other countries of the former Yugoslavia chose this path, which in some cases led to the wars we all know about. The President of Kosovo, Fatmir Sejdin, in declaring the negotiations with Serbia over and failed on 27 November, said Kosovo would make such a declaration as well.[52] But for the authorities in Belgrade this would amount to a flagrant violation of Resolution 1244 of the Security Council, which remains valid and will continue to be until the Council adopts another resolution in its place. Here, then, we have a clear example of a clash between policy and law. And as things stand today, the law is on the side of Serbia, which is a democratic state and is offering Kosovo broad autonomy, as everyone knows.[53] This is the current outlook, although we will have to wait until the mediating troika sends it report to the UN Secretary General on 10 December. This will be a week after the last effort to bring the two sides into an agreement in the visit scheduled for 3 December to Belgrade and Pristina.

We feel that from a strictly legal standpoint, it would be unfair and establish a dangerous precedent for the affected State if the international community advocates Kosovo's independence from Serbia, which is democratic and as respectful of international law (2007) as any state, when the community refused to even consider independence when there were probably reasons to do so with a Yugoslavia that was blind, deaf and mute over the rights of that people as such (1999). The strong statement from the special envoy, who, perhaps sensing what awaited him, wanted to prepare for the worst, to the effect that Kosovo was 'a special case that required a special solution' and 'does not create a precedent for other unresolved conflicts',[54] should not cause us to forget that if the Security Council endorsed his report –essentially it says Kosovo must be independent because the ethnic Albanians cannot put up with living with the Serbs– the UN would be sending the message, regardless of whether Mr Ahtisaari likes it or not, that if a secessionist-minded people living in a sovereign, democratic state that is willing to grant a more than reasonable autonomy to the peoples living in it, manages to create a crisis that makes living together impossible, the international community will recognise its right to independence.

[50] The Contact Group is made up of the US, Russia, Germany, France, the UK and Italy. This group has coordinated multilateral initiatives in the UN, the EU, G-8 and others where their influence allows for transferring their solutions to members of those organisations. Russian opposition to the Contact Group led to the creation of a Quintet which, along with the aforementioned troika, has continued to lead the negotiations on Kosovo.

[51] Cfr. for example, A.F. Rubio Plo (2007), 'La batalla diplomática de Kosovo: posiciones irreductibles e intereses compartidos', *ARI*, nr 46, October, p. 19-25.

[52] The President of Kosovo spoke bluntly when he said 'the independence of Kosovo is the beginning and the end of the process for the Kosovar people'. He also said a unilateral declaration of independence would be made 'quickly'. Cfr. *Le Temps* (Geneva), 28/XI/2007.

[53] According to the daily *El País* (28/XI/2007, p. 5), some of the proposals in that autonomy plan are drawn from the Spanish statutes that grant autonomy to Catalonia and the Basque country.

[54] S/2007/168 cit. (note 13), paragraph 15.

Recognised as Such?

If in the end Kosovo were to declare its independence and this were to be endorsed by the UN Security Council (it is not entirely clear that it can) –as a result of which Serbia would again face the dilemma of yielding or fighting, with no greater hopes of success than it had in 1999–, Kosovo's consolidation as a sovereign state would depend on the outside reaction, in other words, what the world thinks of recognising it.

Given the circumstances of this case it seems clear that the Security Council is not going to go against such a declaration, as it did in 1983 with the Turkish Republic of Northern Cyprus. In this case, if the UN endorsed the independence of Kosovo, it is not going to turn around and disavow its own actions. However, a veto by probably more than one permanent member seeking notoriety (the US, France and the UK are prepared to recognise an independent Kosovo, even if this is done unilaterally) would be a sharp setback for the world body. And we also wonder if in objective terms it would be legal to proceed with recognising such a state.

The practice that has emerged within the framework of the UN has probably transcended its initial borders. Today one can think of the possible existence of a general, international legal standard that *mandates non-recognition* of States born through the violation of fundamental norms of international law, such as the one that establishes the right of colonial peoples to free determination (in 1965 the Security Council barred the recognition of Southern Rhodesia), the one that bans institutionalised systems of racial discrimination, such as *apartheid* (as in the case of the birth of Transkei, the recognition of which the Council banned in 1976), or the one barring the use of armed force in international relations (making it impossible to recognise the Turkish Republic of Northern Cyprus in 1983).[55]

The International Law Commission, in its *Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001) has said that non-recognition of situations created through grave violations of an imperative norm of international law (such as the ones that establish the right to free determination of peoples, the ban on *apartheid* and aggression), and not helping these situations consolidate, are one of the consequences of illicit acts of this nature (articles 40-41) which 'are already supported in international practice and the decisions of the International Court of Justice'.[56] This contributes, as stated recently by the last rapporteur on this issue, to generalising the UN practice of *no collective recognition.*[57] The International Court of Justice, in its consultative ruling on the *issue of Namibia* (1971), said it was the obligation of all States, regardless of whether they are members of the UN, not to recognise the illegal presence of the Republic of South Africa in Namibia or help that country maintain it.[58] But there are even more recent examples of these obligations:

- Although in the case of East Timor the court did not address the underlying issues in the case, Judge Weeramantry in his dissenting opinion did express some ideas that might be useful: that Australia, by agreeing on the treaty governing the resources of the Timor platform and living *de facto* recognition of its annexation by Indonesia after Portugal withdrew (this was condemned by both the General Assembly and the Security Council, which called for the application of the principle of free determination), incurred in international responsibility. This can serve as an example of a situation which should not be recognised by any State, and in which no help should be rendered to the States involved so that the situation can continue, according to the proposal in article 41 of the commission's

[55] Respectively, Security Council resolutions 216 (1965), of 12 November; 402 (1976), of 22 December; and 541 (1983), of 18 November.
[56] Commentary 6 on article 41 (in *Informe … [A/56/10*] cit. [note 2], p. 10 and ff.).
[57] J. Crawford (2006), *The Creation of States in International Law*, Clarendon Press, Oxford, p. 162 and ff., 168 and ff.
[58] Consultative ruling of 21 June 1971, paragraphs 122 ss. (*CIJ Recueil 1971*, p. 55-56).

draft. And as for the question of whether this would amount to a 'serious violation' of the right to free determination, if we look at the definition in article 40.2 and in particular its use of the term 'flagrant', the answer should be yes.[59]

- On the issue of the *legal consequences of the building of a wall on occupied (Palestinian) territory*, the court says Israel has violated *erga omnes* obligations and that any State:

'has the obligation not to recognize the illegal situation resulting from the construction of the wall [and]... not lend help or assistance to maintain the situation created by said construction'.[60]

In 1983 the Security Council prohibited the recognition of the Turkish Republic of Northern Cyprus, which was created through the aggression committed against Cyprus nine years earlier when the Turkish army invaded the north of the island and occupied it. So, in 2007, can Kosovo be recognised if it was born after the war unleashed by NATO against the former Yugoslavia eight years ago? The Cypriot government's opposition to the EU recognising Kosovo leaves no room for doubt as to the concern prompted by this precedent.

Politicians will probably find a way to launch this ship and keep it afloat. We say this not without some concern. The ship might survive, but it will have done so through politics, not respect for the law.

We think this is not the best way to deal with certain issues at the international level, neither for the western countries nor for Russia and China. If the US, France, the UK and even Germany, Denmark and the Netherlands push hard for independence as the lesser of two evils, then Russia and China will push right back to halt the process and back Serbia. And all this will be done because of obscure interests that hinder prospects for peaceful negotiations between the two sides that are directly affected. All signs are that everyone sees Kosovo as more than a question of law. Indeed, if both an unpredictable, independent Kosovo and Serbia concentrate on joining the EU, it is hard to understand why Russia is so determined to keep supporting its Serb allies, unless it is because of concrete interests, such as not endorsing precedents that could hurt Russia domestically (a pro-independence sentiment in Chechnya and Dagestan). Even more evanescent is the role of China, despite its traditional support on this and other similar issues for the Russian position. It should not be forgotten that Tibet is still causing problems for the Chinese authorities, as seen recently with the Dalai Lama's visit to US President George Bush, making the Asian giant very sensitive in regard to its territorial integrity. Having said that, it should be noted that the independence option is strengthened politically by the new governments in Germany and France, which openly support the American position and are firmly opposed to Russia's aims.

[59] His fundamental conclusion is the following: 'In the circumstances of the case, the position of party in the treaty regarding the "Timor Gap" would seem incompatible with recognition of and respect for the right of the people of East Timor to self-rule and permanent sovereignty over their natural resources, inasmuch as the treaty: 1) explicitly recognizes East Timor as a province of Indonesia, without the people of the territory having exercised this right; 2) deals with non-renewable natural resources that might belong to this Territory; 3) does not mention the rights of the people of East Timor, but rather only the mutual benefits of the peoples of Australia and Indonesia in developing the resources of the Area (Preamble, paragraph 6); 4) contains no clause allowing the people of East Timor to decide to renounce the treaty when it has exercised its right to avail of it; 5) specifies an initial, valid period of 40 years, and a possible renewal with successive periods of 20 years; and 6) creates the real possibility of exhausting these resources before they can be enjoyed by the people of East Timor' (dissenting opinion of Judge Weeramantry cit., *CIJ Recueil 1995*, p. 196 ff., mainly 197, 206, 209-210 and 212).

[60] Consultative ruling of 9 July 2004, *CIJ Recueil 2004*, 199-200 (paragraph 159 and paragraphs 155-158 on the *erga omnes* nature of the norms that were violated).

And with what Government?

If, as it seems, the final piece of the principle of free determination remains to be settled in its application to the national peoples forming part of a sovereign state, the true revolution that is still pending involves its application to the population of the State itself, or even of the unitary State or above all.

Repeated proposals in recent times proclaim that the time of the Democratic Principle has come; that is, the right of any people to be governed by whoever they designate. Any people should have the right to a democratic and representative government that respects fundamental human Rights. And if it does not? Therein lies the crux of the question! Does a people have the right to request and receive help from third countries to get rid of a government that is not democratic nor representative of its true will, thus allowing friendly States to provide it without violating the principle barring intervention in domestic affairs?[61]

'Let us not go too fast' in this issue, we have been told,[62] because experience shows that since the middle of the 20th century it is easy to play with the prospect of passing over popular sovereignty in the adversary in order to seek political cover for intervention, even armed intervention. And of course the coverage proposed will only be a pretence. But once the knot is tied, one like the Gordian knot, what will we do too unravel it? Perhaps call Alexander the Great and start from scratch?[63]

Aside from particular regimes in which the rule of law and the democratic principle are *conditio sine qua non* to be a part of them, such as the EU, for instance,[64] and those in which the system features controls for compliance both upon entry and during membership,[65] it would not be prudent to affirm the existence of any norm in international law which, in application of the principle of the free determination of people, establishes the subjective right of the population of all states to have a government that is truly representative and devises mechanisms and institutions for its control and application when necessary: at least not yet…[66]

Therefore, the so-called democratic interventions carried out by a State or a group of them on the basis of their own interpretation of events are not covered under contemporary international law.[67]

And for those readers wondering what these observations have to do with Kosovo, we would simply say they are the result of having deliberated on the hypothesis of a unilateral declaration of

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[61] For an analysis of all the consequences that introducing the Principle of Democratic Legitimacy would have for international law as it stands today, see J. Salmon (2002), 'Le Droit international à l'épreuve au tournant du XXI e. Siècle', *Cursos Euromediterráneos Bancaja de Derecho Internacional,* VI, p. 289 and ff.

[62] A. Remiro Brotons (2001), 'Desvertebración…' cit. (nota 8), p. 131.

[63] For a critical evaluation of what he calls, with regard to the requirements of the so-called Democratic Principle, 'discours irénique', *vid*. Salmon (2002), 'Le Droit international à l'épreuve...', cit., p. 298 and ff.

[64] The EU treaty, as it will read after incorporating changes from the Lisbon Treaty that will be signed 13 December 2007 (CIG 14/07, 3/XII/2007), establishes that member States must fulfil certain requirements for 'belonging to' and 'joining' the EU: respecting and committing to promote 'the values mentioned in Article 1 bis', which are 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (articles 49, 1º and 1-bis).

[65] For a member State which commits grave and repeated violations of the values on which the Union is based, these can lead to 'suspension' of 'certain rights (...) including voting rights of the member State in the Council of Ministers' (article 58 on article 2 of the Constitutional Treaty).

[66] J. Salmon (2002) says the only exception to the current situation (in which joint consideration of the principles of sovereign equality and non-intervention leads to the 'principle of equivalence of political regimes') was the General Assembly's condemnation of 'Nazi and Fascist' regimes (Resolution 36/162 of 16 December 1981); not even the government of South Africa in the toughest times of apartheid or the regime of the Khmer Rouge in so-called Democratic Kampuchea drew such attention ('Le Droit international...' cit. [note 60], p. 273-274).

[67] *Vid*. in more detail, A. Remiro Brotons (2001), 'Desvertebración…', cit. (note 8), p. 126 and ff. and the bibliography quoted there.

independence by the elected government of Kosovo in a context of disagreement among the permanent members of the Security Council, its swift recognition by a group of States allowing for consolidation of the bridgehead established and the temptation –on the basis of arguments like those debated in the previous two paragraphs– of providing beleaguered people with 'fraternal aid' from a friendly, allied State under the guise of protecting the minorities oppressed by the new authorities, which some saw participating earlier as members of the UCK… And we speak of 'fraternal' aid, and not directly of aid from the Serbian motherland to its unruly offspring. If we are consistent with everything we have stated earlier, we are not at all sure –in fact, to the contrary– that international law might not cover those sovereign states which see their territorial integrity violated without legal justification.

But in any case it seems unlikely that the authorities in Belgrade will go so far. Aleksander Simic, an adviser to the Serbian Prime Minister Vojislav Kostunica, threatened on 5 December to use military force if the province of Kosovo were to declare independence unilaterally. He also said such a recourse would be lawful. But those statements were described by the party of the Serbian President, Boris Tadic, as irresponsible and dangerous. It is also worth pointing out that the Serbian Orthodox Bishop Artemije also said he favours strong military pressure, even before the declaration of independence, as a way to show how far Serbia could go. The important military presence currently in Kosovo is certainly a factor that would discourage Serbia from turning to the option of a military attack on the 'rebellious' province.

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Appendix

Map 1. The Kosovo Region

Source: United Nations, 1998.