John Cerone, JD, LLM

Associate Professor,
Director of the Center for International Law & Policy
New England School of Law, Boston

THE LEGALITY AND LEGAL EFFECT OF KOSOVO'S PURPORTED SECESSION AND ENSUING ACTS OF RECOGNITION

International law has very little to say about the legality of secession. This neutrality derives largely from the principle of non-intervention. Thus, in general, the legally significant issue is the effect of the attempted secession; i.e. whether a new state has come into existence. The principle of territorial integrity operates only to impose a duty on states to refrain from acts that encroach upon another state's territorial sovereignty, which of course would include an obligation to refrain from assisting separatist movements in their pursuit of secession. It does not bind these movements as such.

The legality of recognition is analytically distinct from the question of the legality of secession, though the two are interrelated. Recognition of newly independent states is generally lawful, so long as that new state has effectively established its independence in fact. However, it is increasingly accepted that it is unlawful to recognize territorial sovereignty acquired through a violation of the prohibition on the use of force, or violation of another peremptory norm of international law. It would also be unlawful to recognize a state where the Security Council has decided, with reference to a particular situation, that states must refrain from recognizing that state.

At first glance, Kosovo would seem to meet the Montevideo criteria. However, the application of the criteria is complicated by the unique circumstances in which it has evolved over the past nine years. In particular, closer scrutiny is warranted with regard to the claim that Kosovo has an independent government in effective control. It should be recalled that the necessary level of control is context-dependent. It should be considered whether the necessary degree of control must be established in absolute terms, or relative to the level of control retained by the parent state. This then leads to an inquiry as to the relevance of external support.

The last step in the legal analysis is to consider whether and to what extent the legal situation has been altered by the terms of Security Council Resolution 1244. The resolution envisions UNMIK as a neutral facilitator, while at the same time implying movement ("transitional") and direction ("autonomy"; "democratic self-governing institutions"). Thus, the language of enabling the enjoyment of substantial autonomy must be seen as stipulating UNMIK's goal as an interim presence. UNMIK does not appear to be required to take steps to prevent independence.

The real significance of SCR 1244 then is not the legal effect of the resolution as such, but its practical effect. The regime imposed by the resolution does not de jure affect the status of Kosovo. However, that regime created a space for developments on the ground to dictate the final outcome.

Key words: *Kosovo.– Existence of State.– Secession.– International Law.– Security Council Resolution 1244.– Montevideo Convention.*

1. INTRODUCTION

I was initially invited to join the Conference on *Kosovo Self-Proclamed Independence and its Recognition – Legal Aspects* at the University of Belgrade School of Law in response to an opinion piece I wrote in February entitled *Kosovo as a Complex Case*.[1] I wrote that piece as a reaction to what I saw on the editorial pages of the international press, and especially of the US press. A number of commentators had opined that although the purported secession of Kosovo might well be unlawful, it was nonetheless just. In my view, both assertions were open to doubt.

It is also my view, however, that the moral question should be removed, to the extent possible, from the legal analysis of the situation. I will thus attempt to present a dispassionate legal analysis of the legality and legal effect of Kosovo's purported secession and ensuing[2] acts of recognition.

The United Nations' General Assembly (GA), in its recent request for an International Court of Justice (ICJ) Advisory Opinion, formulated the question as: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".[3]

This formulation of the question is amenable to a broad array of interpretations. Indeed, it could be interpreted to mean any or all of the following:

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1 See *http://jurist.law.pitt.edu/forumy/2008/02/kosovo-as-complex-case.php*.

2 Use of the term 'ensuing' in this context is meant only to convey the meaning of 'taking place afterward and in response to'.

3 General Assembly Resolution 63/3, 8 October 2008.

As of February 2008, did international law confer a right upon the Provisional Institutions of Self-Government (PISG) to declare independence?

Did international law require the PISG to refrain from declaring independence?

Did international law confer upon the people of Kosovo a right to secede?

Did international law require Kosovo to refrain from seceding?

Were the PISG entitled to act for Kosovo on the international level?

What was the legal effect of the purported secession? Was it successful?

Were the ensuing acts of recognition authorized by international law?

Were the ensuing acts of recognition prohibited by international law?

What was the legal effect of these ensuing acts of recognition?

Can the legal effect of these ensuing acts of recognition be altered by subsequent acts of recognition?

I shall attempt to narrow the range of possible questions by focusing on the meaning of two distinct phrases within the question formulated by the GA: "declaration of independence" and "in accordance with international law." I shall deal first with the latter.

As we well know, particularly in relation to the international legal system, to say that something is not authorized by international law is not to say that it is prohibited. And to say that something is not prohibited by international law is not to say that it is authorized. Indeed, the ICJ has in the past found particular issues to be *non liquet*.[4] Ultimately, however, we must fall back on the traditional notion that what is not prohibited is permitted,[5] and the language of the question posed seems to be formulated against the backdrop of this traditional notion. To ask whether or not the declaration of independence is "in accordance with international law",[6] seems to indicate a question of agreement with international law.[7] Thus,

[4] See, e.g. Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226 (July 8).

[5] The Case of the SS Lotus (France v. Turkey), Judgment of the PCIJ (1927).

[6] The French text uses the term "conforme," and is thus substantially the same.

[7] Also, the premabular language of the English version of the resolution refers to the "compatibility" with the existing international legal order, reinforcing the issue as one of agreement with international law.

it could equally be read as 'whether the declaration of independence was not inconsistent with international law,' or, more simply, 'whether or not it was prohibited by international law.'

As for the phrase "declaration of independence," a broader interpretation is warranted. In general, it is unlikely that the mere making of a declaration would be regulated by international law.[8] The real questions here seem to be whether or not the attempt to secede was in accordance with international law and whether that attempt to secede was in fact successful, and the question posed by the General Assembly should be read as including both. This interpretation might be challenged by referring to the clear language of the question, which refers only to the "declaration of independence," notably all in lower case, perhaps indicating that it should not be seen as a formal act. Certainly the GA could have used the terms 'secession' or 'purported secession' if these were the intended subjects of the GA's inquiry. However, the GA presumably eschewed such terms because each seems to express an opinion on the legal effect of the secession. This should be taken into account when reading the question so as to eliminate otherwise reasonably narrow constructions of the question.

I would thus read the question posed as entailing the following questions:

1. As of February 2008, did international law require the PISG to refrain from attempting to secede?
2. What was the legal effect of the purported secession?

The GA question does not make reference to the ensuing acts of recognition. Nonetheless, subsequent acts of recognition may indeed be relevant to answering these antecedent questions, and must thus be examined to the extent they bear upon these questions.

In any event, I am not the ICJ, and am thus not bound by the terms of the question as formulated by the GA. I will thus examine, in addition to the two questions previously identified, the legality and legal effects of the ensuing acts of recognition, as well as opine upon the potential legal effect of subsequent acts of recognition.

I should also give the caveat that the rules of international law pertaining to these issues are not entirely clear. I will be giving my best approximation of the content of these rules in the present state of international law.

[8] However, it may be that this refers to the question of whether 1244 imposes an obligation upon the PISG to refraining from making such a declaration. This is addressed infra.

2. INTERNATIONAL LAW AND SECESSION

2.1. The Legality of Secession

International law has very little to say about the legality of secession. Traditionally, the international community simply sits back and waits to see if the secession is effective. This neutrality derives largely from the principle of non-intervention – that states must generally refrain from interfering in the internal affairs of other states. To posit that Kosovo's purported secession is not in conformity with international law implies that there is some international legal procedure for secession that was not observed. No such procedure exists.[9]

Thus, in general, the question of whether a purported secession is lawful as a matter of international law is incoherent.[10] For this reason, the debate over self-determination may be of no moment in the context of Kosovo. The right of self-determination attains legal significance only if it is necessary to establish a duty on states to permit Kosovo's secession.

Thus, in general, the only significant issue is the legal effect of the attempted secession. International law ascribes a legal effect if the secession was successful; to wit, a new state comes into existence. In order for a new state to come into existence, it must meet the so-called Montevideo criteria: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.[11] The latter two criteria incorporate a requirement of independence. The government criterion also entails a requirement of control over the territory and its population.

While some might argue that the principle of territorial integrity, a fundamental principle of the international legal order, poses a legal barrier to secession, this principle operates only to impose a duty on states to refrain from acts that encroach upon another state's territorial sovereignty, which of course would include an obligation to refrain from assisting separatist movements in their pursuit of secession.[12] It does not bind these movements as such.

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[9] It may be argued that a procedure was imposed by the Security Council specifically with respect to Kosovo. This will be address in Section III infra.

[10] It may be that the Security Council can determine that a particular attempted secession is illegal (e.g. as it did with Southern Rhodesia) or invalid (e.g. as it did with Northern Cyprus), although it is unclear what legal significance this has other than potentially denying the secession legal effect and requiring states to refrain from recognizing the entity as a state. While the Security Council has not pronounced upon the legality of Kosovo's secession, it may be argued that the Council, in Resolution 1244, prohibited the unilateral secession of Kosovo (i.e., secession or attempted secession without Belgrade's consent). This will be discussed infra.

[11] Montevideo Convention on the Rights and Duties of States, 1933.

[12] Actions taken to carry out, and in accordance with, otherwise lawful Security Council decisions would by definition not be unlawful.

2.2. The Legality and Legal Effect of Recognition

The legality of recognition is analytically distinct from the question of the legality of secession, though the two are interrelated.

As with secession, international law has little to say about the legality of other states' recognition of newly independent states. In general, there is neither a duty to recognize a state, nor a duty to refrain from recognizing a state. Thus, recognition of newly independent states is generally lawful, so long as that new state has effectively established its independence in fact. However, in the context of attempted secession, to recognize a claimant to statehood prior to its fulfillment of the Montevideo criteria would be to unlawfully intervene in the internal affairs of the parent state.

In addition, it is increasingly accepted that it is unlawful to recognize territorial sovereignty acquired through a violation of the prohibition on the use of force, or violation of another peremptory norm of international law.[13] It would also be unlawful to recognize a state where the Security Council has decided, with reference to a particular situation, that states must refrain from recognizing that state (e.g., as happened in the case of Southern Rhodesia).[14] It is in such a context that the otherwise separate questions of the existence of a state and recognition of that state may intersect. If the international community collectively agrees not to accord recognition to an entity that is otherwise factually independent, it may be said that that entity's claim to statehood has been denied by international law, as determined by the international community. Conversely, even where a new state has come into being in violation of the prohibition on the use of force, or other peremptory norm of international law, collective recognition may operate to affirm that state's accession to sovereignty.[15]

2.3. Application to Kosovo

At first glance, Kosovo would seem to meet the Montevideo criteria. It has a population, a relatively defined territory, a government in control of that territory (at least south of the Ibar), and the capacity to engage in external relations. However, the application of the criteria is complicated by the unique circumstances in which it has evolved over the past nine years.

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[13] See, e.g., ILC Articles on the Responsibility of States for Internationally Wrongful Acts, at art. 41 (2001).

[14] See UN Security Council Resolution 217 (1965).

[15] Where a state comes into being through violation of a peremptory norm of international law, and attracts only partial recognition, it is clear that those recognizing states would be violating their obligation to refrain from recognizing the state; however, it is unclear whether or not the state would have come into existence as a matter of law.

In particular, closer scrutiny is warranted with regard to the claim that Kosovo has an independent government in effective control. Several factors must be considered. In applying the Montevideo criteria, it should be recalled that the necessary level of control is context-dependent. Where a parent state resists a secession, a very high degree of control must be established. At the same time, it should be considered whether the necessary degree of control must be established in absolute terms, or relative to the level of control retained by the parent state. This then leads to an inquiry as to the relevance of external support.

The current public authorities in Kosovo are operating as the de facto government of Kosovo. They have achieved effective control of territory and population (again, below the Ibar). However, it may also be argued that the control exercised has not been established by independent Kosovan institutions, but has in fact been enabled, and continues to be supported by, external forces, including the UN and NATO. In this sense, it could be argued that the Kosovan authorities are not themselves in effective control of the territory.

Nonetheless, the purpose of requiring a higher degree of control in the context of secession is generally predicated on a competing degree of control exercised by the parent state. In the Kosovo context, the control exercised by Kosovan institutions is to the complete exclusion of control by the parent state. It would, thus, seem that that the test of effective control has been met in the case of Kosovo.

A further point of inquiry, however, would be whether and to what extent the external support afforded undermines the requirement of independence or is itself an unlawful intervention. As the support afforded has been authorized by a decision of the Security Council, such support is lawful so long as the resolution is itself lawful. As to the question of independence, reliance on foreign assistance, including military assistance, would not of itself constrain the fulfillment of the Montevideo criteria, at least where such assistance is provided lawfully.[16]

It now remains to be considered whether there has been a violation of the prohibition on the use of force that would give rise to an obligation

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[16] This may be a basis of distinction with respect to South Ossetia, which is otherwise parallel in many respects, and also with respect to Northern Cyprus, though in that situation the Security Council has affirmatively rejected the legality of the situation. As for South Ossetia, while it may be argued that Georgia agreed to the presence of the Russian peacekeepers (though the validity of that agreement is open to question given the circumstances surrounding its conclusion), the conduct of the latter, from the beginning, clearly exceeded the scope of Georgian consent. Another basis of distinction may be found with respect to the degree of independence enjoyed by the authorities. Many of the South Ossetian 'authorities' are Russian public officials (i.e. not merely installed by Moscow, but were already organs of the Russian Federation and continue to serve in that capacity).

on all states to refrain from recognizing claims to sovereignty made pursuant to it. The first question is whether or not the 1999 NATO bombing constituted a violation on the prohibition on the use of force. Most authorities agree that it did constitute such a violation. Thus, if one of the NATO states had claimed sovereignty over Kosovo as a result of this use of force, there would likely be an obligation to refrain from recognizing this acquisition of sovereignty. However, no such state has made a claim over Kosovo.

It is unclear whether a similar obligation would arise in relation to Kosovo's purported accession to sovereignty. Can an unlawful use of force by third parties preclude Kosovo from claiming statehood? Perhaps if Kosovo's secession was the direct result of that violation, it could be argued that there is an obligation to refrain from recognizing the new state. A counter-argument would be that the Security Council's authorization of KFOR's presence was a supervening legal event. While this supervening legal event could not retroactively authorize the NATO bombing, and thus could not afford a valid basis for territorial claims made by NATO countries, it could break the causal connection between that bombing and Kosovo's attempted secession.

At this point, it must be mentioned that if there was an obligation to refrain from recognizing Kosovo, whether or not Kosovo would be precluded from statehood might then turn on whether or not that obligation was observed. Acts of recognition, even if unlawful, may change the legal reality. If Kosovo was to attract recognition from the overwhelming majority of states, international law would adapt to this reality and Kosovo would be regarded as having successfully seceded. While international law will not retrospectively confer a right to engage in a behavior that led to the new reality, it will adapt to the new reality such that the resulting situation will be regarded as in accordance with, or not inconsistent with, international law.[17]

The last step in the legal analysis is to consider whether and to what extent the legal situation has been altered by the terms of Security Council Resolution 1244.[18]

3. THE EFFECT OF SECURITY COUNCIL RESOLUTION 1244

Security Council Resolution 1244 authorized the deployment of both KFOR and UNMIK, the international security and civil presences in Kosovo. Their mandate was to provide security and administration for

[17] Nonetheless, this series of events would probably be reinterpreted as a determination by the community of states that a peremptory norm had not been violated.

[18] UN Security Council Resolution 1244 (1999).

Kosovo on a temporary basis. While this type of international administration of territory was not completely unprecedented, it was certainly the broadest peacekeeping mandate to have been issued by the UN up to that point in its history.

I will now examine three phrases within the resolution that may be interpreted to preclude unilateral attempted secession by Kosovo or recognition of its secession. Those phrases are: the reaffirmation of "the territorial integrity of the Federal Republic of Yugoslavia"; a "final" or "political settlement"; and "within the Federal Republic of Yugoslavia."

As for the first phrase – the reaffirmation of the principle of territorial integrity – this language merely reaffirms the principle as explained above. This basic principle of international law imposes an obligation on states to refrain from compromising the territorial integrity of other states. Its reaffirmation in the preambular language of 1244 has to be seen in light of what the Security Council is about to do in the operative text. Again, the creation of an international administration for Kosovo was an extraordinary use of Security Council power. Thus, the reaffirmation of territorial integrity was likely included to assure states that the creation of this administration, as such, did not in any way compromise the de jure territorial integrity of the Federal Republic of Yugoslavia, which the resolution clearly recognizes as including Kosovo, or that of any of the other states in the region.[19]

As for the second phrase, the references to a "final settlement" and a "political settlement" might be read as requiring that Belgrade consent to the final disposition of the question of Kosovo before it becomes legally cognizable. Certainly, the resolution contemplates that there will be a settlement. The first question then is what will constitute such a settlement? The resolution as such provides little guidance. However, it may be argued that the ordinary meaning of the term settlement connotes agreement. The question then arises, whose agreement is required? The particular parties to the dispute? Or the international community as a whole?

Even if the resolution contemplates a final settlement, what is the legal effect of a failure to achieve such a settlement? Does it require the continuation of the status quo, and thereby impose an obligation on all parties to maintain the status quo? This is unlikely, as the references to a final settlement do not seem to be the lynch pin to any obligations imposed by the resolution, except as a marker for the completion of UNMIK's mandate. As such, failure to achieve a settlement might simply

[19] One might argue that the resolution reaffirms that Kosovo was part of the Federal Republic of Yugoslavia (FRY), and that this reaffirmation is irrelevant since the FRY no longer exists. However, this argument may be dismissed as it is agreed that Serbia continues the legal personality of the FRY.

prevent UNMIK from fulfilling its mandate. This is reinforced by the Security Council's failure to end UNMIK's mandate. (UNMIK's mandate is self-renewing unless the Security Council votes to terminate it. Thus, any permanent member can prevent the termination of the mandate.)

What are the legal consequences then of a failure to achieve or terminate the mandate? It would seem that UNMIK's supervisory authority would continue. Is the existence of this authority sufficient to undermine Kosovo's fulfillment of the Montevideo criteria? Probably not. The High Representative in Bosnia enjoyed similar authority and this was not seen as inconsistent with Bosnia's claim to statehood.

As for the third phrase – "within the Federal Republic of Yugoslavia" – it may be argued that this language legally requires that Kosovo remain within the FRY or Serbia. The whole paragraph reads:

> [The Security Council] [a]uthorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo...

In the context of the paragraph as a whole, it becomes clear that this language refers to the purpose of the administration. UNMIK is established in order to provide an administration under which the people of Kosovo can enjoy autonomy with the FRY. While this language recognizes that Kosovo is within the FRY, it does not indicate that Kosovo must remain part of the FRY. This is reinforced by the way in which UNMIK is conceived throughout the resolution.

The resolution envisions UNMIK as a neutral facilitator, while at the same time implying movement ("transitional") and direction ("autonomy"; "democratic self-governing institutions"). Thus, the language of enabling the enjoyment of substantial autonomy must be seen as stipulating UNMIK's goal as an interim presence.

Clearly, UNMIK is not mandated to promote independence. Perhaps it is even required to refrain from promoting independence. But it also does not appear to be required to take steps to prevent independence.

But perhaps it could be argued that the PISG are also creations of 1244, and as such are similarly bound by it, and are therefore obliged to refrain from promoting or striving toward independence. Nonetheless, this would not necessarily mean that Kosovo's secession was not successful. Even if the PISG could be said to have violated 1244, this does not

mean that their purported secession was legally ineffective. It could also be argued that the PISG ceased to be the PISG upon declaring independence, or that they acted simultaneously in the capacity of a separatist government.[20]

The real significance of SCR 1244 then is not the legal effect of the resolution as such, but its practical effect. The regime imposed by the resolution does not de jure affect the status of Kosovo. However, that regime created a space for developments on the ground to dictate the final outcome. It is certainly arguable that the UN Mission and KFOR at several points acquiesced in the developments that led to that outcome, including, for example, bowing to pressure to repeal Serbian law from the law applicable in Kosovo. Nonetheless, to the extent such acquiescence occurred with a view toward ensuring substantial autonomy and was not intended to promote secession, it remained within the scope of UNMIK's mandate.

4. CONCLUSION

As my analysis above indicates, there are many areas of ambiguity that make it difficult to give clear answers to the questions underlying the General Assembly's inquiry.

Nonetheless, I will conclude by giving my predictions as to how the ICJ will respond, discounting any likelihood that the rendering of these predictions might itself alter their eventual realization.

If I were a betting man, I would bet that the ICJ will not decline to render an advisory opinion (which seems to be a pretty safe bet considering that the Court has never done so where the question was validly posed). I would also bet that the ICJ will answer the narrow question of whether the declaration of independence was as such unlawful in the negative.[21] If it answers the broader question of whether the attempted secession successfully led to the establishment of a new state, it will answer in the affirmative.[22] However I suspect it will only answer this question if it can muster a clear majority in favor of this position; otherwise is will

[20] In this capacity, however, they should be regarded as being competent to act only on behalf of the territory and population group that they actually control (i.e. south of the Ibar).

[21] The Court could also construe the question as focusing on the specific question of whether the PISG had an obligation under Resolution 1244 to refrain from declaring independence. If it does, it could consider such an obligation violated. However, I suspect it would not conclude from this that Kosovo's secession was not legally effective.

[22] Alternatively, it may find the issue *non liquet*, which would have the same practical result. Each state would simply be left with the political decision whether or not to recognize.

decline to render an opinion on this question, perhaps by giving the GA's question a narrow construction. If its answer to this question is yes, then it may also opine on the legality of the ensuing acts of recognition, and will likely find these acts of recognition to be lawful. But, again, it will not reach this question if it could not muster a clear majority in favor of the view that the attempted secession was successful, and it will find the acts of recognition lawful only if it can avoid opining on the legality of the 1999 NATO bombing (e.g. by finding that SCR 1244 was a supervening legal event that renders examination of the NATO bombing irrelevant).