EDITORIAL NOTE

For more than nine years now Serbia has not exercised sovereignty over its southern province – Kosovo and Metohia. Since the fall of Milošević, Serbian government has engaged itself in a political and legal battle intended to reintegrate Kosovo and Metohia within its constitutional order. The latest stage in this diplomatic process has been the United Nations' General Assembly resolution, adopted in October of this year, to seek an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law. *Annals of the Faculty of Law in Belgrade,* i.e. *Belgrade Law Review*, has recognized the importance of the General Assembly's initiative for the further development of international public law and decided to dedicate an important part of its 2008 edition to this issue. As a result, the law review organized, on the 15th of November 2008, an international conference at the Faculty of Law of the University of Belgrade entitled: *Self-Proclaimed Independence of Kosovo and its Recognition – Legal Aspects*. For this occasion, *Belgrade Law Review* gathered a number of international and domestic experts in order to obtain original articles which would treat the issue from an objective and legal, rather than from political, point of view. The contributions of scholars: Barbara Delcourt, John Cerone, Miodrag A. Jovanović, Ivana Krstić and Miloš Jovanović who participated at the Conference, and to whom *Belgrade Law Review* expresses, once again, its immense gratitude, are published in this volume together with other valuable contributions on different topics. *Belgrade Law Review* regrets the fact that Kosovar experts, who were also invited at the Conference, either declined the invitation, under the pretext that it was too early to dwell upon it, or even ignored the invitation. *Belgrade Law Review* has no illusions that this volume, as well as the Conference which preceded it, could make a turnaround in the international political perception of the Kosovo case. However, *in magis et voluise sat est* (in important situations, enough is at least to try), especially now when this case is pending before the International Court of Justice.

Barbara Delcourt, PhD

Professeur à la Faculté des sciences sociales politiques et économiques et à l'Institut d'études européennes, membre associé du Centre de droit international, Université libre de Bruxelles

LE DROIT INTERNATIONAL À L'ÉPREUVE DU KOSOVO

This contribution aims at explaining the reasons why international law has been overlooked by the governments and institutions that were supposed to solve the problem of the Kosovo's final status. It focuses on the conditions under which some governments, mainly Western, have recognised Kosovo as an independent and sovereign state. At first glance, this process contains some similarities to the 1990's when the federal entities of the Yugoslav federation were recognised as independent on the basis of the right to self-determination and in exchange for their commitment to abide by international legal norms (Human Rights, Democracy, Rule of Law, protection of minorities,etc.) As a matter of fact, the authorities of Kosovo have undertaken to fully apply the provisions of the Ahtisaari's plan referring to such norms, and in so doing have earned international support for their declaration of independence. Thus a parallel could be drawn between these two processes of conditional recognition. But a thorough examination of the discourse surrounding the settlement of Kosovo's status shows quite a different picture when it comes to the role played by international legal rules in legitimizing its independence. Indeed the main arguments used in the case of Kosovo were not grounded on international law but rather on political or "ethical" considerations, whereas international norms were mainly used by those governments opposing this decision. To a certain extent, the process of "de-formalization" of international law – defined by Nico Krisch as "the replacement of formal criteria for determining the law by more substantive ones which usually reflect the Universalist principles underlying a hegemon's foreign policy" – is not entirely new. An assessment of the way international rules have been used in the Yugoslav context could provide evidence of this trend. Nonetheless, this process seems to have reached its climax in the case of Kosovo and could be explained by a peculiar understanding of the sovereignty principle impinging upon the interpretation and use of international norms.

Key words: *Kosovo independence.– Recognition of Kosovo .– International Law Weaknesses.– Deformalization of Inaernational Law.– Yugoslav Federation.– Ahtisaari Plan.– Sovereignity.*

INTRODUCTION

Les déclarations de reconnaissance du Kosovo, en particulier celles émanant des Etats-Unis et de certains membres de l'Union européenne font, de manière plus ou moins explicite, référence à l'engagement des autorités kosovares à mettre en œuvre le plan concocté par le médiateur de l'ONU, Martti Ahtisaari, prévoyant une indépendance du Kosovo supervisée par "la communauté internationale".[1] Ce plan contient des dispositions assez précises relatives aux droits et libertés devant être garantis au Kosovo, tant au profit de sa population albanophone que des minorités se trouvant sur son territoire, et impose au nouvel Etat un certain nombre de prescriptions permettant d'assurer à terme son "intégration dans la famille euro-atlantique". A première vue, il semble donc que la reconnaissance du Kosovo ait été conditionnée par le respect de normes essentiellement juridiques permettant à la fois de légitimer l'appui donné au projet indépendantiste et d'écarter les critiques émises à l'encontre de celui-ci par les autorités serbes, mais aussi par les Etats qui se sont opposés à ce processus de reconnaissance ou n'ont pas donné suite à la demande de reconnaissance des autorités du Kosovo. Dans ces circonstances, il serait tentant d'établir un parallèle avec la décision de reconnaissance conditionnelle des républiques yougoslaves prise par les douze Etats membres de la Communauté européenne le 16 décembre 1991. En effet, cette décision de reconnaissance et sa mise en œuvre ont été marquées par une référence importante au droit international et une forme de juridicisation du processus de reconnaissance à travers l'établissement de la fameuse "Commission Badinter" chargée, entre autres, de vérifier le respect des conditions mises à la reconnaissance de l'indépendance des anciennes entités fédérées yougoslaves.[2] De surcroît, il a été fréquemment répété que la reconnaissance du Kosovo contribuerait à clore le dernier chapitre de la désintégration de la Yougoslavie, suggérant ainsi que le processus entamé au début des années 90 n'avait pas été mené à son terme et qu'il convenait dès lors de réparer ce manquement.

S'il est assurément possible de considérer que la reconnaissance du Kosovo a suivi une logique qui s'apparente à celle des années 90, un examen plus approfondi de la place réservée au droit international dans l'argumentaire des Etats qui ont soutenu le processus d'indépendance

[1] Martti Ahtisaari, "Comprehensive Proposal For a Kosovo Status Settlement", 2 February 2007 (Nous soulignons), disponible sur *http://www.unosek.org/docref/Comprehensive_proposal-english.pdf*.

[2] Sur ce sujet, v. notre thèse, *Droit et souverainetés. Analyse critique du discours européen sur la Yougoslavie*, Bruxelles, Bern, Berlin, Frankfurt/M, New York, Oxford, Wien, P.I.E.-Peter Lang, 2003.

montre, au contraire, une tendance à écarter les arguments juridiques au profit de considérations de nature stratégico-politique ou morale (I). Cependant, loin de consacrer une rupture radicale avec la stratégie de légitimation par le droit qui avait été celle des Européens au moment du démembrement de la Yougoslavie, les conditions dans lesquelles la reconnaissance s'opère permettent de mettre en évidence, voire de confirmer, une utilisation assez paradoxale du droit international (II). De fait, elle se retrouve de plus en plus dans le discours européen qui servira de matériau privilégié à cette étude et peut s'expliquer notamment par le succès d'une conception particulière du principe de souveraineté et du droit international qui permet de justifier *in casu* la mise sous tutelle du Kosovo et le non-respect du principe d'intégrité territoriale invoqué par la Serbie. Tentative audacieuse et novatrice pour sortir de l'impasse ou pastiche de solutions déjà expérimentées par le passé? Cette question sera posée dans la dernière partie de cette étude (III).

1. LE DROIT INTERNATIONAL À L'EPREUVE DES NEGOCIATIONS SUR LE STATUT DU KOSOVO

Dans un premier temps, les principales caractéristiques du discours européen relatif à la question du règlement du statut du Kosovo seront exposées en étant replacées dans le contexte plus large dans lequel il a été élaboré (A). Nous nous attacherons, dans un deuxième temps, à présenter les représentations sociales du discours majoritaire qui permettent d'expliquer la place modeste réservée au droit dans le dispositif prévu dans le plan de Martti Ahtisaari, ainsi que les logiques d'action qui en découlent (B). Nous verrons ensuite comment des considérations plus légalistes ont été réintroduites. Dans la mesure où celles-ci ont essentiellement trait à la nécessité d'impliquer le Conseil de sécurité dans le règlement final du statut du territoire, il conviendra de s'interroger sur la confusion entre le droit international et le concept de multilatéralisme qui semble caractériser le discours européen (C).

1.1. Les rétroactes de la fabrication d'un consensus transnational sur l'avenir du Kosovo

L'examen des positions défendues par l'UE dans le dossier du Kosovo permet de mettre en évidence un certain nombre de principes qui semblent découler de son engagement à travailler de concert avec l'ONU. Cependant, l'ONU elle-même ne semble pas vraiment avoir été à l'origine du cadre normatif que les Européens ont élaboré en l'espèce. En effet, sa genèse doit plus à l'implication du Groupe de contact et à l'importance

prise par certaines personnalités évoluant au sein d'autres organisations internationales et think tanks.

1.1.1. La formation du discours de l'UE

La question du statut du Kosovo n'a pas été abordée de front par les responsables européens pendant plusieurs années. L'UE est pourtant, depuis 1999, fortement impliquée dans la gestion de ce territoire et dans les programmes de réhabilitation dont il bénéficie.[3] Ce n'est qu'à partir de 2005 que l'Union développera une argumentation plus spécifiquement liée à la question du statut.[4] Quelques jours avant la tenue du Conseil européen de juin 2005, le Haut Représentant pour la politique extérieure et de sécurité commune (PESC), Javier Solana et Olli Rehn, Commissaire à l'élargissement, précisent, tout rappelant la vocation européenne des Balkans évoquée lors du Conseil européen de Thessalonique en 2003,[5] que le Conseil adoptera une ligne de conduite qui sera inspirée par les principes suivants:

- pas de retour au statu quo prévalant avant 1999. L'avenir de Belgrade et de Pristina doit être déterminé par la perspective de leur intégration dans les institutions euro-atlantiques;
- il faudra veiller à ce que le Kosovo préserve son caractère multiethnique et à ce que les droits des minorités soient protégés ainsi que leur héritage culturel et religieux. Les mécanismes de lutte contre le terrorisme et le crime organisé doivent être rendus efficaces;
- la solution retenue devra contribuer à consolider la sécurité et la stabilité de la région;
- aucune modification du territoire du Kosovo ne pourra être avalisée (ni partition, ni union avec des Etats voisins);

[3] V. site de l'UE *http://ec.europa.eu/enlargement/serbia/kosovo/eu_kosovo_relations_en.htmet*; l'UE est en charge du pilier IV de la MINUK qui se consacre à la reconstruction économique. V. également le site de *European Agency for reconstruction* qui gère les principaux programmes d'assistance destinés aux Etats issus du démembrement de la Yougoslavie (exception faite de la Slovénie et de la Croatie): *http://www.ear.eu.int*.

[4] Un examen attentif des textes produits par les institutions européennes permettrait certainement de mettre en évidence certains choix politiques non assumés par les responsables européens et prédisposant ceux-ci à favoriser l'option d'une "indépendance surveillée", comme par exemple la décision du Conseil du 30 janvier 2006 reprenant les principes, conditions et priorités des accords de partenariat avec la Serbie, le Monténégro et le Kosovo (2006/56/EC) et le document de la Commission "on a Multi-annual Indicative Planning Document 2007–2009 for Kosovo under UNSCR 1244 (C (2007)2271 du 1er juin 2007. Il n'est cependant pas possible, dans le cadre de cette étude, de se livrer à pareil exercice.

[5] V. les conclusions de la présidence de l'UE, Conseil européen des 19 et 20 juin 2003, §40: *http://www.amb-grece.fr/presidence/conclusions_thessalonique.htm*.

– toute solution devra être compatible avec les standards et valeurs de l'Europe et en cela contribuer au processus d'intégration du Kosovo et de la région à l'UE;

– une présence internationale civile et militaire s'avère indispensable à la stabilisation de ce territoire.[6]

L'UE annonce par ailleurs que la sécurité du Kosovo devra encore être assurée par la présence de l'OTAN et qu'elle est disposée à s'investir de manière plus importante dans le domaine civil.

Les chefs d'Etat et de gouvernement de l'UE qui se sont réunis à Bruxelles les 16 et 17 juin 2005 ont repris l'essentiel de ces considérations:

> "§7: On the status of Kosovo, the European Council reaffirmed that any solution must be fully compatible with European values and norms, comply with international legal instruments and obligations under the United Nations Charter, and contribute to realising the European Prospects of Kosovo and the region. At the same time, any agreement on status must ensure that Kosovo does not return to the pre-March 1999 situation.
>
> § 9: The European Council also declared that the determination of the status of Kosovo must reinforce the security and the stability of the region. Thus any solution which was unilateral or resulted form the use of force, as well as *any changes to the current territory of Kosovo, would be unacceptable*. Thus there will be no partition of Kosovo, nor any union of Kosovo with another country or with part of another country....The territorial integrity of neighbouring countries must be fully respected".[7]

A ce stade, on peut constater une vague référence à certains principes de droit international et à la Charte (le respect de l'intégrité territoriale, l'interdiction du recours à la force), mais aussi une certaine ambiguïté. Le §9 en particulier semble impliquer que le Kosovo bénéficie d'ores et déjà des droits d'un Etat souverain, en particulier du droit à voir respecter son intégrité territoriale. La partition du Kosovo est donc explicitement exclue, mais pas celle de la Serbie. On retrouve un dispositif argumentatif fort semblable à celui qui avait été mis en place au début du processus de désintégration de la Yougoslavie alors même que la reconnaissance de l'indépendance des républiques yougoslaves n'était pas encore acquise.[8]

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[6] Summary note on the joint report by Javier Solana, EU High Representative for the CFSP, and Olli Rehn, EU Commissioner for Enlargement, *On the future EU Role and Contribution in Kosovo,* Brussels, 14 June 2005 S217/05, p. 2.

[7] Declaration on Kosovo, Annex III Presidency Conclusions – Brussels 16 and 17 June 2005 (Nous soulignons). Voy. également Council of the EU/ GAER 2687th Council Meeting 13622/05 (presse 274), 7 novembre 2005.

[8] V. notre thèse, *Droit et souverainetés. Analyse critique du discours européen sur la Yougoslavie*, *op. cit.*, pp. 219–228.

Les mois qui suivent voient la nomination d'un représentant personnel de Javier Solana à Pristina et se concrétiser la volonté de l'UE de s'impliquer davantage avec l'ONU dans la gestion de la province.[9] A partir de 2006, le Conseil appuiera explicitement les démarches entreprises par l'envoyé spécial du Secrétaire général de l'ONU, Martti Ahtisaari.[10] On voit alors se dessiner les contours de la future mission de l'UE.[11] Constatant la persistance des divergences de vues entre les négociateurs serbes et albanais, le Haut représentant leur enjoindra de faciliter le travail du médiateur.[12] En octobre 2006, il félicitera les autorités belgradoises pour la bonne tenue du référendum sur la nouvelle constitution serbe mais ajoutera que, pour ce qui concerne la disposition relative au Kosovo qui rappelle qu'il fait partie intégrante du territoire serbe, Belgrade doit tenir compte du fait que le Kosovo est sous administration internationale et que son futur statut sera déterminé en fonction du processus engagé par Martti Ahtisaari.[13] Lorsque ce dernier présentera son projet au début de l'année 2007, les autorités européennes s'engageront fermement à le soutenir et encourageront les deux parties à négocier sur cette base.[14]

Cette position défendue très explicitement par le Haut représentant pour la PESC et le Commissaire à l'élargissement, et de manière plus implicite par le Conseil et les Etats membres (voir *infra*), est également celle du Parlement européen. Ses membres ont eu l'occasion d'entendre Olli Rehn sur la question de l'engagement de l'UE au Kosovo la veille de l'adoption d'une résolution sur ce sujet.[15] Celle-ci reprendra dans les grandes lignes les propos du Commissaire et les considérations développées dans un rapport rédigé par Joost Langendijk (Commission des af-

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[9] S395/05 (2 décembre 2005), Torbjörn Sohlström va assister le représentant spécial de l'UE qui s'occupe plus particulièrement des questions liées au statut du Kosovo, Mr Stefan Lehne; Summary note on the joint report by Javier Solana, EU High Representative for CFSP, and Olli Rehn, EU Commissioner for Enlargement, *On the future EU role and contribution in Kosovo* (9 December 2005) S412/05.

[10] GAERC (General Affairs and External Relations Council), 27 February 2006, § 3.

[11] *On the future EU role and contribution in Kosovo*, *op. cit*.

[12] Comments on the first round of high level direct talks on Kosovo held in Vienna, 24 July 2006, S217/06.

[13] Javier Solana, EU High representative for the CFSP, congratulates Serbia for the orderly conduct of the referendum on a new Constitution for Serbia, 30 October 2006, S296/06.

[14] Statement by Javier Solana, EU High representative for the CFSP, on Martti Ahtisaari's draft comprehensive proposal for Kosovo, 2 February 2007 S043/07; Summary of remarks by Javier Solana EU High representative for the CFSP, and Fatmir Sejdiu, President of Kosovo, at a joint press briefing, 7 February 2007 S047/07.

[15] Olli Rehn, "The future of Kosovo and the role of the European Union. EP debate on the future Status of Kosovo (Langendijk report), Brussels, 28 March 2007, Speech 07/205.

faires étrangères) sur l'avenir du Kosovo et le rôle de l'UE,[16] un document qui reproduit lui aussi l'ensemble des considérations permettant de justifier le détachement de la Serbie et la mise sous tutelle par l'UE du probable futur Etat. Le président Kolë Berisha de l'Assemblée parlementaire du Kosovo remerciera d'ailleurs son homologue du Parlement européen, Hans-Gert Pöttering et le rapporteur de la Commission des affaires étrangères, pour le soutien ainsi apporté à l'indépendance du Kosovo.[17]

Le soutien exprimé par le Haut représentant, le Commissaire à l'élargissement et le Parlement européen aux démarches entreprises par l'envoyé spécial de l'ONU donne l'impression que l'UE se situe très nettement dans le sillon tracé par l'ONU.

1.1.2. *Le positionnement discret et ambigu de l'ONU*

La plupart des discours analysés font peu ou prou référence à l'ONU et aux responsabilités spécifiques du Conseil de sécurité quant à la détermination du statut du Kosovo. L'organisation elle-même est pourtant peu diserte sur ce sujet précis, en particulier dans la période qui a précédé la remise du rapport élaboré par l'envoyé spécial du Secrétaire général au Conseil. Certes, il existe des rapports volumineux évoquant les activités de l'ONU sur place, mais les perspectives d'avenir de la province sont toujours évoquées de manière assez vague et ne permettent pas de déterminer une position univoque.[18] Pour ce qui concerne la MINUK, il semble qu'elle ne veuille pas assumer un rôle politique dans le processus de détermination du statut[19] pour pouvoir continuer à assumer les charges qui découlent de son mandat, en particulier la mise en œuvre des "standards"[20] censés assurer la mise en place d'institutions de gouvernement respectueuses des principes démocratiques.

Il est frappant de constater que la production de textes par le Conseil de sécurité est inversement proportionnelle aux références qui y sont faites par les autres acteurs ou institutions. Il convient en premier lieu de rappeler que plus aucune résolution n'a été votée concernant spécifiquement le Kosovo depuis la résolution 1244 du 10 juin 1999. Le dernier projet de résolution a été soumis en juin 2007 mais n'a pas fait l'objet d'un vote en raison de la menace d'utilisation de son droit de veto par la

[16] A6–0067/2007, 13 mars 2007

[17] V. la lettre datée du 2 avril 2007 (lettre à en-tête de l'UNMIK (Provisional Institutions of Self-Goverment)"Memorandum Zyrtar to Mr Hans-Gert Pöttering from Köle Berisha/ Subjet: letter of appreciation).

[18] V. par ex. le rapport du Secrétaire général sur la mission de la MINUK, S/2007/395, 29 juin 2007.

[19] V. l'intervention de Mr Jessen-Petersen, représentant spécial du SG au Kosovo, S/P.V.5471, 20 June 2006, p. 4.

[20] V. *http://www.unmikonline.org/standards/index.html*.

Russie.[21] Plusieurs débats sur la situation au Kosovo ont évidemment eu lieu, mais très peu ont donné lieu à des déclarations du Président du Conseil ou à des communications officielles.[22] Cet état de fait semble pouvoir s'expliquer à la fois par l'existence du Groupe de contact (Etats-Unis, Russie, France, Grande-Bretagne, Allemagne, Italie) qui s'est imposé comme une enceinte diplomatique plus à même de suivre l'évolution politique du Kosovo, mais également par le constat de la persistance des divergences au sein même du Conseil.

Ainsi, et pour ne reprendre qu'un exemple, le débat sur le transfert de compétences de la MINUK aux institutions provisoires du Kosovo, a montré des positions pour le moins peu conciliables. Gennady M. Gatilov (représentant de la Russie) a rappelé que toute initiative en ce sens devait être conforme à l'esprit et à la lettre de la résolution 1244 (1999), le représentant du Mexique (Carlos Pujalte) ne disant pas autre chose. En revanche, le représentant des Etats-Unis (James B. Cunningham) a demandé à Belgrade de reconnaître les plaques d'immatriculation délivrées au Kosovo et a enjoint les habitants de la province à faire enregistrer leurs véhicules auprès de la MINUK. Le représentant de l'Espagne (Inocencio F. Arias) s'est dit inquiet de l'attitude des dirigeants albanais du Kosovo, estimant que certaines de leurs positions étaient contraires à la résolution 1244. Du même avis, le représentant de la Serbie et du Monténégro, Dejan Sahovic, a demandé à ce que la MINUK prenne des mesures concrètes afin de mettre un terme au "débordement de compétences".[23]

On sait désormais que ce type de problème a souvent été, dans les faits, traité par le Groupe de contact, avec ou sans l'assentiment de la Russie.[24] L'activisme de ce groupement *ad hoc* peut s'expliquer par le fait qu'il s'agit d'une structure très faiblement institutionnalisée et qui présente l'avantage, par rapport au Conseil de sécurité, de pouvoir, grâce aux relais dont il dispose au sein de la MINUK, exercer certaines responsabilités politiques sans être empêchée par l'attitude récalcitrante d'une de ses composantes. C'est ainsi que l'on évoque parfois certaines positions du Groupe de contact "minus Russia".[25]

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[21] 17 July S/2007/437 draft resolution (Belgium France Germany, Italy, UK and USA).

[22] V. *http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2693011/k.6DA1/KosovobrUN_Documents.htm.*

[23] Press release, SC/7807, 3 July 2003. V. aussi "Memorandum of the Government of FR Yugoslavia on the implementation of Resolution 1244", disponible sur: *http//www.arhiva.serbia.sr.gov.yu/news/2000–05/15/18903.html; ...2000–03/06/17631.html; ...2000–03/06/17633.html.*

[24] V. notre étude, "Le principe de souveraineté à l'épreuve des nouvelles formes d'administration internationale de territoires", *Pyramides*, n°9, Printemps 2005, pp. 87–109.

[25] V. par ex. ICG, "Kosovo: Toward final status", 25 January 2005.

Par comparaison avec le Conseil de sécurité, le Secrétaire général semble avoir été un élément plus dynamique. Il est à l'origine d'une activité politique importante liée à la mission de Kai Eide.[26] Ce diplomate norvégien, représentant de son pays auprès de l'OTAN, a été désigné par le Secrétaire général pour examiner la situation au Kosovo à la suite des émeutes de mars 2004 qui ont causé la mort de 17 personnes et la destruction de nombreux sites historiques et religieux serbes. Dans son rapport, il identifie les sources de malaise: le manque d'opportunités économiques et l'absence de perspective politique claire et suggère d'accélérer le transfert de compétences "*to enhance a sense of ownership*". Il estime en conclusion qu'il est temps de lancer le processus de négociation sur le statut futur de la province.[27] Presque un an plus tard, le président du Conseil de sécurité félicitera le diplomate pour le travail effectué et saluera la volonté du Groupe de contact d'engager un processus politique devant aboutir à éclaircir le statut du Kosovo. Est également soutenue l'initiative du Secrétaire général consistant à nommer un envoyé spécial chargé de superviser ce processus.[28] C'est dans ce contexte qu'a été désigné Martti Ahtisaari.

1.1.3. *Les positions militantes*

Les principes évoqués par les instances européennes sont assez similaires à ceux qui avaient été proposés antérieurement par *Crisis Group* (ICG) au sein duquel Martti Ahtisaari assume une fonction de conseiller.[29]

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[26] V. S/2004/932, 30 November 2004.

[27] S/2004/932, 30 November 2004.

[28] S/PRSY/2005/51, 24 October 2005.

[29] "Kosovo: No Good Alternatives to the Ahtisaari Plan", *Europe Report n° 182 – 14 May 2007/* Appendix: ICG (Crisis group) se présente comme "an independent, non-profit, non-governmental organisation. Crisis Group works closely with governments and those who influence them, including the media. The board includes prominent figures from the fields of politics, diplomacy, business and media. Crisis Group is co-chaired by Chris Patten (former European Commissioner for external relations) and Thomas Pickering (former US Ambassador). Since 2000, its president and chide executive is the former Australian Foreign Minister Gareth Evans. CG raises funds from governments, charitable foundations and individual countries (Y compris des fondations qui s'impliquent résolument en faveur de l'indépendance, comme la Fondation Rockfeller, voy. la déclaration conjointe faite à New York à la mi-avril fixant les priorités pour les 120 jours de la transition, en présence de l'équipe de négociation du Kosovo, d'ambassadeurs occidentaux, de W. Petrisch, de l'envoyé spécial des Etats-Unis au Kosovo, avec le soutien de Bill Clinton et Madeleine Albright, BBC 16 April 2007...); George Soros fait partie du comité exécutif, ainsi que Lakhdar Brahimi, Zbigniew Brezezinski, Wesley Clark (ancien commandant des forces de l'OTAN durant l'opération militaire entreprise à l'encontre de la RFY en 1999), Pat Cox, Mark Eyskens, Joschka Fischer, Christine Ockrent et beaucoup d'autres personnalités politiques, anciens ministres...V. aussi la liste très impressionnante des donateurs (entreprises et personnes privées). Parmi les *senior advisers*, on retrouve Martti Ahtisaari, Paddy Ashdown, Alain Destexhe, Bronislav Geremek, Mohamed Sahnoun.

En janvier 2005, ce think tank a rendu public un document dans lequel la solution de l' "indépendance surveillée" du Kosovo s'imposait comme la solution sur le fond. Concernant la forme, il y était assumé que "Desirably, to give it complete legal as well as political effect, the Accord would also to be endorsed by the UN Security Council. Kosovo's de jure sovereignty, if not achieved by Serbian agreement or Security Council resolution, should be recognised by the whole international community, or at least such of its member states (including the U.S. and EU members) as prepared to do so".[30]

Ses membres les plus influents, dont Chris Patten et Gareth Evans, auront recours à la presse internationale pour assurer un large soutien au plan de Martti Ahtisaari, rendu public en février 2007.[31]

Le plan élaboré par *Crisis Group* sera en grande partie repris par le Groupe de contact pour le Kosovo en novembre 2005.[32] A noter également que la solution préconisée – l'indépendance conditionnelle dans l'attente d'une intégration à l'UE – reflète également les vues de la Commission internationale pour les Balkans.[33]

Il faut également relever que l'évaluation critique, quoique non explicite, de la manière dont la MINUK s'est acquittée de son mandat et la perspective que l'UE se substitue à l'ONU pour superviser le processus qualifié d' "*empowerment*" des institutions provisoires du Kosovo se retrouvent déjà dans un texte rédigé par Kai Eide en 2004 et publié dans la revue de l'OTAN.[34] Au cours de l'Assemblée parlementaire de l'OTAN qui s'est tenue en novembre 2005, ce dernier a d'ailleurs plaidé en faveur d'une résolution rapide de la question du statut définitif du Kosovo.[35] Les prises de position du Secrétaire général de l'OTAN, Jaap de Hoop Scheffer, seront, sans grande surprise, favorables au plan proposé par Martti Ahtisaari.[36]

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[30] "Kosovo: Toward final status", 25 January 2005, disponible sur: *http://www.euractiv.com/en/enlargement/Kosovo-final-status/article–134640?_print.*

[31] V. par ex., Gareth EVANS et al., "Kosovo Must Be Independent", *The International Herald Tribune*, 16 June 2007; Chris Patten, "A thicking Clock on Kosovo", *Boston Globe*, 10 August 2007.

[32] Déclaration du 31 janvier 2006: §6: rappel des lignes directrices de novembre 2005: pas de retour au statu quo ante 1999; pas de partition ou d'union avec un autre Etat; supervision internationale de la période transitoire (dimensions civile et militaire); maintien du caractère multiethnique ...

[33] V. *The Balkans in Europe's Future*. Report of the International Commission on the Balkans et également la note rédigée par Emerson, CEPS, 1 February 2007.

[34] "Kosovo: the way forward", *NATO Review*, Winter 2004.

[35] Assemblée parlementaire de l'OTAN, 13 novembre 2005.

[36] Press Briefing Mr. Jaap de Hoop Scheffer and Martti Ahtisaari, 18 October 2006; Joint Press Point, Mr. Jaap de Hoop Scheffer and Martti Ahtisaari, 16 February 2007. 2 April 2007 "NATO decision-makers visit Kosovo"; 15 June 2007: "Alliance calls

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La convergence des attitudes de différents acteurs sur la question du statut du Kosovo n'est pas le résultat d'un quelconque complot anti-serbe. Elle s'explique par un processus social complexe qui a permis l'émergence d'une sorte de référentiel commun à partir duquel il a été possible de dégager, pour un temps, un certain consensus. Celui-ci semble s'être imposé sans grande difficulté ou résistance dans des institutions concernées au premier chef par l'avenir de l'ancienne province serbe, une situation pouvant s'expliquer par le fait que celles-ci (UE, ONU, OTAN) ont, d'une manière ou d'une autre et sans jamais l'assumer, contribué à créer l'impasse dans laquelle les habitants du Kosovo se trouvent aujourd'hui. De manière générale, le professeur de droit international Nathaniel Berman relève que: "le droit international en tant que pratique discursive façonne son propre changement, ses propres mutations, son propre 'réalisme', et puis les présente comme une nouvelle réalité extérieure".[37] Dans le champ politico-diplomatique, le même type de phénomène peut être identifié. Il conduit à occulter les responsabilités particulières des acteurs extérieurs dans la survenance d'une situation, du moins lorsque celle-ci apparaît comme problématique.

1.2. Le dispositif de mise à l'écart de considérations légalistes

La plupart des textes produits entre janvier 2005 et janvier 2007, ainsi que les déclarations officielles ou articles de presse relatifs à la question du statut futur du Kosovo, révèlent un certain nombre de traits communs qui permettent de comprendre la place très limitée réservée au droit international. Si certaines normes juridiques sont bel et bien évoquées (le droit des minorités, les droits de l'homme et les libertés fondamentales), le droit international n'est pas en tant que tel censé encadrer le processus de détermination du statut. Il apparaît plutôt comme un registre formaliste uniquement destiné à permettre aux autorités serbes et russes de contrecarrer les plans de la "communauté internationale".

1.2.1. Les représentations sociales permettant de comprendre la structuration du discours dominant

L'examen des positions défendues par la plupart des Etats, organisations internationales et personnalités "engagées"montre que le soutien assez important dont a bénéficié le plan de Martti Ahtissari s'est décliné de manière relativement similaire. L'argumentaire qui est employé en l'espèce est assurément de nature à dévaluer ou écarter des arguments

for 'speedy' Kosovo Resolution"; 13 July 2007 "Discussing NATO-Serbia Partnership and Kosovo".

[37] Nathaniel Berman, *Passions et ambivalences. Le colonialisme, le nationalisme et le droit international*, Paris, Pedone, 2008, p. 323.

juridiques qui lui seront inévitablement opposés et repose sur des éléments qui ressortissent essentiellement à des registres différents, de nature politique ou éthique.

1.2.1.1. Le Kosovo est un cas exceptionnel

L'insistance à présenter la situation au Kosovo comme étant exceptionnelle, unique, sans équivalent ailleurs dans le monde, peut sans doute se comprendre par la volonté de ne pas contribuer à l'émergence d'une nouvelle norme pouvant à l'avenir légitimer des aspirations sécessionnistes ou irrédentistes. Il est donc régulièrement affirmé que l'indépendance du Kosovo ne sera pas un précédent[38] et, de surcroît, qu'il représente la dernière étape du processus de désintégration de la Fédération yougoslave. La réponse de Javier Solana à un journaliste évoquant le risque de contagion en Voïvodine, au Sandjak dans la vallée de Presevo en est un exemple..."Kosovo is the last open issue in the Balkans".[39] Plus récemment, et dans une tribune conjointe, les ministres des Affaires étrangères français et britannique affirmaient: "nous affrontons le dernier avatar de l'éclatement de l'ancienne Yougoslavie".[40] Ce type d'affirmation est rarement argumenté. On notera cependant que, selon un journaliste americain: "Kosovo is a unique case and sets no precedent for separatist movements elsewhere, because in 1999, with Russian support, the UN was given authority to decide the future of Kosovo".[41] Le projet de résolution rédigé par le rapporteur de la commission des Affaires étrangères du PE reprend également cet argument.[42] Dans le point 4 du rapport de l'ICG, le caractère exceptionnel de la situation au Kosovo est également appuyé par une référence à l'autorité du Conseil de sécurité:

> "Kosovo as a unique case: The Security Council in Resolution 1244 explicitly called for 'a political process designed to determine Kosovo's future status', thus reflecting the uniqueness of the Kosovo situation. Such a perspective has not been offered before or since with regard to other (superficially comparable) conflicts. While Resolution 1244 did not formally strip the then Federal republic of Yugoslavia (RFY) of its sovereignty over Kosovo, it did implicitly state that Serbia had lost the right to exercise its authority over the entity".[43]

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[38] V. avis de la Commission du commerce international du Parlement européen joint au rapport Langendijk, A6–0067/2007, §2.

[39] Interview of Mr Javier Solana published in *Epoka e Re*. (trouvée sur le site off. UE)

[40] Bernard Kouchner, David Miliband, "Kosovo, une affaire européenne", paru dans *Le Monde* du samedi 8 septembre 2007.

[41] *Washington Post*, 13 March 2007.

[42] Joost Langendijk, "Draft report on the future of Kosovo and the role of the EU (2006/2267 INI)), 22 January 2007, pt. C).

[43] "Kosovo: No Good Alternatives to the Ahtisaari Plan", *Europe Report n° 182 – 14 May 2007*, p. 44.

Dans la résolution qu'il a adoptée le 29 mars 2007, le PE considère que: "[...] au cours des années 1990, la population du Kosovo a été soumise à des actes de violence et de répression systématiques qui ont abouti en 1999 à une expulsion massive de la population civile qui a conduit le Conseil de sécurité, *dans le droit fil de l'intervention de l'OTAN*, à intervenir et à placer le territoire sous contrôle civil et sécuritaire international; *considérant que ceci crée une situation inédite en droit international*".[44]

Ce paragraphe sous-entend que la résolution 1244 avalise d'une certaine manière l'opération militaire entreprise par l'OTAN et, plus encore, que le droit international n'est pas à même de fournir des éléments permettant de statuer en droit sur la question du statut du territoire. Il est affirmé un peu plus loin que la situation exceptionnelle dans laquelle se trouve le Kosovo "ne permet guère d'envisager la réintégration du Kosovo dans la Serbie"[45] mais que, néanmoins, "tout règlement concernant le futur statut du Kosovo doit être conforme au droit international",[46] une référence sans doute à la nécessité de passer par le Conseil de sécurité afin de conférer le sceau de la légalité au détachement d'une partie du territoire de la Serbie (voir *infra*).

1.2.1.2. La Serbie n'a plus le droit d'imposer son autorité à la population du Kosovo

L'évocation des souffrances endurées par les Kosovars, les meurtres de masse, le système qualifiée d' "apartheid" mis en place sous le régime de Milosevic, la déportation de centaines de milliers de personnes, sont autant d'éléments qui auraient déterminé la "communauté internationale" à lancer une opération militaire en 1999. En l'occurrence ce rappel des faits survenus avant mars 1999 est souvent utilisé pour dénier à Belgrade le droit d'exercer son autorité sur son (ancienne) province. Il est ainsi souvent rappelé aux autorités serbes que la perte du Kosovo doit être imputée à Slobodan Milosevic et que les "mythes historiques paralysants"l' empêcheront, si elles persistent dans cette voie, d'accéder à l'UE.[47] Pour les libéraux démocrates du Parlement européen, il est temps de prendre acte que le "Kosovo n'est plus dans la sphère d'influence de la Serbie";[48] une formule qui permet sans doute d'éviter de devoir se pro-

[44] A6–0067/2007, Résolution du Parlement européen du 29 mars 2007 sur l'avenir du Kosovo et le rôle de l'UE (2006/2267(INI)), pt.B. (Nous soulignons).

[45] *Ibid.*, pt. H.

[46] *Ibid.* §3.

[47] *Washington Post*, 13 March 2007; voy. également les propos de l'Ambassadeur de France à Belgrade, M. Pernet, en septembre 2005, disponible sur: *http//www.amba-france-yu.org/article-imprim.php3?id_article=917* ainsi que le compte-rendu établi par Judy Batt du séminaire qui s'est tenu à l'Institut d'études de sécurité de l'UE, Paris, 20 juillet 2007, IESUE/SEM(07)17.

[48] Groupe ALDE du Parlement européen, 29 mars 2007.

noncer clairement sur des problèmes juridiques impliquant de préciser l'identité du titulaire de la souveraineté et l'assiette territoriale sur laquelle il est censé exercer son autorité. ICG, par contre, a entendu traiter cette question et a rapidement que conclu que:

> "Since international intervention evicted Belgrade from the province in 1999, Kosovo has been run as a UN protectorate. UN Security Council Resolution 1244, which mandates an international administration, is ambiguous on the duration of Belgrade *technical* sovereignty over Kosovo. But It does make clear that Belgrade, having violently expelled more then 700.000 Kosovo Albanians in 1999, has lost the *right* to run the province, and that following a period of international administration, a *political* process will determine the final status".[49]

Le fait d'avoir confié à l'ONU l'administration du territoire aurait donc rendu caduques les droits de la Serbie sur ce territoire. Celle-ci ne pourrait plus se prévaloir que d'un titre très formel qui, de surcroît, ne pourrait pas être invoqué en raison des crimes dont elle est tenue pour responsable.

1.2.1.3. La Province est peuplée à plus de 90 % d'albanophones ("ethnic Albanians")

Certains éléments de fait semblent avoir eu un poids déterminant pour écarter des considérations fondées en droit. Ainsi, le rappel du rapport de 9 à 1 en faveur de la population albanophone est un argument particulièrement utilisé pour justifier l'option de l'indépendance et/ou le soutien au plan de Martti Ahtisaari.[50] De même, la situation désastreuse du point de vue économique et les chiffres alarmants du chômage dans la province sont autant de constats factuels et "objectifs" qui viennent soutenir les propos de ceux qui veulent régler rapidement la question du statut et avaliser le plan du médiateur de l'ONU.[51] Selon Anne-Marie Lizin, une sénatrice belge militante de longue date pour l'indépendance du Kosovo: "Il est irresponsable de ne pas prendre en compte la demande d'indépendance du Kosovo: le Monténégro vient de l'obtenir sans difficultés avec 56% de sa population qui y est favorable; au Kosovo c'est un peuple meurtri qui réclame sa liberté à plus de 92%".[52]

Pour autant, à aucun moment n'est évoqué le droit à l'autodétermination du peuple Kosovar, et ce contrairement à la situation

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[49] V. le site de ICG, "Kosovo's Status: Difficult Months Ahead", 20 December 2006, (Nous soulignons).

[50] V. les informations diffusées sur le site d'information officiel de l'ONU (*http://www.un.org*) durant l'année 2007 (not. 30 janvier–7 février– 22 février–12 mars– 29 avril).

[51] Martti Ahtisaari évoque régulièrement ces problèmes, *http://www.un.org* (26 avril 2007).

[52] Anne-Marie Lizin (sous la dir. de), *Kosovo, l'inévitable indépendance*, Bruxelles, Ed. Luc Pire, 2007, p. 15.

prévalant en 1991, lorsque les Européens justifiaient leur reconnaissance des républiques sur cette base. En l'espèce, la simple mention du fait que 90% de la population est d'"origine albanaise"dans cette partie du territoire, et qu'elle semble de surcroît unanimement souhaiter son indépendance, suffirait à conférer le sceau de la légalité au projet cautionnant le détachement de la province. Le fait d'éviter toute référence à l'autodétermination permet aussi, et peut-être surtout, de justifier la mise sous tutelle du Kosovo et l'octroi de pouvoirs importants à des instances externes dont la légitimité ne relève pas directement du principe de souveraineté. Dans le plan concocté par Martti Ahtissari, il est prévu que le Kosovo sera une démocratie de marché multiethnique dont la surveillance par la communauté internationale sera censée reposer sur un consentement des autorités: "1.10 "The international community shall supervise, monitor and have all necessary powers to ensure effective and efficient implementation of this Settlement ...Kosovo shall also issue an *invitation* to the international community to assist Kosovo in successfully fulfilling Kosovo's obligations to this end".[53] Toutefois, les différents textes évoquant les responsabilités qui devraient être exercées par l'administration civile chapeautée par la "communauté internationales"et l'UE (ICO-EUSR) montrent que le modèle de référence est celui en vigueur en Bosnie-Herzégovine.[54] Ce que l'on appelle "les pouvoirs de Bonn" justifient l'exercice d'un pouvoir de dernière instance[55] permettant l'annulation de certaines décisions prises par les autorités locales, la révocation de personnels élus dont les comportements ne seraient pas compatibles avec les principes agréés par les parties et les conditions mises à la reconnaissance de l'indépendance.

Dans le jargon européen, l'expression "*ownership*" est, dans ces circonstances, privilégiée. Notons cependant qu'il ne s'agit en rien une notion juridique. C'est tout au plus un principe politique en vogue au sein des institutions internationales soucieuses de légitimer leur intervention

[53] Martti Ahtisaari, "Comprehensive Proposal For a Kosovo Status Settlement", 2 February 2007 (Nous soulignons), disponible sur: *http://www.unosek.org/docref/Comprehensive_proposal-english.pdf*.

[54] ICO-EUSR preparation team– EUPT Kosovo, February 2007, voy. également le projet de résolution du 17 juillet 2007, §6 et Annex I (ESDP mission); l'annexe II prévoit expressément que les forces militaires "supervise, monitor and have executive authority over the KSF" (pt. G). Création de deux structures ICO-EUSR/EUPT: définition des compétences du bureau civil qui sera dirigé par une personnalité à double casquette ("Communauté internationale" et "UE"). La future mission PESD aura pour principale fonction de soutenir les autorités du Kosovo dans les domaines de la Justice, de la police, du contrôle des douanes, de la grande criminalité. Il est envisagé de déployer 1500 personnes (juges, procureurs, policiers....).

[55] V. §11.3 du plan rédigé par M. Ahtisaari: "The ICR shall have overall responsibility for the supervision, and shall be the final authority in Kosovo regarding the interpretation of this settlement", *op. cit.*, p. 4.

en présentant les programmes de (re-)construction d'Etat ou d'institutions comme étant co-écrit et agréé par tous les acteurs concernés et pas imposés de l'extérieur.[56] Cependant, l'option de l'octroi de l'indépendance se justifie surtout par le fait que ne pas l'accorder contribuerait à un regain de violence dans la région,[57] un argument abondamment utilisé par le gouvernement allemand pour justifier la reconnaissance unilatérale de la Croatie et de la Slovénie en 1991, avant la date prévue par les autres Etats membres de la CE.

1.2.1.4. La négociation a échoué, aucun autre compromis n'est possible pour assurer la paix et la sécurité de la région

Le maintien de positions diamétralement opposées et, par conséquent, le caractère vain de la poursuite des négociations sont également des éléments de fait qui semblent avoir nourri la conviction que le plan proposé par Martti Ahtissari est le seul compromis réaliste imaginable,[58] le seul à assurer la stabilité et la paix dans les Balkans. Cette situation d'impasse ne prend sens en réalité que sur la base d'un rapport de forces politique. Il suppose par ailleurs que les deux parties (Belgrade et Pristina) jouissent d'un statut équivalent en droit alors que la Serbie est un Etat souverain membre de l'ONU contrairement au Kosovo. Un tel constat suppose également que le droit international, ou plus précisément la résolution 1244, crée un "vide de souveraineté"[59] et qu'une solution ne pourrait alors qu'être inédite dans la mesure où est exclu tout retour à la situation prévalant avant l'opération militaire entreprise par l'OTAN en mars 1999.

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[56] Au Kosovo, des critiques sont émises à ce sujet considérant que le futur Etat sera "handicapé". Le mouvement *autodétermination* est particulièrement critique du type de solution et des conditions qui seront imposées au Kosovo. C'est pourquoi, beaucoup d'albanophones considèrent qu'ils ne peuvent aller plus loin dans le compromis tel que présenté dans le plan Ahtisaari, voy. notamment *Koha Ditore*, ""Ahtisaari's plan has already been written. It is a product of Contact group instructions and the pressure form the international community on the Kosovar during the negotiations. Ahtisaari's plan could make Kosova a state, but it would be a handicapped state, which would have difficulties in functioning normally. It would, in a way, divide Kosovo along ethnic lines, even is just temporarily. It would make Kosovo dependant on the international community, through great powers given to the EU in leading the international civil mission, thus limiting democracy in Kosova, 15 août 2007 (article traduit par les services de *BBC Monitoring European*).

[57] Chris Patten: "Kosovo's Last Chapter Is Still to be Written", *The Financial Times*, 7 June 2007; ICG –New Report: "Europe Must Break the Kosovo Stalemate", 21 August 2007.

[58] Disponibles sur: *http://www.un.org* (12 mars 2007).

[59] Intervention de Steiner lors de la 4782ème réunion du Conseil de sécurité; il évoque le problème lié au statut indéfini du Kosovo, Press Release SC/7807, 3 July 2003.

L'intervention du représentant des Etats-Unis lors d'une réunion du Conseil de sécurité qui s'est tenue le 10 mai 2007 reprend ces différents éléments. Il estime que le *statu quo* menace la paix et la sécurité régionale et regrette que "les propositions des Serbes n'aient pas pris en compte l'histoire de la région et la polarisation des communautés résultant de la politique de nettoyage ethnique mise en place par Slobodan Milosevic [...] Le représentant a appuyé les propositions de l'envoyé spécial pour le Kosovo, un territoire qui faisait partie d'un pays qui n'existe plus. Cette solution est unique et les Etats-Unis se sont positionnés comme un partenaire du Kosovo afin de conclure le dernier chapitre de la désintégration de l'ex-Yougoslavie".[60]

On retrouve ce même type de propos dans le préambule de la résolution présentée par les Etats-Unis, la Grande-Bretagne, la France, la Belgique, l'Allemagne et l'Italie le 17 juillet 2007: "Recognizing the specific circumstances that make Kosovo a case that is sui generis resulting from the disintegration of the former Yugoslavia, including the historical context of Yugoslavia's violent break-up, as well as the massive violence and repression that took place in Kosovo in the period up to and including 1999 ...".[61]

Quant aux événements violents qui ont suivi cette date, ils sont soit peu mentionnés et, lorsqu'ils le sont, ils servent indirectement à justifier la présence civile et militaire de l'UE et de l'OTAN dans le futur Etat ainsi que les limites imposées au pouvoir exercé par les autorités kosovares. La plupart des rapports et documents relatifs à la situation au Kosovo donnent finalement une image assez désastreuse de la situation y prévalant, que ce soit sur le plan économique, social ou politique.

1.2.2. Les représentations sociales permettant de comprendre le discours minoritaire

Les positions défendues par les gouvernements serbe et russe, ainsi que par d'autres acteurs, donnent une place plus importante au droit international et proposent une autre lecture de la situation sur le terrain, de l'histoire du Kosovo et des perspectives d'avenir. Pour leurs détracteurs, l'invocation du droit n'est qu'un moyen cynique de défendre ses propres intérêts[62] en "prenant en otage"le Kosovo.[63] Seront simplement exposées

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[60] Conseil de sécurité, 5673ème séance, 10 mai 2007.

[61] 17 July S/2007/437 draft resolution (Belgium France Germany, Italy, UK and USA); voy. également "Kosovo: No Good Alternatives to the Ahtisaari Plan", *Europe Report n° 182*, 14 May 2007.

[62] Chris Patten, "A thicking Clock on Kosovo", *Boston Globe*, 10 August 2007. Certains commentaires laissent entendre que la Russie pourrait effectivement lier la question du règlement du Kosovo et celle du bouclier anti-missiles, voy. par ex., *New York Times*, 9 July 2007.

[63] Crisis Group, "Kosovo: Toward final status", 25 January 2005.

ici les éléments permettant de comprendre comment un rapport d'adversité peut se nourrir, en partie, de l'opposition entre droit et politique.

1.2.2.1. La solution pour le Kosovo doit être basée sur un principe applicable à d'autres cas similaires

Pour les critiques du plan Ahtisaari, il n'apparaît pas évident de considérer que la situation au Kosovo est à ce point exceptionnelle et encore moins que la décision qui serait prise en l'espèce ne constituerait pas un précédent en droit. Dans un dossier publié par le *Courrier international*, "l'insoutenable légèreté des Européens", il est fait référence au peu d'attention portée aux risques de réaction en chaîne dans les territoires de l'ex-URSS.[64] Le journal communiste *L'Humanité* souligne le caractère inédit, non pas de la situation sur le terrain, mais d'une décision qui contribuerait à réduire sensiblement le territoire d'un Etat membre de l'ONU. Le projet est, selon cette source, contraire au droit international et, sur le plan politique, contribuerait à sanctionner la création d'une colonie de l'UE.[65] Selon le président russe, la solution retenue pour le Kosovo doit pouvoir être appliquée partout. Il s'agit donc bien de dégager un principe qui serait d'application universelle…[66]

> "Russia's position is very strong because it is principled. Let me quote what Lavrov said: 'By calling for Serbia's territorial integrity, Russia is protecting the UN Charter and international law, and by asking for maximum rights for the Kosovo Serbs and the protection of churches and monasteries, it is safeguarding the fundamental principles of Europe and democratic world".[67]

L'articulation entre les arguments juridiques, politiques et moraux ne semble pas dans ce cas problématique, sur le plan formel du moins. Les différents registres sont ici présentés comme étant complémentaires et pas en opposition.

1.2.2.2. De simples éléments de fait ne peuvent remettre en cause le titre juridique de la Serbie sur le Kosovo

Pour le président serbe, il est évident que le droit ne peut fournir aucun élément permettant de justifier l'indépendance du Kosovo ou toute autre solution qui n'aurait pas l'aval de la Serbie.[68] Dans un entretien avec un journaliste, il s'en explique en ces termes:

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64 *Courrier International*, n°851 du 22 au 28 février 2007.

65 *L'Humanité*, 21 mars 2007.

66 *Courrier International*, n°848 du 1er au 7 février 2007.

67 *BBC*, 24 April 2007 (revue de presse PE).

68 Le Président Tadic estime qu'il faut poursuivre les négociations et écarter les propositions de M. Ahtisaari qui remettent en cause la souveraineté serbe sur le Kosovo. Il a par ailleurs exclu tout recours à la force par la Serbie, *Rapport de la mission du Conseil de sécurité sur la question du* Kosovo, S/2007/256*,* 4 mai 2007, §19.

> "As law and Justice are clearly on Serbias's side, this is no easy task for the advocates of independence. That is probably the reason why they are not even trying to counter Serbia's legal arguments. They did not even try to do that. Had they tried to present some systematic explanation, the whole thing might have appeared more serious. Instead, they appeared totally unconvincing"... Q.: Did Ahtisaari at least have some legal argument in favour of his plan to present the Albanians with a state? K.: No. Since it is impossible to find legal grounds for an illegitimate and illegal proposal, he called on history, on what happened in the 90's. My counter-argument to this was very clear: history is not measured in years but in centuries, and the Serbs and Albanians have been developing relations for centuries. And if he wants to count as history the last 10 years, then he cannot just take into account what happened before 1999 but also what happened after. In any case, his ideas about history cannot make up for the obvious lack of legal grounds".[69]

Il est par ailleurs rappelé que 30.000 "Albanais" vivent à Belgrade, et qu'il est donc possible d'imaginer des formule de coexistence entre les deux communautés.

1.2.2.3. Un compromis est encore possible

Dans un CD-Rom réalisé par un think tank serbe établi à Bruxelles et intitulé "Kosovo 2006. The Making of a Compromise",[70] il est fait référence aux diverses formules qui auraient pu être discutées pour tenter de trouver une issue au conflit. Du statut du Sud-Tyrol à celui de Hong Kong en passant par le modèle fédéral belge, les exemples ne manquent pas pour illustrer à la fois le caractère non exceptionnel de la situation et pour évoquer l'éventualité d'une solution qui pourrait être inédite sur un plan politique tout en préservant les droits souverains de la Serbie. Dans le rapport de la mission de l'ONU, il apparaît que la Serbie pourrait également accepter le principe d'une "autonomie supervisée". C'est, pour le représentant serbe, une option viable qui a été proposée lors des négociations à Vienne, mais n'aurait pas été prise en considération par le médiateur de l'ONU.[71] Dans son §21, le rapport fait aussi mention du fait que les partis politiques serbes ont quasi tous rejeté les propositions de Martti Ahtisaari et que les personnalités qui étaient néanmoins prêtes à les accepter ont précisé qu'il était inacceptable de faire de la renonciation au Kosovo une condition d'entrée dans l'UE.[72]

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[69] *BBC Monitoring European*, 16 April 2007.

[70] Institute 4S, Brussels, *http://wwww.kosovocompromise.com.*

[71] Rapport de la mission du Conseil de sécurité sur la question du Kosovo, S/2007/256, 4 mai 2007, §§12–13.

[72] *Ibidem*. Il est entendu que, vis-à-vis de Belgrade, la carotte de la reprise des négociations avec l'UE peut être utilisée en dépit de sa non coopération avec le TPY**,** *Le Figaro*, 31 mars 2007.

1.2.2.4. Le syndrome de Munich

Pour les autorités serbes, le respect du droit international exclut la possibilité d'imposer à la Serbie une solution qui n'aurait pas son assentiment, y compris en recourant à l'autorité du Conseil de sécurité. Les propos de Kostunica sont à cet égard sans ambiguïté:

> "Serbia has clearly warned that resolution 1244 is binding on all governments and that no UN member can breach a Security Council resolution. If anyone dared unilaterally recognize the independence of the province, this would represent the worst breach of UN Charter. Further more, it would be a double breach, as both the Charter and the resolution 1244 would be violated, and this would be trampling of the authority of the United Nations itself. I think that this should absolutely not be allowed to happen, and that everyone is aware of the seriousness of the consequences". Q: "Is there any chance for the Security Council ever to decide to take the Kosovo away from Serbia?"K.: "No. Never. This would mean that one of the highest UN bodies is in breach of the highest UN law. This would be a dramatic U-turn that could hard back tot the situation on the eve of WWII when some serious breaches led to serious consequences".[73]

Alors que le "syndrome de Munich"avait été utilisé, notamment par Madeleine Albright, pour justifier la réponse militaire de l'OTAN en 1999, il est aujourd'hui mobilisé pour délégitimer toute tentative de redessiner les frontières de la Serbie pour sauvegarder la paix et la stabilité de la région. Le ministre Popovic rappelle ainsi: "You know, the 1938 Munich Agreement was also imposed. Part of a democratic country was removed from it by the decision of some other players, and they said it was because we would have peace, and you remember what happened after. I do not see a better parallel".[74]

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Ces critiques à l'encontre du plan Ahtisaari peuvent sans aucun doute être considérées comme minoritaires. De manière générale, tant dans les médias (occidentaux) que dans la plupart des instances internationales, elles sont rarement évoquées, prises en considération ou sérieusement discutées.[75] C'est le cas pour les questions de pur fait, et davantage encore pour les objections formulées en termes juridiques, qu'elles concernent les droits souverains de la Serbie, les pouvoirs du Conseil de sé-

[73] *BBC Monitoring European*, 16 April 2007.

[74] *Financial Times*, 30 May 2007.

[75] Johan Galtung, Jan Oberg et Alexander Mitic ont en fait l'amère expérience. Ils ont, à plusieurs reprises, essuyé des refus de la part de grands médias internationaux concernant la publication d'une tribune particulièrement critique de la manière dont le dossier du Kosovo a été géré.

curité et la possibilité d'imposer l'indépendance du Kosovo ou encore la perspective de créer un Etat indépendant, mais ne disposant pas de toutes les compétences normalement dévolues à un Etat souverain. Au vu des développements les plus récents, on peut toutefois considérer qu'elles ont pu contribuer à infléchir quelque peu les positions défendues jusque là et qu'elles sont, parmi d'autres éléments, un facteur permettant de comprendre la réintroduction de considérations plus légalistes.[76]

1.3. La réintroduction de considérations plus légalistes: une conséquence de l'affaiblissement du discours dominant ?

Les références au droit international et à la Charte de l'ONU ne sont pas tout à fait absentes des textes produits par les institutions européennes. Hormis les usages ambigus relevés ci-dessus, elles se retrouvent régulièrement dans des considérants ou en préambule et sont souvent exprimées sous forme incantatoire, sans viser une situation très précise ou un problème donné. L'approche développée par l'UE apparaît somme toute très technocratique, comme en témoignent les documents relatifs à la préparation de la mission de l'UE qui semblent prendre pour acquis la mise en œuvre du plan Ahtisaari pour se concentrer sur des aspects plus opérationnels.[77]

Progressivement cependant, il apparaît que le déploiement tel que prévu s'est heurté à la non résolution du problème juridique soulevé par la détermination du statut. La résistance opposée par la Russie (et par la Serbie dans une moindre mesure), mais aussi la position très ferme des Etats-Unis en faveur de l'indépendance, ont contribué à relancer des débats. Le consensus qui s'était dégagé précédemment a semblé, pour un temps, moins assuré (1); ce qui a contribué à accorder une place plus importante aux considérations développées par le discours minoritaire (2). Cette évolution n'a pas pour autant débouché sur une solution de compromis justifiée en droit, exception faite peut-être de la nécessité d'obtenir un mandat du Conseil de sécurité pour faire avaliser l'indépendance du Kosovo et sa mise sous tutelle (3).

1.3.1. Les doutes exprimés en Europe

Le débat qui s'est tenu en mai 2007 au sein de l'Assemblée parlementaire de l'UEO (Union de l'Europe occidentale/WEU) permet, dans

[76] Notons cependant que certaines déclarations émanant du gouvernement russe, concernant le droit à l'autodétermination par exemple, ne sont pas non plus dénuées d'ambiguïté et ne peuvent être comprises que par référence au soutien apporté par la Russie à certains mouvement sécessionnistes en Géorgie ou en Moldavie.

[77] Pour l'UE, il s'agit surtout de clarifier son rôle et la répartition des compétences dans les institutions mises sur pied pour assurer la relève de l'ONU et surtout veiller à une répartition bien déterminée des rôles assignés à chaque acteur international.

une certaine mesure, de comprendre les réticences et les doutes exprimés par certains Etats membres de l'UE par rapport au scénario envisagé pour le Kosovo.[78] A noter cependant que l'absence de documents officiels reprenant en substance le résultat des échanges qui ont eu lieu au sein du Conseil et plus encore lors de réunions informelles de type "Gymnich" est assurément problématique lorsqu'il s'agit d'identifier avec précision le type d'arguments utilisés par les ministres des Affaires étrangères.[79]

Dans un rapport relatif à la question du Kosovo et plus généralement à la sécurité de l'Europe,[80] un certain nombre de considérations portent la marque du discours dominant présenté ci-dessus. Par exemple, le fait que la Serbie doive choisir entre une vision idéologique et passéiste visant à maintenir certaines structures sociales et l'adoption de standards européens (point iii), ainsi que le fait de considérer que le Kosovo constitue a "*special case*" (point xxiv). Sont néanmoins mentionnés, avec une certaine rigueur, et sans jugement moral, la position de la Serbie et les considérations juridiques qu'elle oppose à la mise en œuvre du plan de Martti Ahtisaari, la situation particulièrement dramatique dans laquelle se trouve la population serbe ainsi que les risques de déstabilisation pour la région dans l'hypothèse d'une application forcée de ce plan, autant d'éléments fort peu évoqués dans des documents de même nature.

Le débat qui aura lieu moins d'un mois plus tard dans cette même enceinte illustre l'existence de différences d'appréciation et d'opinions "dissidentes" ou critiques qui commencent à s'affirmer plus nettement. On notera en premier lieu que les Parlementaires ont eu l'occasion d'entendre Tim Judah, journaliste pour *The Economist* et spécialiste des Balkans. Visiblement peu habitué au langage diplomatique et au jargon en vogue dans les institutions internationales, il a mis en évidence de manière très explicite les difficultés auxquelles les principaux décideurs seront confrontés s'ils persistent dans la voie qu'ils ont tracée, les divergences qui minent l'unité de la "communauté internationale" et la détermination de Moscou à faire accepter son point de vue.[81] Evoquant l'hypothèse d'une reconnaissance de l'indépendance sans aval du conseil de sécurité, il précise:

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[78] Quand bien même il faut prendre en considération le statut particulier de cette institution en voie de liquidation puisque ses principales fonctions ont été reprises par l'UE et le fait que les opinions qui y exprimées sont le fait de parlementaires et pas de responsables de l'exécutif.

[79] La presse s'est fait l'écho des divergences existantes pour les déplorer dans la plupart des cas.

[80] Assembly of Western European Union. The Interparliamentary European Security and Defence Assembly, Fifty-third session, 15 May 2007, "The EU and Security in south-east Europe", Report submitted on behalf of the Political Committee by Gerd Höfer (Germany, Socialist group), Document C/1970.

[81] Third Sitting, 5 June 2007, A/WEU (53) CR3, pp. 3 et ss.

> "Let us recall the other point that has become rather obvious but has not been mentioned. If Kosovo declares independence, we shall have the ironic situation whereby the Special Representative of the Secretary General, the highest legal authority in the land and the head of the United Nations in Kosovo, would be obliged to declare this illegal because it would not be within the competencies of resolution 1244 and the Kosovar Parliament would not be allowed to declare independence. The United States and others would therefore be contemplating recognising the independence of a country that had been declared illegal by the highest authority in the land– the United Nations. It is not surprising that, in those circumstances, we are seeing a little backing off".[82]

Le débat qui s'en suit est intéressant à plusieurs égards. Le premier intervenant, Lord Russel-Johnston (UK/groupe libéral) persiste à présenter les différentes options en fonction de considérations morales:

> "In this assembly, we should have an opinion. Is it right or not right that, after the dreadful war in which five times as many Kosovo-Albanians died as Serbs, the Kosovo people should be pushed back into Belgrade? Surely our decisions on these questions are not, or should not be simply a matter of balancing demands and obligations, but concern what is *right* and what is wrong".[83]

Ses collègues, en revanche, se montrent plus enclins à développer des considérations d'ordre politique, voire juridique. Ainsi, Mr DØRUM (Norway) répliquera:

> "I listened to my friend Lord Russel-Johnston and I would like to say that sometimes there are three alternatives: messy, much more messy and perhaps less messy. I try to stick to the position of less messy"..."It should be a necessity for everybody trying to apply international standards in the western Balkans to adopt a comprehensive attitude towards all states and political entities in the area, not in order to do the same things at the same time but to do certain things in a certain order".[84]

Mr Rivolta (Italie), intervenant au nom de la fédération des chrétiens démocrates et démocrates européens, rappelle que:

> "The Italian parliament had reached the conclusion that there was no obstacle in principle to Kosovar independence, provided both parties agreed. If independence were to be pursued against the will of one party would be *a de facto* breach of international law; it had been said in Mr Ahtisaari's report that this would not become a precedent in other situations. However, it would in reality set a precedent".[85]

Une appréciation du plan Ahtisaari sera formulée en termes plus critiques par son compatriote, Mr Laakso:

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[82] *Ibid*., p. 4.

[83] *Ibid*., p. 6 (Nous soulignons).

[84] *Ibid*., pp. 8–9.

[85] *Ibid*., p. 6.

> "[...] despite coming from Finland, I am critical of Mr Ahtisaari's proposals. The question has been posed as to whether Mr Ahtisaari is a declining or a rising star? In any case, to the United Nations, he is a star. He was proposed as a special envoy because he fully shares the United States' opinions on the future status of Kosovo. That is the only reason why he has been appointed".[86]

Il fera ensuite référence au précédent des îles Aaland en rappelant que l'option de l'indépendance, à laquelle la Finlande s'opposait tout en proposant un statut d'autonomie, avait été exclue à l'époque. Il estime que: "The problem with Kosovo is that we never had the opportunity to discuss autonomy because the United States and other countries – those who always follow the United States unquestionably – support independence".[87] Le député slovène, Mr Jelinčič poursuivra dans la même veine:

> "We should not talk about Ahtisaari, whose plan is a kind of story for non-open-minded people that can never work in the real world. It could cause a new Pandora's Box to be opened and countries all over the world to say, "We want the same thing to happen here". What should we do then? Send the Americans to bomb the whole world?"..."The only way to calm down the situation in the western Balkans is to take all the countries in the region– Bosnia and Herzegovina, Croatia, Serbia, Montenegro, Macedonia and Albania – into the EU at the same time, when they are ready".[88]

En conclusion, le président du comité politique déclare:

> "Everything depends on the United Nations Security Council resolution and reactions to it. The Political Committee had been right to call for this report in order to demonstrate through the Assembly that WEU was an integral part of the EU and could provide critical but constructive support for the process in the region".[89]

Cette conclusion pourrait s'expliquer par la volonté de cette assemblée de justifier son existence en dépit du fait que l'UEO n'est plus opérationnelle et que ses fonctions peuvent sembler redondantes par rapport à celles assurées par le Parlement européen. Cela étant, elle apparaît également se faire l'écho de préoccupations exprimées par d'autres personnalités et reprises par certains Etats membres de l'UE.

1.3.2. Les facteurs d'affaiblissement du discours dominant

L'espoir de voir un jour le Kosovo devenir une démocratie multiethnique est parfois ébranlé par des informations qui grippent la mécanique argumentative mise en place en soutien au plan de l'envoyé spécial

[86] *Ibid*., p. 11.

[87] *Ibid*., p. 11.

[88] *Ibid,* p. 9.

[89] *Ibid*., p. 12.

de l'ONU. Ainsi, dans le courant du mois de mars 2007, la presse française a traité de l'inculpation par le TPY de l'ancien premier ministre du Kosovo, Ramush Haradinaj, pour crimes contre l'humanité. L'acte d'accusation visait des crimes perpétrés en 1998 par l'UCK.[90] Etait également évoquée la disparition suspecte de certains témoins susceptibles de confirmer les soupçons de la justice internationale. Sa remise en liberté est alors accueillie avec circonspection.[91] Selon un journaliste, "Inculpé depuis le 9 mars 2005, M. Haradinaj, homme puissant, longtemps choyé par les Américains, dispose de nombreux alliés au sein de la communauté internationale qui regrettent les accusations portées par la procureure du TPIY, Carla Del Ponte. Le 6 juin 2005, les Juges du TPIY ont d'ailleurs remis M. Haradinaj en liberté provisoire, accompagnée de mesures exceptionnellement clémentes. Placé sous l'autorité de la MINUK, l'accusé était autorisé à participer à des activités politiques jugées importantes 'pour un développement positif de la situation politique et sécuritaire au Kosovo'".[92] Ce même journaliste constate que les Etats se montrent réticents à fournir les preuves qui permettraient de sanctionner les responsables de l'UCK et accuse la MINUK de faire obstruction aux enquêtes.

Dans un article paru dans *Le Monde Diplomatique*, Jean-Arnaud Dérens regrette également que la communauté internationale ait renoncé à faire valoir les standards qu'elle a imposés en matière de respect des droits de l'homme et des minorités et de jugement des criminels de guerre.[93] Il estime non pertinent de qualifier le plan Ahtisaari de compromis dans la mesure où il ne tient aucunement compte du raisonnement de Belgrade. Pour lui, il n'y a pas eu non plus de réelle négociation, ni de prise en considération des limites et des effets pervers de la tutelle exercée en Bosnie-Herzégovine qui a servi de modèle pour concevoir la future mission qui sera exercée par l'UE au Kosovo. Il conclut: "M. Ahtisaari semble reprendre à son compte deux principes erronés et contre-productifs suivis par la 'communauté internationale' dans sa gestion des guerres yougoslaves des années 1990: séparer les problèmes les uns des autres, et gagner du temps en différant la recherche de solutions".[94]

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[90] *Libération,* 6 mars 2007.

[91] *Le Figaro*, 5 mars 2007.

[92] *Le Monde*, 4 mars 2007.

[93] V. également le jugement sévère porté par la Commission internationale pour les Balkans: "Time is running out in Kosovo. The international community has clearly failed in its attempt to bring security and development to the province. A Multi-ethnic Kosovo does not exist except in the bureaucratic assessments of the international community", rapport précité, p. 19.

[94] Jean-Arnaud Dérens, "Les propositions contestées des Nations Unies. Indépendance du Kosovo, une bombe à retardement", *Le Monde Diplomatique*, mars 2007, pp. 6–7.

En dépit des assurances données par les partisans de l'indépendance du Kosovo, certains ne semblent toujours pas convaincus par l'argument faisant de celle-ci une conséquence de l'existence d'une situation exceptionnelle impliquant une solution inédite ne créant pas de précédent. En témoigne notamment, cette anecdote racontée par un diplomate:

> "[...], a map with potential hotspots of the Kosovo kind marked on it has been sent through diplomatic channels to the addresses of 200 interested parties. The document had 30 hotspots marked in red. According to this diplomat, when diplomatic circles gave serious consideration to the Pandora's Box effect, the Americans had to answer the question as to how they meant to solve the problem of another Kosovo.... 'After five or six beers, their answer was this was not a problem, because another Ahtisaari would be dispatched to another Kosovo'".[95]

Loin d'avoir été convaincu par le fait que seule la Russie poursuit des intérêts égoïstes dans la région en s'opposant à la mise en œuvre du plan Ahtisaari, un article paru dans *The Guardian* rappelle un certain nombre d'éléments qui étaient jusque là essentiellement évoqués par des médias ou des personnalités peu visibles:

> "Far from being concerned about this fragmentation, Washington encourages it. 'Liberating' Kosovo from direct Belgrade control, achieved by the illegal 1999 bombardment of the rump Yugoslavia, has already brought rich picking for US companies in the shape of the privatisation of socially owned assets. Even more important, it has enabled the construction of Camp Bondsteel, the US's biggest 'from scratch' military base since Vietnam war, which jealously guards the route of the trans-balkan Ambo pipeline, and guarantees western control of Caspian oil supplies...".[96]

James Dancer, diplomate britannique en poste à Belgrade entre 2001 et 2003, a écrit au rédacteur en chef du *Financial Times* pour attirer son attention sur les risques qu'une déclaration unilatérale d'indépendance par le Kosovo en faisant un parallèle avec la situation en Croatie en 1991 et en Bosnie en 1992. Il conclut néanmoins qu'une issue pacifique est imaginable mais que "the present talks have been pre-cooked to lead to independence, and neither side believes them meaningful. A solution is only possible based on the consent of both parties and the endorsement of both ethnic groups in separate referendums".

1.3.3. Le multilatéralisme comme substitut au droit international?

Le type de considérations développées dans les deux articles évoqués ci-dessus ne se retrouve pas dans les positions adoptées par les responsables européens, loin s'en faut. On remarque cependant, dans leurs

[95] *BBC Monitoring European*, 10 March 2007.

[96] *The Guardian* "The Emperor has spoken: His support for Kosovan independence exposes Bush's naked Balkan ambitions for all to see", 13 June 2007.

déclarations antérieures à la proclamation de l'indépendance, une prise de distance par rapport aux principes mis en avant par le Groupe de contact et ICG. En 2007, il apparaissait peu probable que les Européens acceptent une mise en œuvre forcée du Plan Ahtisaari et procèdent à une reconnaissance unilatérale de l'indépendance du Kosovo, une solution un moment évoquée par Washington et par ICG.[97] En second lieu, le souci d'obtenir l'accord des deux parties semblait s'être imposé dans les esprits. Ce souci n'est pas tout à fait nouveau. On le retrouve déjà dans le rapport de la Commission internationale pour les Balkans:

> "We do not believe that Kosovo's independence will solve all the territory's problems, but we are concerned that postponing the status talks will lead to further deterioration in the situation in the province. *In our view Kosovo's independence should not be imposed on Belgrade*. The 'imposition' if Kosovo's independence is not only undesirable, it is also unlikely to happen, bearing in mind that some members of the UN Security Council (Russia, China) are opposed to it. Moreover, if Belgrade opposes the process, it will significantly increase the chances of trouble breaking out elsewhere whether in Bosnia, Macedonia or Montenegro".[98]

La nécessité d'obtenir le consentement de Belgrade ne repose toutefois pas sur une motivation établie en droit mais plutôt sur des considérations liées à la fois aux rapports de force internationaux et aux risques de déstabilisation dans la région, voire par référence à un principe moral. Ainsi, un ancien ministre slovaque soutient la position de Moscou en estimant que le président Poutine a raison de s'opposer à l'indépendance et de critiquer la politique de deux poids/deux mesures des Occidentaux. Il est par ailleurs persuadé que le fait de défendre le principe que toute solution doit reposer sur un accord des parties équivaut également à défendre un principe *moral.*[99] La prise en compte de l'accord des autorités serbes ne semble pas déterminée par le souci de respecter la souveraineté de la Serbie. Les responsables européens qui, progressivement, semblent ce ranger à cet avis, ne justifient pas leur position en faisant explicitement référence à cet aspect juridique pourtant essentiel aux yeux de Belgrade et de Moscou.[100] Ils semblent plutôt estimer que l'impasse actuelle requiert sans doute de mettre à l'écart le plan Ahtissari et de continuer à explorer d'autres voies.

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[97] ICG –New Report: "Europe Must Break the Kosovo Stalemate", 21 August 2007: "The sooner the EU, or a significant majority of its member states, declares itself ready to back independence, the better the chances of forestalling disaster".

[98] *The Balkans in Europe's Future. Report of the International Commission on the Balkans*, 12 April 2005, p. 20 (Nous soulignons).

[99] *Courrier International*, n°851 du 22 au 28 février 2007.

[100] *BBC Monitoring System*, 23 April 2007: pour les Russes, il ne peut y avoir d'indépendance du Kosovo sans accord de la Serbie. C'est la raison pour laquelle la Russie pourrait user de son droit de veto au Conseil de sécurité.

Le fait d'évoquer la possibilité d'une partition du Kosovo, alors même qu'elle figurait comme option non négociable dans les principes mis en avant dès 2005, est sans doute le résultat des doutes qui ont saisi les Européens; ces derniers semblent également prendre conscience de l'importance d'aboutir à une solution de compromis basée sur un accord entre Belgrade et Pristina. Chris Patten, en revanche, estime que la partition doit être rejetée car elle n'est pas conforme au principe de l'inviolabilité des frontières.[101] Sur ce point particulier, et sans évaluer la pertinence de l'argument présenté, on remarquera que c'est cette fois un membre d'ICG qui se réfère à un principe de droit pour écarter une solution qui serait basée sur un accord politique.

Il est cependant un point sur lequel les Européens semblent s'être, pour un temps, accordés: la nécessité d'obtenir une résolution du Conseil de sécurité afin de fournir une base juridique à la présence civile et internationale au Kosovo et de déterminer son statut.

Le 23 avril 2007, les ministres des Affaires étrangères de l'UE réunis à Luxembourg entendent le plaidoyer du ministre slovaque qui enjoint tous les pays européens à se mettre d'accord sur le fait que le statut futur du Kosovo devra être approuvé par le Conseil de sécurité.[102] Quelques jours auparavant, les propos du sous-secrétaire d'Etat Richard Burns relatifs à la reconnaissance unilatérale de l'indépendance du Kosovo par les Etats-Unis ont été démentis. Ce qui était alors perçu des deux côtés de l'Atlantique comme une condition souhaitable apparaît progressivement comme étant indispensable.[103]

Au même moment, l'échec des négociations qui se sont déroulées à Vienne sous la houlette de Martti Ahtisaari conduit le Conseil de sécurité à organiser une visite des membres du Conseil de sécurité au Kosovo et en Serbie. Le rapport qui y fait suite ne peut que constater la persistance des divergences entre Belgrade et Pristina.[104] La discussion qui se tiendra quelques jours plus tard au Conseil prend acte de ce blocage. Son président, le belge Johan Verbeke, rappelle que le statu quo n'est pas viable et que tant l'UE que l'OTAN attendent du Conseil qu'il leur fournisse un mandat précis.[105] Comme l'avait affirmé précédemment Olli Rehn, une résolution du Conseil de sécurité "[...] permettrait d'y voir clair

[101] *Libération*, 14 août 2007.

[102] Selon un diplomate belge, un membre permanent du Conseil de sécurité aurait voté contre cette proposition. Dans la presse, il est régulièrement rappelé que les Etats les plus critiques par rapport au plan Ahtisaari sont la Slovaquie, la Grèce, l'Espagne et la Roumanie.

[103] Mi-juin, Européens et Américains semblent s'être mis d'accord de manière plus explicite sur la nécessité d'obtenir le feu vert de l'ONU, *Agence Europe*, 12 juin 2007.

[104] *Rapport de la mission du Conseil de sécurité sur la question du Kosovo*, S/2007/256, 4 mai 2007.

[105] Conseil de sécurité, 5673ème séance, CS/9015, 10 mai 2007.

sur les plans tant juridique que politique", il rappelle également que seuls les Etats souverains peuvent "établir des relations contractuelles avec l'Union, étape indispensable du processus d'adhésion".[106] Dans la foulée, le chef de l'équipe de préparation du futur bureau civil international censé prendre le relais de la MINUK, celui de l'équipe de planification de l'UE en charge de la phase transitoire, le responsable du bureau de liaison de la Commission et le représentant spécial adjoint du SG déclarent que l'engagement de l'UE et de l'OSCE nécessite "une base juridique claire, qui devrait être fournie par le Conseil de sécurité".[107]

Cela étant, les positions exprimées par les autres membres sont peu claires ou explicites sur la question du statut final et des problèmes juridiques y afférant. La Chine se contente de rappeler la nécessité de procéder avec prudence et souplesse tandis que le Panama affirme sa préférence pour une solution négociée plutôt qu'imposée.[108] Le 1er août 2007, faute d'accord au sein du Conseil de sécurité, la poursuite des négociations est décidée et placée sous la responsabilité du Groupe de contact. Elle est mise en œuvre par une troïka composée de représentants de la fédération de Russie, de l'UE et des Etats-Unis. L'UNOSEK[109] se déclare disposé à fournir toute information utile aux négociateurs. Le Secrétaire général annonce que le Groupe de contact est censé lui faire rapport pour le 10 décembre 2007.

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L'affaiblissement du discours dominant peut s'expliquer par divers facteurs. L'opposition farouche de Moscou au Plan Ahtisaari a certainement été déterminante;[110] elle ne peut cependant expliquer à elle seule le repositionnement des Européens. Pour autant, cette évolution n'a pas contribué à faire du droit international un cadre normatif de référence à l'instar de ce que l'on avait pu observer lors de la reconnaissance des

[106] Il se dit convaincu que cette perspective encouragerait les dirigeants du Kosovo à poursuivre l'application des normes et à faire en sorte de construire un Kosovo multiethnique. Il estime qu'il revient au Conseil de sécurité de décider si oui ou non le Kosovo pourrait être un précédent. Il considère toutefois que la situation au Kosovo n'a pas d'équivalent et qu'elle est la conséquence d'un "concours de circonstances unique", R*apport de la mission du Conseil de sécurité sur la question du Kosovo, S/2007/256,* 4 mai 2007, §9.

[107] *Ibid.*, §§36–37.

[108] Conseil de sécurité, 5673ème séance, CS/9015,10 mai 2007.

[109] Office of the Special Envoy of the Secretary General of the United Nations for the future status process for Kosovo: *http://www.unosek.org/unosek/index.html.*

[110] *BBC Monitoring European*, 15 August 2007, on explique le revirement de l'Allemagne par le fait qu'elle considère que la Russie est pour elle un partenaire stratégique. "Germany's understanding for multilateralism in the world consists in the sentence: 'Russia should not be disturbed', and thus insists that the Kosova status should be solved through a UN resolution" (*Koha Ditore*).

républiques yougoslaves par la CE et ses Etats membres en 1991. Les représentations sociales qui ont structuré le discours dominant en l'espèce, et qui ont entraîné une mise à l'écart du registre juridique, n'ont pas pu se modifier radicalement en quelques mois. Certaines convictions ont sans doute été ébranlées,[111] mais il faut bien constater que les arguments juridiques développés sur le fond par Belgrade et Moscou ne font pas l'objet de beaucoup de considérations et que les problèmes politiques et juridiques inhérents à la mise sous tutelle du Kosovo sont largement ignorés.[112] En fait, la seule contrainte juridique qui semble s'imposer à ce moment concerne l'exercice par le Conseil de sécurité de ses responsabilités au titre du Chapitre VII.

Mais les motivations ayant poussé les Occidentaux à s'engager à revenir devant le Conseil ne sont pas très claires ou dénuées d'ambiguïté, du moins s'agissant des règles de droit qu'il s'agirait de faire respecter. Pour la majorité des responsables européens, ce passage obligé semble surtout pouvoir pallier l'absence de consentement de la Serbie (et les résistances de certains responsables albanais peu enthousiastes à l'idée de voir leur autorité limitée de l'extérieur[113]). L'objectif principal est, pour l'UE, et de se voir conférer une légitimité suffisante pour pouvoir prendre le relais de la MINUK et poursuivre les transformations politiques et économiques nécessaires à l'intégration dans l'UE. Dans cette perspective, la question de savoir si le Conseil est habilité à sanctionner le détachement d'une partie du territoire d'un Etat membre n'apparaît pas centrale. Quant aux problèmes qui pourraient résulter du refus des autorités du Kosovo de se soumettre à une autorité extérieure en invoquant leur droit à l'autodétermination, ils ne sont pas même évoqués (officiellement du moins).

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[111] On pourrait estimer que les considérations liées au coût de l'opération et à la taille réduite du marché Kosovar ne sont pas étrangères à ce repositionnement ("some EU-based investment firms already say Kosovo is best avoided, simply because Serbia – the largest ex-Yugoslav market, with 8 m peple is more valuable"), voy. en particulier, *Financial Times*, 13 August 2007.

[112] V. les réflexions de Simon Chesterman concernant notamment le paradoxe qu'il y a à vouloir imposer le principe de l'Etat de droit par exemple à travers la mise en place d'une administration internationale qui refuse de soumettre ses décisions aux cours et tribunaux et peut se permettre d'emprisonner des suspects sans garantir un accès à la justice, *You, The People. The United Nations, Transitional Administration and State-Building*, Oxford University Press, 2004, pp.6–9.

[113] *BBC Monitoring European*, 15 August 2007 (Koha Ditore): "Ahtisaari's plan has already been written. It is a product of Contact group instructions and the pressure form the international community on the Kosovar during the negotiations. Ahtisaari's plan could make Kosova a state, but it would be a handicapped state, which would have difficulties in functioning normally. It would, in a way, divide Kosovo along ethnic lines, even is just temporarily. It would make Kosovo dependant on the international community, through great powers given to the EU in leading the international civil mission, thus limiting democracy in Kosova...".

L'impression qui se dégage des discussions intra-européennes est que le passage par le Conseil de sécurité est avant tout conçu comme un standard de comportement et un moyen permettant d'assurer l'unité des 27. Son adhésion au principe du multilatéralisme est le plus souvent invoquée dans l'optique d'une consolidation des institutions appelées à prendre part à la "gouvernance mondiale" et se comprend essentiellement au regard des ambitions nouvelles de l'UE sur la scène internationale.[114] Dans ce cadre, le passage par le Conseil de sécurité ne semble pas réellement découler d'une conviction établie en droit. Comme nous avons déjà eu l'occasion de le souligner, l'expression "multilatéralisme efficace", en vogue dans les milieux européens, est un avatar de la formule utilisée par l'administration Clinton pour justifier une action coercitive ayant fait l'objet d'une opposition (russe et/ou chinoise) au Conseil de sécurité.[115] En l'espèce, le Commissaire à l'élargissement lui a préféré l'expression "multilatéralisme responsable". Replacée dans son contexte, elle semble essentiellement destinée à convaincre les Russes de ne pas faire obstacle à la mise en œuvre du plan Ahtisaari et donc au déploiement de la mission européenne.

De manière concomitante, le fait de considérer qu'il serait de bon ton que les Russes n'usent pas de leur droit de veto sur un dossier qui est fondamentalement du ressort de l'Europe[116] laisse penser que l'UE, comme au début des années 90, entend garder la haute main sur ce qu'elle considère être son pré carré: les pays ayant vocation à intégrer l'Union. La conviction qu'elle joue (une fois de plus) sa crédibilité sur la scène internationale, explique sans doute les appels à l'unité et les regrets souvent exprimés par rapport aux Etats membres les plus récalcitrants à l'idée d'une indépendance imposée.

À ceci, il faut encore ajouter le fait que son action conjointe avec l'OTAN, telle que prévue dans les documents préparatoires au déploiement de la mission de l'UE, est aussi conçue comme un test de la capacité des deux organisations à coopérer sur le terrain. Ces enjeux et les ambitions qui les sous-tendent expliquent très largement la nervosité de ses représentants. Javier Solana ne manque d'ailleurs pas de rappeler qu'il s'agira de la mission la plus importante de l'histoire de l'UE.[117]

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[114] Ceci permet sans doute de comprendre le §21 du rapport Langendijk (cité ci-dessus) enjoignant le Conseil de sécurité de régler le problème du statut en tenant "dûment compte de la position commune de l'UE".

[115] V. notre étude, "Les paradoxes de l'Europe puissance, normative, civile... et tranquille?" *in* Bernard Adam (sous la dir. de), *Europe puissance tranquille? Rôle et identité sur la scène mondiale*, GRIP, Bruxelles, Editions Complexe, 2006, pp. 90–101.

[116] V. par ex. la tribune de Bernard Kouchner et David Miliband, "Kosovo, une affaire européenne", parue dans *Le Monde*, 8 septembre 2007.

[117] *International Herald Tribune*, 30 March 2007.

2. LE DROIT INTERNATIONAL À L'ÉPREUVE DE LA RECONNAISSANCE

Les discussions qui ont précédé la proclamation d'indépendance expliquent en grande partie le fait que, contrairement à ce qui s'est passé en 1991, les Etats membres de l'UE n'ont pu s'accorder sur le principe d'une reconnaissance collective.[118] Il apparaît évident que des pays comme l'Espagne, la Roumanie, la Grèce, la Slovaquie et Chypre, qui ont opposé à un refus à l'idée de reconnaître l'indépendance proclamée par les autorités du Kosovo le 17 février 2008, ne sont pas tous motivés uniquement par des considérations légalistes. Il est néanmoins clair que l'absence d'une résolution du Conseil de sécurité et l'opposition de Belgrade à la mise en œuvre du plan Ahtisaari et, de manière générale, la mise à l'écart des principes fondamentaux sur lesquels repose la sécurité collective telle qu'incarnée par l'ONU, ont constitué des arguments de poids permettant de justifier le fait de ne pas se rallier à la majorité des Etats de l'UE et de rompre ainsi l'unité attendue des Européens dans ce dossier.

Cependant, s'il nous a été possible de mettre en évidence un lien entre la référence au droit international et l'acceptation du principe de reconnaissance des républiques en 1991/1992 (tout en n'excluant pas bien entendu d'autres facteurs d'explication), et de démontrer ainsi les capacités de légitimation du droit, il nous était apparu tout aussi évident que le droit tel qu'interprété et mis en œuvre par les Européens à l'époque présentait les caractéristiques d'un droit "mou et conjoncturel".[119] De fait, le discours juridique était empreint d'une certaine incohérence et témoignait d'une conception problématique du principe de souveraineté. Et surtout, il semblait essentiellement destiné à s'appliquer aux entités ex-yougoslaves. Ainsi l'interprétation particulière qui avait été faite de certaines règles de droit international, en particulier le droit à l'autodétermination, comme justification de la reconnaissance de l'indépendance d'entités sécessionnistes, n'a plus été mobilisée dans d'autres situations similaires.[120] Il semble donc que l'espace yougoslave ait une certaine vocation à être

[118] Il faut toutefois noter que la décision de reconnaissance à proprement parler a toujours été du ressort des gouvernements nationaux et pas des instances européennes.

[119] Serge Sur, "Système juridique et utopie", *Archives de Philosophie du Droit,* Sirey*,* tome 32, 1987, p. 45.

[120] On relèvera également que la volonté d'écarter toute solution basée sur la partition du Kosovo n'a pas été justifiée par référence au principe de l'*uti possidetis juris*, utilisé en 1991 pour justifier la reconnaissance des républiques dans leurs anciennes limites administratives. Pour une analyse critique de l'usage de ce principe juridique, voy. Olivier Corten, Barbara Delcourt, Pierre Klein et Nicolas Levrat (sous la dir. de), *Démembrements d'États et délimitations territoriales: l'*uti possidetis *en question (s),* Bruxelles, Bruylant, 1999, 455 p.

considéré comme exceptionnel ou *sui generis* pour utiliser le jargon européen.[121] D'ailleurs, c'est encore le caractère prétendument exceptionnel de la situation prévalant au Kosovo en 1998–1999 qui avait, dans le chef de certains responsables européens, justifié leur participation à l'opération de l'OTAN contre la RFY. S'en expliquant devant l'assemblée générale de l'ONU, ils s'étaient empressés de rassurer une audience généralement critique à l'endroit des "interventions d'humanité" en affirmant que cette action militaire ne devait pas constituer un précédent en droit international.[122]

Les justifications des Etats ayant d'ores et déjà reconnu l'indépendance du Kosovo font, sans surprise, écho à celles employées dans la période ayant précédé la déclaration d'indépendance et qui ont été présentées dans la première partie. Elles n'accordent dès lors qu'une place très limitée aux considérations juridiques et rappellent que la reconnaissance est une institution essentiellement politique (A). Cet avis pourrait sans nul doute être partagé par les gouvernements qui n'ont pas encore reconnu l'indépendance du Kosovo. Il semble néanmoins que leur attitude soit en partie déterminée par la conviction qu'il existe des principes ayant vocation à encadrer son usage, comme la non-intervention dans les affaires intérieures, voire l'obligation de non reconnaissance qui pourrait découler d'une interprétation particulière de la résolution 1244 ainsi que de l'absence de caution donnée par le Conseil de sécurité (B). La situation engendrée par les divisions au sein de l'UE et de l'ONU, en particulier s'agissant des problèmes juridiques liés à la reconnaissance et au lancement de la mission "Etat de droit" de l'UE, aura conduit certains responsables à élaborer une argumentation juridique permettant de justifier la mise en œuvre du plan Ahtisaari en l'absence de résolution du Conseil de sécurité et du consentement de l'Etat serbe (C).

2.1. La reconnaissance du Kosovo: une décision sans portée juridique

A l'heure où nous écrivons ces lignes quelque 40 gouvernements ont procédé à la reconnaissance du Kosovo. Leurs motivations ne sont pas toujours claires ou dénues d'ambiguïté.[123] Il est toutefois possible de dégager des arguments récurrents dont certains ont une connotation plus politique qu'à proprement parler juridique à l'instar des arguments utili-

[121] V. aussi Mathias Vermeulen, "Kosovo's Future Status: Opening a Pandora's Box of Secessionist Claims or a Precedent for the 'Responsibility to Protect'?", *Studia Diplomatica*, vol. LIX, 2006, n°4, pp. 85 et ss.

[122] Olivier Corten, *Le droit contre la guerre. L'interdiction du recours à la force en droit international contemporain,* Paris, Pedone, 2008, pp. 799–800.

[123] La lettre préparée par le ministère des Affaires étrangères afghan précise que la reconnaissance est conforme aux points A et B de l'article 1 (*sic*) et point B de l'article 76 de la Charte de l'ONU qui traite du régime international de tutelle! Disponible sur: *http://www.mfa.gov.af/detail.asp?Lang=e&Cat=2&ContID=562.*

sés dans le débat sur le statut définitif. On constatera effectivement que, par rapport aux principes d'effectivité et de légitimité qui sont normalement censés encadrer la décision de reconnaissance, il existe une fois de plus un certain flottement.

2.1.1. Une décision exceptionnelle

Le ministre des Affaires étrangères de Lettonie a particulièrement insisté sur le caractère exceptionnel de la situation en précisant que cette décision de reconnaissance ne pourra servir de précédent pour d'autres conflits gelés dans le monde.[124] A côté de cet argument, on retrouve parfois une volonté de ménager Belgrade en assurant qu'une telle reconnaissance ne doit pas être interprétée comme un geste inamical vis-à-vis de la Serbie.[125]

2.1.2. Reconnaître la volonté d'une majorité qui a été opprimée par le passé

Le Costa Rica estime, qu'à défaut d'un accord entre Belgrade et Pristina, la déclaration unilatérale d'indépendance représente un moyen de sortir de l'impasse tout en étant conforme à la volonté de la majorité de la population telle qu'exprimée par l'Assemblée du Kosovo le 17 février.[126] Il est fait référence dans ce cas à la légitimité politique du projet indépendantiste et au fait qu'il n'était pas imaginable d'imposer aux habitants de vivre sous souveraineté serbe après ce qui s'est passé sous le régime de Milosevic.[127]

2.1.3. Assurer la paix et la sécurité de la région

Le gouvernement allemand justifie sa décision de reconnaissance par le fait qu'elle sanctionne une volonté majoritaire au Kosovo et qu'el-

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[124] V. aussi la position du Pérou, Communicado Oficial 002–08, 22 de febrero de 2008, disponible sur: *http://www.rre.gob.pe/porta/boletinInf.nsf/mealdiaC9B7043F80DBAF7052573F.*

[125] V. la lettre émanant des autorités suisses et irlandaises, ainsi que la déclaration commune de la Hongrie, de la Bulgarie et de la Croatie, disponible sur: *http://www.javno.com/pr.php?id=133225&1=en.*

[126] Accessible sur le site, *http://www.kosovothankyou.com*. V. également la position de la Lettonie (Announcement by Ministry of Foreign Affairs, 20 February 2008), disponible sur: *http://www.mfa.gov.lv/en/press-releases/2008/february/20–4/?print=on*, ainsi que celle du Danemark telle qu'exprimée par le ministre des Affaires étrangères le 21 février 2008, disponible sur: *http://www.um.dk/CMS.Web/Templates/Content%Pages/DefaultPage.aspx?NRM.*

[127] V. également la position du premier ministre canadien, qui précise que les souverainistes québécois ne sont pas fondés à invoquer cette décision car elle se rapporte à une situation unique, disponible sur: *http://www.branchez-vous.com/Nationales/080319/N0319167AU.html.*

le est susceptible d'apaiser les tensions dans cette région.[128] Il fait également référence à la déclaration de l'UE en date du 18 février; une manière sans doute d'apparaître cohérent par rapport à son engagement européen alors même que cette déclaration ne contient aucune exigence, pour cause, concernant l'attitude à adopter dans ce dossier et ne fait que rappeler que la reconnaissance relève de la compétence des gouvernements nationaux.[129] Bien plus, la reconnaissance permettrait d'assurer le développement économique de la région.[130]

2.1.4. Assurer la solidarité des "alliés"

L'Irlande mentionne le fait que la majorité de ses partenaires au sein de l'UE a déjà procédé à la reconnaissance,[131] le Liechtenstein fait état pour sa part les décisions prises par l'Autriche, l'Allemagne et la Suisse.[132] De même, l'Australie mentionne les décisions prises par les Etats-Unis et la Grande-Bretagne.[133] En Corée du sud également, il semble bien que la position adoptée par les Etats-Unis dans ce dossier constitue l'élément déterminant de la décision de reconnaissance.[134]

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[128] V. aussi la position du gouvernement des Pays-Bas, 4 mars 2008, disponible sur: *http://www.minbuza.nl/nl/actueel/nieuwsberechten, 2008/nederland-erkent-onafha.*

[129] Press release n°51, 20.02.2008, disponible sur *http://bundesregierung.de/Content/EN/Pressemitteilungen/BPA/2008/02/2008–0...*

V aussi la position de l'Italie (Consiglio dei Ministri n.93 del 21 febbraio 2008, disponible sur: <http://wwww.governo.it/Governo/ConsiglioMinistri/testoint.asp?d=38401>, et les explications données par le ministre des Affaires étrangères du Luxembourg à la chambre des députés le 20 février, la veille de la reconnaissance, disponible sur: http://www.gouvernement.lu/functions/printVersion/index.php; et l'annonce de la République de Finlande (Press release 80/2008, 7 March 2008, disponible sur: http://formin.finland.fi/Public/Print.aspx?contentid=123797&nodeid=15146&culture=...

[130] V. Statement by the President of the Swiss Confederation, *op. cit*.

[131] V. annonce du ministre des Affaires étrangères le 29 février 2008, disponible sur: *http://foreignaffairs.gov.ie/home/index.aspx?id=42938&media=print.*

[132] V. Pressemitteilungen du 28.03.2008, disponible sur: *http://www.llv.li/amsstellen/llv-pia-pressemitteilungen...* Parmi les investisseurs étrangers les plus importants au Kosovo, on retrouve, par ordre d'importance, des firmes en provenance de l'Autriche, de l'Allemagne, de la Slovénie, de l'Albanie, de la Grande-Bretagne, de la Suisse, de l'Inde, des Etats-Unis, de la Belgique, V. Enis Veliu, "Kosovo: les compagnies étrangères ont investi un milliard d'euros en huit ans", 11 mars 2008, disponible sur le site du *Courrier des Balkans* (*http://www.balkans.courriers.info/*).

[133] Media release, 19 February 2008, disponible sur: *http//www.foreignminister.gov.au/releases/2008/fa-s034_08.html*.

[134] V. l'article du *Korea Times* du 27 mars 2008, disponible sur: *http://www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=21458*.

V aussi la declaration de Prague "Were it not for the expectations of Western powers, the post-socialist countries would not have accepted Kosovo's independence, as shown by statements from the Polish and Slovak prime ministers who implied the situa-

2.1.5. L'effectivité?

La référence à l'effectivité affleure dans les lettres de reconnaissance qui évoquent le principe de réalité à travers la prise en compte de la situation prévalant sur le terrain.[135] On peut aussi y ajouter les arguments tels ceux développés par la Hongrie concernant le fait que cette solution était la seule susceptible de sortir de l'impasse provoquée par le non règlement du statut définitif de la province.[136] Mais à y regarder de plus près, ces arguments n'ont finalement qu'un rapport très éloigné avec le principe d'effectivité tel qu'il ressort de la pratique internationale en matière de reconnaissance d'Etat. Hormis les cas de décolonisation classiques, la reconnaissance d'entité ayant fait sécession s'opère sur la base de critères permettant de définir un Etat en droit international (un territoire, une population et un gouvernement souverain, indépendant par rapport aux autres Etats et capable de faire respecter son autorité sur l'ensemble de son territoire et de sa population). Dans ce cas, la souveraineté n'est pleinement acquise que lorsque la tentative de sécession est admise par l'ancien Etat central.[137] Outre le fait que le Kosovo ne réunit pas les conditions classiques permettant de la qualifier d'Etat en droit international,[138] la reconnaissance du Kosovo dans la foulée de la proclamation d'indépendance du 17 février peut être considérée comme prématurée et non conforme au principe de non-intervention dans les affaires intérieures de la Serbie. Il a été objecté que, parce que cette partie du territoire a été "internationalisée", cet argument ne serait plus pertinent.[139] S'il est vrai que la Serbie n'exerce plus aucune compétence au Kosovo depuis 1999, il n'en demeure pas moins que la résolution 1244 qui lie tous les Etats membres de l'ONU ne remet pas en question le titre juridique de la Serbie sur ce territoire. On peut donc considérer que l'Etat central est fondé à s'opposer à toute tentative de reconnaissance sur la base du droit international.

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tion was forced upon the European Union by the United States and its Western European allies" (*IPS*, 14 March 2008).

[135] V. la lettre émanant de l'Autriche, 28 février 2008, disponible sur: *http://www.bmeia.gv.at/foreign-ministry/news/presseaussendungen/2008/plassnik...*

[136] V. Déclaration du 19 mars 2008, disponible sur: *http://www.mfa.gov.hu/en/bal/actualities/spokeman_statements/Kosovo_recogn...*

[137] V. les exemples fournis par Olivier Corten, "la reconnaissance prématurée du Kosovo: une violation du droit international", *Le Soir*, 20 février 2008, disponible sur: *http://wwww.lesoir.be/outils/*.

[138] V. Marius Oroveanu, "Kosovo lacks of sovereignty puts recognition in doubt", The Tirastopol Times and Weekly Review, 15.03.2008, disponible sur: *http://tirastopoltimes.com*.

[139] V. Pierre d'Argent, "Kosovo: être ou ne pas être", disponible sur le site de l'IGPS (Interest Group on Peace and Security) de la société européenne de droit international (SEDI).

Certains Etats ayant reconnu l'indépendance du Kosovo admettent d'ailleurs que la reconnaissance sans le consentement de la Serbie et l'aval du Conseil de sécurité n'est pas "idéal",[140] un vocabulaire qui n'est pas à proprement parler juridique.

L'Etat reconnu est d'autant moins souverain que la déclaration d'indépendance, si elle a singulièrement compliqué la situation prévalant sur le terrain, n'a pas jusqu'ici remis en question l'exercice des pouvoirs exercés par la MINUK.[141] A partir du moment où la résolution 1244 reste en vigueur, une situation admise par les représentants kosovars eux-mêmes et par tous les Etats, y compris ceux qui ont reconnu l'indépendance du Kosovo, il est évident que le Kosovo ne peut être qualifié de souverain. Il suffit de lire le rapport du Secrétaire Général en date du 28 mars 2008 pour s'en convaincre. Ainsi, c'est bien la MINUK qui a mis un terme à la tentative de reprise de contrôle d'une section du réseau de chemins de fer du Kosovo par du personnel serbe[142] et c'est son représentant spécial qui a signé le budget 2008.[143] Il est signalé dans ce même rapport que de nombreux ministères ne disposent toujours pas d'effectifs et autres ressources nécessaires au fonctionnement de services s'occupant de la protection des droits de l'homme.[144] Dans son rapport relatif au premier mois d'existence de l'Etat kosovar, *Crisis Group* mentionne des problèmes similaires et note:

> "'The echoing, empty corridors of the ministries are a worry' an EU official said. The government lacks expertise and is asking international consultants to help. 'Until now, we were the final status team, not a government', an adviser to the prime minister admitted. Assessment teams from the international financial institutions were disappointed by the government's lack of plans and vision and concluded that there is limited capacity to absorb much donor funding. The international community must still play a big role but also be sensitive not to undermine local leadership and public participation in decision-making. The independence declaration read out by Prime Minister Thaci was largely written by the U.S. State department. Although locally designed, the flag was also chosen with strong U.S. involvement behind closed doors. The parliament, after some arm twisting by diplomats, signed away its authority to consider individually the laws that the Ahtisaari plan calls for passage of

[140] V. par exemple les propos de l'Ambassadeur britannique John Sawers le 18 février 2008, disponible sur le site *http://www.unmikonline.org/*.

[141] Security Council resolution still in force in Kosovo– Secretary –General, 1 April 2008.

[142] Rapport du Secrétaire général sur la Mission d'administration intérimaire des Nations Unies au Kosovo, S/2008/211, 28 mars 2008, §11. Il faut également évoquer les incidents qui ont conduit à une intervention musclée des forces de police et de l'OTAN pour rétablir l'ordre à Mitrovica Nord en février 2008.

[143] *Ibidem*, §15.

[144] *Ibidem*, §23; voir aussi le rapport de Canas précité, p. 8§43.

during the 120-day transition. During this crucial period, legislation will be adopted in packages, with little debate".[145]

Certains notent ainsi que la gestion du territoire par l'UE, si jamais elle parvient à s'imposer, aura certes sanctionné un détachement de ce territoire par rapport à la Serbie mais, sur le fond, perpétuera une situation de dépendance[146] et, de manière assez paradoxale, le maintien du statu quo, pourtant considéré comme la cause de tous les maux.[147]

Dans ce cas, il est tentant de se référer une nouvelle fois aux travaux de Nathaniel Berman. Son analyse d'une certaine pratique diplomatique se revendiquant du "réalisme" et du discours juridique révisionniste des années 30 démontre que les choix prétendument réalistes ne sont pas à proprement parler définis ou contraints par rapport à des "réalités". Se référant à la notion de réalisme textuel utilisée par les théoriciens littéraires, il affirme qu'"un tel 'réalisme textuel' obtient l"effet du réel' par une référence textuelle à un autre discours, familier et accepté, un discours trouvé soit plus tôt dans le même texte (répétition, tautologie), soit dans un autre texte (cliché, citation, retranscription, parodie, pastiche)".[148] Il évoque ensuite la "sloganisation" du discours de l'élite juridique et diplomatique pour décrire précisément ce phénomène de diffusion de "formules décrochées de leurs preuves" et qui se transmettent sur un mode publicitaire.[149] De fait les arguments repris dans les déclarations de reconnaissance ou dans les positions exprimées dans la presse présentent de grandes similitudes et rares sont les responsables politiques évoquant des intérêts plus particuliers ou des opinions "originales".

2.1.6. Légitimité ?Légalité ?

Il est d'abord évident que le fait que les autorités kosovares aient accepté de mettre en application les dispositions du plan Ahtisaari constituent, pour les Etats ayant reconnu le Kosovo, un élément clé de leur décision. La référence au droit concerne essentiellement l'engagement fu-

[145] International Crisis Group, "Kosovo's first Month", *Policy Briefing n°47*, 18 March 2008, p. 4. V. aussi le rapport établi par Vitalino Canas, rapporteur de l'assemblée parlementaire de l'OTAN, "Kosovo and the future of Balkan security", (draft), 5 May 2008, p.7, §35.

[146] David Chandler, "Kosovo will come under similar EU protectorate powers as those exercised by the EU's special representative over Bosnia. Giving formal recognition to Kosovo's separation from Serbia is by no means the same as giving the province independence", *Spiked*, 15 January 2008, disponible sur: *http://www.spiked-online.com/*.

[147] Humphrey Hawksley, "Kosovo's Independence Could Mean a New Conflict", *YaleGlobal Online*, 5 November 2007, disponible sur: *http://yaleglobal.yale.edu/article.print?id=9934*.

[148] Nathaniel Berman, *Passions et ambivalences. Le colonialisme, le nationalisme et le droit* international, op. *cit.*, p. 330.

[149] *Ibid.*, p. 332.

tur du Kosovo à respecter le droit international, en particulier la Charte de l'ONU, les droits et libertés fondamentales de tous les habitants, ainsi que le droit des minorités. C'est une préoccupation que l'on retrouve dans la majorité des lettres de reconnaissance**.** Est-ce pour autant la manifestation d'une volonté de redonner une place à des considérations juridiques? Peut-on établir un parallèle avec les conditions imposées par les Européens aux nouvelles républiques yougoslaves?

D'un certain point de vue, il serait pertinent d'établir une comparaison car il est évident que l'attachement à l'idée de reconnaître un Etat présentant certaines garanties sur le plan du respect des droits et libertés fondamentales, des droits des minorités et du principe de l'Etat de droit est commune aux deux cas d'espèce.[150] Mais, d'autre part, le plan Ahtisaari contient des dispositions qui ne sont en rien des règles de droit international et surtout il ne bénéficie d'aucun statut juridique en droit international positif n'ayant pas été avalisé ni par les parties concernées, au premier chef la Serbie, ni par le Conseil de sécurité. Pourtant, dans la lettre de reconnaissance qu'il adresse aux autorités du Kosovo, le président Bush prend note du fait que le Kosovo s'est engagé à respecter le plan Ahtisaari[151] et il encourage les autorités à coopérer avec la communauté internationale durant la période de transition, une supervision qui est, selon lui, pleinement consentie. Les Etats-Unis estiment ainsi que les autorités du Kosovo sont *juridiquement* liées par les engagements qui se retrouvent dans sa déclaration d'indépendance. Ils estiment que le respect du plan permettra au Kosovo de se joindre rapidement à la famille euro-atlantique.[152]

On retrouve dans ce cas un paradoxe déjà relevé précédemment et consistant à conférer une valeur juridique contraignante à des principes ou

[150] D'après Gordon Brown, la décision de reconnaissance a été prise après avoir reçu des assurances du gouvernement du Kosovo concernant la protection des minorités, *http://www.number10.gov.uk/output/Page14594.asp*; ceci ressort également de la position adoptée par la Norvège dans sa décision de reconnaissance du 28 mars 2008, disponible sur: *http://www.regjeringen.no/en:dep/ud/press/News/2008/norway_kosovo.html?id=505130* et de la déclaration du gouvernement bulgare (20 mars 2008, disponible sur: *http://www.governement.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0137&n...*

[151] Text of a Letter from the President to the President of Kosovo, February 18, 2008, disponible sur: *http://www.whitehouse.gov/news/releases/2008/02/print/20080218–3.html*. V. également la lettre adressée par les autorités de la République française en date du 18 février 2008, disponible sur le site: *http//www.diplomatie.gouv.fr/fr/pays-zone-geo_833/balkans1056/kosovo_650/fran...*; Statement by the President of the Swiss Confederation, 27.02.2008, disponible sur: http://www.eda.admin.ch/eda/en/orifil/media/mcom/single.encoded-Show%3D1%26i...; Note du gouvernement de l'Islande en date du 5 mars 2008, disponible sur: *http//www.mfa.is/speeches-and-articles/nr/4135*; Statement by the Foreign Minister Masahiko Koumoura, March 18, 2008, disponible sur: *http//www.mofa.go.jp/annonce/2008/3/0318.html*.

[152] V. également la position exprimée par le gouvernement norvégien.

des normes qui n'ont pas encore acquis ce statut en droit positif, une situation que certains auteurs qualifient de "juridicisation du politique" et qui est étroitement liée à un autre phénomène: la politisation du droit.[153] A noter également que le respect du droit est essentiellement envisagé pour encadrer le comportement futur des autorités de l'Etat reconnu et n'est pas vraiment évoqué pour justifier la reconnaissance en tant que telle.

On constate néanmoins un certain flottement, notamment pour ce qui concerne la nature multiethnique du Kosovo. Pour certains, comme l'Islande, c'est le caractère multiethnique avéré du nouvel Etat qui semble avoir motivé la décision de reconnaissance, mais pour la majorité des gouvernements ayant reconnu le Kosovo c'est plutôt l'engagement à assurer dans le futur le caractère multiethnique qui semble avoir été déterminant.[154]

Enfin, il est à relever que seule l'Albanie a fait mention du droit à l'autodétermination. Sali Berisha, Premier ministre, s'est en effet référé à la déclaration de l'Assemblée d'Albanie du 21 octobre 1991, à la décision de l'Assemblée du Kosovo du 17 février et au droit à l'autodétermination. Il estime que l'indépendance du Kosovo correspond à la mise en œuvre du droit à l'autodétermination et clôt le chapitre de la désintégration yougoslave.[155]

Cela étant, il n'est guère étonnant que ni les principes d'effectivité ni ceux ayant trait à la légitimité/légalité ne soient véritablement convoqués pour justifier la reconnaissance du Kosovo. Car c'est précisément le manque d'effectivité et de légitimité qui permet de justifier une présence civile et militaire internationale (voir *infra* point 3) L'action commune de l'UE fait référence à la responsabilité de protéger,[156] EULEX étant conçue comme une mission de "gestion de crise" et la lecture de son dispositif ne laisse aucun doute sur la confiance très limitée qui est accordée aux responsables du nouvel Etat.

Il semble donc que la légitimité de la reconnaissance découle, non pas des qualités intrinsèques du projet nationaliste albanais ou de la conformité au droit existant, mais plutôt du fait qu'il s'agisse de décisions prises par des gouvernements démocratiques et légitimes et disposant, qui plus est, de capacités et de moyens susceptibles d'imposer leurs options à un certain nombre d'acteurs internationaux. Cependant, le nombre limité de reconnaissance démontre les résistances auxquelles se heurte ce projet.

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[153] V. Michael Savage, "Legalizing politics and politicizing law. The changing relationship between sovereignty and international law, *in* Christopher Bickerton, Philip Cunliffe and Alexander Gourevitch (eds.), *Politics without Sovereignty. A Critique of Contemporary International Relations*, London, UCL Press, pp. 169–185.

[154] V. aussi la position de la Finlande.

[155] Statement of Prime Minister of Albania on Recognition of Independence of Kosova, 18/02/2008, disponible sur: *http://www.keshilliministrave.al/print.php?id=7323*.

V. Action commune 2008/124/PESC, 4 février 2008, considérant (2).

2.2. A non reconnaissance du Kosovo: entre prudence et légalité[157]

2.2.1. Le manque d'effectivité

On peut estimer à la lecture de la presse internationale que certains des gouvernements qui n'ont pas encore reconnu le Kosovo s'en sont tenus à des considérations traditionnelles en matière de reconnaissance d'Etats issus de sécession et préfèrent dès lors attendre que la nouvelle entité ait fait la preuve de sa capacité à assurer l'exercice d'un pouvoir souverain sur l'ensemble du territoire revendiqué ainsi que sur l'ensemble de la population qui s'y trouve. Dans certains cas, c'est bien le défaut d'effectivité qui semble justifier une position attentiste. Dans d'autres, il semble que les gouvernements préfèrent tout simplement voir ce qui se passe sur le terrain[158] et faire preuve de prudence.[159] Cet attentisme se conjugue à l'occasion avec des considérations liées à l'absence de consentement de Belgrade et à son refus d'accepter la mise en œuvre forcée du plan Ahtisaari. Dans ce cas, ce sont plutôt des considérations juridiques qui sont invoquées pour justifier une attitude de refus. La position de la Grèce exprime parfaitement la combinaison de ces différents éléments.[160]

2.2.2. Le manque de légitimité/légalité

Pour certains Etats, comme l'Algérie, le refus de reconnaître le Kosovo n'est assurément pas l'expression d'une forme de solidarité avec la Serbie. Au contraire, certains Etats musulmans ont tenu à faire part de sympathie envers la population musulmane du Kosovo. Néanmoins, ils estiment qu'en l'espèce le respect des règles de droit international doit primer sur toute autre considération.[161]

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[157] Cette partie a été rédigée sur la base des documents trouvés sur le site Wikipédia et reprenant l'ensemble des positions des Etats et acteurs non étatiques sur la question de la reconnaissance du Kosovo: *http://en.wikipedia.org/wiki/International_reaction_to_the_2008_Kosovo_declaration_of_independence#States_which_formally_recognise_Kosovo_as_independent*; elle n'est cependant pas exhaustive et certains liens repris sur le site se sont avérés indisponibles.

[158] V. par exemple la position du Nicaragua du 19 février 2008, qui semble tiraillé entre ses alliés traditionnels, disponible sur: *http://php.terra;com/templates/imprime-articulo.php?id=act1142155* et celle de la Nouvelle Zélande, *New Zealand Press Association*, disponible sur: *http://en.wikipedia.org/wiki/New_Zealand_Press_Association*.

[159] V. la position du Portugal, visiblement inquiet pour ses soldats déployés au Kosovo, disponible sur: *http://www.ebusiness.com/news-eu/1206798425.44*, ainsi que celle de la Malaisie, *Malaysian National News Agency*, 24 April 2008.

[160] V. le communiqué de l'Ambassade de Grèce du 17 février 2008, disponible sur: *http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=1&folder=19&article=19833.* V. la position du Bangladesh, *Press release*, 18 February.

[161] V. *Le Soir d'Algérie*, 3 mars 2008, disponible sur: *http://www.lesoirdalgerie.com.*

Les propos de Galal Nassar sont assez symptomatiques du malaise ressenti parmi les pays arabes ou musulmans.[162] Selon lui, trois facteurs peuvent pousser les Etats arabes à reconnaître le Kosovo: le drame humanitaire, le facteur religieux et le facteur ethnique. Mais d'autre part, certains éléments ont tendance à neutraliser l'élan de solidarité dont ils pourraient faire preuve. Il relève en premier lieu le fait que les Albanais eux-mêmes ont du sang sur les mains et ne sont donc pas exempts de tout reproche, en particulier pour ce qui concerne leurs relations avec la communauté serbe. Il pose ensuite certaines questions de principe comme le fait de savoir s'il est opportun de favoriser le délitement de liens sociaux dans des pays multinationaux. Et surtout, il met en doute le caractère exceptionnel de la situation du Kosovo en soulevant la délicate question du non-règlement du conflit israélo-palestinien.[163]

C'est aussi ce problème qui a motivé le refus de reconnaissance exprimé par l'Etat israélien qui dit comprendre la position serbe "which is grounded in the principles of international law".[164] Dans ce cas, la crainte qui est exprimée est celle de voir les Palestiniens déclarer leur indépendance en dehors d'un processus de négociation.

La négociation est, aux yeux de beaucoup d'Etats, le seul moyen de régler ce type de différend sans enfreindre le droit international.[165] L'Ukraine estime à cet égard que toutes les possibilités n'avaient pas encore été épuisées,[166] tandis que la Jordanie dit attendre une résolution en bonne et due forme du Conseil de sécurité avant de se prononcer.[167]

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[162] V. la position du Bangladesh, *Press release*, 18 February 2008 (*http://www.mofa.gov.bd/Adviser%20press%20release.htm*) et du Pakistan (*http://www.mofa.gov.pk/Press_Releases/2008/Feb/PR_033_08.htm*); ainsi que la position prudente adoptée par l'Organisation de la conférence islamique, communiqué final 13–14 mars 2008, (*http://www.oic-oci.org/oicnew/is11/french/11COM-FINAL-fr.pdf*), §§ 63–64.

[163] Disponible sur: *http://weelky.ahram.org.eg/print/2008:887:op3.htm*; v. Stephen ZUNES, "Kosovo and the Politics of Recognition", *Washington Times*, 21 February 2008. Il considère que le soutien des Etats-Unis en faveur de l'indépendance du Kosovo tranche avec la position de son administration qui refuse de reconnaître un droit à l'autodétermination au profit des Sahraouis (apparemment 45 Etats ont reconnu l'indépendance du Sahara occidental après la proclamation de l'indépendance en 1976). Il explique cette incohérence par le fait que les Etats-Unis soutiennent fermement le royaume chérifien. Il estime que ce double standard peut aussi être relevé dans la manière dont sont traitées les tentatives israéliennes visant à créer des enclaves dans les territoires occupés.

[164] *Jerusalem post Online*, 19 February 2008 (*http://www.jpost.com*).

[165] V. la position du Mexique telle qu'exprimée le 19 février 2008, disponible sur: *http:///www.sre.gob.mx/csocial/contenido/comunicados/2008:feb/cp_032.html*, la position de la Chine, disponible sur: *http://mfa.gov.cn/eng/xwfw/s2510/t408032.htm* et celle de l'Inde, Press release of the External Ministry of India, 18 February 2008, disponible sur: *http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=03&dd=31&nav_id=48973*.

[166] V. la communication du Président ukrainien du 19 février 2008, disponible sur: *http://www.president.gov;ua/en/news/9060.html?PrintVersion.*

[167] *International Herald Tribune*, 22 February 2008.

Pour le gouvernement slovaque, le souvenir de la "trahison de Munich" est évoqué pour s'opposer avec force à la mise à l'écart du droit: "Western powers allowed Hitler's Germany to tear apart of the Czechoslovakian territory, Sudetenland, inhabited by majority ethnic Germans, in the hope of appeasing Berlin and avoiding a War, which broke out only a year later". Si les autorités slovaques considèrent que l'UE est une organisation influente, elles lui dénient néanmoins le droit de décider du sort des nations.[168]

Le respect du droit, en particulier du principe de l'intégrité territoriale et de la résolution 1244,[169] est aussi combiné à la référence à des intérêts nationaux particuliers. Dans le cas argentin par exemple, il est évident que la non-résolution du problème des îles Falkland a pesé dans sa décision de ne pas reconnaître le Kosovo.[170] Pour l'Azerbaïdjan, c'est la déclaration d'indépendance elle-même qui constitue un acte illicite en droit international et, dans ce cas également, le problème du Nagorno-Karabakh, partie intégrante du territoire azéri mais contrôlée par l'Arménie, explique sans nul doute sa position de refus.[171] De manière générale, il apparaît que les Etats soumis eux-mêmes à des revendications séparatistes ou irrédentistes n'aient pas été convaincus par les affirmations selon lesquelles la reconnaissance du Kosovo ne créera pas de précédent.[172] Dans ce cas, la combinaison d'arguments juridiques et de la référence à l'intérêt national s'explique bien évidemment par le fait que les règles du droit positif protègent la souveraineté et l'intégrité territoriale des Etats existants.[173]

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[168] *Budapest Business Journal*, 26 février 2008, disponible sur: *http://www.bbj.hu/news/print36629slovakia=ardent+in+opposing+kosovo+indepen....*

[169] V. par exemple les positions exprimées par le Belarus, (disponible sur: *http://www.mfa;gov.by/print.en/press/news:ac692ee50d369a5d.html*) par le Brésil (dans le *Diario Catarinense*, 22 février 2008, disponible sur: *http://www.clicrbs.com.br/diariocatarinense/jsp/default.jsp?uf=1&local=11newsID=a...*), par l'Afrique du Sud, (19 February 2008, disponible sur le site: *http://allafrica.com*), par le Vietnam, (18 February, *Reuters*), par Chypre (site *B92*, *http://www.b92.net*, 26 mars 2006).

[170] *Tanjug*, 29 février 2008, repris sur le site de B92; le Chili, 27 February 2008, Ministry of Foreign Affairs, "Communicado de Prensa Situation en Kosovo".

[171] *Reuters*, 18 February 2008 (*http://www.reuters.com*)

[172] V. par exemple, les positions adoptées par le Venezuela et la Bolivie, *Herald Tribune*, 21 February 2008; la position de la Roumanie, *Reuters*, 18 février 2008, de l'Espagne, 20 février 2003 (*http://www.clarin.com/diario/2008/02/20/elpais/p–00701.htm* et celle du Sri Lanka, *AFP*, 17 février 2008 *http//afp.google.com*).

[173] Olivier Corten, "Le droit international est-il lacunaire sur la question de la sécession?" ("Are there gaps in the international law of secession?"), *in* M. Kohen (ed.), *Secession. International Law Perspectives*, Cambridge, Cambridge University Press, 2006, pp. 231–254. Cet article remet en cause la thèse de la neutralité du droit international en s'appuyant sur la pratique des Etats et des organisations internationales dans les situations de sécession.

Pour des raisons que l'on imagine aisément, la Géorgie laisse entendre qu'elle ne reconnaîtra pas le Kosovo.[174] Cela étant, tant les Etats-Unis[175] que l'UE donnent régulièrement à ce pays des garanties concernant le respect de son intégrité territoriale. Leurs déclarations utilisent même un langage et des arguments juridiques qu'ils ont systématiquement écartés s'agissant du Kosovo. Confrontés au regain de tension lié à la situation en Abkhazie, la présidence du Conseil a ainsi tenu à réaffirmer "l'attachement de l'UE à la souveraineté et à l'intégrité territoriale de la Géorgie à l'intérieur de ses frontières internationalement reconnues, conformément à la résolution 1808 du Conseil de sécurité des Nations Unies". La Commission européenne a également tenu à préciser que "la décision de la Russie de renforcer ses liens avec les éléments séparatistes des régions d'Abkhazie et d'Ossétie du Sud représente une atteinte à l'intégrité territoriale de la Géorgie" et a déclaré que "toute proposition d'action doit être mesurée à l'aune de sa capacité à baisser la tension". La plupart des groupes politiques du Parlement européen ont, de même, vertement critiqué la Russie pour avoir violé les accords existants, occupé un territoire au nom de la paix, contribué au morcèlement la région et "nourri un nouvel impérialisme fauteur de guerre".[176] On ne peut qu'être frappé par la similitude entre les arguments évoqués aujourd'hui pour protéger la Géorgie et ceux employés, en vain, par ceux qui entendaient soutenir les arguments élaborés par la Serbie pour s'opposer à l'indépendance du Kosovo.

Ce rapport un peu paradoxal au droit international se marque également dans les discussions qui ont entouré le déploiement de la mission européenne de surveillance conformément au plan Ahtisaari et qui ont contraint les Européens à réintroduire des considérations juridiques pour justifier leur décision, le caractère démocratique de l'UE n'étant manifestement pas suffisant pour neutraliser les problèmes juridiques soulevés par cette initiative.

2.3. La réintroduction de considérations juridiques comme condition de légitimité du déploiement de la mission européenne "Etat de droit" (EULEX) au Kosovo

Comme évoqué ci-dessus, les autorités européennes et l'administration américaine avaient estimé, bien avant la déclaration d'indépen-

[174] V. la communication publiée sur: *http://www.armenews.com* le 21 février 2008. Sur les effets déstabilisateurs de la gestion de la question du Kosovo, V. Rick Fawn, "The Kosovo – and Montenegro – effect", *International Affairs*, vol. 84, n°2, 2008, pp. 269–294.

[175] *Ibid.*, p. 285.

[176] Service de presse de PE, relations extérieures, 07.05.2008, disponible sur: *http// www.europarl.europa.eu/news/expert.infopress_page/030–28501–128–05–19–90...*

dance, que le lancement de la mission européenne telle que prévue dans le plan Ahtisaari devait obtenir le feu vert du Conseil de sécurité. Une nouvelle résolution était donc attendue afin d'avaliser le plan du médiateur de l'ONU et de fournir à l'UE la base légale et la légitimité politique permettant à la mission EULEX de pouvoir se déployer au Kosovo tout en prenant le relais de la MINUK. L'opposition de la Russie n'ayant pas permis de mettre en application ce programme, une argumentation nouvelle a été élaborée visant à convaincre les gouvernements européens du caractère légal du lancement de l'opération.[177] Bien entendu, certains gouvernements, convaincus du bien-fondé de celle-ci, ne se sont pas émus outre mesure de l'absence de base légale. Ainsi, le ministre belge des Affaires étrangères, Karel de Gucht, souhaitait que le déploiement de la mission européenne commence au plus vite "pour éviter la discussion sur la base légale".[178] D'autres, en revanche, se sont montrés plus soucieux de trouver une solution susceptible de lever l'obstacle lié à l'absence d'accord au niveau du Conseil de sécurité.[179] C'est dans ce contexte que l'on a vu fleurir des arguments "juridiques" élaborés à partir d'une interprétation "originale" de la résolution 1244.[180]

2.3.1. Le Secrétaire général de l'ONU peut inviter l'UE à prendre le relais de la MINUK

Le paragraphe 10 de la résolution 1244 prévoit en effet qu'il incombe au Secrétaire général d'organiser les modalités de l'administration civile du Kosovo. Il pourrait dès lors estimer opportun de transférer les pouvoirs exercés jusqu'ici par la MINUK aux autorités européennes. Par ailleurs, les responsables onusiens semblent souhaiter ardemment ce passage de témoin.

Il faut en premier lieu préciser que, lorsque le Conseil a pris la décision de lancer l'opération, le Secrétaire Général avait simplement été "informé" de cette décision prise par l'UE.[181] Il ne s'existait donc pas une

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[177] V. les conclusions de la présidence du 14 décembre 2007, disponible sur: *http://www.consilium.europa.eu/uedocs/cmsUpload/071214-Extract_from_EUROPEAN_COUNCIL.pdf*; ainsi que les conclusions du Conseil du 18 février 2008, disponible sur: *http://www.eu2008.si/fr/News_and_Documents/Council_Conclusions/February/0218_GAERC5.pdf*.

[178] *L'Echo*, 30.12.2007, disponible sur: *http://wwww.lecho.be/article/article.6032369*.

[179] Cette absence de base juridique semble aussi avoir constitué un souci majeur pour certains parlementaires européens.

[180] Cette argumentation affleure dans les prises de position de responsables européens. Elle a été reconstituée par l'auteur sur la base d'entretiens avec certaines personnalités bien informées.

[181] Rapport du Secrétaire général sur la mission d'administration intérimaire des Nations Unies au Kosovo, 28 mars 2008, S/2008/211, §5. Dans d'autres documents anté-

invitation en bonne et due forme adressée aux autorités européennes, contrairement à ce que laissent penser certaines déclarations. Certes, quelques semaines plus tard, le Secrétaire général semble avoir cédé aux pressions occidentales et proposé que la mission EULEX se déploie sous le couvert de l'ONU.[182]

Cela étant, et sur un plan strictement juridique, il n'est pas évident d'affirmer que le Secrétaire général a le pouvoir de décider unilatéralement d'un tel transfert. La marge de manœuvre dont il dispose selon les termes de la résolution concerne en effet les modalités d'exercice de l'autorité par la mission de l'ONU au Kosovo. Dans ce cadre, il a effectivement été demandé à d'autres organisations internationales de s'associer aux efforts de l'ONU.[183] Mais les activités entreprises par l'UE et l'OSCE par exemple étaient placées sous la responsabilité du représentant spécial de l'ONU. Dans le scénario imaginé par les responsables de l'UE, l'ONU n'est plus appelée à chapeauter la mission de l'UE. Il est simplement envisagé une forme de concertation avec l'ONU et les autorités compétentes du Kosovo.[184] Le Secrétaire général ne peut dès lors de défausser des responsabilités qui lui incombent aux termes de la résolution 1244 en confiant à l'UE l'exercice d'une autorité que lui-même ne possède pas.[185] Ce faisant, il s'arrogerait les pouvoirs du Conseil de sécurité et contribuerait à déplacer le centre de décision de l'ONU à l'UE – et plus précisément à son représentant spécial (Pieter Feith), également représentant du bureau civil international (International Civilian Office/ICO) – au chef de la mission EULEX (Yves de Kermabon) et à la délégation de la Commission européenne au Kosovo.[186] Comme le rappelle fort opportu-

rieurs à la déclaration d'indépendance, le Secrétaire général a simplement pris acte de la disponibilité de l'UE à lancer une opération de surveillance de l'indépendance. Rapport SG UNMIK (S/2207/768) du 3 janvier 2008, le §34 prend note et souhaite l'engagement plus important de l'UE. Cet élément doit cependant être interprété à la lumière du contexte: l'éventualité d'un accord sur la mise en œuvre du plan Ahtisaari.

[182] *Financial Times*, 13 June 2008. V. le rapport du Secrétaire général sur la MINUK, 12 juin 2008, S/2008/354, §§12–13.

[183] V. l'organisation en piliers, et l'implication de l'UE et de l'OSCE.

[184] Action commune 2008/124/PESC, § 7. V. également l'art. 7 §4 qui précise que le personnel reste sous le commandement intégral des autorités nationales de l'Etat d'origine ou de l'institution de l'UE concernée. L'art. 8§6 précise également que le chef de la mission est responsable des questions de discipline et que d'éventuelles actions disciplinaires seraient du ressort de l'autorité nationale ou de l'autorité de l'UE. Le § 9 précise que le chef de mission assure la coordination avec les acteurs internationaux compétents (OTAN/KFOR, MINUK, OSCE et Etats tiers).

[185] Comme l'a encore rappelé Jean-Marie Guéhenno (directeur du département des opérations de maintien de la paix de l'ONU) au sujet des discussions concernant le départ de la MINUK, ce n'est pas au Secrétariat qu'il revient de décider de cette question, *Koha Ditore*, 4 mai 2008, traduit par *BBC Monitoring European*.

[186] V. les informations disponibles sur le site officiel de l'UE, "The EU in Kosovo", February 2008.

nément Dimitri K. Simes: "...a decision by the United States and the European Union is not a substitute for a UN Security Council mandate",[187] une autre manière de dire qu'Américains et Européens ne peuvent prétendre représenter la "communauté internationale" et se prévaloir de manière unilatérale de la légitimité qu'incarne l'organisation mondiale.

C'est pourtant cette prétention qui explique la création du groupe de contact et, plus récemment, la mise sur pied du *steering committee* chargé de superviser l'indépendance du Kosovo, une décision prise à Vienne le 28 février 2008 par plusieurs Etats membres de l'UE et les Etats-Unis.[188] Guidé par la conviction que la mise en œuvre du plan Ahtisaari est, quoi qu'en disent ses détracteurs, la meilleure solution pour le Kosovo, *Crisis group* considère que: "The collective weight of its members will have to make up for the deficit of formal authority it lends to the ICR"(Pieter Feith).

Par ailleurs, Yves de Kermabon a clairement dit, qu'en tant que responsable d'EULEX, il ne travaillerait pas sous l'autorité de l'ONU: "I am here based on the EU's joint action plan– not one by others– which is a legal basis four our mission. I have a legal basis – an invitation from the President of Kosova – to deploy the EU mission, EULEX, and lastly there is the other legal basis, Resolution 1244. So, I have no doubts regarding the legitimacy of our mission".[189]

Les responsables de l'OTAN semblent également se trouver dans une position un peu schizophrène car, si d'un côté, l'OTAN se targue de respecter la résolution 1244, une partie de ses membres se préparent à entraîner la nouvelle armée kosovare, conformément à ce qui était prévu dans le plan Ahtisaari.[190]

2.3.2. La résolution 1244 est "neutre" s'agissant de la question du statut définitif du Kosovo

Cet argument laisse entendre qu'à partir du moment où le Kosovo a été placé sous administration internationale, la question de son statut

[187] V. la controverse entre Dimitri K. Simes et Franck Wisner, *National Interest on line,* 22.01.2008, disponible sur: *http://www.nationalinterest.org/Article.aspx?id=16670.*

[188] International Crisis Group, "Kosovo's first Month", *Policy Briefing n°47*, 18 March 2008, p. 17. Ce groupe comprend des représentants de la Grande-Bretagne, des Etats-Unis, de la France, de l'Allemagne, de l'Italie, de l'Autriche, de la Turquie, de la Finlande, de la Tchéquie, de la Suède, de la Belgique, du Danemark, de la Hongrie, de la Slovénie et de la Suisse.

[189] *BBC Monitoring European*, 23 May 2008, interview reproduite dans *Koha Ditore*, 21 mai 2008.

[190] *BBC Monitoring European*, 19 May 2008, repris de *Koha Ditore*, 16 mai 2008. Belgrade considère que cette activité n'est pas conforme à la résolution 1244. Certains membres de l'OTAN n'ayant pas reconnu le Kosovo, cette formation sera sans doute confiée à un groupe plus restreint d'Etats membres de l'Alliance.

définitif devait trouver une réponse politique.[191] La résolution 1244 ne contenant aucune indication à ce sujet, et ne précisant aucunement que seul le Conseil de sécurité est apte à en décider, il est permis d'envisager toute solution, y compris la supervision de l'indépendance, qui respecte l'esprit de la résolution (le maintien de la paix et de la sécurité dans la région et un gouvernement autonome pour les Kosovars), si pas la lettre.

Il est pourtant difficile de considérer que la résolution 1244 est "neutre" sur le plan du statut juridique. A trois reprises, il y est fait référence à l'intégrité territoriale de la Yougoslavie.[192] Le rapport établi par *Crisis Group* en juin 1999 estimait d'ailleurs à l'époque que la perspective de l'indépendance était incompatible avec le préambule de la résolution votée par le Conseil de sécurité et potentiellement déstabilisatrice pour la région.[193] Le paragraphe 10 évoqué ci-dessus pour justifier le transfert entre la MINUK et l'UE et les pouvoirs du Secrétaire général pour ce faire mentionne très clairement le fait que cette administration doit être conçue dans le cadre du respect de l'intégrité territoriale de la RFY à laquelle la Serbie a succédé. De surcroît, l'état actuel du droit international positif ne contient aucune règle permettant de justifier la partition d'un Etat membre de l'ONU sans son consentement. Tout au plus pourrait-on trouver des arguments juridiques en faveur d'une telle solution, mais à condition qu'elle soit avalisée par le Conseil de sécurité au titre du Chapitre VII, *quod non*.

2.3.3. La mission EULEX poursuit les objectifs contenus dans la résolution 1244

Il est aussi régulièrement affirmé que le mandat contenu dans la résolution 1244 est suffisamment large pour couvrir les aspects opérationnels de l'action commune adoptée par le Conseil le 4 février 2008.[194] A l'instar de la MINUK, la mission européenne pourrait donc se concevoir en l'absence d'un règlement définitif de la question kosovare. Essentiellement destiné à aider les institutions kosovares à respecter certains stan-

[191] Jean d'Aspremont, "Regulating Statehood: The Kosovo Status Settlement", *Leiden Journal of International Law,* vol. 20, 2007, p. 653.

[192] Résolution 1244, 10 juin 1999, voy. les considérants, le §10, ainsi que les annexes 1 et 2 (§5– §6 prévoyant le retour du personnel yougoslave et serbe des forces armées et de police notamment et "§8. Un processus politique en vue de l'établissement d'un accord-cadre politique intérimaire prévoyant pour le Kosovo une autonomie substantielle, qui tienne pleinement compte des Accords de Rambouillet et du principe de souveraineté et de l'intégrité territoriale de la République fédérale de Yougoslavie et des autres pays de la région, et de la démilitarisation de l'ALK...".

[193] ICG Balkans Report n°69, "The New Kosovo Protectorate", Sarajevo, 20 June 1999, p. 7.

[194] Action commune 2008/124/PESC du Conseil, 4 février 2008 relative à la mission "Etat de droit"menée par l'Union européenne au Kosovo, EULEX Kosovo, *Journal officiel de l'UE, L 42/92*.

dards européens,[195] EULEX pourrait parfaitement être rendue opérationnelle indépendamment de la délicate question du statut du Kosovo (Etat indépendant ou province serbe). C'est sans doute ce type d'argument qui permet d'expliquer que certains gouvernements européens ne souhaitant pas reconnaitre l'indépendance du Kosovo aient néanmoins accepté de soutenir l'envoi d'EULEX. D'ailleurs, les textes qui détaillent les tenants et aboutissants de la présence de l'UE évitent soigneusement de parler d'Etat et d'indépendance. Il est plus souvent fait référence aux "autorités locales" et au principe d'" *ownership*".[196]

Cette affirmation est pourtant problématique au regard de la raison d'être et des circonstances dans lesquelles cette mission a été élaborée car elle est intimement liée à la mise en œuvre du plan Ahtisaari.[197] Relevons au préalable que si la mise en œuvre de la résolution 1244 a, dans les faits, contribué à consacrer la séparation d'avec la Serbie et renforcé les institutions kosovares de gouvernement, elle a néanmoins exclu que celles-ci exercent des compétences pleines et entières sur les questions monétaires, douanières, de sécurité et de défense et de politique étrangère[198] Or, et comme son nom l'indique, la mission "Etat de droit" de l'UE présuppose l'existence d'un Etat. La Constitution du nouvel Etat a par ailleurs été avalisée par le représentant spécial de l'UE, Pieter Feith, conformément à ce qui était prévu dans le plan Ahtisaari.[199] Cette Constitution est sans nul doute celle d'un Etat qui se veut souverain quand bien même elle contient des dispositions de nature à entamer sérieusement son indépendance.[200] Dans le même temps, le texte officiel qui consacre la nomination du représentant spécial évite les questions qui divisent comme celle du statut définitif,[201] mais il est évident que la présence civile et internationale telle que conçue initialement n'a de sens que dans le cadre de la mise en œuvre d'une indépendance surveillée.

Jean d'Aspremont, dans un article paru en 2007, avait prédit que certains Etats seraient sans doute tentés de prolonger la résolution 1244 pour accompagner le processus d'indépendance en cas de problème au niveau du Conseil de sécurité. Il redoutait cette perspective en rappelant

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[195] Action Commune 2008/124/PESC, art. 2.

[196] V. par ex. European Fact Sheet, "EULEX Kosovo"et "EUSR in Kosovo", February 2008.

[197] AG/PKO/197 – 11 mars 2008/Comité spécial des OMP, session de fond 2008. Pour le représentant de la Serbie, le déploiement d'EULEX est illicite car il vise à mettre en œuvre le plan MA qui n'a pas été avalisé par le Conseil de sécurité.

[198] V. Michael Matheson, "United Nations Governance of Post Conflict Societies", *American Journal of International Law*, 2001, vol. 95, n°1, p. 81

[199] *Financial Times*, 3 April 2008; *Le Monde*, 10 avril 2008.

[200] V. en particulier le chapitre XIII, art. 143.

[201] Joint Action 5576/08 appointing a EU SR in Kosovo – Pieter Feith (4 February 2008)/ REV 1 du 12 février 2008.

la manière dont la coalition anglo-saxonne avait essayé de justifier l'opération militaire contre l'Irak en 2003 arguant d'une forme d'autorisation implicite contenue dans les résolutions déjà votées et concluait: "On top of further undermining the future use of Chapter VII powers, such a trick would fundamentally undermine the legitimacy of the lingering international presences in Kosovo and put at risk the solution shaped by the Kosovo Status Settlement".[202]

Contraints de trouver une justification en droit, les partisans de la mise en œuvre forcée du plan Ahtisaari, ont tenté de se raccrocher au seul élément "juridique" à leur disposition: la résolution 1244. Il existe pourtant une contradiction majeure dans ce raisonnement car de deux choses l'une:

– soit on estime que la résolution 1244 s'applique encore après l'indépendance, mais il est alors évident que toute action favorisant celle-ci serait contraire à la résolution.

– soit on estime que la résolution 1244 est rendue caduque par la déclaration d'indépendance et dès lors les pays ayant procédé à la reconnaissance peuvent exciper du consentement des autorités souveraines du Kosovo pour justifier la présence civile et militaire internationale, la référence à une autorisation devenant alors superflue.

Au stade actuel, il semble que l'UE ne puisse reconnaître l'indépendance du Kosovo mais se déclare néanmoins disposée à superviser cette indépendance. Il est possible que l'entrée en vigueur de la Constitution du Kosovo le 15 juin encourage certains gouvernements à user de la seconde branche de l'alternative; et il est tout aussi probable que ce type de raisonnement apparaîtra aux yeux de certains comme le signe d'une rationalité juridique moderne et sans doute un peu obsolète.

3. BACK TO THE FUTURE?

Dans son étude sur la légitimité des interventions dans un monde divisé, Nathaniel Berman jette un éclairage intéressant sur des événements passés qui permet de mettre en perspective la gestion actuelle du problème du Kosovo et la place réservée au droit dans ce processus. Revenant sur le marchandage qui a eu lieu à Munich en 1938, il rappelle que certains publicistes avaient considéré que celui-ci illustrait un effort pour contourner les impasses formalistes de la SDN tout en tenant compte des problèmes concrets: "De tels commentateurs soutenaient qu'un conclave international incarnant 'l'esprit de Genève' avait pris place à Munich, tandis que ce qui n'était que la lettre morte du droit international demeurait

[202] Jean d'Aspremont, "Regulating Statehood: The Kosovo Status Settlement", *op. cit.*, p. 668.

en Suisse".[203] C'est typiquement le genre de considération que l'on peut retrouver dans un mémorandum produit par les instances européennes (non officiel et non accessible au public), et selon lequel l'indépendance du Kosovo, si elle ne respecte pas à strictement parler la lettre de la résolution 1244, est néanmoins conforme à son esprit.[204]

Ce type de justification se retrouvait également dans les tractations entre la France, la Grande-Bretagne et l'Italie au sujet de l'Ethiopie. Dans ces deux cas, le professeur Berman relève une propension à se référer une "communauté internationale alternative" reposant dans les faits sur une coalition informelle et ponctuelle qui peut éventuellement comprendre des adversaires idéologiques. Il identifie également une autre variante qui repose sur une alliance idéologique cette fois présentée comme la "véritable communauté internationale" quand bien même elle n'est pas universelle dans les faits. Cette variante s'est avérée particulièrement utile pour les superpuissances qui se sont affrontées durant la guerre froide et a permis de légitimer leurs interventions sur la base de valeurs substantielles qui étaient opposées à l'autorité juridique formelle de l'ONU et à son universalité "simplement quantitative". Les propos du ministre français des Affaires étrangères saluant une victoire de la communauté internationale à l'occasion de la proclamation de l'indépendance du Kosovo[205] peuvent être compris à la lumière de cette analyse. Berman lui-même poursuit sa démonstration en prenant l'exemple du "illégal-mais-légitime" qui a été le crédo des gouvernements qui ont participé à l'opération de l'OTAN contre la Yougoslavie en 1999. Son analyse permet également de comprendre, la logique fonctionnelle qui a présidé au fonctionnement du Groupe de contact (avec la Russie) et la constitution du *steering committee* (sans la Russie) qui repose précisément sur la constitution d'une communauté internationale alternative basée, dans ce cas, sur une plus grande cohérence idéologique puisqu'elle ne compte plus la Russie dans ses rangs.

A ce stade de la gestion de la question du Kosovo, on ne peut être que frappé par la réactivation de l'idée que seuls les Etats démocratiques ont la légitimité nécessaire pour régler des problèmes comme celui-là: "Kosovo and Tibet, on the front lines between liberty and tyranny, make the case for a new international league of Democracies, from which Russia and China would perforce be excluded".[206]

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[203] Nathaniel Berman, *Passions et ambivalences. Le colonialisme, le nationalisme et le droit international*, *op. cit.*, p. 104.

[204] Chris Borgen, "International Law and Kosovo's Independence: Assessing Resolution 1244", disponible sur: *http//www.opiniojuris.org/posts/1203466666.shtml*; Paul Reynolds, "Legal furore over Kosovo recognition", *BBC News*, 16.02.2008.

[205] Déclaration de Bernard Kouchner, Bruxelles, 18 février 2008 disponible sur le site: *http://diplomatie.gouv.fr*.

[206] Stephen Schwartz, "Recognition Without Power. A report form independent Kosovo", *Weekly Standard*, vol. 013, n°28, 31.03.2008. V. encore la tribune signée par

Dans un tel contexte, le droit international "classique" n'apparaît plus comme un registre privilégié de légitimation ou un cadre normatif très contraignant...

> "[...] being old, stable and egalitarian, international law confers strong legitimacy on those acting within this framework and it allows in particular, stabilizing an order significantly. Yet due to these characteristics, it also places considerable constraints on the exercise of dominance. Its pre-existing rules limit the freedom of action, its stability prevents a quick reshaping according to hegemon's vision, and its egalitarian character gives other states an important role in law-making and makes it difficult for the hegemon to create rules that apply only to others, not to itself".[207]

Pour David Chandler, cette situation est surtout la conséquence du succès des programmes de "*state-building*" et de l'idée d'intervention humanitaire telle qu'elle s'est imposée au cours des années 90. Ce succès repose lui-même sur une nouvelle acception de la souveraineté qui se définit surtout en fonction de la capacité de l'Etat à produire certains bien publics et plus vraiment en fonction du principe d'indépendance et d'autonomie. A l'appui de sa démonstration, il cite le politologue américain Robert Keohane:

> "We somehow have to reconceptualize the state as a political unit that can maintain internal order while being able to engage in international co-operation, without claiming the exclusive rights...traditionally associated with sovereignty ....the same institutional arrangements may help both to reconstruct troubled countries that are in danger of becoming 'failed states", and to constrain the autonomy of those states".[208]

Dans cet article datant de 2003, Keohane suggérait déjà la solution consistant à prévoir une indépendance limitée pour le Kosovo et partant l'octroi de pouvoirs importants aux institutions internationales qui seraient chargées de superviser cette indépendance.[209] Notons que dans le

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Robert Kagan, "The case for a League of Democracies", *Financial Times*, 13 May 2008 et la présentation critique du programme international du candidat républicain à la présidentielle reprenant cette idée par Serge Halimi, "Les projets très impériaux du sénateur John Mc Cain" dans *Le Monde Diplomatique*, disponible sur: <http://www.monde-diplomatique/fr/carnet/2008–02–14-John-McCain>

[207] Nico Krisch, "Imperial International Law", *Global Law Working Paper 01/04*, NYU School of Law, p. 59.

[208] David Chandler, *Empire in Denial. The Politics of State-Building*, London, Pluto Press, 2006, p. 41. Il justifie son titre dans ces termes: "In fact, the new framework of domination has been built on the basis of the denial of Western power and responsibility. The new administrators of empire talk about developing relations of 'partnership' with subordinate states [...] at the same time as instituting new mechanisms of domination and control [...] They are eager to deny that they have any interests or deciding influence at the same time as instituting new mechanisms of regulation which artificially seek to play up authority, rights and interests of those subordinate to them", p. 9.

[209] *Ibid*., p. 42.

cas du Kosovo, mais aussi de la Bosnie-Herzégovine, l'exercice du pouvoir par les acteurs externes ne se limite pas à la supervision puisqu'il s'agit, en vue de leur adhésion future, de transformer les institutions étatiques, les normes en vigueur et, plus généralement es sociétés, pour les rendre conformes aux standards européens.[210]

L'aspect formel de la souveraineté est préservé mais le concept est vidé de sa substance selon trois procédés:

> "by redefining sovereignty as a variable capacity rather than an indivisible right, thereby legitimising a new hierarchy of variable sovereignty and undermining UN Charter principle of sovereign equality; secondly, by redefining sovereignty as a duty or a responsibility rather than a freedom, legitimising external mechanisms of regulation, held to enhance sovereignty despite undermining the traditional right of self-government or autonomy; and, thirdly, by exaggerating the formal importance of international legal sovereignty so that this formal shell then facilitates the repackaging of external domination as partnership or country ownership and the voluntary contract of formally equal partners".[211]

En mettant en évidence les tensions auxquelles est soumis le principe d'égalité souveraine des Etats, son d'analyse permet effectivement de comprendre les ressorts idéologiques qui sous-tendent le projet européen pour le Kosovo.

S'agissant plus précisément du droit international et des relations avec tous les acteurs concernés par la gestion du dossier, l'étude réalisée par Nico Krish[212] nous semble particulièrement utile pour expliquer l'ensemble des phénomènes que l'on a pu observer dans les Balkans depuis le début des années 90 et comprendre l'économie des relations entre droit et politique que l'on retrouve dans le discours européen sur l'ex-Yougoslavie. Son analyse des rapports équivoques que les Etats dominants entretiennent avec le droit international met en évidence plusieurs cas de figure qui, combinés, présentent toutes les caractéristiques d'un droit international qualifié d'impérial:

– l'instrumentalisation du droit qui se marque par un activisme soutenu dans l'élaboration et la mise en œuvre de certaines normes juridiques, mais aussi par une tendance à la déformalisation du droit.[213] Est également relevée la propension à utiliser le

[210] *Ibid.*, pp. 107 et ss.

[211] *Ibid.*, p. 33.

[212] Nico Krisch, "Imperial International Law", *Global Law Working Paper 01/04*, NYU School of Law.

[213] Il conçoit cette notion comme "Replacement of formal criteria for determining the law by more substantive ones which usually reflect the universalist principles underlying a hegemon's foreign policy. Such a turn to substantive criteria leads to far-reaching change with a high degree of control: since the criteria are usually very vague, their concrete obligation will involve much discretion and thus allow for a significantly greater

Conseil de sécurité pour obtenir certaines décisions ou faire adopter de certaines règles qu'ils ne pourraient obtenir de manière plus conventionnelle (par la négociation par exemple);

– la mise en place de mécanismes permettant de limiter le champ d'application du droit international existant à travers, soit l'invocation du caractère exceptionnel d'une situation, ou la création de catégories d'Etats "hors-la-loi" et de critères de légitimité politique justifiant l'application d'un double standard;[214]
– le fait de privilégier l'exportation de certaines normes de droit interne ou de "standards" par rapport au droit international.

Les exemples qu'il fournit à l'appui de sa démonstration sont le plus souvent tirés des pratiques impériales des puissances européennes et des pratiques plus contemporaines développées par les Etats-Unis. Comme il vient d'être démontré, le rapport que l'UE entretient avec le droit international, du moins pour ce qui concerne l'ex-Yougoslavie, présente le même type de caractéristiques.

La difficulté dans ce cas sera finalement de déterminer dans quelle mesure le discours dominant déploie une stratégie d'évitement du droit en raison de son utilisation par ses contradicteurs – ce qui serait finalement simplement opportuniste – ou, plus fondamentalement, pour des raisons qui tiennent à la manière dont se déploient les jeux de pouvoir sur la scène internationale.

exercise of power than more formalist ones. The introduction of civilization or democracy as a key term of international law allows for greater flexibility", p. 23.

[214] V. notre contribution, "La séduction du concept d'impérialisme libéral auprès des élites européennes: vers une redéfinition de la politique étrangère européenne?" *in* Helène Ruiz-Fabri et Emmanuelle Jouannet (sous la dir. de), *Impérialisme et droit international en Europe et aux Etats-Unis*, Société de législation comparée, coll. UMR de droit comparé de Paris, vol. 13, 2007, pp. 73–114. Une version actualisée et remaniée de cet article a été publié dans Hélène Ruiz-Fabri, Emmanuelle Jouannet and Vincent Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law,* vol.1, 2006, Oxford/Portland, Hart Publishing, pp. 181–207.

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

[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).

Miodrag A. Jovanović, LLM, PhD

Associate Professor,
University of Belgrade Law Faculty

EU AND THE RECOGNITION OF KOSOVO – A BRIEF LOOK THROUGH THE LEGITIMACY LENSES

This paper examines the legitimacy of the politics of the European Union after the unilateral declaration of independence of the Serbian province of Kosovo and Metohia. The decision whether to recognize this act or not was left to individual Member States, and so far 22 out of 27 Member States did recognize Kosovo's independence. However, the EU foreign and accession policy is largely built on the principle of unanimity of Member States. Despite the fact that, regarding the recognition of Kosovo, such consensus was not achieved, a number of EU bodies and officials act as if it was. This paper demonstrates that these acts are illegitimate, both in terms of lacking the authorization of all Member States and in terms of undermining the established goal of integrating the entire region of Western Balkans into the EU.

Key words: *Recognition of States. – Kosovo and Metohia. – European Union. – Foreign policy. – Legitimacy*.

1. INTRODUCTION

In its Conclusions, adopted the day after the unilateral declaration of independence of the Serbian province of Kosovo and Metohia, the European Union's External Relations Council stated: "On 17 February 2008 the Kosovo Assembly adopted a resolution which declares Kosovo to be independent. The Council takes note that the resolution commits Kosovo to the principles of democracy and equality of all its citizens, the protection of the Serb and other minorities, the protection of the cultural and religious heritage and international supervision. The Council welcomes the continued presence of the international community based on UN Security Council resolution 1244. The Council notes that Member States

will decide, in accordance with national practice and international law, on their relations with Kosovo."[1]

To be sure, deciding about "relations with Kosovo" amounts by and large to deciding whether to recognize this province as an independent state or not. In what followed, Member States of the European Union have demonstrated that their understanding of international law and their practices with respect to the recognition of states were somewhat different. In the moment of writing, twenty two EU Member States have recognized unilaterally declared independence of Kosovo. In doing so, they principally reiterated the US-launched argumentation that Kosovo is a 'unique case' and that as such cannot and shall not set a precedent for some similar cases around the globe.[2] It seems, however, that some of the EU Member States, like Spain, Cyprus, Slovakia, Greece or Romania, have not taken that argumentation for granted and, thus, have not extended recognition to Kosovo. Interestingly enough, the position of these countries largely coincides with the fact that they themselves have a serious record of mitigating internal ethnic conflicts.

2. EU FOREIGN POLICY – LEGAL AND POLITICAL FRAMEWORK

Recognition of states falls within the domain of foreign policy and the existing primary law of the EU has provisions on common foreign and security policy. Namely, the *Treaty on European Union* (or, Maastricht Treaty), signed on 7 February 1992, and entered into force on 1 November 1993, represented a new step in the process of European integration. It renamed the European Economic Community into the European Community (EC), "thus dropping the word 'economic' in order to indicate that many non-economic matters had become part of its architecture."[3] Furthermore, it has also added two 'annexes' to the Community pillar – the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (JHA), which subsequently became Police and Judicial Cooperation in Criminal Matters (PJCC). All together, they constitute 'three pillars' of the EU building.

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[1] *Conclusions on Kosovo*, 2851st External Relations Council meeting, Brussels, 18 February 2008

[2] More on the viability of this argument in, M. Jovanović, *Is Kosovo and Metohia Indeed a 'Unique Case'?*, available at *www.kosovo-law.org*; The fragility of this argument was soon persuasively demonstrated when, after the short Georgian war, Russia recognized unilaterally declared independence of South Ossetia and Abkhazia.

[3] W. van Gerven, *The European Union – A Polity of States and Peoples*, Hart Publishing, Oxford and Portland, 2005, 8.

After the successive treaty changes, Article 11 of the current Treaty on European Union (TEU)[4] states that the objectives of the Union in a common foreign and security policy shall, *inter alia*, be "to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter" and "to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders." Second paragraph of this article calls for the Member States' active and unreserved support of the EU external policy, as well as for their mutual political solidarity. This implies that they "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations." Article 12 specifies that the aforementioned objectives are to be pursued by: defining the principles of and general guidelines for the common foreign and security policy; deciding on common strategies; adopting joint actions; adopting common positions; and, strengthening systematic cooperation between Member States in the conduct of policy. In the next article it is said that defining the principles of and general guidelines for common foreign policy falls within the competence of the European Council. This body shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

As for the role of the Council of Ministers, Article 13 states that it shall take the decisions necessary for defining and implementing the European Council's general guidelines. It shall also make recommendations to the European Council to adopt common strategies and, when adopted, implement them, in particular by means of joint actions and common positions. In Article 14 (1) it is stipulated that "joint actions shall address specific situations where operational action by the Union is deemed to be require", while Article 15 states that "common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature." Article 23 (1) defines the voting procedure, stating that decisions in this area "shall be taken by the Council acting unanimously."[5] In performing its functions, the Council shall be assisted by the Sec-

[4] *Consolidated Version of the Treaty on European Union*, OJ (2006) C 321

[5] This article also specifies that "abstentions by members present in person or represented shall not prevent the adoption of such decisions", as well as that the Council shall act by qualified majority in the following cases: when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; when adopting any decision implementing a joint action or a common position; when appointing a special representative. A member of the Council may oppose the qualified majority procedure "for important and stated reasons of national policy" and then the matter may be "referred to the European Council for decision by unanimity."

retary-General of the Council, who is in the same time High Representative for the common foreign and security policy. He assists the Council by formulating, preparing and implementing policy decisions, and, when appropriate, conducting political dialogue with third parties (Article 26).[6]

One of the major features of the traditional state sovereignty concept is exactly the autonomy in foreign policy choices.[7] However, the aforementioned overview of the legal framework of the EU foreign policy amply demonstrates that the EU is not a classical state, for it essentially lacks powers of coercion. Namely, as long as matters, such as foreign, defense and security policy, and criminal matters "remain subjected to decisions to be made unanimously by Member State representatives in the European Council and the Council of Ministers, the Union is not, as such, empowered to live up to the legitimate expectations that international recognition implies in a global world."[8] Moreover, since not having yet a single legal personality, the EU is obviously apt neither to receive, nor to grant recognition in the international legal sense of the word.

The attempt was made through the *Treaty Establishing a Constitution for Europe*[9] to achieve a higher level of political integration even in such sensitive areas as foreign policy. Hence, Article I–28 established the institution of the Union Minister for Foreign Affairs, who "shall conduct the Union's common foreign and security policy", "preside over the Foreign Affairs Council", and "be one of the Vice-Presidents of the Commission." As for another important element of the external aspect of the EU's legal subjectivity, the one related to the EU position in international law, Article I–7 of the Constitution explicitly stated that "the Union shall have legal personality." This norm represented a clear departure from the still valid EU Treaty provisions, from which it "does not appear [...] that the

[6] In addition, the Council is advised by the Political and Security Committee, which monitors the international situation and the implementation of the agreed policies (article 25).

[7] The others are: internal authority of state, as the supreme political power that has the monopoly over legitimate use of force within its territory; the control over movements across its borders; and the right to be free from external intervention, which is recognized by other states. This taxonomy is borrowed from the 2003 speech of the US governmental official, Richard N. Haass, at the Georgetown University. Quoted in J. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept", *The American Journal of International Law*, Vo. 97, No. 4/1997, 786.

[8] W. van Gerven, 38. However, this "does not prevent the Union from being a *political system* as it possesses all the elements needed to be such a system: institutional stability and complexity; powers of government through which citizens and social groups seek to achieve their political desires; a significant impact on the distribution of economic resources and the allocation of social and political values; and a continuous interaction between political outputs, new demands on the system, and so on." *Ibid*., 38.

[9] *Treaty Establishing a Constitution for Europe*, OJ (2004) C 310

contracting parties intended to confer the necessary degree of autonomy on the Union."[10] Nevertheless, even the Constitution provided, in Article III–300, that European decisions in the area of foreign policy "shall be adopted by the Council acting unanimously."

After the well-known failure of the EU constitution, generated by the refusal of the French and Dutch electorate to ratify this document, the successive *Lisbon Treaty*[11] retreats somewhat in the rhetoric and symbolism of the further political integration. Not only that the term 'Constitution' is solemnly abandoned, and there is no mentioning of the EU symbols, such as the flag, the anthem or the motto, but 'Union Minister for Foreign Affairs' is again renamed into High Representative of the Union for Foreign Affairs and Security Policy. In terms of substance, almost nothing has changed, since the Lisbon Treaty also provides (Article 31 of the Consolidate Version of the TEU) that, by rule, decisions in the area of common foreign and security policy shall be taken unanimously.

3. LEGITIMACY DILEMMAS IN THE EU

One of the pertinent problems – at least, as perceived by scholars of political theory – concerns the legitimacy of the EU institutions. Much has been written so far on this topic, but one of the most comprehensive assessments of this problem is presented in Beetham and Lord's book *Legitimacy and the European Union*.[12] These authors proceed from the general question of what makes a political authority legitimate. In that respect, they differentiate between the three dimensions. Political authority is legitimate "to the extent that:

1. it is acquired and exercised according to established rules (legality)
2. the rules are justifiable according to socially accepted beliefs about (i) the rightful source of authority, and (ii) the proper ends and standards of government (normative justifiability)
3. positions of authority are confirmed by the express consent or affirmation of appropriate subordinates, and by recognition from other legitimate authorities (legitimation)."[13]

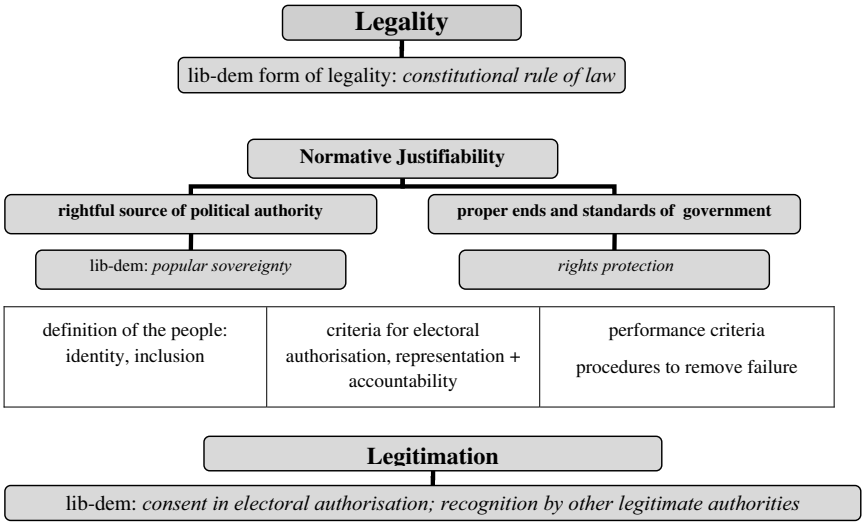
[10] K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, Sweet & Maxwell, London, 1999, 612.

[11] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* OJ (2007) C 306; Consolidated versions of both treaties are published in OJ (2008) C 115

[12] D. Beetham and C. Lord, *Legitimacy and the European Union*, Longman, London and New York, 1998.

[13] *Ibid*., 3.

Beetham and Lord say that the first level is that of rules, the second concerns justifications grounded in beliefs, while the third one acts of consent or recognition. These authors emphasize that "three levels are not alternatives, since all contribute to legitimacy." Taken together, "they provide the subordinate with moral grounds for compliance or cooperation with authority." In turn, each of these elements "has its distinctive negative: illegitimacy (breach of the rules); legitimacy deficit (weak justification, contested beliefs); delegitimation (withdrawal of consent or recognition)."[14] Most importantly, the overall structure of legitimacy, or its "heuristic framework", is a universal one, while its particular form "is variable according to the historical period, the society in question and the form of political system."[15] In that respect, they find several defining characteristics of a distinctively liberal-democratic legitimacy. They can be schematically presented as follows:[16]



Having this in mind, the key question becomes "whether, and to what extent, these liberal-democratic criteria of legitimacy are appropriate to the institutions of the EU, and its executive, legislative and regulatory authority."[17] After dismissing the rival standpoints that treat the EU

[14] *Ibid*., 4.
[15] *Ibid*., 5.
[16] *Ibid*., 9.
[17] *Ibid*., 11.

as predominantly an international organization,[18] or 'regulatory state',[19] Beetham and Lord note that "the EU is a political system in its own right, or at least a 'partial polity'",[20] and that as such should be measured by the liberal-democratic criteria of normative validity and legitimation. These are the following criteria:

1. performance (effective performance in respect of agreed ends);
2. democracy (democratic authorisation, accountability and represenation); and
3. identity (agreement on the identity and boundaries of the political community).[21]

As for the *performance* component, one may here distinguish between the two possible sources of the EU legitimacy deficits. The first one concerns fundamental ideological disagreements over the definition of ends and purposes that the EU should serve, while the second possible failure relates to the effectiveness of decision-making procedures.[22] When it comes to the democracy component, it can be further subdivided into three mutually connected features of political authority: *authorisation*, *accountability* and *representation*. When assessed by these criteria, the EU institutions prove to be still deficient in each aspect.[23] Finally, *identity* is, in Beetham and Lord's opinion, an inseparable element of the debate about liberal-democratic criteria of normative validity and legitimation of the EU institutions, because it largely affects the representativeness of the EU organs, especially the European Parliament, or the accountability of the executive branch, etc.[24]

Despite a rather forceful argument that the EU, in terms of everyday functioning, behaves as one legal entity under three pillars and that it is as such recognized by other international actors,[25] it seems justifiable,

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[18] According to this view, the EU is foremost a contractual arrangement of its Member States, and not the one that is constituted by the people of Europe. *See, e.g.*, D. Grimm, *Die Zukunft der Verfassung*, Suhrkamp, Frankfurt, 1991.

[19] Majone defends the 'regulatory' (technocratic), instead of traditional 'liberal-democratic', model of legitimacy. He contends that "it is not misleading but actually heuristically useful to think of EC/EU as a 'regulatory state'." G. Majone, "The Rise of Statutory Regulation in Europe", in G. Majone (ed.), *Regulating Europe*, Routledge, London and New York, 1996, 55.

[20] D. Beetham and C. Lord, 14.

[21] *Ibid*., 22.

[22] *Ibid*., 24–25.

[23] *Ibid*., 26–27.

[24] *Ibid*., 28.

[25] D. Curtin and I. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, 1999, 83–132.

for the purposes of the legitimacy debate, to differentiate between the first pillar and the two remaining ones. While the first pillar is largely 'supranational', the second and third are primarily 'intergovernmental' in nature. As pointed by van Gerven, "[i]t is indeed under the first pillar that the integration process, driven by a strong executive, the EU Commission, has advanced the farthest, and, accordingly, that accountability, submission to the rule of law, good governance, and open government are most needed."[26] In contrast, the reason why the second pillar cannot be deemed to comply with the liberal-democratic concepts of Rule of Law and *Rechtsstaat*, "is mainly that judicial review by the Community courts of acts or omissions of the Council, or of the European Council, is unavailable under the second pillar".[27] At the same time, this pillar can be more appropriately assessed by the standards of the international organizations' type of legitimacy.

According to Beetham and Lord, this type of legitimacy is grounded in the principle "that system of authority is legitimate whose authority is recognised and confirmed by the acts of other legitimate authorities."[28] In the case of the EU's second pillar, this would imply acquiring the recognition and confirmation by Member States. Furthermore, legitimacy of an international organization is heavily dependant upon the 'performance' criterion, that is, the realization of the established ends and purposes.[29] Were these two criteria to be employed, then the EU 'legitimacy deficit' in the second pillar would have been possible only in the two following cases: 1. if individual Member States have good reasons systematically to challenge the EU's authority; and 2. if a Member State's legitimacy itself is eroded, so that the EU policies cannot be effectively implemented at the state level.[30]

4. EU AND THE SELF-PROCLAIMED 'STATE' OF KOSOVO – THE QUEST FOR LEGITIMACY

As indicated at the beginning, 22 out of 27 Member States have so far recognized the self-proclaimed 'state' of Kosovo. A rhetorical consolation for this uncomfortable situation, frequently used by various EU authorities, is found exactly in the fact that recognition of states does not

[26] W. van Gerven, 62.

[27] *Ibid*., 109, n. 24.

[28] D. Beetham and C. Lord, 11.

[29] Cf. J. Coicaud, "International Organizations, the Evolution of International Politics, and Legitimacy", in J. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, United Nations University Press, Tokyo, New York, Paris, 2001, 523.

[30] D. Beetham and C. Lord, 13.

fall within the Brussels' competences. However, notwithstanding that, legally speaking, this is indeed so, no doubt that the EU would have wanted to achieve political unity with respect to Member States' position towards unilateral declaration of Kosovo's independence. After all, it is the constant strive of the EU – through the failed Constitution and, to a lesser extent, through the Lisbon Treaty – to build a distinctive European political identity via, among other things, a common foreign policy.[31] The Kosovo case, being the one on the European soil, was a perfect test for this political aspiration. From all we know, the EU has largely failed in building a common political stance on the Kosovo case.[32]

Nevertheless, from some statements and acts of certain EU representatives and bodies one might get the impression that no such discrepancy in the policy towards Kosovo exists. Hence, only two days after Kosovo unilaterally declared independence, the European Union's High Representative for the common foreign and security policy, Javier Solana, paid a visit to Priština for talks with the Kosovo officials, Fatmir Sedjiu and Hashim Thaci. There, he was reported saying: "We are good friends of Kosovo, and Kosovo is good friend with the European Union." Then he added that "the European perspective of all of the countries of the (Balkan) region is open."[33]

Even more explicit was European Commissioner for External Relations and European Neighborhood Policy, Benita Ferrero-Waldner, who said during her visit to Moscow that the EU believes that a stable, democratic and multi-ethnic Kosovo has an EU perspective. At the same time, when asked if other secessionist regions in the world will follow the ex-

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[31] In the Preamble of the TEU of the Lisbon Treaty, it is said that signatories are "resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence [...] thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world."

[32] The lowest common denominator that Member States could agree upon was to form the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) (Joint Action 2008/124/CFSP, OJ [2008] L 42, p. 92). According to the statement on its web site, the central aim of EULEX "is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs. The mission is not in Kosovo to govern or rule. It is a technical mission which will mentor, monitor and advise whilst retaining a number of limited executive powers." (http://www.eulex-kosovo.eu/?id=2) Concerning the highly dubious international legal grounding for such a move, certain Member States abstained from actively participating in this mission. Serbia is vehemently opposed to the transfer of power from UN Mission in Kosovo (UNMIK) to EULEX without the explicit authorization of the UN Security Council and the modification or alteration of the UN SC Resolution 1244 that is still in force. Furthermore, Serbia's reservation towards this mission stems from the fact that it was envisaged by the so-called Ahtisaari's plan, which recommended the independence of Kosovo, but was not as such accepted neither in negotiations between Belgrade and Priština, nor in the Security Council.

[33] *EU, Kosovo "good friends" Solana says in landmark trip*, at *http://www.eubusiness.com/news-eu/1203437835.56/*

ample of Kosovo and demand independence, Ferrero-Waldner reiterated the well-known argument that Kosovo is a unique case, because it has a specific history over the past decades – "I don't believe that it is right to make comparisons between the conflicts. Instead, we should try through negotiations to find solutions which are acceptable to all parties."[34]

In a similar fashion, the European Union special representative in Kosovo, Peter Feith, has voiced expectation, while visiting Montenegro, that all countries in the region will soon recognize Kosovo's independence. Feith said that such move might not represent a friendly act towards Belgrade, but that it would nonetheless contribute to the stability in the region. Moreover, he expressed belief that Montenegro's recognition of the unilaterally proclaimed Kosovo's independence would have no major consequences, since Serbia might withdraw its ambassador from Pogorica, "and that's all."[35]

On a May 2008 meeting between the European and Kosovo parliamentarians, the flag of the self-proclaimed 'state' of Kosovo has been flown over the European Parliament in Brussels. The European Parliament's rapporteur for Serbia, Slovenian deputy, Jelko Kacin, said that this in effect meant that the parliament had recognized Kosovo's independence. He defended the flying of the Kosovo flag there, by uttering that "Kosovo, too, has its place in the European Union and I am against any country, including Serbia, obstructing Kosovo on its way to the EU."[36]

Finally, at the Kosovo Donors Conference, held in Brussels on 11 July 2008, Olli Rehn, the EU Commissioner for Enlargement, expressed the following words: "Kosovo has committed itself to a tall order of responsibilities. These include: A high standard of protection for human and minority rights, including the rights of Roma communities. This is one of the cornerstones of the plan presented by Martti Ahtisaari. Improving the socio-economic conditions for all people in Kosovo. Good governance through reinforced administrative capacity and sound rule of law. Protection of cultural and religious heritage; as well as Promotion and development of regional cooperation and a commitment to peace and stability in the region. The international community cannot but welcome such commitments. Achieving them across the region of the Western Balkans is a key priority for the EU and the European Commission."[37]

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[34] UNMIK Media Monitoring 4 June 2008, at *http://www.unmikonline.org/DPI/LocalMed.nsf/0/82C173F8BC4C089AC125745E00261A41/$FILE/Headlines%20-%2004.06.08.doc*

[35] *http://www.mfa.gov.yu/Bilteni/Engleski/b260608_e.html#N13*

[36] *European Parliament Flies Kosovo Flag*, at *http://www.balkaninsight.com/en/main/news/10613/*

[37] Olli Rehn's speech is available at *http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/389&format=HTML&aged=0&language=EN&guiLanguage=en*

In all the aforementioned occasions, the EU representatives have more or less openly treated Kosovo as if it was a full-fledged state, recognized as such by the EU as a whole. Since this is not the case, the question is on what grounds these official statements and acts of the EU bodies might be considered legitimate. As indicated in the previous chapter, concerning the predominantly 'intergovernmental' character of the EU second pillar, the legitimacy of the EU authority in this domain primarily depends upon the acts of recognition and confirmation taken by other legitimate authorities, that is, Member States. Since several Member States have explicitly stated that they consider the unilateral declaration of Kosovo's independence to be legally void and that, accordingly, they cannot recognize this province as a state, any action of the EU authorities that assumes the Union's unanimous stance in favor of Kosovo's independence can be nothing but illegitimate. The most paradigmatic in this respect is the case of the current High Representative for the common foreign and security policy, Javier Solana, who finds himself in a strange position of emphatically talking about an EU-Kosovo friendship, while his country of origin – Spain – is adamantly opposed to the recognition of Kosovo.

The second element of legitimacy in the EU foreign policy area concerns the 'performance' criterion, that is, the realization of the established ends and purposes. Kosovo and Metohia is the Serbian province that is geographically located in the Western Balkans, and one of the Union's expressed political goals is exactly to integrate all the countries from that region into the EU.[38] How successful could the realization of this goal be if the EU does not have a common position regarding the question whether Serbia should enter the Union with its province of Kosovo and Metohia, or the latter territory should be treated as a separate state? In a recent interview to the Serbian daily *Večernje Novosti*, the European Parliamentary rapporteur for Serbia, Jelko Kacin, was being asked whether Kosovo will entry the EU as an independent state. He responded, somewhat cynically, that "only state can become a member. Up to now it has not happened that

[38] The EU-Western Balkans Summit in Thessaloniki, held on 21 June 2003, ended with the adoption of the Declaration, which, *inter alia*, states: "The EU reiterates its unequivocal support to the European perspective of the Western Balkan countries. The future of the Balkans is within the European Union. The ongoing enlargement and the signing of the Treaty of Athens in April 2003 inspire and encourage the countries of the Western Balkans to follow the same successful path. Preparation for integration into European structures and ultimate membership into the European Union, through adoption of European standards, is now the big challenge ahead." Available at *http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/76291.pdf.*

At Salzburg in March 2006, building on the Thessaloniki agenda, the EU reiterated its commitment that the future of the countries of the Western Balkans lays within the European Union. See, at *http://www.consilium.europa.eu/uedocs/cmsUpload/060311-Salzburg_EU_Western_Balkans-Joint_Press_Statement.pdf*.

no-state enters the European Union."[39] As we saw, a number of EU officials have already spoken about a Kosovo's 'EU perspective', despite the fact that Article 49 of the TEU stipulates that, upon the application of a candidate state, the Council "shall act unanimously" and the agreement on the conditions of admission shall be concluded between the Member States and the applicant State, and subsequently ratified "by all the contracting States in accordance with their respective constitutional requirements." Knowing the present situation, it is hardly imaginable that such consensus would be possible, either with respect to the position that Kosovo should enter the EU as an independent state, or to the position that the integral territory of Serbia, with its province of Kosovo and Metohia, should become a Member State. In both cases, the EU would fail in satisfying the 'performance' criterion of legitimacy.

5. CONCLUSION

As noted earlier, one of the plausible EU 'legitimacy deficits' in the second pillar would amount to a situation of an individual Member State systematically challenging the EU's authority.[40] So far, the major legitimacy crisis in the EU has come as a consequence of some 'big country' pursuing "its own narrowly defined national interests with little regard for the implications of its actions on its partners." [41] Three such most striking episodes were the French 'empty chair' crisis (1965–66),[42] the British budget crisis (1979–84)[43] and the German recognition of Slovenia and

[39] (translation mine) *Srbija stalno greši* (*Serbia makes mistakes all the time*), at *http://www.novosti.rs/code/navigate.php?Id=1&status=jedna&vest=122235&datum=2008–06–03*

[40] If the Lisbon Treaty enters into force, this challenge would be institutionally possible through the so-called 'withdrawal clause', whereby a Member State may withdraw from the EU. Article 49 A of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (OJ 2007 C 306) was renumbered Article 50 TEU in the consolidated version (OJ 2008 C 115) More about this secession clause in, M. Jovanović, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Eleven, Utrecht, 2007, 158–164.

[41] M. Gilbert, "European Federalism – Past Resilience, Present Problems", in S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States*, Routledge, London and New York, 2005, 38.

[42] In July 1965, President Charles de Gaulle ordered a French boycott of the Council of Ministers, withdrew France's permanent representative to the Community and instructed the Gaullists to absent themselves from the European Parliament. This 'empty chair' policy was occasioned by the ending of a transition period in the Common Market, after which a range of decisions, previously requiring unanimity, would be taken by qualified majority voting. *http://www.euro-know.org/dictionary/b.html*

[43] *See, e.g.*, S. George, "Great Britain and the European Community", *Annals of the American Academy of Political and Social Science*, Vol. 531, 1994, 44–55.

Croatia (December 1991).[44] It is highly doubtful that the treatment of Kosovo by some EU officials and bodies as it was unanimously recognized as an independent state may actually trigger some fierce reaction of a Member State that rejects Kosovo's recognition. This is so, because even "[w]ithin democratic countries, citizens tend to be least well informed about foreign affairs."[45] Hence, legitimacy of a government would rarely be taken into question because of some foreign policy choices, especially those concerning recognition of new states.[46] *Mutatis mutandis*, legitimacy of the EU would most certainly not be challenged if some EU foreign policy moves go against the expressed opposition of certain Member States towards Kosovo's independence. However, not only that the taken course of action is hardly consistent with the EU foreign policy objectives stated in Article 11, but it will in the long run most likely undermine the legitimacy of the EU foreign policy towards the region of Western Balkans, because it will ultimately put individual Member States to literally choose between the territorially integrated Serbia and the self-proclaimed 'state' of Kosovo.[47]

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[44] See, e.g., C. C. Hodge,, "Botching the Balkans: Germany`s Recognition of Slovenia and Croatia", *Ethics and International Affairs*, Vol. 12, No. 1/1998, 1–18.

[45] R. Dahl, "Is International Democracy Possible? A Critical View", in S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States*, 200.

[46] This conclusion is certainly relative, since it largely depends on the significance that one such foreign policy choice can have for the internal politics. Take, for example, the contrary evidence of the recent decision of the Montegrin government to recognize Kosovo as an independent state that provoked massive riots.

[47] A new moment came with Serbia's intention to seek the UN General Assembly's support for an advisory opinion from the International Court of Justice on the legality of Kosovo's independence, which was subsequently supported within this UN body. This initiative was from the very beginning challenged by some officials coming from the EU Member States that recognized Kosovo. Hence, Bernard Kouchner, the French foreign minister, called on Serbia to drop its plans, while the British ambassador in Belgrade called this move a "mistake" and argued that it represented a "direct challenge to the EU", which in turn would make cooperation between the EU and Serbia more difficult. One commentator rightly argues that these voices from the EU are counterproductive, because "it would not look good for EU members to demand that their own actions be exempt from legal scrutiny on the grounds of political expediency." Moreover, "[a]fter insisting that the states of the Balkans must not resort to armed force in managing their disputes, and having explicitly warned Serbia not to do so in the case of Kosovo, it is illogical, if not fundamentally wrong, now to try to close off the most peaceful and legitimate methods of conflict resolution." Finally, by pressuring Serbia to drop its plan, countries that recognized Kosovo "only serve to entrench doubts about the legitimacy of Kosovo's declaration of independence, and, in the case of EU members, undermine the European Union's wider foreign policy goals in the Balkans and beyond." J. Ker-Lindsay, *A matter of justice – Europe should not obstruct Serbia's efforts to bring the question of Kosovo's independence to the international court*, available at *http://www.guardian.co.uk/commentisfree/2008/aug/05/serbia.eu?gusrc=rss&feed=worldnews*

Ivana Krstić, LLM, PhD

Assistant Lecturer,
University of Belgrade Law Faculty

FAILURE OF INTERNATIONAL COMMUNITY TO SAFEGUARD BASIC HUMAN RIGHTS IN KOSOVO

In recent decades, number of international human rights treaties were adopted, and different universal and regional enforcement mechanisms were established. Formally, human rights had a central role after the establishment of the UN administration in Kosovo, and the parole "Standards before Status" was a policy under which Kosovo should achieve certain level of human rights standards before the international community will begun to discuss its final status. However, this policy was forgotten and not implemented before the unilateral declaration of independence of Kosovo in February 2008.

After the unilateral proclamation of independence, some suggested that the grave violations of human rights by Serbia present a legitimate reason for losing the title over Kosovo. However, this paper will identify the position of human rights in legal document adopted in Kosovo, and find that, despite its significant place; human rights are poorly implemented in practice due to many obstacles. The author will conclude that the international community and local agents failed to protect and promote some basic human rights in Kosovo. The question is whether it is legal to unconditionally recognize a state which is not willing and able to protect basic human rights of its citizens? If the answer is positive, than the reasoning that Serbia has lost its title over Kosovo because of the human rights violations must be urgently reconsidered.

Key words: *Human rights. – UNMIK. – KFOR. – Resolution 1244. – Jurisdiction. – European Court of Human Rights. – European Convention on Human Rights. – Immunity.*

1. INTRODUCTION

In recent decades, the international law evolved from a system which primarily regulated a behavior of states to the system in which the

central focus is on the rights of individuals.[1] This change happened after the adoption of Universal Declaration of Human Rights in 1948, which emphasized in its Preamble that the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family*" is "*the foundation of freedom, justice and peace in the world*." Thus, international law started to concentrate on human rights and treatment of citizens, although that area was traditionally considered to be under the realm of domestic law.[2] Number of international multilateral treaties was adopted, and universal and regional enforcement mechanisms were established.

After the end of the Cold War, international community has intervened in Bosnia, Kosovo, East Timor, Afghanistan and Iraq in order to set up "political trusteeships" where it exercises powers traditionally associated with sovereignty. In all these cases, humanitarian crisis and violation of human rights were in the focus of interventions. Formally, human rights had a central role after the establishment of the UN administration in Kosovo, and the parole 'Standards before Status' was a policy under which Kosovo should achieve certain level of human rights standards before the international community will begin to discuss its final status.[3] Finally, after the unilateral proclamation of independence, some politicians and theoreticians suggested that the grave violations of human rights can even be the reason for losing the title over certain territory, in this case Kosovo. As Koskenniemi pointed out, "*certain substantive values in contemporary international law pose real challenges to the legitimacy of statehood as a basis for international order*."[4]

However, in this paper, it will be first demonstrated that human rights have found a significant place in legal documents in Kosovo, and, second, that despite its formal proclamation human rights situation in reality is very poor. Afterwards, the main obstacles in the implementation of human rights standards will be identified, and it will be suggested that international community failed to recognize and respect some basic human rights in Kosovo. In a conclusion, if Serbia can lose its title over Kosovo because of the human rights violations, than Kosovo cannot be unconditionally recognized before the fulfillment of some basic human rights.

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[1] Antonio Cassese, Individuals, in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* 1991, 113.

[2] Peter. E. Quint, *International Human Rights: The Convergence of Comparative and International Law*, 36 Texas International Law Journal, 2001, 605.

[3] Standards for Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/PR/1078, 2003.

[4] Martti Koskenniemi, *The Future of Statehood*, 32 Harvard International Law Journal, 397, 1991.

2. THE SETTLEMENT OF INTERNATIONAL CIVIL AND MILITARY PRESENCE IN KOSOVO

Following the conflict in 1999, international civil and security presences were deployed in Kosovo, under United Nations auspices and with the agreement of the Federal Republic of Yugoslavia (FRY), pursuant to Security Council's Resolution 1244, adopted on 10 June 1999. On 9 June 1999 KFOR, the FRY and the Republic of Serbia signed a 'Military Technical Agreement' (MTA) by which they agreed on FRY withdrawal and the presence of an international security force following the Resolution 1244.[5] This Resolution decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK). It requested the Secretary General to provide the assistance and to appoint a Special Representative to the SG (SRSG) to control its implementation. UNMIK was to coordinate closely with KFOR and comprised four pillars,[6] placed under the authority of the SRSG and headed by a Deputy SRSG. The head of UNMIK is the Special Representative of the Secretary-General for Kosovo, who is the most senior international civilian official in Kosovo and presides over the work of the pillars.

Resolution 1244 also provided for the establishment of a security presence (KFOR), which is a NATO-led international force responsible for establishing and maintaining security in Kosovo. Its mandate is to establish and maintain a secure environment in Kosovo, (including public safety and order), to monitor, verify and when necessary, enforce compliance with the agreements that ended the conflict, and to provide assistance to the UNMIK. KFOR consists of "*Member States and relevant international institutions*", "*under UN auspices*", with "*substantial NATO participation*," which is under "*unified command and control*".[7] KFOR troops come from 35 NATO and non-NATO countries and its contingents are grouped into four multinational brigades.[8] These troop contributing

[5] Military Technical Agreement between the KFOR and the Governments of the FRY and the Republic of Serbia, 9 June 1999, (1999) 38 International Legal Materials 1217.

[6] Pillar I concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

[7] Resolution 1244, Annex 2, para. 4.

[8] The NATO member-States participating in KFOR are: Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and United States. The non-NATO participating countries are: Argentina, Armenia, Austria, Azerbaijan, Finland, Georgia, Ireland, Morocco, Sweden, Switzerland, Ukraine and United Arab Emirates.

states have not transferred full command over their troops, and they have only the limited powers of operational control. This power is vested with the NATO commander who has right to give orders to the commanders of the national units, who must implement orders based on their own national authority. Other powers, such as disciplinary measures or orders to individual soldiers are vested with the national states.

3. THE IMPORTANCE OF HUMAN RIGHTS STANDARDS IN DIFFERENT LEGAL DOCUMENTS ADOPTED IN KOSOVO AFTER 1999

Human rights,[9] *rule of law and minority rights were supposed to play a major role in building the standards necessary for the final status of Kosovo, and they were perceived as indispensable elements of any settlement.*[10] The importance of the respect of human rights can be seen in a number of provisions in different legal documents, beginning with the Resolution 1244. In Preamble of this Resolution it was emphasized that one of the purposes of the adoption of this instrument is "*to provide safe and free return of all refugees and displaced persons to their homes.*" Article 9 (c) further provides that international community is obliged to "*establish a safe and secure environment in which refugees and displaced persons can return home in safety*." Also, Article 11 (k) guarantees "*the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo*". Moreover, Resolution proclaims under Article 10, that international community must secure "*conditions for a peaceful and normal life for all inhabitants of Kosovo*". Importantly, Security Council decides that the main responsibility of the international civil presence is to protect and promote human rights (point 11 (j)).

UNMIK has adopted Regulation on the Authority of the Interim Administration in Kosovo in 1999, which said that domestic law is applicable only if it is in accordance with international human rights standards.[11] It required from all public officials to observe these standards and

[9] There are three laws pplicable in Kosovo: the legislation of the Socialist Federal Republic of Yugoslavia (SFRY) and Serbian municipal statutes, the body of UNMIK regulations and administrative directions as well as those laws passed by the Kosovo Assembly which were subsequently promulgated by the SRSG, and the instruments of international law imported into the domestic legal order. See UNMIK Regulation no.1999/1.

[10] See Wolfgang Benedek, Final Status of Kosovo: The Role of Human Rights and Minority Rights, Chicago Kent Law Review, vol. 80, p. 215, 2005, Michael P. Sharf, Earned Sovereignty: Judicial Underpinnings, 31 Denver Journal of International Law and Policy, 2003, 373, Paul R. Williams, Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status, 31 Denver Journal of International Law and Policy, 422, 2003.

[11] UNMIK/REG/1999/1, 25 July 1999 (amended by UNMIK/REG/2000/54, 27 September 2000), Section 2.

proclaimed the principle of non-discrimination in the implementation of public duties and official functions.[12] In particular, those standards are enshrined in the following international instruments: Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, and the International Convention on the Rights of the Child.[13] These enumerated international instruments present the core human rights documents.

Two years later, the UN promulgated the Constitutional Framework for Self Government,[14] which established a mechanism of dual-key governance in which competencies are successively transferred from an international agent to local agents. The Constitutional Framework established the Provisional Institutions of Self-government (PISG), such as the Assembly, President, Government, Courts and other bodies and institutions.[15] This arrangement constitutes a *sui generis*, loosely bounded political system in which policy is made by both the UNMIK and the PISG.[16] PISG act under the authority of UNMIK, which is responsible to organize and oversees "*the development of provisional self-governing institutions*".[17] They must exercise their authorities consistent with the Resolution 1244

[12] *Ibid.*

[13] See UNMIK Regulation No. 2000/59 Amending UNMIK Regulation 2000/24 on the Law Applicable in Kosovo, UNMIK/REG/2000/59, 27 October 2000, Section 1.3.

[14] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001. "Constitution of Kosovo" was ratified on April 9 2008 and came into effect on 15 June 2008. In Article 21 it is guaranteed that "human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order" in Kosovo. Article 22 further provides that human rights guaranteed in Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, International Covenant on Civil and Political Rights and its Protocols, Council of Europe Framework Convention for the Protection of National Minorities, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child; and Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment are directly applicable and in the case of conflict "have priority over provisions of laws and other acts of public institutions". Text is available at *www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf,* last visited on 29 November 2008.

[15] Their area of competence is set forth in Chapter 5.1 of the Constitutional Framework.

[16] See more at Bernhard Knoll, Legitimacy and UN-Administration of Territory, 8 *German Law Journal,* no. 1, 2007, 1.

[17] Resolution 1244, paras. 10 and 11 (c) and (d).

and the Constitutional Framework. Importantly, they must promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation.[18]

The Special Representative of the Secretary General has the authority to intervene as necessary in the exercise of self-government for the purpose of protecting the rights of Communities and their members. Another organ, the Ombudsperson Institution is established as an independent institution to address disputes concerning alleged human rights violations, or abuse of authority between individuals, groups and legal entities and the Interim Civil Administration or any emerging central or local institution in Kosovo.[19] It will "*give particular priority to allegations of especially severe or systematic violations and those founded on discrimination*".[20] Ombudsman accepts complaints, initiates investigations and monitors the policies and laws adopted by the authorities to ensure that they respect human rights standards and the requirements of good governance. In particular, human right standards enshrined in the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights must be respected.[21]

The Constitutional Framework extends this list of core international documents and proclaims that human right standards enshrined in the following international instruments must be taken into account: Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, European Charter for Regional or Minority Languages, and the Council of Europe's Framework Convention for the Protection of National Minorities.[22]

The Constitutional Framework also directly addresses the 'Rights of Communities and their Members', charging the PISG with the responsibility of ensuring that communities and their members should have the right to: use their own language and alphabets before courts and other public bodies; receive education and access to information in their own

[18] However, this complicated system became even more complicated after the adoption of the Kosovo Constitution which was proclaimed on June 15 2008, and after this date very few executive decisions have been issued by the Special Representative of the Secretary General.

[19] UNMIK Regulation no. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000.

[20] *Ibid*, Section 3.1.

[21] *Ibid*, Section 1.1.

[22] Constitutional Framework for Provisional Self-Government, Preamble.

language; enjoy equal opportunities with respect to employment in public bodies and access to public services at all levels; further rights relating to association, the media, religion and the preservation of religious institutions.[23] The PISG was also charged with the administration of public services and with specific responsibility for the promulgation of legislation to protect the rights of minority groups in accordance with international standards, including legislation envisaged to protect the right to freedom of expression and prohibit the use of hate speech in the mass media.[24]

Finally, the SRSG has signed an agreement with the Council of Europe reincorporating the Framework Convention of National Minorities into Kosovo's applicable law. Agreement between UNMIK and the Council of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities was signed on 23 August 2004.[25] This agreement was signed although Article 3.2 (h) of the Constitutional Framework already incorporates the Framework Convention into Kosovo's municipal legal system. While the Preamble of the agreement explicitly states that the agreement 'does not make UNMIK a Party to the Framework Convention', UNMIK affirms 'on behalf of itself and the PISG' in Article 1 "*that their respective responsibilities will be exercised in compliance with the principles contained in the Framework Convention*."[26] The same agreement was concluded between UNMIK and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 23 August 2004.[27] These agreements present a concrete expression to the above mentioned content of the Constitutional Framework's enumeration of human rights instruments, which are supposed to be applicable in the territory of Kosovo.

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[23] *Ibid*, Chapter IV. It must be said that the UNMIK Department of Civil Administration and the Office of Communities, Returns and Minority Affairs have ceased their activities after June 15, in anticipation of their amalgamation into the Mission's Office of Political Affairs.

[24] To date, the PISG has not taken such measures.

[25] The Council of Ministers authorized the Secretary General to conclude such agreement at its 890th Meeting (30 June 2004).

[26] UNMIK committed itself to submit full information to the Committee of Ministers on the legislative and other measures taken to give effect to the Framework principles. (Article 2 (2)). The reporting schedule, which remains in force for the duration of UNMIK's mandate, provides that UNMIK submit reports on a 'periodic basis' and whenever the Committee of Ministers so requests (Art. 2(3)). UNMIK shall participate, in an observer capacity, in the Council of Minister's meetings in which information on compliance with the Framework Convention are considered (Art. 2(5)).

[27] Under this agreement, the relevant CoE Committee will obtain direct access to places where persons are deprived of their liberty by UNMIK (Art. 1(2)).

4. HUMAN RIGHTS SITUATION IN KOSOVO

There are a number of reports suggesting that human rights situation in Kosovo is very poor. In its report from 2004, the Venice Commission was asked to provide report on this matter,[28] which relied on its independent research, but also on several other reports, such as the annual reports of the Ombudsperson institution in Kosovo,[29] the reports by the OSCE Mission in Kosovo, the reports by the US Department of State and the reports by Amnesty International, including also the information provided by UNMIK, KFOR, OSCE and OHCHR.[30] In this report, it was found that there is a lack of security of the non-Albanian communities in Kosovo, lack of freedom of movement for Serbian and Roma communities which results in limited access to basic public services, such as education, medical care, justice, public utilities and working places, insufficient protection of property rights, lack of investigation into abductions and serious crimes, lack of fairness and excessive length of judicial proceedings, difficult access to courts, detentions without independent review,[31] corruption that is widespread and severe, human trafficking, and lack of legal certainty, judicial review and right to an effective remedy for human rights violations.[32] In another report from 2004, Amnesty International claimed that, "*despite the mandate of the international community ... to protect and promote human rights and the incorporation of international human rights standards into applicable law, minorities in Kosovo continue to be denied access both to their basic human rights, and to any effective redress for violations and abuses of these rights*."[33] Denial of basic civil, political, social, economic and cultural rights of minorities is produced by the climate of fear, insecurity and impunity. This prolonged situation results in non-return of internally displaced persons and refugees. Amnesty International further acknowledges that "*[s]ince the deployment of UNMIK and KFOR, serious crimes and human rights abuses have continued to be perpetrated at a disturbing rate in Kosovo*." Impor-

[28] The Venice Commission was asked to provide report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, Opinion no. 280, 11 October 2004, 60th Session.

[29] It was particularly relied on its fourth annual report from 12 July 2004.

[30] *Ibid*, para. 25.

[31] Particularly by KFOR which detained suspects on the basis of military decisions not subject to any independent review outside the chain of command and outside the administrative hierarchy.

[32] *Ibid*, paras. 27–61.

[33] Amnesty International, Serbia and Montenegro (Kosovo/Kosova), "*Prisoners in our homes*": *Amnesty International's concerns for the human rights of minorities in Kosovo/Kosova*, 29 April 2003.

tantly, delays in establishing a criminal justice system which is consistent with international human rights standards and the policy of impunity for serious acts is contributing to the creation of a climate in which some people in Kosovo believe that they may commit crimes and abuse the human rights of others with impunity.[34]

Another respected NGO, Human Rights Watch, in report released after the march violence in 2004 noted that "*the international community appears to be in absolute denial about its own failures in Kosovo*."[35] Two days violence left 19 persons dead, 954 wounded, forced out the entire Serb population from a number of locations and at least 550 homes and 27 Orthodox churches and monasteries were burned, leaving around 4,1000 Serbs and other non-Albanian minorities displaced.[36] Human Rights Watch judged that the UNMIK and NATO "*failed catastrophically in their mandate to protect minority communities*" during this violence.[37]

In report that was released in February 2008, just several days before the unilateral declaration of independence, Human Rights Watch acknowledged that Kosovo is a place where human rights are frequently violated.[38] It, therefore, recommended urgent action to improve the following areas: to establish an independent judicial system, to combat abuse of women, to protect minorities from violence, to allow refugees and displaced persons to return safely to their homes, to improve the living condition of the Roma, Ashkali and Egyptian communities, to ensure that the EU-led mission is transparent and to respects human rights and promote reconciliation.

In her latest book "Hunt", Carla Del Ponte is explaining allegations concerning the possible trafficking of prisoners' organs from a mysterious yellow house near the Albanian town of Burrel, where doctors extracted the captives' internal organs. These organs were then transported out of Albania via the airport near the capital Tirana. According to her revelations, these events took place after June 12, 1999, when NATO and UNMIK were established in Kosovo, and when NATO was in Albania too.[39] These organizations share a responsibility to investigate what happened in areas under their control, and how around 400 non-Albanians disap-

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[34] *FRY (Kosovo): Amnesty International's Recommendations to UNMIK on the Judicial System*, AI Index: EUR 70/06/00, February 2000.

[35] Human Rights Watch, *Failure to Protect: Anti-Minority Violence in Kosovo*, March 2004, July 200, vol. 16, no. 6, 3.

[36] *Ibid*, 2.

[37] *Ibid.*

[38] Human Rights Watch, *A Human Rights Agenda for a New Kosovo*, February 2008, no. 1, 2.

[39] In 2008 the Parliamentary Assembly of the Council of Europe authorized Carla del Ponte to lead a formal investigation on this matter.

peared in this period.[40] Unfortunately, noting was seriously done to improve the human rights situation after 1999, and human rights were just a proclamation without real effort and sincere will to protect population in Kosovo. On 4 April 2008, the Human Rights Watch requested Hashim Thaci and Sali Berisha to open investigations in order to investigate these allegations, but both ignored the letters and publicly rejected these claims. However, a month later, Human Rights Watch confirmed that "*serious and credible allegations have emerged about horrible abuses in Kosovo and Albania after the war*."[41]

Finally, inter-ethnic violence is still on-going, having in mind incidents of stone-throwing between Kosovo Serbs and Kosovo Albanians in the ethnically mixed villages of Berivojca and Suvi Do, and some other places in Kosovo.[42] Also, "*the number of returns has declined sharply in comparison with previous years and remains disappointing*".[43] It is interesting to note that Serbs constitute only 24 per cent of the total number of returnees in 2008, compared with an average of 43 per cent since 2000,[44] meaning that no effort was undertaken to improve the situation that will enable displaced to return to their homes.

5. OBSTACLES IN IMPLEMENTATION OF HUMAN RIGHTS STANDARDS IN KOSOVO

One of the main obstacles in implementation of human rights standards in Kosovo is that the Constitutional Framework does not provide any judicial review mechanisms through which individuals and groups could enforce their constitutional rights. Also, there is a lack of accountability of members of UNMIK, the absence of an independent regulatory body competent to investigate allegations of professional misconduct, including KFOR officials. Neither the Human Rights Advisory Panel, nor the Ombudsperson Institution, is competent to investigate complaints against KFOR. Thus, the accountability of KFOR depends on the measures taken by troop-contributing countries to KFOR to ensure that allegations of human rights violations are fully investigated. Finally, to fully implement human rights standards, it is important to establish the human rights culture in one society and to constantly educate citizens of

[40] Fred Abrahams, Kosovo Must Come Clean on Missing Serbs, Balkan Insight, 19 May 2008.

[41] Fred Abrahams, K. Serbs abduction claims authentic, B 92 News, 5 May 2008.

[42] See Report of the Secretary– General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, par. 6.

[43] *Ibid*, par. 11.

[44] *Ibid.*

their basic rights. However, the Ombudsperson found in one of his reports that there is very little general knowledge, on the part of both the PISG authorities and the public, of human rights standards.[45] Furthermore, the Human Rights Oversight Committee (HROC) was established in 2002 to consider and agree on actions and policies to enhance human rights protection in Kosovo and ensuring that the actions and policies of all UNMIK Pillars and Offices are in compliance with international human rights standards and "*to make recommendations to the SRSG*." However, this body is not independent and does not meet on a regular basis.

5.1. Immunities

As it was said above, there is no effective mechanism enabling individuals whose human rights are breached in Kosovo to initiate proceedings against the respondent authorities and to obtain just compensation. In particular, KFOR, KFOR personnel, UNMIK, and UNMIK personnel is "*immune from any legal process*", and not subject to any independent review.[46] The immunity of UNMIK and KFOR is in accordance with international rule that international organizations enjoy immunity from legal process by courts of member states and other international institutions, in order to ensure performance of their tasks without undue and unnecessary interference by domestic courts. However, immunity of international organizations cannot be understood that every decision or act of international organization is legal and allowed. This is of particular importance for individual acts that violate human rights. Therefore, UNMIK Regulation provides that immunity does not benefit to the individuals, but to KFOR and UNMIK, and that the Secretary General has the right and duty to waive immunity of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice, whilst waiver of jurisdiction over KFOR personnel will be "*referred to the respective commander of the national element of such personnel for consideration*".[47] Moreover, the immunity of international organization does not exclude the establishment of independent legal review mechanisms which are an integral part of the international organizations itself, such as the UN Administrative Tribunal. It must be emphasized that some authors clearly argue that immunity from judicial process is in violation with human rights standards,[48] and it can lead to the denial of justice and denial of acceess to the court, which is one of the core human rights today.

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[45] Third Annual Report of the Office of the Ombudsperson, 2002–03, 8.

[46] UNMIK Regulation no. 2000/47 of 18 August 2000 on the Status, Privilegies and Immunities of KFOR and UNMIK and their Personnel in Kosovo, Sections 2 and 3.

[47] *Ibid*, Sections 6.1 and 6.2.

[48] Carsten Stahn, *The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis*, in Jochen A. Frowein, Rudiger Wolfrum (eds.), 5 Max Planck Yearbook of United Nations Law, 105, 159–161, 2001.

The European Court of Human Rights (ECtHR), deciding about the immunity of the European Space Agancy (ESA) from German jurisdiction in cases *Beer and Reagan v. Germany,*[49] and *Waite and Kennedy v. Germany*[50] held that the rule of immunity from jurisdiction is legitimate because the attribution of privilegies and immunities to international organizations is an essential mean of ensuring their proper functioning. However, it further said that any limitation on the right of access to court guaranted by Article 6, par. 1 of the ECHR had to be grounded in "*a legitimate aim [and have] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*."[51] However, the Court was clear that the immunity is only permissible if there is a reasonable alternative means to protect effectively rights set up in the European Convention.

5.2. The lack of enforcement mechanisms

Another problem in the realization of human rights standards, despite their formal proclamation in Kosovo, is certainly the lack of appropriate enforcement mechanisms. One of the ideas was to establish a Human Rights Court for Kosovo, by the agreement of UNMIK and NATO on the one hand, and the Council of Europe on the other. This body would deal with complaints about the alleged violations of the ECHR and its Protocols by UNMIK, the Provisional Institutions of Self-Government and NATO (including NATO member States). The procedure and case-law of this body would be based on those of the European Court, and it will be composed of mixed membership.[52] However, this idea was never realized.

In relation to external enforcement mechanism, this problem is illustrative in *Behrami* and *Saramati* case, which will be explained and analyzed below.

5.2.1. Behrami[53] and Saramati[54] case

Two Albanian boys, Gadaf and Bekir Behrami, were living in the municipality of Mitrovica in Kosovo. On 11 March 2000, they were play-

[49] ECtHR, App. no. 26083/94, 18 February 1999.

[50] ECtHR, App. no. 28934/95, 18 February 1999.

[51] See Human Rights Case Digest, Martinus, Nijhoff Publishers, vol. 10, numbers 1–3, 1999, 29–32.

[52] See more Committee of Ministers, Resolution (93) 6, Opinion on the Setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina, 1997.

[53] ECtHR, *Behrami and Behrami v. France*, App. no. 71412/01, 31 May 2007.

[54] *Saramati v. France, Germany and Norway*, App. no. 78166/01, 31 May 2007.

ing with another six boys and they came upon a number of undetonated cluster bomb units (CBUs) which had been dropped during the bombing by NATO in 1999. There was no sign of danger and believing it was safe, one of the children threw a CBU in the air which detonated and killed Gadaf Behrami and seriously injured Bekim Behrami who was disfigured and now is blind.

UNMIK police investigated the case and reported that detonated site had been marked out by KFOR the day after the accident, and that KFOR was aware of the unexploded CBUs for months, but did not consider it as a high priority. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "*unintentional homicide committed by imprudence*".[55] Agim Bekrami, the father of two boys complained to the Kosovo Claims Office (KCO) that France had not respected Resolution 1244, and this complaint was forwarded to the French Troop Contributing Nation Claims Office (TCNCO) which rejected the complaint. It reasoned that the Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over, and that such operations had been the responsibility of the UN since 5 July 1999.

Relying on Article 2 (the right to life) of the ECHR, Agim Behrami and Bekim Behrami complained before the ECtHR that the explosion took place because French KFOR troops failed to mark or defuse the undetonated bombs, despite being aware of their presence.

In another case, Saramati[56] was arrested by UNMIK police on 24 April 2001 on suspicion of attempted murder and illegal possession of a weapon. On the next day, an investigating judge ordered his pre-trial detention and investigation of the charges. On 23 May 2001, a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001, the Supreme Court allowed Saramati's appeal and he was released. However, a month after his release, UNMIK police informed him by telephone that he had to report to the police station in Prizren in order to collect his money and belongings. This station was in the sector assigned to MNB Southeast, leaded by Germany.[57] When he came to the station, UNMIK police officers arrested him by order of the Commander of KFOR, who was a Norwegian officer

[55] *Ibid*, par. 6.

[56] Saramati was born in 1950 and also of Albanian origin living in Kosovo.

[57] KFOR contingents were grouped into four multinational brigades (MNBs) each of which was responsible for a specific sector of operations. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

at the time.[58] His imprisonment was extended by the Commander for another 30 days.

When this time expired, Saramati's representatives challenged his detention, but KFOR Legal Adviser advised that KFOR had the authority to detain under the Resolution 1244 as it was necessary "*to maintain a safe and secure environment*" and to protect KFOR troops.[59] This position was based on the information that Saramati was involved with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia (FYROM) and that he represented a threat to the security of KFOR and to those residing in Kosovo. On 11 August 2001, his detention was again extended by order of Commander of KFOR, whilst a month later his case was transferred to the District Court for trial. During trial hearings from 17 September 2001 to 23 January 2002, Saramati's representatives requested his release based on the decision of the Supreme Court in June 2001, but District court repeated every time that his detention was entirely the responsibility of KFOR.

Finally, on 23 January 2002, Saramati was convicted of attempted murder and he was transferred by KFOR to the UNMIK detention facilities in Pristina. However, on 9 October 2002 the Supreme Court of Kosovo quashed his convictions and ordered his release from detention. Saramati complained that his detention at the hands of KFOR between July 2001 and January 2002 breached Article 5 (the right to liberty and security) and Article 13 (the right to an effective remedy) of the ECHR.

The applicants argued that they fell under the jurisdiction of the respondent States, within the meaning of Article 1 of the ECHR, which says that "*[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms*" set up in this Convention.' Also, they emphasized that the acts and omissions in question had to be attributed to France and Norway. In the first case, the applicants argued that the KFOR's failure to act had to be attributed to France in its capacity as the State controlling the Multinational Brigade Northeast, in charge of the Mitrovica sector.[60] In the second case, the final decision regarding Saramati's detention lay with the Commander of KFOR, who was not dependent on or accountable to NATO for that decision. In other words,

[58] On 3rd October 2001, a French General was appointed to the position of COM-KFOR.

[59] *Ibid*, par. 11.

[60] KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

his acts had to be attributed directly to Norway. The applicants further claimed that nothing in Security Council Resolution 1244 required them to act inconsistently with the ECHR, and that Contracting Parties to this Convention are entitled to transfer their sovereign powers to an international organization which must protect fundamental rights in a manner equivalent to the protection given by this instrument.[61] This position was particularly underlined by Louis Arbour at the Opening of the Judicial Year 2008 of the European Court of Human Rights, when she suggested that "*the UN should ensure that its own operations and processes subscribe to the same standards of rights protection which are applicable to individual States. How to ensure that this is so, and the setting up of appropriate remedial measures in cases of default, would benefit immensely from the inputs of legal scholars and policy makers, if not of the jurisprudential insight of the courts*."[62] However, this protection was not offered by NATO or KFOR in Kosovo.

On the other hand, the respondent States, France and Norway, denied that the applicants came within their jurisdiction and argued that the cases were inadmissible *ratione loci* and *ratione personae*.[63] They emphasized that the applicants were not present on their respective national territories at the relevant time, and did not reside in the 'legal space' of the ECHR. Moreover, they pointed out that it was the UN which had effective control of Kosovo and that KFOR, and not the individual commanders of KFOR, exercised control over Saramati. They took the position that described acts and omissions could not be attributed to them, and argued that KFOR is an international force with a single chain of command ran from the Security Council.[64] Thus, national contingents acted in accordance with the operation plan approved by NATO and not in accordance with national instructions.

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[61] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, par. 155. See Banner and Thomson, Human Rights Review of State Acts Performed in Compliance with EC Law – *Bosphorus Airways v Ireland*, (2005) 6 European Human Rights Law Review*,* 649; Hoffmeister, '*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland*. App. No. 45036/98', (2006) 100 American Journal of International Law 442; Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', (2006) 6 *Human Rights Law Review,* 87; and Parga, '*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe', (2006) 31 European Law Review, 251.

[62] Louis Arbour, United Nations Commissioner for Human Rights, Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008–11–02.

[63] *Behrami and Saramati* case, The submission of the respondent States, paras. 82–95.

[64] Third party observations were submitted to the ECtHR by the Governments of Denmark, Estonia, Germany, Greece, Poland, Portugal and the United Kingdom as well as by the UN.

5.2.2. The decision of the European Court

In order to decide the case, the Court recalled that Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling with their 'jurisdiction'.[65] Therefore, the question was whether the applicants came within the extra-territorial jurisdiction of the respondent States.[66] Resolution 1244 provides that all UN Member States are committed "*to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia*" and they regard Kosovo as being part of the Federal Republic of Yugoslavia (now Serbia) which has ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) on 3rd March 2004, without any territorial reservation in respect to Kosovo. However, Serbia cannot exercise 'jurisdiction' within the meaning of Article 1 ECHR over Kosovo and thus, cannot be responsible for human rights violations committed on a territory that is outside of its effective control.[67] Therefore, the question is whether the Respondent States exercise extra-territorial jurisdiction over Kosovo and whether they can be accountable for the violations of Articles 2, 5 and 13 of the ECHR?

Interestingly enough, the Court held that the question here "*is less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo*."[68] To answer this question, the Court must consider whether or not the acts and omissions could be attributed, in principle, to the UN. In deciding the case, the ECtHR reviewed the relevant legal instruments and subsequent arrangements between KFOR and UNMIK to determine which of the two entities had a mandate to detain individuals and to carry out demining activities in Kosovo. It held that the arrest and detention of Saramati came within the security mandate of KFOR, while the supervision of demining activities fell within the mandate of UNMIK.

It reasoned that in carrying out their mandate, both KFOR and UNMIK were exercising powers delegated to them by the Security Council

[65] *Behrami and Saramati* case, par. 69.

[66] In *Loizidou*, the Court held that 'jurisdiction' "*is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory*." The Court further concluded that Contracting Party can be responsible for military actions when "*it exercises effective control of an area outside its national territory*." See *Loizidou v. Turkey*, App. no. 15318/89, 18 December 1996, par. 52. See also *Bankovic and Others v. Belgium and 16 other Contracting States*, App. no. 52207/99, 12 December 2001, par. 71.

[67] Serbia can be accountable only for violations committed in Kosovo or in respect of Kosovars by its own state organs.

[68] *Ibid*, par. 71.

within the framework of Chapter VII of the Charter.[69] As regards UNMIK, the ECtHR noted that the Mission was a subsidiary organ of the UN and therefore its conduct was, in principle, attributable to the UN. As regards KFOR, the ECtHR took the position that the Security Council, by authorizing the Member States of the UN and relevant international organizations to establish an international security presence in Kosovo, delegated to the States and international organizations concerned "*the power to establish an international security presence as well as its operational command*".[70] KFOR was therefore operating 'on the basis of UN delegated, and not direct, command', which must remain sufficiently limited to be compatible with the Charter and to permit the attribution of KFOR's conduct to the UN. The ECtHR reasoned that the fact that contributing States retained some authority over their forces, for instance in disciplinary matters, was compatible with the effectiveness of NATO's operational command.

Having established that the acts and omissions of KFOR and UNMIK were attributable to the UN, the ECtHR finally considered whether it was competent *ratione personae* to review any conduct found to be imputable to the UN. Referring to the relevant case law of the International Court of Justice (ICJ) on the primacy of the Charter as well as to the objectives of the UN, the Court held:

"*Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfillment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations*."[71]

In the ECtHR's view, this reasoning applied with equal force to voluntary acts performed by the respondent States, such as the contribution of troops to peacekeeping missions, because of their critical role in enabling the Security Council to carry out its mandate under Chapter VII of the Charter. The ECtHR also rejected the applicants' submissions that KFOR failed to protect fundamental rights in a manner at least equivalent

[69] *Ibid*, par. 128.

[70] *Ibid*, par. 129. According to the ECtHR, the Security Council did retain such ultimate authority and Resolution 1244 imposes clear limits on the exercise of delegated powers and requires the leadership of the military presence to report to the Security Council.

[71] *Ibid*, par. 149.

to the ECHR on the basis that the circumstances of the present case differed essentially from those in the *Bosphorus* case.[72] Accordingly, the ECtHR concluded, by a majority, that the applicants' complaints were incompatible *ratione personae* with the provisions of the ECHR, and that actions of UNMIK and KFOR "*were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective."*[73]

5.2.3. Commentary on this decision

To decide the Case, ECtHR examined whether KFOR and UNMIK operated in the framework of Chapter VII of the Charter, and whether their acts and omissions could be attributed to the UN in accordance with the rules of international law governing the responsibility of international organizations. However, before the enquiry into the attributability of the alleged wrongful conduct to particular States, the first matter that was logically to address is the existence of a jurisdictional link between the applicants and the respondent States is a preliminary matter that must be addressed.[74] Then, the Court should have found whether national personnel operating as part of KFOR and UNMIK carried out their functions in a national or an international role. This dual national and international function implies that every act or omission of national personnel taking part in an international operation has to be examined to determine in what capacity it was performed. Depending on the finding, it will be decided whether there is a jurisdictional link under Article 1 of the ECHR.[75]

Moreover, if there is a responsibility for the internationally wrongful conduct of KFOR and UNMIK, it does not exclude the possibility that the same conduct may also be attributable to the respondent States and may engage their responsibility.[76] This is so, because *n*ational contingents

[72] *Ibid*, par. 151. The Court held that the seizure of the applicant's leased aircraft in this case had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers. See *Bosphorus Hava Yollarý Turizm ve Ticaret Anonim Þirketi (Bosphorus Airways) v. Ireland*, App. no. 45036/98, ECHR 2005-VI, par. 137. In this case, the Court reasoned that "*the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities*."

[73] *Ibid*.

[74] *Ibid*, par. 121.

[75] Under the jurisprudence of the ECtHR, the initiation of criminal proceedings against a member of a national contingent by his service authorities within the territory of the host State must be considered as an exercise of extra-territorial jurisdiction that has to conform to the relevant provisions of the ECHR, in particular Article 6 concerning the right to a fair trial. See *Issa and Others v Turkey*, App. no. 31821/96, 16 November 2004, para. 71, *Findlay v. United Kingdom* 1997–I 263; (1997) 24 EHRR 221.

[76] It must be taken in mind that the mandate of UN and KFOR is unique and overwhelming in its magnitude. UNMIK came to occupy a unique position in the Kosovo

retain their character as organs of their respective sending State. The international organizations use personnel made available to them by their Member States or third States in order to perform military operations. In the case [of] UN peacekeeping operations, States contributing military forces usually conclude agreements with the UN in which they agree to place their national contingents under the command of the UN, vested in the Secretary-General, and thereby transfer to the Secretary-General full authority over the deployment, organization, conduct and direction of their personnel.[77] But, it does not completely severe the legal and institutional relationship between national contingents and their sending States. Therefore, it is important to mention that OSCE mission in Kosovo stated in its report from 2001 that human rights obligations of Governments participating KFOR apply to the conduct of their troops abroad.[78] It must be taken in mind that the majority of NATO states are members of the Council of Europe and Contracting Parties to the ECHR. Other states are bound by some universal international instruments and subject to review of some UN treaty bodies, which have, more or less, the same practice as the ECtHR.

Maybe it can be doubtful that no jurisdictional link existed between the applicants in *Behrami* and France because UNMIK not only formed part of the institutional structure of the UN, but also exercised powers delegated to it by the Security Council under Chapter VII of the Charter. On the other side, the presence of KFOR in the territory of the FRY rests on a dual legal basis: the consent of the local authorities and Security Council Resolution 1244.[79] It is unclear whether KFOR is merely a multinational instrument of the contributing States, an organ of NATO, or an entity with a separate legal existence. According to the ECtHR, the Security Council retained "*ultimate authority and control over the security mission and it delegated to NATO ... the power to establish, as well as the operational command of, the international presence, KFOR*."[80] But, the exercise of military command and control over national armed forces is a

legal system: it became part of the domestic constitutional order, and at the same time remains superior to it. See Bernhard Knoll, Beyond the *Mission Civilisatrice*: The Properties of a Normative Order within an Internationalized Territory, Leiden Journal of International Law, 19 (2006), p. 283.

[77] Article V(7), Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations: Report of the Secretary-General, 23 May 1991, A/46/185.

[78] OSCE, Kosovo Review of the Criminal Justice System, October 2001, 40. See also Inter-American Commission on Human Rights, *Coard et al. v. the United States,* Case 10.675, Report No. 51/96, par. 37.

[79] The MTA also specifically authorized KFOR to take such actions as are required, including the use of necessary force, to ensure its own protection. Both, the MTA and Resolution 1244, confer a right on KFOR to issue detention orders.

[80] *Ibid*. at para. 135.

prerogative of the State to which those forces belong. Moreover, the Security Council has not requested the Secretary-General to appoint a Special Representative 'to *control* the implementation of the international civil presence', but to instruct his Special Representative merely 'to *coordinate closely* with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner'. Thus, the KFOR is not a subsidiary organ of the UN and its acts are not attributable to the UN. Its acts or omissions can be attributed either to the NATO as international organization, or to the national country.[81]

As a consequence, in the first case, it seems that jurisdiction of the ECtHR could not be established, having in mind that no foreign contingents serving in Kosovo exercises overall effective control over acts exercised in Kosovo, and the conclusion in *Behrami* in terms of 'inadmissibility' seems to be correct. On the contrary, in the second case the jurisdiction could be established because both, France and Norway ratified the ECHR. The *Saramati* case is, thus, pretty different because the applicant was actually in the hands of State agents serving outside the territory of its own country. Every arrested individual has a right under Article 5, par. 3 of the ECHR to be brought promptly before a judge in order to avoid arbitrary conduct, *incommunicado* detention and ill-treatment. Therefore, the respondent State should have been considered as exercising "personal jurisdiction" over the arrested.[82]

This decision is a precedent to several other complaints relating to the conduct of KFOR inadmissible on the ground that it is incompetent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN.[83] It's a pity that the Court rejected the idea that Kosovars should have a possibility to bring a claim before the ECtHR. But it mustn't be forgotten that in Rambouillet, it was agreed that *"applicable rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols shall directly apply in Kosovo*", and that *"these shall have priority over all*

[81] See Resolution 1244, Annex 2, para. 4 and paras. 13–14.

[82] See for the same conclusion Federico Sporetto, The International Security Presence in Kosovo and the Protection of Human Rights, working paper no. 48, 24 May 2008, 11. Text available at *http://www.du.edu/gsis/hrhw/working/2008/48-sperotto–2008.pdf,* last visited on 30 November 2008.

[83] See *Ilaz Kasumaj v. Greece*, Decision of 5 July 2007, Application No. 6974/05; *Slavisa Gajic v. Germany*, Decision of 28 August 2007, Application No. 31446/02; *Duan Beri and Others v. Bosnia and Herzegovina*, Decision of 16 October 2007, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

other law", that was never enforced in reality.[84] Venice Commission also particularly emphasized the need for an urgent set up of a system of independent review of UNMIK and KFOR acts for conformity with international human rights standards.[85] It concluded that "*it is certainly unwarranted to leave the population of a territory in Europe indefinitely without access to the Strasbourg Court*."[86] Besides, the Ombudsperson stressed out that the inhabitants of Kosovo remain effectively deprived of their access to international human rights mechanisms that have recently been accorded to the inhabitants of Serbia.[87] Unfortunately, although the Constitution of Kosovo came into effect on 15 June 2008 providing in Article 22 that the ECHR is directly applicable in Kosovo and, "*in the case of conflict, have priority over provisions of laws and other acts of public institution*", this provision is just a proclamation without practical value.

6. CONCLUDING REMARKS

It must be concluded that the international community haven't done enough for the respect and improvement of human rights situation in Kosovo. As it was explained above, the ECtHR rejected its jurisdiction for alleged acts or omissions of UNMIK and KFOR although it was not clearly established whether those acts were attributable to them, or to the respective countries. Also, even if those acts were attributable to UNMIK and KFOR it can be argued that they are subject to jurisdiction of the ECtHR because they perform tasks traditionally associated with states and not to the ordinary UN mandates. It is incompatible with the principles of democracy, the rule of law and respect for human rights that UNMIK and KFOR could act as State authorities and be exempted from any independent legal review.

Position that acts or omissions of UNMIK are not under the jurisdiction of the ECHR because they can lead to the respect of all treaties concluded on specific territory and would be contrary to the need to establish UN mandate which is not bound by limitations created by individual states, is not in accordance with the idea that core human rights should be respected by those organs performing governmental functions. However, in Kosovo, UNMIK declared that one of the three different laws that is applicable are the instruments of international law imported

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[84] The Rambouillet Accord, Interim Agreement for Peace and Self-Government in Kosovo, Article VI, February 23, 1999. Text available at *http://www.commondreams.org/kosovo/rambouillet.htm*, last visited on 30 November 2008.

[85] *Ibid*, para. 96.

[86] Venice Comission, par. 17.

[87] Ombudsperson Institution, *Fourth Annual Report (2003–2004)* (2004), p. 30.

into the domestic legal order. But, in practice, it did not respect what was proclaimed. Another position that Resolution 1244 was adopted by Security Council which acted under Chapter VII and Article 103 of the UN Charter which provides that the obligations set up in this instrument "*shall prevail*" over "*obligations under any other international agreement*" is not viable. One of the main purposes of the UN Member States enshrined in Article 1, par. 3 is to promote and encourage respect "*for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*." The centrality of human rights was even highlighted by the UN Secretary-General who emphasized that "*UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority"* when the UN administration was established.[88] However, no real and sincere effort was invested to respect core international human rights instruments, which were so many times proclaimed but remained only dead letters. Thus, it is urgent that the UN system itself develop mechanisms which ensure respect for the limitations on UN action. It is obvious that international community has done almost nothing to improve the human rights situation in Kosovo and to implement "Standards for Kosovo" before the recognition of Kosovo as a state.

The remaining question here is whether a newly established State can be recognized as such? The alleged massive violation of human rights in Kosovo led to the NATO intervention and the adoption of Resolution 1244. After the unilateral recognition of Kosovo, many commentators and politicians explained the uniqueness of Kosovo and justification of its independence because of the massive violation experience.[89] However, so far in modern practice there is no "*suggestion that as regards statehood itself, there exist any criterion requiring for fundamental human rights*."[90] Sadly, but truly, there is no government which does not violate human rights of individuals who are under its jurisdiction, but there is no case where such violations have called statehood in question.[91]

However, if Serbia can lose its title over Kosovo because of the massive human rights violations, is it than legal to recognize a unilateral

[88] See Federal Republic of Yugoslavia (Kosovo), *Setting the Standard and KFOR's Response to the Violence in Mitrovica*, Amnesty International, AI Index: EUR70/013/2000, 13 March 2000.

[89] For example, Daniel Fried, U.S. Assistant Secretary of State for European and Eurasian Affairs, A "European Future" for the Balkans, U.S. Department of State, 6 February 2007.

[90] J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, 2006,149.

[91] *Ibid*. The Craford points out that human rights violations can cause humanitarian interventions, but they "*must be carried out for the humanitarian purpose, cannot entail any acquisition of territory and must be brought to an end as soon as possible once the humanitarian situation has been restored*." *Ibid*, 150.

declaration of Kosovo independence, a State that is not willing and capable of respecting and promoting core human rights standards for non-Albanian population? Rule of law, democracy and human rights are preconditions for membership in the Council of Europe and the European Union, and these principles also constituted important criteria for the recognition of the successor states of the Former Yugoslavia and the Former Soviet Union by the EU. Is it than illegal to recognize Kosovo before certain human rights standards are achieved? If the answer is positive, than every single state[92] that has recognized Kosovo as a state in this stage, acts contrary to some basic principles of international law enshrined in the *jus cogens* character of some human rights norms, such as the right to life, freedom from torture, the access to courts, etc. Interestingly enough, none of them used conditional recognition of Kosovo in support of human rights, although all of them were aware that international community and local government failed to protect basic human rights. It brings us to the conclusion that human rights serve only as a veil to some other interests, and that there is no sincere concern about the destiny of people who live in the heart of Europe without adequate human rights protection. In that case, we must be honest and admit that international community has not achieved that level of humanity and that the violation of some basic human rights is not a precondition for the recognition of newly established states. Therefore, the reasoning that Serbia has lost its title over Kosovo because of the massive human rights violations must be urgently reconsidered.

[92] As at 31 October, Kosovo had been recognized as an independent state by 52 countries.

Miloš Jovanović, LLM

Researcher,
Institute of International Politics and Economics, Belgrade

RECOGNITION OF KOSOVO INDEPENDENCE AS A VIOLATION OF INTERNATIONAL LAW

Has International Law been violated by the states which recognized the independence of Kosovo? The raised question has resulted from the recent secession of Kosovo and Metohia. It is a starting point of the theoretical analysis of the problem of creation and recognition of states in international law. Contrary to the classical international law doctrine according to which the act of recognition is purely a political act and not subject to legal appreciation, the author demonstrates that an act of recognition of a state by another state can be considered in legal terms and possibly declared unlawful. This seems particularly true in the case of independence of Kosovo and Metohia since the UNSC Resolution 1244 protects the sovereignty and territorial integrity of the Republic of Serbia.

Key words: *Recognition of States.– Creation of States.– International Law Effectiveness.– Legality.– UN SC Resolution 1244.*

INTRODUCTION

On October 8th 2008, the General Assembly of the United Nations has adopted the Resolution requesting the International Court of Justice (ICJ) advisory opinion answering the question "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law". This request has given the principal judicial body of the United Nations a chance to express its opinion on several very important problems of international law, such as the question of territorial integrity, right of peoples to self-determination, secession and remedial secession, role and importance of the principle of

effectiveness in international law, and finally the wide ranging problem of creation of states.[1] One important question will however be out of the scope of the judicial review – the question of recognition of states.

The problem of recognition of states represents, at least declaratively, the main reason for the Republic of Serbia to start the advisory opinion proceedings and do not opt for the lodging of complaints before the ICJ against the states that have recognized the independence of the southern Serbian province. Different opinions given about this subject reflect the complexity of the basic question which could paradoxically be formulated in a very simple manner: have the states that have recognized the independence of Kosovo and Metohia violated international law?

The most common answer that could be heard in the Serbian public opinion is in accordance with the traditional legal doctrine considering recognition as unilateral and discretionary act based on the political analysis of advisability regarding the recognition of a new state.[2] In other words, given its nature, an act of recognition is not subject to the assessment of its legality. Professor of international law Vojin Dimitrijević, answering to the question how can we (Republic of Serbia) start contentious proceedings before ICJ against states that have recognized the independence of Kosovo, says that there is a problem, because the recognition is a "political decision" and that "any state can recognize anybody".[3] This opinion, although adherent to the traditional doctrine, is still problematic, especially concerning the case of Kosovo and Metohia. Namely, there is a huge discrepancy between the perception of law, i.e. the violation of law, and the opinion that by recognizing the independence of Kosovo and Metohia law has actually not been violated.

Before we return to the important question regarding the accuracy of the perception that in case of Kosovo and Metohia international law

[1] This problem has already been discussed by the Supreme Court of Canada in 1998 when delivering the opinion on almost the identical, however hypothetical question "2. Does International law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally". There is no doubt that problems of territorial integrity, effectiveness, as well as the question of remedial secession, its positive nature and its applicability to the case of Kosovo will form the axis of the discussion of the topic before ICJ.

[2] For the formulation of the traditional understanding see: Marc Perrin de Brichambaut, Jean-François Dobelle, Marie-Reine d'Haussy, *Leçons de droit international public*, Presses de Sciences Po / Dalloz, 2002, p. 52.

[3] Tamara Spaić, "Misija EU na Kosovu je u interesu Srbije", Intervju sa Vojinom Dimitrijevićem, *Blic*, 29.12.2007. See also: Jelena Cerovina, Marko Albunović, "Kosovo pred sudom", *Politika*, 28.02.2008: "When it comes to complaints against states that have recognized the independence of Kosovo, lawyers do not agree on chances for them to succeed. Namely, some think that, given that in law recognition of new states is a discretionary right of each state, such a decision cannot be attacked, so Serbian complaints would not be successful before ICJ".

has actually been violated, it is important to additionally clarify why we consider that it is insufficient, if not wrong, to invoke the political and discretionary nature of the act of recognition to demonstrate that that act is not subject to legal assessment, i.e. that it is legally neutral. Namely, most acts or decisions of one state are political, discretionary and unilateral acts. That is the consequence of the very nature of the international system, whose main characteristic is anarchy – defined by the absence of central governing authority – and whose main subjects are sovereign states.

When United States decided to military attack Iraq in 2003, it was also an eminently political and basically unilateral act of that state (i.e. USA). It is also undisputed that decisions on use of force are subject to legal assessment and could be considered either legal or illegal. The reason is simple – use of force is strictly regulated by the law of international peace and security arising from the Charter of the United Nations. In international order use of force is prohibited. Prohibition has only two exceptions: military action based on the decision of the Security Council for the purpose of the protection of international peace (article 42 of the UN Charter) and self-defense, prescribed by the article 51 of the UN Charter. The conclusion is that if the act of recognition cannot be subject to legal assessment, the reason does not lie in the political and discretionary nature of that act, but in the underdevelopment of the law, i.e. in lack of legal regulation regarding the act of recognition.[4]

We should make here a final clarification in order to define our problem. The lack of legal regulation is not so much related to the recognition of states, as it is to the subject of the recognition – the state, i.e. its creation. The Answer to the question why recognition of states is an act outside the scope of law, is not to be found in the act of recognition or in its nature, but in the understanding of the creation of states. Understanding of recognition of states as a legally neutral category is derived from the traditional understanding of creation of states in international law.

Professor Christopher J. Borgen, explaining the European Union's analysis of the UN SC Resolutions 1244, says: "The EU memorandum on Resolution 1244 contends that '[g]enerally, once an entity has emerged as a state in the sense of international law, a political decision can be taken to recognise [sic] it.' This reflects the general understanding that recognition itself is not a formal requirement of statehood. Rather, recognition

[4] The conclusion is a tautology. The concept of discretionary is precisely defined as the lack of legal regulation. The purpose of this artificial *breaking up* of the problem is to clarify the question and overcome the reflex *prima facie* refusal of the idea of the legal assessment of recognition. For a definition of the concept of *discretionary* see: Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruylant/AUF, 2001, p. 344.

merely accepts a factual occurrence. Thus recognition is declaratory as opposed to constitutive".[5] This is an excellent description of the traditional construction and classical understanding of both creation of states and role of recognition: the existence of a state is a question of facts, not a question of law; the state objectively exists or does not exist; the act of recognition only verifies the existence of state, and therefore it is a declaratory act. This understanding of creation of state makes the act of recognition doubly neutral. First, recognition as such does not participate in the process of creation of state and it is solely of declaratory nature. Second, as the creation of state is a question of facts, not a question of law, i.e. legally neutral, the recognition cannot have different characteristics than its subject and could also be only legally neutral.

According to this traditional understanding, not only that it could not be answered to the question whether international law has been violated by the recognition of independence of Kosovo, but the question itself could not be possible to formulate.

However, is the traditional understanding of creation of states correct? In other words, to answer the question whether the states recognizing Kosovo and Metohia have violated international law, we should not only answer the question whether the secession of Kosovo and Metohia is legal, but on the first place whether the act of recognition of independence could be legal. Both questions are conditioned by the solution of the first and fundamental problem: is the creation of states a matter of law at all? If creation of states is only a matter of facts, any legal analysis would be pointless. If creation of states is subject to legal regulation, i.e. if there are requirements of legality for the creation of states, those requirements will be automatically transferred to the act of recognition. Accordingly, first part of this paper will be devoted to the critical analysis of the opinion that creation, and consequently, recognition of states are legally neutral questions (I). The second part of the paper will be devoted to the assessment of legality of secession of Kosovo and Metohia. This assessment is a precondition for answer to be given – whether the states that have recognized the independence of Kosovo and Metohia have violated international law?[6]

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[5] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", *ASIL Insight*, Vol. 12, Issue 2. Internet, *http://www.asil.org/insights/2008/02/insights 080229.html.*

[6] The defined problem is very much coinciding with the problem that will be dealt by ICJ in order to answer the question of (il)legality of secession of the southern Serbian province.

1. CREATION AND RECOGNITION OF STATES AS LEGALLY NEUTRAL CATEGORIES: A CRITICAL REASSESMENT

In its first opinion from 29th November 1991, the Arbitration Commission of the Peace Conference on the former Yugoslavia, also known as the Badinter Commission, has expressed that the existence or disappearance of a state is a question of fact, as well as that the effects of recognition of other states are purely declaratory.[7] This is only one of many statements where a direct link between understanding of the creation of states and understanding of the act of recognition as legally neutral categories is to be found. However, we will see that conditions to attain statehood cannot be exclusively reduced to the existence of certain factual situation (1.1.) and that accordingly an act of recognition can be legally assessed (1.2.).

1.1. Existence of requirements for statehood

For the classical doctrine of international law, creation of states is exclusively question of facts, i.e. effectiveness. It is somewhat the minimal rule prescribed by international law: a state objectively exists from the moment when it has three classical constitutive elements of statehood: territory, population and government (1.1.1.). Not only that this is inherently problematic, but it also negates the requirement of legality for the creation of states (1.1.2.).

1.1.1. States are created in legal vacuum or the theory of effectiveness

We shall see that the reality often refutes the theory of effectiveness (1.1.1.1.) as it refutes the purely declaratory nature of the act of recognition (1.1.1.2.).

1.1.1.1. The theory of constitutive elements of statehood has not always been confirmed in reality

As a typical example of the formulation in international law of the theory on three constitutive elements of statehood authors usually cite the article one of the Convention on the Rights and Duties of States from Montevideo (1933), prescribing that "The state as a person of international law should also possess the following qualifications: a) a permanent population, b) a defined territory, c) government, and d) capacity to enter into relations with other states (MJ – this condition is usually understood as independence)".[8] Professor Jean Combacau is also on the same

[7] "Conférence pour la paix en Yougoslavie: Commission d'arbitrage: Avis n°1", 29/11/1991 in Pierre-Marie Dupuy, *Grands textes de droit international public*, Dalloz, 1996, p. 123.

[8] See: James Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, second edition, 2006, p. 45; Antonello Tancredi, "A normative 'due pro-

standing, claiming that the creation of states is a *legal fact*, i.e. that it is a result of actions and occurrences with legal significance assigned to them by the previously existing rule. That rule is: "*La qualité d'Etat au sens du droit international est acquise à tout pays politiquement organisé ayant accédé à l'indépendance*".[9] In other words "(...) *l'Etat existe en droit dès lors que le pays existe en fait*".[10] According to this understanding, the creation of states is outside of the legal sphere. The only rule that international law prescribes regarding this matter is that it is not subject to law but exclusively to the factual situation. Consequently, it is futile, moreover impossible, to analyze the creation of states through the lens of law, because the law does not have any role in this matter. This understanding arises from the primitive, decentralised character of the international law. Without judicial body with universal and binding jurisdiction, without enforcement of judicial decisions, without sanctions or system of nullity, international law cannot always cope with the reality, i.e. effectiveness. Professor Joe Verhoeven has expressed the abovementioned situation in best way by suggestively stating that *on ne voit pas très bien ce qu'un système (M.J. – système du droit international), impuissant à contester des effectivités, gagne à les refuser*.[11] In that context, it is clear that the principle of effectiveness plays a significant role in the international arena, even when it is a consequence of violation of international law, as said by Charles de Visscher: "*Il en résulte que le refus de reconnaître une situation issue d'agissements illicites ne conserve pas indéfiniment sa signification juridique. Une tension trop prolongée entre le fait et le droit doit fatalement se dénouer, au cours de temps, au bénéfice de l'effectivité*".[12] Before we return to the tension between facts and law, we should point out that practice doesn't always confirm the objective existence of the state, sometimes not even the *fatal triumph of effectiveness*.

There are a lot of examples where a certain entity had constitutive elements of statehood yet it never became a state. Effectiveness does not

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cess' in the creation of States through secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 171; John Dugard, David Raič, "The role of recognition in the law and practice of secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 96.

[9] Jean Combacau, Serge Sur, *Droit international public*, Paris, Montchrestien, 5 édition, 2001, p. 279. Professor Combacau refuses terminological choice of "constitutive elements" and calls them, more appropriately, "elements of creation". Besides this terminological clarification, three classical elements are explicitly present in the definition given by Combacau, stating that "(...) *un Etat apparaît lorsqu'un pays* [territory and population] *politiquement organisé* [government] *est devenu indépendant*", p. 272.

[10] *Ibidem*.

[11] Joe Verhoeven, "La reconnaissance internationale: déclin ou renouveau ?", *AFDI*, vol. XXXIX, 1993, p. 38.

[12] Charles de Visscher, "Les effectivités du droit international public"; Paris, Pedone, 1967, p. 25.

automatically get its legal transcription. Republic of Srpska Krajina, or Republic of Srpska, have undoubtedly possessed defined territory, population and government, yet they have never been deemed states, nor they became states. Today the same could be said for Transdnistria. In second half of seventies of the twentieth century Southern Rhodesia, although effectively existing, has not became a state. The Turkish Republic of Northern Cyprus has declared independence in 1983 yet even today the *tension between facts and law* has not been solved to the benefit of effectiveness. All of these examples are contrary to the theory of effectiveness. That the consent between facts and norms does not always have to exist is best shown on the opposite example of Bosnia and Herzegovina, that could not be considered as a state when it legally became one.[13] This last example opens the question of the nature of recognition and questions its declaratory character.

1.1.1.2. The opinion that recognition or absence of the same does not influence the objective existence of state does not have a standing in reality either

The third article of the aforementioned Montevideo Convention states that *the political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts*.

This article advocates the objective existence of state, i.e. the non-existing role of recognition in the process of state creation. This statement also has not a standing in practice, implying the inherent deficiencies of the theory of effectiveness. For most of the doctrine the act of recognition is purely of declaratory nature and it is reduced to registering the objective existence of a state. Contrary to the declaratory nature of recognition, part of the doctrine has given a constitutive character to recognition and considers it a precondition for creation of states.[14] Theory on declaratory effect of recognition has a logic of its own. Recognition, as a discretionary political act of a state, cannot be used as a benchmark and criterion of existence of a new state. In other words, the existence of a state cannot depend upon subjective actions of other states. Intended to show arbitrariness and logical impossibility of the constitutive theory, various authors ask the following question: "What if a newly created state is recog-

[13] On April of 1992 when it was recognized as sovereign state Bosnia and Herzegovina did not fulfill any of "requirements for the creation of state".

[14] For a short introduction in the debate on the nature of recognition see: James Crawford, *The Creation of States in International Law*, op. cit, pp. 4–36.

nized by some states, and not by others?".[15] We think that the question needs to be formulated in an other way: what if the newly created "state" is not recognized by none other state? We don't see what would be the effect of the objective existence of a state not recognized by any other state. Would it be a state having in mind condition 4 of the Article 1 of the Montevideo Convention regarding the necessity to enter into relations with other states?[16] Reality also confirms these doubts. The Turkish Republic of Northern Cyprus is not a state, because it is not recognized by any other state than Turkey. Republic of Srpska has also not become a state because it was not recognized by none other. Therefore it is needed to assume a balanced approach about the nature of recognition. Charles de Visscher has assumed, and most likely it is the most reasonable assumption, that recognition has both aspects – declaratory and constitutive: "La reconnaissance est déclarative en ce sens qu'elle constate l'effectivité d'une prétention. Elle a une portée constitutive du fait qu'elle met fin à un état de choses politiquement incertain pour y substituer une situation de droit définie".[17] Even this balanced approach cannot explain clearly the constitutive function of recognition in the case of Bosnia and Herzegovina, implying the inherent flaws of the theory of effectiveness.

When it comes to the theory of effectiveness its main fallacy is that effectiveness is not of exclusively objective character. When it comes to creation of states physical reality is shaped by the human will, subjective by its definition. There is a direct discrepancy between ideally conceived, statical and objective factual situation based on which it could be assessed that a situation firmly exists – in this case an entity with defined territory, population and government – and the fact that, on one hand, effectiveness has a dynamic undercurrent because the shape of things is subject to change and that, on the other hand, the states could influence the shape of things, i.e. effectiveness, by their conduct (e.g. recognition or lack thereof, by which states are subjectively proving that they consider that a certain situation exists as far as they are concerned). There is, however, one more significant critique that could be and must be addressed to the theory of effectiveness and that is emphasized by Théodore Christakis.[18] Namely, by relying on the factual situation, the law is actually

[15] See for example O. Račić in V. Dimitrijević, O. Račić, V. Đerić, T. Papić, V. Petrović, S. Obradović, *Osnovi međunarodnog javnog prava*, Beogradski centar za ljudska prava, 2005, str. 82.

[16] Unrecognized entity having the factual requirements of statehood could be deemed a state in sociological, weberian sense, but not in the sense of international law, because it simply could not become a subject of international law.

[17] As cited by Jean Salmon, *La reconnaissance d'Etat*, Paris, Armand Colin, 1971, p. 19.

[18] Théodore Christakis, "The State as a 'primary fact': some thoughts on the principle of effectiveness", in Marcelo G. Kohen (ed.), *Secession, International Law Perspec-*

relying on the balance of power. Given that effectiveness is by definition always formed by the stronger party, we come to the elementary contradiction according to which the law actually takes into account the law of the strongest. This conclusion is a negation of law and therefore unacceptable. We will however see that it is not right to say that the effectiveness is almighty when it comes to the creation of new states, because it is widely accepted that new states cannot be created by violation of the fundamental norms of international law.

1.1.2. Existence of requirements for the legality is contradicting the theory of effectiveness and adds to factual requirements for the attainment of statehood

The creation of new states is not always conducted outside of legal realm. International practice shows that there are examples of creation of states, i.e. non-recognition of secession conducted *contra legem*, although constitutive elements of the state have been present, i.e. factual conditions have been fulfilled. International law knows generally accepted unlawful situations of creation of states (1.1.2.1.) whose domain is widened by the theoretical elaboration of the right of self-determination (1.1.2.2.)

1.1.2.1. Accepted cases of illegal creation of states

Accepted situations are related both to the breach of the right of the peoples to self-determination regarding the decolonization and to the case of aggression. Examples of Rhodesia and South African Bantustans clearly show that the state cannot be created against the will of the majority of the population, i.e. by breach of the right to self-determination. International community has never accepted – recognized – the existence of Southern Rhodesia proclaimed independent by the white minority leader Ian Smith in 1965, although the newly created state effectively existed, i.e. had all three constitutive elements of statehood. UN Security Council has condemned in Resolution 217 "usurpation of power by a racist settler minority in Southern Rhodesia" and pointed out that the declaration of independence, by the aforementioned minority, is "having no legal validity".[19] Just after the 1979, when most of the (black) population could freely declare, the internationally recognized Zimbabwe was formed. The same goes for the white minority in Southern African Republic, trying to separate from the black majority giving her, contrary to its will, small "independent" states – Bantustans (Transkei has became independent in 1976; Bophuthatswana in 1977; Venda in 1979; Ciskei in 1981) – that were simply forced to become independent. Those countries were not rec-

tives, Cambridge University Press, 2006, pp. 156–157.

[19] "Résolution 217 (1965) du 20 novembre 1965", Internet, *http://www.un.org/french/documents/scres.htm*.

ognized, and the UN General Assembly declared null and void the decision on creation of these states.[20] The reason for the nullity was not the absence of effectiveness of those "states", but the illegal nature of their creation.

Secession is also illegal if it is a result of the illegal use of force, i.e. aggression. The best example is the creation of the Turkish Republic of Northern Cyprus in 1983, after the effective partition of the island caused by the Turkish military intervention in 1974. This entity has not been recognized by any other country than Turkey. The reason for non-recognition is not the lack of effectiveness of the Turkish Republic of Northern Cyprus, but the illegal nature of its creation. UN Security Council in Resolution 353 (1974) demanded "immediate end to foreign military intervention in the Republic of Cyprus", requested for "withdrawal without delay from the Republic of Cyprus of the foreign military personnel", and called upon "all states to respect the sovereignty, independence and territorial integrity of Cyprus".[21] When few years later Turkish part of Cyprus declared independence, UN SC in Resolution 541 (1983) considered "therefore that the attempt to create a 'Turkish Republic of Northern Cyprus' is invalid, and will contribute to a worsening of the situation in Cyprus".[22] These examples, generally accepted in the international law doctrine, clearly show that effectiveness does not have a decisive role in the process of creation of states. Besides these two obvious cases of illegal creation of states, with theoretical development of the right of peoples to self-determination outside the context of decolonization, another limit, i.e. legal requirement for creation of states, arises.

1.1.2.2. Theoretical construction of the right of peoples to self-determination outside the context of decolonization[23]

The right of peoples to self-determination is most closely linked to the phenomenon of decolonization. It was never disputed that colonized peoples have the right to create their own state, illustrated by the Resolution of the UN General Assembly on the Granting of Independence to Colonial Countries and Peoples from 1960. What is the status and what

[20] "General assembly (...) rejects the declaration of 'independence' of the Transkei and declares it invalid", A/RES 31/6, 26 octobre 1976, "Politique d'*apartheid* du Gouvernement sud-africain", Internet, *http://www.un.org /french/documents/ ga/res/31/fres31.shtml*.

[21] "Résolution 354 (1974) du 23 juillet 1974", Internet, *http://www.un.org/french/documents/scres.htm*.

[22] "Résolution 541 (1983) du 18 novembre 1983", *Ibidem*.

[23] We will not elaborate in this paper the positive character of the remedial secession. We will accept, for the purpose of the analysis and the questioning of its applicability to Kosovo case, the presumption that remedial secession theory is a positive norm of international law.

are the consequences of the right of peoples to self-determination outside the context of decolonization?

The right of peoples to self-determination has two aspects. The first one is the internal aspect and respect for the rights of minority group of one state. Minimum and sufficient requirement for the respect of internal right of self-determination is that a minority group is not in any way discriminated in the state, that it participates in political life and that it is represented in the structures of government. A minority group could enjoy collective rights realized through certain form of autonomy in accordance with the constitutional organization and basic principles of public law of the state. On the other hand, external aspect of the right of the peoples to self-determination purports a separation of the part of the territory from the parent state in order to create a new state or annexation of the separated part to some other, already existing state. Outside the context of decolonization, international public law does not recognize the external right of peoples to self-determination, i.e. the right to secede. In a study devoted to this question professor Théodore Christakis has shown that no international instrument – from the UN Charter, international covenants on civil and political, economical, social and cultural rights, General Assembly Resolution 2625 on friendly relations and cooperation among states from 1970, to the Helsinki Final Act – as well as international practice, does not recognize the external right of peoples to self-determination.[24] In other words, internal right of peoples to self-determination is accepted, while external is not. This rule knows only one exception: in case of serious and massive breach of internal right of peoples to self-determination, the group has a chance to use the external aspect of that right.

In other words, if a state deprives its minority group from the internal right to self-determination, the group will obtain the external right to self-determination. Antonello Tancredi reminds that the source of this construction is to be found in the Advisory Opinion of the Second Commission of Rapporteurs in the case of Åland Islands (1921) where, after the refusal of the existence of a general right of secession, it is claimed that: "the separation of a minority from the State of which it forms a part and its incorporation into another State may only be considered as an altogether *exceptional* solution, *a last resort* when the State lacks either the

[24] See: Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La documentation française, 1999. For international practice see: James Crawford, *The Creation of States in International Law*, op. cit, pp. 388–418, as well as the report of the same professor from which it could be seen that, outside the context of decolonization, no new state, created as a result of unilateral secession, wasn't accepted to UN: James Crawford, "State practice and international law in relation to unilateral secession", Report, 19 February 1997, Internet, *http://canada.justice.gc.ca/en/news/nr/1997/ factum/craw. html*.

will or the power to enact and apply just and effective guarantees".[25] This mechanism got its legal expression in recent times. In the Resolution 2625 of the UN General Assembly the respect for the principle of territorial integrity is conditioned upon the existence of the government "representing the whole people belonging to the territory without distinction as to race, creed or colour". The condition from the paragraph 7 of the Resolution 2625 is taken over in Vienna Declaration on Human Rights of 1993, as well as declaration of heads of states on the occasion of the fiftieth anniversary of UN in 1995. As a practical example of this mechanism, secession of Bangladesh (Eastern Pakistan) from Pakistan in 1971 is put forward. The creation of the state of Bangladesh was not illegal because Bengali people (their internal right to self determination) were deprived of their rights and their relatively peaceful protest was crushed with repression that resulted in mass atrocities.[26] For most authors today, theory of remedial secession has become a positive norm of customary international law.[27] Although the practice is still scarce, i.e. it is reduced to the case of Bangladesh, there is a strong *opinio iuris* in favour of the mentioned principle, defined by Dugard and Raič as follows:

(a) There must be a people which, through forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within a part of the territory of that State

(b) The State from which the people in question wishes to secede must have exposed that people to serious grievances (carence de souveraineté), consisting of either

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[25] Antonello Tancredi, "A normative 'due process' in the creation of States through secession", op. cit, p, 178.

[26] Authors like Dugard and Raič cite over million casualties, John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p.121.

[27] See: Christian Tomuschat, "Secession and self-determination", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 41; John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p. 109; Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op. cit. p. 314. *Contra*: Antonello Tancredi, "A normative 'due process' in the creation of States through secession", op. cit, p. 188. Tancredi takes as key evidence of non-existence of remedial secession in international law the example of Kosovo and Metohia. He thinks that Kosovo is an ideal example of possibility to check the theory of remedial secession because Kosovo and Metohia Albanians were subject to mass and flagrant human rights violations. This opinion does not correspond to reality. He also thinks that international community, through opinion expressed in according UN SC resolutions is firmly on the ground that the solution for the southern Serbian province must be found with full respect for sovereignty and territorial integrity of the Republic of Serbia. This opinion also has less and less stronghold in the reality and great powers politics. Similar opinion, in our view wrong, is brought out by professor Corten. See, Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", *RGDIP*, 2008–4, p. 748, prepared for print.

– a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance a pattern of discrimination) and/or

– serious and widespread violations of fundamental human rights of the members of that people

(c) There must be no further realistic and effective remedies for the peaceful settlement of the conflict.

Authors conclude that: "An act of unilateral secession that does not fulfill these conditions is an abuse of right and unlawful as a violation of the law of self-determination".[28] They continue by stating that: "the obligation of respect for the right of self-determination, including the prohibition of abuse of this right, has entered the law of statehood and may now be seen as a constitutive condition for statehood".[29]

Finally, it should be mentioned that lack of other examples of the applicability of this theory is nothing strange because remedial secession could be used only in extraordinary cases. As mentioned by T. Christakis, in order for this theory to apply, regular violations of the principle of representativeness or prohibition of discrimination are not enough; flagrant, serious and mass violations of human rights are necessary.[30]

It is therefore undisputed that there are situations where a certain entity illegally tries to become a state.[31] Traditional doctrinal construction of creation and recognition of states cannot be upheld any more. Moreover, the opinion that recognition is a discretionary and legally neutral act confuses even more when having in mind theoretical constructions legally assessing the act of state recognition.

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[28] John Dugard, David Raič, "The role of recognition in the law and practice of secession", op. cit, p. 109.

[29] *Ibidem*

[30] Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op. cit. p. 314. Professor Christian Tomuschat arrives to similar conclusion: "Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed", Christian Tomuschat, "Secession and self-determination", op. cit, p. 41.

[31] Interesting notions are brought by James Crawford when he says that there are entities that have a basis (right) to become states and those that don't have basis for statehood: "(...) Instead, notions of entitlement or disentitlement to be regarded as a state have been influential, at least in some situations. Thus entities which would have otherwise qualified as a state may not do so because their creation is in some significant sense illegitimate (Rhodesia, the Bantustans, the Turkish Federated States of Cyprus). Palestine involves the converse problem, that of an entity which is not sufficiently effective to be regarded as independent in fact, but which is thought entitled to be a state". James Crawford, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL*, 1/1990, p. 310.

1.2. Act of recognition is subject to legal assessment

Years back, in international doctrine opinions are being brought out, frequently confirmed in practice, that act of recognition could represent a violation of international law (1.2.1.). Those opinions question the very nature of the act of recognition as discretionary act (1.2.2.).

1.2.1. Doctrine and practice

There are two doctrinal constructions: the theory of premature recognition (1.2.1.1.) and collective non-recognition of illegal situations (1.2.1.2.)

1.2.1.1. Premature recognition

The theory of "premature recognition" is based on the classical understanding of the creation of state. According to Kelsen, "Refusal to recognize the existence of a new state is no violation of general international law and thus constitutes no violation of the right of any other community. However, recognition of a community as a state, even though it does not fulfill the conditions laid down by international law, is a violation thereof".[32] Under the "conditions laid down by international law", Hans Kelsen assumes three classical conditions, the existence of territory with an independent government (actually four conditions: population, territory, government, independence). In other words, to recognize an entity as a state before it has a population and territory over which a government effectively and independently rules is a violation of international law. In that case recognition is illegal because it is premature. The theory of premature recognition is accepted in international doctrine.[33] Professor Jean Salmon says that each recognition that would not be based on the principle of effectiveness would constitute a breach of international law if that would represent a breach of principle of non-intervention in internal affairs of a state (which is almost always the case). He cites recognition of Manchuko by Japan in 1932 as an example of a premature recognition.[34] The principal value of the theory of premature recognition lies in the fact that it legally assesses the act of recognition subordinating his validity to the conditions set out by international law. We have seen that international law, besides classical factual conditions for creation of states, establishes also the conditions of legality. It is interesting that interna-

[32] Hans Kelsen, "Recognition in International Law: Theoretical Observations", *AJIL*, Vol. 35, No. 4, 1941, p. 610.

[33] See Jean Salmon (dir.), *Dictionnaire de droit international public*, op.cit, p. 948. See *contra*: Jean Combacau, Serge Sur, *Droit international public*, Paris, Montchrestien, 5 édition, 2001, pp. 288–290.

[34] Jean Salmon, *La reconnaissance d'Etat*, op.cit, pp. 36–37.

tional law doctrine and international practice have as well taken these conditions into account when questioning the recognition of new entities as states through collective non-recognition of illegal situations.

1.2.1.2. Collective non-recognition of illegal situations

In the introduction of the book "International Recognition" by Jean Charpentier, professor Suzanne Bastid states that the author is keen to accept the thesis according to which illegal situation lasting longer in time cannot remain outside the legal realm. Professor thinks that this thesis is not really supported because the practice, even on the American continent, based on the principle of collective non-recognition of situations arising from the use of force, must be taken into consideration.[35] One of the most important examples of mentioned practice, called "Stimson doctrine", is the case of Manchuko, a "state" created by Japanese intervention in 1932. This example clearly shows that the "international community" has found long before the creation of the UN system a way to respond to violations of law by collective non-recognition of situations arising from these violations. Since then, as we have seen, the practice has been ripe with examples of illegal creation of "states" and non-recognition of the same. The most important illustration of aforementioned practice is the case of the Turkish Republic of Northern Cyprus".[36] Logically, most authors think that in that case there is a duty of non-recognition of illegal situations of creation of states.[37] Moreover, professor Christakis thinks that recognition itself should be the question of lower importance, because "*À partir du moment où un acte juridique est nul, sa reconnaisance par un État tiers ne peut produire d'effets juridiques, si elle n'est pas elle-même illégale*".[38] However, as the author himself emphasizes later, the principle of non-recognition itself is the one ensuring the respect of law in international community hardly accepting the regime of nullity. Therefore, the question of non-recognition comes into focus. Jean Salmon claims that the recognition could not be granted against the im-

[35] Jean Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Paris, Pedone, 1956, p. X.

[36] European Community has on December 16th 1991. issued a Declaration on "*Guidelines* on the Recognition of New *States* in Eastern Europe and in the *Soviet* Union" where it is stated that "The Community and its Member States will not recognize entities which are the result of aggression.". See "Déclaration sur les lignes directrices sur la reconnaissance des nouveaux Etats en Europe orientale et en Union soviétique" in Pierre-Marie Dupuy, *Grands textes de droit international public*, op. cit, p. 130.

[37] Prohibition of recognition of situations arising from serious violations of international law could be found in Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) of the International Law Commission: Articles 40 and 41. Internet, *http://www1.umn.edu/humanrts/instree/ Fwrongfulacts.pdf*.

[38] Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, op.cit, p. 283.

perative norms of international law, because in the contrary the recognition itself would be illegal.[39]

Professors Dugard and Raič, after stating that the prohibition of the abuse of law of peoples to self-determination has become a constitutive requirement for statehood, claim the same by stating that: "(...) recognition of an otherwise effective territorial entity which has been created in violation of the right of self-determination, including the prohibition of abuse of thus right, is itself unlawful because it constitutes a violation of the prohibition of premature recognition and of the principle of non-intervention (an aspect of the principle of territorial integrity)".[40] It seems however that the authors are confusing in this opinion the two theoretical constructions. The theory of "premature recognition" should not be related to the recognition of the situation created *contra legem*. Illegal situation simply could not be recognized. Therefore, there is no "premature recognition" of the same. Similary confusing is professor Pierre-Marie Dupuy saying that "*pour être prématurées, de telles reconnaissances n'en sont pas pour autant attentoires au droit, tant du moins qu'elles n'aboutissent pas à consolider des situations internationalement illcites*".[41] By stating this, professor Dupuy actually refuses the theory of premature recognition but confirms the opinion that recognition of illegal situation is a violation of law. Finally, professor Borgen also thinks that the statement, according to which states should not recognize a new state if such recognition would perpetuate a breach of international law, could be a "good argument".[42]

Essentially unique doctrinal opinion about the problem of recognition of new states as well as the international practice regarding that question show that there is existing legal regulation regarding the act of recognition. This observation opens the question of qualification of the act of recognition as a discretionary act.

1.2.2. Discretionary nature of the act of recognition?

As we have seen in this paper, from the discretionary character of the act of recognition a number of domestic authors have concluded that the Republic of Serbia cannot sue states that have recognized the independence of the southern Serbian province before the ICJ. It is not sure that discretionary character is really an obstacle for the ICJ to come out

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[39] Jean Salmon, *La reconnaissance d'Etat*, op.cit, p. 36.

[40] John Dugard, David Raič, "The role of recognition in the law and practice of secession", in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, op.cit., p.109.

[41] Pierre-Marie Dupuy, *Droit international public*, Paris, Dalloz, 1998, p.88.

[42] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", op. cit.

about this question (1.2.2.1.) as well as it is not really sure that the act of recognition could be qualified as an absolutely discretionary act (1.2.2.2.).

1.2.2.1. The question of discretionary right is still essentially a legal question

The International Court of Justice, under presumption that there are grounds for establishment of jurisdiction, could not ignore the question whether certain act of recognition is a violation of international law and *prima facie* reject the case under the pretext of lack of jurisdiction *ratione materiae*. The International Court of Justice could hardly proceed in that way because the question of a discretionary right is still a legal question. As stated by George Selle, in the context of an advisory opinion by the ICJ on conditions for the acceptance of states in UN "*ce serait une singulière confusion dans les idées juridiques que de croire que la détermination d'une compétence discretionnaire n'est pas essentiellement une question juridique*".[43] Again, we don't see how the ICJ could reject the legal question related to the nature of the act of recognition, especially bearing in mind that the answer to the question what are discretionary competences of a state is to be given by international law.

However it is not sure whether the act of recognition is really of discretionary nature. Namely, it is undisputed that the act of recognition could violate the rights of state on whose territory a new state is being created. As emphasized by Kelsen, "the question whether the right of a state has in fact been infringed by the act of recognition – a question which is disputed between this state and the recognizing state – is only a special application of the general principle concerning the question whether in a given case one state has violated the right of another state".[44] There is no doubt that the answer to this question could be and must be given by the court as well as there is no doubt that the act of recognition, which could represent a violation of international law, is only partially of discretionary nature.

1.2.2.2. Relativity of discretionary nature of the act of recognition

Discretionary right of states is as wide as legal regulation is nonexisting in particular areas. As professor Ch. Rousseau states: "*La détermination des matières laisées a la compétence discrétionnaire de l'Etat est, donc, en un sens, une question de fait puisque'elle se réduit à la constata-*

[43] As cited by: Stevan Jovanović, *Restriction des compétences discrétionnaires des Etats en droit international*, Paris, Pedone, 1988, p. 106.

[44] Hans Kelsen, "Recognition in International Law: Theoretical Observations", op. cit, p. 610

tion des matières, qui à un moment donné, ne sont pas réglées par le droit international".[45]

The use of force, historically, is and ideal example of discretionary right of states in international order. However, from the establishment of contemporary law of international peace and security by the UN Charter the use of force is legaly regulated. States could still conduct wars. It is still a matter of eminently political and frequently unilateral decisions, but they are not of discretionary nature anymore. Aggression on Federal Republic of Yugoslavia in 1999 as well as the aggression on Iraq in 2003 are simply illegal actions. If the International Court of Justice had a chance to come out on these military interventions, it could hardly find a support for such (mis)doings in positive norms of international law. The development of international law reduces the field of discretionary decisions of states.

When it comes to recognition of states, it could be said that it is only a partially discretionary act of a state. Namely, in positive sense it is a discretionary act because there is no duty to recognize certain entities as states. In other words, states are free to recognize or not recognize a newly created state. In negative sense they could not recognize "states" created in illegal way! Actually, they could do so, just as they could use force outside the cases prescribed by the UN Charter, but such a recognition would be deemed illegal, just as that use of force would be deemed illegal too. Existing legal regulation and fundamental principles of international laws are strongly relativizing the discretionary character of the act of recognition. With development of international law, that character will be totally lost.

It remains to be seen whether in the case of Kosovo and Metohia international law has been violated by foreign states that have recognized the independence of the southern Serbian province. The answer to this question is conditioned upon the legality of secession of Kosovo and Metohia.

2. THE UNLAWFULL CHARACTER OF THE SECESSION AND RECOGNITION OF KOSOVO AND METOHIA

There is a vast number of arguments that can be put forward in favour of the assertion of the illegality of the secession of Kosovo and Metohia from Serbia and its recognition as an independent state. The most important arguments are the following: the secession of Kosovo and Metohia not only represents the violation of the principle of territorial

[45] As cited by: Stevan Jovanović, *Restriction des compétences discrétionnaires des Etats en droit international*, op. cit, p. 91.

integrity of a state (2.1.) but is also the result of the illegal use of force and represents the violation of the Resolution 1244 SCUN (2.2.).[46]

2.1. Respect for the principle of territorial integrity and possible exceptions

Within the context of non-applicability of the theory of remedial secession on the Kosovo case (2.1.2.), the principle of territorial integrity of a state protects Serbia from the attempt of secession (2.1.1.).

2.1.1. The principle of territorial integrity

Various opinions exist regarding the question of the correct meaning and the effect of the principle of territorial integrity. Is it a principle of an interstate character (2.1.1.1.), or an absolute rule (2.1.1.2.).

2.1.1.1. Inter-state character of the principle of territorial integrity

It is not certain that the principle of territorial integrity can protect a state in case of threat of secession. A certain number of authors solely insist on the interstate character of the principle of territorial integrity. The French professor Alain Pellet with group of authors, in the report on the territorial integrity of Quebec in case of attainment of sovereignty, emphasizes that *the principle of territorial integrity appears to be strictly an inter-State* rule and that *the principle of territorial integrity does not preclude non-colonial peoples from gaining independence*.[47] Support in favour of such an assumption can be found in the UN Charter which does not affirm the principle of territorial integrity as an autonomous one. This principle is mentioned in the Charter only in the direct relation with the prohibition of the use of force between states. Therefore, a logical conclusion can be reached according to which a state, victim of a secessionist movement which is not directly or indirectly aided from the outside, i.e.

[46] It can be argued, disregarding the requirement of legality, that Kosovo actually does not even fulfill the factual requirements since it does not fulfil the requirement of independence when the global role of NATO is taken into consideration. Having this in mind, its recognition would be at the very least premature.

[47] Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat, *The Territorial Integrity of Québec in the event of the attainment of sovereignty*, March 4, 1992, Internet, *http://english.Republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainment_of_sovereignty*, § 3.14 and § 3.15. Similar opinion is brought out by Georges Abi-Saab: "Therefore, though in some respects the principle of non-intervention, by its effects, favours the central authority, it would be erroneous to say that secession violates the principle of the territorial integrity of State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours", Georges Abi-Saab, Conlusion in Marcelo G. Kohen (ed.), *Secession, International Law Perspectives*, Cambridge University Press, 2006, p. 474.

from another state, cannot invoke the principle of territorial integrity from Art. 2§4 of the Charter of the UN. The principle of territorial integrity would only apply in the external aspect, i.e. in relation to other states, and could not be regarded as a protection from internal problems.[48]

2.1.1.2. Principle of territorial integrity: principle of an absolute character?

However the situation is somewhat complicated. Marcelo Kohen, after a detailed analysis of the concept of territorial integrity, concludes that it should be regarded as an autonomous principle, independent of the principle of the prohibition of the use of force.[49] Such an assumption is also supported by the fact that in certain international legal instruments the principle of territorial integrity is affirmed separately from the principle of the prohibition of the use of force.[50] It is stated in the Resolution of the UN General Assembly 1514 from 1960 that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[51] A year later the Security Council condemned secession attempt of the province of Katanga, explicitly calling upon the need to "maintain territorial integrity and political independence of the Congo". Contrary to the cases of Southern Rhodesia and the Turkish Republic of Northern Cyprus, in case of Katanga the illegality of the

[48] This opinion is also supported by Theodore Christakis: "The UN Charter [2§4] is not, in principle, applicable in case of secession which occurs without military intervention of other states", Théodore Christakis, *Le droit à l'autodétermination en dehors dines situations de décolonisation*, Paris, La documentation française, 1999, p. 145.

[49] One of the reasons for such an assumption lies in the fact that the principle of territorial integrity is older than the principle of the prohibition of the use of force. Paradoxically, while enumerating the situations in which the principle of territorial integrity is breached, professor Kohen does not explicitly specify the case of secession which is not aided by another state. It specifies, however, the case of the *division of the state in order to create a new artificial entity.* Finally, as a concrete example of this case, apart from Manchuko and the Turkish Republic of Northern Cyprus, Kohen mentions the UN Security Council Resolution 787 from 1992 which relates to Bosnia and Herzegovina and the respect of its territorial integrity. In such a way he confirms, not precisely enough though, the assumption according to which territorial integrity protects the state from all attempts of secession. Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, P.U.F, 1997, pp. 369–377.

[50] M. Kohen is giving as an example The Final Act of Helsinki (4th principle). *Ibidem*

[51] "Résolution 1514 (XV) de l'Assemblée générale des Nations Unies: Déclaration sur l'octroi de l'indépendances aux pays et peuples coloniaux ", 14/12/1960 in Pierre-Marie Dupuy, *Grands textes de droit international public*, Dalloz, 1996, p. 75. Even though the Resolution 1514 (1960) is dealing with decolonization, it nonetheless affirms in an autonomous way the principle of territorial integrity which can naturally be applied only to all states – emerging from decolonization or previously existing.

attempt to create a new state is derived solely from the breach of the principle of territorial integrity of the Congo.[52]

That the principle of territorial integrity certainly provides protection to a state from secessionist movements – even when they are not helped from abroad – is also indicated by the later international practice. OSCE, as well as the UN, have put an accent in all recent secessionist crises on respecting the principle of territorial integrity, in that way disabling the secession of parts of internationally recognized states. The principle is applied to:

- *Moldova and Transdnistria*: OSCE has in 1993 commenced a mission in the Republic of Moldavia with the aim of "Consolidation of the independence and sovereignty of the Republic of Moldova within its current borders and reinforcement of the territorial integrity of the State along with an understanding about a special status for the Trans-Dniester region".[53] OSCE has never deviated from this initial frame.
- *Azerbaijan and Nagorno-Karabakh*: due to the conflicts between Azerbaijan and Armenia regarding Nagorno-Karabakh, a region that is inhabited by Armenians and is situated at the borders of Azerbaijan, the UN Security Council adopted several resolutions, among which is Resolution 884 (1993), in which it has reaffirmed "the sovereignty and territorial integrity of the Azerbaijani Republic and of all other States in the region".[54] In this crisis also the solution is to be looked for within the frame which would not breach the mentioned principle.
- *Georgia and Abkhazia, i.e. Southern Ossetia*: in Resolution 1494 (2003) UN SC it is emphasized that "the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders, and the necessity to define the status of Abkhazia within

[52] "Résolution 169 (1961), Adoptée par le Conseil de sécurité à sa 942e séance, le 24 novembre 1961", Internet, *http://www.un.org/french/documents/view_doc.asp?symbol=S/RES/169(1961)&Lang=E&style= B*. It is true that the text of the Resolution mentions also the help that the secessionist movement obtained from abroad however we are still outside the unlawful situation which has occurred as the consequence of the illegal use of force. Leastways, all secessionist movements obtain such help. During the nineties such help from the outside was afforded to the seccesionist movement of Albanians from Kosovo and Metohia.

[53] "CSCE Mission to the Republic of Moldova", CSCE/19-CSO/Journal No.3, Annex 3, 4 February 1993, Internet, *http://www.osce.org/documents/mm/1993/02/4312_en.pdf*.

[54] Resolution 884 (1993), Adoptée par le Conseil de sécurité à sa 3313e séance, le 12 novembre 1993, Internet, *http://www.un.org/french/documents/sc/res/1993/884f.pdf*.

the State of Georgia in strict accordance with these principles".[55] Regarding the question of Southern Ossetia, the European Union has in several times confirmed the position that the solution to the conflict in Georgia should be "*fondé sur le respect de la souveraineté et de l'intégrité territoriale de la Géorgie à l'intérieur de ses frontières internationalement reconnues*".[56]

– *Bosnia and Herzegovina and the Republic of Srpska*: In all resolutions of the UN SC which are related to Bosnia and Herzegovina the imperative of respecting the principle of territorial integrity is emphasized. It is either the respect of the "territorial integrity of Bosnia and Herzegovina" Resolution 752 (1992); or the "commitment to the political settlement of the conflicts in the former Yugoslavia, preserving the sovereignty and territorial integrity of all States there within their internationally recognized borders," – Resolution 1305 (2000) / Resolution1423 (2002).[57]

– *Russian Federation and Chechnya*: Although UN Security Council has never, logically, dealt with this matter, "international community" has never questioned the territorial integrity of Russian Federation. Professor Crawford quotes the statements of several high representatives of France (minister of foreign affairs), Great Britain (government) and USA (State department) from 1995 where they insist on following: "La Tchétchénie fait partie de la Fédération de Russie. Le respect *du principe de souveraineté et d'intégrité territoriale est une règle de base de la vie internationale*" – (France);

"(...) the exercise of the right [of self-determination] must also take into account questions such as what constitutes a separate people and respect for the principle [of] territorial integrity of the unitary state (...) we have repeatedly called on the Russians to work for a political solution which would allow the Chechen people to express their identity within the framework of the Russian Federation" – (Great Britain);

"We support the sovereignty and territorial integrity of the Russian federation" – (USA).[58]

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[55] Résolution 1494 (2003), Adoptée par le Conseil de sécurité à sa 4800e séance, le 30 juillet 2003, Internet, *http://daccessdds.un.org/doc/UNDOC/GEN/N03/446/50/PDF/N0344650.pdf?OpenElement*.

[56] "Déclaration de la Présidence au nom de l'Union européenne sur l'évolution récente de la situation en Géorgie-Abkhazie et Ossétie du sud", Bruxelles, 20 juillet 2006, Internet, *www.doc.diplomatie.gouv.fr/ BASIS/epic/www /doc/DDD/911474697.doc*.

[57] Internet, *http://www.un.org/french/documents/scres.htm*.

[58] James Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, second edition, 2006, p. 409–10.

We could question did not Badinter Commission stand on the same ground in its second opinion (11. January 1992.) when clearly stating that: "The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise; Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law".[59] We think that by stating this, Badinter Commission in an indirect way, i.e. by applying a very questionable principle of *uti possidetis juris*, implicitly but substantially applied the principle of territorial integrity of states.[60]

There is absolutely no reason or legal possibility that this principle could be disobeyed or breached today. It is interesting to point out that the opinion of the "international community" regarding this question was

[59] See Opinion no. 2 in Milenko Kreća, *Badenterova arbitražna komisija, kritički osvrt,* Jugoslovenski pregled, 1993, p. 99.

[60] Identical mechanism is applied in the report of legal experts in case of the territorial integrity of Quebec under the presumption of attaining the independence. Through the principle of *uti possidetis* and always problematic notion of minority they arrive to the following conclusion: "If Quebec were to attain independence, the principle of legal continuity (absence of a vacuum juris) would allow the territorial integrity of Quebec, guaranteed both by Canadian constitutional law and public international law, to be asserted over any claims aimed at dismembering the territory of Quebec, whether they stem from: the Natives of Quebec, who enjoy all the rights belonging to minorities (...); the anglophone minority (...); persons residing in certain border region (...), Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat, *The Territorial Integrity of Québec in the event of the attainment of sovereignty*, March 4, 1992, op.cit, § 4.02. In other words, what is not applicable for independent and sovereign Canada, is applicable for sovereign and independent Quebec. In the same way, what was not applicable for independent and sovereign Socialistic Federative Republic of Yugoslavia was applicable for independent and sovereign Croatia or Bosnia and Herzegovina. This contradiction could not be possibly justified. It is correct that a large part of doctrine viewed Yugoslavian case through lens of dissolution of state. However, regardless whether we analyze the case of SFRY as dissolution of state or secession, solutions should have been different. Namely, in generally accepted perspective of dissolution of state (we will not dwell into all incoherent and contradictory aspects of that thesis), it was not possible to take into consideration anything related to the state "in process of dissolution", especially not the borders that existed between its republics. If the federal state doesn't exist anymore, its internal borders could not exist any more either, and the discussion about them must be opened, if they are disputed at the first place. If it is about secession, it is simply not allowed as confirmed by Badinter commission and could only be a result of agreement. Bosnia and Herzegovina as well as other Yugoslav Republics could not perform secession. Professor Marcelo Kohen gives somewhat different interpretation of these problematic examples based on the definition of peoples and the question of the bearer of the right to self-determination. However, it seems that Marcelo Kohen studies the whole problem through the lens of relation between right of peoples to self-determination and territorial integrity. Marcelo G. Kohen, *Possession contestée et souveraineté territoriale*, op. cit, pp. 422–433.

in compliance with the generally accepted practice and international law. In all UN Security Council Resolutions concerning the problem on Kosovo and Metohia, – before (Resolution 1160 (1998)) during (Resolution 1239 (1999)), or after the NATO aggression (Resolution 1244 (1999)) – UN Security Council clearly states the "commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia". Besides that, SC has in resolutions before NATO intervention insisted that "the Kosovo Albanian leadership condemn all terrorist actions", demanded that "such actions cease immediately" and emphasized that "all elements in the Kosovo Albanian community should pursue their goals by peaceful means only".[61] Finally, UN SC has always pointed as a goal "enhanced status for Kosovo, a substantially greater degree of autonomy, and meaningful self-administration within Serbia".[62] From all of the abovementioned undoubtedly it is derived that territorial integrity of Republic of Serbia would be breached by giving the independence to Kosovo and Metohia and that the independence would represent a violation of this important norm of international law. Question still arises whether the principle of territorial integrity is of absolute or relative character? Is there an exception when that principle must back down before imperative norms of law and justice?

2.1.2. Non-applicability of the theory of remedial secession on the case of Kosovo and Metohia

Principle of territorial integrity, as we have seen, protects Serbia from every attempt of secession. The only exception before which the abovementioned principle could back out – serious violation of the internal right of self-determination, i.e. theory of remedial secession – could not be applied in case of Kosovo and Metohia for two reasons. First: never has internal right of self-determination of Kosovo Albanians been questioned (2.1.2.1.). Second: even under the false presumption that internal right to self-determination has been violated, readiness of the Republic of Serbia to give substantial autonomy to its southern province disables the applicability of the theory of remedial secession (2.1.2.2.).

2.1.2.1. Internal right of self-determination of Kosovo and Metohia Albanians has never been questioned

Here we should soberly analyze occurrences in Kosovo and Metohia in period from 1989. to 1999, i.e. in period during which the Kosovo inhabitants were, according to their claims, deprived of their rights. Did

[61] "Résolution 1203 (1998), Adoptée par le Conseil de sécurité à sa 3937e séance, le 24 octobre 1998", Internet, *http://www.un.org/french/documents/scres.htm.*

[62] This opinion was in the first Resolution on Kosovo-Resolution 1160 (1998), as well as the last Resolution on Kosovo – Resolution 1244 (1999), Internet, *http://www.un.org/french/documents/scres.htm.*

serious and mass violation of human rights really occur? We think that the answer is negative. It is important to go back to the cause of discontent of the Albanian leadership in 1989. The reasons of the Albanian dissatisfaction were the amendments to the Constitution of Republic of Serbia adopted in March 1989 in accordance with the valid procedure (that is to say with the consent of the autonomous provinces), according to which the constitutional power was returned back to the exclusive competence of the state assembly (Amendment XLVII). Namely, the Republic of Serbia has stopped being *a federation inside a federation*. That year the autonomy of the southern Serbian province was not, as it is frequently considered, abolished.[63] Regulation of constitutional competences that clearly does not constitute a violation of human rights is a "cause" to further sequence of events. Albanian MPs declared illegally a "Republic of Kosovo" in Kosovo assembly on July 2nd 1990. The central Serbian authorities reacted to this illegal attempt of secession by suspending the provincial assembly. Kosovo and Metohia Albanians by so called Kačanik Constitution declared independence of the southern Serbian province on September 7th 1990, this time outside of any state institution. This sequence of events represents the beginning of the crisis.[64] It is true that during the nineties Serbian authorities were not representative because Albanian population did not participate in the government. But the question why was that the case is of extreme importance. Did any of ethnic discrimination as provided by law, existed, or was that a voluntary and elaborate making of the parallel state structure by Kosovo Albanians who, simply, decided not to participate in any way in the political life of the Serbian state, because they simply didn't want to live in it anymore? It is sure that legally, both formally and substantially, nothing prevented Albanians from participating in republic elections and fight for their goals in a democratic way. Contrary to that option, radicalization of the conflict and Albanian terrorism has caused the chain reaction with banal sequence terrorism-repression; however, nothing that would lead to justifying secession as *ultimum remedium*. Historically, internal right of Kosovo Albanians to self-determination has never been questioned.

2.1.2.2. Substantial autonomy disables the applicability of remedial secession theory

However, even if we should adopt the incorrect presumption that Kosovo Albanians have been deprived of their internal right to self-deter-

[63] Autonomy of Kosovo and Metohia has never been abolished, but suspended. Constitution of Republic of Serbia from September 28th 1990, on force until the adoption of the new constitution in 2006, provides for the autonomy of Kosovo and Metohia, Chapter VI (*Territorial organization*), articles 108–112.

[64] We could not retrospect on historical aspects of Kosovo and Metohia problem and decades long Albanian aspirations for independent Kosovo in the course of this work.

mination, what is sure today is that substantial autonomy that is offered to Albanian national minority exceeds all international standards of minority protection. According to the Serbian negotiations platform, the southern Serbian province would have exclusive competences and absolute self-government in all areas of life, except in certain domains where the competences would remain with the central government: "The province would independently conduct all competences, excluding a number of reserved powers for Serbia. Competences concerning foreign policy, border control, protection of human rights in last instance, monetary policy, customs policy, protection of Serbian religious and cultural heritage, as well as areas of special customs-inspection, would remain reserved for the central government".[65] But even in the conduct of abovementioned exclusive competences of authorities in Belgrade, Kosovo Albanians would participate. Calling upon the right to self-determination for justifying secession in that context is nothing more than the abuse of that right. The inevitable conclusion is that the creation of an independent state of Kosovo and Metohia is illegal, because it would, besides representing a violation of international norms on protection of territorial integrity, violate the prohibition of abuse of right to self-determination. There is, however, another strong argument in favour of the illegality of Kosovo and Metohia secession. It is the illegal use of force.

2.2. Secession of Kosovo and Metohia as a consequence of illegal use of force and Resolution 1244 UNSC

Besides representing a breach of the Resolution 1244 (2.2.2.), the secession of Kosovo and Metohia represents a consequence of an illegal use of force (2.2.1.).

2.2.1. Unquestionable causality between aggression in 1999 and unilateral declaration of independence

There is no doubt that the unilateral declaration of independence of Kosovo and Metohia would not be possible without NATO aggression on Federal Republic of Yugoslavia in 1999 (2.2.1.1.). The existence of the Resolution 1244 could not influence the abovementioned situation (2.2.1.2.).

2.2.1.1. Bombing in 1999 is the cause of effective secession of the southern Serbian province

It is frequently forgotten, and rarely mentioned, that the actual situation in Kosovo and Metohia is the result of illegal use of force, i.e. ag-

[65] Platform of state negotiations team on future status of Kosovo and Metohia, Internet, *http://www. srbija.sr.gov.yu/kosovo-metohija/index.php?id=51322.*

gression. International law precisely regulates the use of force. According to the Article 51 of the Charter "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". In case of determined threat to international peace and security by the Security Council, in accordance with the article 42 of the Charter "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". Outside these two cases, the use of force is strictly prohibited and represents the crime of aggression, as defined by the Resolution 3314 (1974) of the General Assembly of UN.[66] Given that in 1999 there could be neither self-defence, nor did UN Security Council adopt the appropriate resolution, there is no doubt that the NATO intervention represented a grave violation of international legal norms, such as the principle of non-intervention in internal affairs, and most important of all, the prohibition of use of force. A parallel could be drawn with the case of Cyprus. Turkish Army invaded part of Cyprus in July 20th 1974, which resulted in factual partition of the island. Nine years later, on November 15th 1983, Turkish community declared independence of the state under the name of Turkish Republic of Northern Cyprus. UN Security Council has deemed this declaration of independence null and void because every secession that is the result of illegal use of force (aggression) is deemed illegal.[67] NATO in 1999 committed aggression against Federal Republic of Yugoslavia. Existing situation in Kosovo and Metohia and unilateral declaration of independence are direct consequences of such an illegal act. As in the case of Turkish Republic of Northern Cyprus, declaration on independent Kosovo should be deemed null and void by the "international community". However, there is an opinion that the causality link between NATO aggression and unilateral declaration of independence of Kosovo is discontinued because of the adoption of the Security Council Resolution 1244. Olivier Corten points out that in the case of Kosovo not only did the causality link was discontinued because of the adoption of the Security Council Resolution, but primarily because of the consent of the Federal Republic of Yugoslavia, after which the following resolution was adopted.[68]

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[66] "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter, as set out in this Definition". "Résolution 3314 (XXIX) de l'Assemblée générale des Nations unies: Définition de l'agression", in Pierre-Marie Dupuy, *Grand textes de droit international public,* Dalloz, 1996, p. 261.

[67] "Résolution 541 (1983) du 18 novembre 1983", Internet, *http://www.un.org/french/documents/scres.htm*.

[68] Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", op.cit, p. 748

2.2.1.2. Causality link between NATO bombing and unilateral declaration of independence of Kosovo and Metohia is not discontinued with Resolution 1244

Such an opinion seems unjustified. First it must be pointed out that the undisputed illegality of the armed intervention of the NATO cannot be *a posteriori* justified. Neither the signing of the Kumanovo Agreement nor the adoption of the Resolution 1244 by the UN Security Council cannot give, nor have they given, a legal basis for the NATO intervention. Both documents are discussing future questions and they are not justifying the starting and flagrant illegality of the NATO intervention, i.e. aggression.[69] Illegal character of abovementioned aggression is of objective nature.

When it comes to the causality link between aggression and secession it is extremely important to mention the following: the Resolution 1244 itself has never been applied completely – especially in the part prescribing the return of Serbian security forces in Kosovo and Metohia in accordance with the paragraph 4 of the Resolution. It is undisputed that the provision on the return of Serbian security forces (both military and police) on part of Serbian territory represented, besides affirmation of the principle of territorial integrity, the main reason for Serbia to accept the adoption of the Resolution 1244 (and sign the Military-Technical agreement in Kumanovo). If Resolution 1244 had been completely applied, Serbian security forces would be present in Kosovo and Metohia and secession would not be possible. In our opinion, a resolution which is not completely applied could not be relevant and therefore could not constitute a rupture of the relation of causality.

This observation brings us to a fundamental reason why the abovementioned opinion on the discontinuance of the causality sequence is not acceptable. Existence of the Resolution 1244 cannot represent a discontinuance of the causality link between aggression and declaration of independence, i.e. recognition of same, because the unilaterally declared independence is contrary to the UN Security Council Resolution 1244! Resolution 1244 cannot constitute an interim stage which would neutralise the initial illegality of NATO intervention, which is being transmitted to the illegality of both the declaration of independence and its recognition. Even if we should accept the opinion on discontinuance, then we would have to agree that it is a double discontinuance, because the unilaterally declared independence undoubtedly represents a discontinuance regarding the Resolution 1244. Essentially, unilateral declaration of independence has returned us to the spring of 1999 – i.e. to the state of war, because Resolution 1244 fundamentally represents a peace agreement which

[69] See Serge Sur, *Le recours à la force dans l'affaire du Kosovo*, Les notes de l'Ifri – n°22, IFRI, Paris 2000, p.17.

not only has not been applied, but was breached completely by the unilaterally declared independence – and the situation is logically being returned to *statu quo ante* 1244.

2.2.2. UNSC Resolution 1244 as specific prohibition of secession

The conclusion from previous is as follows: the attempt to create an independent state of Kosovo and Metohia is illegal. Such an attempt represents a triple serious violation of principle of territorial integrity, right to self-determination and prohibition of use of force. From these reasons, and according to the fundamental legal principle – *ex iniuria ius non oritur,* Kosovo and Metohia, from the aspect of international law, cannot become an independent state.[70] Besides these general principles, in case of Kosovo and Metohia there is a specific, binding Resolution of UN Security Council.[71]

According to the Article 25 of the Charter, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Although legal effect of Security Council resolutions could be discussed, it is undisputable that resolutions based on the Chapter VII of the Charter have binding character. Resolution 1244, adopted on June 10th 1999 represents one of major arguments of the Republic of Serbia in favour of claims that states that have recognized the independence of Kosovo and Metohia have violated international law. However, during the status negotiations, under the auspices of the Troika, it could be heard from the chairman, Mr. Wolfgang Ischinger that the "Resolution 1244 could be interpreted in different ways" and that not all of them lead to the same conclusion – i.e. to the protection of sovereignty and territorial integrity of the Republic of Serbia.[72] This statement by Mr. Ischinger is only one of manifestations of the so-called creative interpretation of legal norms.[73] However, a question whether the Resolution 1244 needs interpretation arises (2.2.2.2.) because the first, often forgotten, rule of interpretation of legal norms is that norms that are clear don't need interpretation (2.2.2.1.)

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[70] If we should use legal terminology of James Crawford, we should say that Kosovo simply does not have a basis to become a state (disentitlement).

[71] It is important to mention that the existence of the resolution of UN Security Council only strengthens general principles of international law. Even without the appropriate resolution of UN Security Council secession and recognition of Kosovo and Metohia would represent illegal acts. Resolution 1244 in this case only elaborates political solutions that should be looked in existing borders of Republic of Serbia and represents additional limitation, i.e. prohibition of secession.

[72] Wolfgang Ischinger has explictely expressed opinion on different possible interpretations of Resolution 1244 on the meeting in Vienna on October 22nd 2007.

[73] "Creative interpretation" is not a legal term and it is completely outside the scope of rules on interpretation of legal norms.

2.2.2.1. Resolution 1244 protects the territorial integrity and sovereignty of the Republic of Serbia

Resolution 1244 in several occasions confirms the sovereignty and the territorial integrity of the Republic of Serbia. In opening part Security council confirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2".[74] It also reaffirms "the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo".

First article of the operative part of Resolution states as follow: "the Security Council 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". Annexes 1 and 2 contain, therefore, basic principles that should provide a framework for a political solution of the Kosovo crisis. As a general principle for the solution of the crisis the Annex 1 is mentioning "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA". The Annex 2 is mentioning the "Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations". Finally in paragraph 10 of the Resolution 1244 UN Security Council "authorizes 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".

All above mentioned provisions are clear and explicitly confirm the sovereignty and territorial integrity of the Republic of Serbia. Could interpretations that would, as proposed by Mr. Ischinger, lead to different conclusion, find the ground in the text of the Resolution?

[74] According to the article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro all international obligations have been transferred from the Federal Republic of Yugoslavia to Serbia.

2.2.2.2. Are contrasting interpretations of the Resolution 1244 possible?

At first sight, the Resolution 1244 could be subject to different interpretations, given that the paragraph 11 introduces ambiguous concepts of final settlements and future status. In the article *a* of the mentioned paragraph it is pointed out that main responsibilities of the civil mission will include "promoting the establishment, pending a *final settlement*, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648)", while article *e* provides for "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648)". In above mentioned article *a final settlement* is clearly separated from the *substantial autonomy* which obviously represents an interim period until the final settlement is being established. This exact provision serves to prove that Resolution 1244 doesn't prohibit the independence of Kosovo and Metohia as form of *final settlement.*[75] However, in article *a* everything is returned to the Annex 2 which must be taken into full account. And by that a concept of *final settlement* is returned under the principle of "A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo".

Finally, there are provisions definitively confirming that the sense of the Resolution 1244 is to find a political solution for the Kosovo crisis through substantial autonomy within Federal Republic of Yugoslavia i.e. Serbia. It is the already mentioned paragraph 4 of the Resolution 1244 by which the Security council Confirms "that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2". Annex 2 contains following provision: "After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions: Liaison with the international civil mission and the international security presence; Marking/clearing minefields; Maintaining a presence at Serb patrimonial sites; Maintaining a presence at key border crossings". A resolution that prescribes the return of Serbian security forces so that they could, among other things, maintain presence at key border crossings, simply could not be interpreted as a legal instrument authorizing secession of Kosovo and Metohia but exclusively as an instrument confirming the sovereignty and territorial integrity of the Republic of Serbia. Therefore, recognition of independ-

[75] See Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition", op. cit. and Snežana Bogavac, "Rezolucija Ujedinjenih nacija 1244 nije prepreka za priznanje Kosova", *Voice of America*, 24.01.2008, Internet, *http://www.voanews.com/Serbian/archive/ 2008–01/2008–01–24-voa6.cfm*.

ence of Kosovo and Metohia itself constitutes a violation of Resolution 1244, i.e. violation of international law.[76]

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Aforementioned doctrine as well as international practice clearly show that theory of legal neutrality of creation of new states as well as their recognition could hardly be justified. Factual conditions of statehood are complemented with the conditions of legality that must be fulfilled by certain entity in order to attain statehood. The possibility of legal assessment of the subject of the recognition is transferred to the act of recognition itself. Theory on premature recognition as well as practice of collective non-recognition of illegal situations explicitly confirm that the act of recognition is by no means legally neutral. From the legal perspec-

[76] For the end of the discussion on Resolution 1244 we should point out that professor Panayotis G. Haritos has brought to light dark actions conducted immediately before the adoption of the Resolution 1244 representing a violation of extremely important principle of international law – a principle of good faith. Professor Haritos clearly shows that a fraud has been attempted by adding the reference (S/1999/648) along the words "Rambouillet accords". That same reference is not to be found in Article 8 of annex II of resolution 1244 along the words "Rambouillet accords". Annex II has been derived from the Belgrade agreement from June 3rd 1999. The Belgrade agreement is the basis for all future documents, i.e. the Military-Technical Agreement as well as the Resolution 1244. "Rambouillet accords" in Belgrade agreement are referring only to what was agreed upon in Rambouillet, but not on the ultimatum presented to the parties under the title "Interim Agreement for Peace and Self-Government in Kosovo", providing for, among other things, free movement of NATO troops on the territory of Serbia (Chapter 7, Appendix B, article 8), as well as international conference that would in three years determine mechanism for the finding of the final settlement based on the will of the people (Chapter 8, Article 1, al. 3). As such, this was not accepted by the Serbian delegation in Rambouillet. However, it was this proposal, by intervention of the French representative in UN SC, that was incorporated into the Resolution 1244 under the title "Rambouillet Accords (S/1999/648)", on purpose and with the real title left out, and still very skillful for fraud to succeed because it was identified with the Rambouillet Accords from the Annex II of the Resolution 1244, i.e. the Belgrade Agreement. Reference in question is the registry number that was given by the SC to the refused ultimatum which was imputed by the French representative on June 7th instead of Rambouillet accords agreed upon. Independent from the reference in Resolution 1244, it is impossible to claim (and it would most certainly be illegal) that "Rambouillet accords" that are in Resolution 1244 sometimes mentioned with the abovementioned reference, sometimes without, are referring to the ultimatum titled "Interim Agreement for Peace and Self-Government in Kosovo". See Panajotis G. Haritos, "Status Kosova i Metohije prema međunarodnom pravu", u *Kosovo i Metohija, prošlost, sadašnjost, budućnost*, Srpska akademija nauka i umetnosti, Beograd, 2007, str. 367–401. Finally, even if we incorrectly presumed that this attempted fraud could have a legal consequence, unilateral declaration of independence would again be contrary to the Resolution 1244 SC UN, that would in that case prescribe specific procedure for the eventual attainment of independence. See: Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du Sud et à l'Abkhazie", op.cit, pp. 735–736 and p. 739.

tive, undoubtedly there is a strong argumentation to support the thesis that the international recognition could be illegal or in the case in question, starting point to this analysis, that the state that have recognized the independence of Kosovo and Metohia have violated international law. It is unlikely that the International Court of Justice, in contentious proceedings that would hypothetically be started against certain state that recognized unilateral and illegally declared independence of Kosovo and Metohia, would *prima facie* declare that it has no jurisdiction stating that the act of recognition is a political act upon the discretion of each state and that therefore it could not be a subject of dispute.

In a wider sense, it is clear that a very coherent and complete construction of something that could be called the law of statehood could be made. In such construction, where, as we already pointed out, the creation of states must fulfill certain requirements, secession could be possible only as a result of agreement, or as *ultimum remedium*, in case of hardest breaches of internal right of self-determination.[77] Of course, such a construction leaves aside the influence of politics, i.e. force, but it could be justified by an answer to an already cited question of professor Verhoeven, that *on ne voit pas très bien ce qu'un système (M.J. – système du droit international), impuissant à contester des effectivités, gagne à les refuser*.[78] The answer would be that by not accepting illegal effectiveness, international law would simply get more... legal character.

[77] This construction could be supplemented with problems of the bearer of the right to self-determination, precise distinctions between concepts of people and national minorities as well as the question of peoples pretending to have more nation states. However, main difficulties of this approach are in different sociological and political understandings of the concepts of peoples, citizens, nations etc. making it hardly operative for now.

[78] See footnote 11.

Thomas H. Koenig, PhD*

Full Professor,
Department of Sociology and Anthropology
Northeastern University, Boston

BLENDING U.S. CRIMINAL AND TORT LAW FOR CIVIL PUNISHMENT

Civil actions that concurrently fulfill the private function of compensating injured claimants while serving the broader public purpose of controlling socially harmful behavior are labeled "crimtorts" because these legal hybrids blend the principles of criminal law and the law of torts. The crimtort paradigm explicitly recognizes that punitive damages litigation can advance societal interests through civil punishment and deterrence in cases that are beyond the criminal law. The fervent "tort reform" dispute over procedural fairness in punitive damages litigation is part of a much larger theoretical dispute over the legitimacy of the crimtort as a mechanism that uses private tort remedies for a public purpose.

Key words: *Crimtort. – Punitive damages. – Civil punishment. – Deterrence.*

1. INTRODUCTION

Over the past quarter century the line between criminal and tort law in the U.S. has been collapsing across a broad front,[1] creating what I

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* Fulbright Visiting Professor, University of Belgrade Law School 2008–2009.

[1] One of many examples of the increasing breakdown of the theoretical bright line between criminal and tort remedies is the U.S.'s adoption of "structured fines" for criminal misbehavior in which the amount of the fine is based on the wealth or income of the wrongdoer. Finland, Germany, Sweden, and Denmark also employ wealth calibrated penalties that are called "day fines" in which wealthy individuals are assessed fines for misbehavior such as reckless automobile driving that are based on the income of the wrongdoer. Vera Institute, Bureau of Justice Assistance, How to Use Structured Fines (Day Fines) as Intermediate Sanctions, Nov. 1996. *http://www.vera.org/publication_pdf/96_64.pdf* (last visited November 20, 2008).

have labeled "crimtort"[2] litigation that seeks quasi-criminal financial punishments to remedy organizational wrongdoing. Courts and commentators have been slow to recognize the existence of crimtort remedies because of the conceptual blinders created by the false dichotomy between criminal law and the law of torts.[3] This Article argues for the legitimacy of blended remedies. Criminal law and the law of torts were not separated at birth but only became differentiated as separate law school subjects in the latter half of the nineteenth century.[4] In the real world, "private and public consequences arise from a single act."[5]

The fundamental debate over the legitimacy of crimtort remedies is whether tort law verdicts should go beyond redressing individual harms in order to protect the public interest.[6] Punitive damages, the most common American crimtort remedy, is a uniquely Anglo-American alternative to Europe and Japan's strong regulation and social insurance solutions.[7]

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[2] Much of this essay is drawn from a much longer article, Thomas Koenig, *Crimtorts: A Cure for the Hardening of the Categories*, 17 WID. L. REV., 733 (2008) (providing an in-depth explanation of the concept of "crimtort.")

[3] "Civil wrongs, private injuries, compensation, and private law are concepts that belong together, as do crimes, public injuries, punishment, and public law. Viewed against the background of this conventional taxonomy, punitive damages, or punishments inflicted through the civil law, appear to be an anomaly, a hybrid in search of a rationale." Marc Galanter & David Luban, *Punitive Damages and Legal Pluralism*, 42 AM. U. L.REV. 1393, 1394 (1993).

[4] "To emphasize the fact torts was not considered a discrete area of the law until the late nineteenth century, Professor White noted the following: The first American treatise on torts appeared in 1859. Torts were not taught as a law school subject until 1870. Finally, the first torts casebook did not appear until 1874. As late as 1871, Holmes himself did not consider torts a discrete subject. He referred to torts as a collection of unrelated writs." Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralistic Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 393 (2005); See also, PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 185 (1920) (noting that Blackstone's Commentaries bifurcates criminal law as concerning the community at large as opposed to private law).

[5] Martin Shapiro, *From Public Law to Public Policy, or The 'Public' in 'Public" Law*, 5 (4) American Political Science Review 410, 410 (1972).

[6] As William L. Prosser notes "perhaps more than any other branch of the law, the law of torts is a battleground of social theory." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 14 (3rd ed. 1964).

[7] "The rise of public compulsory social insurance in nineteenth-century Germany especially with respect to workplace accidents is another way of dealing with problems caused by undeveloped private insurance markets..... It is however debated whether – even with highly-developed insurance markets – tort law is well suited for this job and whether a comprehensive tort law will not cause excessive costs for the legal system as well as insufficient deterrence." Hans-Bernd Schafer, *3000 Tort Law: General* in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS (CIVIL LAW AND ECONOMICS (2007) at 574. Cf. Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153, 2153 (1997) (concluding that the United States must confront its thalidomide

In European countries, for example, in sharp contrast to the United States, tort law plays "a rather insignificant role for workplace injuries."[8]

Tort reform scholars have questioned the justness of employing punitive damages to punish and deter, which are functions theoretically reserved for criminal law:

> Why are punitive damages part of tort law at all? Isn't tort law about compensation, making victims whole, or corrective justice? Even from an economic point of view, isn't it about deterrence by cost-internalization, or about insurance? Why is this criminal-seeming treatment found within our private law, our tort system?[9]

My rejoinder is that punitive damages are an alternative to compulsory social insurance because of America's cultural preference for market driven solutions in contrast to the "thick" regulatory mechanisms that characterize Western European legal systems.[10] For more than two hundred years, wealth-calibrated punitive damages have functioned to restore equilibrium in American society, supplementing the work of other societal institutions such as first party insurance and workers compensation.

The downside of a European-style central state insurance regime is that government officials may create "the tyranny of the status quo" by unnecessarily impeding groundbreaking, but disruptive, technologies in the name of reducing primary accident costs.[11] Conservatives warn of the dangers of heavy-handed government regulation:

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history, as other nations in the world have done, and build social institutions – strong regulation and social insurance – to guard against toxic disasters of the future).

[8] Hans-Bernd Schafer, 3000 *Tort Law: General, Id. at 570.*

[9] Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Tex. L. Rev. 105, 106 (2005). Professor Zipursky believes that punitive damages should be limited to enforcing the individual victim's "right to be punitive," but should not vindicate society's rights, which are the province of criminal law. Id. at 106; See also, James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1158–64 (1984) (contending that punitive damages has illegitimately invaded the province of criminal law).

[10] U.S. antitrust law, for example, is largely about protecting the market, whereas the European approach is more paternalistic:

> Since the 1990s, the task of antitrust enforcers has been to find a middle ground that avoids the extremes of over-and under-enforcement. In contrast, European antitrust enforcers perceive competition process as vulnerable and are more eager to address perceived distortions.

Katarzyna A. Czapracka, *Where Antitrust Ends and IP Begins – On the Roots of the Transatlantic Clashes*, 9 Yale J. L. & Tech. 44 (2007) (comparing U.S. market based approach to European "thick" regulation of competition). See generally, Lester Thurow, Head to Head: The Coming Economic Battle Between Japan, Europe and America (1993) (arguing that America is falling behind Japan and Europe because of its preference for market based economic policies in contrast to Japan and Europe's strong regulatory regimes).

[11] See generally, Milton and Rose Friedman, The Tyranny of the Status Quo (1984) (asserting that already existing interest groups subordinate market forces by lobbying the government to protect their interests).

> [A]n overzealous government that tries to keep all bad products off the market is likely to err by keeping too many good products off the market.... The danger is that new legislation could be a veil for protectionism, as special interests try to gain advantage in the domestic market by restricting imports and by handicapping smaller domestic firms by increasing their regulatory costs.[12]

Crimtort remedies fill the enforcement gap without requiring rigid bureaucratic rules, which are inherently incapable of evolving quickly enough to address new social problems. An inflexible government regulatory body may work well in a homogenous society such as Sweden but is likely to obstruct important innovations in the United States. Wealth-calibrated fines that strip illicit profits from wrongdoers provide the financial deterrent power to constrain powerful organizational actors.[13] Crimtorts serve as a necessary mechanism of social control that punishes and deters practices and policies that threaten the well-being of American society.

2. THE SOCIAL FUNCTIONS OF CRIMTORT REMEDIES

2.1. Compensating for inherent weaknesses of the criminal law

The crimtort is an invaluable supplement to fill the enforcement gap created by the inherent limitations of criminal law. Criminal law is ineffective in punishing and deterring emergent social problems that do not fit the precise elements of criminal law causes of action. Even when criminal law statutes do address embryonic social problems, the elevated burden of proof required for criminal convictions and the limited resources of government prosecutors often make public law enforcement impractical for dealing with rapidly evolving threats to society.[14] Public law develops at a snail's pace and is thus unable to restore equilibrium, given the amazing dynamism of American society.

Crimtort law, in contrast, possesses the flexibility necessary to redress the new vulnerabilities continually being created by America's swiftly globalizing information society.[15] Hackers, for example, have re-

[12] James Dorn, *Toxic Toys: Congress Risks Making Things Worse*, http:// www.cato.org/pub. display.php?pub id+8808 (last visited Jan. 21, 2008).

[13] See Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 Geo. L. J. 421, 455–56 (1998) (contending that effective deterrence depends upon stripping illicit gains from wrongdoers).

[14] Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDIS. L.J. 63, 86, 96 (2001). "Criminal law, by its very nature, lags behind technology. . . . By the time a statute is enacted to counter an Internet-related threat, the creative cybercriminal finds new technologies to bypass an essential element of the prohibited act or offense." Id.

[15] "Punitive damages . . . can be individualized to provide a deterrent that will be adequate for each case... Such flexibility can ensure a sufficient award in the case of a rich

cently established "service businesses [that] aggregate large networks of compromised computers, called botnets and rent out portions of their networks for whatever task the client has, perhaps to distribute spam, disable a competitor's website, or infiltrate a firm's network in order to steal intellectual property."[16] Online enablement of identity theft is a boom industry that takes advantage of the low probability of prosecution by public authorities:

> Gifted hackers are now enabling the far larger market of wannabes whose deficient skills would otherwise shut them out of the cybercriminal enterprise system. By creating services for those people, hackers can generate huge profits without actually committing fraud. Gold prospectors may or may not strike it rich, but folks selling pans and pickaxes make a heck of a living either way. What surprises some experts about this new service economy is just how innovative and vibrant it has become. The hackers code at a PhD level. Their solutions to problems are creative and efficient. They respond to market conditions with agility. Their focus on customer service is intense. If this loose collective of criminal hackers were a company, it would be a celebrated case study of success.[17]

Few prosecutors possess the training and resources to even identify, much less punish, these sophisticated cybercriminals. Cybercrimtorts, by incentivizing private attorneys general with specialized computer and legal knowledge, potentially have the deterrent power to constrain theft that crosses national borders at the click of a mouse.[18] Crimtorts have the ability to evolve to meet this type of novel legal challenge that endangers the network of trust that is the glue of societal co-operation, stability, and prosperity.[19]

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defendant and avoid an overburdensome one where the defendant is not as wealthy.... In short, 'although a quantitative formula would be comforting, it would be undesirable.'"*Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (citations omitted).

[16] Debra Wong Yang & Brian M. Hoffstadt, *Countering the Cybercrime Threat*, 43 Am. Crim. L. Rev. 201, 204 (2004).

[17] Scott Berinato, *The Cybercrime Service Economy*, 26, 26 Harv. Bus. R. (Feb. 2007) (reporting that, "Cybercrime services are so sophisticated and powerful that they make one pine for the days of simple website defacements and e-mail viruses with cute embedded messages. The new breed does not just disrupt business; they threaten it by frightening customers and undermining commercial confidence. As the victims of online crime pile up, more and more of them will look for someone to hold responsible. And it won't be the hackers; it will be the brands that customers trusted to protect them.")

[18] "Last year, two Russians created a subscription-based– identity theft service. Rather than steal personal credentials themselves, the two hacked into PCs and then charged clients $1,000 per compromised machine for 30 days of unfettered access. The clients are betting that during the 30-day period (one-billing cycle) victims will bank or otherwise submit personal data online." Id.

[19] Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity (1996) (arguing that only societies that have developed a high degree of social trust can build the large scale corporate enterprises necessary to achieve economic prosperity).

Government regulators are understaffed and often lack the political will to tackle corporate malfeasance on the borderline between criminal law and the law of torts.[20] Prosecutors rarely have either the expertise or the financial resources to prosecute corporate wrongdoers who endanger public health and safety.[21] No criminal prosecution for corporate manslaughter has been successful in any U.S. mass products liability action. The first American prosecution of a manufacturer for manslaughter, a case that arose from three deaths caused by the dangerously defective Ford Pinto, resulted in a defense verdict.[22] The automobile manufacturer was acquitted despite evidence that Ford failed to recall their dangerously defective vehicles.[23] Ford's punishment was the punitive damages awarded in private lawsuits that led to the recall and redesign of an entire line of automobiles.

2.2. Evolving to meet new challenges in a rapidly changing society

As American society becomes increasingly differentiated and multifaceted, its legal system must adapt to mediate relationships between strangers with dissimilar values, backgrounds, and societal interests.[24] As the nineteenth century French sociologist, Emile Durkheim, argued:

> Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus, we

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[20] *See* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 176 (2001) (documenting how tort remedies bridge the gap left by long decades of weak enforcement by federal government agencies).

[21] The criminal prosecutions largely are for regulatory offenses punishing companies for failure to have the proper permits or for filing false reports rather than actually causing the increased risk of death among their workers, customers, or surrounding community. It is easier to prove that a company transported hazardous materials such as PCB transformers without a permit. The criminal standard of "beyond a reasonable doubt" is almost impossible to prove where the causal connection cannot be clearly established and epidemiological or animal studies are not conclusive.

[22] Joseph R. Tybor, *How Ford Won Pinto Trial*, NAT'L L.J., Mar. 24, 1980, at 1 (reporting acquittal of Ford Motor Company in State v. Ford Motor Co., No. 5234 (Ind. Super. Ct. Mar. 13, 1980)).

[23] Michael Rustad & Thomas Koenig, *Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers,* 42 AM. U. L. REV. 1269, 1329 n. 296 (1983) ("first American prosecution of a manufacturer for manslaughter arose from three deaths caused by the ... defective Ford Pinto .... The prosecutor based the case on the company's failure to recall a potentially deadly vehicle when the company had knowledge of a defect in the vehicle").

[24] "[T]he great diversity of the population; the lack of direct communication between various segments; the absence of similar values, attitudes, and standards of conduct; economic inequities, rising expectations and the competitive struggles between groups with different interests have all led to an increasing need for formal mechanisms of social control." STEVEN VARGO, LAW AND SOCIETY (6th ed.) 18 (2000).

> may be sure to find in the law all the essential varieties of social solidarity.[25]

America's rapid rise over the past two centuries has required a co-evolving legal order that facilitates far-reaching technological and economic change while preserving the social fabric.[26]

Throughout Anglo-American history, crimtort remedies have evolved to defend each era's core social norms and values. Most eighteenth American punitive damage verdicts punished and deterred reprehensible conduct between members of the local community.[27] The *TVT Court* noted that early punitive damage awards were reserved for malicious torts such as:

> severe intentional misconduct causing bodily injury, personal affronts, or deprivations of property. Especially noteworthy in the formative precedents were cases evincing a defendant's abuse of social status, wealth or public office, for instance through deliberate injuries inflicted by a master assaulting or killing a servant, by a person of great wealth or rank outrageously mistreating a poor one, and by agents of the state misusing authority.[28]

In the nineteenth century, punitive damages extended to punish railroads that recklessly endangered passengers and other corporate wrongs.[29] In the post-World War II era, punitive damages further stretched to punish and deter grossly negligent medicine, malicious activities by inadequately supervised employees, and dangerously defective products.[30] Contemporary punitive damages cases generally redress organizational harms and penalize hated individuals such as O.J. Simpson, when the criminal law fails to properly punish and deter.

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[25] Emile Durkheim, *The Division of Labour in Society* in Steven Lukes and Andrew Scull (eds.) Durkheim and the Law 34 (1983).

[26] "A legal system attains the end of the legal order .... by recognizing certain of these interests, by defining the limits within which those interests shall be recognized and given effect through legal precepts developed and applied by the judicial .... process according to an authoritative technique and by endeavoring to secure the interests so recognized within defined limits." Roscoe Pound, Social Control Through Law 66 (1997) (originally published in 1941).

[27] Clarence Morris stated that the remedy was utilized as "an orderly legal retaliation . . . to be preferred to a private vengeance, which will disturb the peace of the community . . . ." Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1198 (1931).

[28] *TVT Records v. Island Def Jam Music Group***,** 279 F.Supp.2d 413, 419 (S.D. N.Y. 2003) (citing Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269 (1993)).

[29] Thomas H. Koenig & Michael Rustad, In Defense of Tort Law 40 (2001) (documenting that "[r]ailroads were frequently assessed punitive damages in their capacity as common carriers of passengers").

[30] Id. at 46–59.

The law must evolve at a slower pace than other social institutions in order to minimize its interference with societal synchronization:

> An incessant change of such fundamental social relationships as property, the family, and the forms of government would mean a continuous revolution—economic, social, and political—which would make stable order in the society impossible. These facts explain why the norms of official law tend to "harden" and in this "hardened" form tend to stay unchanged for decades, even centuries, until a profound change in the law-convictions of the members occurs... *Official law, then, always lags somewhat behind unofficial law*.[31]

Legal lag becomes a problem because threats emerge more rapidly than criminal law statutes can be drafted, let alone enforced.[32]

Crimtorts, unlike statutory law, advances from the common law decisions of jurists who face novel social problems that require the stretching of time-honored civil law doctrines. Social conservatives have viewed the common law as an embankment protecting personal liberty and societal stability.[33] Legislators cannot possibly be aware of all of the consequences that may arise from a new statute, [34] while common law remedies are constantly being tested and refined through judicial wisdom and practical experience. Conservative icon Friedrich Hayek extolled the common law for its ability to adjust to changing circumstances, arguing that, "the common law is superior because it builds piecemeal in response to immediate situations, with regular feedback – the supply of new cases responding to previous decisions – and having the capacity to make adjustments."[35]

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[31] Pitirim A. Sorokin, Society, Culture and Personality: THEIR STRUCTURE AND DYNAMICS: a System of General Sociology 82 (1947) (italics in original).

[32] Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. Cal. Interdisc. L.J. 77, 95 (2003 (explaining term "legal lag" through sociologist William Ogburn's concept of cultural lag in which the various institutions of American society do not change at the same rate, therefore various institutions of American society do not change at the same rate, thereby creating a "cultural lag" when one element has not yet accommodated to developments in another.

[33] "Owing to the entrenched, disbursed nature, renewed every day in decisions made in ordinary courts, Dicey considered this common law tradition, taken in its entirety, to be a more secure basis for liberty than the enactment of written constitutions, for it could be overturned only in the unlikely event of a complete revolution." Brian Z. Tamanaha, On the Rule of Law: History, Politics, THEORY 64 (2004) (summarizing the viewpoint of nineteenth century conservative theorist Albert Venn Dicey).

[34] Adam Smith's "invisible hand" is the most famous example of the often-made argument that legislative interference into complex social relationships is likely to produce unanticipated consequences because lawmakers are unlikely to understand all the impacts of their actions. See generally, Robert Merton, *The Unintended Consequences of Purposive Social Action*, in Robert Merton, Sociological Ambiance (1976).

[35] Hayek argues "[t]he efforts of the judge are thus part of that process of adaptation of society to circumstances by which the spontaneous order grows. He assists in the

2.3. Providing financial incentives for private enforcement

Crimtorts, in the form of punitive damages, feature individual litigants, serving as "private attorneys general,"[36] rather than inflexible bureaucrats. The private attorney general's possibility of obtaining a substantial punitive damages verdict is a key incentive for exposing, publicizing, litigating, and punishing patterns and practices of corporate wrongdoing.

The long-established "American rule" of attorneys' fees is that the plaintiff and the defendant are responsible for paying their own lawyers and litigation costs. The unique U.S. institution of the contingency fees, including punitive damages,[37] creates crucial incentives for trial lawyers to pursue complex cases on the frontier of the litigation landscape.[38] Augmented compensation is frequently justified on the ground that the contingency fee system ensures that plaintiffs will be systematically undercompensated because they must pay substantial legal fees out of their award.

Punitive damages are not an undeserved bonus payment, but rather:

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process of selection by upholding those rules that, like those, which have worked well in the past, make it more likely that expectations will match and not conflict.... But even when in the performance of this function he creates new rules, he is not the creator of a new order but a servant of an existing order. And the outcome of his efforts will be a characteristic instance of those "products of human action but not of human design" in which the experience gained by the experimentation of generations embodies more knowledge than can be possessed by anyone." Friedrich .A. Hayek, The Road to Serfdom 133 (1944).

[36] "Private attorney general" is a concept coined by Circuit Judge Jerome Frank in *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943). Judge Frank employed the term to describe "any person, official, or not, who brought a proceeding...even if the sole purpose is to vindicate the public interest. Such persons as authorized are, so to speak, private Attorneys General." Id. at 704. Private attorneys general supplement but do not supplant public law enforcement.

[37] Congress has enacted hundreds of statutes permitting multiple statutory damages on behalf of the public interest. Examples of multiple damages well-known federal consumer protection statutes are the Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Protection Act, and the Magnuson-Moss Consumer Warranty Act. "Nearly every state has a general consumer protection statute, called Unfair and Deceptive Trade Practices Acts (UDTPA) or Little FTC Acts. Many of these statutes enable consumers to file direct actions by awarding double or treble damages, attorneys' fees and costs." Michael L. Rustad, Everyday Consumer Law 15 (2007).

[38] "The contingency is not just whether there will be a positive outcome for the client (often a given since most tort suits settle before trial) but whether that outcome will be large or small. Other contingencies include the amount of time a case will take; expenses; the period of time between the investment of the first hour and payment by the client; and if there is a trial and a positive verdict, whether the money can be collected given the various obstacles that defendants can raise, including bankruptcy." Anthony J. Sebok*, Dispatches from the Tort Wars,* 85 Tex. L. Rev. 1465, 1498 (2007).

> the extra recovery afforded to plaintiffs by punitive damages, rather than constituting a 'windfall,' serves a useful purpose. The potential for recovering an exemplary award provides an incentive for private civil enforcement of important social norms. The Ninth Circuit noted the social function of punitive damages in incentivizing private attorneys general: "So far is this from being a fundamental personal right that it is not truly personal in nature at all. It is rather a public interest."[39]

Crimtort penalties are most valuable when they encourage private attorneys general to uncover and prosecute complex threats to the public interest. Neither the criminal law nor the civil law alone, for example, can adequately protect the public from the growing hazards of chemical, biological, biochemical, or radioactive exposures. Toxic crimtort cases can take years or even decades and generally require the extensive use of costly research by experts. Even with the possibility of obtaining punitive damages, it is extremely difficult to convince a law firm to undertake this litigation because of the intricacy of establishing a causal connection between an injury and a particular toxic exposure. Private enforcement will be crippled if punitive damages are capped at too low a level, although trial courts have the ability to award attorney fees under many private attorneys general statutes.[40] Trial courts have the option to grant attorney's fees in cases of great "societal importance" where the litigation advances important public policies.[41]

2.4. Vindicating societal norms and values

The well-established functions of punitive damages are punishment and deterrence.[42] As the Supreme Court recently noted in *Philip Morris v. Williams*,[43] "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[44] Nearly every state or federal court employs these twin rationales when imposing punitive damages.[45] Crimtort verdicts play a

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[39] *In re Paris Air Crash*, 622 F.2d 1315, 1319–20 (9th Cir. 1980).

[40] *Anderson v. Ethington*, 651 P.2d 923 (Idaho 1982).

[41] Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984).

[42] As Ben Zipursky notes: "The standard answer is that punitive damages are intended to punish a defendant who has engaged in a form of tortuous conduct that is particularly egregious." Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Tex. L. Rev. 105, 105 (2005) (stating that "[c]ourts routinely state that the "punishment" delivered by punitive damages is justified by both deterrent and retributive concerns"). See also, Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1318–20 (1993) (describing punishment and deterrence functions of punitive damages).

[43] *Philip Morris USA*, 127 S. Ct. 1057 (2007).

[44] Id. at 1061.

[45] Richard L. Blatt et al., Punitive Damages: A State-by-State Guide to Law and Practice § 3.2, at 90–97 (2005 ed.) (documenting predominance of punishment and

key role in vindicating social norms by punishing particularly abhorrent misconduct.

A society maintains and reinforces its sense of unity and cultural integrity through the establishment of social boundaries of tolerable behavior.[46] Crimtorts develop and safeguard social synchronization by teaching the general population about society's norms and the penalties for violating its rules of proper behavior. Elite deviance that goes unpunished creates public cynicism, alienation, and disrespect for the law.

Crimtort punishments often receive enormous publicity, teaching the defendant and the wider society the limits of acceptable behavior:

> [P]unitive damages serve a strong educative function for both the individual offender and society in general, in two significant respects. First, punitive damages certify the existence of a particular legally protected right or interest belonging to the plaintiff, on the one hand, and a correlative legal duty on the part of the defendant to respect that interest, on the other. Second, punitive damages proclaim the importance that the law attaches to the plaintiff's particular invaded right, and the corresponding condemnation that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant.[47]

The crimtort remedy of punitive damages, from this perspective, accomplishes an educative purpose by teaching and reaffirming America's core values. As the Maine Supreme Court noted: "[p]unitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice."[48] Crimtort remedies are not anomalies; they are a functional necessity for flexibly teaching and reinforcing societal mores.

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deterrence rationale). Two states, Connecticut and Michigan, conceptualize punitive damages as fulfilling a purely compensatory function. Connecticut's approach is to award punitive damages to defray the legal expenses of bringing the lawsuit, whereas Michigan's remedy redresses non-economic damages. Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1318 (1993).

[46] Kai Erikson, Wayward Puritans 10 (1966) (explaining that "[w]hen one describes any system as boundary maintaining, one is saying that it controls the fluctuation of its constituent parts so that the whole retains a limited range of activity, a given pattern of constancy and stability, within the larger environment.")

[47] David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 375 (1994) (discussing the multiple functions and aims of punitive damages).

[48] *Tuttle v. Raymond*, 494 A.2d 1353, 1355 (Me. 1985).

3. EXAMPLES OF EMERGING CRIMTORTS FOR A GLOBALIZING WORLD

American tort law is just beginning to address the swiftly escalating problem of hazardous consumer products manufactured by Chinese companies, which do not follow U.S. safety standards. Recently, a Massachusetts jury awarded a $3.35 million[49] to a 4-year-old American boy whose hand was mangled in a Chinese department store escalator malfunction.[50] The plaintiff's attorney was able to hold Otis liable for the boy's injuries because the U.S. company was a joint venturer with the Chinese firm.[51] Otis' elevators in other countries had a "Guardian Skirt Panel" that prevented the "possibility of entrapment."[52] The plaintiff's attorney declared; "Business and travel is global, and the law must recognize these changes—and it does."[53] This cross-border litigation illustrates the ability of tort law to evolve rapidly to address an emergent social problem arising out of America's globalizing economy.

3.1. Crimtorts to protect society from defective imports

The question of how to protect the consuming public from dangerously defective imported products will become more urgent as an increasingly higher percentage of goods travel across international boarders. Already, hardly a week goes by[54] without another report of a consumer recall of a product originating in China.[55] Early in 2007, an estimated 39,000

[49] The compensatory award included special damages of $200,000. Noah Schaffer, *Escalator Accident in China Leads to $3.35 M Verdict Here: Worcester Jury Ties Boy's Hand Injury to Co. Based in U.*S. Massachusetts Lawyers Weekly (Jan. 7, 2008) at 39. The remainder of the award was non-economic damages. Id. Massachusetts has never recognized the common law of punitive damages but if the plaintiff had died, the Massachusetts Wrongful Death Statute would have permitted the recovery of punitive damages if a jury had found Otis had been reckless in not protecting the public after being placed on notice that the elevator repeatedly malfunctioned.

[50] Id. at 1.

[51] Id.

[52] Id. at 39.

[53] Id. at 1.

[54] *Who Sucks? We'll Tell You, Dangerous Made-In-China Products: 2007* (providing a time-line of Chinese important product defects during the first half of 2007). http://www.who-sucks.com/business/made-in-china–2007-danger-timeline (last visited Feb. 1, 2008).

[55] "The number of Chinese-made products that are being recalled in the U.S. has doubled in the last five years, helping to drive the total number of recalls in this country to an annual record of 467 last year. Chinese-made products account for 60 percent of all consumer-product recalls, and 100 percent of all 24 kinds of toys recalled so far this year. Even China's own government auditing agency found that 20 percent of the toys made and sold in China had safety hazards." Consumer Reports On Safety, *Can You Trust Chi-*

U.S. household pets died because of dangerous chemicals in pet food manufactured in China.[56] A New York company recently recalled an imported children's snack food from China that caused "six salmonella cases, mostly in toddlers in nineteen states."[57] American retailers recalled millions of Chinese toys during the 2007 Christmas season because of "dangerous levels of lead used in cheap paints." [58] Mattel and Fisher-Price recalled Chinese-made toys: "Dora the Explorer was the first mascot for the invasion of lead-coated toys, but there were others" including Thomas the Tank, which also delivered lead-based paint to the mouths of American infants.[59]

Neither Chinese exporters nor their American trading partners set out to injure individual consumers. The gross nonfeasance of U.S. companies lies in their failure to conduct the basic due diligence necessary to insure that their Chinese joint venturers follow minimum safety and testing standards. The toy safety crisis is a suitable target for crimtort prosecution because of the enforcement shortfall of regulatory and criminal law institutions. The national toy companies' failure to supervise Chinese suppliers goes to the heart of an expanding threat to children's health and safety. Multi-national corporations were reckless in not preventing "their factories in China from slipping in lead to make colors bright or plastic more stable."[60]

Private litigants are filing crimtort lawsuits in an attempt to hold American importers liable for failing to monitor the safety of the products that they introduce into the stream of commerce.[61] American corporations

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nese-Made Products? June 27, 2007 http://blogs.consumerreports.org/safety/2007/06/can-you-trust-c.html, (last visited Jan. 21, 2008).

[56] World.Net Daily, *China's Toy Sweatshop Pays 36 Cents an Hour: Christmas Product Safety Recalls Continue Along With Import Mania*, (Jan. 6, 2008)

http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=59309.

[57] Paul A. Dame, *Recent Trends in Food and Product Defect Litigation*, Wiley Rein LLP. (Sept. 2007) (citing San Francisco Chronicle report) (last visited Jan. 8, 2008)

http://www.wileyrein.com/publication.cfm?publication_id=13303.

[58] Id.

[59] Curtiss Gibson, *China: A Scapegoat for Unsafe Toys*, The Oracle (University of South Florida) (Nov. 7, 2007).

[60] Michael D. Sorkin, *Which Toys are Safe? Maybe None*. St. Louis Post-Dispatch (Dec. 9, 2007) at A1.

[61] "[A] number of lawsuits have been filed against importers of Chinese products. Menu Foods, the Ontario pet food maker whose Chinese-sourced product contained melamine, faces more than 100 class action lawsuits. A proposed class action has been filed against the distributor of various Thomas & Friends™ wooden railway toys. As long as companies continue to import Chinese goods, it is inevitable that more class actions will be filed." *Chinese Defective Products*, (last visited Jan. 21, 2008) http://www.lawyersandsettlements.com/case/chinese-defective-products.html, (last visited Jan. 21, 2008).

charged with complicity in the Chinese importing scandals will likely mount a "scorched earth" campaign against the first wave of consumer lawsuits because the potential liability is so vast:

> There are billions of dollars in U.S. investment in China, rich contracts between U.S. corporations and Chinese contractors to produce goods for export, and the health and safety of millions of consumers in the balance.[62]

Crimtorts, not the criminal law or regulations, give ordinary citizens the muscle to expose the ways in which the pursuit of profits endangers the larger society.

The consuming public cannot count on the Consumer Product Safety Commission, the Food and Drug Administration or other government agencies for protection from dangerously defective products imported from China.[63] Imports of consumer products have quadrupled since 1980, yet Congress cut the CPSC budget by a third.[64] The CPSC has only fifty percent of the employees it had at its formation. "Currently, only fifteen inspectors are policing the hundreds of points of entry for imported toys; 80 percent of all toys in the U.S. are imported from China."[65] Regulators in China will not safeguard American consumers because "China has no safety standards in its manufacturing, we can't inspect it at a higher rate because of trade rules."[66] The law of products liability in China is as underdeveloped as its manufacturing safety standards.[67] Chi-

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[62] Paul A. Dame, *Recent Trends in Food and Product Defect Litigation*, Wiley Rein LLP. (Sept. 2007) (citing San Francisco Chronicle report) http:// www.wileyrein.com/publication.cfm?publication id=13303 (last visited Jan. 8, 2008).

[63] Joshua Kurlantzick, The Chinavores Dilemna, Mother Jones, (Sept/Oct 2008) (Describing the failure of the Food and Drug Administration and other branches of the federal government to protect U.S. consumers from dangerous Chinese imports). http://www.motherjones.com/news/feature/2008/09/exit-strategy-the-chinavores-dilemma.html (last visited Nov. 15, 2008).

[64] Public Citizen, NEW REPORT, SANTA'S SWEATSHOP: MADE IN D.C. WITH BAD TRADE POLICY (Dec. 19, 2007) http://www.citizen.org/pressroom/release.cfm?ID=2576 (last visited Dec. 28, 2007).

[65] *Rep. Cummings Holds Press Conference on Toxic Toys, Congressman Calls on Mattel to Stop Using Lead, Discusses New Legislation to Protect Children,* CONGRESSIONAL DOCUMENTS AND PUBLICATIONS *(*Dec. 20, 2007) (available on LEXIS/NEXIS curnws library).

[66] Lou Dobbs, *Toxic Toys Still on Shelves,* LOU DOBBS' THIS WEEK (Dec. 23, 2007) (quoting consumer advocate Kitty Pilgrim).

[67] George C. Conk, A *New Tort Code Emerges in China: An Introduction to the Discussion with a Translation of Chapter 8—Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People's Republic of China*, 30 FORDHAM INT'L L.J. 935, 953 (2007) (noting that Chinese officials have an interest in product liability but have not yet addressed other legal infrastructure).

na's civil code gives consumer's rights that are expressed as aspirational principles, but no concrete remedies.[68]

No criminal statute makes American corporations or their officers liable for failing to conduct due diligence in overseas plants. Criminal defendants are entitled to advance notice of what specific behavior is subject to prosecution. Crimtorts supplement anemic public enforcement by imposing punitive damages against reckless organizational activities that threaten the larger public.[69] Crimtort remedies assessed against U.S. companies that enable Chinese manufacturers to endanger the consuming public are necessary to administer a legal spanking that demonstrates that "tort does not pay."[70]

Crimtort lawsuits initiated by private citizens will be the only meaningful way to make U.S. companies' answerable for their reckless outsourcing that endangers millions of consumers. Punitive damages optimally punish and deter wrongdoers where the probability of detection is very low and the probability of harm is very high. The price of wrongdoing must significantly exceed the expected gain in order not to provide the malefactor with a competitive advantage. The message of punitive damages is "teaching the defendant not to do it again, and of deterring others from following the defendant's example."[71]

The current China recall disaster will potentially bankrupt some American importers, who may find themselves saddled with products li-

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[68] In spite of these strong provisions protecting consumers, the CRIL's principal weakness lies in its failure to address the legal consequences should a business operator fail to comply with its obligations. Brooke Overby, *Consumer Protection in China After Accession to the WTO*, 33 Syracuse J. Int'l L. & Com. 347, 362 (2006)(contending that Chinese law codifies protections without providing consumer remedies).

[69] "[T]he criminal system cannot always adequately fulfill its role as an enforcer of society's rules." *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985). Crime in the streets is the target of criminal prosecution not crimes in the suites. When prosecutors direct their scarce resources to white-collar crime, they are far more likely to prosecute environmental, antitrust, fraud, campaign finance, tax evasion or boycotts than cases involving product or workplace safety. See, Russell Mohibker, *The Top Corporate Criminals of the Decade*, Corporate Crime Reporter (last visited Jan. 1, 2008) http://www.corporatecrimereporter.com/top100.html (documenting that the hundred most important corporate crime prosecutions fell into the following categories: "The 100 corporate criminals fell into 14 categories of crime: Environmental (38), antitrust (20), fraud (13), campaign finance (7), food and drug (6), financial crimes (4), false statements (3), illegal exports (3), illegal boycott (1), worker death (1), bribery (1), obstruction of justice (1) public corruption (1), and tax evasion (1)").

[70] *Rookes v. Barnard*, 1964 A.C. 1129, 1129 (H.L.).

[71] See also, Robert Keeton et al., Prosser and Keeton on the Law of Torts at 9 § 2 (5th ed. 1984). (observing that "[Punitive] damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example.")

ability.[72] The recent surge in dangerously defective products recalls results from "a long-term corporate strategy of seeking ever-cheaper wages and raw materials offshore while avoiding oversight and legal liability."[73] American importers' failure to properly monitor their supply chains enables foreign bad actors to intentionally violate U.S. law, making millions of dollars in profits at the expense of the U.S. consuming public. To date, no corporation or officer has been charged with any crime despite the widespread endangerment caused by cheap Chinese imports. Civil punishment is especially appropriate when a company is undeterred by the threat of fixed criminal fines and penalties. Crimtorts send a message to even the wealthiest organizations that they are not above the law.

3.2. Crimtorts to redress societal harm from reckless private armies

Blackwater USA is a multi-billion dollar complex web of companies that provides armed mercenary personnel[74] and security services to the U.S. State Department and other government agencies.[75] The United States government has paid Blackwater and its associated companies

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[72] "More recently an importer of defective automobile tires manufactured in China has stated it will use its remaining assets to recall as many tires as possible, and then go out of business." CORP. COMPL. SERIES: PROD. LIAB. § 3:8 (2007) (available in Westlaw's TP-ALL Library).

[73] KOENIG & RUSTAD, IN DEFENSE OF TORT LAW, Id. at 20–23.

[74] Blackwater Worldwide was founded in 1997 by Erik Prince, a former Navy SEAL. *See* Blackwater USA, Company profile (last visited Jan. 10, 2008 http://blackwaterusa.com (Select company profile). Moyock, NC is home to Blackwater headquarters, as well as its' 7,000 acre training facility. Id. In recent years, primarily during the Bush administration, Blackwater has grown to become one of the largest private military service providers in the world. See Staff of H.R. Comm. On Govt. Oversight and Reform, 110th Cong., Memo on Additional Information about Blackwater USA at 3 (Text in http://oversight.house.gov. Select view more stories. Select October 1, 2007) The company offers a wide range of services including personal security, military training, and its own line of armored vehicles, to U.S. Government and non-U.S. government affiliates, though the former has proven most lucrative. Id. Blackwater's current contract with the State Department known as Worldwide Personal Protective Services II (WPPS II) has a maximum value $1.2 billion per contractor over a five-year period. Id. at 4–5. Triple Canopy and DynCorp, two other private military companies, are signatories to WPPS II. Id. at 4; See also, Complaint in *Albazzaz v. Blackwater Worldwide*, Case No. 1:07-cv–02273-RBW (U.S. District Court, District of Columbia, filed Dec. 19, 2007) (last visited Jan. 8, 2008).

[75] The State Department requires specific training experience, depending on position, from each of its independent contractors. *Private Security Contracting in Iraq and Afghanistan: Statement before the H.R. Comm. On Govt. Oversight and Reform*, 110th Cong. at 4–5 (statement of Ambassador Richard J. Griffin, Assistant Secretary of State for Diplomatic Security). WPPS II was initiated in 2005 to provide Protective Security Specialist, or bodyguard, details throughout Iraq. U.S. Congressional Research Service. *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (RL32419, at 5; June 21, 2007) http://www.fas.org. (posting Select Government Secrecy. Select Con-

nearly a billion dollars since the invasion of Iraq.[76] The crimtort paradigm of public enforcement through private litigation[77] is being tested in litigation recently filed against Blackwater and its affiliated companies for using excessive deadly force against Iraqi civilians. Lawyers for the Center for Constitutional Rights filed a lawsuit in D.C. District Court under the Alien Tort Claims Act.

These alleged incidents involve not only severe injuries to the individual plaintiffs but also substantial harm to America's standing abroad and the undermining of U.S. foreign policy objectives.[78] The U.S. military, the "State Department, and the nation of Iraq"[79] have been victimized if the plaintiff's allegations are true. If successful, the Blackwater lawsuit will serve a broader societal purpose by encouraging other private military forces to renounce lawlessness.

Blackwater's attorneys claim that none of their entities or employees is subject to either Iraqi law or its courts.[80] American criminal prosecutors are powerless to take legal action against private employees of the U.S. military.

This punitive damages lawsuit has the potential to fill this enforcement gap by allowing the plaintiffs to conduct discovery on other possible Blackwater misconduct to determine whether there is a pattern of reckless behavior. If this case goes to trial, the public may well benefit from greater information about the role of military contractors in Iraq; a group which has been characterized as the "coalition of the billing."

The U.S. Supreme Court's downsizing of punitive damages over the past two decades marginalizes the remedy's capacity to address social problems arising out of this type of organizational misconduct.[81] The Court has held that the due process clause of the U.S. Constitution forbids

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gressional Research Service Reports. Select General National Security Topics) (last visited Jan. 10, 2008).

[76] Michael A. DeMayo, *North Carolina Private Security Company Blackwater is Sued for Wrongful Death, Personal Injury and War Crimes,* North Carolina Injury Lawyer Blog

http://www.northcarolinainjurylawyerblog.com/2007/12/north_carolinabased_private_se.html (last visited Dec. 28, 2007).

[77] Id.

[78] Id. (describing the Abu Grahib incident as demonstrating "the power individual contractors wield in terms of influencing global perception of American foreign policy and values in times of war. More importantly, it highlighted a lack of accountability, oversight and administrative mechanisms for bringing civilian contractors who accompany the military overseas to justice").

[79] Id.

[80] Carmel Sileo, *Suit Against Blackwater*, Id. at 19.

[81] The punishment and deterrence function of punitive damages is a well-established example of a tort remedy serving a public purpose. See W. Page Keeton, Prosser

juries from awarding punitive damages designed to punish a corporate defendant for harming non-parties in other cases not directly involved in the lawsuit.[82] This ruling weakens the ability of punitive damages to evolve to meet the legal challenges created by globalization.

4. CONCLUSION

The crimtort paradigm is an attempt to influence the path of the law by emphasizing the need for robust tort remedies that punish and deter organizational misbehavior. Private litigants play a vital societal role in governance when public regulators or prosecutors lack the will, the expertise or the financial resources to control corporate wrongdoing. Plaintiffs' lawyers representing consumers injured by lead-based toys from China will require broad and expensive discovery and considerable legal and cultural proficiency to stand any chance of winning their cases.

The new millennium will require groundbreaking solutions to the growing problems of globalized supply chains, international human rights violations, online oppression, environmental degradation, and negligent enablement of third party crimes. Throughout its long history, punitive damages have served as a private law remedy that is flexible enough to adapt to new forms of wrongdoing that are not adequately punished and deterred by the criminal law. The price of wrongdoing must significantly exceed the expected gain in order not to provide the wrongdoer with a competitive advantage.

& KEETON ON THE LAW OF TORTS 9 (5th ed. 1984) (describing punitive damages as an instance where "the ideas underlying the criminal law have invaded the field of torts").

[82] Id. at 1063.

David A. Westbrook, JD, BA

Professor and Floyd H. and Hilda L. Hurst Faculty Scholar,
University at Buffalo Law School, State University of New York

THEORIZING THE DIFFUSION OF LAW IN AN AGE OF GLOBALIZATION: CONCEPTUAL DIFFICULTIES, UNSTABLE IMAGINATIONS, AND THE EFFORT TO THINK GRACEFULLY NONETHELESS*

Coming to grips with the diffusion of law in an age of globalization requires multiple, rather incommensurate, imaginations of authority. In trying to understand present situations, and heroically presuming the adequacy of raw knowledge, the legal theorist must think from more than one stance, must adopt multiple imaginations. So most of us shift from one imagination to another, trying to make sense of the matter at hand. If we were to take the admittedly risky step of acknowledging that our thinking is polyphonic, that we dance among our incommensurate imaginations of the diffusion of law, and of globalization more generally, then the criterion of approval for social theory would not be descriptive completeness or even impeccable demonstration. Instead we should strive for a certain human gracefulness of response to the world in which we find ourselves.

Key words: *Diffusion of law. – Globalization. – Modernization. – Modern authority. – Despatialization. – Instability of theory.*

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1. INTRODUCTION

The thoughts that comprise this paper were first presented in a keynote address to a rather large conference. For better or worse, the text retains the amplitude and generous intentions – at the cost of a certain lack of rigor – befitting such occasions, where many different folks are to be welcomed. Such occasions have their pleasures for the speaker, too, who is given the privilege of being a bit more speculative, even provocative, than is usually expected in a scholarly setting. Needless to say, I seized the opportunity to speculate and provoke with enthusiasm, that is, I hope this paper is suggestive, because it makes no pretense of being demonstrative.

More specifically, this paper attempts to make some progress toward three interrelated intellectual objectives. First, substantively, I want to provide an introductory account of some of the ways the diffusion of law, or more generally, social authority in an age of globalization, may be rethought. Second, I hope the intellectual approach – "method" would be too strong a word – used here will be sturdy enough to aid more focused analyses. Third, I want to say a little bit about the practice of legal theory.

2. DIFFUSION OF LAW AND GLOBALIZATION

The phrase "diffusion of law" sounds most naturally in comparative law. Understanding what diffusion means and how it happens, what changes and what stays the same, is perhaps the central problem in the field.[1] Instead of plunging into the debates surrounding the diffusion of law as construed by eminent comparative law scholars, however, let me begin by considering another word, globalization. Globalization is a very problematic word, and gives rise to much bad theorizing.[2] Yet globalization cannot be avoided because the diffusion of law at the present time cannot be understood in isolation from those social processes discussed under the rubric of globalization. To start simply, in a globalizing world,

[1] See William Twining, Social Science and Diffusion of Law, 32 J.L. & Soc. 203, 204 (2005) (citing authorities who treat diffusion of law as central) [hereinafter Twining, Social Science]; see also William Twining, Diffusion of Law: A Global Perspective 49 J. Legal Pluralism 1 (2004) (providing an excellent overview and critique of the legal scholarship on the subject) [hereinafter Twining, Diffusion of Law].

[2] I am a theorist of globalization, so this is quite a problem for me. In my own defense, in my book *City of Gold: An Apology for Global Capitalism in a Time of Discontent* (Routledge 2003) I generally eschew the word "globalization," in order to focus on supranational capitalism, a topic quite broad enough, and surely a central aspect of the present transformation.

we might expect to find quite a lot of diffusion, both of law and other things.

The words "diffusion" and "globalization" share something important. In ordinary usage, "diffusion" means the spread of one liquid throughout a second liquid, thereby transforming the character of both. Imagine cream poured into coffee in one of those clear glass mugs that were so popular a few years back: where there had been two substances, there is a wonderful swirling and billowing, but soon there is one glass, full of a uniform liquid. The phrase "diffusion of law" suggests that laws similarly will lose their identities and be folded into an amorphous mass, just like the coffee and cream. Diffusion suggests the fear of, to use another milky word, homogenization; the fear that our legal system, and by implication our culture, will lose whatever it is that makes it special. Not too deeply buried within this anxiety are worries that ethnicity, race, power, home, and the seat of our beliefs will be obliterated by, or at least subordinated to, a modern global culture.[3]

Yet the words "diffusion" and "globalization" also connote worldviews that are fundamentally at odds. As already noted, diffusion sounds in comparison, even if it engenders a lurking fear of homogenization. But if globalization is real, and is in fact bringing hitherto discrete peoples and their laws together into a single social and legal context, then this fear is actualized, and we must wonder to what extent it makes sense to speak of things that are in some important way different and worth studying for their difference.[4] Globalization threatens to make various intellectual enterprises superfluous. Consider the situation of contemporary cultural anthropology, trying to figure out what to do with ethnography after the islands get satellite TV,[5] or whether it makes sense to speak of international law in any sense other than the law of what many feel to be

[3] Such losses, e.g., of our sense of ethnicity, may not be altogether bad. See Kwame Anthony Appiah, Cosmopolitanism: Ethics in a World of Strangers 105–07 (2006) ("If we want to preserve a wide range of human conditions because it allows free people the best chance to make their own lives, there is no place for the enforcement of diversity by trapping people within a kind of difference they long to escape."). For present purposes, however, I will bracket such possibilities and treat the loss of cultural particularity in the usual if simplified way, as a bad thing.

[4] Niklas Luhmann made the point almost twenty-five years ago, declaring that once communication had created a global horizon of discourse, and in that sense society, then "a plurality of possible worlds has become impossible." Niklas Luhmann, World Society as a Social System, in Essays on Self-Reference 175, 178 (1990), quoted in Haun Saussy, Great Walls of Discourse, and Other Adventures in Cultural China 15 (2001).

[5] See, e.g., Douglas R. Holmes & George E. Marcus, Cultures of Expertise and the Management of Globalization: Towards the Refunctioning of Ethnography, in Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems 235 (Aihwa Ong & Stephen J. Collier eds., 2005); see also George Marcus, Beyond Malinowski and After Writing Culture: On the Future of Cultural Anthropology and the Predicament of Ethnography, 13 Austl. J. Anthropology 191, 191–99 (2002); David A. Westbrook, Navi-

a hegemonic global system. If the diffusion of law is basically a euphemism for the extension, refinement, and entrenchment of a global system, then comparative law might well be over.[6]

One response to such a totalizing idea of globalization is denial. Comparatists tend to be somewhat antagonistic to talk of globalization. Haun Saussy, a literary thinker, has observed that

> "When [comparatists] get together to talk about globalization, you can expect to hear about difference, relation, confluence, and hybridity. If they recognize the existence of a global modern culture they are likely to want to accentuate the particular inflections taken on by that culture [...] for without particularity what is left to compare?"[7]

The problem with denial as a response to globalization is that it ends discussion before much understanding has been reached. Although much talk of globalization is overheated, and some skepticism is in order, social life worldwide does seem to be changing in some important ways, even transforming. In particular, at the present time, laws influence one another in many ways. Something more than denial, or its cousins, idiosyncratic typology and moral hygiene, is required for analysis.

On the other hand, and as has already been suggested, a vague conception of "globalization" does not, by itself, do much intellectual work. To say "the world is flat" or something similar won't get us very far.[8] Locality still matters. (Trust me on this point, I teach at Buffalo.[9]) Indeed, culture, which globalization sometimes seems about to abolish, very obviously still matters. More interestingly still, while we often ob-

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gators of the Contemporary: Ethnography as Enterprise and Adventure in the Cross Currents of Present Situations (forthcoming 2008).

[6] While I think the text is correct at its level, Pierre Legrand has argued that, at a yet deeper level, the mainstream of comparative law scholarship is oriented toward sameness rather than difference. Thus we might see mainstream comparative law as, in its deepest desires, in cahoots with globalization. See Pierre Legrand, The Same and the Different, in Comparative Legal Studies: Traditions and Transitions 240 (Pierre Legrand & Roderick Munday eds., 2003). I simply do not feel myself enough of an insider to generalize about and comment on the proclivities of the discipline at this level of nuance.

[7] Haun Saussy, In the Workshop of Equivalences: Seventeenth-Century Globalism and the Comparative Pursuit(May22,1999),http://www.stanford.edu/dept/HPS/RethinkingSciCiv/etexts/Saussy/Workshop.html (preliminary draft, cited with permission of author).

[8] Thomas L. Friedman, The World is Flat: A Brief History of the Twenty-First Century (2005). This dismissal may be a bit unfair on my part, and is certainly hasty. Simplification is part of speech; it is difficult to be a journalist; and Friedman often has something to say. At the same time, it is clear that the tropes of journalism have done much to "flatten" the public discourses that they simultaneously enable.

[9] As US readers are no doubt aware, the fortunes of Buffalo, New York, where my university is located, have been in steep decline for decades. Recent census data indicates that Buffalo is the second poorest major U.S. city.

serve homogenization these days, and it would be foolish to claim otherwise, or to minimize the force of such process, at the same time and almost as obviously, we may observe the emergence of new and important differences among people, and the emergence of such differences runs counter to anxieties, now clichéd, about homogenization.

3. LOCAL AND GLOBAL PERSPECTIVES – REACHING THE MIDDLE GROUND

So how to begin thinking about such contradictions, about this tangled thicket that has sprung up in the social garden that we thought we understood? Such thinking was a delusion, no doubt, but there has been a palpable sense of intellectual dislocation over the last long decade or so, a sense of losing rather than gaining understanding. What does comparison have to offer here?

In response, let me suggest that the challenge for contemporary theorists of the diffusion of law is to pursue their inquiries from a middle vantage point. The intellectual challenge is to embrace neither an insistently local perspective that denies globalization altogether, nor a "globalist" perspective from which the local is dismissed as irrelevant or vanishing. Of course, this is easier said than done. How is this middle ground to be achieved? How, as a matter of intellectual practice, do we theorists go about adopting a stance from which opposites— the local and the global—can both be understood? As the annoying bumper sticker "think globally, act locally" unintentionally suggests, it is difficult for people to think on two levels at once.[10] And, of course, even two levels is an oversimplification. There are more than two levels, as William Twining correctly argues.[11] The regional, national, provincial and even individual still matter, and one could say things about categories of the social, such as the ethnic, the racial, the tribal, the corporate ... This ship may not leave port.

If our paralysis is conceptual – it is hard to know where to start thinking – then perhaps analysis can clear away some of the underbrush. The phrase "diffusion of law" evokes an essentially spatial imagination of social process—the term tacitly imports a geography, in which law is somehow transported from one place to another. Again, I have no wish to enter the comparative law tournament; for my purposes here, it suffices to

[10] Which is not to say the bumper sticker is inaccurate: its righteous thoughtlessness immediately reminds one of a great deal of local politics played out before town boards, in faculty meetings, or for that matter, on bumper stickers.

[11] William Twining, Diffusion and Globalization Discourse, 47 Harv. Int'l. L.J. 507, 508 (2006).

note that the arguments for transplants, and the arguments against, on the basis of local culture, are intensely geographical. And globalization, another essentially spatial image, is usually understood to be the negation of geography. In suggesting the importance and irrelevance of geography, our very language presents substantial conceptual obstacles.[12]

If language, rhetoric, is the problem, then a different rhetoric might produce more fruitful lines of thought; greater care with our imagery may aid our imagination. So what I am going to sketch in this talk is not a descriptive analytic of how legal change extends through the world, but, instead, a more phenomenological account of how we might go about thinking of such changes. Specifically, what I intend to sketch, and what I hope the panels will continue to explore, is what happens if we understand instances of what we term the "diffusion of law" as instances of the modernization of authority. If we do so, I believe that many of the comparative law problems with "globalization" will fall away, and we even may begin to think through aspects of the current situation that the language of diffusion and globalization obscures completely.

4. DIFFUSION AND MODERNIZATION

Let us start with the proposition that diffusion is a modernizing process. Any instance of the "diffusion of law" is a change in the law.[13] Let me be clear: I am here using the word "modern" in a very simple sense, to mean the experience of the new. Modern can mean many other things, and some of them are relevant to this talk, such as a system of

[12] The idea that a contradiction (geography is/is not important) is problematic presumes, along with most scholarship, that it is important to be consistent. This presumption is put under some pressure by this talk, i.e., this talk is in some sense an effort to imagine a scholarship less bound to the virtue of consistency.

[13] For the purposes of presentation, especially oral, I have chosen not to spell out the cuts and biases of approaching diffusion through a relatively temporal and subjective description of authority, as opposed to traditional imagery of comparative law, with its relatively spatial description of social phenomena objectively understood, i.e., as things that can be shipped, transplanted, or otherwise moved. My shift of focus from a rei[a]ed notion of law, usually expressed in legal texts, to the subject of the law mirrors a movement in law and society discourse, from questions about "the effect" of "the law" on "society" to questions about the legal consciousness of actors within the society. See Susan S. Silbey, After Legal Consciousness, 1 Ann. Rev. L. & Soc. Sci. 323, 327 (2005). And the move to the subject invites the sort of constructed "space" that Doug Holmes and George Marcus are attempting to delineate with their highly situated ethnographies, in which the "culture" that traditional ethnography could presume is conceptualized through the ethnographic encounter, worlds constructed on the [o]y by interlocutors moving through ill-articulated contemporary spaces. See Holmes & Marcus, supra note 5; see also Douglas R. Holmes, George E. Marcus & David A. Westbrook, Intellectual Vocations in the City of Gold, 29 Pol. & Legal Anthropology Rev. 154 (2006).

ideas, a historical period, or a political or cultural sensibility, but the focus here is on the simple idea of replacing an old way of doing things with a new way of doing things. In this sense of the word, "the modern" can be experienced in almost any time or place. Any time in which we can speak, in the passive voice, of law being diffused, we may also say, conversely and more actively, the people adopted new laws. We may not be able to specify precisely when the law was adopted; we might not even be sure exactly what counts as "law." Exactly where the law stops is a mystery, as anyone familiar with securities regulation or Kafka's parable of gatekeepers guarding gatekeepers would concede. However, the fact that law is such a slippery idea, impossible to specify or bound satisfactorily, does not preclude our knowing that people have changed their law.

Moreover, if "diffusion" is to mean anything, the new law must be felt to be somehow from elsewhere. There need be no formal "reception," but if we are speaking of the diffusion of law, the new law cannot be considered purely indigenous or familiar. (Indeed, our reader of Kafka may wonder if "familiar law" is not impossibility.) A sense of foreign origins is also central to the experience of the modern. In societies whose members regard themselves as at the forefront of historical change, specifically "modern" experiences are generally understood to be foreign, alienating, strange, and unfamiliar. And for developing countries, the modern is explicitly not only next in time, but already occurring somewhere else, in a more developed country. So while the diffusion of law evokes a spatial conception, albeit one involving change and therefore time, modernization is primarily a temporal concept, albeit one with weak spatial associations. *Diffusion and modernization can thus be understood as reciprocal descriptions of the same phenomena.*

Why should this matter to comparative law? Because its spatial associations are relatively weak, the word "modern" implies no specific geography, either local or global. A social development described as modern might be global in scope, or it might take place on one or more smaller stages. The idea of the modern thus allows us to think further, while bracketing geographical questions; we may discuss legal change without being forced, by the terms we use, to decide *ex ante* how "big" the change we are discussing is. "Modern" promises to facilitate our thinking, precisely because it is vague enough to get us past a conceptual obstacle.

Delivering on that promise, of course, requires us to specify "modern" at some point. Otherwise, we have simply asserted that both the diffusion of law and globalization involve newness, and so they are in that regard alike, or overlapping, or something. If that is all we do, we have not moved the ball much beyond the "world is flat" stage. But this is much less of a problem than it might first appear to be. There is no need

for comparative law scholars to attempt to consider "the modern" in the abstract, or in its totality (in fact, I would counsel against the attempt). Comparative law scholars consider the modernization of actual laws, for example, of corporate governance, that is, we tend to confront "the modern" in quite particular situations. Therefore, the instantiation of "the modern" with which we are concerned, in doing comparative law, is usually already quite specified.

In keeping with the shift in emphasis from the objective (the law was diffused) to the subjective (we adopted new law) that I suggested above, I would like to use the concept of authority to organize our thinking about the modernization of law. From this perspective, the legal theorist should imagine authority either by conceptualizing the law binding upon herself, the "felt necessities" of an era, or through an act of sympathy, by imagining herself in the position of one obedient to the law in question.[14] So, to restate the challenge confronting comparative law scholars as they seek to establish a middle ground between the local and the global: the question of the diffusion of law, understood from the position of the subject of the new law as a modernizing and vaguely alien process, can be rephrased as an inquiry into what gives the new and foreign established and local authority. Why were the old ways not good enough? Why were the new ways, despite their foreign and perhaps even global character, adopted?

Acknowledging the fact of modernization thus shades into the normative act of reevaluating authority; the modern is a normative concept. Adopting a law entails a claim that the new law is right for a collectivity as it moves forward in history. The old ways will not do precisely because the modern claims to be required for progress; dramatically phrased, the modern claims the authority of history itself. The authority of the modern is thus specified, not just as a matter of intellectual propriety, but subjectively, ethnographically or even psychologically. Anytime a legal subject acknowledges a new and heretofore somewhat foreign law as her law, she adopts a perspective toward the modern. To acknowledge authority, to establish a relationship of obedience, requires a conception of what one is obeying.

This is uncomfortable. If we understand that the citizen changes her understanding of what authority is binding upon her, and thus her laws, then she has simultaneously, if imperceptibly, redefined what it means for her to be a citizen. The normative thus shades into the politi-

[14] In what I suppose is my sole publication that might be described as an exercise in comparative law, I criticized what is pejoratively called the "Orientalist" tradition of Islamic law scholarship done in the West for precisely this lack of imaginative sympathy. See David A. Westbrook, Islamic International Law and Public International Law, 33 Va. J. Int'l L. 819, 892–93 (1993).

cally existential. If our ways were inadequate and must be changed, who were we? What are we, as a polity and so as citizens, becoming? These are especially tough questions for Americans these days.

In the American legal academy, it is common enough to answer questions about what legislatures and other lawgivers do, at least when acting in good faith, by reference to policy. Let us put cynicism aside, and presume that, at their best, people do what they think best, under the circumstances. But the deeper question remains: what informs the understandings of circumstances held by legal actors, understandings that make some things required by law, new and foreign law, but law nonetheless, even though that has not been the way it is done, here? "Policy" is just an effort to return the question of legal authority to the objective (often bureaucratic) realm. But the questions of authority, indeed power (the subjectivities of agency and obedience) are only postponed or suppressed, not denied.

The same answer is often presented procedurally, that is, at least in the US legal academy questions about legal authority are often answered by reference to legal process. So we may quite correctly say that a modern law is authoritative because the statute was passed by the legislature and signed into law, or that a judicial decision after due process is law, or that what parties agreed in their contract is law between them. While such essentially positivist answers are interesting in their way, by placing responsibility upon social institutions always somewhere "out there," by refusing to engage in what I am calling sympathetic theory, such approaches beg deeper questions. I would like to cast the issue intellectually reflexively rather than procedurally: why would the legislature or judge or parties regard this, and not that, as the law that modern circumstances require?

Moreover, there is no reason to presume, as the positivist understanding of legal authority does, that the law is substantively modernized within essentially stable institutions that legitimate new texts and endow them with legality, like christening ships upon launch. Modernization means that the old ways, also meaning the old institutions and the old procedures, do not serve. Even old institutions change their characters over time; and sometimes there are new institutions. Process as well as substance may modernize. Rephrased, in a time of globalization, diffusion, and general confusion, which institutions are "making" substantive law is a very unclear question. In cases of diffusion, a simple positivism is hardly available to us. If one is willing to press the issue, then where the law comes from, and the question of what the polity is, become real problems. What is the actual site of lawmaking? Perhaps it is the nation, but perhaps the European Union, the international community, the profes-

sion of accountants or some other special interest, or some combination of these things.[15] Under the pressure of such questioning, the positivist identification of law with cohesive institutions falls apart, and the law again comes to be understood as somehow distinct from its geographical or even institutional context. This separation is theoretically awkward, of course, but it is not entirely new: we find it in the translations of law books in early modern Europe, or in the law of nations, or, for that matter, in any transcendent notion of justice that relies on an appeal to legal authority not limited to geographical or institutional instantiation. Hardly positivist, but hardly uncommon.

The notion of modernization helps us think about legal change during a time of great transformation, including globalization, by requiring us to understand the law to be found in places, but not defined by its location in a given society, or even by its origins in a discrete institution such as a legislature or court. Modernization thus helps us think about law, even in its most local manifestations, in ways that neither logically require nor exclude those vast contexts discussed in terms of globalization. It depends, and we are left, as scholars, to ask how, this time.

5. IMAGINATIONS OF MODERN AUTHORITY

I have been arguing that an experience of the diffusion of law (or even the sympathetic imagination of such an experience) implicitly requires a legal subject to take a stance vis-à-vis modern authority, and that this stance can help comparative legal scholars articulate, think through, what this or that diffusion signifies, without getting bogged down in rather sterile confusions and conflicts among conceptions of global and local.

Similarly, and more generally, talk of globalization requires us to locate ourselves vis-à-vis our imagination of how our historical situation is changing. For theorists of globalization, the question arises: do our imaginations of modern authority, in the context of legal change, resonate or replicate our imaginations of modernity discussed more grandly as "globalization" or "the current great transformation." Obviously, I think that they must. To see why, I want to consider four ways in which modern authority is commonly imagined. There may be other ways, of course, and there are certainly other, less provocative, names, but I will discuss modern authority in terms of imperium, fashion, system, and tribe.

In brief, I maintain the following: each imagination of modern authority fulfills certain mental requirements, under Hume's dictum that

[15] See Twining, Diffusion of Law, supra note 1, at 15 (discussing various sources of the U.K. Human Rights Act of 1998).

reason—even theoretical reason—is the slave of the passions.[16] At the same time, each imagination has its shortcomings. The thinker who seeks to address these failings comes to understand authority in a new way. Therefore, our imaginings of modern authority—and hence our imaginations both of the diffusion of law, and of globalization more generally—are inherently unstable. Let me make this argument more concrete by describing each of these imaginations of modern authority in some detail.

5.1. Imperium

The most straightforward way to understand the diffusion of law is imperially. Law is the command of a sovereign. When a sovereign impresses itself upon people outside its established borders, expands, and creates new subjects, we may speak of imperialism. Such expansion is paradigmatically military, but it may also be commercial or cultural, indeed it is usually some blend of all three. In this view, the diffusion of law is accomplished by power. From this perspective, the nineteenth-century university discipline of comparative law is traditionally organized by the distinctions between common law and civil law treatment of private law questions, because those distinctions seemed to be the salient differences between British and French law in the expansive period of those nations' history.

Today, when globalization often seems indistinguishable from Americanization, it is difficult not to associate U.S. influence with the enormous build up of U.S. armed forces since the end of the Cold War.[17] Indeed, my government has made clear that it intends to spread democracy on the American model, and when necessary (or perhaps just convenient) to planetary management, is willing to use military power to do so. This sort of intention was called, in the some ways more honest nineteenth century, the obligation to spread civilization.

There are, of course, profound problems with understanding the United States (or globalization itself) on the model of empires. While the question is fascinating, it is, as they say, beyond the scope of this talk.[18]

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[16] David Hume, A Treatise of Human Nature, 415 (P. H. Nidditch ed., Oxford Univ. Press 1990) (1739).

[17] See Andrew J. Bacevich, The New American Militarism: How Americans Are Seduced by War 82–88 (2005) (discussing the apparent vindication of American might in the wake of the Cold War and the neoconservative movement to use military power to cement American primacy).

[18] I have long found myself both fascinated by and unsatisfied with imperial accounts of U.S. politics. As with sin, it is important to draw distinctions in politics, but it cannot be denied that there is a certain naughty thrill in offending our republican pieties. And as with dirty jokes, the flippancy of this note masks deep anxieties about our possibilities and limitations. Cf. David A. Westbrook, City of Gold: An Apology for Global

For present purposes, it suffices to acknowledge that modernization often comes through force, and that in light of current events, imperial imaginations fill many minds.

The imperial imagination, however, is rather ironically useful for republican politics. By emphasizing the power of government, the imperial imagination asserts that the government has a degree of freedom of action, and so may be criticized on moral grounds by political opponents. "The government made a mistake; we who would have done otherwise should be elected" is a political argument that sounds in a republican democracy. If we are worried about the diffusion of law, or more broadly, about cultural imperialism, we often assert that the influential power, oftentimes the United States, could have acted in some different, better way. Thus, while claiming that politics is authoritarian, the imperial imagination facilitates argument and, if not democracy, at least the hope of reasoned government.

Or maybe not. While claiming to be concerned for the people who endure power, the imperial imagination addresses itself to the emperor, not the people. Perhaps the emperor will be flattered by such speech, and impressed by the speaker. That is, the imperial imagination might be a conceit of bureaucratic elites, the sort of folks who used to be called courtiers. (Some of these coils should be familiar to law professors.)

However indispensable the imperial imagination may be for elite political discourse, republican or otherwise, imperial will is an insufficient way to understand the diffusion of law. First, imperialism simplifies the relations between law and the will of the sovereign beyond recognition. In discussing domestic law, we are unsure what law our legislatures and courts achieve—that is indeed the central problem confronted by law and society scholarship. But the relationship between political intention and law must be even more complicated outside the jurisdiction of the sovereign in question. What law do we think is actually achieved by U.S. government influence? Law simply is not some package of data that can be replicated here, there, and everywhere.

Even more critically, and as I have emphasized throughout this paper, questions of law are necessarily questions of the legal authority recognized by the subjects of the laws. The law that is diffused is adopted, recognized as law, locally. Once adopted, a law of imperial origins is no longer foreign. Thus "imperial" does not necessarily mean illegitimate.

Capitalism in a Time of Discontent 97–99 (2003) (discussing why "city" and not "empire"); David A. Westbrook, Law Through War, 48 Buff. L. Rev. 299 (2000) (arguing that the imperial distinction between civilized and barbarian inheres in post-Cold War imaginations of international law and politics); David A. Westbrook, Triptych: Three Meditations on How Law Rules after Globalization, 12 Minn. J. Global Trade 337, 347–61 (2003) (arguing that 9/11 would require not only deployment of force, but forcible integration into global order).

The Romans—the Arabs, the British, the French, the Spanish, and, yes, the Americans—left law in the wake of their conquests, law that comparative law scholars study today, even when the conquerors have retired. More philosophically phrased, power—as distinct from force—requires the participation of the subject.[19] The hegemon sets standards to which subjects conform themselves, which leads to my second way to regard authority, fashionably.

5.2. Fashion

If a diffusion of law is an adoption of law, a modernization, then the law should not be imagined as a liquid, poured from one system into another. Instead, a legal system changes in accordance with what people believe to be modern, a belief often formed in view of the examples provided by other legal systems, models. Rather than diffuse, modern laws are literally re-presented by other jurisdictions.[20]

Understanding the modern in terms of fashion, or perhaps less pejoratively, in terms of learning from models, or even conversion, is not restricted to law. Individuals and entire societies model themselves. Consider Tolstoy's memoir Childhood, Boyhood, and Youth, in which he was trying to understand, like all young people, how he was supposed to act, but in French, comme il faut, rather than in Russian.[21] Some contemporary scientists maintain that a tendency to copy our fellows, oftentimes without reason, is characteristic of humans as a species.[22] So we should not be surprised when legal actors adopt laws first pronounced elsewhere.[23] That is, modernization may happen because people try to be modern.

To claim that modernization is essentially fashion constitutes a by-now orthodox response to charges of cultural imperialism. After all, the

[19] Hannah Arendt, The Human Condition 201 (1958).

[20] Cf. Duncan Kennedy, Two Globalizations of Law and Legal Thought, 1850–1968, 36 Suffolk U. L. Rev. 631 (2003) (arguing that certain legal cultures have successively become models for "modern" legal science).

[21] Leo Tolstoy, Childhood, Boyhood, and Youth 261–64 (C. J. Hogarth trans., Everyman's Library 1991) (1857).

[22] See Carl Zimmer, Children Learn by Monkey See, Monkey Do. Chimps Don't., N.Y. Times, Dec. 13, 2005, at F2.

[23] For a well-known example, the transformation of Turkish law, Esin Örücü maintains that "the difference between reception and imposition is related to the existence or absence of choice. On this criterion alone, the Turkish experience is a substantial and thorough experience in 'reception.'"Esin Örücü, Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition, 59 Nederlandse Vereniging Voor Rechtsvergelijking 1, 82 (1999).

argument goes, McDonalds commands no armies. Cultural artifacts, including law, are adopted because the people believe them to be better. In fact, to maintain the imperial imagination is to deny the agency of ordinary people, people in developing countries or marginal situations. Thus, if the imperial imagination tends to serve critique of, or negotiation with, great power, those who wish to valorize the marginalized (or sell something to them) are likely to approach modernity as fashion.

Of course people's choices do matter, and so perhaps we all get the exotic we deserve. But such nuanced understandings of the complicitous character of modern authority can easily shade off into a rather vacuous correctness. To view change as essentially chosen is to miss much of the pathos of history. A sense of core and periphery, of leading and developing nations abides, even if it may be impolite to dwell on such hierarchical distinctions, and simply wrong to take much moral comfort in the happenstance of one's superior position. But those things said, upon reunification, East Germany adopted the laws of West Germany, not the other way around.

More generally, and following on the example of German reunification, one might be skeptical of claims of autonomous choice.[24] Autonomy is rare, and almost always compromised. Although we may, as an academic matter, point out the contingency of history, actually doing otherwise—political change— tends to be very difficult. The economic orthodoxy underlying the policies of the Bretton Woods institutions, the imaginations of government that structure the constitutions for failed states, the social structures through which large corporations operate—these things are not natural, but they are hardly up for grabs. History, once it becomes history, is not contingent. Which leads to my third imagination of modern authority, the systemic.

5.3. System

Perhaps those developments that we discuss under the rubric of globalization are not only modern in the sense we have been using it thus far, an experience of the new displacing the old, but also modern in the stronger sense of a new form of society, with its own distinct character.[25] And perhaps this as of yet vaguely named modern society is forcefully

[24] See generally Dominic Boyer, Spirit and System (2005).

[25] It is worth remembering, however, that declarations of a new world order themselves have a long history, at least in the European West. See, e.g., Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983); Erwin Panofsky, Renaissance and Renascences in Western Art (1960). And while the Greeks are generally understood to have a cyclical view of history (if a sometimes linear mythology), the decline of the city-state and the rise of empires (first Athens, then Macedonia) reconstituted the logic of politics, and so of political philosophy.

establishing itself, resulting in the destruction of traditional patterns of life. If this is correct, then a vitally important intellectual task (well, at least what I have been doing) is to try to conceptualize this new global society, which I have called the City of Gold.[26]

A pivotal aspect of this new society is law. Obviously, law in the narrow sense, the rules that allow for the landing of airplanes and the transfer of funds and the occasional regime change, is important. From a social perspective, if global society is to be considered a society, it must have structures, deep commitments that it will enforce. More deeply, the need for global society to organize relations among strangers would seem to require formalities that are legal in character. The sheer scale of global society requires the substitution of rights and obligations for actual personal relations. So the existence of global society entails the existence of global law, even if little by way of statute or judicial decision.

The emergence of a law for global society often suggests, as I have already remarked, the end of comparison. I think this is profoundly mistaken, though in the context of this talk I can only suggest the reasons why. Insofar as globalization is understood in terms of capitalism, it is a partial, even impoverished, discourse, for the simple reason that capitalism is an impoverished discourse. And capitalism is a partial discourse by design; its core institutions of money and property are simply not capable of conveying much that is central to being human. Thus much of what it means to be human happens, and must be articulated, *outside* of the logic of global capitalism. One might imagine other discourses with the spatial extension of finance— human rights, bureaucratic science, perhaps, or certain kinds of celebrity— but such discourses are even more obviously partial.

If globalization is vast but impoverished, then it is unsurprising that so many people oppose it. Indeed, globalization appears to be very difficult to think through, but quite easy to think up against. In popular and academic culture, globalization is often defined vaguely and negatively, the dark background against which meanings, legal and otherwise, are constructed among people. Which brings me to my fourth imagination of modern authority, the law that groups make among themselves, going forward.

5.4. Tribe

We may imagine the modern in essentially tribal terms, a word whose nomadic associations I intend.[27] Law may be formed among per-

[26] See Westbrook, City of Gold, supra note 19.

[27] To be explicit: I mean the word "tribe" as a provocation to thinking about contemporary society. I do not here use "tribe" as it is used in the sense of classical anthropol-

sons without regard to place. The most readily recognized example of this is perhaps law among the adherents of a religion.[28] Upon a moment's reflection, however, the creation of law more or less outside the institutions of the state is ubiquitous: consider not-for-profit networks, including many educational institutions, churches, medical institutions, and political organizations, but also corporations, and the notion of contract itself. When we speak of civil society, we often speak of legal relations that are not created by a state, that do not fulfill any particular purpose of the state, operate among people not defined as citizens, and are not bounded by the state's territory.[29]

And to take the argument a step further, in a world of regime changes, failed states, and especially ethnic separatism, it is the people (however they may be defined), that give the law to the state, not the other way around. From this perspective, the state is not the source of authority, that is, the state does not occupy the foundational position it occupies in positivist jurisprudence, international law, and modern political thought generally. Instead, people occupy this foundational position, and so the tribal perspective might less provocatively be called the democratic perspective, from demos, the people. But I love the smell of provocation in the morning, so I will continue to use "tribal."[30]

It is all too easy to see the tribal as a regression, and the reemergence of tribal claims to authority (one thinks immediately of ethnic violence) as archaic, the return of the repressed. I would like to suggest another view. In the nomadic state evoked by "tribal" we encounter the contemporary. In its emphasis on people rather than territory, the tribal imagination may be seen as a product, rather than a rejection, of globalization. In a world where geography and history are less meaningful, it is difficult to speak of meanings shared among people who live in a particular time and place. Simply put, it is difficult to speak of culture. Thus the turn to the tribal provides what culture once did, community solidarity. Tribal authority responds to the deficiencies of globalization, generally speaking, alienation.

Importantly for our purposes, the deterritorialization of globalization can be positively rearticulated as the move from a law of govern-

ogy, as a social and political grouping found among some "premodern" peoples, e.g., the various tribes of Native Americans, or their descendants.

[28] The Peace of Westphalia simultaneously symbolizes territorial law, and provides the conditions for a law among believers who may not be territorially organized.

[29] Since the American Legal Realists, or even the progressive movement, it has been commonplace to point out that the state provides the mechanisms for enforcement, and so there is no truly "private" law, and, therefore (the point of the argument), the state may regulate economic arrangements without undue regard for the freedom of contract. Yes, but that is hardly the whole story.

[30] Apologies to Robert Duvall, Apocalypse Now (United Artists 1979).

ments, defined by institutions upon a territory, to a law of persons. The private/public distinction is reborn as the creation of association, community, in a context of vast scope, personal mobility, and hence alienation.[31] By way of examples consider the multinational corporation, or Olivier Roy's understanding of globalized, post-modern, and indeed post-cultural Islam and other religions—the product of no one place, no shared history, few institutions—but a shared belief.[32] The law of and among corporations, the law of shari'a among Muslim communities in Europe or in the United States, are in important ways laws of people, and quite if not absolutely independent of states.

By focusing on the creation of special relations among people, the tribal imagination emphasizes how people are differentiated one from another: corporate insiders and outsiders, believers and nonbelievers. The tribal perspective, like the imperial perspective, stresses the creation of social status, the classification of people as members or non-members of the tribe, as inside or outside the bounds of the empire, as Greek or barbarian. The tribal and the imperial perspectives provide, even during the creation of what is widely feared to be a homogenous and alienating world system, or widely touted as the proliferation of equality under the banner of human rights, the possibility of deeply felt political divisions, in Carl Schmitt's strong sense of the word "politics," of a social life structured by alliances strong enough to be used to organize people to kill other people.[33]

Understanding modern authority in such ugly terms is nonetheless an intellectual advance, not just because violence remains a problem, but because a focus on differentiation is required to counter the homogenizing connotations of the words globalization and indeed diffusion of law. Contemporary history is not merely the swirling and obliteration of human differences and therefore political passion suggested by my earlier image of a coffee and cream. The forces of homogenization are not the only forces at work; we also observe forces of differentiation.

In the Enlightenment tradition, modernizing developments have been understood as the unfolding of individual autonomy, phrased in terms of legal doctrine, as the expansion of the realm of contract. As Henry Sumner Maine famously put it, "the movement of the progressive societies has hitherto been a movement from status to contract."[34] And in any number of areas of law— certainly in commercial law, but also in areas of family law, personal expression, and the like—one can hear con-

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31 Westbrook, City of Gold, supra note 19, at 158.

32 See generally Olivier Roy, Globalized Islam: The Search for a New Ummah (2004).

33 See Carl Schmitt, The Concept of the Political 35 (1996).

34 Henry J. S. Maine, Ancient Law 96 (Gaunt 1999) (1861).

tract glorified. It would be wrong, however, to agree wholeheartedly with Maine and simply understand the glorification of contract to require the overthrow of status, although certain kinds of status (one thinks immediately of race) are no longer regarded as legitimate social markers. But the disappearance of some categories hardly precludes the emergence of others. Our time is also witnessing massive reassertions of status; indeed, our economy turns just as deeply on notions of status and property as it does on ideas of autonomy and contract.[35]

Thus, if the liberal narrative of history is the unfolding of contract (which I have called the fashionable imagination), if perhaps bounded (the systemic imagination), then the tribal and imperial imaginations present counternarratives, which turn on the reinvention of status.

6. RETHINKING OF MODERN AUTHORITY

This talk has come full circle. Conceptual difficulties with objective and spatial imaginations have occasioned more subjective and temporal lines of thought. But working through the legal subject's temporal imaginations of the diffusion of law as the authority of the modern has suggested how social spaces are reconstituted, even if physical geography is relatively insignificant.[36] Thus comparison is reinvented in a new key. This paper has gone on quite long enough, but before concluding, let me sketch a few of the possibilities, and of course difficulties, presented by the rethinking of modern authority not necessarily geographically defined suggested here.

6.1. Despatializing (some) politics and reimagining international law

Among the possibilities, such thinking can help us get past the Westphalian paradigm, with its dependence on territory, physical space, for conceptual and thus for juridical purposes. While difficult for us, who have thought of the power to speak law, jurisdiction, in territorial terms for several hundred years, this may be less radical than it sounds. In the masterly introduction to his arresting Beowulf, Seamus Heaney speaks of an emotional geography with "no very clear map-sense of the world, more an apprehension of menaced borders, of danger gathering beyond

[35] See, e.g., Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171–72 (2d Cir. 1968) (holding that an employer should expect certain risks to arise in the course of employment, even if traditional agency requirements are not met); Kidd v. Thomas Edison, Inc., 239 F. 405, 407 (D.C.N.Y. 1917) (suggesting that, in tort, a master's responsibility for a servant is based not on consent but a historical idea of status).

[36] See Holmes, Marcus & Westbrook, supra note 12 (describing the process of reconstructing such an imagination).

the mere and the marshes. [...]"[37] He is also speaking of our world, in which space is relevant to, but hardly definitively organizes, our politics or its dangers.

As a corollary, we are in a position to see that the Westphalian imagination of politics, on which the fields of both public international law and comparative law were founded, is quite a special and even strange imagination. In the nineteenth and twentieth centuries, in Europe and some places influenced by Europe, it was possible to imagine the global space in terms of discrete cultures represented by autonomous sovereigns, whose pronouncements were law, and so whose contractual obligations with like sovereigns, treaties, were also law. As Saussy puts it, we grew used to experiencing and recounting history through the device of the state as protagonist,[38] in the collective yet personal terms entailed in the old word, sovereignty. Those days are hastening on, if not already past.[39]

But a truly despatialized politics, in which political power does not take responsibility for establishing a humane order over a given territory, is radically insufficient. The present administration's lame response to Hurricane Katrina was outrageous precisely because the government avoided its responsibility for its territory, and the people, insignificant thought they may have been in the calculus of partisan politics, who nonetheless lived there.

6.2. Thinking through globalization

Subjective and temporal approaches also may encourage more nuanced interpretations of globalization. We may begin to move away from understanding globalization as a totalizing modernity, and modernity as

[37] Seamus Heaney, Introduction to Beowulf: A New Verse Translation, at xv (Seamus Heaney trans., Norton 2000).

[38] Saussy, supra note 7, at 5.

[39] The high positivism of Bentham (who coined the phrase "international law" as a replacement for the rather mystical "law of nations") was never a good description of international politics and hence law. If we look at the Mediterranean worlds throughout history, medieval Europe, the cultural hegemony of ancient China, and "the civilized nations" of the 19th century, we rarely see positive law organized among autonomous sovereigns. Influence and adoption, armies and comme il faut and civilizations and peoples rising are far more usual. Even at Münster and Osnabrück, if we take a few minutes to read the treaties, we see that supranational law was also understood in terms of God, nature, and the law of all nations, that is, the actual Peace of Westphalia required imaginations quite different from the classical (19th and 20th) century model of public international law that roots itself in, among other things, Bentham's sloganeering for national sovereignty and a mythologized Westphalia. More generally, regnant theory should not be confused with actual history nor even the whole of the law. More generally still, much of the current "great transformation" is a transformation of how we think rather than history or the human condition, a metamorphosis of our worlds, not the world. Cf. Kennedy, supra note 21.

the unfolding of liberty, but instead come to understand our globalization as the formation of new contexts, new social spaces, and indeed, new hierarchies.

6.3. Reimagining comparative law

Taking the two last points together: if we no longer understand political space in essentially geographical terms, and we no longer understand the processes of globalization as essentially totalizing or even global, then the tension between particular and general, local and global, which has structured much recent comparative discourse, can be reconfigured. Comparative law scholars, too, may think globally.

6.4. Acknowledging the instability of theory

While our thinking is increasingly structured by social spaces with peculiar, if any, relations to geography, exactly what constitutes such spaces is unclear, not just practically, but in principle. Each of the four imaginations of modern authority suggested here (the imperial, the fashionable, the systemic, and the tribal), are interrelated, responsive to the blind spots of the others. Because each imagination has its functions, its appeal, and its weaknesses, it is unlikely that any one imagination will banish another from discourse, indeed from an individual mind, altogether. So, for dramatic if obvious example, it is easy enough to characterize recent legal diffusion in Iraq in terms of imperialism, the desire of the Iraqis to have a proper modern state, the systemic needs of a capitalist world order, or as the forceful expression of whichever group of people comes to dominate. And, like the committee of blind men, each of whom grabs a different part of an elephant and tries to describe the beast, each perspective has evidence, good evidence, to support it. Each perspective can be used to articulate important truths about the world. Our thinking is unstable.

6.5. Losing our hold on modernity

The modern is in important ways never achieved. The modern experience is not only alienating; it is an experience of losing moorings, of being liberated. But, as already discussed, if we look, we see the reestablishment of moorings, of particularities. Status and so hierarchy are recreated even while they are being destroyed; the progressive dream recedes like the horizon. Once the new law is adopted, it is no longer foreign, and soon enough, it is no longer new. The sense of being newly liberated cannot last; the modern is itself a passing sensation.

7. CONCLUSION

At least in the American legal academy, most papers (and all presentations) end on a normative note. It is slightly odd, perhaps, for a bit of theorizing to end with an exhortation—so, now that we know what the diffusion of law is all about, go out and vote!—but in order to discharge my obligations in responsible fashion, I am professionally required to have a gently normative conclusion. So here goes.

If we turn the tribal imagination of authority on ourselves, as scholars, then I hope we consider how much of our work is maintaining the social order of our fields. It is worthwhile to ask how theory can be used to construct a social space, otherwise known as a field or discipline, and how a society so informed constrains the possibilities for theory itself.

But this is too downbeat, so let me try again. I have been trying to suggest that coming to grips with the diffusion of law in an age of globalization requires multiple, rather incommensurate, imaginations of authority. As the example of Iraq makes painfully obvious, in trying to understand present situations, and heroically presuming the adequacy of raw knowledge, the legal theorist must think from more than one stance, must adopt multiple imaginations. So most of us shift from one imagination to another, trying to make sense of the matter at hand. If we were to take the admittedly risky step of acknowledging that our thinking is polyphonic (a nicer word than schizophrenic), that we dance among our incommensurate imaginations of the diffusion of law, and of globalization more generally, then the criterion of approval for social theory would not be descriptive completeness or even impeccable demonstration. Instead we should strive for a certain human gracefulness of response to the world in which we find ourselves. So think gracefully, and enjoy the day.

Prakash Shah, LLM, PhD

Senior Lecturer at the Department of Law,
Queen Mary, University of London

GLOBALISATION AND THE CHALLENGE OF ASIAN LEGAL TRANSPLANTS IN EUROPE*

This article reviews the main patterns of Asian migration to Europe and the ways in which Europe today has become multicultural with Afro-Asian legal diversities. It discusses the limited role which Asian states have played in these processes of emigration and settlement. It further examines the status of the laws transplanted by Asian migrants and their descendants in Europe and the ways in which Asian diasporas in Europe are engaging in new hybrid patterns of socio-legal navigation and reconstruction. The article is critical of European legal orders as not having reacted adequately to these patterns of Asian legal reconstruction but also urges comparative legal scholars to investigate this underexplored field in more detail.

Key words: *Globalisation.– Legal Transplants.– Hybrid Laws.– Asian Laws in Europe.*

1. INTRODUCTION

The choice of the term 'legal transplants' in this article, which discusses the laws of Asian diasporic communities in Europe, may seem somewhat strange since Alan Watson famously used the term to the consternation of socio-legal and comparative law scholars.[1] Watson used the concept of legal transplant in the very narrow and limited sense of the

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[1] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens and London: The University of Georgia Press, 1993).

transfer of a legal rule from one jurisdiction to another, and did not seem to consider it necessary to acknowledge the strong determining role of culture of the 'sending' or 'receiving' society when assessing the fate of any such rule. It appears that Watson was working with too abstract an idea of transplantation, and with too narrow an idea of law.[2] The term 'legal transplant' in this article is more consonant with that used by Japanese jurist, Masaji Chiba, who defines it in the wider sense of a "law transplanted by a people from a foreign culture".[3] Very pertinently, Chiba includes the transfer of law through the migration of people from one place to another in his concept, specifically mentioning the immigration of people from the Korean peninsula in the 3rd century AD as having involved "probably the first transplantation of foreign law to Japan".[4]

Turning to the issue of Europe and its relationship with Asia, one could mention the connections of ancient times that gave rise to enormous advances in knowledge, science and technology in Europe through Asian influences. Those connections have been repeatedly renewed and led to the further development of Europe, but also to the subjugation of large sections of Asia under colonialism and now under more recent pressures of globalisation according to Western terms. These challenges are being faced by Asians and it is far from clear whether globalisation is necessarily following Western dictates; rather it increasingly appears as if these are complex processes involving, not one-way, but multiple exchanges and *globalisations*, including those of peoples, laws and legal traditions.[5]

Exchanges of laws and legal traditions probably go back to prehistoric times right up to the interactions of the Greeks with the Egyptian,

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[2] Watson's thesis continues to provoke discussion as seen by some essays in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford and Portland, Oregon: Hart Publishing, 2001).

[3] Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture* (Tokyo: Tokai University Press, 1989) at 179 [*Legal Pluralism*]. Chiba also recognises a narrower sense to the term which he defined, for the purposes of the project he was then pursuing, as "the state law of a non-Western country transplanted from Western countries".

[4] Masaji Chiba, *Legal Cultures in Human Society* (Tokyo: Shinzansha International, 2002) at 20–21 [*Legal Cultures*]. Subsequent streams of migrants from the Korean peninsula continued to have a crucial bearing on legal developments, notably with the introduction of Buddhism in the 6th century AD, and also agricultural and artisan techniques over many years.

[5] See H. Patrick Glenn, *Legal Systems of the World* (Oxford: Oxford University Press, 2000) at 47–50 [*Glenn*]; Werner F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd ed., Cambridge: Cambridge University Press, 2006) [*Comparative Law*]; Prakash Shah, "Diasporas as Legal Actors: Implications for Established Legal Boundaries" (2005) Vol. 5, No. 2 *Non-State Actors and International Law* 153 [*Shah*].

Anatolian, Mesopotamian, Persian and Indian civilisations. One might also note the importance of the originally West Asian religious traditions of Judaism, Christianity and Islam as having had a tremendous impact on Europe and, at least in the combination of the first two traditions, so much so as to have contributed to a distinct European cultural and legal identity. This identity has been effective enough, especially if we trace it further in its intermixture with Greco-Roman and modernist aspects, to lend to Europe a legal culture which shows strong indications of incompatibility with other legal traditions.

The very concept of 'Asia', essentially Western, and defined primarily as Europe's other (together with other 'others' such as Africa), is also linked to this problem in so far as it rests on the assumption of the homogeneity of Europe.[6] One of the main threads of discussion in this paper is that that assumed homogeneity, in itself unsustainable,[7] is increasingly called into question in the legal field through the establishment of Asian diaspora communities in Europe. The separation of Europe from Asia is all the more remarkable considering their geographical contiguity, and lends further credence to the view that the differentiation lies not so much on the geographical as on the ideational plane. This sharp apparent difference means that the long process of exchange between Europe and Asia has also seen its fair share of suppression of the same. We know far too little today of the more recent impact of Islamic legal ideas on the development of the common law, let alone the impact of other ancient Asian cultures on European thinking about law.[8] I recently came across interesting evidence showing the continued operation of Muslim *qadi* courts in Bosnia-Herzegovina after the Austro-Hungarian Empire took over control of the region from the Ottomans. This system of *qadi* courts apparently remained in place up to the formation of the Yugoslav Republic.[9]

Therefore, having somewhat unwisely set myself the topic of Asian laws in Europe, I also have to acknowledge that I use the notions of 'Asia' and 'Asian' somewhat loosely. Otherwise what should we make of say Islamic law since, although large sections of its following have Asian origins, it ranges across continents today? Should I insist that Asians from

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[6] K. N. Chaudhuri, *Asia before Europe: Economy and Civilisation of the Indian Ocean from the Rise of Islam to 1750* (Cambridge: Cambridge University Press, 1990) at 22–23.

[7] For the methodological problems in the analysis of diversity among European legal systems, see Pierre Legrand, "How to Compare Now" (1996) Vol. 16, No. 2 *Legal Studies* 232.

[8] See Glenn, *supra* note 5, at 208–210.

[9] Mark Pinson (ed.), *The Muslims of Bosnia-Herzegovina* (Cambridge, Mass.: Centre for Middle Eastern Studies, Harvard University, 1993); Francine Friedman, *The Bosnian Muslims* (Boulder, Colorado: Westview Press, 1996).

Africa or the Caribbean who today live in Europe have no familiarity with and have not been affected by other local legal traditions in those places? I only have to think about the number of Swahili words that are assumed to be part of the normal vocabulary of a Gujarati with East African origins, while Swahili itself draws on a rich resource of Asian vocabulary combined with Bantu syntax.[10] Why should we suppress these hybrids even as we engage with newer processes of hybridisation in Europe? It should be no surprise therefore if readers detect some level of slippage between the terms 'Afro-Asian' and 'Asian' in this discussion, as our rough and ready categories often tend to fail us.[11]

2. AFRO-ASIAN SETTLEMENT AND THE MULTICULTURALISATION OF EUROPE

The Asian presence in Europe is impossible to date with any exactitude. We also know that one of Europe's oldest Asian minorities, despised wherever they have settled, is the Roma group.[12] We also have some writers who record the long South Asian[13] or Muslim[14] presence in Britain, for instance. This article has the more modest task of examining the more recent developments mainly in the post-Second World War period, during which time the size of Asian populations in Europe seems to have outpaced that in any known previous era.

In the early post-war years, many people from the Southern European belt and much further afield in Africa, Asia, and the Caribbean were recruited as workers by statal industries, or by private firms, often through networking among migrants themselves, while others came as a result of insecurity that followed decolonisation, such as the South Asians from East African countries. The individual patterns in different countries of

[10] The world is replete with such examples of hybridity. I was impressed to learn, at the first European conference on African Studies (29 June – 2 July 2005) at SOAS, that in Senegal the fascination for Indian cinema has led to Indian film societies being formed, members of which excel in the art of imitating the dances performed in those films, as well as to learn about the activities of Chinese businessmen in Namibia. On Swahili, see Abdulaziz Y. Lodhi, *Oriental Influences in Swahili: A Study in Language and Culture Contacts* (Göteborg, Sweden: Acta Universitatis Gothoburgensis, 2000).

[11] Whereas in Britain we tend to use the word 'Asian' to refer to South Asians, this article takes a much broader perspective also including people with roots in other parts of Asia.

[12] For an Indian perspective of Roma in Europe and the USA, including some legal aspects, see S.S. Shashi, *Roma: The Gypsy World* (Delhi, India: Sundeep Prakashan, 1990).

[13] R. Visram, *Asians in Britain: 400 Years of History* (London: Pluto, 2002).

[14] Humayun Ansari, *'The Infidel Within': Muslims in Britain Since 1800* (London: C Hurst & Co, 2004).

North West Europe varied depending on historical and cultural ties as well as decisions about the sources of labour supply. While Britain and France, for example, relied mainly on former or existing colonies, Germany relied on countries in Southern Europe and Turkey. The fairly large-scale movement also set in motion the establishment of translocal connections between Europe and regions in the South facilitated by networks of kinship and friendship, best encapsulated in the Chinese term *guanxi*[15], which were later built upon to organise the Afro-Asian colonisation of Europe, mainly in the cities.

This process was given a major fillip when recruitment stops occurred, first when the British scaled down work vouchers to a minimum after the Commonwealth Immigrants Act 1962, and in other European countries from 1973/74. The patterns across countries are quite striking and, although they have been fairly well documented[16], it is worth reviewing some main lines of development here. The consequence of these official recruitment 'stops' was not a limitation of the Afro-Asian presence but a major shift in the *type* of migration: to family reunification and family formation along the translocal networks that were already in place. The immigration of men of working age came to be outnumbered by that of women and children. New spouses were also sought, a process which continues today.[17]

These movements, occurring across a range of groups and resulting in the increase in the numbers of Afro-Asian people, involved a more or less conscious process of ethnic consolidation. The migrants transplanted and readapted the economic and social infrastructure that they already knew from 'back home' to the European environment. The Turkish *mahalleler* in Berlin were mirrored, for example, in the South Asian *bastis* of Leicester, Birmingham, Manchester and London.[18] Thus large sections of North West Europe began, certainly from the 1970s, if not already before, to be faced with unprecedented multiculturalisation. I am arguing that this also involved the multiculturalisation of the legal orders in Europe, as legal transplantation became an inevitable part of cultural recon-

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[15] See Ming-Jer Chen, *Inside Chinese Business: A Guide to Managers Worldwide* (Boston: Harvard Business School Press, 2001) at 45–50 [*Chen*] for a discussion of the concept of *guanxi*.

[16] Stephen Castles & Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Basingstoke, Hampshire: Macmillan, 2003) at 68–93, 220–254.

[17] Elisabeth Beck-Gernsheim "Transnational lives, transnational marriages: A review of evidence from migrant communities in Europe" (2007) Vol. 7, No. 3 *Global Networks* 271.

[18] *Mahalleler* (pl.) can mean neighbourhood in Turkish while *basti* can mean colony in Hindi.

struction. Geographical concentration has had its own role to play in the salience with which such diasporic legal reconstruction took place.

From the 1980s onwards, these trends have also been evident in the previously labour sending Southern European belt, and are currently also in motion in some Eastern and Central European states that joined the EU in May 2004. We therefore recently saw squabbles about the establishment of a Chinatown in Rome's central area of Esquilino. Laura Casanelli, a researcher, is quoted as observing:

> One thing that irritates the Italians is that the Chinese have not come to serve them. They work for Chinese in Chinese businesses and in Esquilino, sell Chinese goods. They come, they buy up stores, they set up. They work among their own relatives. The whole Italian idea of integration is irrelevant to them.[19]

Clear analysis of these recent trends is, however, occluded by the lack of a positive policy framework, not only because their EU involvement entails pressure on these countries to tighten controls at the EU's southern and eastern wings, but also, as Casanelli hints, because of different concepts of 'integration' at work.[20] That these countries too have been attracting workers, often on an irregular basis, from further south and east is nevertheless quite apparent, while there are already non-European settlements at somewhat advanced stages in countries such as Italy and Spain, of Moroccans, Senegalese, Chinese, Bangladeshis, Sri Lankans and so on.

Much of the above picture is made even more complex when we consider recent asylum migration to all parts of Europe. Effectively these represent new phases of ethnic colonisation from places such as Vietnam, Iran, Sri Lanka, Turkey, Afghanistan, Iraq, China, Nepal, etc. Legal scholars, however, have focused far too much, in my view, on official developments in asylum and refugee law, at the expense of examining in any detail the role of networks and their impact in influencing migration and settlement, and indeed in mitigating the impact of 'strong state' approaches to controlling asylum migration.[21]

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[19] Daniel Williams "Chinatown is a hard sell in Italy. Romans say immigrant area isn't doing as they would do" *The Washington Post* (1 March 2004). For more details on Chinese in Italy, see Bruni, Michelle & Fu Xin, "Chinese Migration to Italy" in Wang Ling-Chi & Wang Gungwu, eds., *The Chinese Diaspora. Selected Essays*, Vol. II. (Singapore: Times Academic Press, 1998) at 153–166; and for Europe, see Frank N. Pieke & Gregor Benton, *The Chinese in Europe* (Basingstoke: Macmillan, 1997).

[20] Kitty Calavita, *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe* (Cambridge: Cambridge University Press, 2005). Calavita develops these themes for Spain and Italy, pointing out the contradictions inherent in the public discourse of 'integration' and the realities of the migrants' officially sanctioned exclusion.

[21] Prakash Shah, ed., *The Challenge of Asylum to Legal Systems* (London: Cavendish, 2005).

3. THE ROLE OF SENDING STATES

The role of sending states divides into two main categories. The first involves the general level of interest taken by them in the larger processes of 'their' people relocating and forming colonies abroad. The emigration of Asians to Europe and further afield, as we have noted, dates much further back than the post-war period. Much of Indian settlement abroad took place under colonial auspices leading to settlements in the Caribbean, South and East Africa, Malaysia, etc. Chinese, on the other hand, were also moving already in imperial times, competing for space in territories such as present day Australia, Canada, as well as Europe. There was limited possibility of intervention in such movements in those times, although the Indian colonial government did make some efforts to mitigate restrictionist policies against Indians in various territories, while the Chinese state, especially in the first half of the twentieth century, promoted a more nationalistic vision among the diaspora.[22]

The migratory movements of the post-war period do not seem to have evoked much response in the sending states, and where there has been, it is relatively ineffectual. Until much more recently, for example, India appears to have neglected much of its diaspora, and interest was generated mainly when some exiles abroad began to pose a threat to national security.[23] While some states may have facilitated movement abroad through inter-state agreements, as with Turkey, it seems that few took active steps to support people once abroad or really understood how to benefit from the presence of a diaspora population in Europe. This seems to be the case even as much capital was being remitted to areas of origin through translocal connections. Part of the explanation might be that for countries such as India, Pakistan, Bangladesh, Sri Lanka, Thailand, Philippines and China, a complex diaspora network was in place, not just in Europe but, to different degrees, within Asia itself and in Africa, Australia and North America.[24] It is possible that the difficulty of assessing how advantages might be drawn from this complex dispersal of people prevented any firm stance being taken. Much of the process of emigration and diasporic reconstruction was taking place unofficially through the use of kinship and friendship networks, and the lack of firm interest by send-

[22] On the 'types' of Chinese in the diaspora and the extent of Chinese state interest in them, see Wang Gungwu, *China and the Chinese Overseas* (Singapore: Times Academic Press, 1991). On Indian emigrants during the colonial period, see Hugh Tinker, *A New System of Slavery: the Export of Indian Labour Overseas, 1830–1920* (London: Oxford University Press, 1974).

[23] K. N. Malik, *India and the United Kingdom: Change and Continuity in the 1980s* (New Delhi *et al*: Sage Publishing Pvt. Ltd, 1997) at 87–143.

[24] Castles and Miller, *supra* note 16, at 154–177.

ing states may also be explained by the more general Asian preference for self-regulation, and thus minimal state intervention, among the constituent communities. This may be contrasted with European states which often supported the colonisation of overseas territories by their people.

In more recent years, we are seeing a change of tone, however, as sending states have begun to accept the possibility of dual nationality or easier relinquishment of nationality, while various sorts of overseas national status are being experimented with. Thus Turkey now allows the possibility of renouncing its citizenship, but with an option for members of the diaspora to retain certain privileges in Turkey.[25] For India, the Person of Indian Origin Card seems to have been only a first step in the establishment of an Indian overseas citizenship status.[26] The Philippines, amidst a greater policy profile for overseas migrant workers, have also eased conditions on dual nationality.[27] The precise effect of these reforms remains to be evaluated, with diaspora people obviously varying a great deal in their reactions to such developments. But the size and the financial muscle of diaspora communities has had some role in establishing them as serious actors in the process of inward investment, and possible bridge points of influence in Europe.[28]

> The second factor that involves a role for the sending states' legal order for diaspora populations is the field of private international law or conflicts of law. While there is no denying the importance of this aspect of law, which is really a branch of the 'host' national legal order, some critical observations about its limited role need to be outlined. Its usefulness is limited largely to facilitating the recognition of legal acts that occurred in the pre-migration stage although, for those migrants who behave like international commuters, going back and forth between states and ordering their lives accordingly, its importance may be somewhat heightened.[29] Conversely, for acts that take place in diaspora, the domestic state

[25] Bülent Çiçekli, "Turkish Citizenship Policy Since 1980" (2003) Vol. 17, No. 3 *Immigration, Asylum and Nationality Law* 179.

[26] Indian Overseas citizen status is to be conferred under the Citizenship (Amendment) Act 2003 of India.

[27] Andre Palacios, "Trends in Philippine Citizenship Law: Relaxing the Rules?" (2005) Vol. 19, No. 2 *Immigration, Asylum and Nationality Law* 109.

[28] For a US focused perspective, see Peter F. Geithner, Paula D. Johnson & Lincoln C. Chen, eds., *Diaspora Philanthropy and Equitable Development in China and India* (Cambridge, Massachusetts: Global Equity Initiative, The Asia Center, Harvard University, 2004).

[29] A pattern of international commuting was carried on for a long period of time by Bangladeshi men from Sylhet who are among the last of the large South Asian groups in Britain to have instituted family reunification. Private international law or conflicts of law issues concerning them therefore continue to be relevant in the British courts. See Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glass House, 2005) at 123–140 [*Legal Pluralism in Conflict*].

places limits on recourse to overseas law, while subsequent generations in Europe might find it even less useful to rely upon it.[30]

In general, and notwithstanding the role of some Afro-Asian sending states in concluding agreements with host European states regarding matters of private international law, European states can also be seen to make the applicability of Asian laws in this field subject to overriding considerations of public interest or *l'ordre public*. Further, the positivist assumptions about law in Europe tend to distort appreciation of Afro-Asian personal laws and therefore often result in their misapplication. Especially when immigration control concerns invade the legal process, we tend to find further possibility of distortion. Asian states tend to adopt a quite passive position when questions of 'their' laws come up in official European legal fora. This picture is quite different to that prevailing when colonising European states tended to push at official level for the extraterritorial application of law to 'their' people, thereby also avoiding recourse to Asian legal principles. In this official gap we find that lawyers from Asian countries will also tend to ratify the positivist assumptions of their European counterparts, blocking from view the socio-legal position of those most directly affected. Shared assumptions of legal modernity among professional lawyers therefore often do more damage by undermining Asian legal principles at this level.[31]

4. SOCIO-LEGAL NAVIGATION: ASIAN LAWS IN EUROPE

Besides limited official recognition at the level of private international law, European legal systems have shown little inclination to incorporate, in any significant sense, Asian laws as an integral element of official law. Minor concessions have been made through flexible interpretation of official provisions, but European legal systems are not ready yet to admit that there is a major transplantation of Afro-Asian legal orders which needs to be recognised at the structural level. The increasing influence of Asian entrepreneurs in Europe, and the level of attention paid to

[30] On these aspects of private international law (chiefly in relation to family relations), see Marie-Claire Foblets, "Conflicts of Law in Cross-Cultural Family Disputes in Europe Today: Who Will Reorient Conflicts Law?" in Marie-Claire Foblets & Fons Strijbosch, eds., *Relations FamilialesInterculturelles/Cross Cultural Family Relations*. (Oñati: International Institute for the Sociology of Law, 1999) at 27–45; Marie-Claire Foblets, "Muslim Family Laws Before the Courts in Europe: a Conditional Recognition" in Brigitte Maréchal *et al*., eds., *Muslims in the Enlarged Europe: Religion and Society* (Leiden and Boston: Brill, 2003) at 255–284.

[31] See Shah, *supra* note 5, on examples in which Indian and Pakistani laws, among others, are interpreted by often ignoring the capacity offered under those legal systems for private ordering of family relations without state intervention, thereby reading into them Western or modernist postulates.

such phenomena by the media, has not it seems provoked a major change in the way their legal status is perceived officially. Thus, while it is evident that internationally weighty businessmen such as Laxmi Mittal, the Hindocha brothers or the Pathak family, or the recent takeover battle for Rover car manufacturers in Britain by two Chinese companies, are being watched carefully, it would also be worth investigating whether Asian business units only operate along principles of Western capitalism and the law that supports it, or whether Asian legal principles also govern their activities.[32]

A number of elements play a role in limiting the range of analytical focus here. A significant aspect is the positivist orientation of European law and legal thinking which means that Asian laws, which are normally transplanted as a result of migration and settlement of people at the socio-legal level, are not seen as being properly 'legal' phenomena. Rather they are seen more properly as 'customs', 'cultures' and 'religions', and therefore as extra-legal matter. That Asian laws can operate independently of state sanction seems a hard principle for many European lawyers and official authorities to accept.[33] There are also problems of according Asian laws a respected position within European legal orders, the latter being seen as applying a more developed form of law, while the former are required to conform to European laws as a condition of acceptance. In a book on *Islam and European Legal Systems*, its co-editor Silvio Ferrari,[34] puts the matter of recognition of non-European principles thus:

> ...the fundamental principles of the European model of relationships between religion, politics and law cannot be altered. But their concrete translations should be examined in order to evaluate their compatibility with those principles. In other words, Europe is not an empty space, a desolate land without history or culture, nor is it a new Paraguay where 'holy experiments' of any kind can be conducted. A European juridical identity exists and this is expressed, to use the words of the Treaty of Maastricht, in a 'common constitutional tradition' which constitutes a 'general principle of community law'. The right to religious freedom is a part of this, and it is understood not only as the right to profess and manifest one's own faith or conviction, but also as the right not to suffer any discrimination as a result. To connect penal or civil consequences to the choice to abandon a religion or to provide a system of rights and duties

[32] See *Chen*, *supra* note 15. Chen in his analysis, mainly concerning businesses run by overseas Chinese families in South East Asia, is in no doubt that Chinese principles have a critical bearing on their functioning.

[33] This sums up the perspective taken by Sebastian Poulter in his major works on ethnic minorities under English law. Sebastian Poulter, *English Law and Ethnic Minority Customs* (London: Butterworths, 1986); Sebastian Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Clarendon Press, 1998).

[34] S. Ferrari, "Introduction" in S. Ferrari & A. Bradney, eds., *Islam and European-Legal Systems* (Aldershot: Ashgate, 2000) at 5.

> that are differentiated according to the religious creed professed would be incompatible with this fundamental principle of European law.

This passage evokes the problem that we mentioned above about the perception of homogeneity of European identity and therefore also of law. Essentially, Asian laws would have to fit within the predetermined contours set by European legal structures to gain official recognition. While this allows European legal systems to pick and choose aspects of Asian law that they see fit to recognise, it also means their considerable distortion at official level, as we already see with European private international laws. Indeed, the last sentence in the passage quoted seems to rule out the Asian model of different personal laws being officially recognised.

Nevertheless, in jurisprudential writing there are signs that the principle of general legal uniformity in Western law is increasingly being questioned. Cotterrell writes of the growing "jurisprudence of difference" in Anglo-American law,[35] while on France, Freedman writes, somewhat more pessimistically, about *le droit à la difference*, the right to be different.[36] Menski has recently pointed out that European legal systems have not managed to keep non-European laws at bay by a simple refusal to recognise them. Rather they too acknowledge, as Ferrari does above, that certain principles, such as the freedom of religion, would have to entail some concessions.[37] Precise patterns at the level of various national legal orders and the level of the EU of course vary depending on a range of factors. Thus the absolutist refusal to countenance a compromise of the principle of uniformity of law has to be attenuated, despite many misgivings.

From discussions on the status of Muslims and Islamic law in European countries, which have dominated the agenda on ethnic minority laws in recent years, it seems that a pattern is emerging among states to look for ways to incorporate minority norms. As Ferrari advocates, these should be premised on a predetermined and somewhat fixed notion of the relationships between religion, politics and law. However, these established relationships have more or less generally relegated religion to the 'private' sphere and made politics the exclusive agent of law making. Furthermore, official measures tend to start with the assumption that other minority groups will conform to the modes of organisation of Chris-

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[35] Roger Cotterrell, *The Politics of Jurisprudence* (London: LexisNexis, 2003) at 209–236.

[36] Jane Freedman, *Immigration and Insecurity in France* (Aldershot: Ashgate, 2004) at 127–141.

[37] Werner F. Menski, "Rethinking Legal Theory in Light of South-North Migration" in Prakash Shah & Werner Menski, eds., *Migration, Diasporas and Legal Systems in Europe* (London: Cavendish, 2006) at 13–28.

tianity which are in some ways already accorded a measure of official recognition.[38] Although Islamic structures do not conform to such expectations, new institutions have been established, or representative spokespersons have been sought from within the Muslim fold, to communicate with the state. However, such drives often distort legal structures within Muslim communities and confer legitimacy to religious spokespersons that they may well not enjoy under other circumstances.[39] Much less well founded is the assumption, again reflected by Ferrari above, that it is solely upon 'religion' or 'creed' that minorities in Europe will base their legal relationships. This leaves out large chunks of legal experience among ethnic minorities of all backgrounds.[40]

My colleagues in London and I have found the theoretical work by Masaji Chiba,[41] formulated initially through comparative work among Afro-Asian legal systems, to be immensely valuable in conceptualising the new patterns of legal pluralism being experienced in Europe. We draw upon Chiba's concept of 'unofficial law' to denote the place of ethnic minority laws in Europe, which exist in creative tension with 'official law', but operate according to their own values, which Chiba would term 'legal postulates' – in our case a sort of Europeanised version of 'Asian values'. More recently, Chiba wrote about the problem of "legal pluralism in conflict" which exists especially when a choice of law is presented and one or other of opposing alternatives is preferred because of its value in cultural terms.[42] This scenario is offered by Chiba partly as a means of balancing the general presentation of legal pluralism as one of a harmonious working together of the different levels of law.

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[38] S. Ferrari & A. Bradney, eds., *Islam and European Legal Systems* (Aldershot: Ashgate, 2000); Brigitte Maréchal, "Institutionalisation of Islam and Representative Organisations for Dealing with European States" in Brigitte Maréchal *et al*., eds., *Muslims in the Enlarged Europe: Religion and Society* (Leiden and Boston: Brill, 2003) at 151–182; S. Ferrari, "The Legal Dimension" in *ibid*., at 219–254.

[39] In the aftermath of the 7 July 2005 bombings in London, one can see the British state grasping for persons among the Muslim communities who can be called upon to answer for and control such events, but their representativeness among Muslims is doubtful, although this is rarely communicated through the media and is possibly not understood well enough by officials themselves.

[40] On a related matter, Stanley Tambiah, *Magic, Science, Religion and the Scope of Rationality* (Cambridge: Cambridge University Press, 1990); Frits Staal, *Ritual and Mantras: Rules Without Meaning* (Delhi: Motilal Banarsidass Publishers, 1996). Both Tambiah and Staal provide strong critiques of the concept of religion as essentially centred on Western, predominantly Protestant, assumptions which are not applicable to Asian realities.

[41] See especially the following: Masaji Chiba, *Asian Indigenous Law in Interaction With Received Law* (London and New York: KPI, 1986); *Legal Pluralism*, *supra* note 3; Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World" in (1998) Vol. 11, No. 3 *Ratio Juris* 228 [*Phases*]; *Legal Cultures*, *supra* note 4.

[42] "*Other Phases*", *ibid.*

The most fascinating and vibrant aspect of Asian laws (and for that matter all ethnic minority laws) in Europe is their reconstruction in the socio-legal sphere. Partly, this occurs as a result of the above-mentioned relative inflexibility of official legal orders to accord any significant measure of recognition to Asian laws in Europe. Evidence from Britain, highlighted initially by Menski, shows that South Asians[43] and Muslims[44] have responded to official positions by developing processes of hybridisation whereby reconstruction of Asian laws takes place by a constant taking-into-account of the official law. Menski therefore writes about hybrid South Asian laws that readapt legal knowledge by building in the requirements of official laws when thought necessary or expedient.[45] Essentially, this is a form of legal pluralism with the dynamic adaptive processes taking place, not at official level, but in the socio-legal sphere. Thus there is a whole range of intermixtures between kinship and societal structures, religion and state as new accommodations are found.

The case of Afro-Asian minority laws in Europe, as Chiba envisages for cases of legal pluralism more generally, also certainly reveals a multitude of conflicts and tensions that arise often as a result of the problem of reconciling the values or legal postulates that underpin the minority laws on the one hand and official state laws on the other. This is the effective corollary, at the socio-legal level, of the problem that state laws also experience in according recognition to Asian legal principles, although the penalty for not doing so may be more often experienced subjectively by the individual acting under conditions of legal pluralism in conflict.[46]

Existence in a constant state of conflict and non-acceptance reinforces certain processes at the socio-legal and religious levels as known legal capital is redeployed in competition with official law to provide self-help legal solutions. It will hardly be news to those familiar with the working of Asian laws that they have in-built know-how on self-regulation so that much legal activity, for example in the form of dispute resolu-

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[43] Werner F. Menski, "Asian Laws in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain?" in M. Israel & N. K. Wagle, eds., *Ethnicity, Identity, Migration: The South Asian Context* (Toronto: Centre for South Asian Studies, University of Toronto, 1993) at 238–268 [*Menski*].

[44] David Pearl & Werner F. Menski, *Muslim Family Law,* 3rd ed. (London: Sweet and Maxwell, 1998) [*Pearl and Menski*]; Werner F. Menski, "Muslim Law in Britain", No. 62 *Journal of Asian and African Studies* 127 [*Muslim Law in Britain*]; Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation-States* (Aldershot: Ashgate, 2005).

[45] Menski, *supra* note 43.

[46] I have recently used Chiba's concept of "legal pluralism in conflict" to develop a framework for the analysis of ethnic minority laws in Britain. See *Legal Pluralism in Conflict*, *supra* note 29.

tion or social healing, can take place away from official fora altogether.[47] This of course does not solve the problem of cross-cultural legal communication in interaction with official law, but can be seen as self-preservation strategies that may gain more importance as privatisation of justice moves apace. The most prominent example in the British case is the establishment of '*shari'a* councils' among Muslim communities that come in to fill some gaps in official legal protection, possibly where the more immediate fora within family or kinship structures have failed. Similar structures are also established in London among Kurds from Turkey. No policy has yet been worked out as to their relationship with official structures, however: perhaps yet another case of British muddling through. However, public speeches in 2008, by the Archbishop of Canterbury, Dr. Rowan Williams and the Lord Chief Justice of England and Wales, Lord Phillips, are prominent indications of acknowledgement of the need to find accommodations.

So far I have written in quite general terms of Asian law and Afro-Asian laws being reconstructed in creative interaction with official laws. However, there are also limits to the extent we can generalise about such developments since each case of diasporic legal reconstruction occurs in a culture specific way. As noted above, Asia is defined in opposition to Europe, but this opposition postulates homogeneity in Europe, while ignoring Asian diversities. The deployment of Asian laws in Europe, in the socio-legal, unofficial sphere at any rate, undermines the fiction of European homogeneity of values and laws further, but also calls for analysis of Asian legal diversities. Menski finds that there is no globally agreed definition of law, and finds it necessary to work through culture-specific conceptualisations of law for successful comparison.[48] This applies as much in the case of Asians living in diaspora, where each legal community builds on its own inherited assumptions of law and builds in requirements of the state legal orders. Thus Muslims are busy reconstructing an *angrezi shariat*, a British Muslim law,[49] while Hindus are said to be living by *angrezi dharma* in the British context.[50] Perhaps we need also to dis-

[47] Menski, *supra* note 43; Günter Bierbrauer, "Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans", Vol. 28, No. 2 *Law and Society Review* 243; Roger Ballard, "Ethnic Diversity and the Delivery of Justice: The Challenge of Plurality" in Prakash Shah & Werner F. Menski, eds., *Migration, Diasporas and Legal Systems in Europe* (London: Cavendish, 2006) at 29–56.

[48] *Comparative Law*, *supra* note 5.

[49] Pearl and Menski, *supra* note 44; *Muslim Law in Britain*, *supra* note 44.

[50] Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003) at 592. On Hindus in Europe, see Martin Baumann, "The Hindu Diasporas in Europe and an Analysis of Key Diasporic Patterns" in T. S. Rukmani, ed., *Hindu Diaspora, Global Perspectives* (Montreal: Chair in Hindu Studies, Department

cuss principles of European *li* for Chinese communities, and so on for other Asian diasporas, as aspects of the globalisation of Asian laws. This is one of the critical challenges to the analysis of Asian laws in Europe. If Asian legal principles, in all their variety and culture specificity, are being readapted to the European environment, in what manner is this being done and what changes take place as a consequence? We are only just very near the start of the process of understanding such developments and huge challenges have to be faced in so doing.

5. CONCLUSION

I have merely sketched some outlines of current legal debates concerning Asian diasporas in Europe. It remains vital for more research to be conducted about Asian laws in Europe, but not simply as detached entities floating around under the auspices of strong state systems in Europe where they remain largely unrecognised and ignored. While such aspects of marginalisation are critical problems for discussion in themselves, there is much more exciting evidence on the ground where we find complex processes of legal navigation as strategies of sustainable hybridisation of law are taking place. In this sense I see Asian laws in Europe (or for that matter elsewhere in the world) as globalised extensions of 'parent' legal cultures that also need to be analysed from Asian points of view. Exchange of data among comparative lawyers should not neglect the diasporic picture, since it remains a vibrant and ever more important aspect of globalisation if current trends are anything to go by.

of Religions, Concordia, 1999) at 59–79. Note, however, that anthropologist Roger Ballard (2006) highlights the role of *rivaj*, the South Asian equivalent of *adat*, because, as he argues, this aspect of unofficial law, rather than the religious law of *shari'a*, has greater salience as a mechanism of order maintenance among Muslims. For further discussion of the complexity of *adat* and its uses in unofficial and official fora, see Wazir Jahan Karim, *Women and Culture: Between Malay Adat and Islam* (Boulder *et al*: Westview Press, 1992) on Malaysia; and John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003) on Indonesia. These discussions will, one hopes, assume a greater salience in Europe too as we try to sharpen our analytical tools.

Zoran S. Mirkovic, LLM, PhD

Associate Professor
University of Belgrade Faculty of Law

BELGRADE HIGHER SCHOOL (1808–1813) AND LEGAL EDUCATION IN SERBIA

The Higher School (Velika škola, La Haute École), founded in Belgrade on September 1, 1808 (old calendar), i.e. September 13, 1808, has already been widely researched, but some significant questions remain unresolved. One of the most important is related to its character and whether it can be considered as the predecessor of today's University of Belgrade, and particularly of the Faculty of Law. New research allows a more detailed assessment of the nature of Serbia's higher education of that time, which can increase our understanding of this issue.

This paper examines higher education in Serbia in the beginning of the 19th century and the legal studies in the Austrian Empire. The professors of the Belgrade Higher School, as well as those who could have major influence on its emergence and profile were mainly Austrian or Hungarian students; it probably favored reception of the Austrian educational model in Serbia. The criteria used for comparisons of the Belgrade Higher School and Austrian royal academies include curricula, the length of schooling, number of lecturers, academic titles and the methods of lecturing. This essay also compares the Belgrade Higher School (1808–1813) with the subsequent Serbian educational institution – the Lyceum in the time when it was founded (1838), finding that the Higher School of 1808 had a more developed legal curriculum than the Lyceum. This article argues that the Belgrade Higher School can be regarded as the predecessor of the University of Belgrade, particularly of its present Faculty of Law and to some extent of the Faculty of Philosophy, and that it was set up similarly to the Austrian royal academies.

Key words: *Legal studies in Serbia. – Belgrade Higher School – Royal Academy. – Lyceum. – Faculty of Law. – University of Belgrade.*

1. INTRODUCTION

This year (2008) is the two hundredth anniversary of the founding of the Higher School (*Velika škola, La Haute École*) in Belgrade, opened on September 1, 1808 (the old Julian calendar), i.e. September 13 (today's Gregorian calendar).[1] Through its very name, the Higher School left a major impression on the intellectuals of that time. The affection with which the School was held is illustrated by two of its most famous graduates who left written testimonies about its founding and early history, Vuk S. Karadzic (reformer of the Serbian language and creator of the modern Serbian alphabet) and historian Lazar Arsenijevic Batalaka.[2] There have been numerous attempts to determine the character of the Higher School: was it something like a gymnasium, a school of applied studies, or it had a higher rank, like an academic applied school, or was it the predecessor of the contemporary University of Belgrade?[3] What has not been done thus far is to comprehensively analyze the Higher School in the context of academic education in its historical and cultural milieu. This research tends to produce a somewhat more reliable answer to the question raised: should the University of Belgrade and particularly its Faculty of Law link the beginning of their existence to the Belgrade Higher School (1808–1813)?[4] In the monograph published on the occasion of the 165th anniversary of the University of Belgrade Faculty of Law, Sima Avramovic raised the question of higher legal education in Europe and Serbia, claiming that only a comprehensive and detailed comparative examination of the educational institutions of that time, unadulterated by modern concepts, could give a more accurate answer on whether higher legal education in Serbia reaches up to the Belgrade Higher School of 1808.[5]

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[1] The difference between the old and new calendar in the 19th century was 12 days.

[2] V. S. Karadzic, *Material for the Serbian History of Our Time and Lives of the Most Significant Leaders of The Time,* Belgrade 1898, 268–273; L. Arsenijevic-Batalaka, *History of the Serbian Uprising, 1st part,* Belgrade 1898, 385–398.

[3] A review of opposed opinions on the character of the Higher School from the First Serbian Uprising is found in R. Ljusic "From the Higher School to Lyceum (1808–1838)", *University of Belgrade 1838–1988,* Belgrade 1988, 8–9; Lj. Kandic, J. Danilovic, *History of the faculty of Law (1808–1905),* 1st Book, Belgrade 1997, 27–28.

[4] The text of Prvos Slankamenac is an exception, "Foundation and Character of the Belgrade Lyceum*", Modern School (periodical for pedagogical issues)*, 7th year, Belgrade, 3–4/1952, 9–22, in which the author provides a parallel analysis of the curricula on the Belgrade Higher School and the Lyceum, and the syllabi of the Hungarian royal legal academies. It seems that the subsequent authors took over the conclusions of P. Slankamenac without any special investigation of this issue.

[5] S. Avramovic, "How Long is The History of the Faculty of Law in Belgrade", *Hundred and Sixty Five Years of the University of Belgrade Faculty of Law (1841–2006),* Belgrade 2006, 12–15.

An in-depth examination of the relation of the Belgrade Higher School and the subsequent Serbian educational institution (the Lyceum), when it was founded in 1838, being finally transformed into the University of Belgrade, will provide insights into the continuity of Serbian higher education. The beginning of the Faculty of Law can also be considered to be 1841 (i.e. the academic year 1841/42), when it was transferred from Kragujevac to Belgrade as a three-year educational institution offering professional teaching of legal subjects. As Avramovic observes:

> [T]he Lyceum at the beginning was not clearly a stronger institution than its predecessor, the Higher School. It would be possible even to assert the contrary. It was only in 1840 that the Lyceum offered a three-year program of studies, which allowed a more advanced legal education ... Parenthetically, though this comparison need not be one of significance, the number of teachers at the Higher School and the Lyceum did not differ substantially—there were two lecturers at the Higher School, while the Lyceum had three teachers... Only the third year of the Kragujevac Lyceum was professionally oriented, which was retained at the Lyceum when it moved to Belgrade in 1841. This was almost an identical educational model to the one established by the Higher School much earlier.

This text will also focus on the higher educational system of the Austrian Empire from which its educational model could have been borrowed.

2. LATE 18TH AND EARLY 19TH CENTURY AUSTRIAN HIGHER EDUCATION

There are several reasons why the attention should be directed to higher education in the Austrian Empire. To begin with, many Serbian intellectuals who have played an important role in Serbia's insurgent leadership, when the uprising against the Turkish rule took place in 1804 (including renowned Boza Grujovic – Teodor Filipovic, Mihailo Grujovic, Miljko Radonic, and numerous others), acquired their education in the Austrian-modeled system.[6] Also, the founder of the Belgrade Higher School, Ivan Jugovic (Jovan Savic), was also educated within the Aus-

[6] M. Ristic wrote about Miljko Radonjic that after finishing the primary school and the gymnasium he graduated "law or philosophy in Pest". The author continues: "This could mean that his parents were well-to-do, since his brother also received education at higher schools. In a list of 'Hungarian-Serb lawyers' it is mentioned that Teodor Radonjic took the oath for the title of Hungarian lawyer on March 11, 1802. This list also mentions the following Serbs from the then distinguished Serbian families: Teodor Filipovic (called Bozidar Grujovic in Serbia) and Grigorije Savic, the brother of Jovan Savic (called Ivan Jugovic in Serbia), all the three of them in 1802–1803", M. Ristic, "Mihailo-Miljko Radonjic (the first minister of foreign affairs in the restored Serbia)", *Historical Herald,* 1–2, 1954, 239–240.

trian educational area. Furthermore, according to Stojan Novakovic, the whole constitutional action from January 1811 should be attributed to Ivan Jugovic, who became secretary of the Serbian government. Following the death of famous Serbian reformer and educator – Dositej Obradovic, he became the minister of education at the end of March 1811.[7] Jugovic was a highly knowledgeable person, speaking German, Latin, Italian, Hungarian, and French. He earned a university degree in "Hungarian jurisprudence" in Pest, was a professor in Karlovci with Metropolitan Stratimirovic, secretary of the Backa Bishop Jovanovic. He was an Austrophile,[8] whose positive orientation towards the Habsburg Empire could have been a major influence on the educational model of the Higher School.

What was the model of higher university education in the Austrian Empire in the late 18th and early 19th centuries? At the time of Empress Maria Theresa (1740– 1780) educational reforms were implemented in the spirit of the so-called enlightened absolutism. Education became a

[7] S. Novakovic, *Resurrection of the Serbian State,* Belgrade 2000, 337; L. Arsenijevic-Batalaka, *History of the Serbian Uprising, II part,* Belgrade 1899, 870. In an informer's report dated March 1811, discussing the reform of the Government, it was mentioned that "Mladen manages the Secret Office", and the note says that under Mladen's name the operations were ran by Jugovic, A. Ivic, *Documents of the Viennese Archive on the First Serbian Uprising, Book IX – year 1811,* Belgrade 1971, 142 (doc. no. 118 dated 3 March).

[8] See more in L. Arsenijevic-Batalaka, (1898), 388–389, 394; M. Ristic, Jovan Savic-Ivan Jugovic, Archive Almanac – periodical of the Archivist Society of the People's Republic of Serbia and State Archives of Serbia, no. 2–3, Belgrade 1960, 263–264. The views of Ivan Jugovic as to the organization of the state central authority in insurgent Serbia (which were in the spirit of enlightened absolutism of the Austrian Empire, whose nature and theoretical basis were known to I. Jugovic from his studies), which provided a theoretical support for the forces led by Karadjordje, inclined to a strong central authority in conflict with the dukes inclined to strong authority in districts and abandoning to the central authority only those affairs that they agree upon, see "The Speech of Ivan Jugovic in the Government (*Правительствующи Совјет*) on February 24, 1810", *Material for History of the First Serbian Uprising* (edited by R. Perovic), Belgrade 1954, 200–206.

The data for the biography of Ivan Jugovic have also derived from the archive material, i.e.: A. Ivic, *Documents of the Viennese Archive on the First Serbian Uprising,* Book VII-VIII–year of 1810*,* vol. 2, Belgrade 1966, 612 (doc. no. 469 dated 16 November), 627 (doc. no. 481 dated 24 November); A. Ivic, *Documents of the Viennese Archive on the First Serbian Uprising,* book IX–year *1811,* 224 (doc. no. 180 dated 10 April), 299–300 (doc. 259 dated 10 July), 303 (doc. no. 260 dated 13 July), 305 (doc. no. 262 dated 16 July), 306 (doc. no. 262 dated 16 July), 489–490 (doc. no. 399 undated); A. Ivic, *Documents of the Viennese Archive on the First Serbian Uprising,* book XI–year 1813, Belgrade 1977, 35–38, 43–45, 50–51 (doc. no. 39, 47 and 55 dated 16 and 31 March and 8 April); *Дьlovodnьый protokolь odь 1812. maia 21. do 1813. avgust 5. Kara-Ђorђa Petrovиa*, edited by Isidor Stojanovic, Belgrade 1848, 93 (no. 1120 dated 26 February 1813), 97 (no. 1134 dated 28 February 1813.); V. B. Savic, *Karađorđe, Documents III (1813–1817),* Gornji Milanovac 1988, 1329–1330 (doc. no. 958 dated 20 November 1813).

central part of the national and public spheres, which was particularly clear after the abolition of the Jesuit Order. On July 21, 1773 Pope Clement XIV issued the document "Our Lord and Redeemer" (*Dominus ac Redemptor noster*), by which he abolished the powerful Jesuit Order (*Societas Jesu*). It was an extremely important event, because the Jesuit Order dominated advanced education in many European states. Their control of education provided substantial wealth for this very rich ecclesiastical order.[9] Although it was not the Pope's objective, this move opened the door to the secularization of European schools. Empress Maria Theresa took the advantage of this opportunity to reorganize the educational system in order to produce an educated and loyal civil service bureaucracy. The school system as a whole, including higher education, was only a part of a broader plan to implement sovereign and secular state structure in place of religious education. The intention was to engender an absolutist state with the objective to have all the state affairs placed within the competence of the ruler and newly-created central administration, thus excluding the former feudal particularistic forces.[10]

The indispensable ability of Austria to compete with the other European powers in the economic, military, and political spheres led to numerous social reforms, including those in the field of education.[11] During the process of centralization of the Habsburg monarchy, the significance of education of the citizens increased. The central objective of the unification of the Austrian legal system was preserving the Habsburg monarchy through the Theresian enlightened system of higher education. To form competent and loyal civil servants was a basic task assigned to legal educators.

The system of higher education of Joseph II, the heir of Empress Maria Theresa, was practically oriented. The reforms of Joseph II performed in the spirit of enlightened absolutism was principally perceptible in the educational system. In addition to the *Patent of Tolerance* of 1781,[12] which implemented the secularization of the school system and opened

[9] In early 17th century the Jesuits founded an educational institution in Belgrade too (the author obtained a part of the data on educational institutions in Belgrade in the 17th and 18th centuries by courtesy of Dr Slobodan Grubacic, Professor and Dean of the Philological Faculty of the Belgrade University).

[10] R. Meister, *Entwicklung und Reformen des österreichischen Studienwesens,* Teil I: Abhandlung, Österreichische Akademie der Wissenschaften, Philosophisch-historische Klasse, Sitzungsberichte, 239. Band,1. Abhandlung/I, Wien 1963, 23.

[11] Perhaps it would not be inappropriate to note that the Bologna Declaration on the so-called European space of the higher education has been mostly caused by the need to make this education capable of competition on equal terms with American system of higher education.

[12] R. Kink, *Geschichte der kaiserlichen Universität zu Wien,* Zweiter Band (Statutenbuch der Universität), Wien 1854, 589 (doc. no. 186 dated 13 October 1781).

the doors to non-Catholics, the Emperor also carried out the elimination of some universities, so that only the universities of Vienna, Prague and Lvov (Lemberg) were retained.[13] The other higher schools and universities were transformed into lyceums with limited study programs.

The Graz University (*Karl–Franzens Universität zu Graz*) offers a particularly interesting example of transformation of a university into a lyceum. It was transformed into a lyceum in fall 1782 (and subsequently raised again to the university rank by the Emperor's decree on January 27, 1827).[14] The Graz University's Faculty of Law was founded in 1778. In addition to the two years of philosophical studies as preparation (*Durchgangstudium*) for the other subject areas (majors) of higher education, a four-year program of theological studies was offered at the Lyceum, in contrast to the two-year education provided in law and medicine. The Lyceum had only two law professors. The first one, Professor Tiller, taught the subjects of natural law (*das ganze Naturrecht*), the history of Roman laws (*die Geschichte der römischen Gesetze*) and the Roman laws (*die römischen Gesetze*), which included Justinian's *Institutiones*, *Digesta*, et al. The other faculty member, Professor Winckler, was assigned to teach the essentials of general church law and basic principles of the provincial laws (*die Hauptgrundsätze aus dem allgemeinen Kirchenrechte und aus den Landesgesetzen*).[15]

The recommended literature indirectly indicates that among the "provincial laws" they taught state, criminal and feudal law, as well as statistics, stylistics and political science. The short notes about the work duties of these two professors show that Winckler was a salaried lecturer of the Pandectae, Digesta, provincial laws and criminal laws, while Tiller was a salaried lecturer of natural, international, public and civil law as well as the Institutions. Admittedly, some parts of the preserved documents also provide contradicting data. The educational topics, the number of professors and all other important parts of the curriculum remained unchanged until the academic year 1810/1811.[16] This model of lyceums as reduced universities was certainly familiar to the Austrian Serbs who

[13] For more details see P. Skrejpkova (Prague), "Die juristische Ausbildung in den böhmischen Ländern bis zum Ersten Weltkrieg", *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg,* Frankfurt am Main 2007, 163–164.

[14] The similar destiny was also, for example, of the University of Innsbruck, which was reduced by the Emperor Joseph to the level of a Lyceum on November 29, 1781. Such destiny was also shared by the University in Salzburg in 1810 after attaching Salzburg to Bavaria. See more details at *http://www.uni-salzburg.at/portal/page?_pageid=117,58990&_dad=portal&_schema=PORTAL.*

[15] *Geschichte der Karl Franzenz-Universität in Graz,* Festgabe zur Feier ihres dreihundertjährigen Bestandes, verfasst von Dr. Franz von Krones, O. Ö. Professor, Graz 1886, 465–470.

[16] *Ibid,* 474, 504–505, 588–589.

were the founders of both the Higher School and the Lyceum in 1838 and it could serve as their educational model. This particularly applies to the Lyceum, which is obvious from the name itself.

In brief, the reforms of Empress Maria and Emperor Joseph led to the transformation of the university from a corporate body into a national institution, depriving the universities of their autonomy over internal organization and financing, and reducing many schools to the role of educating civil servants.

In search of the "donor country" for potential transplantation, special attention should be drawn to Hungary "and the countries annexed to it" of the Habsburg Empire, as the educated Serbs generally completed their studies within the reformed educational system. Empress Maria Theresa reorganized the entire school system in the Hungarian countries in 1777 through the regulations *Ratio educationis totiusque rei litterariae per Regnum Hungariae et provincias eidem ad nexas* (hereinafter: *Ratio educationis* of 1777), which did not regulate only the gymnasiums and universities, but also the royal academies. The royal academies were medial schools that prepared students for enrollment in the universities, but they were also terminal schools for those entering administrative state employment.

The seat of the University in Hungary was relocated from Trnava (a small town near Pozun—*Pressburg*, present-day Bratislava, the capital of the Slovak Republic) to Buda in 1777.[17] "At the same time the legal education was extended from two to three years... The university curriculum was designed to provide general education; while the applied skills of the legal profession could be acquired only through practice."

The University of Vienna had the highest reputation and it was a model other schools followed. Thus the legal studies were entirely organized in imitation of its model. In addition to the traditional topics of Roman, Canon and Hungarian substantive and procedural law, Political Science and Finance were introduced as new subjects, corresponding to the ideas and needs of the absolutist government. In addition, Empress Maria Theresa also introduced the Natural Law into the curriculum. A new

[17] K. Gönczi (Budapest/Frankfurt a. M.), "Die Juristenausbildung in Ungarn vom aufgeklärten Absolutismus bis zum Ende der Habsburgmonarchie", *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg,* Frankfurt am Main 2007, 45. Sava Tekelija, in his memoirs *An Account of Life* (preface and editing by Aleksandar Foriskovic), Belgrade 1966, 61, asserts that the Faculty of Law of the Budapest University, which as the date of its formation takes January 2, 1667 when its foundation charter was issued, was relocated from Trnava to Buda in 1776. In the monograph of the Budapest Faculty of Law on the occasion of 300th anniversary it is not mentioned explicitly, but it can be indirectly inferred that it happened in 1777, after the publication of *Ratio educationis* of 1777, see *История Юридического факултета Будапештского универзитета имени Лоранда Этвеша (1667–1967 GG.),* Budapest 1967, 12.

course entitled "Constitutions of the European States" brought a comparative perspective into legal education and this subject was designed according to the model provided by Göttingen University. The science of sources, heraldics and numismatics were also offered by the Faculty of Philosophy also following the Göttingen model. The professors were directly invited and appointed by the Empress to lecture on these subjects.

A significant novelty of the Theresian educational reforms was that Natural Law was introduced into the gymnasiums. The Theresian reform promoted the secularization of science and education, on one hand, and provided a step toward the development of a national legal culture, on the other.[18]

The *Ratio educationis* of 1777 established Royal Academies of Science (*Regia scientiarum Academia*) that provided three two-year courses—philosophy, law and theology.[19] The two-year philosophy course (*cursus philosophicus*) would be completed first, after which the two-year legal course (*cursus iuridicus*) would be attended. The university reform of Empress Maria Theresa in the early seventies—several years prior to the publication of the *Ratio educationis* of 1777—provided that the Faculty of Philosophy was only a preparation for the other faculties, but not an autonomous educational institution.[20] The *Ratio educationis* of 1777 also mandated the royal academies that provided the second degree of the state legal education. The reason for introducing the academies into the system of higher education could have been that the Buda University (in 1784 the seat of the University and its Faculty of Law moved to Pest) was too distant for the students from remote areas to reach. Nevertheless, it is obvious that the Empress originally created these educational institutions with the aim of producing a greater number of loyal and competent lawyers for her civil service. According to the provisions of the *Ratio educationis* of 1777 in the Hungarian countries there are five royal academies covering the study of law. They are located in five districts with their seats in *Agram* (Zagreb), *Raab* (Djur)—from 1785 to 1802, *Fünfkirchen*

[18] About reforms in the University in Hungary see K. Gönczi, 46–47. About the Faculty of Law of the Vienna University at the end of 18th and in the early 19th centuries see the voluminous work of Rudolf Kink, *Geschichte der kaiserlichen Universität zu Wien,* Erster Band (Geschichtliche Darstellung der Entstehung und Entwicklung der Universität bis zur Neuzeit. Sammt urkundlichen Beilagen), I Theil (Geschichtliche Darstellung), Wien 1854, 519–622. The second volume of the first book – II Theil (Urkundliche Beilagen) and the second book – Zweiter Band (Statutenbuch der Universität) provide documents significant for the history of the Vienna University, but also in general for the history of universities and the overall system of higher education in the Habsburg Monarchy. See Ilse Reiter's text on education of jurists at the Faculty of Law of the Vienna University, in particular the pages 5–11, on the website of this faculty: *http://www.juridicum.at/index.php?option=com_content&task.*

[19] This text will not be examining the theological studies.

[20] R. Meister, 27.

(Peçuy), *Kaschau* (Košice), *Tyrnau* (Trnava)—in 1784 relocated to *Pressburg* (Pozsony, present-day Bratislava) and *Grosswardein* (Oradea).[21] The district royal academies were regarded as the "daughters of the University" (in Buda and subsequently Pest), due to their links to the University.[22]

According to the provisions of the *Ratio educationis* of 1777, the teaching subjects in the department of philosophy were as follows—in the first year: *Logica* (logic), *Mathesis pura* (pure mathematics), *Historia Pragmatica Hungariae* (pragmatic history of Hungary), *Historia naturalis usum in oeconomia rustica et in artefactis* (natural history used in rural economy and artifacts), *Historia Philosophiae* (history of philosophy), *Mathesis adplicata* (applied mathematics), *Collegium novorum* (collegium of public news).

The following subjects were taught in the second year: *Historia Religionis Ecclesie et Eruditorum Hungariae* (history of church and scholarship of Hungary), *Physica* (physics), *Philosophia practica* (practical philosophy), *Mathesis adplicata ad Oeconomicum rusticam et artefacta* (mathematics applied in rural economy and artifacts), *Historia Imperatorum et ditiorum haereditariarum* (history of the emperors and the hereditary countries), *Metaphysica* (metaphysics) and *Collegium novorum* (on Saturdays in both semesters).

These subjects were organized into four chairs: of philosophy, mathematics, physics and history. The curriculum should accordingly be provided by four professors.

The *Ratio educationis* of 1777 mentions that the historical studies in the legal curriculum were designed to widen the knowledge acquired in the studies of philosophy. The history of European countries was taught as part of the academy's legal studies during the entire first year. The second year of legal studies covered general history that was taught based on the "synchronistic table" (*tabela synchronistica*), also including surveys of the geography of the contemporary countries. The historical re-

[21] About the beginnings of the study of law at the Zagreb Faculty of Law and generally in Croatia see V. Bayer, "Founding of the Faculty of Law in Zagreb (1776) and its final organization (1777)", *Collection of the Faculty of Law in Zagreb*, 19, 2/1969, 221–288 (with annexes); D. Cepulo (Zagreb), "Legal education in Croatia from medieval times to 1918: institutions, courses of study and transfers", *Juristenausbildung in Osteuropa bis zum Ersten Weltkrieg,* Frankfurt am Main 2007, 81–151.

[22] If we put aside the differences that will be subsequently discussed, the difference between attending the classes in the academies and the university were not too noticeable even to the contemporaries. Stephan Tichy in his work *Philosophische Bemerkungen über das Studienwesen in Ungarn,* Pest-Ofen-Kaschau 1792, 78–80 under the subtitle "Unterschied der ordentlichen Vorlesungen auf Akademien, und auf der Universität" infers that the difference lies in the fact that a university has several faculties and offers more academic subjects in addition to regular lectures.

view class was required to cover the history of religion, culture and trade. In addition to this, the professor of history taught his students a "collegium of public news", i.e. introduced them the current events in Europe and the world, all on the basis of the data from the university journal and other approved periodicals. It seems that this idea was taken over by the Belgrade Higher School, since after history and geography in the first two years, the second and the third year introduce the subject of geographical and "statistical" history of Hungary, Russia, England, France, Poland, Austria and Turkey.[23] The only major difference is the choice of countries: The *Ratio educationis* of 1777 stipulates teaching the history of Roman popes, France, Spain, England, Denmark, Sweden, Naples and Russia since the time of Peter I.[24]

The *Ratio educationis* provided the following chairs for compulsory subjects of the legal studies at the academy:

1) Public Law and Related Issues (*Ius publicum et quae eodem pertinent*), covering four subjects:
   a) Natural Law (*ius naturalae*),
   b) General Public Law (*ius publicum universale*),
   c) International Law (*ius gentium*), and
   d) State and Church Public Law of Hungary (*ius publicum Hungariae tam politicum quam ecclesiasticum*).
2) Homeland (national) Law with Accepted Customary Law (*Ius patrium una cum usibus et receptis consuetudinibus*),
3) Political, Commercial and Financial Sciences (*Politica, commercium et rei aerariae scientiae*),
4) History of European Countries, General History and Collegium of Public News (*Historia provinciarum europearum, Historia universalis et Collegium novorum publicorum*).[25]

All the subjects of the first year in an unusually entitled course "Public Law and Pertinent Issues" were taught according to the textbook "Natural Law".[26] This subject was taken over in the Serbian Lyceum under the title of Natural Law.

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[23] The concept of "statistics" covered basic elements of the state system, i.e. the constitutional and legal system. See footnote 34 for more details.

[24] *Ratio educationis totiusque rei litterariae per Regnum Hungariae et provincias eidem ad nexas,* Vindobonae 1777, 306–317 (paragraphs 177–178; also see the table in the enclosure) (hereinafter: *Ratio educationis* of 1777).

[25] *Ratio educationis* of 1777, 331–340 (paragraphs 185–189; also see the table in the enclosure).

[26] See V. Bayer, 256–258 for details about the subjects of the chair *Ius publicum et quae eodem pertinent* and the textbooks used for teaching in the Hungarian royal academies.

The education of lawyers in the royal legal academies was more practice-oriented than the legal studies at the university. It was "through the royal academies," says the Hungarian author *K. Gönczi*, that "the legal science and education of jurists in Hungary achieved significant progress... The professors of the academies were recruited for the faculty from the Royal University... The reforms of Maria Theresa essentially contributed to shifting the focus of legal education to the academic grounds."[27] The organization of legal studies in the royal academies and their significance for the development of Hungarian legal culture is illustrated by the Royal Academy of Law in Djur, which was restored there in 1802, to become by 1848 "one of the most prominent centers for legal education" that provided the majority of the professors of the Pest University.[28]

In 1781, Emperor Joseph II confirmed the *Ratio educationis* of 1777. The teaching subjects were reorganized to better educate the future civil servants. Political and cameral sciences were given central positions in legal education, and a new course was introduced under the strange title of curial style (*stylus curialis*), whose first lecturer at the Belgrade Lyceum was the latter famous Serbian writer and lawyer Jovan Sterija Popovic. This subject dealt with the judicial and administrative procedures.

The second *Ratio educationis publicae totiusque rei litterariae per Regnum Hungariae et Provincias eidem adnexas* was enacted in 1806 (hereinafter: *Ratio educationis* of 1806)**,** which appeared in some of its elements to be a step backwards in comparison with its predecessor from 1777. This was an expression of the age of enlightenment.

The subjects provided by the philosophy department were as follows. In the first year: *Philosophia Theoretica* (theoretical philosophy), *Historia Pragmatica Hungariae* (pragmatic history of Hungary) and *Mathesis Pura* (pure mathematics), while the second year included *Historia Universalis* (general history), *Physica* (physics), *Mathesis adplicata* (applied mathematics), *Philosophia Theoretica et Practica* (theoretical and practical philosophy), and *Historia naturalis, et Oeconomia rustica* (natural history and rural economy). According to the provision of the *Ratio educationis* of 1806 subjects within the philosophy course were offered in a simplified form compared to the *Ratio educationis* of 1777. Essentially, they were reduced to philosophy, mathematics, physics and history (which were the chairs according to the provisions of the *Ratio educationis* of 1777).

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27 K. Gönczi, 51.

28 *Ibid,* 61.

The *Ratio educationis* of 1806 brought changes resulting in the progress of the studies of law.[29] Firstly, it extended the duration of the legal studies at the royal academies to three years. It omitted general history and history of classes, but it introduced new subjects: Statistics, Mining Law**,** and the Law of Commerce and bills of exchange. The focus of teaching law at the royal academies was increasingly shifting towards the jurisprudence (and not only to legal practice). The curriculum now included the Roman law in addition to the Natural Law.

According to the *Ratio educationis* of 1806, the legal studies curriculum was structured so that the first semester of the first year included *Ius naturae* and *Ius Ecclesiasticum publicum et privatum*, while the second semester included *Ius Publicum, Universale, et Gentium; et horum in nexu Ius quoque publicum Hungariae and Ius Ecclesiasticum, ut supra*.

The first semester of the second year encompassed *Politia, et Scientiae Camerales* and *Institutiones Iuris Civilis Romani*. The second semester took in *Ius Cambiale, Mercatorium*, *Ius Feudale in compendio, et Ius Criminale*.

The first semester of the third year covered *Statistica Hungariae, et Ditionum hereditariarum Caesareo-Regiarum, nec non aliorum Europae Regnorum* and *Ius privatum Hungariae, seu Patrium*, while the second semester included *Ius Montanum, seu Metallicum* and *Continuatio Iuris Patrii, et Stylus Curialis*.[30]

The *Ratio educationis* of 1806 stipulated that the department of philosophy of the Royal Academy should change its name into Lyceum, while the legal department should be simply called the Academy. These two departments form an entirety, so that they were called "twins".[31]

3. COMPARATIVE ANALYSIS AND ASSESSMENT

The comparative analysis of the Belgrade Higher School (1808–1813) and the higher legal education provided in the Habsburg Empire of that time (i.e. the royal academies of law in the Hungarian countries of the Habsburg Empire, and the lyceums in other regions of this Empire)

[29] About the plans for the reorganization of the studies of law at the Lyceum and the University from 1806, see: C. U. D. Eggers (Hrsg.), *Nachrichten von der beabsichtigten Verbesserung des öffentlichen Unterrichtswesens in den österreichischen Staaten mit authentischen Belegen,* Tübingen 1808, 383–385. See also the chapter "Gedanken über die Einrichtung des juridischen Studiums" on pages 310–328 of the same work.

[30] *Ratio educationis publicae totiusque rei litterariae per Regnum Hungariae et Provincias eidem adnexas,* Budae, 1806, Tab. IX (See also pages 94–95 and 120–121).

[31] *Ratio educationis* of 1806, 82.

focused on several topics: teaching subjects, duration of the studies, number of the faculty, academic titles and the lecturing method.

3.1. Subjects

The first year students at the Higher School had to learn sketching (measuring, geometry), general history, general geography, calculation, German language. The second year included general history, general geography, calculation, German language (next level), statistics of Serbia, "stylistics" and "geographical-statistical" history of Hungary, Russia, England, France, Poland, Austria and Turkey. The third year included a higher level of German, "stylistics" and "geographical-statistical" history of the aforementioned states, international law ("people's law", probably the translation of the German term *Völkerrecht*), state law, criminal law and the "method of judicial proceedings in criminal cases". In addition to the German language, all the three years included moral education (ethics), church singing and martial arts (drills with a gun and fencing, present at the Russian universities as well).[32]

The philosophical studies taken over from the royal academies were provided by the Higher School in a simplified form, as generalized basic courses. History, geography, calculation and geometry (mathematics) covered the whole first and half of the second year of the Higher School, as well as the curriculum at the royal academies in Hungary. The central role of the German language in all the three years of education at the Higher School clearly illustrates Austrian influence.

For a long time the prevailing opinion was that only the third year of the Higher School had a legal character. Analyzing the content of the teaching subjects, Professor Ljubica Kandic refutes this contention:

> Some of the subjects taught in the first two years as general compulsory subjects that were significant for the general education of the students of the Higher School, included a lot of state legal subject matters. In this case it primarily refers to the 'Geographical-Statistical History'... and General Civil Geography ('*Всеобшче граждданско землеописаније*')... For that reason we could not accept the existent opinion that the legal subjects were studied only in the third year.[33]

This viewpoint is confirmed by the list of legal subjects at the Belgrade Higher School. In the second year these are the "statistics" of Serbia, "stylistics" and "geographical-statistical" history of Hungary, Russia, England, France, Poland, Austria and Turkey[34], in the third year "stylis-

[32] V. Stojancevic *et al.*, *History of the Serbian People (from the First Uprising to the Berlin Congress 1804–1878),* book V, volume I, Belgrade 1994, 76; R. Ljusic, 7.

[33] Lj. Kandic, J. Danilovic, 28.

[34] The content of the subject of statistics of that period is very remote from the today's colloquial meaning of the word. The professor of law in royal academies in Za-

tics" and "geographical-statistical" history of the listed states, international law, state law, criminal law and the "method of judicial proceedings in criminal cases". The total duration of the legal studies would, in accordance with this calculation, amount to one and a half years, out of three years altogether. Ljubica Kandic concluded that the content of the legal subjects is complex, and that their creators had given them an appropriate theoretical basis.[35]

A direct comparison of the subjects of the Higher School and the legal studies in the Hungarian royal academies shows the following parallels:

a) Statistics of Serbia[36]—*Statistica Hungariae, et Ditionum hereditariarum Caesareo-Regiarum* (*Ratio educationis* of 1806);

b) Stylistics (in the second and the third years)—*Stylus Curialis* (*Ratio educationis* of 1806);

c) Geographical and Statistical History of Hungary, Russia, England, France, Poland, Austria and Turkey—in the second and the third years (*Historia provinciarum europearum, Historia universalis et Collegium novorum publicorum*) (*Ratio educationis* of 1777*)*;[37]

d) International Law (in essence, international public law)—*ius gentium et ius publicum universale* (*Ratio educationis* of 1777 and *Ratio educationis* of 1806);

greb and Djur, and then in the University of Buda and Pest (where he becomes the rector 1786), Adalbert Adam Baric, in the book *Statistica Europae* from 1792 wrote: "<1.1> Statistica communiter dicitur notio praesentis constitutionis alicuius regni.; <2> Per constitutionem intelligimus complexum iuris publici et obligationum inter subditos et imperantem...; <2.1> Hinc nos dicimus statisticam esse cognitionem status uniuscuiusque regni; per statum vero intelliguntur omnes qualitates et objecta; sic in omni civitate debet esse territorium, debent adesse cives illud incolentes; iam nomine qualitatum intelligimus memorabiles qualitates, quae scilicet ad finem totius civitatis concurrunt, sive dein bonae sint qualitates sive malae.; <3.1> Complexus ergo harum cicumstantiarum erit statistica...; <5.1> Triplex ergo statisticae est studium, nempe 1-o Historia regnorum; 2-o enarratio status praesentis regnorum; 3-o complexus propriorum quae docent quid felicitati civium prosit sive obsit" (A. A. Barić, *Statistica Europae 1792, Vol. 1.* Edited by Zeljko Pavic and Stjepko Vranjican, translated from Latin by Neven Jovanovic, Maja Rupnik, Margareta Gasparovic), Zagreb 2001, 4–7. V. and S. Kurtovic, "A. Baric: Statistics of Europe, II part", *Statistica Europae 1792, Vol. 2,* Zagreb 2002, IX-XXIII.).

[35] Lj. Kandic, J. Danilovic, 16–27, 28.

[36] L. Arsenijevic-Batalaka, (1899)*,* 870–871, says that "in the statistics of Serbia... the professors in the second year of the Higher School read like this" about state organization of Serbia from January 1811. This is a significant evidence on the content of the subject of "Statistics of Serbia", because L. Arsenijevic-Batalaka was in early 1811 in the second year where the Statistics of Serbia was taught!

[37] A. Gavrilovic, *Belgrade Higher School 1808 – 1813 (Excerpt from the History of Liberation of Serbia),* Belgrade, 1902, 32–42, wrote about the history and current events (just like in the Collegium of Public News) in the script from the subject of geographical-statistical history of some particular states.

e) Public Law—*ius publicum* (*Ratio educationis* of 1777 and *Ratio educationis* of 1806);

f) Criminal Law and "method of judicial proceedings in criminal cases"—*Ius Criminale* (*Ratio educationis* of 1806).

To these clearly legal topics one should also add the preserved manuscript of the lectures on General Civil Geography, Paper no. 2 (*"Всеобште граждански земљеописаније—географија, Бумага 2*"), as the second part of the general geography, mostly dealing with state law.[38] The impression about the legal character of the Higher School is additionally enhanced, as well as the similarity of the Higher School to royal academies of law in the Hungarian part of the Habsburg Empire. The founders and professors of the Belgrade Higher School[39] apparently combined the educational principles of the *Ratio educationis* of 1777 and the *Ratio educationis* of 1806.

It is also important to compare the legal subjects set down at the Higher School (1808–1813) with the Lyceum curriculum in 1838 when it was founded in Kragujevac, as the University of Belgrade Faculty of Law considered for a long time 1841 as the year of its foundation (i.e. the academic year 1841/1842), when the Lyceum moved from Kragujevac to Belgrade. The issue is particularly controversial due to the authors who took into account the curricula of the Lyceum (either in Kragujevac or in Belgrade), which were never implemented.[40] This produces an exaggerated list of legal subjects and the educational contents at the Lyceum at its founding, which makes the Lyceum appear superior to the teaching provided at the Higher School.

The Lyceum in Kragujevac in 1840 had a course in natural law (taught by Jovan Sterija Popovic who also held on his initiative a course entitled "curial style"), as well as "statistics" (taught by Ignjat Stanimirovic). He taught the same subjects in Belgrade during the academic years 1841/42 and 1842/43, until his departure on October 26, 1842 to become the head of the Education Department, and his place was taken by Sergi-

[38] See the published manuscript in R. Perovic, (1954), 250–260. In the "Notes on texts" regarding this text the author wrote this on page 335: "This is actually political geography with strong elements from the field of state law."

[39] One should have in mind Ivan Jugovic as well as Miljko Radonic and Lazar Voinovic for the second and third years, which mostly contained the legal subjects.

[40] Thus R. Ljusic, 16 has in mind the curriculum according to the School Act dated 23 September 1844, which was to be applied from the academic year 1844/45. V. Grujic, *Lyceum and Higher School,* Document of SANU (Serbian Academy of Sciences and Arts), CXXVIII, Belgrade 1987, 36–37, has in mind the "System" from August 1840, but admits: "However, at the founding of the Legal Department of the Lyceum, the realization of the study of law had a modest framework, both in the first year and later". P. Slankamenac, 19–20, also compares the curriculum, which obviously remained on paper, with the legal subjects set forth by the *Ratio educationis* of 1806.

je Nikolic. "Statistics" was taught by Ignjat Stanimirovic and "policing" by Jovan Rajic, leaving in February 1842, when his place was taken by Georgije Petrovic.[41] Therefore, the legal subjects were only taught during the third year of studies. There were only three (if the "curial style" is also counted, four subjects), compared to six legal subjects in the second and the third year of the Higher School. This clearly confirms that the legal studies at the Lyceum in its early years actually lagged behind the legal studies in the Higher School. It was only from the academic year 1843/44 that three new subjects were introduced into the Lyceum and the legal studies were extended to two years. Only then did the curriculum come close to the regulations of the *Ratio educationis* of 1806, almost fully meeting the 1806 standard after the adoption of the Law on Schools of September 23, 1844.[42]

The comparative analysis of the subjects taught in these two oldest Serbian educational institutions reveals that higher education, and particularly the legal studies, have their origin already in the Belgrade Higher School. However, there are some more points that could be mentioned.

3.2. Duration

The difference in duration is clearly noticeable: three years of teaching in the Higher School as compared to four years in Hungarian royal academies; a year and a half of legal studies in the Belgrade Higher School, as compared to two years of legal studies in the Hungarian royal academies and Lyceums in other parts of the Habsburg monarchy. However, this difference is much smaller than it appears at first glance.

How long did the teaching last? What were the daily and weekly schedules of teaching? According to the evidence of Lazar Arsenijevic Batalaka, the students of the Higher School had the following schedule:

> The professors did not have any fixed number of hours per week for teaching a particular academic field. They came in the morning and in the afternoon to their classes, and they spent as many hours for lectures and for explanation as was necessary. Every day the professors regularly spent three hours in their classes each morning and two hours in the afternoon, totaling five or more hours per day.[43]

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[41] This is shown by the documents in Lj. Kandic, J. Danilovic, 393–394 (enclosure no. 4), 397 (enclosure no. 6), as well as 53–54. V. and *Lyceum 1838–1863, Collection of Documents,* Archive Material on Belgrade University, Book I (edited by Rados Ljusic), Belgrade 1988, 180 (doc. no. 126 dated 1. [13] July 1842) – hereinafter: R. Ljusic, (1988 a).

[42] The School Act from September 23, 1844, which was to be applied from the academic 1844/1845, see Lj. Kandic, J. Danilovic, 55.

[43] L. Arsenijevic-Batalaka, (1898), 396.

The students in the Hungarian royal academies attended lectures lasting four hours on a daily basis, while the students of the Higher School attended lectures lasting at least five hours per day.[44]

Furthermore, at the royal Hungarian academies the teaching was held five days per week. They did not work on Thursdays, Sundays and holidays, while the teaching in the Higher School lasted for six working days, except on Sundays and during holidays.[45] This reveals that the three-year program at the Higher School came very close in its hours of education to the four years of study provided by the Hungarian royal academies. A year and a half of legal education at the Higher School corresponded to two years of legal studies in these academies. The total number of hours of instruction, as well as the "student workload'"(in terms of today's Bologna terminology), is corroborated by an interesting parallel with the Vienna University in the second half of the 18th century. According to the regulations of 1753, students enrolled at the Faculty of Law studied for five years, if they attended two hours of lectures each day. They could finish their studies in four years if they attended three hours of lectures per day.[46]

In addition to this, Lazar Arsenijevic Batalaka declares: "Jugovic's intention and subsequently (according to Jugovic) Radonjic's intention as well, was to introduce another class in addition to these two."[47] It is quite probable that there was a plan to add additional courses in order to make legal education equivalent to that provided by the royal Hungarian academies of law, a contention which is supported by the subsequent course of the higher education in Serbia.[48]

The only scholar who left original writings about the early Serbian legal education, L. Arsenijevic Batalaka, observed that the classes started on September 1, 1808 (according to the old calendar), and the first students finished their schooling and were sent to serve civil service, seven among them, in August 1812.[49] This calculation could mean that the Higher School lasted for four years, although it is taken as a commonplace that it was a three-year school. So far, the most acceptable explanation has been given by R. Perovic, who maintains that the Higher School was

[44] Unfortunately, the material containing the data on the daily and weekly schedules of the lyceums in the Habsburg Monarchy remained unavailable for the author of this text.

[45] This is indirectly stated in L. Arsenijevica-Batalake, (1898), 397: "In addition to the strictly working days, Vojinovic was teaching due to his own affection...: *moral science* on Sundays and other holidays, after the Church service."

[46] R. Kink, (1854 a), 467.

[47] L. Arsenijevic-Batalaka, (1898), 390.

[48] R. Ljusic, (1988 a), 10.

[49] L. Arsenijevic-Batalaka, (1898), 398.

open in the academic year 1808/1809, but was closed in 1809/1810 due to military reasons, and resumed its work in the academic years 1810 through 1813.[50]

3.3. Number of professors

The small number of faculty at the Higher School was a result of the pedagogical approach of that time, not only in Serbia. From September 1811, when the third year was probably introduced, each year of studies had its own teacher—therefore three teachers was all that were necessary. The lack of professors also prevailed in royal academies. It is confirmed by the conditions in the Zagreb Royal Academy of Law at that time:

> This was almost customary at the beginning of the 19th century and up to the 1830s. In 1810/1811 Imbro Domin was the only professor at the Faculty of Law, while in 1825 two professors held lectures in all disciplines.[51]

The law school at Graz, which has already been discussed, had also only two professors at its founding, as well as when it became a lyceum (between the academic years 1782/1783 to 1810/1811).

3.4. Academic titles

Neither the Belgrade Higher School, the royal academies of law, nor the lyceums in the Habsburg Empire, granted academic degrees of bachelor (*baccalaureat*), master or doctorate, as their basic mission was to train the students for serving in the civil service. In the Habsburg Empire, granting of academic degrees was solely within the competence of the universities, which is a significant advantage over the royal academies and lyceums. At the royal academies the students were granted certificates testifying to their attendance in classes dealing with particular studies and their passage of the examinations in these subjects. The situation in the Higher School appears similar, as revealed in the words of L. Arsenijevic Batalaka: "In August, following the end of examinations in 1812, seven students left this school upon the completion of several described disciplines, to go to civil service."[52]

3.5. Teaching method

The professors who taught at the Belgrade Higher School were students of royal academies of law or the Faculty of Law of the Pest Univer-

[50] See the text of R. Perovic "Teaching of State Law" ("*Наставленија права државнога*') by Lazar Voinovic", *Supplements for the History of the First Serbian Uprising,* Belgrade 1980, 111–123.

[51] D. Čepulo, 113.

[52] L. Arsenijevic-Batalaka, (1898), 398.

sity, where "[t]he level of lectures in law can be explained by the absolutist higher school policy, in which the memorizing of dictation and of the information presented in the textbooks rather than the analysis and development of thought, was the prevailing didactic method".[53] Professors also applied this teaching method in the Belgrade Higher School, which is directly confirmed by L. Arsenijevic Batalaka, who noted that: "Jugovic ... read and explained to his students... the history of the world which he translated from German... However, upon reading, he dictated himself or through one of his students, and they had to write down what they heard." In another place, he refers to the way Miljko Radonic taught German: "They used to learn in the German language, by heart, from conversations taken from the dictionary, while Radonic composed for them various congratulatory messages in the German language that the students had also to copy and learn by heart."[54]

However, there is a source pointing out that there were also other forms of teaching. A court document from the time of the First Serbian Uprising describes the entire judicial procedure from the main court hearing to the passage of the sentence. The publisher of this source with a good reason assumed that this account was an example designed to illustrate the judicial procedure in criminal cases ("method of judicial proceedings in criminal cases"), as depicted by Professor Lazar Voinovic. Therefore, it seems that the Belgrade Higher School applied the practical teaching model of the Austrian criminal procedure through exercises (*exercitationes*), probably borrowed by L. Voinovic, who was familiar with it as a graduate of an Austrian Empire law school.[55] It may be just an additional example of educational legal transplants, to paraphrase the terminology of Alan Watson.[56]

4. CONCLUSION

The model of education, and particularly the legal education, applied in the Belgrade Higher School (1808–1813) was a modification of

[53] K. Gönczi, 59.

[54] L. Arsenijevic-Batalaka, (1898), 388–389.

[55] For the text of this "fictive" court document and the note on the text see R. Perovic, (1954), 274–306, 337–339. The same author returned again to this document and asserted that the professor of the Belgrade Higher School (1808–1813) Lazar Voinovic, who also taught criminal proceedings, was "undoubtedly the author of this text as well", R. Perovic, (1980), 98, fn. 3. When compared with the documents of the Austrian courts, this document indicates the judicial procedures according to the Austrian model, v. for example the text of S. Gavrilovic "Trial of T. A. Tican and His Death (1807–1810)", *Personalities and Events in Times of the First Serbian Uprising,* Novi Sad 1996, 121–132.

[56] A. Watson, *Legal Transplants: An Approach to Comparative Law,* The University of Georgia Press, Athens – London 1993.

the pedagogical system employed by the royal academies of law in the Hungarian lands of the Austrian Empire, as stipulated in the *Ratio educationis* of 1777 and the *Ratio educationis* of 1806. A similar model was also applied in the other parts of the Austrian Empire (except for Hungary "and the countries belonging to it"), having lyceums with a limited curriculum, initially composed of two years of philosophical studies, followed by two years of legal studies (as well as theological and sometimes medical education). This system of education in lyceums was introduced by Joseph II, who was even more zealous in implementing the policy of enlightened absolutism established by his mother, Empress Maria Theresa. This curriculum was designed to produce competent and loyal civil servants. The intentions of Serbian patriots I. Jugovic, M. Radonic, L. Voinovic, the founders and first professors of the Higher School, were identical: the new born state of Serbia needed a high-quality institution of legal education ("*велико учебно заведеније*") that would produce skilled civil servants. Was it just a coincidence that the Code of Karageorge, the leader of the First Serbian Uprising, was being written at that very moment?[57] In any case, in the very same time Ivan Jugovic was invited to establish the Belgrade Higher School and educate the students how to carry out state policies.[58]

The most powerful evidence that the Belgrade Higher School was viewed by its contemporaries as being as good as the royal academies in the Hungarian countries of the Habsburg Empire are the words of a prominent professor of the Higher School, Lazar Voinovic, in the manuscript of his lecture on General Civil Geography. He claims that all these disciplines were within the curriculum of two types of educational institutions: institutions providing higher education (universities and academies) and those providing primary education (primary schools). Humanities and sciences were taught at the universities and academies. However, the distinction between these two types of institutions is that the lectures on the same subject matters were more comprehensive at the universities. Furthermore, the universities had the capacity to grant academic titles,

[57] For more details see Z. Mirkovic, *Karadjordje's Code*, University of Belgrade Faculty of Law, Belgrade 2008.

[58] In early March 1811, the Government (*Правитељствујушчи совјет*), according to the claims of the Austrian informer's report, decided to recruit young educated men (supposedly Serbs) from the Habsburg Empire, who would spend some time in the Government and after they would go to work at the provincial districts. According to I. Jugovic that would be good for the Austrian cause, because they would have their people on important positions, v. A. Ivic, *Documents of the Vienna Archives on the First Serbian Uprising, Book IX– year 1811,* 139 (doc. no. 116 dated 2 March). The Austrian officials rejected this idea, because, as the deputy head of the police said, as to religion Serbs are closer to Russia than to Austria, and secondly, the ambition could turn these young men to lead hostile policy in relation to Austria, A. Ivic, *Documents of the Vienna Archives on the First Serbian Uprising, Book IX–year 1811,* 165, 167 (doc. no. 140 dated March 15).

whereas this was not the case with the academies.[59] Vuk Karadzic and Lazar Arsenijevic Batalaka, contemporaries of the Belgrade Higher School, clearly describe it as one of the educational institutions ("*учебним заведенијам*") that are really top notch, which is made clear by its very name—Higher School ("Velika škola").

For all these reasons, the Faculty of Law and partially the Faculty of Philosophy of the University of Belgrade can reasonably be viewed as the heirs of the Belgrade Higher School. It was created according to the model of higher education established by the Habsburg Empire. It appears clear that the legal education provided by the Higher School of 1808 considerably exceeded in practice the legal studies available at the subsequent Serbian educational institution—Lyceum, during its early years.

[59] R. Perović, (1954), 255.

Marko Davinić, LLM, PhD

Assistant Lecturer,
University of Belgrade Law Faculty

IMPORTANCE OF NATION-STATE IN THE GLOBALIZED WORLD*

The nation-states no longer play a unique and exclusive role in modern societies since they have had to share powers and responsibilities with increasingly important non-state actors: the civil society and the private sector. In addition, the unprecedented military and economic power of the U.S., as well as the growth of worldwide networks of interdependence, has prevented other states and their leaders from being absolutely sovereign on their territories.

However, the author tends to demonstrate that nation-states haven't lost their role or their necessity for existence, and that there is a need, more than ever, for strong states with effective institutions. The author maintains that biggest paradox globalization faces today can be summarized as follows: globalization is decreasing the authority and strength of the nation-state as an obstacle to free trade, although a strong state (which does not mean an extensive state) is a precondition for free flows of capital and people.

Globalization presents opportunity for economic growth and the inflow of foreign investments. Nevertheless, the benefits of globalization are distributed unevenly, which undermines the very system of globalization, making it unsustainable in its current form. In short, developing countries with their weak institutions are not capable of seizing the opportunities offered by globalization. Therefore, the author concludes that the building and strengthening of public institutions in those countries would turn the whole process in the right direction.

Key words: *Globalization. – Nation-state. – Private sector. – Civil Society. – Governance.*

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1. INTRODUCTION

The world has changed dramatically in the last two decades. As a consequence of technological innovations, political decisions, and economic demands, the world has become smaller and more connected, consequently bringing uncertainty and complexity to its inhabitants. In order to depict these changes, the term 'globalization' has been introduced, and quickly becoming the main buzzword of our time. However, globalization is not a linear process with clear rules and certain outcomes. On the contrary, the globalized world is at the same time networked and fractured, demonstrating both homogenization and particularization. This is the system where actors compete and co-operate at the same time, changing our traditional perception of the world. The first chapter of this paper aims to describe this process, and to evaluate both its positive and negative aspects.

The principle of sovereignty of nation-states, which was dominant for many centuries, has faced a radical transformation in this new era. Nation-states have remained the dominant actors in world affairs, but they have lost their sole authority to govern their territories independently. Moreover, they have had to share powers and responsibilities with increasingly important non-state actors: the civil society and the private sector. Thus, the term governance, which comprises all governing actors in the contemporary world, has emerged to become the generally accepted phrase. However, strong states and their effective institutions, despite the presence of many non-state actors, are essential for the globalizing process, a concept analyzed further in the second chapter.

2. GLOBALIZATION

Globalization is probably the most researched subject in the last twenty years, and yet the most unclear and least understood one. Moreover, this process has different meanings for different people. "For some, globalization is a central reality; for others, it is still on the margins of their lives. In short, there is no one experience of globalization. That, in itself, is an important aspect of the process".[1] The fact that people are living in different parts of the world indicates that they are affected very differently by this transformation. Therefore, globalization has been analyzed and described by various observers in different, often opposing ways.[2]

[1] Frank J. Lechner and John Boli, eds., *The Globalization Reader* (Blackwell Publishing Ltd., Malden, Oxford, Carlton, 2004), p. 123.

[2] Steger compares this phenomenon with the ancient Buddhist allegory of the blind scholars and their encounter with the elephant. By touching different parts of the

The reason could also be found in the fact that this process is highly vague and blurred and eludes clear definition. Moreover, it comprises many smaller processes, which create further difficulties in grasping the whole issue while making disagreements among scholars much more likely. As Steger points out, "globalization is not a single process, but a set of processes that operate simultaneously and unevenly on several levels and in various dimensions".[3] That is the reason that studies of this phenomenon cut across traditional scientific boundaries and require an interdisciplinary and comprehensive approach.[4]

For the purpose of this paper, I will accept Nye's definition of globalization as "the growth of worldwide networks of interdependence,"[5] indicating that this process is not the product of modern times, as is usually perceived by lay persons, but has a much older origin.[6] What is definitely new is the magnitude, complexity, and speed of contemporary globalization, compared to similar processes throughout history.[7] "The networks are thicker and more complex, involving people from more regions and social classes."[8] In other words, globalization goes "farther, faster, deeper and cheaper than ever before."[9]

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animal's body, they had completely different perceptions of the elephant's appearance. See: Manfred B. Steger, *Globalization, A Very Short Introduction* (Oxford University Press, New York, 2003), pp. 13 – 14.

[3] *Ibid*., p. 36; Allison goes further and emphasizes that globalization is a conceptual construct, not a simple fact. Graham Allison, "The Impact of Globalization on National and International Security", in Joseph S. Nye Jr. and John D. Donahue, eds., *Governance in a Globalizing World* (Brookings Institution Press, Washington, D.C., 2000), p. 72; For Friedman, globalization is an international system that replaced the Cold War system after the fall of the Berlin Wall. See: Thomas L. Friedman, *The Lexus and The Olive Tree, Understanding Globalization* (Anchor Books, New York, 2000), p. 7.

[4] Steger, *Globalization*, Preface.

[5] Joseph S. Nye, Jr., *The Paradox of American Power, Why the World's Only Superpower Can't Go It Alone* (Oxford University Press, Oxford, New York, 2002), p. 78

[6] About historical perspectives on globalization, see: Jurgen Osterhammel and Niels P. Petterson, *Globalization, A Short History* (Princeton University Press, Princeton and Oxford, 2005).

[7] David Held and others, *Global Transformations: Politics, Economics and Culture* (Stanford University Press, 1999), p. 235, quoted in Robert O. Keohane and Joseph S. Nye Jr., Introduction, in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 11.

[8] In 'bumper-sticker' words, globalization is "thicker and quicker". Nye, *The Paradox of American Power*, pp. 78, 85;

[9] Friedman, *The Lexus and The Olive Tree*, p. 9; As Marquardt and Berger suggest, four T's have brought us to this global age: technology, travel, trade, and television. Michael J. Marquardt and Nancy O. Berger, eds., "A New Century Requires New Types of Leaders", in *Global Leaders for the Twenty-First Century*, (State University of New York Press, Albany, 2000), p. 3.

Although there are several disagreements among scholars concerning globalization, it has become conventional wisdom to analyze this process at three different levels: economic, political, and cultural. Despite evident conceptual differences among them, it is important to emphasize that there are no clear lines which cut across these dimensions. All of them have mutual influences and cannot be analyzed in seclusion, without basic knowledge of the other levels. Hence, all of them will be briefly analyzed in this paper, although the main attention will be focused on the political dimension.

2.1. Economic globalization

Economic globalization is the engine of the entire phenomenon. It is based on a simple premise: the world has become a single, integrated economy where everyone is dependent on everyone else.[10] The parts of the world economic system have become so inter-reliant that they have now all become vulnerable to distant crises. "The production of many goods (...) spread across the globe, linking companies, workers, and whole countries in transnational 'commodity chains.'"[11] The institutional frame of economic globalization has been comprised of three main organizations: the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (GAAT/WTO). These organizations are designed to promote open trade and worldwide development, and they are responsible for making and enforcing the rules of the global economy.[12] Those rules and policies have become known as the Washington Consensus because of their origins in financial institutions located there.[13] "One may roughly summarize this consensus as (...) the belief that free-markets and sound money is the key to economic development."[14] Liberalization of capital markets and trade, privatization, tax reform, and realistic exchange rates have become the basic rules, someone would say mantra, of the modern economic system.[15] The developing countries are required by those rules to implement structural adjustment programs in order to obtain much-needed loans. Those programs require governments to cut pub-

[10] Lechner and Boli, eds., *The Globalization Reader*, p. 157.

[11] *Ibid*., 158.

[12] Richard N. Haass and Robert E. Litan, "Globalization and Its Discontents, Navigating the Dangers of a Tangled World", in *Globalization: Challenges and Opportunity* (Foreign Affairs, New York, 2002), p. 125; Steger, Globalization, p. 52.

[13] Merilee S. Grindle, "Ready or Not: The Developing World and Globalization, in Nye and Donahue", eds., *Governance in a Globalizing World*, p. 181.

[14] Leslie Sklair, "Sociology of the Global System", in Lechner and Boli, eds., *The Globalization Reader*, p. 70.

[15] Jessica Einhorn, "The World Bank's Mission Creep", in *Globalization: Challenges and Opportunity*, p. 85.

lic spending, liberalize financial markets, increase interest rates to attract foreign capital and investments, and eliminate tariffs, quotas, and other controls on imports.[16] Unfortunately, those programs rarely produce the desired results.[17] The explanation can be found in the fact that states are forced to undertake radical changes in domestic policy without any guarantee regarding the liberalization of external markets or access to modern technologies and capital.[18] However, the main reason for the failure of many developing countries can be found in their weak and ineffective institutions, which cannot successfully implement and control the required polices. This demonstrates that economic globalization cannot be analyzed without its political context.

2.2. Political globalization

Political globalization is a central aspect of the process since "almost all forms of globalization have political implications."[19] This aspect of globalization can by analyzed on different levels. The very fact that the entire world, with a few exceptions, is organized through an identical type of political unit, the nation-state, is a starting point and a most visible sign of political globalization.[20] Moreover, sovereign nation-states

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[16] "A Better World is Possible!", in Lechner and Boli, eds., *The Globalization Reader*, p. 442.

[17] Steger, *Globalization*, pp. 52 – 53; Wood argues that debt has become the main instrument of the new imperialism. "The goal was to open other economies, their resources, their labour and their markets, to western, especially US capital". Ellen Meiksins Wood, *Empire of Capital*, (Verso, London, New York, 2005), pp. 131, 132; In a similar way, Perkins admits that his job was "to convince third world countries to accept enormous loans for infrastructure development – loans that were much larger than needed – and to guarantee that the development projects were contracted to U.S. corporations (...). Once these countries were saddled with huge debts, the U.S. government and the international aid agencies allied with it were able to control these economies (...). The larger the loan, the better. The fact that the debt burden placed on a country would deprive its poorest citizens of health, education, and other social services for decades to come was not taken into consideration". See: John Perkins, *Confessions of an Economic Hit Man*, (Ebury Press, London, 2006), pp. 16, 248.

[18] Ramesh Ramsaran, "Inequality and the Division of Gains at the Global Level: Some Reflections, in Ann Marie Bissessar", ed., *Globalization and Governance, Essays on the Challenges for Small States*, (McFarland & Company, Jefferson, NC, London, 2004), p. 139.

[19] Keohane and Nye, "Introduction, in Nye and Donahue", eds., *Governance in a Globalizing World*, p. 6.

[20] Lechner and Boli, eds., *The Globalization Reader*, p. 211; The sovereign nation-state, which replaced feudalism and established the rule of law, has been the leading actor in world politics for more than two centuries. See: Bruce R. Scott, "The Great Divide in the Global Village", in *Globalization: Challenges and Opportunity*, p. 64; Edward S. Cohen, *The Politics of Globalization in the United States*, (Georgetown University Press, Washington, D.C., 2001), p. 33.

show considerable uniformity in terms of their organization, functions, programs, and overall goals.[21] However, nation-states are no longer the only political units, with omnipotent powers and sole responsibility in their territory. They are increasingly sharing powers and responsibilities with businesses, international organizations, and a variety of citizens groups known as nongovernmental organizations (NGOs).[22] Moreover, these actors compete with governments not just in internal politics and within national borders, but simultaneously in international relations and at the global level. As Bond puts it, "where once global politics were dictated exclusively by elected governments, now elected governments must compete with "civil society""[23] and transnational corporations. This new role of the state, as well as the state's changing nature and character, probably presents the most important aspect of political globalization today. Such a new circumstance has required a new vocabulary. Thus, the term governance was introduced in the last decades of the 20th century to depict those changes and to encompass all actors besides the state in a contemporary world. In the second chapter of this paper this term, especially in the context of globalization, is thoroughly analyzed.

2.3. Cultural globalization

Cultural globalization presents itself as a byproduct of economic and political globalization, although it is often a more visible and disturbing aspect of this process. It suggests intensification of cultural flows and exchange around the globe,[24] and culture presents "the sum total of ways of life, thought and action, behavior, beliefs, customs and the values underlying them."[25] The problem with cultural globalization is that it is often perceived not as an exchange, but rather as an imposition of western, especially American, ideas and values. That is the reason that the terms Americanization, Westernization, and cultural imperialism are used by many to describe cultural globalization. There is no doubt that globalization, especially in its cultural aspect, is America-centric, because the content of global information networks is largely created in the U.S.[26] However, quoted phrases can be misleading, implying some level of force as

[21] Lechner and Boli, eds., *The Globalization Reader*, p. 211.

[22] Jessica T. Mathews, "Power Shift", in Lechner and Boli, eds., *The Globalization Reader*, p. 270.

[23] Michael Bond, "The Backlash Against NGOs", in Lechner and Boli, eds., *The Globalization Reader*, p. 277.

[24] Steger, *Globalization*, p. 69.

[25] NJAC report, quoted in John La Guerre, Cultural Policy, "Globalization and the Governance of Plural Societies", in Ann Marie Bissessar, ed., *Globalization and Governance*, p. 206.

[26] Nye, *The Paradox of American Power*, p. 80.

a part of this process. In fact, things are much more complicated. As Fuller suggests, "the desirability of American cultural products – which are perceived to be superior, modern, the wave of the future – means that the 'victims' themselves play an important role in the spread of American culture."[27] Moreover, American culture is in a continuous state of change and subject to constant foreign influences, which makes it both universal and appealing.[28] Furthermore, Western and American culture are not replacing local cultures and traditions, as can be assumed. "American culture is becoming everyone's second culture. It doesn't necessarily supplant local traditions, but it does activate a certain cultural bilingualism."[29] This complex set of social-cultural influences and interactions has been described as hybridization or glocalization and is a main characteristic of cultural globalization today.[30]

2.4. Shades of gray (value judgment)

An analysis of the main aspects of globalization poses a simple question: is this process good or bad? I would argue neither. Any sharp and radical conclusion cannot provide a realistic and objective description of this system. As Brzezinski put it, "black and white view of the world ignores the shades of gray that define most global dilemmas."[31] Or, as the late Pope John Paul II argued, "globalization, a priori, is neither good nor bad. It will be what people make of it."[32]

Globalization presents opportunity for economic growth, the inflow of foreign capital and investments, which in the final phase can decrease the level of poverty in developing countries.[33] Also, competition among different actors at the global level can decrease the price of goods, making them more affordable for all people.[34] Taking that into account, Wolf's

[27] Steve Fuller quoted in Ziauddin Sardar, Merryl Wyn Davies, *Why Do People Hate America?* (The Disinformation Company Ltd., New York, 2002), p. 130.

[28] Neal M. Rosendorf, "Social and Cultural Globalization: Concepts, History, and America's Role", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 119; See also: Cohen, *The Politics of Globalization in the United States*, pp. 66 – 67.

[29] An unnamed Norwegian scholar quoted in Nye, *The Paradox of American Power*, p. 71.

[30] See: Rosendorf, "Social and Cultural Globalization", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 109.

[31] Zbigniew Brzezinski, *The Choice, Global Domination or Global Leadership* (Basic Books, New York, 2005), p. 26.

[32] Quoted in Brzezinski, *The Choice*, p. 152.

[33] *Ibid*., 140.

[34] Shaeffer R, *Understanding Globalization: The Social Consequences of Political, Economic and Environmental Change* (Rowman and Littlefield, 1997), quoted in Sadia Niyakan-Safy, "Rethinking Globalization's Discontent", in Bissessar, ed., *Globalization and Governance*, p. 124.

statement that "the world needs more globalization, not less,"[35] is becoming clear and acceptable.

However, the benefits of globalization are distributed unevenly, which undermines the very system of globalization, making it unsustainable in its current form. In short, developing countries with their weak institutions are not capable of seizing the opportunities offered by globalization. Huntington recognized that problem of developing countries long before the term 'globalization' was even introduced. In his words, "the most important political distinction among countries concerns not their form of government but their degree of government. (...) The primary problem of politics is the lag in the development of political institutions behind social and economic change."[36]

Furthermore, developed countries are not consistent in the policies which they impose on the developing countries, meaning that the open market is not really open in all areas and fields of industry and trade. As Scott argues, "rich countries insist on open markets where they have an advantage and barriers in agriculture and immigration, where they would be at a disadvantage."[37] That is the reason that the balance between openness and social responsibility is becoming not just desirable, but the only real solution for most developing countries. Needless to say, nation-state has a major role in this delicate balancing.

In addition, the global market is still far from being integrated, which is illustrated by the fact that "wages, prices and conditions of labour are still so widely diverse throughout the world. In a truly integrated market, market imperatives would impose themselves universally (...). But, on balance, global capital benefits from uneven development, at least in the short term".[38]

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[35] Martin Wolf, *Why Globalization Works*, (Yale University Press, New Haven and London, 2004), p. 320.

[36] Samuel P. Huntington, *Political Order in Changing Societies* (Yale University Press, New Haven & London, 1968, 1996), pp. 1, 5.

[37] Scott, *The Great Divide in the Global Village*, p. 57; Stiglitz argues in a similar fashion: "Today, few (...) defend the hypocrisy of pretending to help developing countries by forcing them to open up their markets to the goods of the advanced industrial countries while keeping their own markets protected, policies that make the rich richer and poor more impoverished – and increasingly angry." Joseph E. Stiglitz, *Globalization and Its Discontents* (W. W. Norton & Company, New York, London, 2003), p. XV; Wood is even more straightforward in her assumptions. She claims that "globalization has nothing to do with free trade. On the contrary, it is about the careful control of trading conditions, in the interests of imperial capital". Wood, *Empire of Capital*, p. 134.

[38] *Ibid*., p. 136; Perkins explicitly asserts that "today, we still have slave traders. They no longer find it necessary to march into the forest of Africa looking for prime specimens (...). They simply recruit desperate people and build a factory to produce the jackets, blue jeans, tennis shoes, automobile parts, computer components, and thousands of other items they can sell in the markets of their choosing. (...) The modern slave trader

Globalization in its current form is doomed to failure, not because of the strength of competing systems (actually, there are no serious alternatives), but because of flaws in the very process of globalization. The biggest paradox that globalization is facing today, which undercuts its own foundation, can be summarized as follows: globalization is decreasing the authority and strength of the nation-state as an obstacle to free trade, although the strong state (which does not mean the extensive state) is a precondition for free flows of capital and people. As Steger puts it, "since only strong governments are up to this ambitious task of transforming existing social arrangements, the successful liberalization of markets depends upon intervention and interference by centralized state power. Such actions, however, stand in a stark contrast to the neoliberal idealization of the limited role of government."[39] Wood argues in a similar way, that "the state lies at the very heart of the new global system" and "the very essence of globalization is a global economy administered by a global system of multiple states and local sovereignties, structured in a complex relation of domination and subordination".[40] Moreover, the nation-state as a source of identity is required as a guardian from radical, often religious and nationalist movements. When the nation-state is weak, those movements step in to fill the existing gaps.[41] In the final phase, failed states impede any kind of free market and become the source of the main problems in global society; terrorism is probably the most dangerous and visible one.

Globalization, as a growth of worldwide networks of interdependence, deserves a reasoned defense, but it also needs essential reform and transformation.[42] To start, the world needs more delicate, country-by-country approaches which will respect diversity among nations and cultures. External economic advice and aid must be adjusted to each country's unique political and social context.[43] Above all, the nation-state and

assures himself (or herself) that the desperate people are better off earning one dollar a day than no dollars at all, and that they are receiving the opportunity to become integrated into the larger world community". Perkins, *Confessions of an Economic Hit Man*, pp. 180 – 181; About growing corporate practice of shipping jobs to cheap foreign labor markets, see: Lou Dobbs, *Exporting America, Why Corporate Greed Is Shipping American Jobs Overseas*, (Warner Books, New York, Boston, 2004).

39 Steger, *Globalization*, p. 97.

40 Wood, *Empire of Capital*, p. 139, 141.

41 See: Samuel P. Huntington, *The Clash of Civilization and the Remaking of World Order* (Simon & Schuster, New York, 1996); As Cohen puts it, "when it reaches a certain point, globalization inevitably challenges some of the fundamental values, narratives, and symbols that have held communities together, and some sort of reaction is inevitable". Cohen, *The Politics of Globalization in the United States*, p. 160.

42 Amartya Sen, "How to Judge Globalism", in Lechner and Boli, eds., *The Globalization Reader*, p. 21.

43 Scott, *The Great Divide in the Global Village*, p. 70; RAND analysts emphasize that importance by saying that "many reconstruction and reform programs, often imple-

its institutions, despite the presence of many useful and necessary non-state actors, have to be strengthened, which will be analyzed further in the next chapter.

3. GLOBALIZATION AND GOVERNANCE

The sovereign nation-state has played a dominant role in the organization of human society for a long period. As Steger points out, "for the last few centuries, humans have organized their political differences along territorial lines that generate a sense of 'belonging' to a particular nation-state."[44] The nation-state was born as a product of the Peace of Westphalia, concluded in 1648, which ended a series of religious wars among the main European powers. The foundation of the nation-state was built on the principles of sovereignty and territoriality; this system challenged and gradually replaced the medieval feudal mosaic of small entities in which political power was mainly local and personal.[45] The new system was based on the premise that the world is divided into sovereign nation-states which recognize no superior authority. In addition, processes of law-making and enforcement, as well as the settlement of disputes, are placed exclusively in the hands of newly formed nation-states, and, later, of intergovernmental organizations, which gain their authority from nation-states.[46]

This system remained dominant and survived for a few centuries, due to its ability to adjust itself to new events and circumstances. Nation-states proliferated during the 20th century, largely as a consequence of the collapse of empires after WWI and the process of decolonization after WWII. The world's division into two blocs, while making smaller states less relevant, did not replace the Westphalian system. However, after the fall of the Berlin Wall in 1989, it became clear that the old system was seriously shaken. In 1990, when U.S. President George H. W. Bush announced the birth of a New World Order, it was quite obvious that an old model had disappeared.[47] The unprecedented military and economic power of the U.S., as well as the growth of worldwide networks of inter-

mented by Western policing, justice, and intelligence professionals, are overly positivist and technocratic in their approach. To ensure that reconstruction and reform programs are of lasting value, it is important that internal security specialists and development specialists work together with regional experts to structure programs that are adapted to the context." Seth G. Jones, Jeremy M. Wilson, Andrew Rathmell, and K. Jack Riley, *Establishing Law and Order After Conflict* (Summary), RAND Corporation, 2005, p. xix.

[44] Steger, Globalization, p. 56.

[45] *Ibid*., p. 57.

[46] David Held defines seven elements of the Westphalian model. See: David Held, *Global Transformations*, pp. 37 – 38, quoted in Steger, *Globalization*, p. 58.

[47] *Ibid*., pp. 59 – 61.

dependence, has prevented other states and their leaders from being absolutely sovereign on their territory any more. In other words, the world has become "smaller," which, as a consequence, has made individual nation-states more vulnerable to events around the globe. The line between domestic and foreign issues has become blurred. The tragic events of September 11, 2001 just emphasized that fact.

In efforts to depict this changed situation in the world brought by globalization, a new term – governance – was introduced by scholars and practitioners in the last decades of the 20th century. It was obvious in that period that the nation-state no longer played a unique and exclusive role in this complex society. Nation-states, of course, haven't disappeared, but they have had to share powers and responsibilities with increasingly important non-state actors: the civil society and the private sector. Thus, the term governance has emerged and has quickly become a generally accepted phrase.[48] According to the United Nations Development Program (UNDP) definition from 1997, "governance transcends the state to include civil society organizations and the private sector, because all are involved in most activities promoting sustainable human development."[49] This definition clearly identifies three main elements of governance: the state (usually called government) and its institutions, the civil society (nongovernmental organizations), and the private sector (with an increasing importance of transnational corporations). It is important to emphasize that these three sectors do not exist in isolation, but rather are highly interdependent. Sometimes they compete with each other, but very often they complement and harmonize their mutual activities (usually in the form of partnerships).[50] Moreover, the term governance is not limited to the state level, but includes local, regional, international, and global levels, which are all directly or indirectly connected in the age of globalization.[51]

3.1. Nation-state (changed role and character)

Globalization has thoroughly changed the character and nature of traditional nation-states. As mentioned in this chapter, sovereign nation-

[48] It is interesting that there is no appropriate and precise expression for this phrase in the Serbian language.

[49] Quoted in Ali Farazmand, "Sound Governance in the Age of Globalization: A Conceptual Framework", in Ali Farazmand, ed., *Sound Governance, Policy and Administrative Innovations* (Praeger, Westport, London, 2004), p. 7.

[50] Keohane and Nye, "Introduction", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 23; See also: Thorsten Benner, Wolfgang H. Reinicke, and Jan Martin Witte, "Global Public Policy Networks, Lessons Learned and Challenges Ahead", *The Brookings Review*, Spring 2003, Vol. 21, No. 2, The Brookings Institution, pp. 18–21.

[51] Farazmand, "Sound Governance in the Age of Globalization: A Conceptual Framework", in Ali Farazmand, ed., *Sound Governance*, pp. 7, 18.

states have lost their sole authority to govern independently in their territories. Officially they have remained sovereign, but in fact their policies have been increasingly influenced by binding decisions and codes of conduct of supranational governance organizations (IMF, WB, WTO and EU).[52] Furthermore, the unparalleled strength and power, both military and economic, of the U.S. have limited the scope of sovereignty of other states and are perceived by many non-Americans as a global hegemony. The threat of military intervention is just one, albeit rarely exercised, aspect of this hegemony. For most countries, the influence which the U.S. has on global economic institutions, as well as the strength and dominance of the American market, are much more important aspects of American superiority. In addition, America is not just the only superpower in the world; it has become the defining power as well. As Sardar and Davis put, "America defines what is democracy, justice, freedom; what are human rights and multiculturalism; who is 'fundamentalist', a 'terrorist', or simply 'evil'. (...) The rest of the world, including Europe, must simply accept these definitions and follow the American lead."[53] Otherwise, they face expulsion from the American market, economic sanctions, or, in the worst cases, military intervention. All of these forces are changing the character of nation-states and making them less sovereign.[54]

The traditional nature of the state has also been changed by the increasing degree of interdependence among modern states, which is mainly caused by the necessity for cooperation in matters that concern all people on the planet. The most important example of this change is the alarming concern for the global environment and awareness that individual actions cannot provide desirable results in this area.[55] Environmental degradation affects the entire world, making global cooperation not just desirable, but the only possible approach to those problems.[56] At the same time, those joint actions mean that states voluntary disavow one part of their sovereignty for universal goals.

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[52] Ali Farazmand, "Globalization and Governance: A Theoretical Analysis", in Farazmand, ed., *Sound Governance*, p. 41.

[53] Sardar and Davies, *Why Do People Hate America?*, pp. 178, 201.

[54] However, this process has been highly exaggerated in modern literature and run to an extreme. As Weiss suggests "the state itself is in its death throes, we are constantly told. For this is the era of 'civil society' and 'postmodernity', of 'global society' and the transnational market. (...) Wherever we look across the social sciences, the state is being weakened, hollowed out, carved up, toppled or buried. We have entered a new era of 'state denial'". Linda Weiss, *The Myth of the Poweless State, Governing the Economy in a Global Era*, (Polity Press, Cambridge, 2004), p. 2.

[55] Farazmand, "Globalization and Governance: A Theoretical Analysis", in Farazmand, ed., *Sound Governance*, p. 41.

[56] Lechner and Boli, eds., *The Globalization Reader*, p. 363; See also: J. F. Rischard, *High Noon, 20 Global Problems, 20 Years to Solve Them* (Basic Books, New York, 2002).

Finally, under the forces of globalization, "the role of government is progressively shifting toward providing an appropriate enabling environment for private (corporate) enterprise."[57] This change is comprised of a shift from a welfare state to a corporate (competition) state. In contrast to a welfare state, which tends to balance public and private interests, a corporate state is mainly concerned with providing fertile ground for private initiatives. The state has decreased its role as the major provider of public goods and services, while at the same time it has increased its function as a partner and promoter of the private sector.[58]

3.2. Private sector

The private sector is one of the main actors in the contemporary world, in some ways even more powerful than the nation-state. Thus, 51 out of the 100 largest economies today are transnational corporations (TNCs), and just 49 are states.[59] The whole global economy is dominated by huge TNCs, which sell their products all over the world, making it difficult or even impossible for smaller firms companies to survive. In order to gain bigger profits, TNCs produce and maintain the culture or ideology of consumerism, which is a vital element of global capitalism. With great assistance from the media, they are intentionally blurring the lines among information, entertainment, and promotion of products.[60] In order to control global capital and material resources, TNCs easily cross national borders, influencing and interacting with domestic policies.[61] At the same time, almost all countries are trying to attract global capital as a means of increasing internal development and decreasing unemployment. However, countries with a well-educated and skilled population are in a

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[57] UNCTAD, 1996a, pp. IC1 – 22, quoted in Farazmand, "Globalization and Governance: A Theoretical Analysis", in Farazmand, ed., *Sound Governance*, p. 41.

[58] *Ibid*., pp. 41 – 42; Weiss underlines interdependence as one of the main aspects of government-business relations. "Firms rely on their governments to establish and nurture conditions essential (...) for access to stable markets. Governments, on the other hand, depend on firms to increase wealth by generating jobs and growth". Weiss, *The Myth of the Poweless State*, p. 38.

[59] Wolfgang Sachs, "Globalization and Sustainability", in Lechner and Boli, eds., *The Globalization Reader*, p. 403.

[60] Leslie Sklair, "Sociology of the Global System", in Lechner and Boli, eds., *The Globalization Reader*, pp. 72 – 75; Alex Carey highlights that "the twentieth century has been characterized by three developments of great political importance: the growth of democracy, the growth of corporate power, and the growth of corporate propaganda as a means of protecting corporate power against democracy". Quoted in: Dobbs, *Exporting America*, p. 7.

[61] Nevertheless, TNC's have their own base in single nation-states, and "depend on them in many fundamental ways". See: Wood, *Empire of Capital*, p. 135; Similar: Weiss, *The Myth of the Powerless State*, p. 185.

much better position to benefit from investment opportunities, as well as a small group of people in developing countries (elites, wealthy, globally connected). Unfortunately, a majority of the population in developing countries appears only as an unlimited source of cheap labor and is increasingly marginalized.[62] Even the most responsible corporations cannot avoid the essential imperatives of capitalism (competition, profit-maximization and accumulation), "which inevitably means putting profit above all other considerations, with all its wasteful and destructive consequences".[63] Moreover, the strength and importance of the global market have reduced the ability of states to manage their own political and economic destinies so that "in the face of powerful economic forces that were shaping the world, and the inability of states to offer much protection, movements have arisen to provide some kind of collective response."[64] Those movements have become known as civil society or nongovernmental organizations (NGOs).

3.3. Civil society (nongovernmental organizations)

Civil society can be defined as "an area of association and action independent of the state and the market in which citizens can organize to pursue purposes that are important to them, individually and collectively."[65] While governments pursue the public interest, and businesses are oriented to private interests, civil society is concerned with the interests of social groups within society, especially those groups disadvantaged

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[62] Merilee S. Grindle, "Ready or Not: The Developing World and Globalization", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 188.

[63] Wood, *Empire of Capital*, p. 14; The same author accurately argues that "capitalism is driven by competition, yet capital must always seek to thwart competition. It must constantly expand its markets and constantly seek profit in new places, yet it typically subverts the expansion of markets by blocking the development of potential competitors". *Ibid*., p. 22; In a similar way, Justice Hugo Black stresses that "free market competition inevitable tends to lead to the development of monopoly power by those who have over the decades survived the forces of free-wheeling, cutthroat competition. Social Darwinism suggests that survival-of-the-fittest competition among firms in an industry produces monopoly control or at least oligarchical control over goods production or service delivery". Quoted in Kenneth F. Warren, *Administrative Law in the Political System*, (Westview Press, Boulder, 2004), p. 91; Present market of Serbia, which has been 'suffocated' by small number of tycoons, absolutely confirms these arguments.

[64] L. David Brown, Sanjeev Khagram, Mark H. Moore, Peter Frumkin, "Globalization, NGO, and Multisectoral Relations", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 274.

[65] *Ibid*., p. 275; Civil society can also be defined as "the intermediate realm between state and family, populated by organizations that are separate from the state, that enjoy autonomy in relation to the state, and are voluntarily formed by members of the society to protect or extend their interests or values". IDB 2001, p. 141, quoted in Jack Menke, "Globalization, Diversity and Civil Society in the Caribbean, Integration by Design or Default?", in Bissessar, ed., *Globalization and Governance*, p. 59.

and unprotected by existing arrangements.[66] The world has witnessed an explosion in the number and size of nongovernmental organizations in the last two decades, from tiny village associations to influential and giant global organizations like Greenpeace.[67] Although diverse in activities and goals, the big international NGOs cover three main areas: human rights, development, and the environment.[68] Because of their flexibility, they are often much more effective than government institutions, for example, in aid distribution or poverty relief. Moreover, they are usually better positioned to control TNCs, due to their closeness to grassroots and their capabilities to mobilize public opinion. As a result, corporations are more and more involved in corporate social responsibility, because otherwise they risk the consequences of bad press or consumer boycott.[69]

However, NGOs have been the objects of serious criticism recently, especially in terms of the transparency and accountability of their work. Moreover, their motives and good intentions have been questioned and challenged. According to many, the proliferation of NGOs has more to do with the availability of resources for their work than with the protection of particular groups or value-based missions.[70] Above all, by providing aid and services in developing countries, without building and strengthening states' own capacities, NGOs can just weaken already ineffective state-institutions.

3.4. Need and importance of state strengthening (building)

No matter how strong the globalization process is, or how increasing role non-state actors have today, nation-states haven't lost their necessity for existence. On the contrary, there is a need more than ever for strong states with effective institutions as guarantors of processes in the contemporary world. As Nye puts it, "there is little evidence that a sufficiently strong sense of community exists at the global level or that it could soon be created. (...) At this point in history democracy works best in sovereign nation-states, and that is likely to change only slowly."[71]

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[66] Brown, Khagram, Moore, Frumkin, "Globalization, NGO, and Multisectoral Relations", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 276

[67] Jessica T. Mathews, "Power Shift, in Lechner and Boli", eds., *The Globalization Reader*, p 271.

[68] Bond, "The Backlash Against NGOs", in Lechner and Boli, eds., *The Globalization Reader*, p. 278.

[69] *Ibid*., pp. 278–279; Ethan B. Kapstein, "The Corporate Ethics Crusade", in *Globalization: Challenges and Opportunity*, pp. 113–114.

[70] Brown, Khagram, Moore, and Frumkin, "Globalization, NGO, and Multisectoral Relations", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 278.

[71] Nye, *The Paradox of American Power*, pp. 109, 163; See also: Grindle, "Ready or Not: The Developing World and Globalization", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 193.

Even with such strong networks of global interdependence, or even because of them, "most people remain strongly rooted to the ties of local, regional, and national communities that give people a sense of blood and belonging."[72] Thus, claims that we are all becoming cosmopolitan citizens (citizens of the world) must be seen as exaggerations, since most people in most societies remain rooted in their local communities or nation-states.[73] Wolf, as a prominent defender of globalization, also argues that "the primary loyalty to the nation makes a nation state an extraordinarily potent form of social organization" and that "individual states remain the locus of political debate and legitimacy."[74] It is the state structures, and the loyalty of people to particular states, that enable them to create connections among themselves, handle issues of interdependence, and resist amalgamation.[75] Wood sums up those ideas by saying that "the world today (...) is more than ever a world of nation states".[76]

However, the nation-state has, and should be, changed in order to address the problems of the contemporary world. Old and extensive bureaucratic systems cannot survive new and dramatically changed circumstances. As Friedman suggested, "because of globalization and the increasing openness of borders, the quality of (...) state matters more not less".[77] Thus, many state sectors and policies of developing countries, as obstacles to economic growth, need to be reduced, if not eliminated. Nevertheless, the problem lies in the fact that although states need to be cut back in some areas, they need to be simultaneously strengthened in others.[78] As Fukuyama points out, there is a great importance in distinguishing between "the scope of state activities, which refers to the different functions and goals taken on by governments, and the strength of state power, or the ability of states to plan and execute policies and to enforce laws cleanly and transparently. (...) While the optimal reform path would have been to decrease scope while increasing strength, many countries actually decreased both scope and strength."[79] The international community, led by the U.S., despite its best intentions, is often involved, not in

[72] Pippa Norris, "Global Governance and Cosmopolitan Citizens", in Nye and Donahue, eds., *Governance in a Globalizing World*, p. 173.

[73] *Ibid*., p. 166.

[74] Wolf, *Why Globalization Works*, pp. 36, 319.

[75] Keohane and Nye, p. 13.

[76] Wood, *Empire of Capital*, p. 20.

[77] Friedman, *The Lexus and The Olive Tree*, p. 158.

[78] Francis Fukuyama, State-Building, *Governance and World Order in the 21st Century* (Cornell University Press, Ithaca, New York, 2004), p. 5.

[79] *Ibid*., p. 7; In a similar way, Friedman explains that "the trick for governments today is to get the quality of their states up at the same time that that they get the size of their states down. (...) Because less government without better government is really dangerous". Friedman, *The Lexus and The Olive Tree*, pp. 158, 159.

the strengthening and building of state capacities in developing countries, but in their decline or even destruction. This occurs because the main intention of the international community is to provide, through NGOs and the private sector, services and goods to the country in need. That approach can give satisfactory results in the short-term, because it bypasses local governments, which are often corrupt and ineffective. However, once the foreign aid programs are over, the country is left with atrophied state institutions unable to function independently.[80] That is the reason why successful programs have to be idiosyncratic, using local knowledge to create local solutions, and not subject to broad generalization.[81] Prescribed solutions and best practices cannot produce desirable results without involving context-specific information. Although some areas of public sector are, by their nature, more liable to foreign formal modeling (e.g., central banking), many more sectors require delicate local approaches (e.g., education, law, social security).[82]

Market-oriented reforms cannot be implemented and cannot produce desirable results in countries which have not established the principle of 'rule of law'. However, 'rule of law' as a foundation for any democratic country requires not just the existence of norms and rules, but also strong and effective institutions which will enforce and safeguard those rules.[83] Only with strong institutions can the state provide public goods which the market cannot or has no interest to provide, remedy inevitable market failures, and help and support groups of people who are more vulnerable or less equipped for the market-game.[84] Therefore, "public institutions need to be the vehicles by which leaders take public responsibility for the public interest. Otherwise, markets determine the public interest, which manifestly does not work, especially in finance".[85]

In addition, pundits around the world started to abandon the belief that the private sector takes the necessary measures to correct and cure problems in societies. In the wake of the great financial crisis of 2008, the nation-state and its institutions have been perceived as the main instruments for solving widespread social problems. That said, we do not imply that the nation state should take over all functions previously reserved and performed by the free market. We do suggest, however, that free mar-

[80] Similar: Fukuyama, *State-Building*, pp. 39–42.

[81] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Conditions Have Failed* (Yale University Press, New Haven, CT), quoted in Fukuyama, State-Building, p. 82.

[82] Fukuyama, *State-Building*, pp. 43, 84.

[83] *Ibid*., p. 59.

[84] Wolf, *Why Globalization Works*, p. 61.

[85] Colin I. Bradford, Johannes F. Linn, "A Message for the Ministerial Meetings: Reform the IMF or Create a New Global Agency, But Do Something", *The Brookings Institution*, (posted on October 9, 2008), p. 1.

ket initiatives should be scrutinized and controlled with effective regulatory oversight, especially in the financial sector, in order for countries to prevent and avoid further crises.

Moreover, the private sector and NGOs need strong states, because only states have legitimate coercive powers to provide and safeguard fertile ground for the activities of all actors. "Global capital still – in fact, more than ever – needs a closely regulated and predictable social, political and legal order", in short "global capital needs local states".[86] This is also true for international organizations, since they "gain their legitimacy and authority from the states that belong to them."[87] Nevertheless, a strong state does not equate to a centralized state. On the contrary, all decisions in all countries should be made by levels of government no higher than that necessary to perform a given function; this is known as the principle of subsidiarity. That approach can ensure that all decisions are made by those actors which are better informed about particular issues and prepared to respond and adapt to certain types of changes.[88]

We further suggest that states with strong institutions show two main features: they achieve their public goals despite and over the pressures of powerful social groups ('autonomous power'),[89] and their institutions are highly adaptive to changing environments. This second characteristic is usually described as 'transformative capacity' and has become an important advantage of countries in the globalized world.[90] Actually, their response in the time of financial crisis and economic turmoil largely

[86] Wood, *Empire of Capital*, p. xi, 155; Wood continues by saying that, "capitalism needs stability and predictability in its social arrangements. The nation-state has provided that stability and predictability by supplying an elaborate legal and institutional framework, backed up by coercive force, to sustain the property relations of capitalism, its complex contractual apparatus and its intricate financial transactions". *Ibid*., p. 17.

[87] *Ibid*., p. 319; In another article, Wolf emphasizes that, "the bedrock of international order is territorial state with its monopoly on coercive power within its jurisdiction". Martin Wolf, Will the Nation-State Survive Globalization?, in *Globalization: Challenges and Opportunity*, p. 108.

[88] Fukuyama, State-Building, pp. 67 – 69; However, decentralization requires a delicate approach. Countries need to be centralized first in order to induce decentralization. Uncontrolled decentralization, can just make the situation in some countries worse.

[89] This characteristic is emphasized, for instance, by Gourevitch, Skocpol, and Zysman, quoted in Weiss, *The Myth of the Poweless State*, p. 27, 31; Many times, special interests have acted selfishly and contradictory to the nation's general welfare (for instance, in the cases of Enron, WorldCom, Arthur D. Anderson and subprime mortgage crisis). See: Warren, A*dministrative Law in the Political System*, p. 85; Without 'autonomous power' state can easily be 'captured' by special interest groups and powerful individuals. Serbia, at the moment, is a very good example for that.

[90] Weiss defines transformative capacity as "the ability (of the state – M. D.) to coordinate industrial change to meet the changing context of international competition". For broader discussion on this topic, see: Weiss, *The Myth of the Poweless State*, pp. 4–40.

depends on this adaptive ability. Friedman emphasizes this aspect by saying that "countries that have built up sophisticated, honest and credible financial and legal infrastructures (...) are much better positioned to fend off speculative attacks on their currencies, are much better able to withstand sudden outflows of capital (...), and are much faster at taking steps to minimize their impact".[91]

In short, globalization needs strong (autonomous and adaptable), effective, and decentralized states, with an established principle of rule of law and with a limited scope of necessary state functions. However, the current form of globalization does not provide (or even undermine) ground for such states and consequently the whole process of globalization is jeopardized.

4. CONCLUSION

The nation-states no longer play a unique and exclusive role in modern societies because they have had to share powers and responsibilities with increasingly important non-state actors: the civil society and the private sector. In addition, the unprecedented military and economic power of the U.S. and the growth of worldwide networks of interdependence, have prevented other states, and their leaders, from being absolutely sovereign on their territories. However, nation-states have not lost their role or reason for being. On the contrary, there is a need, more than ever, for strong states with effective institutions to serve as guarantors of processes in the contemporary world.

States with strong institutions show two main features: they achieve their public goals despite and over the pressures of powerful social groups ('autonomous power'), and their institutions have the ability and strength to act in a changed environment and to adjust to the new circumstances ('transformative capacity'). Unfortunately, the current form of globalization does not provide firm ground for such states and, because of that, the whole process is jeopardized. The biggest paradox that globalization faces today, which undercuts its own foundation, can be summarized as follows: globalization is decreasing the authority and strength of the nation-state as an obstacle to free trade, although a strong state (which does not mean an extensive state) is a precondition for free flows of capital and people.

Globalization presents opportunities for economic growth and the influx of foreign investments. Nevertheless, the benefits of globalization are distributed unevenly, which undermines the very system of globalization, making it unsustainable in its current form. In short, developing

[91] Friedman, *The Lexus and The Olive Tree*, p. 162.

countries, with their weak institutions, are not capable of seizing the opportunities offered by globalization. Therefore, the building and strengthening of public institutions in those countries would turn the whole process in the right direction.

In the wake of great financial crisis of 2008, the nation-state and its institutions have been perceived as the main instruments for solving widespread social problems. Whether they will live up to those expectations is yet to be seen.

Dragica Vujadinović, LLM, PhD

Full Professor,
University of Belgrade Law Faculty

PHILOSOPHICAL FOUNDATIONS OF DWORKIN`S THEORY OF JUSTICE

Ronald Dworkin, together with John Rawls, has had a central role in renovating political philosophy in the second half of the 20th century, through thematizing liberal theories of justice. Rawls` conception of "justice as fairness" is centered on the concept of liberty, while Dworkin's conception of justice as "equality of resources" is centered on the concept of equality.

The long and distinguished career of Ronald Dworkin – as an academic lawyer and political philosopher – has been designed and designated by the attempt to show how an egalitarian vision of the world can shape the character of liberal-democratic legal, political, social, and market institutions. Dworkin tends to reaffirm the value of equality within the framework of contemporary liberal political philosophy.

In a process of developing his political philosophy systematically, i.e the theory of justice called an "equality of resources" account of justice; Dworkin also made attempts to outline – but still not to articulate in a systematic way – the philosophical foundations (ethical, gnoseological, epistemological) of his theory of justice. His liberal theory of justice is supposed and proposed to be further developed and surrounded by the subsequent systematical articulation of these philosophical foundations.

This text attempts to reconstruct from Dworkin's previous work the philosophical foundations of his theory of justice.

Key words: *Political Morality. – Equal Importance. – Individual Responsibility. – Liberal Ethics. – Integrity of Fundamental Human Values.*

1. INTRODUCTION

Ronald Dworkin, one of the greatest contemporary political and legal philosophers, started firstly developing his comprehensive theory of the central position of the concept of equality in the field of philosophy of law[1], followed by developing a liberal political theory of justice[2], and finally through attempting to clarify philosophical foundations[3] of this political theory.

Dworkin develops his own conception of liberalism called "liberal equality" focused on an "equality of resources" account of justice. His theory affirms the central role of the political ideal of equality, i.e. "equal concern."

Equality represents the main political value for Dworkin. According to him, and in contrast with "the old rights" giving of priority to the value of freedom (followed by material inequality), as well as with "the old left's" giving of priority to the value of equality (of material wealth), the idea or ideal of liberal equality contains inseparable values of both freedom and equality, giving special priority to the value of equality.

His consideration that the value of equality is an "endangered species" in the contemporary liberal tradition should be primarily connected

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[1] R. Dworkin, *Taking Rights Seriously*, Gerald Duckworth &Co Ltd, London 1977; R. Dworkin, *A Matter of Principle,* Harvard University Press, Cambridge, Massachusetts 1985; R. Dworkin, *Law's Empire*, Harvard University Press, Cambridge, Massachusetts 1986. Dworkin turned back again to the field of jurisprudence with his last book *Justice in Robes*, Harvard University Press, Cambridge, Massachusetts 2006.

[2] Dworkin has collected all the articles concerned with his liberal political theory of justice, which he had written during the previous twenty years, in his book *Sovereign Virtue – the Theory and Practice of Equality,* Harvard University Press, Cambridge, Massachusetts / London, England 2000.

[3] A philosophical conception of morality (a philosophical ethics concerned with the fundamental values of humanism) has been initially articulated in Dworkin's manuscript "Justice for Hedgehogs": (Available from *http://www.nyu.edu*/Accessed August 26, 1999), and also in the introduction to *Sovereign Virtue* (2000).

Pilosophical ethics and moral foundations of liberalism and their interconnections with (the pluralism of) individual ethics are presented in his "Foundations of Liberal Equality" (1990).

The axiological/gnoseological conception of the status and the integrity of values is elaborated in "The Foundations of Liberal Equality", in "Justice for Hedgehogs" and in the article "Interpretation, Morality and Truth", *http://www.law.nyu.edu/clppt/program2002/readings/dworkin/dworkin.doc,* Accessed 2002.

The epistemological explanation of objective truth in the field of values is given in the article, "Objectivity and Truth: You'd Better Believe It", *Philosophy & Public* Affairs 25, 1996. As well as in the above mentioned article "Interpretation, Morality and Truth" (2002).

with the issues of economic inequality. He believes that economic inequality has been totally marginalized, but he also believes that the norms of moral equality (that all people have equal moral worth) and of political equality (that all people have a right to participate in democratic decision-making) have become stronger than ever.[4]

Dworkin's political theory of justice presupposes that the concept of equality means "equal concern." According to him, "equal concern" is the sovereign virtue of political communitie, and finds its concrete articulation in the "equality of resources" account of justice.

The "equality of resources" account of justice represents Dworkin's attempt to articulate a redistributive scheme concerned with economic resources, which will be more "endowment insensitive" and at the same time more "ambition-sensitive" than has been offered by John Rawls' theory of justice[5], and especially by his "difference principle." The point is that equal concern would mean an equal share of economic resources if it were not dependant on morally irrelevant circumstances, and preferably dependant on individual choices.[6] In order to attain these twin goals in a way better than Rawls had managed, Dworkin constructs his own rather complicated distributive scheme, which involves, in the context of a free market, the use of auctions, insurance plans and taxation.[7]

An egalitarian theory of justice presupposes specific conception of liberalism: form of liberalism based on equality, assuming neutrality of the state only as a derivative value, and "strategy of continuity" between political morality (the theory of justice and liberal ethics), on one side and individual ethics (value pluralism), on another. On the other hand, the contrary theory of (procedural) justice, which affirms the centrality of the ideal of liberty, presupposes a "strategy of discontinuity" between justice (political morality) and pluralism of individual ethics.

The point of difference between these two versions of liberalism is that liberalism based on neutrality finds an epistemological defense in moral skepticism and therefore means a negative for uncommitted people

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[4] Dworkin, (2000), 3.

[5] J. Rawls, *Theory of Justice*, Harvard University Press, Cambridge, Massachusetts 1999.

[6] Dworkin differentiates between a person's mental and physical powers, which he assigns to the sphere of unequal natural endowment, undeserved inequalities (circumstances), and a person's tastes and ambitions, which he assigns to the sphere of personal choice. Thus, as a consequence, personal physical and mental powers should not influence the equality of resources, being morally arbitrary characteristics. While belonging to one's "natural endowment" and, according to the requirement for "endowment insensitive" redistribution, they should be equalized in order to enable an equal share. *Ibid.* 3–4.

[7] *Ibid.*

and cannot offer any justification for common goals (justice, political morality, and liberal ethics) and against economic inequalities and other privileges. In contrast, liberalism based on equality rests on a positive commitment connected with an egalitarian morality (liberal ethics).[8]

Dworkin aims to reaffirm/redemthe moral foundations, utopian character and mobilizing force of liberalism.[9]

In an attempt to demonstrate the substantial (not only the procedural) connection between his liberal (egalitarian) theory of justice (political morality) and individualistic value pluralism in liberal society, Dworkin makes an additional theoretical effort to demonstrate the philosophical foundations of his liberal theory of justice.

2. THE PHILOSOPHICAL FOUNDATIONS OF POLITICAL MORALITY

In the last phase of elaborating his theory of equality and liberalism, Dworkin pays attention to the philosophical foundations of his theory of justice and liberalism. In that context he mentions philosophical ethics and philosophical morality, the philosophical/axiological account of the status and integrity of values, and epistemological conception of objective truth in the field of values (the "face value view of morality").

In the Introduction to *Sovereign Virtue* Dworkin says that he plans to introduce a more philosophical level of the argument concerned with theory of justice in a later book. According to him, the theory of political morality, which has been developed in this book, should be located in a more general account of human values of ethics and morality, of the status and integrity of value, and of the character and possibility of objective truth.[10]

This is all in accordance with his distinction between a philosophical perspective and a political perspective.[11] According to Dworkin, a comprehensive and plausible liberal theory ("political perspective") has to be based on the following "philosophical perspective": firstly, it has to reflect basic commitments for the value of human life and about each person's responsibility to realize that value in their own life, i.e. the two principles of ethical individualism. Secondly, it has to show that the central political values of democracy, liberty, civil society, and equality have the status of something good, and also are mutually integrated (growing

[8] R. Dworkin, (1985), 205. He went on to develop the 'strategy of continuity' in his articles, manuscripts, and books written after 1985 (1990, 1999, 2000, and 2002).

[9] R. Dworkin, (1990).

[10] R. Dworkin, (2000), 4.

[11] R. Dworkin, (1990).

out of and reflecting in all others in a sense which does not mean their simple compatibility, but their inner indivisibility). Thirdly, it has to show that central political values have the status of objective truth in the framework of "the face value view of morality."

2.1. Ethical Individualism – Two Cardinal Values of Humanism

The philosophical/moral perspective contains, according to Dworkin, a diversity of general ideas about whether and why human life has value and how that value is to be realized. Philosophical/moral foundations of liberalism are connected by two cardinal values of humanism, and they represent a philosophical/moral basis of both liberalism (philosophical morality, liberal ethics) and of individual ethics` pluralism.

A note about Dworkin`s terminology should be added[12]: he uses the term "ethics" in a broader and narrower sense. In its broad sense ethics means *morality* and refers to the overall art of living, to the study of right and wrong actions, to the question how we should treat others. Ethics in its narrow sense is concerned with individual ethics, or, more precisely, with the question of well-being, i.e. the question of how we should live to make good lives for us (in short – how to live well). In the context of well-being, Dworkin makes a difference between "critical well-being" and "volitional well-being."

There are philosophical/moral foundations of liberalism at different levels: firstly, the most abstract one is concerned with two cardinal values, secondly, philosophical/liberal morality (he also calls it liberal ethics), and thirdly, individual ethics connected with critical well-being.

Two principles of "ethical individualism," according to Dworkin, are fundamental for his conception of liberalism, i.e. for his account of equality or of "equal concern." It could be said that these principles follow the fundamental premise of the liberal tradition, the natural freedom and equality of all individuals.

The most abstract account of equality (or of justice), which is called "equal concern" as the sovereign virtue of political community – has had, on one hand, its first-level-explication at the level of material resources called "equality of resources." On the other hand, at a more basic level, "equal concern" and "equality of resources" have their philosophical foundations in two cardinal values of humanism.

As aforementioned, a comprehensive liberal theory is based, or should be based, on the two principles of ethical individualism. The first principle of ethical individualism is the principle of equal importance, and the second is the principle of individual responsibility.

The principle of special responsibility is centred on an individual's responsibility for thier own life choices, for deciding what would count as

[12] *Ibid.* 8–9.

a successful or damaged life within whatever range of choices have been permitted by their resources and culture.[13] According to Dworkin, the responsibility principle does not mean that people do not have to care about other people and that they can do whatever they wish. His interpretation of special responsibility for success in our individual lives has been further developed in a sense that it has to be considered not only from the point of our opportunities and resources, but also from the point of necessary collectively-made decisions about what resources and opportunities will, in fact, be open to us. Consequently, individual responsibility concerns also collective decisions by taking into account the opportunity costs which our choices have for the other participants in the "auction" (fair distribution of resources).

This also has been treated as an inner connection between justice and individual ethics in Dworkin's attempts to elaborate moral foundations of liberalism[14], as well as in the context of his assumption that democratic order is best fitted for realizing the ethical principles of equal importance and special responsibility and the basic political principle of equal concern. There is an inner connection between the institutional question and the ethical question.[15]

Equal importance "...attaches not to any property of people but to the importance that their lives come to something rather than being wasted."[16] According to Dworkin, it is not part of the meaning of this principle that each of us has an obligation to act in such a way as to improve the average happiness or well-being in the world, or to help the worst off before the better off, rather part of the meaning is to care about others, not to be indifferent, and also to show preference in paying attention or distributing our resources for those people close and special to us.

Dworkin's interpretation of the principle of equal importance is most centred upon an equal concern of sovereign power for its citizens.

Dworkin concludes – on the basis of the foundational principles of humanism (ethical individualism) – that "equal concern... is the special and indispensable virtue of sovereigns."[17] In other words, "equal concern is the sovereign virtue of political community."[18]

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[13] R. Dworkin, (2000), 6.

[14] R. Dworkin, (1990).

[15] R. Dworkin, (1990, 2000).

[16] R. Dworkin, (2000), 6.

[17] "The first principle requires government to adopt laws and policies that insure that its citizens' fates are, so far as government can achieve this, insensitive to who otherwise they are – their economic backgrounds, gender, race, or particular sets of skills and handicaps. The second principle demands that government work, again so far as it can achieve this, to make their fates sensitive to the choices they have made." (*Ibid.*)

[18] *Ibid.* 1.

These two principles – the principle of equal importance and the principle of individual responsibility – have to act in concert; they ensure that the sovereign is concerned equally with each citizen and, at the same time, leave space for personal decisions and life choices.

These two principles are the foundation of Dworkin's political philosophy. They represent the moral basis of his conception of "liberal equality" and consequently the moral basis of politics. They endow the political theory of liberalism with the twin characteristics of equality and liberty, of egalitarian and collective principles, along with the principle of individual responsibility.

Dworkin intends to achieve a unified account of equality and responsibility that respects both, instead of, and in contrast to, giving priority either to equality or to responsibility.

2.1.1. Liberty and Equality

On the basis of the above-mentioned principles, Dworkin assumes that his theory of political morality reflects even more basic commitments about the value of a human life and about each person's responsibility to realize the value of their own life. In that attempt, he takes a path contrary to Isaiah Berlin's assumption that equality and liberty have been in dramatic conflict and also contrary to John Rawls' attempt to insulate political morality from the ethical assumptions of individuals about the sense of a good life. For Dworkin, equality and liberty are inseparable value, and political morality is not based in any anonymous and hypothetical contract, but rather in more general ethical values concerned with the value of life and individual responsibility for a personal life.[19]

2.2. Moral Foundations of Liberalism

The moral foundations of liberalism have been built in accordance with Dworkin`s "strategy of continuity" between political morality ("political perspective", the liberal account of justice as "equality of resources") and philosophical morality ("philosophical perspective" – two fundamental values of humanism, liberal ethics – followed by a "challenge model of ethics" and individual ethics – attached to "critical well-being").[20]

[19] *Ibid.* 5.

[20] The theory of justice demands neutrality of the state: but there are two conceptions of the relation between political morality, individual ethics, and the neutrality of the state. The first is called the "strategy of discontinuity", in which the neutrality of the state is a fundamental principle and justice matters only in the form of procedures concerned with neutral institutional regulations, having nothing to do with individual value orientations and with the common good. The state does not and must not concern itself with individual ethics (with individual value-concepts of the good). The second is called the

Liberal ethics must be abstract, and not absorbable by different individual ethical convictions. Abstract liberal ethics require that individuals "test their concrete opinions in a certain light." Liberal ethics have to be concerned with the sense of good life, with abstract issues such as the following: What is the source of questions about ethics? Why should we worry about how to live? Whose responsibility is it to make lives good? What is the measure of a good life?

Dworkin says that two fundamental principles of humanism (the principle of equal importance and that of special responsibility) offer attractive answers to the first two questions of source and responsibility.

Response to the question: "Whose responsibility is it to make our lives good?" is connected to his statement that justice is the sovereign virtue of a political community, as justice is a parameter of individual ethics.

Dworkin answers the question concerned with the measure of a good life by elaborating on a "challenge model of ethics" – as opposed to an "impact model of ethics" – as well as by differentiating between critical well-being and volitional well-being, and between the critical self-interests of individuals and their volitional self-interests. The point is that there are not only egoistic self-interests, but also those which make for an inner connection between just acts and a critically better life. Critical well-being and critical self-interests lead towards accepting justice as the parameter of individual ethics. This means that critical well-being supposes taking into individual value consideration of what would be, generally speaking, a better life.[21]

A "challenge model of ethics," which adopts Aristotle's view that a good life has the inherent value of a skilful performance, offers space for

"strategy of continuity", according to which the neutrality of the state is a derived principle. In this case the connection between the common good, value pluralism of individual conceptions of the good life and justice has been an internal one. While the "strategy of continuity" implies that the neutrality of the state can be compatible with the perfectionist demand that the state concern itself with the common good as well as with individual value-conceptions of the good, the "strategy of discontinuity" implies an incompatibility between political morality and perfectionist ethics.. The above-mentioned two conceptions essentially result in two different designs of liberalism. (See: Dworkin, 1990, 2000)

[21] "We must recognize, first, a distinction between what I shall call volitional well-being, on the one hand, and critical well-being on the other. Someone's volitional well-being is improved, and just for that reason, when he has and achieves what in fact he wants. His critical well-being is improved by his having or achieving what he *should* want, that is, the achievements or experiences that it would make his life worse or *not* to want.... [Our] project of finding a liberal ethics as a foundation for liberal politics must concentrate on critical as distinct from volitional well-being. We need an account of what people's critical interests are that will show why people who accept that account and care about their own and other people's critical well-being will be led naturally towards some form of liberal polity and practice." R. Dworkin, (1990), 42, 46.

convictions about the critical interests of individuals, doing their best to successfully meet challenges which they face in order to make their life better and also to connect the parameters of challenge and of skilful performance with their own culture and other circumstances.[22]

Living well is seen as responding appropriately to one's situation. This is the field where the main political values of liberalism and abstract liberal ethics and concrete individual value orientations (critical interests, critical well-being, and the challenge model of ethics) mutually encounter one another. Dworkin says: "Political principles are normative in the way critical interests are: the former define the political community we should have, the latter how we should live in it. Our search for ethical foundations is therefore a search for normative integrity."[23]

2.2.1. Concept of the Neutrality of State

As above mentioned, Dworkin`s theory of justice, i.e. the "strategy of continuity" presupposes neutrality of the state not as the foundational principle, but only as the derivative.

Neutrality is a part of the argument concerned with the feasibility of moral equality. The question is how the state can be legitimate in the context of moral equality and the answer is that neutrality is the tool. A restricted conception of neutrality means that in spite of the pluralism of individual conceptions of a good life (or in other words, mutually conflicting individual value orientations) there are more basic ethical values which are widely shared, do not contradict the neutrality of the state, represent the common ethical background of individual choices, and enable a widely-shared moral commitment to liberal politics.[24]

There are important indications[25] that Dworkin changed some crucial standpoints concerned with the concept of neutrality with the passage of time. At the beginning Dworkin developed (like Rawls, although contrasting with Rawls' contracterianism) his concept of justice as being connected with an assumption of the neutrality of the state as a foundational principle. This was followed by the "strategy of discontinuity" between political morality and individual ethics (value pluralism). Dworkin in his later works steps aside from treating the principle of neutrality as a foundational one and attempts to develop the "strategy of continuity" between a theory of justice and a theory of ethics and morality.

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[22] *Ibid*, (57–65).

[23] R. Dworkin, (2000), 245.

[24] "Liberalism can and should be neutral at some, relatively concrete, levels of ethics. But it cannot and should not be neutral at the more abstract levels at which we puzzle, not about how to live in detail, but about the character, force, and standing of the very question of how to live." (R. Dworkin, 2000, 240)

[25] R. Dworkin, (1990), 7; (1995), 205.

The concept of tolerance takes on different connotation in the light of the above– mentioned restricted neutrality of the state and (abstract) liberal ethics. Tolerance does not mean – as in the context of the "strategy of discontinuity" – that political morality is divided from ethical convictions, but rather that liberal ethics affirm certain fundamental moral and political values, while at the same time affirm tolerance among mutually different or even conflicting individual moral convictions.[26]

2.3. Status and Integrity of Values

As mentioned above, Dworkin has attempted – after developing a political theory of morality in *Sovereign Virtue* – to articulate the ethical, axiological and epistemological foundations (philosophical perspective) of his theory of justice (political perspective). His axiological attempt aims at locating his theory of political morality "in a more general account of the human values, ...of the status and integrity of value."[27]

Relevant human values in this context are those concerned with political morality, which identify a legitimate and attractive state – one that is democratic, which respects liberty, realizes a just distribution of property and opportunity, and provides an attractive civil society. His more general account of relevant political values, such as democracy, equality, liberty, community, and justice, aims for an axiological account of their status and mutual integrity.[28]

Dworkin provides specific interpretations of main liberal political ideals, i.e. his notion of the concepts democracy, equality, and liberty: "Democracy does not mean majority rule but rather collective government by a partnership in which all citizens are full and equal partners, which is something different. Equality does not mean aiming to make people equal in any property, like happiness or wealth, but rather aiming to make them equal in the costs their choices imposes on others. Liberty is not the power to do what you want free from the interference of others, but to do what you want, free from such interference, with property and opportunities that are rightfully yours."[29]

Dworkin says that his understanding of the above-mentioned concepts has to pass two tests. The first test demands that in each case there must be a particular kind of reflexive equilibrium within the boundaries of the concept itself. On the one hand, the conception of some ideal must keep enough faith in our prior convictions (value judgments based on the ideal in question). On the other hand, our conception of this ideal (cardi-

[26] R. Dworkin, (1990), 22.

[27] R. Dworkin, (1999), 1.

[28] *Ibid.*

[29] *Ibid.* 2.

nal political value) must show why the ideal embedded in the concept, of which these convictions (value judgments) are instances, "is something *good*". The second test demands an overwhelming endeavour to achieve harmony between our value concepts and judgments and to ensure that "... the system of these political values make sense from the perspective of our philosophical ethics: our more general ideas about whether and why human life has value and how that value is to be realized."[30] At this level of axiological analysis Dworkin names the first test of finding the reflexive equilibrium inside each political value as the "test of interpretative justification" and the second test of the harmonious interpretation of all our relevant political values as mutually indivisible and essentially interconnected as the "test of interpretative integrity across our concepts."

Dworkin assumes that the integrity of main political ideals (values) is the heart and essence of liberalism: "Liberalism is special and exciting because it insists that liberty, equality, and community are not three distinct and often conflicting political virtues, as other political theories both on the left and right of liberalism regard them, but complementary aspects of a single political vision, so that we cannot secure or even understand any one of these three political ideals independently of the other."[31]

These two tests are supposed to show how each of our main political values separated, as well as all of them together are *good*, while expressing the two fundamental values of humanism – equal importance and special responsibility – and more generally, the value of human life and the ways of its realization. The above-mentioned axiological position aims at interconnecting a philosophical perspective (philosophical ethics) and a political perspective (political morality). In other words, it aims at articulating the moral foundations of liberalism.

Dworkin speaks about interpretative justification and interpretative integrity in relation to these main political concepts – democracy, equality, liberty and community, as well as the more abstract concept of political morality (justice) – as "*interpretative* concepts." In this respect he creates a distinction between "*criterial* concepts" and "*interpretative* concepts." Criterial concepts are shared among people "...in virtue of sharing some rule about the criteria for their correct application. We share rules setting out the criteria for identifying something as a book or table, for example, or a mammal or arthritis". These are concepts in respect of which there are no possible genuine disagreements. In contrast, in the case of interpretative concepts genuine disagreements are possible because "...we share these concepts not in virtue of sharing rules about the

[30] *Ibid.* 3.

[31] R. Dworkin, (1990), 2.

criteria for their correct application, but in virtue of agreeing that they name a real or supposed value, and that their correct application turns on the question of what that value, more explicitly stated and understood, really is."[32]

Therefore, concepts of justice, equality, liberty and so on impose the need for discourse about values, for juxtaposing different value interpretations, their confrontation with previous convictions and widely accepted intuitions about their meaning, attempting to get as a result a reflexive equilibrium and integrity of the main values of political morality.

One of Dworkin's main points is that the concept of justice cannot be interpreted as procedural or criterial (because there are no shared rules for its application), but as an interpretative concept. Justice, together with equality, liberty and community, should be reconsidered from the standpoint of finding out what is good about these concepts, capturing the value of these political ideals. Disagreements concerned with interpretative concepts such as justice, or with the question what is just, or why something is just or unjust, are based on conflictive judgments that count as substantive moral (value) arguments.

2.3.1. "Democratic Dilemma"

Dworkin links his conception of justice with the "democratic dilemma" and by attempting to achieve not just consensus, which is unattainable, but alo sufficient popularity of the democratic order to solve this "dilemma."

"Democratic dilemma" and the real chances for solving it are connected with the fact that although people disagree, fundamentally and radically, about religion, ethics, and all other dimensions of value, two cardinal values of humanism have been widely shared among the people. This implicitly means that liberal ethics (the "challenge model") and individual's ethics (the "critical well-being") have been determined by the principle of "equal concern." Dworkin insists on reaffirming and redeeming liberal political values and democratic order as the best framework for realizing two fundamental human values.

Dworkin believes that sufficient popularity of democratic order could be achieved with insisting not on what divides us but on what connects us. He expresses his belief that two cardinal values of humanism, captured in the principle of equal importance and the principle of special responsibility, have been widely shared among us in spite of our more concrete ethical and religious disagreements (and in spite of the "endangered" status of the value of justice). These cardinal values have come to be settled in the foundations of our fundamental political values in a sense

[32] R. Dworkin, (1999), 4.

of their being something *good*. This contributes essentially to their being treated as interpretative concepts, as well as to the affirmation of the integrity of these fundamental political values. Ultimately, they lend plausibility to the concept of democracy, making for the popularity of the democratic order as the best account of political justice. It is this that offers real chances for resolving the democratic dilemma.[33]

2.3.2. Democratic Order and Individual Responsibility

The political structure of democracy is the only coercive structure of the state which can be consistent with people's ethical responsibility to lead their own lives. The individual responsibility of active participants in political decisions attributes to the idea of responsibility not only as individuals but also a collective, as we exercise responsibility for some tasks not only individually but also collectively.

Speaking about an the inner connection between the institutional question and the ethical question, Dworkin says: "We must define democracy as that form of government in which all citizens have an opportunity to participate, as active and equal partners, in the political decisions that govern them, in circumstances that make individual consequential responsibility appropriate. That makes the institutional question – what institutional arrangements count as democracy, and which changes in these institutions count as improvement in democracy? – turn on an ethical question: When *is* it appropriate for someone to treat himself as an active and equal partner within a collective agency?"[34]

2.4. The Character and Possibility of Objective Truth in the Field of Values

Dworkin develops an epistemological position, which logically follows from the above-mentioned axiology and inherits its terminology from it.[35] He speaks about interpretative concepts as considered by an "epistemology of equilibrium" which aims at affirming that certain political values and value judgments in general have the status of objective truth, according to the value procedure of reconsidering values (including political values) from the point of philosophical ethics and "face-value view of morality."[36]

Dworkin elaborates the epistemological position of internal scepticism, which he has applied to human convictions in the fields of ethics, morality, law, and esthetics. Internal scepticism has been characterized by

[33] R. Dworkin, (1990, 1999, and 2000).

[34] R. Dworkin, (1999), 15.

[35] R. Dworkin, (1996, 1999, and 2002).

[36] R. Dworkin, (1996).

the claim that in the field of values it is neither possible nor appropriate to be sceptical from beginning to end. There are value estimations or substantive value judgements, which could be asserted to be objectively true. According to internal scepticism, generally speaking, there exists value pluralism, and it is appropriate to consider values in relation to their historical genesis, as well as to some kind of historical progress (for example, in the case of slavery).

Internal scepticism is connected with critical discourse about values, based on reflexive equilibrium and interpretative justification, and aiming at mutual normative integrity of the fundamental political, legal, moral concepts and also with the two fundamental human values. The final aim of internal scepticism however is the approved status of objective truth for certain relevant concepts, values, ideals.

3. CONCLUSION

Normative integrity of fundamental liberal values – as based on two cardinal moral values – represents an essence of the philosophical foundations of Dworkin's political philosophy. The conception of liberalism linked with the "strategy of continuity," which presupposes abstract liberal ethics and implicates the project of solving "democratic dilemma," bears in itself elements of utopian ideal of common fundamental values which do not annihilate pluralism of individual value orientations.

The above mentioned normative integrity, "strategy of continuity," restricted neutrality of the liberal state, and democratic order have been the theoretical-practical framework for realizing the "equality of resources" account of justice; in other words, for making liberalism a more just political community.

The main aim of Ronald Dworkin's theory of justice is to reaffirm the egalitarian dimension – (equal importance and the fair distribution of resources) of liberalism, without annihilating the concept of liberty and individual choice and responsibility.

If we would want to summarize his conception of justice in one sentence, it would have to be: "Justice is the sovereign virtue of a liberal political community and at the same time justice is a parameter of individual ethics."

Philosophical foundations of his theory of justice enable the clear articulation of the relation between equality, liberty, the common good, individual autonomy, political morality and individual ethics, neutrality of the state and value pluralism inside the liberal state and society.

DDr. Rudi Kocjančič,

Außerordentlicher Professor
Fakultät für Verwaltungswesen, Ljubljana

VERFASSUNG SERBIENS ALS SELBSTSTÄNDIGER UND UNABHÄNGIGER STAAT

Following the disintegration of Solana's State Union of Serbia and Monte Negro in 2006 – upon the referendum held in Monte Negro – more than eighty years after the "Serbs, Croats, and Slovenes" after the World War I had founded Yugoslavia, Serbia became an autonomous and independent State. In the same year, more than one hundered years after Serbia as a kingdom had adopted Constitution in 1903 – comparable with the then European constitutions – it also adopted a new Constitution as the autonomous and independent State.

The Constitution is composed of a preamble, which in terms of the technique of legal drafting and its place in the overall structure of the document is not a constitutive part of the Constitution, and is also composed of a normative part. According to the text of the preamble, the Constitution stems in particular from the state tradition of the Serbian nation and from the equality of all citizens and ethnic communities in Serbia. In terms of its substance and the character of the basic principles, especially those concerning state sovereingnty, the rule of law, the separation of powers, and the regulation of human and minority rights and freedoms, as well as regarding the introduction of a parliamentary system, the Serbian constitution is comparable with newer constitutions of Central and Eastern Europe.

The Constitution also contains several new elements which have a broader significance for the constitutional doctrine, and several specialities that particularly originate from the legal tradition and ethnic structure of Serbia. Thus, the definition of the principle of the 'rule of law' as a basic presupposition of the constitution and the systemic incorporation of the principle of a State governed by the rule of law into the constitutional text, signify certain steps towards the convergence in it of European Continental law and Anglo-American law. Furthermore, the Constitution did not include the principle of a social State but rather introduced the principle of social justice, which more subtly defines the role of the State in regulating economic and social relations and the protection of economic and social rights.

What is a particular speciality of the Serbian constitution is the fact that it jointly and comprehensively regulates human and minority rights and freedoms and

that it ensures – in addition to the possibility of their direct exercise and judical protection – also the right of citizens to refer to international institutions for the protection of their constitutional rights and freedoms. The Constitution introduced a parliamentary system, being a combination of the clasical parliamentary system and – particularly after a government is formed – the parliamentary-governmental system.

Key words: *Constitution of the Republic of Serbia. – Fundamental constitutional principles. – Human and minority rights and freedoms. – Parliamentary system.*

Das Referendum in Montenegro und der Zerfall des Staatenbundes Serbien und Montenegro im Jahr 2006 stellten einen Umbruch für die innenpolitische und internationale Lage Serbiens und für ihre künftige Verfassung dar. Nach dem Zerfall von Solanas Staatenbund ist Serbien nämlich nach mehr als achtzig Jahren, seitdem die "Serben, Kroaten und Slowenen" nach dem Ersten Weltkrieg Jugoslawien gegründet hatten, zum selbstständigen und unabhängigen Staat geworden. Zugleich hat Serbien nach mehr als einhundert Jahren, seitdem es als Königreich im Jahre 1903 seine Verfassung erhalten hatte (die mit den damaligen europäischen Verfassungen vergleichbar war), eine neue Verfassung als selbstständiger und unabhängiger Staat angenommen.[1]

Die Verfassung besteht aus einer Präambel, die nomotechnisch und ihrer Einordnung nach kein Bestandteil der Verfassung ist, und dem normativen Teil. Die Präambel hat zahlreiche kontroverse Reaktionen hervorgerufen, insbesondere wegen des Wortlautes, wonach die Provinz Kosovo und Metohia (so bezeichnet man in Serbien das Kosovo) ein Bestandteil Serbiens ist und diese Provinz im Rahmen des souveränen Staates Serbien eine wesentliche Autonomie hat. Nach der Resolution des UN-Sicherheitsrats Nr. 1244 aus dem Jahre 1999 steht Kosovo zwar unter zeitweiliger Verwaltung einer UN-Mission (UNMIK), doch angesichts der Einstellung der internationalen Gemeinschaft zur Kosovo-Frage ist die Zukunft Kosovos außerhalb Serbiens – wie dies auch der Ahtisaari-Plan bestätigt – sozusagen ein Fait accompli.

Der normative Teil der Verfassung hat 206 Artikel, die in 10 Teile gegliedert sind: 1. Verfassungsgrundsätze (Artikel 1–17), 2. Menschen– und Minderheitenrechte (Artikel 18–81), 3. Wirtschaftsordnung und öffentliche Finanzen (Artikel 82–96), 4. Kompetenzen der Republik Serbien (Artikel 97), 5. Herrschaftssystem (Artikel 98–165), 6. Verfassungsgericht (Artikel 166–175), 7. Territoriale Gliederung (Artikel 176–193), 8. Verfassungs– und Gesetzmäßigkeit (Artikel 104–202), 9. Verfassungsänderungen (Artikel 203–2005) und 10. Schlussbestimmung (Artikel 206).

[1] Službeni glasnik RS, br. 98/2006 od 10.11.2006. godine (Amsblatt der Republik Serbien, Nr.98 vom 10. November 2006).

Im ersten Teil bestimmt die Verfassung folgende Strukturprinzipien:

1. Die Republik Serbien ist der Staat des serbischen Volkes und aller in ihm lebenden Staatsbürger (Artikel 1),
2. Die Staatsbürger sind Träger der Souveränität (Artikel 2),
3. Die Herrschaft des Rechts (rule of law) ist eine grundlegende Voraussetzung der Verfassung (Artikel 3),
4. Die Gewaltenteilung ist das grundlegende Organisationsprinzip des Staates (Artikel 4).

Im Rahmen des ersten Grundsatzes bestimmt die Verfassung, dass sich die Republik Serbien auf der Herrschaft des Rechts und der sozialen Gerechtigkeit, den Grundsätzen der Bürgerdemokratie, den Menschen– und Minderheitenrechten sowie Freiheiten und der Zugehörigkeit zu den europäischen Grundsätzen und Werten gründet. Im Vergleich zu Artikel 20 des deutschen Grundgesetzes, der nach Ansicht der Verfassungsdoktrin eine "Verfassung in Kurzform" darstellt, ist der Artikel 1 der serbischen Verfassung insbesondere als Wertedisposition der Verfassung als Ganzes bedeutend.

Die Verfassung hat die klassische Formulierung, dass die Gewalt vom Volk ausgeht, aufgegeben und stattdessen festgelegt, dass die Staatsbürger die Souveränität durch Referenden, aufgrund von Volksinitiativen und über ihre gewählten Repräsentanten ausüben. Ähnlich wie das GG (Art. 21) garantiert auch die serbische Verfassung die Mitwirkung der politischen Parteien an der Bildung des politischen Willens der Staatsbürger (Art. 5). Unter den Verfassungsgrundsätzen fallen insbesondere die Rezeption und Formulierung "Herrschaft des Rechts" (rule of law) auf. Die Herrschaft des Rechts ist als Grundprämisse der Verfassung definiert, und zwar als Prämisse, die auf den unveräußerlichen Menschenrechten basiert. Nach der Verfassung wird die Herrschaft des Rechts in freien und unabhängigen Wahlen, durch die verfassungsmäßigen Garantien der Menschen– und Minderheitenrechte, durch die Gewaltenteilung, durch eine unabhängige Judikative und durch die Bindung der Gewalten an Verfassung und Gesetze verwirklicht. Der Verfassungsgeber hat bei der inhaltlichen Definition der Herrschaft des Rechts die Auffassung dieses Grundsatzes in der amerikanischen Literatur und Rechtsprechung zum Vorbild genommen.

Den Grundsatz der Gewaltenteilung regelt die Verfassung in einem besonderen Artikel (Art. 4) und verleiht ihm damit größere Bedeutung als andere europäische Verfassungen. Andererseits ist der Sozialstaat, den die meisten neueren Verfassungen übernommen haben, in der serbischen Verfassung nicht erwähnt. Sie beruft sich lediglich auf den Grundsatz der sozialen Gerechtigkeit als eine der Wertquellen der Republik Serbien. Zu-

gleich definiert sie Serbien als laizistischen Staat (Art. 11). Die Verfassung gewährleistet im ersten Teil auch die Autonomie der Provinzen und die lokale Selbstverwaltung (Art. 12) sowie den Schutz der nationalen Minderheiten (Art. 14) und die Gleichberechtigung der Geschlechter (Art. 13).

Der zweite Teil der Verfassung unter dem Titel "Menschen– und Minderheitenrechte sowie Freiheiten" ist mit 63 Artikeln der umfangreichste Teil der Verfassung. Die Verfassungsbestimmungen über diese Rechte und Freiheiten sind in drei Gruppen mit folgenden Titeln gegliedert: 1. Grundprinzipien, 2. Menschenrechte und Freiheiten, 3. Rechte der Angehörigen nationaler Minderheiten. Unter den Grundprinzipien sind Bestimmungen über die unmittelbare Anwendbarkeit der verfassungsmäßig garantierten Rechte, über den Zweck der Verfassungsgarantien, über die Beschränkung von Menschen– und Minderheitenrechten, über das Verbot der Diskriminierung sowie über den Schutz der Menschen– und Minderheitenrechte.

Laut Verfassung werden die Menschen– und Minderheitenrechte und Freiheiten unmittelbar ausgeübt, d. h. man kann sich unmittelbar aufgrund der Verfassung auf sie berufen. Das Gesetz kann lediglich die Art und Weise der Ausübung dieser Rechte bestimmen, und auch das nur, wenn die Verfassung dies ausdrücklich vorsieht und dies für die Ausübung eines einzelnen Rechtes aufgrund seiner Natur unerlässlich ist (Art. 18). Die Verfassung bestimmt ausdrücklich, dass der Zweck der Verfassungsgarantien in der Wahrung der Würde des Menschen und in der Verwirklichung der vollen Freiheit und Gleichheit eines jeden Individuums liegt (Art. 19). Diese Rechte können zwar durch Gesetz eingeschränkt werden, jedoch nur dann, wenn die Verfassung diese Einschränkungen zulässt (Art. 20). So bestimmt die Verfassung, dass es im Ausnahme– und Kriegszustand zulässig ist, von den Menschen– und Minderheitenrechten abzuweichen, doch führt sie hierbei diejenigen Rechte an, die auch im Ausnahme– und Kriegszustand gelten (Art. 202). Nach der Verfassung hat auch jeder Anspruch auf gerichtlichen Schutz wegen Verletzungen oder Verkürzungen von verfassungsmäßig garantierten Menschen– oder Minderheitenrechten wie auch Anspruch auf Behebung der Folgen einer solchen Verletzung (Art. 22). Die Verfassung garantiert ausdrücklich auch den Schutz von Menschen– und Minderheitenrechten durch eine Verfassungsbeschwerde (Art. 170).

Auch der Katalog der Menschenrechte und Freiheiten in der serbischen Verfassung beginnt nach dem Vorbild des GG (Art. 1) mit der Bestimmung, dass die Würde des Menschen unantastbar ist (Art. 23). Jedoch bestimmt die serbische Verfassung, dass alle verpflichtet sind, die Würde des Menschen zu achten und zu schützen, wobei sie die staatliche Gewalt nicht ausdrücklich erwähnt. Nach dieser Bestimmung hat jeder

auch das Recht auf freie Entwicklung der Persönlichkeit, wenn dadurch die verfassungsmäßigen Rechte anderer nicht verletzt werden.

So wie andere osteuropäische Verfassungen garantiert auch die serbische Verfassung die klassischen Freiheitsrechte, unter anderem das Recht auf Leben, persönliche Freiheit und Unantastbarkeit der Person sowie politische Grundrechte, darunter auch die Vereinigungs– und Versammlungsfreiheit wie auch die grundlegenden Sozialrechte, insbesondere das Recht auf Arbeit und Sozialschutz, sowie das Recht auf Eigentum. Die Angehörigen der nationalen Minderheiten haben neben den Verfassungsrechten, die allen Staatsbürgern zustehen, zusätzliche individuelle und kollektive Rechte. Im dritten Teil bestimmt die Verfassung die Grundlagen der Wirtschaftsordnung und der öffentlichen Finanzen (Marktwirtschaft, freies Unternehmertum, Gleichberechtigung des privaten Eigentums und anderer Eigentumsformen).

Im vierten Teil bestimmt die Verfassung taxativ die Kompetenzen der Republik Serbien, im fünften Teil regelt sie das Gewaltenteilungssystem, in dessen Rahmen die verfassungsrechtliche Regelung des Parlaments (Nationalversammlung), des Präsidenten der Republik und der Regierung sowie die Grundprinzipien der Staatsverwaltung und der Justiz wie auch die Funktion des Bürgerbeauftragten (Ombudsmann) bestimmt werden. Laut Verfassung hat das 250-köpfige Parlament Gesetzgebungs-, Wahl– und Aufsichtsfunktion (Art. 99), der unmittelbar gewählte Präsident der Republik hat dagegen eine vorwiegend repräsentative Funktion (Art. 112). Die Aufgabe der Regierung ist vor allem, die Politik des Staates zu bestimmen und zu leiten sowie Gesetze auszuführen und vorzuschlagen (Art. 123).

Die Art, wie das Verhältnis zwischen dem Parlament, dem Präsidenten der Republik und der Regierung ausgestaltet wurde, legt nahe, dass in der Verfassung ein parlamentarisches System mit Elementen des parlamentarischen Regierungssystems und des klassischen parlamentarischen Systems eingeführt wurde. So wird der Premierminister nach dem Vorbild des GG (Art. 63) vom Parlament auf Antrag des Präsidenten der Republik mit Mehrheit der Stimmen aller Abgeordneten gewählt, doch stimmt gleichzeitig das Parlament auch über das Regierungsprogramm und die vom Premierministerkandidaten vorgeschlagenen Minister ab. Andererseits können die Abgeordneten (und zwar mindestens 60 Abgeordnete) wie im klassischen parlamentarischen System ein klassisches Misstrauensvotum gegenüber der Regierung wie auch gegenüber einem einzelnen Minister verlangen (Art. 130), und die Regierung – nicht der Premierminister – kann die Vertrauensfrage stellen (Art. 131). Der Präsident der Republik kann auf Antrag des Premierministers das Parlament auflösen (Art. 109).

Laut Verfassung ist die Verwaltung des Staates selbstständig, an die Verfassung und das Gesetz gebunden sowie gegenüber der Regierung für ihre Tätigkeit verantwortlich (Art. 136). Der Ombudsmann ist ein unabhängiges Staatsorgan, schützt die Rechte der Staatsbürger und überwacht die Tätigkeit der Staatsverwaltung sowie der Unternehmen und Einrichtungen mit öffentlichen Befugnissen (Art. 138). Die Verfassung bestimmt ausdrücklich eine demokratische und zivile Aufsicht über die Armee Serbiens (Art. 141).

Die Verfassung bestimmt zugleich, dass die Gerichte selbstständige und unabhängige Staatsorgane sind, die aufgrund der Verfassung und des Gesetzes entscheiden (Art. 142), sowie dass die Richter unabhängig sind und nur der Verfassung und dem Gesetz unterstehen (Art. 149). Eingeführt wurde die Permanenz der Richterfunktion (Art. 146), beibehalten wurde die Wahl der Richter im Parlament (Art. 147) sowie die Standardbestimmung über die Immunität der Richter (Art. 151).

Auch die jetzige serbische Verfassung hat das Verfassungsgericht und mit ihm das konzentrierte System der Überwachung der Verfassungsmäßigkeit beibehalten. Die Verfassung sieht eine repressive Kontrolle der Verfassungsmäßigkeit sowohl abstrakt als auch konkret sowie eine präventive Kontrolle von Gesetzen auf Antrag von mindestens einem Drittel der Abgeordneten vor (Art. 169). Das Verfassungsgericht entscheidet insbesondere über die Konformität von Gesetzen und anderer allgemeiner Akten mit der Verfassung, über die Konformität ratifizierter internationaler Verträge mit der Verfassung und über die Konformität anderer allgemeiner Akte mit dem Gesetz, ebenso über Kompetenzkonflikte zwischen Gerichten und anderen Staatsorganen, zwischen dem Staat und den Gebietskörperschaften wie auch zwischen den einzelnen Gebietskörperschaften (Art. 167). Eine besondere Neuerung ist, dass das Verfassungsgericht auch über Verfassungsbeschwerden wegen Verkürzung oder Verletzung von Menschen– oder Minderheitenrechten entscheidet (Art. 170).

Im achten Teil definiert die Verfassung die Verfassungs– und Gesetzmäßigkeit. Im Rahmen dieses Teils ist die Hierarchie der inländischen und internationalen allgemeinen Rechtsakte (Art. 194) sowie die Hierarchie der inländischen allgemeinen Rechtsakte (Art. 195) und der Grundsatz der Gesetzmäßigkeit der Verwaltung (Art. 198) bestimmt. Mit der Übernahme des Grundsatzes der Herrschaft des Rechts, definiert als Grundprämisse der Verfassung und als Prinzip, das auf den unveräußerlichen Menschenrechten basiert, sowie mit der systematischen Inkorporierung des Grundsatzes des Rechtsstaates in den Verfassungstext bedeutet die serbische Verfassung einen Schritt hin zu einer Konvergenz des kontinental-europäischen und des angelsächsischen Rechts.

Über Verfassungsänderungen entscheidet das Parlament mit Zweidrittelmehrheit der Stimmen aller Abgeordneten auf Antrag von mindestens einem Drittel aller Abgeordneten, des Präsidenten der Republik, der Regierung und mindestens 150.000 Wählern. Das Parlament kann den Verfassungsänderungsakt den Staatsbürgern in einem Referendum zur Bestätigung vorlegen. Falls sich der Verfassungsänderungsakt auf die Verfassungspräambel, auf die Verfassungsgrundsätze, auf die Menschen– und Minderheitenrechte und Freiheiten oder auf das Gewaltenteilungssystem bezieht, ist das Parlament verpflichtet, ihn in einem Referendum den Staatsbürgern zur Bestätigung vorzulegen (Artikel 203).

Die Republik Serbien ist nun auf dem Weg von einem "law – on – the – books" zu einem "law – in – action".

Violeta Beširević, LLM, PhD

Associate Professor,
Union University Law School, Belgrade

BASIC NORMS OF BIOETHICS: INFORMED CONSENT IN UNESCO BIOETHICS DECLARATIONS*

The purpose of this paper is to assess the informed consent requirements in the Universal Declaration on the Human Genome and Human Rights, the International Declaration on Human Genetic Data and the Universal Declaration on Bioethics and Human Rights. These requirements represent recent international attempts to make informed consent central to ethically and legally acceptable medical and research practices. The author shows that the given standards are minimal and that the drafters failed to make consent and consenting rigorous and a fully specific. Yet, while some national laws have gone beyond these standards, the author reminds that in most countries legislation addressing the social implications of biotechnological developments is either unsystematic or nonexistent. Hence, although not fully determined and included in legally non-binding instruments, the authoritative statements concerning informed consent in the UNESCO declarations represent a very helpful what-to-do list. Moreover, the declarations are the most thorough global initiative thus far to consider human rights implications of biomedical sciences and as such, symbolize an important step in protecting human rights in the area of bioethics.

Keywords: *Bioethics. – UNESCO Declarations. – Informed Consent. – Human Rights. – Human Dignity. – Autonomy.*

In the last decade bioethics has ceased to be only a branch of applied ethics predominantly concerned with establishing what is good and what is bad conduct in medical settings and medical research. To address human rights challenges arising from an increasing number of issues, ranging from abortion, assisted suicide, organ donation to cloning, stem-cell research and genetic engineering, another and no less fundamental approach has been taken *i.e.* a link with human right law has been estab-

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lished and standards to protect human rights in this filed have been set up. Therefore, bioethics also refers to the normative regulation of biomedical activities.[1]

A prominent role in establishing global standards relating to biomedical issues has been taken by UNESCO and its International Bioethics Committee (IBC), established in 1993. So far, all of the 191 Member States of UNESCO have unanimously adopted three bioethics declarations drafted by the IBC: The Universal Declaration on the Human Genome and Human Rights of 1997, The International Declaration on Human Genetic Data of 2003 and The Universal Declaration on Bioethics and Human Rights of 2005.

To decide on complex bioethical issues addressed in these declarations, one need to be well informed about the relevant facts and in most cases has to consider the issue of consent, since consent usually makes unacceptable conduct acceptable. The purpose of this paper is to address and assess the authoritative statements of informed consent in the UNESCO bioethics declarations. These authoritative statements represent resent attempts to make informed consent central to ethically and, one may say, legally acceptable medical and research practice.

Before turning to informed consent requirements set out in the UNESCO instruments, I will briefly recap how the conceptual framework that surrounds the notion of informed consent has become a fundamental feature of modern medicine and medical research.

1. RUDIMENTS OF INFORMED CONSENT

As it is known, informed consent is predominantly judicial construction. However, Justice Cardozo, the most famous founding father of this construction, found the inspiration for his statement that every human being of an adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without patient's consent, commits an assault,[2] in John Locke's teaching that in a civilized society each individual has Property in his own Person.[3] Thus, the seventeenth-century theoretical construction served as basis to launch a judicial concept of informed consent within the common law tradition. Because it is mostly rooted in the value of individualism,

[1] See R. Andorno, "Global Bioethics and Human Rights", 27 *Medicine and Law* 1, 2008, 14.

[2] *Schloendorff v. Society of New York Hospital*, 211 NY 125 (1914).

[3] J. Locke, *The Second Treaties of Government*, in *Two Treaties of Government*, ed. Mark Goldie, Everyman, London, 1993, par.27.

the efforts for establishing informed consent doctrine beyond the Western world has been sometimes charged of "ethical imperialism".

Justice Cardozo's statement from 1914 and the core of the liberal social contract teaching that freely given consent legitimize action that would otherwise be unacceptable have been invoked, reworked and internationally recognized after the WWT. The Nuremberg Code of 1947 is generally seen as the first authoritative statement of consent requirements in biomedical ethics. However, its focus was on research ethics and it did not mention autonomy or information requirements.

The rapid development of biomedical technology and transformation of medical ethics that began in the late 1960s and have continued since then, initiated the extension of consent requirements from research to clinical practice. An evolution took place in the United States through a series of informed consent cases in 1960s and 1970s. By the time bioethics became an international field of study, paternalistic medicine had been largely transformed in the US and patient's rights had been soundly established. The same developments are occurring today in many developing countries where bioethics has more recently become a topic of interest. In these countries, legal guarantee of individual rights, including the patient's rights as well, in the past few decades has been one of the goals of social and political reformers.[4]

Contemporary efforts to make informed consent central to every medical treatment and research seek to raise standards, as well. The Nuremberg standards were open to range of criticism particularly in regard with information requirements and the quality of the consent given.[5] The contemporary standards speak about highly explicit, written and fairly specific consent. Besides the UNESCO's declarations, among many documents aimed at defining adequate standards, one should mention the Declaration of Ethical Principles for Medical Research Involving Human Subjects, better known as the Declaration of Helsinki, and the European Convention which extremely long title is commonly shortened to the Convention on Human Rights and Biomedicine, known as the Oviedo Convention, as well.

Now about substance: why consent is seen to be a goal of modern medicine and what stands for informed consent today?

As to the first, it is a standard view that informed consent aims at promoting patient autonomy and his or her rational-decision making. As to the second, the basic concept is relatively simple: physicians, research-

[4] See R. Macklin, *The Doctor Patient Relationship in Different Cultures*, in H. Kuhse and P. Singer, (ed.), Bioethics*: An Anthology*, Blackwell Publishing, Malden and Oxford, 2006, 2nd, 665.

[5] For more see N. C. Manson, and O. O'Neili, *Rethinking Informed Consent in Bioethics*, Cambridge University Press, Cambridge, 2007, 4 –16.

ers, genetic therapists and other agents have to disclose information about proposed research, proposed medical treatment, alternatives, costs, benefits and risks to patients, research subjects and those deciding whether to proceed with genetic testing, and then they choose or decide which course of treatment or action, if any, to take. In general, the consent must come from a competent person, must be voluntarily given, based on adequate information and the patient must understand the information presented.[6]

It appears that, while one might occasionally encounter a retrograde longing for the day when physicians did not have to go through the process of getting consent, consent is now mostly taken as a standard requirement. This however may not be a complete picture.

First, we know that even in the cultures with a long tradition of seeking and obtaining informed consent, actual consent is not obtained in all cases, and even when consent is obtained, it may not be adequately informed or autonomous. Usually, explicit consent is reserved for more complex or exotic treatments and decisions. It is still common to hear people distinguish between treatments for which consent is required and those for which it is not.[7] In other cultures, the physicians work very much against establishing the informed consent requirements within their medical settings for various reasons, which are usually connected with cultural differences. For example, one physician from Philippines finds informed consent unnecessary in this country, because unlike in the US where patients do not trust their doctors, in Philippines patients place great trust in their physicians.[8] Or, there is a claim that informed consent is incompatible with East Asian principle which holds that every agent should be able to make his or her decisions and actions harmoniously in cooperation with other relevant persons.[9]

On the theoretical level, many question the efforts of making informed consent an ultimate goal of modern medicine. On such views, individual autonomy is only one among a number of important ethical requirements in biomedical practice which is to be balanced against other important principles such as beneficence, non-maleficence, justice etc. Those less radical speak about rethinking informed consent while more radical argue if favor of its abandoning.

Even among supporters, a number of issues have arisen with respect to its application. Most discussions of informed consent in bioethics and medical law focus on two types of issues: (a) – on the disclosure of

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[6] For more see G. J. Annas, *The Rights of Patients*, New York University Press, New York and London, 2004, 3rd ed.

[7] R. M. Veatch, *Abandoning Informed Consent*, in *Bioethics, An Anthology*, ed. Kuhse and Singer, 637.

[8] See in R. Macklin, 665.

[9] *Ibid*., 668–670.

information by those who seek consent and (b) on decision-making by those whose consent is sought.

2. CONSENT REQUIREMENTS IN THE UNESCO INSTRUMENTS

I turn now to my main inquiry: what are the informed consent requirements in the bioethics declarations adopted by UNESCO. I will mostly deal with standards set out in the Universal Declaration on Bioethics and Human Rights because it well illustrates the position taken in all declarations. Besides, this Declaration is of particular importance since it is the first global instrument which takes international human rights legislation as the essential framework and starting point in the development of bioethical principles.[10]

The first point to be made is that Articles 3 to 17 of this Declaration lay out principles that address policy makers, health care providers and different professional groups and bodies with the aim to serve as sources of legislation, policy, and individual decision-making.

A top priority in all actions taken in medical settings and research procedures is given to a request for respecting human dignity. In this way, despite its contested nature, dignity represents a principle of all fundamental rights recognition in the field of bioethics. Thus, informed consent is a concrete manifestation of the principle of human dignity. Closely related to this principle is the principle of autonomy. Respect for autonomy involves not just a respectful attitude but also respectful action. However, autonomy is not simply an invested right. It also has the dimension of responsibility in regard with a decision made and in regard with others. Article 5 declares the right of each person to make individual decisions, while at the same time respecting the autonomy of others.

Accordingly, human dignity, autonomy and responsibility are the basis of informed decisions in the field of bioethics. Article 6 of the Declaration deals with the concept of informed consent in two major fields. Paragraph 1 refers to any decision or practice with regard to medical diagnosis and treatment while paragraph 2 deals with informed consent in the field of scientific research.

In the field of medical practice, the Declaration requires prior, free and informed consent of the persons concerned with regard of any intervention. Note that, neither express nor written consent is specified as a general requirement. On the contrary, the rule is that the consent should,

[10] UNESCO, Explanatory Memorandum on the Elaboration of the Preliminary Draft Declaration on Universal Norms on Bioethics, *http://unesdoc.unesco.org/images/0013/001390/139024e.pdf*, November 5, 2008.

where appropriate, be express, and this would be, as a rule, in cases of more complex treatments and procedures. Although this may appear as a strange solution, the reason for such omission may not be only attributable to differences among national standards. One should bear in mind that such requirements under normal circumstances might demand too much because procedures for explicit and written consent create enduring records of a patient's involvement in consenting procedure. No writing is required to make most contracts, so no written form is required to make consent to treatment valid. A consent form is not *consent* but just some evidence that the consent procedures occurred.[11]

In addition, the Declaration spells out that a given consent does not affect a patient's ability to change his or her mind and windrow consent. Consent may be withdrawn at any time and for any reason without disadvantage or prejudice for the person concerned.

In the field of scientific research, rules are tailored in a slightly different manner. Thus, it is requested for scientific research to be carried out only with the prior, free, express and informed consent of the person concerned. It is accented that the information should be adequate, provided in a comprehensible form and that should include modalities for withdrawal of consent which can be made at any time and for any reason without disadvantage or prejudice for the person concerned. Because of the history of abuse, to protect research subjects' rights, it is made clear that ethical and lawful human experimentation requires the voluntary, competent, informed and understanding consent of the subjects. Note also that in Article 8 of the International Declaration on Human Genetic Data it is emphasized that for the collection of human genetic data, human proteomic data or biological samples, and for their subsequent processing, use and storage, informed consent should be obtained without inducement by financial or other personal gain.

Nonetheless, in the field of scientific research, limitations on the principle of consent are possible and in my opinion, on this point, the drafters of the declarations should have been more specific. For example, in the Universal Declaration on Bioethics and Human Rights it is said that exceptions to consent principle are possible and should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in the Declaration, in particular in Article 27, and international human rights law. Article 27 requests that if the application of the principles of this Declaration is to be limited, it should be done by law, including laws in the interests of public safety, for the investigation, detection and prosecution of criminal offences, for the protection of public health or for the protection of the rights and freedoms of others. Further requirement is that any such law needs to

[11] G. J. Annas, 129.

be consistent with international human rights law. To remind, the reference to international human rights law is frequently made in the UNESCO declarations. Yet, I believe that such general limitation clause is to loose in the field of medical research. We should not forget that the progress is "*an optional goal*, *not unconditional commitment"*[12] and that the objection that respect for individual sometimes delays scientific advance is insignificant objection. Therefore, to prevent taking advantage of the research subjects, the limitations imposed on their right to consent to medical research should have been listed in a specific terms.

The Universal Declaration on Bioethics and Human Rights speaks about obtaining an additional agreement of the legal representatives of the group or community concerned in appropriate cases of research carried out on a group of persons or a community. However, this does not make an individual's informed consent redundant. It is emphasized that in no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual's informed consent.

As it has been shown, if a patient is competent, their consent or refusal of medical treatment is decisive. In contrast, if a patient is incompetent, they may be treated without their consent and therefore it is vitally important to protect their rights and interests. The UNESCO declarations place a chief responsibility for protecting the rights of the persons who do not have the capacity to consent on national states. The domestic law of national states should provide for consent to be given by members of the family, an official or court where the person concerned is incapable of doing so. Yet, some common standards have been recognized. First, once it has been established that a patient lacks capacity, authorization for research and medical practice should be obtained in accordance with the best interest of the person concerned. Second, autonomy principle is not totally abandoned. Thus, the person concerned should be involved to the greatest extent possible in the decision-making process of consent as well as that of withdrawing consent. International Declaration on Human Genetic Data specifies that the opinion of a minor should be taken into consideration as an increasingly determining factor in proportion to age and degree of maturity.

Knowing that incompetent persons are particularly vulnerable to exploitation in research, the declarations define a number of standards for research that involves such subjects. In these cases, research is based on a principle of beneficence and is subject to the authorization and the protective conditions prescribed by law. In addition, because competent patients are always preferable as research subjects for the reason that they

[12] H. Jonas, "Philosophical Reflections on Experimenting with Human Subjects", 98 *Daedalus* 219, 1969, 245.

can consent on their on behalf, the declarations approve research to involve incompetents only if there is no research alternative of comparable effectiveness with research participants able to consent.

Research which does not have potential direct health benefit for the incompetent patient concerned is also possible but is limited to exceptional cases and with number of steps to be taken to make such research safe and not abusive. Note also that involvement in research is not mandatory. Namely, it is requested to respect refusal of such persons to take part in research.

Finally, it is important to address standards concerning the right not to be informed. Some recent developments in genetics-based medical treatments, including genetic testing and screening, have raised increasing concerns about equal treatment of individuals, their privacy, family relations, labor relations, insurance and intellectual property rights.[13] To address such concerns the International Declaration on Human Genetic Data and the Universal Declaration on the Human Genome and Human Rights promulgate the right of each individual to decide whether or not to be informed of the results of genetic examination, the resulting consequences and research results. Although this concept is sometimes seen as opposing patient autonomy,[14] it is the patient that makes a final decision and in this sense, the right not to be informed represents corollary of informed consent doctrine. However, the declarations fail to provide the conditions for the exercise of this right.

3. CONCLUSIONS

Taken as a whole, the assessment of the informed consent standards specified in the UNESCO declarations has shown that the declarations have proclaimed minimal standards to be followed in the procedure of seeking and obtaining informed consent. Having in mind that some national laws have gone more beyond these standards, it is possible to claim that the drafters failed to make consent and consenting rigorous and a fully specific. On the other hand, one should bear in mind discrepancies among national states. Thus, while in some cultures, the fact that anyone ever considered it acceptable practice to treat an adult without informed consent is found outstanding, in many countries this has been still regarded as an important aim to be achieved. In most countries legislation addressing the social implications of medical and technological develop-

[13] For more see *e.g.* J. Sandor, (ed.), *Society and Genetic Information: Codes and Laws in the Genetic Era*, CEU Press, Budapest and New York, 2003.

[14] See *e.g.* J. Harris and K. Keywood, "Ignorance, Information, and Autonomy", 22 *Theoretical Medicine and Bioethics*, 2001, 415–436.

ments is either haphazard or nonexistent. Therefore, the UNESCO declarations represent a very helpful what-to-do list. In addition, although legally non-binding, the declarations are the most thorough global initiative thus far to consider human rights implications of biomedical sciences and as such, they represent a significant step forward in protecting human rights in this sensitive and rapidly developing area.

BOOK REVIEWS

DDr. Miodrag A. Jovanović*

Susanne Boshammer, *Gruppen, Rechte, Gerechtigkeit – Die moralische Begründungder Rechte von Minderheiten*,
Walter de Gruyter, Berlin – New York, 2003, 248 pp.,
ISBN 3-11-017848-6

Parallel mit der Entstehung dieses Textes, organisierte die deutsche Regierung den zweiten großen Gipfel im letzten Jahr in der Zusammenarbeit mit verschiedenen Einwanderer-Verbänden über das Thema Integration. Die zentrale Aufgabe des daraus resultierenden ersten Nationalen Integrationsplans der Bundesrepublik bezieht sich auf die verbesserten Bedienungen für die Integration der Ausländer in der deutschen Gesellschaft. Aber nicht nur darauf, insofern das den Kern dieses Problems betrifft, "sondern auch die Frage, wie Deutschland sich zu den Migranten und die Migranten sich zu Deutschland stellen." (*Die Zeit*, 12. Juli 2007) Das stellt einen ganz neuen Kampf dar, den die Bundesregierung in der letzte Zeit geführt hat und aus der Perspektive eines Außenstehenden, die Neuheit bei dieser Anstregung ist, dass sie mit dem veränderen Bewusstsein über den multikulturellen Charakter der deutschen Gesellschaft unternommen wurde. Übrigens kann man auch in der jüngsten Entwicklung des deutschen Rechts die Öffnung zur Anerkennung der Vielfalt bemerken und, folglich, Denninger redet über die neue Verfassungsparadigmen – *Sicherheit*, *Vielfalt* und *Solidarität*, besonders in der neuen Bundes Länder Verfassungen. Ich würde sagen, dass das Paradebeispiel dieser Tendenz die bekannte Entscheidung des Bundesverfassungsgerichts im so gennanten *Schächten* – Fall (1 BvR 1783/99) ist. Es ist merkwürdig, dass die zeitgenössische Rechtsliteratur auf Deutsch sich nicht ausreichend für dieses Problem interessiert. Das 2003 erschienene Buch von Susanne Boshammer *Gruppen, Rechte, Gerechtigkeit* stellt diesbezüglich eine Ausnahme dar. Deshalb scheint es, dass fünf Jahre später dieses Buch,

* Forschungsstipendiat der Alexander von Humboldt-Stiftung Juristiches Seminar, Heidelberg und Außerordentlicher Professor Juristiche Fakultät, Universität in Belgrad.

besonders in Deutschland, aktueller ist als im Moment der Veröffentlichung.

Boshammer anfangs ihre Forschung (Teil I) mit den drei verschiedenen Fälle die ganz erläuternde für die moderne multikulturelle Gesellschaften sind. Sie führt ein Beispiel für den Frauenquotenstreit, ein Beispiel für die Kopftuchsdebatte (beide sind aus Deutschland) und den bekanten Fall der Amish people aus den USA an. Der erste Fall ist typisch für die Problematik der strukturellen Diskriminierung; der zweite als das Phänomen der relativen Benachteilung und der dritte als ein Beispiel für die Gefahr der kulturellen Erosion. Was am allerwichtigsten ist, alle drei gehören angäblich zu der Kategorie der Gruppenrechte.

Dannach, fährt sie fort (Teil II) mit der Betrachtung über die Struktur, die Begründung und die Funktion von Rechten. In dieser Hinsicht, Boshammer konzentriert sich auf zwei einflussreiche Rechtstheorien der Gegenwart – Joseph Razs *Interessenkonzepzion* (Interest Theory of Rights) und Herbert Harts *Autonomiekonzepzion* (Choice Theory of Rights). Der ersten wird insofern Vorrang gegeben, als die Gruppenrechtsforderung selten als ein Problem der Autonomie beschrieben wird. Ein zusätzlicher Grund ist in der Tatsache enthalten, dass die Interessenkonzeption wesentlich inklusiver als die Autonomiekonzepzion ist, weil, was in der letzten Theorie als ein Recht gilt, auch in der frühen Theorie als das Recht gelten wird. Zuletzt, es gibt, laut Boshammer, drei sozialen Funktionsweisen von Rechten – Rechte als Symbole sozialer Anerkennung; Rechte als "Waffen" im Kampf um die Durchsetzung legitimer Interessen und Rechte als Währung d.h. als ein Distributionsmittel für die benötigen Ressourcen.

In dem nächsten Schritt (Teil III), versucht Boshammer die zwei verschiedenen Formen der Gruppenrechte zu erklären und an den drei oben erwähnt Fällen zu prüfen. Während die *Kollektivrechte* die normativen Vorteile bestimmten Gruppen als solchen gewähren – und auf diese Weise ihre Existenz und ihren Fortbestand in einer multikulturellen liberalen Gesellschaft sichern sollen, dienen die *individuellen Sonderrechte* zugunsten der Mitglieder bestimmter Gruppen dem Schutz ihrer fundamentalen Interessen, die sich mittelbar oder unmittelbar aus der Gruppenzughörigkeit ihrer Träger ergeben. Dannach, diskutiert Boshammer die Frage welche Gruppen sich für die Politik der Anerkennung qualifizieren könnten und, ihrer Meinung nach, dreht sich in der Gruppenrechtsdebatte alles um die so gennanten "Natürlichen Gruppen", die "konstitutiv" für die Gestaltung den individuellen Wertvolstellungen und Handlungsmöglichkeiten sind und in dennen die Mitgliedschaft mehr oder weniger unfreiwillig ist.

In den letzten zwei Teilen (IV und V), widmet Boshammer sich dem Problem der moralischen Begründung von Kollektivrechten und

gruppenspezifischen Sonderrechten. Sie betont, als wesentlich, der Unterschied zwischen dem *Kolektivgüter Argument*, demzufolge die Kollektivrechte letzlich mit Verweis auf die Interessen von individuellen Mitgliedern begründet sind und, folglich, sie als *abgeleitete Kollektivrechte* bezeichnen werden können, und dem *Kollektivsubjekt-Argument*, demzufolge konstitutive Gemeinschaften nicht nur aufgrund ihrer Bedeutung für die Individuen, sondern um ihrer selbst willen geschützt werden müssen und dem nach die Kollektivrechte als *intrinsisch* bezeichnen werder können. Die zweite Position ist besonders der Gegenstand ihrer Kritik und, laut Boshammer, dieser Standpunkt ist summa summarum, "kontraintuitiv und schwer plausibel zu machen."

Im letzten Teil, diskutiert Boshammer die drei potenzielle Quellen dieser gruppenspezifischen Sonderrechten – die Kompensation, die Chancengleichheit, und die Anerkennung der Differenz. Die in dem Kompensations-Argument begründeten Sonderrechte wären in der Anwendungspraxis kaum möglich, weil die Mitglieder bestimmter Minderheit selten tatsächlich Geschädigte sind. Demgegenüber können die verschiedene Quotenregelungen als die Form von Sonderrechten gerechtfertigt werden, insofern als die gruppenspezifischen Interessen in der Struktur "der gesellschaftlichen Entscheidungs– und Verteilungsverfahren keine ausreichende Berücksichtigung finden". Letzlich, kann man auch das Recht auf Kulturzugehörigkeit, das der Ausdruck der Differenz-Anerkennung bedeutet, in einer multikulturellen liberalen Gesselschaft legitimieren, aber dieses Recht wird oft in Konflikt kommen mit dem traditionellen liberalen Neutralitätsgebot. Boshammer schließt folglich ab, dass diese potenzielle Rechts– und Interessenkonflikte "nicht ein für allemal zu lösen" sind, sondern "von allen Beteilgten immer wieder die Bereitschaft zum Kompromiss erfordern". Deshalb muss das Recht auf Kulturzugehörigkeit im Einzelfall konkretisiert und gewichtet werden.

Im folgenden kurzen kritischen Rückblick würde ich noch einmal auf die drei problematischen Punkte von Boshammers Ansicht verweisen. Zuerst, die Hauptthese, auf der ihre Ablehnung der Kollektivenrechte gegründet ist, lautet, dass die Existenz (auch der Fortbestand) einer konstitutiven Gruppe kein Rechtsgegenstand sei und "dass es sich hier um nichterzwingbares Gut handelt." (S. 162) Das ist aber eine seltsame Behauptung, wenn man weiß, dass das weitaus schlimmste Verbrechen des internationales Strafrechts der Völkermord ist. Der schützende Rechtsgegenstand dieses Verbrechens ist gerade die physische Existenz der relevanten Gruppe – nationale, ethnische, rassische oder religiöse. Deshalb, beinhaltet diese Rechtsnorm offensichtlich ein Recht auf Gruppenexistenz und ihm entspricht eine Pflicht – für alle Individuen, Staaten und anderen Gruppen – auf Unterlassung von allen Verhaltensweisen, die die schützende Gruppenexistenz verletzen könnten.

Das bedeutet folglich, dass Boshammers Überzeugung, dass das Argument des intrinsischen Werts des Kollektivs "kontraintuitiv" sei, kaum zu verteidigen ist. Sie hat verschiedene Strategien gegen den so gennante "value collectivism" Standpunkt gebraucht aber am Ende scheint es, dass ihr zentrales Argument die Offensichtlichkeit der Wahrheit des liberalen Individualismus betrifft. Boshammer stellt fest, "dass die Behauptung der vorrangigen Schutzwürdigkeit der Freiheit und des Wohlergehens von Individuen gegenüber allen kollektiven Zielen und kollektiven ´Entitän´ den Status einer objektiven Wahrheit gewonnen hat". (S. 137) In dieser Hinsicht, glaube ich, dass nicht nur der Völkermord, sondern auch die andere Normen des gegenwartigen Völkerrechts, wie z.B. diese über den Minderheitsschutz oder die Rechte der einheimischen Völker, beweisen, dass "value collectivism", entgegen Boshammers Behauptung, schon intuitiv, wenn auch nicht systematisch, in die internationalen Rechtsordnung angenommen worden ist (siehe, M. Jovanović, *Recognizing Minority Identities Through Collective Rights*, 27 HRQ (2005), pp. 627–651).

Abschließend sei gesagt, dass Boshammers Kritik des Kollektivsubjekt-Arguments (ebenso wie die des Kollektivgüter-Arguments) manchmal so rau und destruktiv ist, dass es fragwürdig wird, wie die Zugehörigkeit der kostitutiven Gruppen am Ende als ein Grund für die Maßnahmen, die entgegen der liberalen Idee "gleiches Recht für alle" sind, gerechtfertigt werden kann. Tatsächlich, schließt Boshammer mit der Behauptung ab, dass es kein festgelegtes Recht auf Kulturzughörigkeit gibt, sondern nur das Bedürfnis der modernen multikulturellen Geselschaft einen Kompromiss, d.h. eine "Einigung auf der Grundlage gegenseitiger Zugeständnisse" in jedem konkreten Fall zu erreichen. In dieser Hinsicht, dürfte Boshammers Motto – "ein bisschen Schutz ist in jedem Fall besser als keiner" (S. 170) – ein kaum zufriedenstellender Abschluß einer umfassenden Untersuchung über die moralische Begründung von Gruppenrechten sein.

Trotz der erwähnten problematischen Punkte stellt dieses Buch jedoch eine rare inhaltsreiche Untersuchung über dieses Thema dar und das ist schon eine ganz ausreichende Empfehlung zum Lesen.

DDr Christa Jessel-Holst*

Mirko S. Vasiljević, *Company Law: Law of Commercial Companies of Serbia and the EU*,
Centre of the University of Belgrade Faculty of Law –
Službeni glasnik, Belgrade 2006, 607 pp., ISBN 86-7630-046-1.

The publication at hand deserves the attention of readers outside Serbia for various reasons. For many if not most of those readers, this will be their first contact with Serbian company law. Until not so long ago, Serbia was an integral part of the Socialist Federal Republic of Yugoslavia, together with five other republics. In 1988, during the final stage of the SFRY's existence, the famous Yugoslav Law on Enterprises was enacted, which for the first time in a long while reintroduced key elements of Western company law into the Yugoslav legal system and has been translated and commented on many times in Germany and elsewhere. After the independence of Slovenia, Croatia, Bosnia and Macedonia, only Serbia and Montenegro remained together, as the two republics that constituted the Federal Republic of Yugoslavia (FRY). During this period, a new Law on Enterprises[1] was adopted (*Službeni list SRJ* 1996 No. 29). However, due to Montenegro's struggle for independence, the FRY was temporarily replaced by the State Union of Serbia and Montenegro, which existed between 2003 and 2006. The year of 2003 simul-

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* The author is Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg. The text is reproduced with permission of the European Business Organization Law Review, T.M.C. Asser Press, The Hague

[1] English translations of this law can be found in *Commercial Laws of the World: Yugoslavia*, rev. ed., loose-leaf, Foreign Tax Law, Inc., Ormond Beach, Florida 1998, as well as in *Zakoni o preduzećima i stranim ulaganjima* [The Laws on Enterprises and Foreign Investment: Investing in Yugoslavia], 2nd ed., Jugoslovenski Pregled, Belgrade 1997. This very interesting law, which was elaborated during Serbia's isolation from the outside world, shows a surprisingly high quality considering the circumstances of its coming into being. It is clearly oriented towards the West. As noted by Mirko Vasiljević in his 'Basic Remarks on the Enterprise Law', in *Zakoni o preduzećima i stranim ulaganjima*: 'The provisions of the Enterprise Law are based on well-known institutions, though more on those of the Roman law than on those of the Anglo-Saxon one' (p. XII).

taneously marked the end of Yugoslavia. In 2002, Montenegro had already adopted its own Law on Commercial Companies, which is still in force today, although it has recently undergone substantial modifications (*Službeni list RCG* 2002 No. 6, as amended by *Službeni list RCG* 2007 No. 17). As a result of the referendum held in Montenegro in June 2006, Montenegro and Serbia each declared their independence. The state union was dissolved and replaced by two separate and independent states: the Republic of Serbia and the Republic of Montenegro.

In 2004, the Republic of Serbia promulgated a new Law on Commercial Companies (LCC) (*Službeni Glasnik* 2004 No. 125), which forms the subject of the book reviewed here. In fact, this book is an English translation of the Serbian original,[2] which was published in Belgrade a year earlier. Before going into details, it should be pointed out that an English translation of the Serbian LCC is available from *Jugoslovenski Pregled* (Yugoslav Survey)[3] in Belgrade (both online and on paper).

The present publication may be regarded as the English 'visiting card' of Serbian company law. It has been written by the leader of the team that was entrusted with the drafting of the law. At this point, it is worth mentioning that, in sharp contrast to other countries in the region (e.g., Bulgaria), Serbian business lawyers are extremely well-organised. This is thanks to Mirko Vasiljević, who is not only Professor of Commercial Law and Dean of the Faculty of Law of Belgrade University but also engages in many other activities. Thus, he is the founder and former president of the Serbian Association of Business Lawyers. In addition, he is the editor in chief of the leading legal periodical in the field of commercial law, *Pravo i Privreda* [Law and Economy]. Last but not least, he is also the founder and long-time president of the annual Serbian Business Lawyers' Conference, which has until now been held in Vrnjačka Banja, but will this year be held on Zlatibor mountain. In this annual conference, which is always attended by a great number of specialists from all legal professions, Serbia has a unique forum for the discussion of acute legal problems as well as national legal strategy in the area of business law.

The book provides a comprehensive and detailed picture of Serbian company law today. The author takes a comparative approach and discusses Serbian company law against the background of Anglo-Saxon, German, Swiss, Italian, Belgian and other laws. The book is divided into thirteen chapters dealing with the definition of company law; commercial (trading) and non-commercial (civil) entities; common concepts of commercial companies; unlimited risk companies (companies of persons); limited risk companies (companies of persons and capital); limited risk

[2] Mirko Vasiljević, *Kompanijsko pravo (Pravo privrednih društava Srbije i EU)*, Pravni fakultet Univerziteta u Beogradu – Centar za publikacije, Belgrade 2005, 575 pp.

[3] See *http://www.yusurvey.co.yu*.

companies (companies of capital); specialised joint-stock companies; specialised organisations and commercial companies; enterprises and entities undergoing privatisation (public enterprises and state-owned companies); groups of commercial companies; commercial associations; the dissolution of commercial companies; and the incorporation of EU company law.

As the author accentuates, the 2004 Law on Commercial Companies combines elements of continental and Anglo-Saxon law, like its predecessor from 1996.[4] This time, however, it is not the continental law that prevails. Instead, Serbian company law now borrows heavily from Anglo-Saxon sources, 'having in mind the apparently irreversible trend of expansion of Anglo-Saxon company law into European continental law' (p. 41). Although Serbia is not a member of the European Union and has not yet concluded an Association and Stabilisation Agreement with the Union, Serbian company law nevertheless incorporates the relevant EU directives. The *acquis communautaire* in the field of company law is dealt with in some detail in the final chapter. Special attention is devoted to the issue of corporate governance, which has had a deep impact on Serbian company law. In this context, it is worth mentioning another recent publication by the same author, the preparation of which goes back to his stay at the Max Planck Institute in Hamburg in 2004, *Korporativno upravljanje. Pravni aspekti* [Corporate Governance: Legal Aspects] (Belgrade 2007).

A number of modern legal concepts have been regulated by the new Law on Commercial Companies for the first time or have only now been regulated in detail. In this area, the extensive comments in the book are especially helpful. A practical example is the issue of 'lifting the corporate veil', which is laid down as a rule in Article 15 LCC. Like many other developed legal orders, Germany does not have such a rule in its legislation but intentionally leaves the matter to legal practice and scholarship, which makes it possible to learn from actual cases and develop very flexible solutions. As the author's comments with respect to the situation in Serbia demonstrate, this approach would not work there because the judges are not prepared for such a task. For this very reason, many other countries in the region, such as Hungary, Slovenia, Croatia and recently Romania have also adopted explicit legal provisions on 'lifting the corporate veil'. As is to be expected in the case of a new legal concept, the part of the book providing examples of Serbian judicial practice is very short and mentions only one case in which Article 15 LCC has actually been applied. This leads the author to complain that: 'even after enacting the concept of „piercing the corporate veil" in our legislation, our court practice, for incomprehensible reasons, still hesitates in implement-

[4] See *supra* n. 1.

ing it' (p. 75). This may well be not the only area where Serbian judicial practice needs time for development, but the conscientious interpretation of the law and the many illustrations taken from foreign legal orders will provide the necessary guidance.

It is not possible in this review to go more deeply into the details of Serbian company law, but one of the most remarkable novelties of the new law concerns the introduction of the Anglo-Saxon board model. The traditional approach followed the German model of a mandatory two-tier system. The part of the book on the governance of joint stock companies is therefore among the most interesting (pp. 375-394). Generally speaking, a movement towards offering a choice between a one– or two-tier system, like in the case of the *Societas Europaea*, can be observed in the region. Thus, Slovenia and Hungary have recently introduced an alternative one-tier system into their national company laws. Romania introduced a developed one-tier system as well as an optional two-tier system in 2006, while Bulgaria has offered such a choice ever since 1991. In 2004, the Serbian legislator opted for the one-tier system (p. 377). Except for smaller companies, the management function is divided between the board of directors (Art. 308 et seq. LLC) and the executive board, whose member are elected by the board of directors (Art. 322 LCC et seq.). Serbian company law has also introduced a distinction between executive and non-executive members of the board of directors. In listed companies, the non-executive members must be in the majority and at least two of those members must be independent (for definition of independent members, see Art. 310(3) LCC). In the case of public joint stock companies, a supervisory board may be provided for in the articles of association, whereas listed companies must have a supervisory board. The existence of a supervisory board is obligatory in joint stock companies conducting business for which a supervisory board is required under special regulations (Art. 329 LCC). In such cases, the members of both the board of directors and the supervisory board shall be elected by the general meeting (Arts. 309 and 330 LCC and pp. 395-396).

The book has been edited with great care, and the translators deserve our respect for the excellent job that they have accomplished. If the reviewer had one wish, it would be for more precise quotations of the relevant articles of Serbian company law, in order to make it easier for the reader to check the provisions for more details. It is to be hoped that this book will find the many readers that it undoubtedly deserves!

Peter Radan, LLB, PhD*

Miodrag Jovanović, *Constitutionalizing Secession in Federalized States: A Procedural Approach*,
Eleven International Publishing, Utrecht, 2007, pp. 246,
ISBN 978–90–77596–27–2.

Over the last few years a number of distinguished American scholars have noted the importance of constitutional law questions in relation to the attempted secession of the Confederate States of America. Akhil Reed Amar observed that '[t]he legality or illegality of secession was probably the most serious constitutional question ever to arise in America'.[1] Sanford Levinson suggested that, 'the legitimacy of secession' is 'the most fundamental constitutional question of our entire history as a country'.[2] Yet, in the sea of literature dealing with the causes and course of the American Civil War the constitutional law questions that it gave rise to get relatively little treatment, notwithstanding that the issue was explicitly addressed by the Supreme Court in its decision in 1869 in the case of *Texas v White*.[3] In relation to the spate of serious secessionist claims that surfaced in the wake of the end of the Cold War, very little of the literature they inspired deals with constitutional law issues. Against this background Professor Miodrag Jovanović's, *Constitutionalizing Secession in Federalized States* is a much needed and important work of scholarship.

Jovanović's chief purpose in writing the book is to 'justify the institutionalization of the consensual form of secession' (p. 1) in federal States. In its early pages, Jovanović's book details the philosophical and

* The author is Associate Professor at the Macquarie Law School (Australia).

1 Akhil Reed Amar, 'An Open Letter to Professors Paulsen and Powell' (2005–2006) 115 *Yale Law Review* 2101, at 2105–6.

2 Sanford Levinson '"Perpetual Union," "Free Love," and Secession: On the Limits of the "Consent of the Governed"' (2004) 39 *Tulsa Law Review* 457, at 461–462.

3 74 US 700 (1869).

theoretical debate over the question of whether or not federal constitutions should contain provisions regulating secession. One of the arguments in favour of constitutionalizing secession is that it will make secession and its often horrendous consequences less likely. Although Jovanović acknowledges that this argument partly motivated him to write his book (p. 197), he does not seek to 'justify the institutionalization of the consensual form of secession' by focusing on the debate over this question. Rather, Jovanović's form of justification is through outlining and defending a procedural approach to secession. Such an approach focuses on the matters to be dealt with in a constitution's secession clause, rather than whether or not such a clause should be included at all. This approach requires answers to a host of questions relating to the details that should be included in such a clause. Although history shows that few States in the past have had explicit secession clauses in their constitutions, Jovanović dutifully scours these cases in search of 'good practice' to be incorporated into his own model.

An important preliminary issue to Jovanović's study was his choice of a procedural, as opposed to a substantive, approach to secession. The latter approach is one that conditions secession upon some moral justification or claim such as ethnic, racial, religious or cultural rights. Jovanović rejects this approach. First, he points to the absence of adequate mechanisms to make the necessary adjudication on the threshold question of whether secession is justified – the 'biased referee' problem (p. 38). Second, he argues that, because the procedural approach he advocates is one based upon consent, moral justifications for secession are unnecessary, whereas the case for such justifications can be made in cases of unilateral secession (p. 40). In his advocacy of a procedural approach, Jovanović stands (almost) alone. Perhaps being a native of the Balkans and having lived through the secessions that were the break-up of Yugoslavia, with its absence of unbiased adjudicators and claims made by all sides to the various secessionist conflicts to being 'the real victims', contributed to Jovanović's adoption of the procedural approach.

The most important parts of Jovanović's book relate to his analysis of the key practical questions that need to be addressed in a constitution's secession clause. Perhaps the most important of these matters of detail relates to: Who decides and how? Jovanović sees a popular referendum as the preferred mechanism, as opposed to a decision by political elites. This requires, as Jovanović readily concedes, that the State be a true liberal-democratic one (p. 5). Jovanović recognizes that there are problems with the referendum process, but argues that they can be met. The question of the territorial grouping of people or 'electorate' in which a secession referendum is to take place is one which Jovanović recognizes has its difficulties. He argues in favour of a series of referenda involving various

different 'electorates' in order to determine the true extent and location of support for, and opposition to, secession, both within the relevant federal unit and in territory adjacent to it. This would enable future borderlines of the seceding unit to be drawn in such a way as to accommodate the wishes of the maximum number of people possible. The need for clarity in the wording of the referendum question and the nature of the majority required for the relevant referendum to 'succeed' are also thoroughly discussed by Jovanović.

Although one may argue about the details of any one or more of the specific recommendations that Jovanović makes, one cannot fault him in terms of the thoroughness with which he has approached the task of considering the relevant literature and weighing up alternative recommendations. However, what is also clear from his study is that specific recommendations cannot be looked at in isolation. Thus, the suggestion that a simple majority vote would be sufficient for a referendum to succeed is conditioned upon there being, as already noted, a number of referenda.

Jovanović's book is a thoughtful, stimulating and provocative treatment of an important and contentious topic. It should be the first port of call for anybody interested in, or dealing with, the resolution of claims to secession.

Branko Radulović, LLM*

Boris Begovic *et al*., *From Poverty to Prosperity: Free Market Based Solution*,

Center for Liberal-Democratic Studies – Službeni glasnik,
Belgrade 2008, pp. 207, ISBN 978–86–519–0062–7.

Why have some countries grown rich while others remain poor? What are the main causes of poverty? What are the forces that can explain the path from poverty to prosperity? Explaining growth is the ultimate rationale of economic enquiry and it is hard to think of more fundamental questions for economists to answer. Questions like these have inspired a rather prolific genre of economic literature and *From Poverty to Prosperity* belongs to this field.

As the authors state in the introduction, the book is firmly based on a strong belief in the invisible hand of the free market and the personal responsibility of the individual for his/her welfare and prosperity. Given the CLDS's (a leading economic think-tank in Serbia) mission, this is certainly no surprise. While too much ideology too often clouds the facts, the authors successfully avoid pitfall of writing just another pro-market (cook)book. Many books on similar topics failed to present a comprehensive and interlocking overview of the various relevant issues, concepts and theories. The authors succeed in providing a clear and easy-to-follow book for anyone hoping to better understand free market solutions to seemingly many unsettled questions and unresolved issues.

What are the main qualities of the book? Among others, the writer of these lines noticed two. First, the book lays the topics in a systematic way centred on incentives and individuals. This is not often the case. Second, taking into account the diversity of topics, the book is concise, yet to support their views *From Poverty to Prosperity* has a lot of explanatory illustrations and purposeful digressions. These two qualities contributed to the third one – *From Poverty to Prosperity* is convincing.

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* The author is Assistant Lecturer at the University of Belgrade Law Faculty.

As the pendulum swings back to a tighter control and regulation of markets, to a larger role for the state, and consequently to a smaller and more constrained private sector, the timing for *From Poverty to Prosperity* couldn't be better. Indeed, from the Rust Belt states in the US to state-owned companies in Serbia requests for subsidies, tariff protection of "the core" industries and other forms of redistributive and protectionist policies are everyday gaining more support among the population at large. With respect to current crisis, *From Poverty to Prosperity* represents a useful reminder of the basic economic principles and sound economic policies that policy makers tend to sacrifice for some "higher interests".

In the first chapter, authors discuss several notions of poverty, poverty measurement, causes of poverty and the distribution of poverty around the world. The authors argue that the only relevant concept for considering poverty and the path is the absolute poverty. Unlike absolute, relative poverty represents a measure of economic inequality.

The authors also provide well founded criticism of the "human rights approach" to poverty. The second theme of this chapter is that the only sustainable way out of poverty is economic growth and not redistribution. If redistribution works at all, it works only temporarily, as in the long-run it removes incentives for wealth creation. While authors, based on latest empirical investigation as in Dollar and Kraay (2002), suggest that growth and poverty reduction go hand in hand, the relationship between inequality and growth is at least not that firm. This question maybe deserves more attention and I will get back to it later.

Chapter two, following Baumol's approach discusses the role of entrepreneurs and public policies that enable entrepreneurship to be productively allocated. Entrepreneurs must be rewarded for their success and if not, authors point to negative economic effects caused by redistributive policies and onerous tax system that lead to what Baumol (2007) calls "the evil twin of entrepreneurship" – unproductive activity. Authors seem to deliberately narrow their discussions not examining the differences in the types and respective roles of entrepreneurs in various systems. However, this is more than justified, as the centre of their investigation is the individual and both replicative and innovative type of entrepreneur share similar attitudes toward public policies analyzed in the chapter.

The underlying reasoning of chapter three is straightforward. The examination of the role of trade is persuasive and along with entrepreneurship authors regard it as the key explanatory variable of prosperity. Even though one of Adam Smith's most important insights was that specialization, and therefore trade was critical to growth and for enhancement of welfare, protectionism has been competing with the concept of free trade for centuries. Besides Bhagwati's three fallacies (infant industries in poor countries will collapse unless protected, the rich countries have more trade

barriers than the poor ones and agricultural subsidies in the rich countries prevent the poor from becoming successful agricultural exporters), authors add the forth one – freer trade would lower wages in rich countries and protection remains necessary. All these fallacies remain to be a powerful justification of policy makers in defining their (protectionist) trade policies. Examples used in this chapter are especially revealing and help reader to understand the root cause of the problem.

Chapter four is devoted to the topic of foreign aid. It presents normative and positive analysis of foreign aid and provides analysis of the correlation between foreign aid and economic growth as well as the assessment of the link between foreign aid and institutions. Following recent research, authors argue that two most investigated poverty traps, those relating to low savings and low productivity, simply do not correspond to the facts (what Easterly in his *The White Man's Burden* calls "Legend Part One"). Furthermore, authors argue that the motives for granting aid do not have much in common with the economic growth of a country or with the reduction and elimination of poverty in that country (or as in Easterly's book second tale of the Legend). It is obvious that between Sachs's social engineering and almost missionary approach and Easterly's view that foreign aid is neither necessary nor sufficient to raise living standards, authors opt for the later. This leaning is also seen in the conclusion to this chapter where authors, similarly to Easterly, advocate piecemeal intervention approach or as they put: "*The future of foreign aid, ..., lies in the abundance of different forms...aimed not at global goals but at small projects ....*" (p.118.). In some ways, the more interesting part of this section lies in the section devoted to the impact of foreign aid on policies and institutions of the recipient country. Authors' detailed analysis of incentive structures supported with depictions of donors' failures is indeed persuasive.

Chapter five analyse relationship between the rule of law (as an efficient protection of private property rights and as an efficient control of contract performance) and economic growth. Indeed, protection of property rights, as well as the burden of fiscal redistribution has long been viewed as growth related factors. This chapter provides first-rate analysis and review of the most recent contributions to the literature. However, the discussion is not limited only to the rule of law, the ways how to provide it, components and aspects of the rule of law, etc., the chapter also includes the examination of the significance of legal origin, relationship between political institutions and property rights, with incentives again as a key unifying theme. As correctly stressed by authors, the main precondition for successful institutional reform is the existence of strong and sustainable incentives to the authorities for that. In fact, as Sonin (2002) recently argued, the rich might benefit from shaping economic institu-

tions into their favour, as their ability to maintain private protection system makes them the natural opponents of full protection of property rights provided by the state. As a consequence in such an environment does not allow demand to drive development of new market-friendly institutions (such as public protection of property rights). To avoid such trap and to make an impact in terms of growth, political elites are often obliged to provide rents to key actors, which in turn allow them to create an institutional environment suitable for growth.

Chapter six discusses the relationship between public finance and growth. It starts with statement that there are needs, or public goods, which must be provided and financed at the government level (security, education, public lighting, etc.). The authors do not see government only as a night watchman (at least not the extreme view of it), but clearly state that out of four usual functions of the government (regulation, allocation, redistribution and stabilization) the focus should be on the provision of public goods, especially those that improve the investment climate including macroeconomic stability and on setting the clear limits with respect to the government role in compulsory redistribution.

Unlike other chapters that are mainly about growth, chapter seven is about redistribution. Authors argue for a very limited compulsory redistribution of income and for social assistance only when no other instrument or policy can be used. As they note the crucial features of good social assistance are that it is limited, well targeted, and includes incentives. Only individuals without choice should be the target of social assistance. It is economic growth, not redistribution, which can bring prosperity to citizens.

A book of this sort obviously provokes many points of discussion, but I would like to turn briefly to an overview of several points that I have questions about. The first concerns issues that are likely to call for additional investigation namely education/human capital and cultural aspects. However, the book does not appear to lose much focusing on the abovementioned topics, so I will rest my point. Some possible additions might be useful, e.g. as economists by their nature quite often tend to generalize issues, reader is probably not clear about the authors attitude towards “one size fits all” approach.

The most usual criticism of this sort of books is that the policy suggestions they provide may look impractical or politically infeasible. While the book is abundant not only with theoretical examination but with numerous examples as well, probably additional examination of several success stories could be beneficial. By that I mean cases in which government succeeded in creating and guaranteeing economic freedoms and in securing the ‘social’ contract between the political elites, the rent-seeking groups and the population at large. Thus, some sort of recognition that the

distribution of economic rewards is a subject that cannot be ignored when a country is trying to promote growth, if only because highly inequitable distributions of income can give rise to political pressures that inhibit or defeat growth. With this respect additional discussion on political economy of growth should be welcomed.

For those readers who have already been persuaded of the value of market-oriented reform, *From Poverty to Prosperity* may be preaching to the converted, but even they will find new or improved argumentation. However, the key readers should be policymakers. As noted by Baumol (2007), policymakers are like students who are given a mass of assorted facts to memorize but have no structure or context in which to place them. As a result, they quickly forget them when confronted with the everyday challenges of having to run governments and meet the unceasing and often conflicting demands of their citizens. For them this book provides both context and arguments how to run sound economic policies. Not only policymakers but unfortunately economists as well often forget basic principles and (for various reasons) support unsound economic policies. Whether they will benefit from this book remains to be uncertain, nevertheless there is a hope that this book will represent a precious reminder of the basic principles of economics. Last but not the least, this book could be used as an additional reference in several undergraduate and graduate courses.

Though one cannot stop the pendulum swinging to more state intervention, any effort of preventing it to move dramatically should be welcomed, and *From Poverty to Prosperity* is the notable one.

Dušan Rakitić, LLM*

Sima Avramović, *Prilozi nastanku državno-crkvenog prava u Srbiji – State-Church Law in Serbia*,
Publication Centre of the University of Belgrade Faculty of Law – Službeni glasnik, Belgrade 2007, pp. 250,
ISBN 978-86-7549-672-4.

The book's title is asymmetrically bilingual: one part of it is not the exact translation of the other. The full title is the one in Serbian *Prilozi nastanku državno-crkvenog prava u Srbiji* (*Contributions on the Birth of State-Church Law in Serbia)* and the shorter one is in English *State-Church Law in Serbia*. The Serbian title denotes the book's structure, for except for its introductory chapter the book is a collection of law review articles and scholarly lectures. However, although the title in English lacks reference to this structural aspect and thus suggests a substantial degree of completeness, it is no less true, for the book both treats all constituents of the subject area of Serbian law, and represents an exhaustive compendium of academic treatises available on the subject in Serbian language.

The fall of the Berlin Wall meant for Serbia the restoration of allegiance of its citizens to churches and religious communities in the same way as it did to other Central and Eastern European countries. However, in Serbia it was only after democratic changes of 2000 that this massive reinstatement of faith in the society began to receive acknowlegment through legislation.

This book does not merely summarize the present outcome of that process. It is a step-by-step testimony of the thorough transformation of the part of Serbian legal system that deals with religious freedom, since most of the contributions it contains have served in fact as intellectual cornerstones for either initializing or justifying pertinent legislative changes. The book, thus, should be regarded as precious source for understanding history of legislation in the field of religious freedom in Ser-

* The author is Teaching Assistant at the University of Belgrade Law Faculty.

bia and the changes that have lasted for almost a decade and that transpired after more than half a century of absence of this area of law from the legal system.

The documentary thoroughness of this collection is all the more so evident from its inclusion of the pleading of Professor Avramović before the Constitutional Court of Serbia in defense of constitutionality of religious instruction, the key testimony for the defense, or of the Draft Law (Bill) on Religious Freedom of 2001/2002, the internationally renowned precursor to the present Law on Churches and Religious Communities of 2006.

The introductory chapter conveys author's understanding of the truly great extent to which the field of church-state law and religious freedom interacts with numerous other areas of law and penetrates the social fabric, especially through its importance for the values of any society of our civilization. The author also in this chapter justifies adoption of the German term "state-church law," which comes as no surprise when one knows that the principle of cooperation between the state and religious organizations, the formative principle in the works of the author in this field, has been the feature of German-speaking countries' legal systems.

The first previously published article in the collection, on religious freedom and its abuse, of 1998, delienates the field of interest by dealing with the sensitive issue of boundaries between legitimate and illegitimate application of religious freedom.

The five contributions that follow all pertain to the restoration of religious instruction to public schools in Serbia. The first and the last one deserve particular attention. The first one, the article titled "The right to religious instruction in domestic and comparative European law," of 2002, was the first that the author had written in this area of law following the democratic changes of 2000, and was published in the midst of a stirring and controversial public debate on the issue during 2001 and 2002. The debate, led both in academic circles and in the media, attracted no less public attention than the then started privatization process.

Restoration of confessional religious instruction for seven traditional churches and religious communities by the Government of Serbia in 2001 set the course of future development in the field – the principle of cooperation between the state and religious organizations was adopted, and the continuity of legal status of traditional churches and religious communities with the one they possessed in the Kingdom of Yugoslavia was recognized. By the same token, this article of the author defined key bearings of the theoritical approach that he explored in all his subsequent works. Firstly, it was the deep understanding of the diversity of church-state relations that existed in Europe, one of which was the model of

church-state cooperation. Secondly, Professor Avramović was the first Serbian legal scholar to confront and unravel the artificial perception of deep conflict between social and legislative recognition of religious rights and application of international human rights treaties. Professor Avramović in this article, and in many that followed invested great care in presenting comparative practice and theory of applying international human rights treaties to such ends.

The fifth contribution in the series devoted to religious instruction may probably be the most vigorous in tone and argumentation, which is understandable considering its nature – it is the testimony of the author in capacity of key expert witness of the Government of Serbia before the Serbian Constitutional Court, given in June 2003, in defense of constitutionality of the Ordinance on Restoration of Religious Instruction and the Alternative Subject to Public Schools of 2001. The constitutionality of the said Ordinance and subsequent statutory provisions was upheld by the Court.

Following a series of lectures – in English, German and Italian – given at international conferences before the new Serbian Law on Churches and Religious Communities was adopted in 2006, two articles are given in which the author dealt with this new law. The first was written while the law was still at the stage of a bill, i.e. it was still not adopted by Parliament, wheareas the second treated the enacted version.

As it has been already mentioned, this collection ends with two statutory texts. The first is the Religious Freedom Bill that the Federal Government of Yugoslavia (consisting of Serbia and Montenegro) sent to Federal Parliament in 2002, but that has never been adopted due to slow constitutional death of the federal state, in the drafting of which the author had a prominent role. The second is the English translation of the enacted Law on Churches and Religious Communities of 2006. A careful reader is thus enabled to recognize similarities between the two texts, particularly with respect to governing principles and key mechanisms, the very same ones that have been in the past six years explained in a sovereign manner to the legal academics and practitioners of Serbia by way of articles and lectures assembled in this collection.

Miroslav Đorđević

Graduate student,
University of Belgrade Law Faculty

COMPARATIVE ANALYSIS OF RISK PASSING IN ROMAN LAW, SERBIAN DOCTRINE AND 19TH CENTURY LEGISLATION*

There are several different theories that attempt to explain the exact moment of risk passing in Roman law. The most accepted explanation claims that the Roman rule periculum est emptoris (risk lies on the buyer) was present not only in the post-classical period of Roman history, but in the classical one as well. A minority of Romanists find this explanation too simplistic, arguing that the opposite rule, periculum est venditoris, (risk lies on the seller) was applied during the classical period of Roman legal history. In this paper the author examines these two approaches and make some comparisons between Roman law of risk passing and the Serbian 19th century legislation and legal doctrine. He concludes that theories claiming that periculum est emptoris was the only way to resolve periculum rei venditae are not convincing.

Key words: *Risk Passing. – Periculum Rei Venditae. – Periculum Est Emptoris. – Periculum Est Venditoris. – Serbian Civil Code of 1844. – Roman Law. – Comparative Legal History.*

Rules about risk passing, *periculum rei venditae*, have been studied and applied since the Roman period and today they are found in almost every civil code. A developed system of trade and market economy is the requirement for such a subtle institute as *periculum rei venditae* is. Therefore it was not present in most medieval laws when direct exchange of goods (*permutatio*) prevailed, due to feudal organization of economy, poverty and the generally low standard of living. With the renaissance and revival of commercial markets, risk passing has once again applica-

* This paper was presented at the *Internationales Sommerseminar 2007* conference in Freiburg im Breisgau (Germany), held on May 17 – 20, 2007. The Conference was organized by Albert-Ludwigs Univerzität (Freiburg im Breisgau, Germany) and Karl-Franzens Univerzität (Graz, Austria), with the general title *Risikomenagement in der Antike.*

ble. Latter on, it can be found in all 19th-century civil codifications. As one of the first modern civil codifications in Europe appeared the Serbian Civil Code of 1844. The Serbian Civil Code, as the cornerstone of the Serbian legal system in the 19th century, will be examined and compared with the Roman law as well as with the other Serbian 19th century laws pertaining to *periculum rei venditae*. It is necessary to briefly examine initially the nature of this institution in the Roman law itself in order to conduct comparisons of other solutions with the Roman one. There are several diverse theories that attempt to explain Roman concept of *periculum rei venditae*, due to the general lack of Roman legal sources and the many interpolations made by Tribonian's commission.

Periculum rei venditae comes out when one of the contractors, either the buyer or seller, has to bear the consequences if the object of *emptio-venditio* (*merx*) is damaged or destroyed by accident (*vis maior* or *casus*). Normally, the owner is to bear the consequences when his thing is destroyed or partially damaged (*casus sentit dominus*). However, if this occurs while the obligation has not been completed between the contracting parties, the problem is how to determine the exact moment of ownership and risk transfer between the seller and buyer, and, consequentlly, who of the two undertakes the consequences. Ownership, as a rule, passed to the buyer only when the thing was actually delivered.[1] If the object (*merx*) is *genera*, the answer is easy. According to the famous Roman rule "*genera non pereunt*", the seller has to take the risk and eventually provide the same amount and quality of goods to the buyer when the *merx* was destroyed. According to the Roman legal sources if the object was *species* the buyer had to take the risk – *periculum est emptoris*.

The majority of Romanists and legal historians have accepted *periculum est emptoris* as a Roman rule despite of it's general dissonance with the spirit of Roman contract law.[2] Firstly, it is obvious that this rule is completely contrary to the Roman maxim *casus sentit dominus*. It would make sense and this could be justified if the *consensus* would led to immediate transfer of ownership on the *merx* without *traditio*. This was obviously not the case. Sale was a consensual contract, which requires no formalities but depends for its validity solely upon the agreement of the parties (which is purely Roman invention).[3] The buyer had only the right to claim *traditio* from the seller (*obligatio*). He did not have any rights on the object itself. On the other hand, the *rule periculum est*

[1] D. 41, 1, 9, 3.

[2] Alan Watson, *The Spirit of Roman Law*, The University of Georgia Press: Athens & London 1995, p. 27; Alan Watson, *The Law of Obligations in Later Roman Republic*, Oxford: Oxford University Press 1965, p. 69; Alan Watson, *Legal Transplants – An Approach to Comparative Law*, The University of Georgia Press: Athens & London 1993, p. 82.

[3] See, Alan Watson (1993), p. 82.

emptoris in practice could lead to some clearly unjust outcomes. For example, if the seller sells the thing to the buyer and prior to the *traditio* object is being destroyed by *vis maior*, the buyer will have to pay the price although he did not get anything out of it, and did not have any liability for the destruction of the *merx*. This situation can be much more unfair if the seller has sold the same object successively. He would have the right to claim the price from each buyer![4] On the other hand, if the object was not destroyed he could claim the price from only one buyer. Furthermore, he would have to compensate other buyers for not fulfilling the contract.

Nevertheless, in the Justinian's Codification we find many acknowledgements on *periculum est emptoris* at many places.[5] This is why most scholars accept this rule as a common place in the Roman law.[6] Among the legal historians who support different explanations of risk passing in ancient Rome are those who try to prove that the rule *periculum est emptoris* was actually combined with the rule *periculum est venditoris* – by which sellers bear the risk until *traditio* is accomplished. There are some authors who claim that *periculum est emtoris* was not used at all in classical Roman law, but only *periculum est venditoris*. These assertions are perhaps not so well-known and widely accepted in Serbian legal theory and among scholars in general, so we shall focus on them.

According to these viewpoints, there is no doubt that *periculum est emtoris* was practiced in the time of Justinian. "*Cum autem et vendito contracta sit, periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emtori tradita non sit*"[7]– As soon as an agreement to sell is concluded, the risk of a sold thing transfers to the buyer also in the case if the *traditio* has not been performed yet. Justinian justifies this solution with the fact that from the moment of the *consensus* the buyer has the right to the fruits and accessions of the object (*merx*).[8]

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[4] Mihajlo Konstantinović, "Prilog teoriji rizika u rimskom klasičnom pravu" [Contribution to the risk theory in classical Roman Law], *Arhiv za pravne i društvene nauke* 3/1924, p. 162; the same article was reprinted later, Mihajlo Konstantinović, "Prilog teoriji rizika u rimskom klasičnom pravu" [Contribution to the risk theory in classical Roman Law], *Anali Pravnog fakulteta u Beogradu* 3–4/1982, 247–258.

[5] For example, Inst. III 23.3.

[6] Dragomir Stojčević, *Rimsko privatno pravo* [*Roman Private Law*], Beograd: Savremena administracija 1988, p. 264; Bertold Eisner, Marijan Horvat, *Rimsko pravo* [*Roman Law*], Zagreb: Nakladni zavod Hrvatske, 1948, p. 422; Watson, Alan (1965), 69; Jelena Danilović, "Srpski građanski zakon i rimsko pravo" [*Serbian Civil Code and Roman Law*], *Sto pedeset godina od donošenja Srpskog građanskog zakonika*, Beograd: Srpska akademija nauka i umetnosti, 1996, p. 58.

[7] Inst. III 23.3.

[8] Eisner and Horvat (1948) state that this explanation is not satisfactory, due to large disproportion between risk that has to be taken and the benefits from *commodum rei*, p. 422.

This rule was undoubtedly present in the time of Emperor Justinian, but was that so in the classical Roman law as well? One of the most famous ex-Yugoslavian legal scholars, late Professor Mihajlo Konstantinović, believed that this was not the case. Konstantinović was one of the foremost Serbian specialists in civil law, teaching at the University of Belgrade Faculty of Law. He got his legal education in Lyon, France and taught law at first at the University in Subotica, and subsequently Belgrade. He is the author of the so-called Draft of the Law of Obligations and Contracts (1969), which served as an inspiration for the Yugoslav Law of Obligations. It has never been enacted, but has always been quoted as a supreme authority. It has become the main model for the Law of Obligations of 1978, which is still in force in Serbia. It has effected most legislations on law of obligation in the ex-Yugoslav countries.

Following the idea of Arno, as far as risks are considered, Konstantinović wrote a couple of works where he tried to prove that *emptio est venditoris* had been the only rule on risk during the Roman classical period. He emphasizes that the contractual obligation of one contractor is *causa* for the obligation of the other. If one's obligation becomes impossible (e.g. if the *merx* is destroyed) the obligation of the other contractor terminates. *Periculum est emptoris* therefore differs from the general logic of Roman contractual law and can cause unjust situations. On the other hand, the classical Roman law has been, in Konstantinović's opinion, much more just, because it used the rule *periculum est venditoris*. Subsequently, Justinian's commissioners took (transplanted), under the instructions of the Emperor, the rule *periculum est emtoris* from the East provinces, from the Greek law, and applied it as a general rule. Only thanks to the rush of the Tribonian's commission, some non-interpolated fragments have survived, so that we can see the traces of *periculum est venditoris* in classical Roman law.

In his article *Contribution to the Roman theory of risk*, Konstantinović challenges the arguments of Rabel, who admits that *periculum est emptoris* has not always been applied.[9] Rules in the *Digest* indicate its application was obviously interpolated, which doesn't mean that *periculum est venditori*s was a general rule. In Rabel's opinion, none of these rules were general – each one of them had its own field of application. The distinctive line between the two is, in Rabel's opinion impossible to find, so he gives enumeration of the cases with *periculum est emptori*s. Konstantinović challenges Rabel's examples in favor of *periculum est emptoris* and comes out, using *argumentum a contrario*, with the conclusion that *periculum est venditoris* was the way to resolve the risk passing in Roman classical period.[10]

[9] Mihajlo Konstantinović (1924), *passim.*

[10] *Ibid.*

For example: Rabel claims that when the slave or an animal is the object of an agreement to sell, the risk is assumed by the buyer from the moment of *consensus*. This opinion is based upon the *Digest*, but Konstantinović argues that these fragments have been severely interpolated in order to modify the nature of the institution into *periculum est emptoris.*[11] It is easy to find legal, linguistic and logical obscurities and discrepancies in fragments about slave trading. Some explanations that Konstantinović gives are quite complicated and sophisticated, especially in linguistic matters, but on the other hand, there are some very simple and obvious examples, like Ulpianus's fragment, stating: *hoc amplius Labeo ait, et si quid in funus mortui servi impensum si, ex vendito consequi oporter, si modo sine culpa venditoris mortem obierit*. This whole fragment is, in Konstantinović's opinion, the work of Justinian's commission. He accepts and elaborates the opinion of Arno that it was impossible for the buyer to be obliged to pay the costs for the burial of a slave who died in a period between *consensus* and *traditio*. The reason is simple: in the time of Labeo the slave master was not obliged to bury the slave at all. Corpses were thrown into *Campus Esquilinus*, where wolves and vultures scattered their remains, in words of Horatio.[12]

Of course, there were some masters who buried their slaves – the place where slave was buried was even *res religiosa* for Romans, but that was a matter of *fas*. According to *ius*, Rome of that time did not oblige slave masters to bury their slaves. Plenty of linguistic characteristics of this fragment also show that this was actually a creation of Justinian's commission. Studying this one and many other interpolated fragments in Digest, Konstantinović comes to the conclusion that *periculum est venditoris* was the general rule in classical Roman law considering risk transfer, with only a few understandable exceptions. One of these exceptions is famous fragment from Gaius' *Res cottidianae*, concerning the selling of wine. Eva Jakab examined this fragment in detail in her works. She states that the seller took the risk for the wine if he had guaranteed wine's quality to the buyer, and *traditio* has been made before the buyer tried the wine. If there is no guarantee from the seller, and the buyer doesn't try the wine (or tries it without noticing its dissatisfying quality), he takes the risk if the wine gets sodden or spoiled. But, Jakab emphases, if the seller knows that quality is about to drop before *traditio*, and does not warn the buyer, seller was to take the risk again.[13] Konstantinović has had the same

[11] Eisner and Horvat (1948), pp. 422. support theories that see *periculum est emptoris* as the only way to resolve the problem of risk transfer in Roman law. However, they admit that this question is highly contraversial and that the presence of Justinian's interpolations is obvious.

[12] Mihajlo Konstantinović (1924), p. 171.

[13] Eva Jakab, "Gaius kommentiert die Papyri*"*, *Symposion 1995, Vortrage zur griechischen und hellenistischen Rechtsgeschichte,* Koeln – Weimar – Wien 2003, pp. 313; Eva Jakab, "'Wo gärt der verkaufte Wein?' Zur Deutung der Weinleiferungskäufe in

opinion about the *periculum rei venditae* in these wine sales as Jakab. This same fragment is, on the other hand, interpreted by Haymann as an example of *periculum est emptoris*, which is further evidence of how this Roman legal matter, *periculum rei venditae*, can be considered in different ways with good argumentation. However, Konstantinović's conclusions and arguments on that topic still sound very convincing.[14]

In comparing Roman understanding of *periculum rei venditae* with the Serbian 19th century legal system, one has to take into account the general situation in the country at that time. At the beginning of 19th century a part of the Serbian people was living under the supreme power of the Ottoman Empire, and the other under Austro– Hungarian Empire. This period of Serbian legal history can be clearly divided into two asub periods – the one before adoption of the Serbian Civil Code of 1844 and the one afterwards. Before the codification was enacted, any comprehension of *periculum rei venditae* did not exist at all. It was a period without written civil laws; courts were judging arbitrarily, mainly according to the customary law and equity, and there are no traces of *periculum rei venditae* mentioned in the preserved court decissions. Situation was different in the now Serbian Northern Province of Vojvodina, inhabited with a huge Serbian population. The area was part of the Austrian Empire, and when the Austrian Civil Code was enacted in 1811, it was applied to all the citizens, including Serbs. Although many Serbian intellectuals from Vojvodina maintained close contacts with the Serbs "from the other side of the Danube", and strongly influenced political, cultural, educational and all elements of life in Serbia during and after the First Serbian Uprising against the Turkish rule in 1804, even then there are no traces of import of rules about risk passing. Even more, legal terminology was weak among Serbs in Vojvodina also: it was common expression in Vojvodina of that time *zavrsio sam posao* [a rough translation would be "I finished (completed) contract"] for situations in which someone has actually only achieved *consensus*, without *traditio*.[15] In the southern part of today's Serbia, being deeper and longer within the Turkish rule, problems that occur dealing with *periculum rei venditae* were resolved without involving the court, according to local customs. This situation changed considerably after enacting of Serbian Civil Code of 1844 and the Serbian Commercial Code of 1860. Highly influenced by Austrian Civil Code of 1811,[16] Serbian Civil Code of 1844 brings *periculum rei venditae* into Serbian legal life.

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den graeco-ägyptischen Papyri", *Symposion 1997, Vortrage zur griechischen und hellenistischen Rechtsgeschichte,* Koeln – Weimar – Wien 2003, pp. 295.

[14] Mihajlo Konstantinović (1924), 173.

[15] Jelena Danilović (1996), pp. 58.

[16] For more details, see Miroslav Đorđević,"Pravni transplanti i Srbijanski građanski zakonik iz 1844. godine" [*Legal Transplants and the Serbian Civil Code of 1844*], *Strani pravni život* 1/2008, 62–84.

If one accepts, as most authors do, *periculum est emptoris* as a general Roman rule, the solutions found in the Serbian Civil Code differ from it almost completely. According to the Code, the buyer does not become the owner of the object with an agreement to sell contract itself (moment of *consensus*), but with the moment of *traditio.*[17] Therefore, the seller had to bear the risk of accidental object destruction fully according to the Roman rule of *res perit domino*. The seller was not capable of transfering the ownership to the buyer due to accidental destruction of the object; he was not allowed to ask for the price, neither to keep it if it was given before, as it would be considered to be in his possession *sine causa*. This solution is very similar to the one found in Austrian Civil Code, as the Serbian Civil Code transplanted it in many aspects. Article 658 of the Serbian Civil Code says: *Što se koristi i opasnosti pri prodatim, no nepredatim stvarima tiče, važi popis zakona pri promeni naznačenog* – "concerning things sold, but undelivered, applicable is the rule written under exchange", which is the article 636 of Serbian Code that says: *Ako je vreme za prodaju određeno, pa bi međutim stvar zabranom zakonom prestala među ljudima prolaziti, i vrednost imati, ili bi slučajno propala, onda prestaje ugovor, i smatra se kao da nije ni učinjen*– "if the object stipulated for excange becomes *res extra commercium,* or accidentally gets destroyed before the delivery (*traditio*), contract is abolished, like it has never been made".

Professor of Roman law from Banja Luka in the BiH Federation, Nikola Mojović, offers in his thesis interesting conclusions about *periculum rei venditae* in Serbian 19th century law. He claims that this is clear application of rule *periculum est venditoris.*[18] Exclusion of objects from legal circulation (due to expropriation, for example), in the Serbian Civil Code is treated equaly as the physical destruction of it. If the contract is abolished, the seller, still being the owner, will be given the compensation for the expropriated good. This may sometimes be worse for the seller, because maybe he could have got the better price from the buyer. In that case, Mojović states, the will of the state in case of expropriation is considered as *vis maior.*[19] When the object of *emtio-venditio* is not completely destroyed, but only damaged, the rule *periculum est venditoris* is also in place, with an exception for situtations in which the object is the whole stock (*djuture*). In this case, risk lies on the buyer's side from the moment of *consensus*. Although the main model for Serbian Civil Code was the Austrian Civil Code, nevertheless we come here to certain difference between the two. In the Austrian Code, if the object is damaged so it has

[17] Serbian Civil Code, Art. 658, 636, 642, etc.

[18] Nikola Mojović, *"Periculum rei venditae" od rimskog do savremenog prava*, Beograd, Pravni fakultet Univerziteta u Beogradu, 1985, 308.

[19] *Ibid.*

lost half of its value, consequences are the same as it was destroyed completely.[20] Serbian Code, on the other hand, in this situation leaves with the buyer the right to decide whether the contract will remain valid or will be eradicated.[21]

In this context it is also important to paz attention to the Serbian Commercial Code of 1860. It had a few additional rules about risk passing, applied along with those from the Serbian Civil Code. Serbian Commercial Code regulates situations when something accidentally happens to goods during their transport. By that law, the owner of the goods takes the risk – *casus sentit dominus*, but has the right to ask for compensation of damage from the carrier or shipping clerk. It is also significant to mention a unique Montenegrenian civil codification of 1888 – *Opšti imovinski zakonik za Crnu Goru* (*General Civil Code for Montenegro*), written by Valtazar Bogišić, a scholar who was greatly influenced by the historical school, stressing importance of national legal customs. This Code had a tremendous influence on Serbian legal tradition, and it definitely should not be left out of any examination in the context of Serbian 19th century law. Written by this brilliant and erudite Viennese scholar, the Code strictly proclaims the rule *res perit domino*. Mojović emphasizes that out of all the civil law regulations of that time, only the English law of sales from 1893 has proclaimed the rule of *res perit domino* as explicitly as Valtazar Bogišić did in his Code.[22] Due to similar solutions on *periculum rei venditae* in the General Civil Code for Montenegro and the ones in the Serbian Civil Code, one should point out two interesting fragments.

Although it seems just and fair in most instances, the rule *res perit domino* can occasionally lead to some unjust solutions, as stipulated in the Art. 231 of the Montenegrenian Code.[23] In this article it appears that the Code leaves the court the option of spliting the cost for damages equally between the buyer and the seller. The court can even arrange the matter in a different way, in cases when it is obviously unjust that only buyer should take the risk or the exact moment of object destruction or damaged cannot be clearly established. It is also important to stress that Roman rule *genera non pereunt* has been literary translated (*vrsta ne gine*), and included in the Code.

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[20] Austrian Civil Code, Art. 1048.

[21] Serbian Civil Code, Art. 637.

[22] Nikola Mojović (1985), p. 310.

[23] "*Ako se nikako ne da tačno odrediti vrijeme kad se slučajni kvar ili gubitak dogodio, tj. da li je to bilo prije ili poslije neg sto je vlaština prešla na kupca; ili bi inace, radi osobitih kakvih prilika i uzroka, bilo očevidno nepravo da sam kupac ili sam prodavac sve štetuje, tad sud moze obojici podijeliti štetu po pola ili onako, kako vec nađe da je priličnije i pravednije*", General Civil Code for Montenegro, Art. 231.

All this brief analysis of the doctrine and legislation significiant for Serbian civil legal history makes particular sense if one puts it into the contemporary context, trying to understand how the legal tradition survives. Serbia's current *Law of Obligations* arranges the matter of *periculum rei venditae* very clearly and simply in Article 456 stipulating that before *traditio* risk of the accidental destruction or damage is on seller, and after *traditio* it is transfered to the buyer.[24] It is evident that the rule *periculum est venditoris* is fully accepted in actual Serbian positive law, like in most other countries, as the remnant of reconciliation of Serbia's 19th century legal solutions and the doctrinal perceptions of the problems in the 20th century.

Was it accepted in the Roman classical period? Theories that tend to approach the problem from a different angle, such as the theory of professor Konstantinović, present a great advance and inspiration for further research in this field. We still find the arguments in favor of *periculum est venditoris* as a dominant rule during the Roman classical period to be very convincing.

[24] Zakon o Obligacionim odnosima, Službeni list SFRJ 29/1978, article 456: *"Do predaje stvari kupcu, rizik slučajne propasti ili oštećenja stvari snosi prodavac, a sa predajom stvari rizik prelazi na kupca*". In the French *Code civil* risk and ownership pass together to the buyer as soon as the contract is perfect; in the German 1900 Codification (BGB) risk and ownership pass together to the buyer, but only on delivery of the thing, while the Swiss solution follows Roman law, and risk passes to the buyer when the contract is perfect, but ownership is transferred only with delivery, see more: Alan Watson (1993), pp. 82.

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