

The *Kosovo* Case – An Unfortunate Precedent

Stefan Oeter*

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Abstract

Secession is a divisive issue in international legal discourse. States are usually quite reserved and sceptical towards secessionist attempts. All the more exceptional is the case of Kosovo where a large number of states supported a move towards independence that happened against the will of the territorial sovereign (Serbia) and despite the continued applicability of SC Res. 1244. The events leading to Kosovo's unilateral declaration of independence – and the subsequent wave of recognition of Kosovo as an independent state – can only be explained by the special circumstances of the case. Nevertheless, the case is not as “unique” as the United States (US) and the majority of the European Union (EU) members try to portray – and it is in danger of creating an unfortunate precedent. This article explains in normative terms why Kosovo as a precedent is so unfortunate, why traditional patterns of non-recognition of secession make sense and why principled arguments of how to deal with competing quests for self-determination and territorial integrity speak very much in favour of a reserved position towards support for secessionist movements. The author does not completely rule out any possibility of a “remedial secession”, but applying this doctrine to the case of Kosovo does not lead to a reassessment of secession that would justify “premature” recognition of Kosovo by third states. The problematic consequences of the *Kosovo* case being perceived as a precedent can now clearly be seen in Russian actions against Ukraine.

* Prof. Dr. *iur.*, University of Hamburg.

I. Introduction

Secession is a divisive issue in international legal discourse. States (and their legal counsels) are usually quite reserved and sceptical towards secessionist attempts – they think, not without reason, that secession struggles tend to make problems worse and potentially erode international order and stability.¹ Advocates of a wide understanding of self-determination of peoples – often moved by a romantic sympathy with oppressed peoples – argue the other way round, namely that a people which has gone through a long history of force, oppression and persecution have a natural right to determine its own fate and to look for a form of government that respects its traditions, values and preferences.² The one side (states) underestimates the emotional strength of the aspirations and desires of oppressed people to achieve self-government, whereas the other side underestimates the practical problems (and the potential collateral damages) linked with secession. Political self-determination is usually related to a given territory (although the boundaries of such territory may be disputed). A “people”, as an “imagined community”³ of common language, culture and traditions, rarely occupies a specific territory alone. There will be also other communities living on the same soil that will not feel enthusiasm when confronted with the prospect of being dominated by the local majority (think of the Crimean Tatars rejecting the secession of Crimea) and that will engage in a protracted struggle over political power and participation – a struggle that in itself will fuel tensions and might exacerbate violence.

A struggle that is seen as “just” and irresistible in its moral justification by one group thus might be perceived by others as awkward and backward-looking, igniting lawless violence and eroding law and order. Any struggle for self-determination waged by an “imagined community”, perceiving itself as a “people”, thus will lead to quite divergent narratives. Listening to the opposite tales, narratives and arguments made by the Ukrainian and Russian side in the conflict over Crimea and Donbass reminds us of that

¹ See e.g. S. Oeter, Self-Determination, in: B. Simma/E. E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations. A Commentary*, Vol. I, 3rd ed. 2012, 313, at 330 et seq.

² See e.g. E. M. Brewer, To Break Free from Tyranny and Suppression. Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion, *Vand. J. of Int'l L.* 45 (2012), 245 et seq., and T. W. Simon, Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo, *Ga J. Int'l & Comp. L.* 40 (2011), 105 et seq.

³ See E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality*, 1990; E. J. Hobsbawm/T. Ranger (eds.), *The Invention of Tradition*, 1983; B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1983.

basic insight. The opposing narratives and justifications demonstrate that both sides live in different worlds (at least in epistemic terms), that their “social constructions of reality” diverge radically. Official propaganda definitely manipulates these divergences in the construction of the shared narratives, but they relate to quite different cognitive patterns present in societies that provide the basic resonance for the propagandistic enterprises.

An experience very much comparable to the cognitive dissonance found in relation to Ukraine could be found some ten to fifteen years ago in the conflict waged about the construction of Kosovo as a separate polity. The narrative of a glorious liberation leading to independent statehood, on the one hand, and the story of an international conspiracy that ended up in illegal separation of Serbian heartland Kosovo-Metohija, on the other hand, also seems to stem from different planets. Even in the single epistemological frame of international legal language, there exist rather divergent perspectives on the *Kosovo* case.⁴ Such perspectives converge as far as the factual basis is concerned – the province of Kosovo seceded from Serbia, supported by a powerful group of third states. But was that secession legal? And what

⁴ Quite a lot has been written on the topic during the last few years – see only *K. W. Watson*, *When in the Course of Human Events: Kosovo’s Independence and the Law of Secession*, *Tul. J. Int’l & Comp. L.* 17 (2008), 267 et seq.; *A. Orakbelashvili*, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, *Max Planck UNYB* 12 (2008), 1 et seq.; *D. Fierstein*, *Kosovo’s Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, *B.U. Int’l L. J.* 26 (2008), 418 et seq.; *R. Mubarremi*, *Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited*, *Rev. of Cent. & E. Eur. L.* 33 (2008), 401 et seq.; *P. Hilpold*, *Das Kosovo-Problem – ein Testfall für das Völkerrecht*, *ZaöRV* 68 (2008), 779, 795 et seq.; *O. Corten*, *Déclarations unilatérales d’indépendance et reconnaissances prématurées: Du Kosovo à l’Ossétie et à l’Abkhazie*, *RGDIP* 112 (2008), 721 et seq.; *B. Bing Jia*, *The Independence of Kosovo: A Unique Case of Secession?*, *Chinese Journal of International Law* 8 (2009), 27 et seq.; *E. Milano*, *The Independence of Kosovo under International Law*, in: *S. Wittich/A. Reinisch/A. Gattini* (eds.), *Kosovo – Staatsschulden – Notstand – EU- Reformvertrag – Humanitätsrecht: Beiträge zum 33. Österr. Völkerrechtstag 2008, 2009*, 21 et seq.; *P. Šturma*, *The Case of Kosovo and International Law*, *Polish Y.B. Int’l L.* 29 (2009), 51 et seq.; *J. Vidmar*, *International Legal Responses to Kosovo’s Declaration of Independence*, *Vand. J. Transnat’l L.* 42 (2009), 778 et seq.; *I. Cismas*, *Secession in Theory and Practice: The Case of Kosovo and Beyond*, *GoJIL* 2 (2010), 531 et seq.; *A. Hehir* (ed.), *Kosovo, Intervention and Statebuilding*, 2010; *B. Delcourt*, *L’indépendance du Kosovo*, in: *Société Française pour le Droit International* (ed.), *Droit international et relations internationales*, 2010, 95 et seq.; *P. M. Eisemann*, *L’indépendance du Kosovo – le point de vue du juriste*, in: *Société Française pour le Droit International* (note 4), 107 et seq.; *U. K. Preuß*, *Kosovo – A State sui generis?*, *Südost-Europa* 58 (2010), 389 et seq.; *T. Fleiner*, *The Unilateral Secession of Kosovo as a Precedent in International Law*, in: *U. Fastenrath* (ed.), *From Bilateralism to Community Interest*, 2011, 877 et seq.; *T. Jaber*, *A Case for Kosovo? Self-determination and Secession in the 21st Century*, *International Journal of Human Rights* 15 (2011), 926 et seq.; *D. Shelton*, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, *AJIL* 105 (2011), 60 et seq.

about the support of third states for Kosovo's secession, culminating in the quick recognition of the "Republic of Kosovo" as an independent state by some hundred states in the world?

A second problem should also be recalled: it is difficult to talk about the secession of Kosovo from Serbia without mentioning the Advisory Opinion of the International Court of Justice (ICJ).⁵ But the Advisory Opinion deliberately does not say anything on the issue of secession (more precise on recognition of the seceding entity).⁶ Arguing about a deliberate void in the

⁵ Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 141 (22.7.2010) – in the following abbreviated as "ICJ Advisory Opinion".

⁶ See as – largely critical – notes on the Advisory Opinion *M. Bothe*, Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence, GLJ 11 (2010), 837 et seq.; *R. Howse/R. Teitel*, Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?, GLJ 11 (2010), 841 et seq.; *R. Mubarremi*, A Note on the ICJ Advisory Opinion on Kosovo, GLJ 11 (2010), 867 et seq.; *T. Burri*, The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links, GLJ 11 (2010), 881 et seq.; *E. Cirkovic*, An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence, GLJ 11 (2010), 895 et seq.; *C. Pippan*, The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: An Exercise in the Art of Silence, *Europäisches Journal für Minderheitenfragen* 3 (2010), 145 et seq.; *C. Ryngaert*, The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Missed Opportunity?, NILR 57 (2010), 481 et seq.; *T. Margueritte*, L'avis consultative de la Cour internationale de Justice sur le Kosovo: Un occasion manqué?, *L'observateur des Nations Unies* 28 (2010), 257 et seq.; *A. Rusniah/D. I. Efevwerhan*, The ICJ Opinion on Kosovo: Symphony or Cacophony?, *I.J.I.L.* 50 (2010), 545 et seq.; *M. P. Andrés Sáenz de Santa María*, Tu quoque, Corte?, *Revista Española de Derecho Internacional* 63 (2011), 55 et seq.; *V. Röben*, The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo, *GoJIL* 2 (2010), 1063 et seq.; *T. Christakis*, The ICJ Advisory Opinion on Kosovo, *LJIL* 24 (2011), 73 et seq.; *J. Cerone*, The International Court of Justice and the Question of Kosovo's Independence, *ILSA J. of Int'l. & Comp. L.* 17 (2011), 335 et seq.; *C. D. Espósito*, El discreto ejercicio de la función consultiva de la Corte Internacional de Justicia en el asunto Kosovo, *Revista Española de Derecho Internacional* 63 (2011), 125 et seq.; *J. A. Frowein*, Kosovo and Lotus, in: U. Fastenrath (note 4), 923 et seq.; *R. A. Falk*, The Kosovo Advisory Opinion, *AJIL* 105 (2011), 50 et seq.; *M. Divac Oberg*, The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion, *AJIL* 105 (2011), 81 et seq.; *M. G. Kohen/K. Del Mar*, The Kosovo Advisory Opinion and UNSCR 1244 (1999), *LJIL* 24 (2011), 109 et seq.; *M. Weller*, Modesty Can be a Virtue – Judicial Economy in the ICJ Kosovo Opinion?, *LJIL* 24 (2011), 127 et seq.; *R. Wilde*, Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion, *LJIL* 24 (2011), 149 et seq.; *H. Hammum*, The Advisory Opinion on Kosovo, *LJIL* 24 (2011), 155 et seq.; *D. Jacobs/ Y. Radi*, Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo, *LJIL* 24 (2011), 331 et seq.; *J. Vidmar*, The Kosovo Advisory Opinion Scrutinized, *LJIL* 24 (2011), 355 et seq.; *J. Summers* (ed.), Kosovo – A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights, 2011; *K. Oellers-Frahm*, Problematic Question or Problematic Answer? Observations on the International Court of Justice's Advisory Opinion Concerning Kosovo's Unilateral Declaration of Independence, *GYIL* 53 (2011), 793 et seq.; *A. Orakbelashvili*, The International Court's Advisory Opinion on the UDI in

reasoning of the Court, however, is a delicate enterprise. The International Court of Justice found itself in an extremely delicate situation where it was more than difficult to find a way out without suffering severe wounds.⁷ The way chosen by the Court to escape such dilemma is not without plausibility under a perspective of “judicial politics”, since it allowed it to avoid the divisive issues of evaluating secession (and in particular recognition of secessionist entities) in terms of international law – an issue that probably would have left the Court utterly divided, without any clear majority (like in the Nuclear Weapons Advisory Opinion). The seemingly easy way out of such dilemma had its price in terms of doctrinal consistency, however, in particular because as a result the Court had to manipulate its factual assumptions in order to be able to follow such an argumentative path.⁸

II. Secession and Self-Determination of Peoples

The Court’s fundamental point stressed in the Advisory Opinion is rather basic and does not depart much from traditional doctrinal writing: declarations of independence issued by political actors inside a state – actors

Respect of Kosovo, Max Planck Yb. of United Nations L. 15 (2011), 65 et seq.; A. Peters, Does Kosovo lie in the Lotus-Land of Freedom?, Leide J. of Int’l L. 24 (2011), 95-108; D.H. Meester, The International Court of Justice’s Kosovo Case, Canadian Yb. of Int’l L. 48 (2011), 215-254; R. Fricot/B. Sander, The Broader Consequences of the International Court of Justice’s Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo, Columbia J. of Transnational L. 49 (2011), 321 et seq.; R. Van Steenberghe/A. Claeys Boúuaert, L’avis de la Cour internationale de Justice sur la déclaration d’indépendance du Kosovo, Revue de droit international et de droit compare 88 (2011), 343 et seq.; P. Hilpold (ed.), Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010, 2012; M. Hartwig, Das Gutachten des Internationalen Gerichtshofs zur Unabhängigkeitserklärung des Kosovo, Osteuropa 58 (2012), 11 et seq.; P. Hilpold, The International Court of Justice’s Advisory Opinion on Kosovo – Perspectives of a Delicate Question, Austrian Review of International & European Law 14 (2013), 259 et seq.; M. Stachonova, The ICJ Advisory Opinion on Kosovo, 2014.; M. Milanović (ed.), The Law and Politics of the Kosovo Advisory Opinion, 2014.

⁷ See M. Weller (note 6), 127 et seq., but also T. Burri (note 6), 882 et seq., as well as C. Pippan (note 6), 145 et seq.

⁸ See as critical notes in this regard R. Howse/R. Teitel (note 6), 842 et seq.; R. Muharremi (note 6), 873 f., and T. Burri (note 6), 882 et seq.; see in addition B. Arp, The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities, GLJ 11 (2010), 847, at 853 et seq.; T. W. Waters, Misplaced Boldness: The Avoidance of Substance in the International Court of Justice’s Kosovo Opinion, Duke J. of Comp. & Int’l L. 23 (2012), 267 et seq.; M. G. Kohen, Le Kosovo entre le droit et la puissance (les questions négligées par l’avis consultatif de la Cour), in: M. K. Kamga (ed.), L’Afrique et le droit international. Liber amicorum Raymond Ranjeva, 2013, 533 et seq.

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not bound by international law – that proclaim independent statehood for certain parts of a territory are not issues regulated by public international law.⁹ They will usually contradict rules of internal law of the state that used to exercise sovereign rights in the respective territory. But it is impossible to measure them against the yardstick of public international law, at least as long as its authors act solely as political actors at an internal level.¹⁰

The central statement of the ICJ thus paraphrases the old saying of public international law treatises: “Secession is a matter of fact, not a matter of law”.¹¹ The essence of this statement is the insight that attempts at secession are first and foremost issues of the political process in a given society but do not automatically constitute a question of international relations.¹²

Thus, secession *per se* is neither prohibited under international law nor does international law support processes of secession.¹³ Such old wisdom of public international law treatises, however, constitutes at best a partial answer to the challenges of assessing secession in legal terms. The central follow-up question of each secession is the question of *recognition* of the seceding entity by third states.¹⁴ The legal judgment reserved for this type of situation under classical international law has always been very clear: the recognition of secessionist entities or regimes has always been perceived – at least as long as the former territorial sovereign continues to fight against the secession – to be illicit, to constitute *intervention*, as long as there does not exist a specific justification for such a *premature recognition*.¹⁵

⁹ ICJ Advisory Opinion, paras. 84, 113 et seq.; see also *M. Bothe* (note 6), at 837.

¹⁰ See in particular *T. Musgrave*, Self-Determination and National Minorities, 2000, at 192 et seq., 209 et seq.; *R. Müllerson*, Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia, *Chinese Journal of International Law* 8 (2009), 2, at 24.

¹¹ See *T. Musgrave* (note 10), 192 et seq.; *T. Christakis*, L'état en tant que “fait primaire”: réflexions sur la portée du principe d'effectivité, in: M. G. Kohen (ed.), *Secession: International Law Perspectives*, 2006, 138, at 155 et seq.; *T. M. Franck*, *Fairness in International Law and Institutions*, 1995, at 159 et seq.; *C. J. Borgen*, The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia, *Chicago Journal of International Law* 10 (2009), 1, at 8.

¹² See as critical discussion of the traditional doctrine of international law's neutrality towards phenomena of secession *U. Saxer*, Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung, 2010, 113 et seq.; *A. Orakbelashvili* (note 4), 12 et seq.

¹³ See *D. Thürer/T. Burri*, Secession, in: R. Wolfrum (ed.), *MPEPIL*, online edition, available at <<http://www.mpepil.com>>; *G. Abi-Saab*, Conclusion, in: M. G. Kohen (note 11), 474; *P. Hilpold*, Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens, *ZöR* 63 (2008), 117 et seq.

¹⁴ See *J. Dugard/D. Raić*, The Role of Recognition in the Law and Practice of Secession, in: M. G. Kohen (note 11), at 94 et seq.

¹⁵ See in particular *C. Haverland*, Secession, in: R. Bernhardt (ed.), *EPIL*, 1987, 385, at 386 et seq., but also *J. A. Frowein*, Recognition, *EPIL*, 340, at 341; see in addition *A. Orakbe-*

Accordingly, it is only possible to escape the verdict of (illegal) recognition if there exists a specific justification for straying from the sovereignty of an entity's former authority – and such justification has been construed in particular by the adherents of the doctrine of so-called “remedial secession”.¹⁶ Such doctrine of a right to secession as a kind of “self-defence” starts from the right of self-determination of peoples. It is recognized and practically beyond dispute, however, that the right of self-determination does not contain a general and unconditioned right of each ethnic group, each “imagined community”, to claim at any time independent statehood.¹⁷ Self-determination of peoples and territorial integrity of states must be balanced against each other in a sensible way.¹⁸

Furthermore, the definition (and the delimitation) of the potential bearer of an (unconditioned) right to independent statehood would raise insuperable difficulties, because the question how to delimit a group with an own “ethnic” or “national” identity distinguished from the majority nation finally depends on a largely subjective judgment.¹⁹ Collective identities are socially constructed, can change over time and are not easy to ascertain, since they depend on “social constructions of reality”. A striking example in that regard is delivered by the dispute of what constitutes a separate language that has to be dealt with on its own terms, different from the vast range of varieties and dialects of the majority language or established other lan-

lashvili (note 4), at 11 et seq.; *D. Fierstein* (note 4), at 430 et seq.; *O. Corten* (note 4), at 744 et seq.; *U. Saxer* (note 12), at 187 et seq.

¹⁶ See as fundamental writings on “remedial secession” *U. O. Umozurike*, *Self-Determination in International Law*, 1972, at 196 et seq.; *L. C. Buchheit*, *Secession: The Legitimacy of Self-Determination*, 1978, at 220 et seq.; *D. Thürer*, *Das Selbstbestimmungsrecht der Völker*, AVR 22 (1984), 113, at 127 et seq.; *K. Doehring*, *Allgemeine Staatslehre*, 1991, at 126 et seq.; *C. Tomuschat*, *Secession and Self-Determination*, in: M. G. Kohen (note 11), at 33; *C. Ryngaert/C. Griffioen*, *The Relevance of the Right to Self-Determination in the Kosovo Matter: In Partial Response to the Agora Papers*, *Chinese Journal of International Law* 8 (2009), 573, at 575 et seq.; *U. Saxer* (note 12), at 394 et seq.; compare also critical *A. Orakhelashvili* (note 4), at 13 et seq., as well as *N. Kemoklidze*, *The Kosovo Precedent and the “Moral Hazard” of Secession*, *Journal of International Law & International Relations* 5 (2009), 117 et seq., and *P. Hilpold*, *The Kosovo Case and International Law: Looking for Applicable Theories*, *Chinese Journal of International Law* 8 (2009), 47, at 55 et seq.

¹⁷ See *J. Vidmar* (note 4), at 807 et seq.; *R. Müllerson* (note 10), at 18 et seq.; *B. Bing Jia* (note 4), at 32 et seq.

¹⁸ In this regard see *S. Oeter*, *Selbstbestimmungsrecht im Wandel. Überlegungen zur Debatte um Selbstbestimmung, Sezessionsrecht und “vorzeitige” Anerkennung*, *ZaöRV* 52 (1992), 741, at 753 et seq.; see also *T. Musgrave* (note 10), at 180 et seq.; *K. W. Watson* (note 4), at 274 et seq.; *T. Marauhn*, *Anspruch auf Sezession?*, in: H.-J. Heintze (ed.), *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt?*, 1997, 105, at 107 et seq.; *E. Milano* (note 4), at 23 et seq.

¹⁹ See *T. Musgrave* (note 10), at 154 et seq.; see also *U. Saxer* (note 12), at 274 et seq.

guages. The practice of states over the last decades, mirrored in the monitoring of the European Charter for Regional or Minority Languages by the Independent Committee of Experts, the relevant treaty body of the Council of Europe, demonstrates that the distinction of (separate) languages from dialects or varieties is a complex issue that cannot be made without recourse to political judgments and self-perception of speakers as well as external perception by others.²⁰

Accordingly, it is not possible to postulate the existence of an “ethnic group” independent from external criteria. Basically there is a need for some objective characteristics which distinguish a group of human beings visibly from the rest of the population or a majority nation – be it an own language, religion, culture, be it a shared common historical fate that separates a certain group of the population from the rest of the population.²¹ It remains uncertain, however, whether and to what degree such external criteria suffice to qualify a group, the members of which share the mentioned characteristics, as a distinct “people”.²² In the end it will usually be the collective identity that tips the balance in favour of forming an own “nation”, which means the common will to perceive oneself as an own, distinct group that has decided to take its fate in its own hands.²³ But the argumentation thus is nearing a circular reasoning: the precondition, the existence of an own, distinct “people”, will usually be clear only as the result of the processes of self-determination in an own, independent polity, because only with an own framework of political organization will it be possible to develop some kind of collective will.²⁴ This demonstrates that an ethnographic, “naturalist” notion of “people” is not really operable as a definitional condition of a right to independent statehood²⁵ – a fact that finds its expression also in the attempts of many states to keep the notion of “ethnic minorities” categorically distinct from any notion of “people” (as bearer of a right of self-determination), in order to cut off any recourse of “ethnic minorities” to

²⁰ See *E. J. Ruíz Vieitez*, Art. 1. Definitions, in: A. Nogueira López/E. J. Ruíz Vieitez/I. Urrutia Libarona (eds.), *Shaping Language Rights: Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts’ Evaluation*, 2012, 35, at 45 et seq.

²¹ Thus argues the approach often called in international legal literature as “ethnic definition” – see *T. Musgrave* (note 10), at 154 et seq., see as a critique also *U. Saxer* (note 12), at 2.

²² See also *P. Thornberry*, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, ICLQ 38 (1989), 867, at 868; *J. Vidmar* (note 4), at 811 et seq.

²³ See *J. Vidmar* (note 4), at 811 et seq.

²⁴ See *U. Saxer* (note 12), at 217 et seq.

²⁵ See also *N. MacCormick*, *Self-Determination and the Determinacy of the Selves*, in: W. J. A. Macartney (ed.), *Self-Determination in the Commonwealth*, 1988, at 112 et seq.

the right of self-determination (and a right of secession deduced from self-determination).^{26]}

But even if one departs from the existence of an own, distinct “people” separable from the majority nation, we must base our construction of self-determination upon a clear pre-eminence of “internal self-determination”, i.e. the forms of self-determination embodied in the various models of effective participation in internal political decision-making.²⁷ The principled presumption in favour of territorial integrity that was so strongly emphasized in the “Friendly Relations Declaration” goes definitely against the assumption that self-determination must always end up in separate statehood.²⁸ The historical characteristic of autonomous regions and member states of federations is exactly the fact that they are integrated into another state, although provided with a certain degree of political and institutional autonomy. The principle of territorial integrity works not only in favour of centralized, unitary states, but also protects federations and other federal or quasi-federal constructs. The result of such precedence of territorial integrity is the legal assumption that in these cases self-determination is bound in the federal constructs. The “people” of such entities historically had reasons for entering into a close relationship with another political entity, and as long as there are no exceptional grounds rebutting such presumption in favour of territorial integrity, “internal self-determination” will prevail.²⁹

²⁶ See *A. Cassese*, *Self-Determination of Peoples: A Legal Reappraisal*, 1996, at 349; *J. Vidmar* (note 4), at 811; *B. Bing Jia* (note 4), at 35; *S. Oeter* (note 1), at 326.

²⁷ As to the notion and concept of “internal self-determination” see *D. Thürer*, *Das Selbstbestimmungsrecht der Völker, mit einem Exkurs zur Jurafrage*, 1976, at 47 et seq., 204 et seq.; *L. C. Buchheit* (note 16), at 14 et seq.; *M. Pomerance*, *Self-Determination in Law and Practice*, 1982, at 37 et seq.; *A. Verdross/B. Simma*, *Universelles Völkerrecht*, 3rd ed. 1984, at 519 et seq.; *K. Doebring* (note 16), at 126 et seq.; *A. Rosas*, *Internal Self-Determination*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 225 et seq.; *A. Cassese* (note 26), at 101 et seq., 346 et seq.; *P. Hilpold* (note 16), at 55 et seq.; concerning the basic pre-eminence of “internal self-determination” see also *G. Fox*, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, *Mich. J. Int’l L.* 16 (1994), 733 et seq., and *S. Oeter* (note 18), at 759 et seq.

²⁸ Compare also *S. Oeter*, *The Role of Recognition and Non-Recognition with Regard to Secession*, in: C. Walter/A. von Ungern-Sternberg/K. Abushov (eds.), *Self-Determination and Secession in International Law*, 2014, 45, at 56, and *G. Welhengama/N. Pillay*, *Minorities’ Claims to Secession by Virtue of the Right to Self-Determination*, *Nord. J. Int’l L.* 82 (2013), 249 et seq.

²⁹ As to “internal self-determination” see also *H. Hannum*, *Autonomy, Sovereignty, and Self-Determination*, 1990; *P. Thornberry*, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism*, in: C. Tomuschat (note 27), 101 et seq.; *W. Danspeckgruber*, *A Final Assessment*, in: W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World*, 2002, 335 et seq.; *U. Saxer* (note 12), 335 et seq.

Doctrinal debate of the last two decades has put much emphasis upon this dimension of “internal self-determination”. In terms of legal politics, it provides a productive alternative to endless claims for independent statehood in ever smaller political entities, leading to a “circulus vitiosus” of ever new claims of secession.³⁰ In constructs of federation and/or autonomy it is much easier to balance competing claims of political participation and dominance, with the central state taking over the role of a guarantor for the complex arrangements balancing the competing interests of regional majorities and minorities. “Internal self-determination” grants a possibility for majority populations of certain historical entities with different, ethnic, linguistic and cultural characteristics than that of the “state nation” to enjoy a high degree of self-government, without falling in counterproductive quarrels over statehood, territory, boundaries and citizenship. Accordingly, the broad range of solutions of “internal self-determination” is also the preferred tool-box of diplomatic mediators when trying to contain (often secessionist) conflicts over title to territory and self-government.³¹

A closer look at state practice, in particular at the wide array of solutions on “internal self-determination”, teaches us another lesson: there is always a territorial element in the construction of self-determination. Self-determination has always been linked to historically pre-constituted political entities with a specific territory. “People” in this understanding is not simply a group of persons, one could also say an “ethnic group”, but the constituent people of a certain territorial entity formed by history.³² Even beyond the context of decolonization, there has never been any serious international support for a claim of self-determination raised by a simple “ethnic group” having no firm territorial basis in a pre-existing political entity.³³ Competing claims of self-determination of (non-territorial) ethnic groups cannot be solved without taking recourse to a defined territory – only in a given territory can a plebiscite or referendum make sense, where the majority might determine the political status of the territory. Although a traditional, “naturalist” understanding of a “people” can point to the intuition that the term “people” does not in itself have a territorial connotation, a functional perspective of self-determination, construing the concept in light of the politi-

³⁰ See *A. Eide*, In Search of Constructive Alternatives to Secession, in: C. Tomuschat (note 27), 139 et seq.

³¹ See *M. W. Doyle*, UN Intervention and National Sovereignty, in: W. Danspeckgruber, *The Self-Determination* (note 29), 67 et seq. as well as *M. Weller/B. Metzger* (eds.), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice*, 2008.

³² See *T. M. Franck*, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, *AJIL* 90 (1996), 359 et seq.; *U. Saxer* (note 12), 310 et seq.

³³ Comp. also *U. Saxer* (note 12), 324 et seq.

cal and legal system in which it is embedded, leads to the insight that a certain degree of “territoriality” is unavoidable if the concept of self-determination shall operate productively. Accordingly, self-determination is a right that can sustainably only be granted to polities coupled to a historically defined territory – here self-determination may easily work, with a majority deciding in a plebiscite upon its political status, and clearly defined boundaries that must be accepted by the neighbours according to the principle of “*uti possidetis*”.³⁴

Such pre-determined entities may be established states, where it is beyond dispute that the peoples of such states enjoy a continuing right of self-determination protecting them against foreign intervention, alien domination or illegal occupation.³⁵ They may also be historical entities traditionally enjoying a certain degree of autonomy within states, or member states of federations.³⁶ The fact that a certain territory has formed a distinct political entity, with a population living together in such an entity for a long time, usually also results in a strong sense of collective identity, irrespective of language, culture, religion. This does not exclude divergences of opinion – the members of the previously dominant group will not like to be separated from their kin-state and thus to be made a minority in a new state, as was the case with Russians in the former republics of the Soviet Union.³⁷ But the international community accepted claims of such republics, as well as the claims of the former republics constituting the Socialist Federal Republic of Yugoslavia, to form their own states.³⁸ Although in both cases the recognition was mostly based on arguments of dismemberment of the former federations, the international community had no problems in accepting their claims of self-determination.

Beyond these specific constellations of pre-determined political entities, a claim that a certain group of persons with distinct characteristics enjoys a

³⁴ See *M. C. Johanson*, Secession and Territorial Borders: The Role of Law, in: A. Pavković/P. Radan (eds.), *The Ashgate Research Companion to Secession*, 2011, 303, at 314 et seq.; *A. Peters*, The Principle of *Uti Possidetis Juris*: How Relevant Is It for Issues of Secession?, in: C. Walter/A. von Ungern-Sternberg/K. Abushov (note 28), 95 et seq.

³⁵ See *K. Doebring*, Self-Determination, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. 1, 2nd ed. 2002, 56, para. 33.

³⁶ See e.g. *O. Kimminich*, A “Federal” Right of Self-Determination?, in: C. Tomuschat (note 27), 83 et seq., as well as *P. Thornberry* (note 29), 101 et seq.; see also *E. McWhinney*, Self-Determination of Peoples and Plural-Ethnic States: Secession and State Succession and the Alternative Federal Option, *RdC* 294 (2002), 171, at 236 et seq.

³⁷ See e.g. *W. C. Allison*, Self-Determination and Recent Developments in the Baltic States, *Den. J. Int’l L. & Pol’y* 19 (1991), 625 et seq.

³⁸ See *M. Weller*, The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, *AJIL* 86 (1992), 569 et seq.

right to self-determination can only be made in terms of “internal self-determination”, exercised in the various forms of autonomy, in federal constructs, or by mere political participation complemented by arrangements of minority protection.³⁹ Such pre-eminence of “internal self-determination” makes an argument for a right of secession even more difficult. There is simply no acceptance in the international community that “people”, whatever group can be coined in such terms, enjoys a general right to separate statehood.

III. Kosovo and Remedial Secession

A considerable part of international legal doctrine in German-speaking academia, and also in the United States, argues that under certain, very specific circumstances the right of collective self-fulfilment inside a given state might be transformed into an (emergency) right to independent statehood.⁴⁰ This line of argumentation is usually referred to as doctrine of “remedial secession”. If the state completely blocks any “internal self-determination”, erodes existing arrangements of autonomy and subsequently takes recourse to brutal forms of violent oppression, ending in gross and consistent patterns of crimes against humanity, forms of “ethnic cleansing”, perhaps even genocide, a “right to secession” as an emergency tool seems to be arguable. Usually such a claim is founded on assumptions of natural law or general principles of law, such as self-defence in situations of extreme emergency.

³⁹ See e.g. *J. Crawford*, *The Creation of States in International Law*, 2nd ed. 2006, 127 et seq.; as concurrent voices from political theory see *W. Kymlicka*, *Federalism and Secession: At Home and Abroad*, C.J.L.J. 13 (2000), 207 et seq.; *R. Bauböck*, *Why Stay Together? A Pluralist Approach to Secession and Federation*, in: *W. Kymlicka* (ed.), *Citizenship in Diverse Societies*, 2000, 366 et seq.; *J. Wright*, *Minority Groups, Autonomy, and Self-Determination*, *Oxford J. Legal Stud.* 19 (1999), 605, 612 et seq.

⁴⁰ It is more than difficult to gain an overview of the extensive literature on this topic – see only the references above note 16, in addition *H. Hannum* (note 29), at 471 et seq.; *S. Weber*, *Das Sezessionsrecht der Kosovo-Albaner und seine Durchsetzbarkeit*, AVR 43 (2005), 494, at 500 et seq.; *A. Tancredi*, *A Normative “Due Process” in the Creation of States Through Secession*, in: *M. G. Kohen* (note 11), 171, at 175 et seq.; *J. Crawford* (note 39), at 120 et seq.; *K. A. Wirth*, *Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit*, ZaöRV 67 (2007), 1065, at 1069 et seq.; *K. Parameswaran*, *Der Rechtsstatus des Kosovo im Lichte der aktuellen Entwicklungen*, AVR 46 (2008), 172, at 177; *C. Schaller*, *Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz*, AVR 46 (2008), 131, at 138 et seq.; *J. Vidmar* (note 4), at 814 et seq.; *O. Corten* (note 4), at 724 et seq.; *T. D. Grant*, *Regulating the Creation of States. From Decolonization to Secession*, *Journal of International Law & International Relations* 5 (2009), 11, at 42 et seq.

State practice has never shown any tendency to embrace seriously such a justification of secession – too many states in our globe (in particular large parts of the Third World) feel threatened by secessionist movements and perceive it as dangerous to open the Pandora’s box of decomposition of statehood by justifying secession, be it even under very limited circumstances (as in the doctrine of “remedial secession”).⁴¹

Such right of remedial secession constitutes an *emergency right* that is applicable only under extreme circumstances of necessity. This is a central point in the whole issue of Kosovo: Can we really argue the existence of extreme circumstances of necessity in the case of Kosovo in 2008?⁴² Probably one could argue a case of extreme suppression, linked with the denial of any political participation, for the period under the *Milošević* regime throughout the nineties, a suppression going along with “gross and consistent patterns of human rights violations”.⁴³ But only with the transition to violent conflict and to the deliberate policy of “ethnic cleansing” in 1998, a situation of extreme violence and persecution with genocidal characteristics arose – a phase characterized by a growing frequency and density of local massacres and the increasing brutality of systematic “cleansings” of the Albanian population.⁴⁴ As a consequence, one might argue a right to “remedial secession” with a view to the situation in 1999.⁴⁵

But “remedial secession” did not occur in 1999. Finally, the North Atlantic Treaty Organization (NATO) intervened with its large-scale aerial bombardments, in an operation with more than doubtful legality.⁴⁶ This military

⁴¹ See *J. Vidmar* (note 4), at 816 et seq.; *E. Milano* (note 4), at 25 et seq.; *O. Corten* (note 4), at 725 et seq.; *U. Saxer* (note 12), at 394 et seq.

⁴² Concerning the application of the doctrine of “remedial secession” to the case of Kosovo see *J. Vidmar* (note 4), at 814 et seq.; *K. A. Wirth* (note 40), at 1071 et seq.; *C. Ryngaert/C. Griffioen* (note 16), at 585 et seq., as well as *M. Goodwin*, What Future for Kosovo? – From Province to Protectorate to State? Speculations on the Impact of Kosovo’s Genesis upon the Doctrines of International law, GLJ 8 (2007), 1, at 5 et seq.

⁴³ See only *M. Weller*, Contested Statehood: Kosovo’s Struggle for Independence, 2009, at 55 et seq.

⁴⁴ See very much in detail *M. Weller* (note 43), at 67 et seq., 76 et seq.

⁴⁵ See *J. Vidmar* (note 4), at 817; *D. Fierstein* (note 4), at 437; *K. A. Wirth* (note 40), at 1071 et seq.; *C. Ryngaert/C. Griffioen* (note 16), at 585.

⁴⁶ See only the contributions of *L. Henkin*, *J. I. Charney*, *C. M. Chinkin*, *R. A. Falk*, *T. M. Franck*, and *W. M. Reisman* in: AJIL 93 (1999), 824 et seq., 834 et seq., 841 et seq., 847 et seq., 857 et seq., 860 et seq.; see also the papers of *K. Ipsen*, *V. Rittberger* and *C. Tomuschat* in: Die Friedenswarte 74 (1999), 19 et seq., 24 et seq., 33 et seq.; *R. Y. Jennings*, Kosovo and International Lawyers, International Law Forum 1 (1999), 166 et seq.; *G. Nolte*, Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten, ZaöRV 59 (1999), 941 et seq.; *N. Krisch*, Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council, Max Planck UNYB 3 (1999), 59 et seq.; *U. Saxer*, Kosovo und das Völkerrecht: Ein Konfliktmanagement im Spannungsfeld von Menschenrechten, kollektiver Sicher-

intervention forced the *Milošević* regime into surrender and thus brought an end to the attempted expulsion of the entire Albanian population.⁴⁷ If one relates the consequences of the military intervention of NATO to the issue of “remedial secession”, one can easily conclude: with *Slobodan Milošević* relenting to the demands of NATO and the sending of foreign troops to Kosovo, a development culminating in the creation of the United Nations Interim Administration Mission in Kosovo (UNMIK) according to Security Council Resolution 1244, the situation lost its emergency character for Albanians in Kosovo, and thus the basis for any claim of “remedial secession” withered away.⁴⁸

The interim administration of the United Nations established in Kosovo in 1999 was oriented towards a (limited and conditioned) self-government of Kosovars.⁴⁹ Such structure of interim administration was intended to gradually include representatives of Kosovo Albanians into the arrangements of government, in a dynamic process leading to more and more self-government of the local population of Kosovo, through elected organs enabling them to participate in the governance and administration of the territory.⁵⁰ The United Nations interim administration continued to exercise some degree of overall control over the self-administration of Kosovars even at the end of the process, but left most of the details to the local politi-

heit und Unilateralismus, 1999; *M. Bothe/B. Martenczuk*, Die NATO und die Vereinten Nationen nach dem Kosovo-Konflikt: Eine völkerrechtliche Standortbestimmung, Vereinte Nationen 47 (1999), 125 et seq.; *J. I. Charney*, Anticipatory Humanitarian Intervention in Kosovo, Vand. J. Transnat'l L. 32 (1999), 1231 et seq.; *D. S. Lutz* (ed.), Der Krieg im Kosovo und das Versagen der Politik, 2000; *D. Thürer*, Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei – echten und scheinbaren – Dilemmata, AVR 38 (2000), 1 et seq.; *F. Francioni*, Of War, Humanity and Justice: International Law after Kosovo, Max Planck UNYB 4 (2000), 107 et seq.; *C. Greenwood*, International Law and the NATO Intervention in Kosovo, ICLQ 49 (2000), 926 et seq.; *W. Kälin*, Humanitäre Intervention: Legitimation durch Verfahren?, SZIER 10 (2000), 159 et seq.; *A. D. Sofaer*, International Law and Kosovo, Stanford J. Int'l L. 36 (2000), 1 et seq.; *M. E. O'Connell*, The UN, NATO, and International Law after Kosovo, HRQ 22 (2000), 57 et seq.; *P. A. Zygojannis*, Die Staatengemeinschaft und das Kosovo. Humanitäre Intervention und internationale Übergangsverwaltung unter Berücksichtigung einer Verpflichtung des Intervenienten zur Nachsorge, 2003, at 30 et seq.

⁴⁷ See *M. Weller* (note 43), at 150 et seq., 165 et seq.

⁴⁸ See *J. Vidmar* (note 4), at 817; *C. Ryngaert/C. Griffioen* (note 16), at 585.

⁴⁹ See *J. Zeh*, Das Übergangsrecht. Zur Rechtsetzungstätigkeit von Übergangsverwaltungen am Beispiel von UNMIK im Kosovo und dem OHR in Bosnien-Herzegowina, 2011; *U. A. Reich*, Internationale Verwaltung im Kosovo, 2012, 41 et seq., 74 et seq.; *L. Moos*, Individualrechtsschutz gegen menschenrechtswidrige hoheitliche Maßnahmen von Übergangsverwaltungen der Vereinten Nationen am Beispiel der United Nations Interim Administration Mission in Kosovo, 2013, 39 et seq.; *N. van Willigen*, Peacebuilding and International Administration: The Cases of Bosnia and Herzegovina and Kosovo, 2013.

⁵⁰ See *J. Gow*, Kosovo – The Final Frontier? From Transitional Administration to Transitional Statehood, Journal of Intervention and Statebuilding 3 (2009), 239, at 241 et seq.

cians. The point of orientation of the whole process of gradual transfer of powers to local authorities was the intention to create a structure of democratic government accountable to the people and committed to the rule of law – expressed in the slogan “standards before status”.⁵¹

At the same time, the final status of the territory was kept open, with a (transitional) agreement on the continuing territorial sovereignty of Serbia. Thus it was left to the parties to determine in negotiations the further legal status of the territory.⁵² The “final status” which Security Council Resolution 1244 envisaged to be determined in direct negotiations with Serbia and representatives of Kosovo, was directed towards self-determination of the population of Kosovo – although it had been left open whether such self-determination should be limited to “internal self-determination” or should comprise also “external determination”, i.e. secession. Two possibilities of “self-determination” were conceived as potential outcomes of such “final status” negotiations – one result could have been independent statehood of Kosovo, the other one a far-reaching autonomy of the territory under continued Serbian sovereignty, although with strong international guarantees for the self-government of Kosovars. The outcome was bound to the consent of the Kosovar people who participated in the negotiations through their representatives elected in the framework of transitional self-government.⁵³

Thus, it is already difficult under general considerations of self-determination and “remedial secession” to construe a plausible justification for a unilateral break away of Kosovo from Serbia in 2008. But a particular detail in the legal set-up of the regime of UN interim administration shifts even more the burden of argumentation for independent statehood of Kosovo – the legal regime of Security Council Resolution 1244 that had found an elaborate (but fragile) compromise between UN-supervised self-administration of Kosovo as a separate territorial entity on the one hand, and the fundamental principle of preservation of (continued) Serbian sovereignty over Kosovo on the other.⁵⁴ Resolution 1244 had constructed – as a reaction to

⁵¹ See *J. Rücker*, Standards and Status: How Kosovo Became Independent, 2011, 33 et seq.

⁵² See *H. H. Perritt*, The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan, 2010, 119 et seq., 157 et seq.

⁵³ As an assessment of the final status negotiations (and the *Ahtisaari* Report) under the perspective of self-determination see *M. G. Koben*, Le Kosovo: Un test pour la communauté internationale, in: V. Chetail (ed.), *Conflits, sécurité et coopération*, 2007, 367, at 374 et seq.; *R. Wolfrum*, Kosovo: Some Thoughts on Its Future Status, in: S. Yee/J.-I. Morin (eds.), *Multiculturalism and International Law*, 2009, 561 et seq.

⁵⁴ Concerning the legal regime of SC- Res. 1244 see *A. Zimmermann*, Yugoslav Territory, United Nations Trusteeship or Sovereign State: Reflections on the Current and Future Legal Status of Kosovo, *Nord. J. Int'l L.* 70 (2001), 423 et seq.; *T. H. Irmscher*, The Legal Frame-

the facts created by the military intervention of NATO – an interim regime that had the purpose to pacify the region. Core to such strategy of pacification were two separate strands of development. On the one hand, a process of gradual creation of structures of “self-government” that was designed to enable Kosovo (as a distinct polity) to develop the beginnings of a workable statehood.⁵⁵ The objective of such initial structures of separate statehood, however, should be kept open because the determination of the so-called “final status” of Kosovo was left to a special process of negotiations between the Serbian Government and the organs of self-administration of Kosovo.⁵⁶ The structures of “self-government” created for the interim phase thus were designed to be status neutral – they were intended to make sense for a separate, independent statehood of Kosovo as well as for a status of far-reaching autonomy in the framework of the Serbian state. The fundamental characteristic of Resolution 1244 was the underlying assumption that during the interim phase of UN administration the build-up of own structures of “self-government”, combined with the ongoing “final status negotiations”, would not change in any sense the international legal status quo of the territory. Accordingly, it was only logical that Resolution 1244 stressed very explicitly the (*de jure*) continuing territorial sovereignty of Serbia during the interim phase of the UN⁵⁷ – an emphasis that was difficult to avoid if one takes into consideration the limited competences of the United Nations Security Council. The Security Council definitively would not have been competent to change or determine the final status of Kosovo in a situation like the one in 1999, since the Security Council is only compe-

work for the Activities of the United Nations Interim Administration Mission in Kosovo: the Charter, Human Rights, and the Law of Occupation, *GYIL* 44 (2001), 353 et seq.; *C. Stahn*, International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead, *ZaöRV* 61 (2001), 107 et seq.; *J. Friedrich*, UNMIK in Kosovo: Struggling with Uncertainty, *Max Planck UNYB* 9 (2005), 225 et seq.; *M. Bothe/T. Marauhn*, UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council Mandated Trusteeship Administration, in: *C. Tomuschat* (ed.), *Kosovo and the International Community – A Legal Assessment*, 2002, 217 et seq.; *J. Vidmar* (note 4), at 795 et seq.; *P. Hilpold* (note 4), at 787 et seq.

⁵⁵ See *M. Weller* (note 43), at 179 et seq., see also concerning the difficult questions of legitimizing such an attempt *B. Knoll*, Legitimacy and UN-Administration of Territory, *GLJ* 8 (2007), 39 et seq.

⁵⁶ Concerning the final status negotiations see *M. Weller* (note 28), at 191 et seq.; see in addition *F. L. Morrison*, Between a Rock and a Hard Place: Sovereignty and International Protection, *Chi.-Kent L. Rev.* 80 (2005), 31 et seq., and *B. Knoll*, Kosovo’s Endgame and Its Wider Implications in Public International Law, *Finnish Yearbook of International Law* 18 (2007), 155 et seq.

⁵⁷ See *J. Vidmar* (note 4), 831 et seq.; *A. Orakbelashvili* (note 4), 32 et seq.; *M. Goodwin* (note 42), 11; *C. Schaller* (note 40), 135 et seq.; *E. Milano* (note 4), 30 et seq.

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tent to take measures needed to safeguard international peace and security, but not tasked with the responsibility to finally adjudge international legal disputes on statehood and territory.⁵⁸ However, as long as Kosovo remains *de jure* attributed to Serbia and is placed *de facto* under international supervision, there will be a lack of a sufficiently independent state authority which constitutes a basic precondition for recognition as an independent state.⁵⁹

IV. Independence of Kosovo and the Legality of Recognition

As a consequence, this results in a significant legal obstacle for third states trying to recognize the “Republic of Kosova” as sovereign state.⁶⁰ As long as Resolution 1244 is valid, the interim status created by this resolution applies to the situation in Kosovo. A central element of this interim status is the continuing territorial sovereignty of Serbia over Kosovo. In order to escape the interim solution explicitly laid down in Resolution 1244, the Security Council would have to declare obsolete Resolution 1244 – entirely or at least partially⁶¹ – or would have to defuse Resolution 1244 at least in interpretative terms.⁶² Such an attempt at reinterpretation has been made sev-

⁵⁸ See only *A. Orakelashvili*, The Acts of the Security Council: Meaning and Standards of Review, *Max Planck UNYB* 11 (2007), 143 et seq.; *A. Orakelashvili*, The Impact of Peremptory Norms on Interpretation and Application of UN Security Council Resolutions, *EJIL* 16 (2005), 59 et seq., also *K. A. Wirth* (note 40), 1082 et seq.; *M. Goodwin* (note 42), 12 et seq.; *E. Milano*, The Security Council and Territorial Sovereignty, *International Community Law Review* 12 (2010), 171 et seq.

⁵⁹ See also in this sense *J. Vidmar* (note 4), 818 et seq., in particular at 825 et seq.; *A. Orakelashvili* (note 4), 9 et seq.; *E. Milano* (note 4), 27 et seq.; *N. Kemoklidze* (note 16), 117 et seq.; see for a different opinion *R. Mubarremi* (note 4), 425 et seq.; *S. E. Meller*, The Kosovo Case: An Argument for a Remedial Declaration of Independence, *Ga. J. Int'l. & Comp. L.* 40 (2012), 833 et seq.; *E. M. Brewer* (note 2), 245 et seq.; *H. F. Köck/D. Horn/F. Leidenmuehler*, From Protectorate to Statehood: Self-Determination vs. Territorial Integrity in the Case of Kosovo and the Position of the European Union, 2009, 125 et seq.

⁶⁰ See also *A. Orakelashvili* (note 4), 16 et seq., 25 et seq.; *O. Corten* (note 4), at 747 et seq.; *E. Milano* (note 4), 34 et seq., *C. Ryngaert/S. Sobrie*, Recognition of States: International Law or Realpolitik?, *LJIL* 24 (2011), 467 et seq.; see in addition – although with a different perspective – *J. Vidmar* (note 4), 832 et seq., in particular at 835 et seq.

⁶¹ See for an attempt to declare Resolution 1244 as obsolete *K. Parameswaran* (note 40), 183 et seq.

⁶² Concerning these attempts at reinterpretation see *A. Orakelashvili* (note 4), at 33 et seq.; *C. Schaller* (note 40), 149 et seq.; see also as voice of a practitioner *H. Tichy*, Rechtsfragen der Anerkennung der Unabhängigkeit des Kosovo, in: *S. Wittich/A. Reinisch/A. Gattini* (note 4), 41 et seq.

eral times, without much success. But it is – in legal terms – the crux of the matter. Only if one succeeds in declaring Resolution 1244 obsolete, is it possible to argue recognition of “Republika Kosova” as an independent state to be legal. There are arguments that speak in favour of such a position. It cannot be that a resolution like 1244 creates an indeterminate obligation for the UN and the states bearing the burden of military pacification and interim administration of the territory to remain indefinitely present in the territory and to provide the resources needed for such presence.

But does the path into independent statehood really relieve such burden? In economic terms, Kosovo is not self-reliant but depends largely on funds contributed by the EU. The tasks of external support in state-building and external supervision have shifted from UNMIK to European Union Rule of Law Mission in Kosovo (EULEX).⁶³ But did these changes require the path towards sovereign statehood? I do not think so. Full membership in the community of states is still far way – Kosovo is not member of the United Nations nor of any of the other important international organizations and treaty regimes, and in the foreseeable future has no chance to lose the condition of a shadow existence, at least as long as Serbia does not consent to separate statehood.⁶⁴ A consolidated “de facto statehood”, as in the case of the Kurdish autonomy in Northern Iraq, could have achieved more or less the same result – without the severe damage done to international law, the division of the international community into two opposing camps as far as recognition of Kosovo is concerned, and the resulting stalemate in EU Common Foreign and Security Policy (CFSP).⁶⁵ Probably there will be no way back – but the same result of (finally) Kosovo achieving independent statehood might have been achieved in a much more prudent way.

⁶³ See *E. de Wet*, The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX, *AJIL* 103 (2009), 83 et seq.; *K. Odendahl*, Die Beteiligung der EU an UN-Missionen im Kosovo UNMIK, UNPT Kosovo und EULEX Kosovo, *SZIER* 19 (2009), 359 et seq.; *R. Mubarremi*, The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law, *ZaöRV* 70 (2010), 357 et seq.; *S. Richter*, Zwischen Kooperation und Konfrontation: Die EULEX-Mission und der Aufbau von rechtsstaatlichkeit im Kosovo, *Südost-Europa* 59 (2012), 448 et seq.; *D. Papadimitriou/P. Petrov*, Whose Rule, whose Law?: Contested Statehood, External Leverage and the European Union’s Rule of Law Mission in Kosovo, *JCMS* 50 (2012), 746 et seq.

⁶⁴ See *A. Gioia*, Kosovo’s Statehood and the Role of Recognition, *Italian Yearbook of International Law* 18 (2009), 3 et seq.; *D.I. Efevverhan*, Kosovo Chances of UN Membership, *GoJIL* 4 (2012), 93 et seq.; *T. Papić*, Fighting for a Seat at the Table: International Representation of Kosovo, *Chinese Journal of International Law* 12 (2012), 543 et seq.

⁶⁵ See *S. Economides/J. Ker-Lindsay*, Forging EU Foreign Policy Unity from Diversity: The “Unique” Case of the Kosovo Status Talks, *European Foreign Affairs Review* 15 (2010), 495 et seq., and *W. Koeth*, State Building Without a State: The EU’s Dilemma in Defining Its Relations with Kosovo, *European Foreign Affairs Review* 15 (2010), 227 et seq.

In addition, the quick recognition of Kosovo by most NATO states has broken with a firmly established pattern of traditional (non-)recognition policy vis-à-vis secessionist entities. Secession is perceived by most states in the world to be a severe threat to international order, and a menace to the orderly development of statehood in the nation-states constituting the international society. Accordingly, there exists a strong bias against secession in state practice.⁶⁶ This bias can be easily seen if one looks at the persistent practice of non-recognition of secessionist entities as long as the previous territorial sovereign has not given up his title of territorial sovereignty over a disputed territory.⁶⁷ For a very long time this approach of non-recognition constituted the “iron rule” of traditional recognition practice with regard to secession.⁶⁸

There is a clear value judgment that serves as the basis of such practice. The traditional practice of non-recognition of secessionist entities is grounded upon a wide-spread perception in the international community that territorial integrity constitutes a primordial value for a system based upon the idea of peaceful coexistence of states.⁶⁹ The addressees of such rule of non-recognition are not internal societal movements, such as rebels, insurgents, revolutionary groups, but the other states. The civil society factions that struggle over the organization of statehood inside a state are not bound by international law. In this regard, the ICJ was quite right in its Kosovo Advisory Opinion, at least in principle. Societal movements inside a state quarrelling about the way the state should be organized may act illegally in the perspective of a given legal (and constitutional) order. But the internal quarrel is not a matter of legitimate international concern, at least as long as the quarrelling factions do not violate – in terms of a “gross and consistent pattern” – fundamental human rights. Quite the contrary, the substantial questions of political organization at stake in such quarrel, as well as the ways and means by which such quarrel is led, are issues of internal self-determination to be decided by the people in question alone, if

⁶⁶ See, in particular, *J. Ker-Lindsay*, *The Foreign Policy of Counter Secession*, 2013, 24 (and very much in detail, as regards the reasons of such bias, 109 et seq.); comp. in addition *M. G. Kohen*, Introduction, in: *M. G. Kohen* (note 11), 1, at 3 et seq., as well as *J. Dugard/D. Raić* (note 14), 94 et seq.

⁶⁷ See e.g. *J. Vidmar*, *Territorial Integrity and the Law of Statehood*, *George Washington International Law Review* 44 (2012), 697, at 709 et seq.

⁶⁸ See e.g. *J. Vidmar*, *Explaining the Legal Effects of Recognition*, *ICLQ* 61 (2012), 361, at 363 et seq.

⁶⁹ See e.g. *J. Mayall*, *Secession and International Order*, in: *A. Pavković/P. Radan* (note 34), 11, at 16; *J. Dugard*, *The Secession of States and Their Recognition in the Wake of Kosovo*, *RdC* 357 (2011) 13, at 31 et seq., 98 et seq.; *M. Fabry*, *Recognizing States: International Society and the Establishment of New States Since 1776*, 2009, 204 et seq.

needed even by civil war.⁷⁰ This does not change if the quarrel goes beyond questions of adequate political and constitutional organization inside a state and extends to questions of territorial organization of statehood as such, namely the question whether diverse parts of a population want to live together in a state or would prefer separate statehood. The internal quarrel over separate statehood (and secession) remains in principle an issue of self-determination – at the outset not of the “people” claiming separate statehood, but of the entire population of the pre-existing state which must sort out the question of continued joint statehood or separation.

The result of such quarrel finally will not depend on matters of (internal) legality, which will be disputed in such cases by definition, but on essentially political factors – which faction has more support in the population, has more resources and can consolidate its claim for legitimacy.⁷¹ There always will exist some cause for secession – otherwise a secessionist movement could not mobilize enough public support to become politically relevant. The judgment whether such cause justifies separation, however, is not a matter to be judged by the outside world. Accordingly, traditional doctrine has dealt with the phenomena of secession as a mere factual issue not regulated as such by international law.⁷² It constitutes a legally neutral act, the consequences of which are regulated internationally.⁷³ Particularly regulated under international law is the admissible reaction of third states to quarrels over secession. Third states may not support armed opposition groups militarily, nor may they feed secessionist movements with military items, trainers or other kinds of significant material support, changing the political balance of power – if provided nevertheless, such support would qualify as a prohibited intervention.⁷⁴ Such prohibition of intervention also applies to “premature” forms of recognition of secessionist movements in terms of a

⁷⁰ See e.g. S. Oeter (note 1), at 313, para. 41.

⁷¹ See only A. Pavković/P. Radan, *Creating New States: Theory and Practice of Secession*, 2007, 33 et seq.

⁷² See D. Thürer/T. Burri (note 13), as well as A. P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, *Stanford J. Int'l L.* 36 (2000), 253, at 257 and M. G. Kohen (note 66), 4; comp. also, as a critical analysis of such traditional doctrine, T. Christakis, *The State as a “Primary Fact”: Some Thoughts on the Principle of Effectiveness*, in: M. G. Kohen (note 11), 138 et seq.

⁷³ See J. Crawford (note 39), at 390.

⁷⁴ See P. Kunig, *Intervention, Prohibition of*, in: R. Wolfrum (ed.), *MPEPIL*, online edition, available at <<http://www.mpepil.com>>, and – as far as direct military support is concerned – G. Nolte, *Secession and External Intervention*, in: M. G. Kohen (note 11), 65, at 76 et seq.

separate statehood.⁷⁵ The resulting rule of non-recognition of (unfinished) secessions secures – at least in the perspective of a more traditional brand of international lawyers – peace and stability of the international order.

There are good reasons for such a position.⁷⁶ A final and lasting settlement usually needs quite a long time for negotiations to go ahead. Such international negotiations should be supported, in the interest of finding an equitable solution, and should not be sabotaged by too early legal fixations of the factual status quo. For such negotiations, the question of incentives is decisive: The situation must remain fluid enough to promise both sides potential gains from a final settlement. As a result, factual holders of power must be clear that there is no way towards sovereign statehood, except as a result of negotiations. At the same time, the former sovereign must be aware that any change of the situation, in the direction of restitution of sovereign rights, requires considerable concessions, typically in form of an extended autonomy with international guarantees. And, last but not least, any final settlement needs a strong (and continued) involvement of outside powers – the parties to the conflict will not have enough trust to believe in a loyal implementation of the settlement and need credible and reliable reassurances and guarantees from the outside world in order to be able to rely on the settlement. As a consequence of such embeddedness of recognition in a pattern of international negotiations, recognition practice tends to lose its nature as a unilateral mode of action of a purely political nature and develops strong traits of a collective pattern of action. This is not a new insight, but has been observed in some more recent studies quite clearly.⁷⁷ As an instrument of conflict management, recognition (or non-recognition) only develops a certain leverage if it is collectively exercised, leaving the parties to the conflict no choice (in terms of playing out third states against each other). Exactly such collective leverage of the community of states has been thrown away by the bilateral rush to recognition in the case of Kosovo.

The unilateral secession of Kosovo from the Serbian state and the (bilateral) recognition of the new state by the United States and a considerable part of EU members has been claimed to be a “unique” case that creates no

⁷⁵ See *D. Geldenhuys*, *Secession and Contested States*, in: A. Pavković/P. Radan (note 34), 285, at 291, but also *D. Raić*, *Statehood and the Law of Self-Determination*, 2002, 92 et seq. and *J. Dugard* (note 69), 27 et seq.

⁷⁶ The following line of arguments is made more in detail in my contribution on “The Role of Recognition and Non-Recognition with Regard to Secession” in the recent OUP collective volume of *C. Walter/A. von Ungern-Sternberg/K. Abushov* (eds.), *Self-Determination and Secession in International Law*, 2014, 45, at 61 et seq.

⁷⁷ See e.g. *J. Ker-Lindsay* (note 66), 10 et seq.; *J. Dugard* (note 69), 57 et seq.; *J. Crawford* (note 39), 501; *U. Saxer* (note 12), 629 et seq.

precedent. But this seems more than doubtful. There exist quite a number of voices in international legal discourse (and also in state practice) that do just the opposite, by using Kosovo as a precedent for making legal claims in other cases. In my perspective, the Kosovo case thus unfortunately constitutes a precedent, although a very unhappy one.⁷⁸ The consensus in general international legal doctrine emphasizing the precedence of the various forms of “internal self-determination” over “external self-determination” was brushed aside without any necessity. If one looks in detail at the particularities of the *Kosovo* case, it becomes obvious that there is no sustainable legal argument why independent statehood for Kosovo really was indispensable. The only argument (of a purely “realpolitik” nature) making such choice plausible were the serious threats uttered by the well-organized extremists of Kosovo-Albanian nationalism, threats that posed a serious risk of turmoil.⁷⁹ It was obvious that the extremists of Kosovo-Albanian nationalism could have made life for the actors of the international community in Kosovo more than difficult in case of conflict. The legitimate objectives of the international community pursued with Resolution 1244, however, could have also been achieved with a far-reaching autonomy in the framework of the Serbian state linked with a system of credible international guarantees. The life of Kosovars would not necessarily have suffered under such a solution. But in terms of international legal policy, such a solution definitively would have been preferable – and it would have also dissipated the concerns of many states being afraid of secessionist tendencies.⁸⁰

V. Conclusions

The (understandable) reservations of these states now have led to a deep split in the international community (and even in the European Union). Self-determination should not too easily be equated with the quest for independent statehood – even if the (often self-appointed) representatives of revolting peoples would like to argue such an equation. The arsenal of sensible arrangements of self-determination is much broader than secession and

⁷⁸ See the plausible arguments against any justification of a Kosovan secession given by S. Cvijic, *Self-Determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo*, GLJ 8 (2007), 57, at 71 et seq., 77 et seq.; see also R. Müllerson (note 10), 20 et seq.; E. Milano (note 4), 38 et seq.; R. A. Falk (note 6), at 58.

⁷⁹ See also A. Orakhelashvili (note 4), 19.

⁸⁰ See J. Gow (note 50), 239, at 244 et seq.

independent statehood – such insight should have been the lesson of Kosovo.

There are thus good reasons why the Russian foreign policy was objecting to the line taken by Western states in the *Kosovo* case. But it is – to a certain degree – an unhappy consequence of Western policies with regard to Kosovo that Moscow has now decided to take a completely different policy line, by following the (unfortunate) precedent of Kosovo⁸¹ in pushing through (also with means of illegal use of force) the secession and subsequent incorporation of Crimea. Russian lawyers try to defend the action taken with legal arguments, but in essence the Kremlin knows that its line of action was illegal under traditional patterns of international law, as was the support for the secession of Kosovo. It seems, however, that President *Putin* and his counsels find themselves justified to follow that path, as a kind of revenge for the violation of international law that the US and EU committed in the *Kosovo* case.⁸² The Russian leadership's orientation very much goes towards equality with the US as a major power – and if the US thinks it reasonable to violate international legal rules when it serves its interests, why should Russia desist from ignoring international law when its fundamental interests are at stake? Taken seriously as a precedent, the line of action taken in the case of Crimea does not serve Russia's interests. But when the West can stress the “uniqueness” of the *Kosovo* case and insists that it does not create a precedent, why not also Russia? Arguing Crimea as a precedent in the terms Russian lawyers use to justify it as a case of self-determination does not make sense – Russia definitely will not want to legally pave the way for independent statehood of Chechnya, Tatarstan and other subjects of the federation. But it is clear that this was not the real intention of the change in policy. Quite the opposite, it is an exercise in “exceptionalism”.⁸³ If the United States and the EU can behave in a way as if they were exempt from international legal rules, then Russia can do the

⁸¹ See on the question whether Kosovo created a “precedent” or is “unique” the contributions in *J. Summers* (note 6); see also *R. Müllerson* (note 10), 2 et seq.; *V. Röben*, Der völkerrechtliche Rahmen für die Sezession einer Minderheit aus dem Staatsverband – Kosovo als Präzedenzfall?, *Die Friedens-Warte* 84 (2009), 39 et seq.; *T. Fleiner* (note 4), 877 et seq.; *U. Halbach/S. Richter/C. Schaller*, Kosovo – Sonderfall mit Präzedenzwirkung?, 2011.

⁸² Comp. also *C. J. Borgen* (note 11), 1 et seq.

⁸³ As to the category of “exceptionalism” see e.g. *T. J. Gunn*, American Exceptionalism and Globalist Double Standards, *Colum. J. Transnat'l L.* 41 (2002), 137 et seq.; *H. H. Koh*, On American Exceptionalism, *Stan. L. Rev.* 55 (2003), 1479 et seq.; *M. Ignatieff* (ed.), *American Exceptionalism and Human Rights*, 2005; *S. Safran*, The Un-Exceptionalism of U.S. Exceptionalism, *Vand. J. Transnat'l L.* 41 (2008), 1307 et seq.; *A. Bradford/E. A. Posner*, Universal Exceptionalism in International Law, *Harv. Int'l L. Rev.* 52 (2011), 1 et seq.; *G. Nolte/H. P. Aust*, European Exceptionalism?, *Global Constitutionalism* 2 (2013), 407 et seq.

same, so seems to be the inherent logic. Here lies the deeply disquieting aspect of the sequence of the cases of Kosovo, Abkhazia, Crimea and “Nowo Rossija”. From a Russian perspective, the West has started to destroy the shared normative understanding as regards issues of secession and (non-) recognition, and now Russia has started to ignore the established set of international legal rules as well. One should have had these consequences in mind when manipulating the legal framework on secession and recognition in the case of Kosovo.