KOSOVO AND INTERNATIONAL LAW: A DIVIDED LEGAL SCHOLARSHIP

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As has long been awaited and several times postponed, Kosovo unilaterally declared its independence from the Republic of Serbia on 17 February 2008 and solicited recognition from all other States. Germany proved to be the first country to recognize Kosovo as a State and quickly renamed its diplomatic office in Pristina into an embassy. Almost a month later, 27 States have recognized the Republic of Kosovo, including 16 European States. More or less a dozen of states have expressly announced that they will not do so. Serbia already recalled its ambassadors from States recognizing Kosovo for consultations without indicating, however, that it is was actually suspending diplomatic relations with these countries.1

International legal scholarship had long been beset by controversies over this issue and it thus came as no surprise that international legal scholars have been unable to offer a uniform answer to the questions of policy-makers on this topic. Indeed, while the idea that independence has to be “authorized” by international law has been rife2, others advocated that an entity does not need to be entitled or authorized to unilaterally estrange itself from an existing State3. Likewise, the behaviour of third State has also been subject to intense discussion. Indeed, some scholars contend that the recognition of Kosovo must be deemed illegal4 while others claim that States are not prohibited from recognizing Kosovo as recognizing the new entity does not boil down to a recognition of a serious breach of a norm of imperative character.5 The latter have argued that it is

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1 See the accounts of these developments in the International Herald Tribune between 18 February 2008 and 8 March. See the surprisingly thorough review of the reactions to the 2008 Kosovo declaration of independence available on wikipedia: http://en.wikipedia.org/wiki/International_reaction_to_the_2008_Kosovo_declaration_of_independence
5 Cfr supra note 3.
uncertain that such a recognition amounts to an undue interference in the internal affairs of Serbia as the situation of Kosovo, according to these authors, has been internationalized and an act of recognition falls short of any “intervention” in the strict sense of the word.  

These controversies had been anticipated in the scholarly literature as soon as it turned obvious that the international community would support the independence of the entity that had been under international administration since 1999. They are therefore not utterly surprising. The wide recognition granted so far to Kosovo by Western States will probably not quell the debate. It may be worth addressing some of these lingering legal issues within the framework of the Interest Group on Peace and Security, drawing on the last developments pertaining to that question.

**Current developments and points of interest**

- The declaration of independence makes reference to the UN Secretary General special envoy’s Kosovo Status Settlement whose “obligations” it “fully accepts”. This includes the principle of democracy, the rule of law and fundamental rights of individuals and individuals belonging to minorities. This reference underpins the idea that in contemporary practice democracy is probably the “price” to pay to secure independence. Likewise, this seems to confirm that, although statehood remains an intrinsically factual phenomenon, there is a growing acceptance of the involvement of the international “community” in the elaboration of the constitutional framework of new born or failed entities. This does however not mean that States will necessarily remain amenable in the future to the establishment of an international administration on a part of their territory when this may lead to the independence of the territory concerned.

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7 See in particular, Enrico Milano *Unlawful territorial situations in international law: reconciling effectiveness, legality and legitimacy*, Leiden, Nijhoff, 2006.
Before the official declaration of independence, the European Union adopted a Joint Action 2008/124/CFSP on 4 February 2008 on the creation of a European Union Rule of Law Mission in Kosovo (EULEX)\textsuperscript{14}. It is interesting to note that the mission bestowed upon the EULEX mission\textsuperscript{15} echoes the tasks envisaged by Kosovo Status Settlement of the UN Secretary General Special Envoy which called upon a “European Security and Defence Policy Mission” to “monitor, mentor and advise on all areas related to the rule of law in Kosovo”\textsuperscript{16}. The joint action can certainly not be construed as an implied recognition by the EU and all its member States of the anticipated independence of Kosovo. It is however mirrors the UN Secretary General Special Envoy’s plan which itself had envisaged the statehood – although in veiled terms – of the new entity. Once again, this seems to underpin the acceptance – at least by European States – of the role played by the international “community” in supporting the (re-)construction of governmental structures in States where institutions have faltered or totally vanished.

While the EU seems to have followed some of the UN Secretary General special envoy’s plan regarding the consolidation of the rule of law in Kosovo, a few countries also followed some of the guidelines of the Kosovo Status Settlement when granting recognition to the new entity. For instance the late recognition by the Netherlands was based on the assurance that Kosovo abide by the protection of civil and political rights.\textsuperscript{17} This being said, this delayed conditional recognition was anything but a token and one may dispute its actual impact. First, it is not at all certain that three weeks after the unilateral declaration of independence, one can glean better assurances of respect of human rights\textsuperscript{18}. Likewise, it can be questioned whether any conditional recognition – although it was implied in the Special Envoy’s Kosovo Status Settlement – was of any avail as the fundamental governmental structure of the new entity has been set up by the international community along the line of the liberal democratic pattern.\textsuperscript{19}

\textsuperscript{14} Official Journal, L 42/92, 16 February 2008, at 92.
\textsuperscript{15} Article 2: “EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices”.
\textsuperscript{16} S/2007/168.
\textsuperscript{17} International Herald Tribune, 4 March 2008. On the consistency with the institutions of Kosovo with civil and political rights, see M. Cogen and E. de Brabandere, “Democratic Governance and Post-Conflict Reconstruction”, Leiden Journal of International Law, 20, 669-693.
\textsuperscript{18} See J. d’Aspremont, “Regulating Statehood: The Kosovo Status Settlement”, op. cit., at 661.
• As is outlined above, Western States – followed by a few others\textsuperscript{20} – have been prompt to recognize the new entity as a State. This widespread recognition of Kosovo among Western State already provides the new entity with a considerable – although not unqualified – external effectivité.\textsuperscript{21} But this external effectivité does probably not need to be overwhelming as the government of Kosovo is already endowed with significant internal effectivité. It is true that the government does not wield its power on all parts of the territory as is illustrated by the recent turmoil in the northern part of the territory\textsuperscript{22} and that it stills relies on the continuous well needed presence of international forces. However, the inability to rule on some parts of the territory and the support provided by third States or international organizations do not suffice to deny any effectivité to the government of Kosovo.\textsuperscript{23}

• The boundaries of the entity have been subject to some discussion and especially the border demarcation between Macedonia and Kosovo. While Macedonia was before engaged in negotiations with Serbia on that issue, it turned to the government of Kosovo. One may wonder whether this is not an implied recognition. Be that as it may, the government of Kosovo – keen as a State in its infancy may be to be awarded express recognition – has so far balked at discussing the border demarcation with Macedonia as long as the latter does not officially recognize Kosovo as a State.\textsuperscript{24}

• It is eventually interesting to note that Foreign Minister Vuk Jeremic asserted that Serbia will soon take Kosovo’s "illegal declaration of independence to the International Court of Justice", adding that "Serbia will seek the legal opinion of the International Court of Justice, asking whether or not this (declaration of independence) was done in compliance with international law."\textsuperscript{25} It is unclear whether the Minister alluded to the advisory or the contentious proceedings before the Court. Be that as it may, it would be surprising that a majority of States at the General Assembly would be amenable to such a request while one may wonder on which basis Serbia could rely to bring a claim against States having recognized Kosovo since it is now clear that Serbia does not continue the

\textsuperscript{20} Senegal, Malaysia, Peru.


\textsuperscript{23} http://afp.google.com/article/ALeqM5igJw-DE39bgC0U5LPQbWO7ygGKsA (visited 10 March 2008).
State of former Yugoslavia (and is therefore not bound by any convention containing a compromisory clause that bound Yugoslavia) and has no optional clause.26

The Interest Group on Peace and Security welcomes reaction from any legal scholar.