Contents

1
Introduction

I. The Meaning of the Kosovo Episode

The Kosovo crisis has divided the organized international community. Not unlike the war in Iraq, international action in relation to Kosovo has inspired fierce debate among governments and observers of international politics. While one might see in the international response to Kosovo an example of the return to the classical power politics of the 19th century, one could also argue that it is the seedcorn for the emergence of a new-style 21st century international constitutional order informed by universally held values. Or one might detect in the Kosovo episode signs of a breakdown both of the classical system dominated by interest politics of states and of the modern system of collective action organized under the umbrella of the United Nations (UN), heralding a period of post-modern international fragmentation and chaos.

A. A return to the 19th century?

The international handling of the Kosovo crisis might indeed be a turning point, demonstrating that we have returned to the classical system of great power politics. Seen from this perspective, the developments concerning Kosovo appear to confirm the old certainties of the classical, so-called realist or neo-realist paradigm. This is an analysis focusing on the state as the key actor in the international system, pursuing its self-interest through the exploitation of its relative power and influence.

The crisis, it could indeed be argued, unfolded according to the script of 19th-century cabinet diplomacy. Major powers became involved, pursuing their particular interests through traditional politics led by self-interest. The United States (US) was keen to utilize its unipolar dominance at the turn of the millennium and imposed its vision for a solution of the crisis (although one would need to question the element of actual self-interest in this instance). Russia sought to retain or regain influence and prestige on the European continent, struggling to be recognized again as a great power. In the application of classical geopolitics, Moscow also sought to defend Serbia, its only remaining ally in central Europe. At least during the first ten-year period of the crisis, Western European states also

seemed to side with some of the Balkan players according to historical alliances, dating back to the Second World War or beyond—a phenomenon particularly visible in relation to the United Kingdom and France. Both states had a historical affinity with Belgrade that was only undermined when the extent of atrocities committed in the wider context of the Yugoslav crisis became apparent. Others were informed in their attitude to the conflict by hard-nosed business interests. Italian companies, for example, obtained lucrative communications licences from Belgrade during the crisis. This had a visible impact on the attitude of the Italian government.

Set against this neo-classical background, the modern institutions for collective action of the post-Second World War international system hardly seemed to matter. According to such a view, they were unmasked as the useless talking shops that political realists had always claimed they were. Instead, we saw the revival of instruments of national or international politics long thought overcome. These included conference crisis diplomacy of leading powers in the mould of Europe's classical balance of power. Peace settlement attempts were conducted in chateaux and castles in a style reminiscent of the 1815 Congress of Vienna or the victors' assembly of Versailles, rather than the sober atmosphere of the cramped UN headquarters building in New York. This classical practice even extended to the issuing of ultimata and the threat and actual use of military force for political ends—terms and concepts thought to have been permanently deleted from the diplomatic dictionary since 1945.

Within this neo-classical environment, according to this view, the US pursued a strategy of seeking to dismantle the Federal Republic of Yugoslavia (FRY) (as it was in 1999). First, the US and its somewhat reluctant allies committed an unwarranted act of aggression. Launching a sustained aerial campaign not only against Kosovo but also extending to much of Yugoslavia, the North Atlantic Treaty Organization (NATO) forced its will on a sovereign state and removed it from control over a significant part of its territory. Then, in a second stage of controversial action, these states conspired with the Kosovo leadership to bring about secession of the territory, in violation of the sovereign rights of Serbia. In both instances, they circumvented international rules and mechanisms designed to address problems of this kind, devaluing the rule of international law and the authority of the United Nations in the process.

B. An emerging international constitutional order

However, this perspective can be countered with reference to a number of innovative developments triggered by the crisis. Seen from a more progressive perspective, Kosovo marks the beginning of a new, more advanced form of international politics—the episode serves as the fountainhead of a new international order, not as a signifier of its demise. Instead of relying on outdated concepts, such as non-intervention and mono-dimensional concepts of sovereignty, Kosovo

anticipates a post-modern international constitutional system that is still in the process of establishing itself. In such a world, people matter more than states.

Viewed from this angle, Kosovo made manifest the discovery that states cannot claim rights and privileges that exceed or destroy those of their constituents, the people. After all, the state is nothing more than the aggregation of the powers and competences transferred to it by its constituents. The rights of the people are the true source of state sovereignty. Such sovereignty cannot provide cover, through the doctrine of non-intervention, for the mistreatment, forcible displacement or extermination of the population or a significant segment thereof. Moreover, the argument continues, the state is a voluntary association of its citizens. Nothing can or should prevent citizens from freely disassociating themselves from an existing state with a view to forming a new one. If creating a state is an act of will of its constituents, then leaving the state on the basis of an act of will should also be possible.

In this instance, the organized international community intervened in order to save a population from severe mistreatment by the very authorities purporting to represent it, thereby exercising a responsibility to protect. Seen from this perspective, action by NATO in relation to Kosovo served as a major beacon to guide the nascent international practice of humanitarian action to save threatened populations. Similarly, the eventual secession of Kosovo from Serbia may be taken by some to vindicate the view that a population can exercise its will and leave a state, at least if it is not genuinely represented within it, or after it has suffered sustained and severe repression by the central authorities.

Adherents of this view will point to the fact that the Kosovo crisis demonstrates an international willingness to enforce core values of the international system, even against the 'sovereign will' of governments that disregard these cardinal principles, and even if, as was the case in this instance, no express United Nations mandate was available.

C. Fragmentation and chaos

As always, there is of course a third line of argument. By this reading, we have neither regressed into the brutal but stable classical system of 19th-century power politics, nor have we advanced towards the pursuit of universal values within an emerging international constitutional system of the 21st century. Instead, the example of Kosovo points towards the increasingly complex, difficult, and in some aspects, frightening post-modern world we are now entering. It is a world that has lost the certainties of brutal but stable classical power politics, and of the Westphalian international order, without gaining the benefits of a more advanced international constitutional system of global power regulation.

In such a world, the stabilizing concepts of state sovereignty, territorial unity and non-intervention have been fatally undermined, leaving us in a less predictable position. After all, the very identity of the nation-state—the core unit of

the classical, Westphalian system—is being challenged by ethnic populations no longer willing to accept state boundaries which they consider unjust. In addition to challenges to the identity of the state as the key unit of the neo-realist system, its internal powers are also threatened. Populations are resisting the exercise of effective governmental authority. Traditionally, effectiveness was seen as the key legitimizing feature for the authority to govern. In addition, the traditional monopoly of the central state over organized violence has been broken by highly destructive terrorism deployed by movements operating across state boundaries. These transnational movements are motivated by ideological, religious or ethnic considerations that cannot be engaged through reasoned argument or negotiations based on what we perceive to be 'rational' choices.

The Kosovo crisis seems to exhibit all of these features. During the conflict, a population successfully rebelled against the authorities of the central state. While Belgrade continued to rely on the classical doctrine of 'effectiveness' of control over territory and population, its machinery of repression was sidelined for a considerable period. An ethnically-defined group dissociated itself from its territorial sovereign through peaceful resistance. It managed to establish and run a parallel system of governance in response to discrimination and repression, rendering meaningless the claim of supreme authority of the classical sovereign.

Subsequently the Kosovo Liberation Army (KLA) deployed what some considered 'terrorist' tactics. Drawing on financial resources collected through a transnational network ranging all over the Western world, it started a process that propelled international actors into war in Europe in defence of humanitarian interests and in disregard of the classical doctrine of non-intervention. In the wake of this use of force, the ethnic Albanians of Kosovo achieved independence with some international backing, breaking through the hitherto sacred doctrine of territorial unity in relation to the Republic of Serbia. Needless to say, this final status and the settlement that accompanied it in the shape of the Ahtisaari plan were obtained without the consent of the territorial sovereign. After independence, the prospect of secession from secession remains. There is talk about dividing Kosovo, assigning its mainly ethnically Serb-inhabited Northern area to Serbia. Such a step would undermine, again, the hitherto sacred doctrine of territorial unity. According to that doctrine, even a seceding entity is entitled to maintain is pre-existing borders (*uti possidetis*).

Seen from this perspective, Kosovo certainly does appear to break with the certainties of the classical international system, and to prophesy instead its fragmentation. This fragmentation was not balanced in this instance by the conduct of international politics through international institutions. When it came to the crunch, collective security administered through the United Nations was sidelined both in relation to humanitarian intervention and secession. Instead, states answered the challenges of the post-modern world through a reversion to unilateralism and power politics harking back to the classical era.

So where does this leave us in our assessment of the international response to the Kosovo crisis? Is it the worst of all possible worlds—a world where we have to contend with the challenges of the post-modern, fractionated international system, without the benefit of enhanced collective institutions and mechanisms capable of addressing them? Instead of collective action in the face of common challenges, are we seeing a return to classic, unilateral remedies that include the renaissance of the use of force as a means of international politics, as the 2003 action of the United States and her allies in relation to Iraq also seems to suggest? Or is this, after all, an international constitutional order in the making—an order characterized by core values, universally held? While enforcement of such values should occur through collective bodies, such as the UN Security Council, groups of states can act in support of international constitutionally-privileged values if these bodies fail to respond.

Against this background, the twenty-year crisis in Kosovo, starting with Belgrade's unilateral reduction of Kosovo's autonomy in 1988 and concluding, provisionally, with independence in 2008, represents more than a struggle for control over an area of some 10,000 square kilometres. It is also a struggle over the redefinition of the international system as such. This struggle is focused on six principal areas:

- the very concept of the state and state sovereignty in relation to its constituents;
- the question of governance within the state;
- the issue of human rights;
- the debate about the legitimacy and utility of the threat or use of force for humanitarian purposes;
- the problem of opposed unilateral secession;
- the issue of hierarchies and competences among international actors, involving a tension between collective action and unilateralism; and
- the issue of state consent in the settlement of international disputes and in the acceptance of international obligations.

These tensions are by no means mere theoretical constructs established in order to offer a neat frame for the analysis that is to follow. Diplomacy in this instance really was a struggle over whether considerations of human rights or of sovereignty should dominate the debate, whether the will of the people should trump the interests of territorial unity and stability, whether force may or may not be used, whether action can or should only be taken within a multilateral framework of collective security, and whether a settlement can be imposed upon parties to a conflict. In this instance, these tensions did not only underpin the debate, they lay at its heart. This was a debate conducted at the highest level of government, at times involving presidents and prime ministers, along with top national and international diplomats. The key international actors in this episode

were keenly aware that they were engaging with the most basic and fundamental structural principles of the international system. They knew that the action they were taking would significantly shape the general international environment of the future, going far beyond this instance.

The principal protagonists, Belgrade and Prishtina, were also fully aware of this struggle over basic principles of the international order. Throughout, they were expressly appealing to the contesting values of the international system in order to strengthen or advance their respective cases. It is therefore worthwhile to explore these competing concepts briefly before turning to an analysis of the flow of events.

II. The Concept of the State

The first area of tension concerns the very definition of the state and its powers. In the early modern age, the state was seen to be the emanation of the sovereign, and sovereignty came in the shape of a person—the king or emperor. Louis XIV really meant it when he proclaimed '*l'état c'est moi*'—he literally was the state. In him, God himself had vested the absolute right to rule over his dominion. Of course, while such rule originated from a sacred grant, with the onset of the modern state system its exercise was no longer bounded by the spiritual authority of Rome. The right to rule really was absolute, restrained only by the personal religious and moral code of the sovereign. Hence, as Jean Bodin put it in his famous definition of 1576, sovereignty denotes supreme power over all subjects and objects in a given territory.[1]

That definition, and the treaties of peace of Augsburg (1555) and of Muenster and Osnabrueck (1648), paved the way for a system of sovereign states that recognized each other's supreme powers in relation to the territory they controlled.[2] This meant that states could profess no interest in the internal affairs of other states. This applied in particular to the religious orientation of the sovereign and the population he controlled. In the wake of the thirty-year religious war that had devastated Europe, such a recognition of the *domaine réservé* of states appeared sensible.

With the enlightenment, the doctrine of popular sovereignty gained currency. According to Jean-Jacques Rousseau, 'each of us puts his person and full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.'[3] Those who had joined

[1] Jean Bodin, *Six livres de la République* (1576).

[2] Leo Gross, 'The Peace of Westphalia, 1648–1948', *American Journal of International Law*, 42(1) (1948), 20–42.

[3] Jean-Jacques Rousseau, 'Of the Social Contract', in Victor Gourevitch (ed.), *Rousseau, The Social Contract and Other Later Political Writings* (Cambridge: Cambridge University Press, 1997), 50.

in such a social contract would be absolutely bound by the general will—the general will that was the expression of sovereignty of the community in question. Hence, sovereignty had been reallocated from the person of the monarch to the polity as a whole. But sovereignty remained absolute. As Rousseau put it:[4]

> Now, the Sovereign, since it is formed entirely of the individuals who make it up, has not and cannot have any interests contrary to theirs; consequently the Sovereign power has no need of a guarantor toward the subjects, because it is impossible for the body to want to harm all its members . . . The Sovereign, by the mere fact that it is, is always everything it ought to be.

Indeed, with the consecration of the free will as the source of all authority in Enlightenment thinking, sovereignty, being the aggregate of the will of all participants in the social contract, retained its somehow sacred character. The mystification of sovereignty was amplified with the advent of nationalism. The nation state was now seen as the expression of a Hegelian national spirit. The sovereign nation realized its historic destiny through the institution of state. Nothing that would interfere with this mystical process could be permitted. Accordingly, one of the cardinal principles of the classical international system was the principle of non-intervention in the internal affairs of states, however the state organized the internal processes of government.[5] The treatment of the internal affairs of the state as a 'black box' by the international system was only slowly breached. During the League of Nations period, certain restrictions were imposed, and internationally monitored, in relation to the treatment of minorities. However, this only applied to certain states that were subject to special legal regimes. After World War II, human rights gained international currency. However, the process of developing a human rights implementation system that would be truly universal (and therefore also apply to the states most likely to violate human rights) was hesitant.

With the termination of the Cold War, however, the concept of popular sovereignty has been readdressed. In part, the Kosovo episode accelerated this process. In the context of the developments in Kosovo of 1999, the UN Secretary-General pointed to the changing view of the meaning of sovereignty.[6] Sovereignty would henceforth not be identified as an accumulation of the rights of the state as an abstraction. Instead, it would be firmly connected with the entitlements of the state population. Its exercise by the government might be rendered conditional on the performance by the government of its responsibilities towards the governed. This changing outlook was a very important factor underpinning the development of the international response to the Kosovo crisis.

[4] *Ibid.*, 52.

[5] As classically analysed and expressed by Ellery C. Stowell, *Intervention in International Law* (Washington, D.C.: John Byrne Co., 1921).

[6] Kofi A. Annan, 'Two Concepts of Sovereignty', *The Economist*, 18 September 1999, 49f.

III. Governance

The principle of popular sovereignty has been formally accepted in international standards since the advent of the modern international system of the United Nations era. As was stated in the Universal Declaration of Human Rights of 1948:[7]

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Of course, in reality, the majority of governments of the post-World War II world were anything but fully democratic. According to the principle of effectiveness, any government, however constituted, was treated as the authentic representative of a state and its population.[8] In order to maintain the legitimizing myth of popular sovereignty, it was simply presumed that any government was, by definition, representing its constituents.

During the Cold War years, when the question of governance lay at the heart of a life and death struggle among competing ideologies, it made sense to leave the issue of genuine democracy unaddressed. No universal consensus on essential principles of representative governance was possible. Accordingly, the international system strengthened, and further refined the international rule of non-intervention. As was stated in the UN General Assembly Resolution on Non-Intervention:[9]

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

The International Court of Justice expanded upon this rule in the Nicaragua case, which involved US armed activities against that state:[10]

> …in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of

[7] Universal Declaration of Human Rights 1948, Art. 21(3).

[8] As was stated in the *Tinoco Arbitration (Costa Rica v. Great Britain)* of 13 October 1923: 'The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place?', 2 ILR 34, 37.

[9] Resolution 2131 (XX), A/RES/20/2131, 21 December 1965, para. 1.

[10] *Nicaragua v. US,* 1986 ICJ 13, 106, 205.

foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.

Of course, when the Court addresses the right of 'the State' to decide freely, in reality this is the effective government in power. Accordingly, the principle of non-intervention does not really protect the process of the genuine transmission of the will of the people to its government from external interference. Instead, the principle protects any existing government from external action in relation to its internal activities.

However, in line with the changed appreciation of the doctrine of sovereignty, to which reference was already made above, the doctrine of representative government and of non-intervention was subjected to considerable review during the period of the Kosovo crisis. In particular, the language of the Universal Declaration of Human Rights was rediscovered at the point of the termination of the Cold War. While that point may not have marked the end of history, it did, at least for a certain period, mark the renewed consecration of the doctrine that the authority to govern must be based on the will of the people.[11] While this principle was revived at the universal level, and in other regions, such as the Americas, it was extended with particular vigour to the wider Europe encompassed in the region of application of the Conference on Security and Cooperation in Europe, the CSCE:[12]

> The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.

At the universal level, the principle had been acted upon in 1994 when the UN Security Council granted a forcible Chapter VII mandate to remove the undemocratic junta that had seized the government of Haiti.[13] In the Americas, the regional states concluded a formal agreement providing for collective intervention should any one of them suffer a counter-constitutional coup.[14] In Europe,

[11] e.g.: General Assembly Resolution 45/150, 18 December 1990, A/RES/45/1501:

> …1. *Underscores* the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which establish that the authority to govern shall be based on the will of the people, as expressed in periodic and genuine elections;
>
> 2. *Stresses* its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor n the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights;
>
> 3. *Declares* that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others, as provided in national constitutions and laws; …

[12] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, 29 June 1990.

[13] Security Council Resolution 940 (1994), S/RES/940 (1994).

[14] Organization of American States Declaration on Representative Democracy, 5 June 1991: 'THE GENERAL ASSEMBLY RESOLVES: 1. To instruct the Secretary-General to call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences

the European Community/European Union (EC/EU), the CSCE and the Council of Europe (CoE) created a mechanism to support and stabilize the transition to democracy of the former communist states of Eastern Europe, known as the Stability Pact for South Eastern Europe.

The question of democratic governance was therefore regarded in a changed light around the time of the actions taken by the Belgrade authority against Kosovo.[15] Those actions appeared to disenfranchise a sizeable proportion of the population of Yugoslavia. While, even now, it is not clear that ethnic population groups that are concentrated in parts of the state territory have a right to territorial autonomy, the situation may be different where autonomy has already been granted,[16] for it is often taken as axiomatic that autonomy cannot be unilaterally revoked by the central government once it has been constitutionally established.[17]

The Kosovo conflict was one of dominance of one segment of the population by another—dominance that became institutionalized in the constitutional system of the state. The rump Yugoslavia (FRY), which emerged after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) and consisted of Serbia and Montenegro, boasted a population of approximately 10.3 million. Of these, 62 per cent were ethnic Serbs. Perhaps surprisingly, by far the next largest ethnic group in the FRY was made up of ethnic Albanians. According to a Yugoslav census of 1991, 1.7 million of the overall population (16.6 per cent) were ethnic Albanians—that is over half of the population of Albania itself (3.3 million). In fact, the 1991 census probably underestimated the number of ethnic Albanians, as they had boycotted the census. The number of ethnic Albanians relative to Serbs in the FRY was set to rise further, given the significantly higher birth rate within that community. Most ethnic Albanians are Muslims, while Serbs tend to profess allegiance to their own branch of Christian Orthodoxy.[18]

In Kosovo itself, the number of Serbs had dropped from some 27 per cent in the 1950s to a mere 7 or 8 per cent by the 1990s. Some 90 per cent of the population of just short of 2 million were estimated to be ethnic Albanian. Around

giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten day period.' . . . Adopted at the fifth plenary session of the General Assembly, 5 June 1991, AG/RES 1080 (XXI-0/91).

[15] e.g., Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86 (1992) 46–91, and Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

[16] This question is addressed in Marc Weller, 'Self-determination and Autonomy', Working Paper Commissioned by the Working Group on Minorities of the United Nations Sub-Commission on Human Rights, UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.5.

[17] Otherwise, it would be a matter of decentralization. See Marc Weller and Stefan Wolff, *Autonomy, Self-governance and Conflict Resolution* (London: Routledge, 2005), Chapter 1.

[18] In addition there were 5 per cent Hungarians, 3.3 per cent 'Yugoslavs', and 3.1 per cent Muslims in the FRY.

350,000 ethnic Albanians had left the territory, even before the 1998 hostilities, as a result of economic deprivation and repression exercised by the Serbian government since 1988. In addition, there were small groups of Turks, Bosniaks, Gorani, Roma, Egyptians, Ashkali and others.

Kosovo, along with the autonomous province of Vojvodina, had obtained a strong federal status under the 1974 SFRY Constitution. While it was an autonomous province within Serbia, it was equally represented in the federal organs, including the federal presidency. Governance in Kosovo was also principally independent of Serbia, and the territory enjoyed the right to create its own constitutional structure. The failure of ethnic Serbs to prosper in the territory, and their declining numbers, were taken as a sign of discrimination directed against them by the ethnic Albanian authorities in Kosovo. Slobodan Milosevic rose to power in Serbia on a promise to reverse this situation. Then, towards the end of the 1980s, ethnic politics began to take hold in Serbia. Tito's doctrine of brotherhood and unity among all ethnic groups was progressively replaced by an attempt to recreate a Greater Serbia, initially through Serbian dominance of the entire SFRY. The move to restore direct Serbian control over Kosovo lay at the heart of this policy. While Kosovo had been populated mainly by Albanians for several centuries, official doctrine promoted the view that the territory was in fact the heartland of Serbia, given the presence there of important and ancient religious sites.

Serbia then embarked upon a strategy of reducing Kosovo's independent powers, subordinating them to direct rule by Serbia. At the same time, Belgrade took control of key organs of the overall federation. This move was resisted by other republics in the federation, most strongly by Slovenia, and subsequently also by Croatia. When their attempts to renegotiate federal arrangements failed, they declared independence in June 1991. Armed conflict ensued, leading to the complete dissolution of the SFRY and also bringing independence for Macedonia and for Bosnia and Herzegovina. The hostilities were dominated by the Serbian attempt to ensure that areas inhabited mainly by ethnic Serbs, but lying outside the Serbian Republic, would be detached from the other republics seeking independence.

In the meantime, ethnic politics in Kosovo were initially administered through formal legislation. While Kosovo nominally retained its autonomous status, a new Serbian constitution, adopted in 1990, made permanent the abolition of Kosovo's independent powers which had commenced in 1988. This result was consolidated by a new constitution for the rump Yugoslavia, adopted in 1992. Over those four years, a whole host of openly discriminatory legislative acts had been adopted, directed at the ethnic Albanian population in Kosovo. This new constitutional and legal system was then enforced with some vigour, including by systematic acts of repression. While demographic manipulation was employed to reduce ethnic Albanian population numbers, a formal programme was introduced to encourage Serb settlement in the territory.

Accordingly, since 1988 the Kosovo population was no longer genuinely represented in the overall state. Nor was the Kosovo region governed by individuals who enjoyed local legitimacy. Hence, it was difficult to maintain that governance, at least in that region, was being administered in accordance with the will of the people. The question therefore arose whether the organized international community would seek to overturn this result and act in defence of Kosovo's entitlement to autonomy. In the classical international system, this would have been highly unlikely, as the internal organization of the state was very much treated as part of the *domaine réservé* covered by the doctrine of non-intervention.

IV. Human and Minority Rights

Of course, even in a state that governs itself according to democratic standards, safeguards for the rights of the minority need to be provided. After all, the minority can in principle be consistently outvoted and disenfranchised within the democratic state. Human rights, at the minimum, protect all human beings within the democratic state territory from abuse and discrimination by the state organs.

The theory of natural or inherent restrictions on the rights of the sovereign had been discussed since well before the appearance of Locke's famous *Treatises on Government*.[19] This doctrine was formally acted upon with the adoption of the Bill of Rights by the English Parliament,[20] when the first ten amendments to the US Constitution (also called Bill of Rights)[21] were ratified, and when the Declaration of the Rights of Men and Citizens[22] was consecrated in the course of the French Revolution. But while some of these documents speak of inherent or inalienable rights, in fact these rights were positively granted by the state. Where the state did not voluntarily restrict its sovereignty through a voluntary act, it could still claim perfect and absolute powers of sovereignty.

Over the decades, the doctrine of auto-limitation was established. While it was argued that sovereignty was principally perfect and comprehensive, the fully sovereign state could nevertheless limit some of its powers through an act of sovereign will. Such limitations initially took the form of constitutional compacts, granting fundamental rights to citizens. Later, such entitlements were also enshrined through international treaties as human rights. Of course, such human rights would initially only bind those states that had contracted into human rights treaties. But over time, a corpus of universally recognized human rights developed by virtue of general international customary law. In fact, the most essential rules of human rights, such as the prohibition of genocide, slavery, torture, discrimination and apartheid, crimes against humanity and war crimes, enjoy a special legal status in the international system. These rights apply to all states, whether or not it has been demonstrated that they have positively consented to

[19] John Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 1988).
[20] 13 February 1689. [21] 25 September 1789. [22] 26/27 August 1789.

them through human rights treaties (universality). All states have a legal interest in the performance of these rights by all other states (*erga omnes* effect). States cannot unilaterally remove themselves from the application of these rights, even in times of crisis or emergency (non-derogability). Moreover, they lack the legal power to agree amongst themselves to suspend the application of the rights (*jus cogens* effect). Serious violations of these rules trigger an obligation on the part of other states not to recognize the consequences of the violation, not to assist the offending state in maintaining in place those consequences, and to consult about steps to reverse the situation (serious violations of peremptory norms of international law). Finally, most of the rules in question attract individual criminal responsibility, in addition to state responsibility. That is to say, the overall state that has committed a systematic campaign of crimes against humanity can be held internationally responsible for its conduct. At the same time, the individuals who have engaged in these acts, or commissioned them, can be held criminally liable in the domestic courts of individual states, or before international courts and tribunals.

By the time of the outbreak of the Yugoslav conflict, this set of international legal rules and mechanisms had consolidated into a coherent system for the protection of human rights, at least on paper. However, this design still collided with the traditional conceptions of non-intervention.[23] The Cold War had prevented the development of implementation mechanisms that would apply universally. Now, after the post-communist transition, such universal mechanisms also extended to Eastern Europe. However, the Yugoslav crisis was the first testing ground for the functioning of the interlocking mechanisms of universal, non-derogable *jus cogens* rights having an *erga omnes* effect and attracting individual criminal responsibility as well as an obligation to respond on the part of the wider international community. While it is generally agreed that the test failed in relation to Bosnia and Herzegovina, Kosovo offered a second opportunity for the application of these mechanisms.

In relation to Kosovo, it was clear that persistent and widespread human rights violations were being perpetrated under the auspices of official state policy. In fact, the discriminatory practices of the Belgrade authorities were openly reflected in Serbian legislation. There was also consistent intimidation of the ethnic Albanian majority population, including arbitrary arrests, beatings and other similar acts. The situation deteriorated significantly when armed conflict erupted in the region. In the campaign against the KLA, it seemed that a campaign of ethnic cleansing might be developing against the majority population in certain areas of Kosovo.

[23] Danilo Tuerk, 'Reflections on Human Rights: Sovereignty of States and the Principle of Non-intervention', in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays on Honour of Asbjorn Eide* (Dordrecht: Martinus Nijhoff, 2003), 753; Karl Zemanek, 'Human Rights Protection vs Non-intervention', in Lal Chand Vorah *et al.* (eds), *Man's Inhumanity to Man*, *Essays in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), 935.

Belgrade officially suspended some of its human rights obligations in order to provide cover for these actions. It also claimed that it had to engage in limited internal police actions to rout the KLA fighters it considered terrorists. However, it denied that there were significant, widespread human rights violations. Moreover, it strenuously held that the matter was an internal issue, to be addressed only by the Belgrade authorities. External interest represented unlawful interference.

It was at this point that the organized international community came under pressure to prove itself. Could it deploy international mechanisms in such a way that the human rights situation in the territory could be investigated, offering authoritative findings in this instance?

In addition to identifying human rights violations and naming them publicly, there remains of course the question of enforcement. Generally, condemnation of human rights practices is deemed sufficient action at the international level. However, what if the state concerned is impervious to international criticism? The rump Yugoslavia had been deeply involved in campaigns of ethnic cleansing and probable genocide in Croatia and in Bosnia and Herzegovina. This involvement was confirmed in official terms by the highest international human rights bodies and even the UN Security Council. The Council imposed tough and comprehensive economic sanctions against Belgrade. Nevertheless, these practices persisted until 1995, when NATO terminated the Bosnian conflict through a short bombing campaign.

If enforcement in relation to a case as notorious as Bosnia had been wanting, what international action would be taken in defence of human rights in Kosovo? Would Belgrade manage to cover its campaign of ethnic dominance and repression by invoking the doctrine of non-intervention, or would it be possible to pierce the armour of state sovereignty in this instance and to insist on political reconstruction of the state in favour of its disenfranchised population?

V. Forcible Humanitarian Action

Where human rights violations lead to the destruction or forcible displacement of an entire population, the question of an international response becomes even more pronounced. Following the advent of the UN Charter in 1945, the doctrine of humanitarian intervention in cases of extreme emergency was often regarded as a doctrine that would open the door to ceaseless abuse by powerful states against weaker ones.[24] As a result, the atrocities committed by Idi Amin

[24] The literature on humanitarian intervention is of course vast. For an overview at the traditional position see, for instance, Ian Brownlie, 'Humanitarian Intervention', in John Norton Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: John Hopkins University Press, 1974), 217; Sean Murphy, *Humanitarian Intervention* (Philadelphia: University of Pennsylvania Press, 1996).

in Uganda and the Khmer Rouge in Cambodia against their own populations were initially left unaddressed during this period. When Tanzania and Vietnam respectively finally intervened, they chose to defend their action as self-defence, rather than invoking the doctrine of humanitarian intervention. It was deemed more important to maintain the international prohibition on the use of force as a means of international policy than to allow a precedent in favour of assisting a persecuted population.

However, with the termination of the Cold War came a re-evaluation of this position. Since 1988, the UN Security Council had become increasingly involved in seeking to oppose attacks by governments or other authorities on populations under their control. Under Chapter VII mandates, international action involving the possibility of the use of force had taken place in over a dozen cases. Determination that action would need to be taken in cases of future threats to populations was redoubled after the disasters of Rwanda and Bosnia and Herzegovina. Close to a million civilians had died in Rwanda while an international peace force mainly withdrew from the territory. In Bosnia and Herzegovina, over 100,000 mainly Muslim individuals had been murdered in a campaign of ethnic cleansing inspired by Belgrade, under the very eyes of a UN protection force.[25] The then incoming UN Secretary-General Kofi Annan had been chief of peacekeeping operations at the time. He, like many leading politicians of Western states, had vowed not to allow similar developments to take place in the future. Instead, a campaign was launched to clarify that state sovereignty could never act as a bar to international action in cases of genuine humanitarian emergency. After all, the population under threat in such circumstances was the actual sovereign, rather than the government seeking to exterminate it.

The Kosovo case fell squarely into this debate. The UN Secretary-General in this context described the:[26]

> …dilemma of what has been called 'humanitarian intervention': on the one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences.

The Secretary-General noted that while the world cannot stand aside when gross and systematic violations of human rights are taking place, intervention must be based on legitimate and universal principles. He then admitted that:[27]

> This developing norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community. Any such evolution in our understanding of state sovereignty and individual sovereignty

[25] Research and Documentation Centre Sarajevo (RDCS). 'Documenting the victims of conflict' (Sarajevo: RDCS). Available at <http://www.idc.org.ba/aboutus/documenting_the_victims.htm>, accessed 6 October 2008.

[26] Speech to the UN General Assembly, 20 September 1999, SG/SM/7136, GA/9596, at 2.

[27] *Ibid.*, 3.

will, in some quarters, be met with distrust, scepticism and even hostility. But it is an evolution that we should welcome.

While it was increasingly accepted that the UN Security Council might act in relation to humanitarian emergencies, the more controversial question was whether individual states could lawfully mount intervention operations in the absence of a Council mandate. The 1991 armed action by an international coalition to rescue the Kurdish population in Northern Iraq did not trigger significant international condemnation. Similarly, an operation the following year to protect the Shiite population in Southern Iraq, the so-called Marsh Arabs, had not engendered much controversy. Accordingly, it seemed possible to argue that there was now emerging within international practice a new right of humanitarian intervention under certain, strictly limited, circumstances.

When the situation in Kosovo worsened in 1998, there were indications of an impending humanitarian catastrophe. Hundreds of thousands of ethnic Albanians were being displaced from their homes. A large number fled across the border into Albania or Macedonia. There were fears that Belgrade might add extermination of the population to its apparent campaign of forcible displacement, as had occurred in Bosnia. The question arose as to whether the organized international community would now be ready to meet this challenge. If it was, the doctrine of humanitarian action, and of the supremacy of the interests of populations over those of states or governments, would be consolidated. If not, the classical doctrine of sovereignty as a bar to international action might be reinforced, at the cost of significant humanitarian suffering in the territory.

VI. The Issue of Secession

The question of international action in response to the emergency in Kosovo was made more complicated by the self-determination dimension of the case.

If the state is nothing more than the accumulation of public powers assigned to it by its constituents, then why should some of those constituents not be able freely to remove their consent, and to leave the existing state structure to create another? This is a problem with which the international system has grappled for many decades.[28] The answer that was found within the classical system was

[28] e.g., Viva Ona Bartkus, *The Dynamic of Secession* (Cambridge: Cambridge University Press, Cambridge, 1999); Harry Beran, 'A Liberal Theory of Secession', *Political Studies* 32 (1984); Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', *Wisconsin International Law Journal*, 7 (1988), 51–105; Sam K.N. Blay, 'Self-Determination: A Reassessment in the Post-Communist Era', *Denver Journal of International Law and Policy*, 22 (1994), 275–315; Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation', *Yale Journal of International Law*, 16 (1991), 177–202; Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, New Haven, CT, 1978); Deborah Z. Cass, 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories', *Syracuse Journal*

straightforward: unilateral opposed secession is simply not possible, or at least it is not legally privileged. If it occurs, the state under threat can use violent means to defeat secession. However, events in the former Yugoslavia in particular have shown that this simple rule may no longer be adequate to address increasingly complex struggles for identity and control over peoples, for self-determination and statehood. Such conflicts do not disappear by virtue of being ignored.[29]

The classical international system, and the rules which govern it, was created by governments acting on the international plane for their own benefit. It comes as no great surprise, therefore, that all governments in power have a mutual interest in perpetuating the survival of the state they claim to represent, within its existing boundaries. Such an attitude is also seen to bring with it the benefit of international stability. Such stability is achieved through the doctrine of territorial unity which is enshrined in numerous international instruments, including the Helsinki Final Act of the CSCE.

Of course, this doctrine is circumscribed by the right to self-determination. While self-determination has many layers of meaning, its scope of application in the context of unilateral opposed secession has been defined in very narrow terms by governments. Self-determination as a legal entitlement to independent statehood has been made available only to colonial non-self-governing territories and in analogous circumstances (for instance, internal colonialism, alien occupation, racist regimes and secondary colonialism). It is not a right pertaining to a self-constituting people, but applies instead to territorial entities defined through colonial administration to which a population is linked in a more or less incidental way. Furthermore, the right can be exercised only once, at the point of decolonization, within the colonial boundaries.[30]

In this way, the rhetoric of self-determination could be safely embraced by governments, including those of newly independent states (former colonies) from the 1960s onwards, without at the same time endorsing a concept which might be invoked against them at some future stage. However, the attempt by the Baltic republics to re-establish statehood and obtain independence from the Union of Soviet Socialist Republics (USSR) in 1990 foreshadowed the pressure which was exerted on this restrictive view after the unfreezing of international relations upon the conclusion of the Cold War. The unilateral declarations of independence of, initially, Croatia and Slovenia which followed in 1991 were seen to pose a dangerous challenge to the

of International Law and Commerce, 18 (1992), 21–40; James Crawford, 'State Practice and International Law in Relation to Secession', *The British Yearbook of International Law* 69 (1998), 85–117; Marcello G. Kohen (ed.), *Secession*, (Cambridge: Cambridge University Press, 2006); Christian Tomuschat (ed), *Modern Law of Self-determination*, (Dordrecht: Martinus Nijhoff, 1993); Christopher Heath Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005).

[29] This issue, and novel approaches to it, is addressed at length in Marc Weller, *Escaping the Self-determination Trap* (Dordrecht: Martinus Nijhoff, 2008).

[30] See Marc Weller, 'The Self-determination Trap', *Ethnopolitics*, 4 (2005), 1–42.

doctrine of territorial unity. Hence, when it emerged that these actions could not be undone, governments set about limiting the effect of the precedent they set.[31]

This was achieved by combining two arguments. The SFRY, it was asserted, had not been subjected to secession, but had in fact dissolved entirely. Hence, there was no bar to statehood for the federal republics which emerged free and unencumbered by the doctrine of territorial unity. After all, the beneficiary of that doctrine, the overall federation, had disappeared. In addition, the federal republics were entitled to claim statehood on the basis of a right to self-determination—a right which was located not in general international law but in SFRY constitutional law, for the SFRY Constitution of 1974 had in fact provided for the possibility of secession of its constituent units.

Oddly enough, a wider assertion of the right to self-determination had been made by the rump Yugoslavia. It claimed that the mainly Serb-inhabited areas of Croatia and Bosnia and Herzegovina should be entitled to secede from secession, as it were, and to constitute themselves as independent states. The Yugoslav republics had argued that they, as constitutional self-determination entities had the right to leave. Kosovo argued that it, too, had this entitlement, based on its federal status under the 1974 Constitution. Both of these propositions were consistent with the doctrine of *uti possidetis*, which holds that seceding entities must do so within previously established (in this case, federal) boundaries. Serbia now claimed that any ethnic Serb population should be able to leave, disrupting the territorial unity of the newly independent entities.

This argument was rejected by the Badinter Arbitration Commission, established to advise the International Conference on the Former Yugoslavia on issues of recognition, statehood, and succession. While self-determination also applied to Serbs and others who now found themselves in the minority in these new states, this was a different kind of self-determination. It was not an entitlement to statehood, but instead self-determination in this context was reduced in content to human and minority rights, and to autonomous structures of governance in areas where Serbs constituted a local majority.[32]

It was partially in order to prevent further extension of self-determination claims that the governments involved in the international administration of the collapse of the SRFY, acting through the European Union (or the European Community), the Organization for Security and Cooperation in Europe (OSCE), NATO, and the United Nations Security Council, insisted on the maintenance of Bosnia and Herzegovina as a state within its former SFRY boundaries. Hence, at Dayton it was accepted that the mainly Serb entity of the Republika Srpska would administer itself with a high degree of autonomy, but within the continued territorial unity of Bosnia and Herzegovina. The legal

[31] See Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law*, 86 (1992), 569–607.

[32] Opinion No. 2 of the Badinter Arbitration Commission (1992) 31 ILM 1497.

management of the creation of new states from the former SFRY thus avoided a precedent in favour of a wider right of secession outside the colonial context.

However, it soon became clear that a concept of self-determination that was based merely on the constitutional status of a republic within a federation was not free of dangers. This became evident with the example of Chechnya.[33] Chechnya had been an autonomous territory within Russia while Russia had been a federal unit of the USSR. With the disappearance of the USSR, Russia achieved statehood. The new Russian Constitution in turn promoted Chechnya to the status of a republic within the Russian Federation. Would Chechnya now be able to claim constitutional self-determination and statehood on the basis of the Yugoslav precedent? The answer provided by other governments was an emphatic no. Chechnya found that it was not accorded the legal protection available under the doctrine of self-determination when it took on the Russian Federation and engaged in an armed struggle for independence.

Instead of insisting on a cessation of repressive measures, the withdrawal of Russian troops, and maintenance of the territorial integrity of Chechnya, the international community merely insisted on compliance by Russia with human rights and humanitarian law while it re-established effective control over the territory. Chechnya's status was only consolidated after Russia effectively lost the armed conflict and had to accept the possibility of Chechen independence in an interim agreement that it concluded voluntarily in 1996. However, when Russia unilaterally abrogated that agreement and forcibly reincorporated the territory after its armed forces had reorganized, international condemnation of the action was muted.

The case of Kosovo was seen to fall squarely on the borderline between the precedent set by the Yugoslav republics and that set by Chechnya. Under the 1974 SFRY Constitution, Kosovo was defined as a part of the Republic of Serbia, but it also had its own separate federal status. It was represented separately on the collective presidency of the SFRY, had its own structures of governance (including a national bank) and its own territorial identity. The international community's hesitation in view of the fact that Kosovo might constitute an unhelpful precedent for other cases made less of an impression on the people of Kosovo, who could not see why a population of 90 per cent Albanians should be left under what they saw as the despotic and arbitrary rule of a small elite of ethnic Serbs in the territory.

Proposals that Kosovo should consider itself a 'colonized' territory entitled to colonial self-determination were however not taken up. While the Kosovars felt as if they were being colonized and subjected to a veritable apartheid regime, governments have developed an understanding which once again limits the application

[33] Luke P. Bellocchi, 'Recent Developments: Self-determination in the Case of Chechnya', *Buffalo Journal of International Law*, 2 (1995), 183–91; Tarcisio Gazzini, 'Considerations on the Conflict in Chechnya', *Human Rights Law Journal*, 17 (1996), 93–105.

of this doctrine very significantly. The definition of a 'colonial territory' is very much restricted to classical colonialism, that is, to the occupation of a distant territory by an alien and racially distinct metropolitan state for the purposes of economic exploitation during the time of imperialism.

Kosovo instead based its case on the particularities of the SFRY constitution. In this way, it could avoid invoking a broad reading of the right to self-determination that would necessarily have had to be resisted by other states. Kosovo also pledged to respect the territorial integrity of neighbouring states and to renounce all territorial claims, for example in relation to Macedonia. It ruled out a pan-Albanian agenda, indicating that it was indeed seeking independence, rather than union with Albania. And it indicated a willingness to accept all conceivable human and minority rights standards, and to subject itself to intrusive human rights monitoring, especially in relation to ethnic Serbs and others.

The governments and international organizations involved in responding to this claim opted for the restrictive view of constitutional self-determination and did not accept a right to statehood for Kosovo throughout most of the run of the crisis. In view of Serbia's position, and the fear of confrontation with the Milosevic government, it was held that Kosovo had not had republic status within the Socialist Federal Republic of Yugoslavia, and was thus barred from the entitlement to statehood as claimed by republics. Instead, human rights should be respected in relation to the territory, and there should be meaningful self-administration. The expression of will in favour of independence by the Kosovo population in a referendum of September 1991 and the declaration of independence were ignored in the initial peace settlement conference on Yugoslavia of 1991/2.[34]

However, ignoring a problem will not necessarily make it go away. Whatever the commitment of the organized international community to the principle of territorial integrity and unity in this case, in the end a situation prevailed where independence could no longer be effectively opposed. Indeed, some twenty years after the process of reducing Kosovo's autonomy was initiated by Serbia, independence was declared with some international support. The question remains how this fact can be explained and what impact this action will have on the international system.

VII. Competences and Hierarchies among International Actors

If Kosovo has presented a challenge to the classical restrictions on international action in relation to the domestic sphere of states, then the question arises: who exactly is entitled to address the situation? Clearly, the architecture of the international system establishes a rough hierarchy of actors. At the top of the pyramid

[34] See Marc Weller, The Crisis in Kosovo 1989–1999 (Cambridge: International Documents and Analysis), 80–89.

sits the UN Security Council. The Council is not restricted in its functions and powers only to ensuring compliance with the prohibition on the use of force enshrined in Article 2(4) of the UN Charter. While states are barred in principle from using force in circumstances other than self-defence against an armed attack, the Council can take effective preventative measures for the maintenance of international peace and security before such a transgression has occurred.

During the 1990s, an expansive view emerged as to which situations could be regarded as threats to international peace and security suitable for Council treatment.[35] In earlier practice, it was thought that the powers of the Council were only applicable to interstate violence. The struggles against colonialism and apartheid expanded this view to cover instances of repression within colonial empires or in South Africa. By the end of the Cold War, it became clear that the external ramifications of internal strife can also constitute threats to international peace. For instance, the outpouring of refugees into neighbouring territories, or the risk of the spreading of internal conflict beyond state borders can trigger Security Council action. Furthermore, since Security Council Resolution 794 (1992) on Somalia, it is also clear that the magnitude of humanitarian suffering of a population under threat of death or displacement can itself be considered a threat to peace.

If the Council can therefore be said to have generated a passport to action through its own practice in relation to internal conflicts, this does not mean of course that it will always act in the same way even when circumstances would appear to so warrant. Some governments remain hesitant when it comes to the authorizing action that would constitute an intervention in the internal affairs of states. This includes China and Russia—two states equipped with the power to veto Council decisions.

What happens if there is a need for authoritative decisions from the Council, but it is precluded from action due to the veto? In the Kosovo episode, this applied both to the demand for humanitarian intervention that followed Rambouillet, and to the endorsement of the final status for Kosovo proposed by UN Special Envoy Martti Ahtisaari. One view would hold that a failure by the Council to act means that no authority is granted. According to this view, it would be presumptuous to determine that no decision amounts to a failure to decide. Instead, inaction by the Council is in fact a decision of the Council that no action should be taken. Such a decision not to act is just as authoritative as a Chapter VII resolution in favour of action.

An alternative view would hold that it is not realistic to focus on action or inaction in accordance with the day-to-day politics of the major powers with permanent seats on the Security Council. While Council authorization is to be preferred, so as to clarify the legitimacy of an action, the lawfulness of that

[35] e.g., Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff, 1994).

action is not dependent on a mandate. A true Chapter VII Security Council mandate would immediately render a humanitarian intervention operation lawful. However, in the absence of a mandate, a legal basis may also be sought in general international law. Hence, for those who believe that Kosovo has strengthened the precedent in favour of a right of humanitarian intervention in general international law, no Council mandate is required.

The same would seem to apply to Kosovo's Declaration of Independence. According to some, unilateral independence against the wishes of a central government is not possible. Only the Council has the power to impose such a result on a government. Others note that statehood is a matter of fact. While the Council can perform an important function in clarifying the situation, the passage of time will have the same effect, as more and more states recognize.

In addition to the powers of the Security Council, another issue concerns the role of defensive alliances and regional organizations.[36] NATO considers itself an alliance which, according to Article 51 of the UN Charter, can use force in self-defence without the need for Council authorization. NATO has sought to preserve its freedom of action even when it is not, strictly speaking, engaging in self-defence. Hence, although NATO's humanitarian intervention in Kosovo was not authorized by the Council, nevertheless, some argue that the collective decision of nineteen NATO states to act under the auspices of the Alliance did accord legitimacy to the operation.

While NATO operations are not subject to a formal veto, the actions of the OSCE are based mainly on consensus decision-making. The OSCE was continually reinventing itself throughout much of the period of the Kosovo crisis. It was created in order to preserve the status quo in Europe throughout the Cold War years. With the sometimes violent dissolution of the former Soviet Union and the former Yugoslavia, it took on a new role of crisis prevention and crisis management. In fact, the OSCE (which is not formally established as a legal organization) was recognized by the UN Security Council as an organization or arrangement of regional security according to Chapter VIII of the UN Charter. This means that it can take on the role of sub-contractor to the Security Council, acting in its stead in the event that a mandate is granted by the Council.

While the OSCE was reinventing itself, the EU was also struggling to develop its identity in the area of foreign and security policy. Its action in relation to the Bosnia crisis was generally considered a failure. The EU was campaigning hard to try again, taking the lead on Kosovo during the second phase of the developing crisis. However, EU policy was prone to internal division among its member states, as was evident throughout. At times, its member states took individual initiatives, stealing the limelight from Brussels. On other occasions, no consensus

[36] Tarcisio Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)', *European Journal of International Law*, 12 (2001), 391–436.

could be reached on collective action and the EU had to proceed according to the lowest common denominator.

While action was difficult to coordinate among members of the relevant international agencies, the same was true in relation to coordination of the international organizations. Through the so-called Contact Group—created in 1994 and composed of the US, the UK, France, Germany, Italy and Russia—an attempt was made to combine the differing layers of authority in Europe and beyond. According to the doctrine of 'joined-up international governance', the Group was meant to bring Russia into the picture. Russian support for policy initiatives was deemed essential, as these would ultimately require the approval of either the OSCE or the UN Security Council. Without Russia's approval, there was no chance that these bodies would grant a mandate.

While reliance on this mechanism offered the prospect of coordinated action between the EU, the OSCE, NATO and the UN, it also posed certain risks. Giving Russia a seat at the table would also limit the freedom of action of the EU and NATO on issues where Russia was unwilling to agree. As it turned out, this difficulty would pose significant problems during the second decade of international attempts to come to grips with the Kosovo crisis.

VIII. The Issue of Consent

A final issue to consider relates to the basic operation of the international system. In the classical system, it is unquestioned that a state can only be subjected to legal obligations if it has freely consented to them. Indeed, classically, it would not even be possible to constrain a government to submit a dispute to peaceful settlement processes. As the Permanent Court of International Justice put it:[37]

> This rule, moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.

Throughout the period of the violent dissolution of Yugoslavia, the rule of consent was applied in relation to Belgrade, and it was exploited by the Milosevic government and its successors. As will be noted later in this book, Belgrade refused to renegotiate the SFRY constitution, contrary to the demands of several other republics.[38] Belgrade also refused acceptance of the outcome of the EC Conference on Yugoslavia—an agreement that was meant to provide for the peaceful dissolution of the federation to the extent that this was still

[37] PCIJ, Ser B, No. 5, at 27, *Eastern Carelia*.
[38] See Chapter 2, Sections III and IV.

possible at the time. All the other republics accepted. Belgrade also frustrated the mission of the Special Group that followed on from the initial conference process.[39] Moreover, Belgrade withdrew its consent to the presence of the early CSCE missions on the territory of Kosovo, forcing that mission, which was one of the few successful ventures in the administration of this crisis, to close down. Finally, Belgrade opposed the Rambouillet agreement on Kosovo, and it denounced the provisions of the Ahtisaari Comprehensive Proposal. Overall, therefore, Belgrade participated in the various international attempts of generating internationally supported outcomes during the various phases of the crisis, but it never genuinely engaged. Rather, its participation appeared limited to the point of keeping negotiation ventures in place when that appeared useful to deflect international pressure.

After this pattern had run consistently over the two decades of the Kosovo crisis, the question ultimately arose whether the organized international community, which had invested billions in stabilizing the territory through the UN governance mission after the 1999 conflict, would now, finally, be ready to impose a settlement. The outcome of the year-long Vienna negotiations, the Comprehensive Proposal put forward by UN Special Envoy Martti Ahtisaari, had been developed as a balanced solution with the support of the international Contact Group (including Russia) and under the flag of the United Nations. It had been endorsed by the UN Secretary-General. Nevertheless, Belgrade demanded a fresh set of negotiations. This demand, too, was granted through the Ischinger Troika negotiations of 2007, without result. Hence, the question arose whether the organized international community, acting through the UN Security Council, would now have the capacity to impose a settlement without Yugoslav consent.

[39] See below Chapter 3, Section II.