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The Long Intervention in Kosovo: a Self-Determination Imperative?

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Abstract

This paper argues that in order to understand the willingness of many states to recognise Kosovo as a new state, an act that flies in the face of the post-war consensus on the illegality of secession, we need to return to the 1998-99 Kosovo crisis and address the dynamics that informed foreign intervention at that time. We will argue that this intervention was motivated as much by a self-determination imperative – whereby foreign powers sought a detailed realignment of the Yugoslav constitution – as by humanitarian concerns.

Keywords

Kosovo, international law, SFRY, FRY, Yugoslavia, self-determination, statehood, recognition of states, NATO, Rambouillet, humanitarian intervention, sovereignty, Badinter, International Court of Justice

The Long Intervention in Kosovo: a Self-Determination Imperative?

STEPHEN TIERNEY

1. Introduction

In this chapter it will be argued that in order to understand the willingness of many states to recognise Kosovo as a new state, an act that flies in the face of the post-war consensus on the illegality of secession¹, we need to return to the 1998-99 Kosovo crisis and address the dynamics that informed foreign intervention at that time. We will argue that this intervention was motivated as much by a self-determination imperative – whereby foreign powers sought a detailed realignment of the Yugoslav constitution – as by humanitarian concerns.

Much of the literature on foreign intervention in the Federal Republic of Yugoslavia ('the FRY')² at the time of the 1998-99 Kosovo³ crisis addressed both the nature of the intervention and its length in fairly narrow terms. In respect of the latter issue, the intervention was generally taken to have begun with NATO's aerial bombardment which commenced upon 24 March 1999 (with the bombardment, if not the intervention, ending on 10 June 1999); while in terms of the nature of the intervention, debate about the legality and/or the justifiability of NATO's bombing campaign has largely revolved around its construction as a purported instance of 'humanitarian intervention', thereby confining the debate concerning both the nature and the legitimacy of western activity within the by now well-established discourse on humanitarian law. The sides of this debate aligned roughly as follows: on the one hand there were those who have sought to justify the air assault by arguing that it was essential to prevent a 'humanitarian catastrophe' in terms of refugee movements resulting from a campaign of 'ethnic cleansing' orchestrated by the FRY security forces.⁴ On the other hand there were two main (and over-lapping) arguments which

¹ Jia, B.B., 'Independence of Kosovo: A Unique Case of Secession?' *Chinese Journal of International Law* 8 (2009): 27-46.

² Five states emerged from the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). On 27 April 1992 two of the six republics of the SFRY – Serbia and Montenegro – formed the Federal Republic of Yugoslavia which was considered by the EC Peace Conference Arbitration Commission to be a new state. Conference on Yugoslavia Arbitration Commission (hereinafter the Badinter Commission), *Opinions on Questions Arising from the Dissolution of Yugoslavia*, (1992) Opinion No. 9. The FRY was recognised by member states of the European Community following the Dayton Agreement of 14 December 1995. The other four republics became independent states: Bosnia-Herzegovina, Croatia, Macedonia and Slovenia.

³ On the question of nomenclature and in particular toponymes, the 1974 Federal Constitution of the SFRY referred to 'Kosovo'. Kosovo, however, is generally known to Serbs as 'Kosovo-Metohija'. As with so many of the internecine conflicts in the Balkans, place names carry great political significance. Metohija is a Greek word which indicates part of a district which was Orthodox Church property. E. Kofos, "The Two-Headed Albanian Question", in *Kosovo: Avoiding Another Balkan War* ed. T. Veremis and E. Kofos (ELIAMEP: Athens, 1998), 48. For Kosovo Albanians, the preferred term is Kosova, an Albanian name which describes it as an ethnically Albanian land (Kofos at 48). Throughout the crisis, the name Kosovo was used by most members of the international community including the United Nations Security Council (e.g. in Resolution 1244 (1999) which authorised an international civil and military presence in Kosovo) and this name will be used here.

⁴ Antonio Cassese, "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of*

considered the intervention to be unjustifiable on ‘humanitarian’ grounds. These suggested either that humanitarian intervention without Security Council authorisation is illegal under international law;⁵ or that any legitimacy claimed for the intervention, whether moral or legal, was undermined by the fact that the western powers were motivated by strategic rather than humanitarian concerns.⁶

This chapter will argue that the intervention should not be addressed in such a temporally and substantively limited way, and that its legality in fact ought to be addressed beyond the exclusive confines of the humanitarian intervention narrative, an approach that will help us come to terms with the international response to Kosovo’s declaration of independence on 17 February 2008. On a temporal level, it seems that, given the intensity of the international involvement in FRY’s affairs from March 1998 onwards, any ‘intervention’, whether humanitarian or otherwise, should properly be considered to have taken place over this year-long period, and not simply when NATO’s bombing began. Although the bombing campaign clearly represented a different order of intervention, the period from March 1998 saw an intense process of coercive diplomacy which included, from August 1998 onwards, threats that force would be used.⁷ Secondly, in substantive terms, it would appear that the agenda of the Western powers throughout this period was not exclusively, or even perhaps primarily, driven by humanitarian concerns. That is not to say that there was not a humanitarian problem – certainly from the summer of 1998 onwards, over 200,000 Kosovars were displaced from their homes, and between January and March 1999 this problem intensified⁸ – but it is equally clear that the diplomatic endeavours of the various international organisations went beyond attempts either to bring about an end to the military conflict between the FRY and the Kosovo Liberation Army (KLA), or to alleviate humanitarian problems. The international community in fact sought to broker an overall political settlement, and to this end in both October 1998 and March

International Law 10 (1999): 23-30; Abraham Sofaer, “International Law and Kosovo”, *Stanford Journal of International Law* 36 (2000): 4; and The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), 4 (the Independent International Commission on Kosovo is hereinafter referred to as the ‘IIC’). Even the IIC report which supported the intervention said it was “illegal but legitimate”, *The Kosovo Report* at 4, a position also taken by a UK House of Commons Foreign Affairs Committee Report – HC Foreign Affairs Committee Fourth Report, 23 May 2000, para. 138. For other opinions which consider the bombing to have been unlawful but which are otherwise sympathetic to NATO’s motivations see, Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects” *European Journal of International Law* 10 (1999): 1-22, Michael J. Glennon, “The New Interventionism: The Search for a Just International Law” 78 *Foreign Affairs* 2 (1999). See also, Nico Schrijver, “NATO in Kosovo: Humanitarian Intervention turns into Von Clausewitz War” *International Law Forum* 1 (1999): 155-159.

⁵ Jonathan I. Charney, “Anticipatory Humanitarian Intervention in Kosovo,” *American Journal of International Law* 93 (1999): 835-6.

⁶ Among those sceptical of the idea that NATO and others were motivated by humanitarian concerns include: Noam Chomsky, *A New Generation Draws the Line: Kosovo, East Timor and the Standards of the West* (New York: Verso, 2001); Robert M. Hayden, “Humanitarian Hypocrisy,” *East European Constitutional Review* 8 (1999): 91-96; Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), 36.

⁷ Going back further, in many ways the ‘long intervention’ has its origins in the dissolution of the Yugoslav state in the early 1990s. The Dayton Accord, the continuing presence of the UN in Bosnia-Herzegovina, and the ongoing work of the International Criminal Tribunal for the former Yugoslavia are all examples of sustained ‘intervention’ in the former-Yugoslav lands by the international community. Below we will discuss how the fall-out of Yugoslavia’s collapse, in particular the Bosnian war, helped shape the approach taken by international actors from 1998-9. It seems that NATO’s bombing campaign in Kosovo requires to be set within this broader context.

⁸ UNHCR figures cited by IIC Report, note 4 above, 82.

1999 (the latter occasion being the Rambouillet forum) the Western powers attempted to impose a model of autonomy for Kosovo which was drafted by them, and which, if accepted by Belgrade, would have amounted to nothing less than an externally imposed re-working of the constitutions of Serbia and the FRY. Finally it is also important to reconsider what is meant by the term ‘intervention’ itself. Certainly it may involve the use or threat of force, but it should also be broad enough to include the use of coercive diplomacy, including but not exhausted by the use of economic and financial sanctions. It is important to recognise that intervention can take different forms and that diplomacy of this kind when exercised by powerful states or international actors can impact upon state the reality of sovereignty. Martin Loughlin discusses sovereignty as having both a legal and political dimension. These he defines, respectively, as ‘competence’ representing legal ‘authority’, and ‘capacity’ representing political ‘power’.⁹ While coercive diplomacy may not affect a state’s legal competence to control its territory, it can certainly impinge upon its political capacity; and to ignore this political dimension is to fall into what Neil Walker terms sociological naïveté.¹⁰ For example, powerful states can control trade terms for errant states, and organisations like NATO and the European Union can use membership of important economic and political bodies as ways of influencing state behaviour.

In this chapter it is intended to explore how Kosovan autonomy became such an important driving-force behind Western intervention, to the extent that this issue, in addition to humanitarian problems in Kosovo, was instrumental in the NATO decision-making process which resulted in the bombing campaign of March 1999 and a factor that helps explain how Kosovo has moved to the verge of statehood today with the complicity of the Western powers.¹¹ The pressure exerted upon the FRY to reach an autonomy settlement with Kosovo begs the question: why should the internal constitutional arrangements of the FRY have been a source of such international concern? In a sense the intervention in Kosovo, with its strong autonomy dimension, recalls Hurst Hannum’s argument set out in 1990 that the, “right of autonomy”, was emerging as, “a new principle of international law... in the interstices of contemporary definitions of sovereignty, self-determination, and the human rights of individuals and groups.”¹² This chapter will address the West’s intervention from this perspective since, at the very least, both humanitarian and autonomy concerns combined in driving the international agenda.¹³ It has even been suggested that NATO’s intervention represents a ‘nexus’ between the principle of self-determination and the developing law of humanitarian intervention in terms of their ‘nature and

⁹ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 84.

¹⁰ Neil Walker, “Sovereignty and Differentiated Integration in the European Union” *European Law Journal* 4 (1998): 255-388.

¹¹ On 18 February 2008 the EU presidency announced that member states were free to decide individually whether to recognise Kosovo's independence; most have done so.

¹² Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, PA: University of Pennsylvania Press, 1990), 473. References to ‘autonomy’ in this chapter are very case specific and allude to particular models of self-government which were advanced specifically for Kosovo; as such the word is used as, “a relative term which describes the extent or degree of independence of a particular entity, rather than defining a particular level of independence which can be designated as reaching the status of ‘autonomy’”. Hurst Hannum and Richard B. Lillich, “The Concept of Autonomy in International Law” *American Journal of International Law* 74 (1980): 858-889.

¹³ It perhaps also reflects the fact that in recent years there has developed within Europe, particularly in light of the collapse of Yugoslavia, Czechoslovakia and the USSR, a growing emphasis upon autonomy for national minorities as a political and legal priority, a point returned to in the conclusion below.

content'.¹⁴ Whether or not we can go as far as this is not clear, but it does seem that the 'autonomy dimension' in the West's approach to Kosovo ought to be treated seriously.

In Part 2, the story of Western involvement from March 1998 to the end of that year will be re-traced in order to illustrate just how pervasive was the determination of the international community, not only to end the military conflict and ameliorate humanitarian suffering, but to secure a political resolution to the perceived problem of Kosovo's constitutional status. In Part 3 it will be suggested that recent Yugoslav history, and in particular the lingering international role in the former-Yugoslav lands by the late '90s, helps explain why, in the case of Kosovo, the international community reacted in the way that it did, when similar pressure has not been brought to bear on other states throughout the world which deny autonomy to their internal minorities. Among the factors which seem to have motivated the Western powers were: first, the recent memory of the UN's failure to stop the internecine wars which characterised the SFRY's dissolution (particularly the war in Bosnia), and the way in which the European Community's approach to state recognition in the wake of that dissolution had left Kosovo as perhaps the most prominent loser in this recognition process; and secondly, a concern on the part of the international community with the way in which Kosovan autonomy, previously entrenched in the SFRY constitution of 1974, had been emasculated from 1989 onwards by both Serbia and the FRY in a process which served to deny Kosovo Albanians both the minority rights and the right of internal self-determination which the European Community arbitration process in the early 1990s had sought to guarantee.¹⁵

2. The Long Intervention: March 1998-March 1999

It is the contention of this chapter that throughout the twelve month period leading to the NATO bombing campaign, the international community was driven as much by a politico-constitutional as a humanitarian agenda. Despite this fact, it is easy to see how the gradual development from March 1998 onwards of a Western strategy in respect of Kosovo has been conceptualised almost exclusively in humanitarian terms. This is largely a consequence of the way in which the international community (and latterly NATO in particular) presented justifications for intervening in the internal affairs of the FRY based upon the need for conflict control and for the alleviation of humanitarian problems. This construction of a humanitarian intervention agenda in itself resulted from a perception that the only legal basis which could be turned to in order to overcome both the prohibition on the use of force and the protection of the FRY's sovereignty and territorial integrity under international law, was a humanitarian one. Certainly, there is no doubt that humanitarian concerns were genuine ones. For example, in March 1998 the initial trigger for the West's response clearly was the deterioration of the security situation in Kosovo, and, in particular, the clamp-down by FRY security forces on the operations of KLA militants – a clamp-down which resulted in further conflict and an increasingly tense refugee situation. As reports emerged in March-April, of a growing cycle of violence between the FRY and

¹⁴ Dajena Kumbaro, *The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention, Final Report* (NATO Office of Information and Press, 2001), 66.

¹⁵ Below both Kosovo's status as an 'autonomous province' of Serbia and the work of the arbitration process will be discussed.

the increasingly militant KLA, the international community began to respond. Aside from the motivations behind Western involvement, it is also interesting that in the early stages of international pressure and throughout the coming months, the diplomatic efforts which were put in place would be marked by a high degree of co-operation and integration amongst a range of international and regional bodies. It is submitted that this concerted campaign of collective diplomacy of itself constitutes a form of intervention in the FRY's affairs.

The lead was taken initially by a Contact Group of the relevant power blocks of the USA, Russia and the EU (represented by the UK, France, Germany and Italy);¹⁶ and throughout the year to March 1999, this Group would attempt to build a coherent strategy which involved a variety of different organisations, in particular the UN Security Council, the Organisation for Security and Co-operation in Europe (OSCE), the European Union and NATO.¹⁷ Although the initial impetus for its establishment was the worsening security position, it was clear from the time of the Contact Group's early work that the removal of Kosovan autonomy by Belgrade (a process which, as will be discussed below, had taken place since 1989) was also of considerable concern; and even at this early stage, as diplomatic pressure began to be exerted, a revision of Kosovo's constitutional status was high on the international agenda. For example, the initial Contact Group Statement of 9 March 1998 set out a list of proposals by which it hoped to help resolve the violence in Kosovo. This listed various practical and immediate steps which are common in diplomatic initiatives of this type, such as a call for cessation of hostilities on both sides and an end to all forms of external support for such hostilities. What is notable, however, is that at this early stage the Contact Group also made clear its intention to secure a political settlement and to guarantee greater autonomy for Kosovo.¹⁸ Although this commitment was hedged with the qualification that any such autonomy arrangement should not affect the FRY's territorial integrity, the March statement certainly represented more than a simple attempt to bring about a cessation of hostilities; at the very least it also served to recognise that the deteriorating military situation resulted from Kosovo's emasculated constitutional status, and that the achievement of any long-term solution would require that this issue be addressed. The remainder of this section of the chapter will discuss how the issue of autonomy for Kosovo remained high on the international agenda through to the autumn of 1998 in terms of both the attempts to secure a diplomatic settlement in the spring and summer of 1998, and the agreements secured in October 1998 (which in the end were not fully implemented).

¹⁶ An initial meeting of the Foreign Ministers of Contact Group states was held in London. Office of the High Representative, Statement of the London Contact Group Meeting, 9 March 1998. The Contact Group had in fact been established in April 1994 as the Contact Group for Bosnia and Herzegovina. See *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, Cambridge International Document Series, Volume II, ed. Heike Kreiger (Cambridge: Cambridge University Press, 2001), 115.

¹⁷ An example of this was the effort undertaken by the Contact Group to secure Security Council backing for its initiatives. As early as March 1998 the Contact Group requested the Security Council to impose an arms embargo on the FRY which was eventually secured through Security Council Resolution 1160, UN Doc. S/RES/1160 (31 Mar. 1998). Another example is the way in which the Contact Group referred frequently to SC Res. 1160 (31 Mar. 1998) and SC Res. 1199, UN Doc. S/RES/1199 (23 Sept. 1998) in both framing its efforts to resolve the crisis and in claiming legitimacy for its role as mediator.

¹⁸ For example the Statement of 9 March proposed a new diplomatic mission by former Spanish Prime Minister Felipe Gonzalez.

a. Kosovo: The Self-Determination Dimension

The initial strategy pursued by the Contact Group in the Spring of 1998 was to pressurise the FRY into entering negotiations with moderate Kosovars led by Ibrahim Rugova of the Democratic League of Kosova (LDK) who distanced himself from the militant strategy of the KLA (political divisions amongst Kosovars themselves would remain a problem for international negotiators throughout the crisis and beyond). Although the Contact Group was keen that any such negotiations should involve international mediation (in particular that of Felipe Gonzalez who was nominated as the Personal Representative of the OSCE Chairman-in-Office),¹⁹ this plan met with firm resistance from the FRY government,²⁰ which remained consistently hostile throughout the crisis to external interference in what it considered to be an issue of internal security.²¹ Instead, Belgrade responded to the Contact Group's demand for autonomy for Kosovo with a referendum on 23 April 1998. This poll was held exclusively within Serbia (which included Kosovo within its republican borders). This served as a clear statement that Kosovo was not a republic within the FRY but was simply a province of Serbia, therefore reinforcing Kosovo's weak constitutional status vis-à-vis the FRY as a whole. In the referendum, the Serbian people were asked for their views on international mediation, and they responded with a message of overwhelming opposition to the idea, thereby creating a mandate for Belgrade's resistance to Contact Group pressure.²² At this early stage, with the Contact Group seeking autonomy for Kosovo, and Belgrade responding with a referendum, the dispute between FRY and the western powers crystallised to a large extent around the issue of self-determination. On the one hand, the Contact Group, in arguing for greater internal autonomy for Kosovo, was suggesting implicitly if not explicitly that the people of Kosovo had a right to 'internal' self-determination, and that this right was not being properly accommodated by the state; while, on the other hand, Belgrade considered that Kosovars did not constitute a separate 'people' and that the relevant self-determining units were either the people of the FRY or the people of Serbia (both of which entities incorporated Kosovo). Working on the assumption that Serbians were the relevant 'people' for the purposes of internal self-determination, the Yugoslav authorities could point to the April referendum as a clear expression of public faith in the Serbian authorities to reject external interference. Furthermore, throughout the crisis, the federal government could rely upon another important feature of the right to self-determination under international law: namely, the way in which references to it in international instruments are so often juxtaposed with concomitant commitments to the territorial integrity of the state – a fact which at the

¹⁹ See UN Doc. S/1998/608 (2 July 1998).

²⁰ "Milosevic Rejects Mediation, Defies Sanctions," *Reuters*, 8 May 1998.

²¹ In this early period the FRY's resistance was maintained despite considerable pressure from the US which was the major player in the eyes of both Belgrade and Pristina. For example, in May lengthy talks took place between President Milošević and US envoy Richard Holbrooke, "US Sends Peace Broker Holbrooke to Yugoslavia," *Reuters*, 9 May 1998; "US Envoy Holbrooke Starts Kosovo Mission," *Reuters*, 10 May 1998. For a discussion of FRY intransigence on the question of international mediation see Kofos, note 3 above, 83.

²² "Serbs vote on Kosovo amid fears of Violence," *Reuters*, 23 April 1998. According to the Serbian Referendum Commission almost 95% voted against intervention (although the referendum was boycotted by ethnic Albanians) – "Serbs vote 'No' to West in Kosovo," *Reuters*, 23 April 1998. The referendum took place one week before a report by the UN Secretary-General to the Security Council, and was criticised by the OSCE as being a diversionary tactic and for having, "a disruptive effect on an already inflamed situation". (Statement of the OSCE Troika, 8 April 1998). UN Doc. S/1998/361, (1998), Annex II, para. 6.

very least precluded any prospect of independence for Kosovo without the FRY's consent (such a commitment to the FRY's territorial integrity was included in the Contact Group's March statement, and was thereafter repeated frequently by international organisations).

This linkage between the principles of territorial integrity and self-determination highlights the legal and practical difficulties which any international body or group of states face in attempting to pressurise a state into agreeing to autonomy for an internal minority when the state resists such pressure and is able to demonstrate strong popular opposition to any external involvement in such a process of constitutional accommodation. At a deeper level, it also demonstrates the tension or paradox within the principle of self-determination which can, through its commitment to territorial integrity, to some extent seemingly belie the commitment to self-government for all peoples which it claims to assert.²³ In this context, the republic-wide referendum held by Serbia echoed that earlier referendum held in Bosnia in 1992 referred to above on the recommendation of the Badinter Commission.²⁴ Just as the principle of self-determination was used to defend the result of this referendum, and hence Bosnia's territorial integrity, in the face of secessionism by Bosnian Serbs, so too could Serbia rely on the referendum of April 1998 as legitimising its opposition to secessionist Kosovars.²⁵ Throughout the crisis, the UN Security Council was also aware of this difficulty, and in its subsequent endorsements of greater autonomy for Kosovo it too confirmed the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.²⁶ It is no surprise, therefore, that the hard and fast linkage between the principle of self-determination and that of territorial integrity comes under criticism. For example, Hurst Hannum is one commentator who, in the Kosovo context, has recently suggested that in an international quest for greater autonomy for an oppressed group, the oppressor state's right to territorial integrity should not be treated as an absolute consideration: "Why should we assume

²³ Martti Koskenniemi addresses the issue from another perspective – that of law's credibility. If self-determination is open to reinterpretation so as to accord a right to statehood in response to new generations of group rights claims this may expose international law's inherent vulnerability since it could lead to the meaning of self-determination as a legal principle being too readily open to processes of re-configuration which in the end could undermine the very concept of statehood itself. Martti Koskenniemi, "Theory, Implications for the Practitioner" in *Theory and International Law: an Introduction*, eds. P. Allott *et. al.* (London: British Institute of International and Comparative Law, 1991), 7.

²⁴ Arbitration Commission, 31 ILM, 1488, Opinion No. 4 para. 4.

²⁵ Admittedly the situation was, from another perspective, in fact, very different given that Bosnia and Herzegovina prior to its recognition had promised autonomy for Bosnian Serbs which the FRY and Serbia were denying to Kosovo. Nonetheless the Bosnian experience does call into question the decision of the states of the European Community to recognise only former Yugoslav 'republics' as states through the application of the principle of *uti possidetis juris* to republican borders (this will be discussed further below). See also J. Laponce, "National Self-Determination and Referendums: the Case for Territorial Revisionism," *Nationalism and Ethnic Politics* 7 (2001): 33-56. The use of referendums both in Serbia and in Bosnia highlight how these devices can exacerbate problematic situations by polarising rather than reconciling divergent positions within a territory. Margaret Moore, "Normative Justifications for Liberal Nationalism: Justice, Democracy and National Identity," *Nations and Nationalism* 7 (2001): 1-20. Michael Lusztiq and Colin Knox, "Good things and small packages: lessons from Canada for the Northern Irish Constitutional Settlement," *Nations and Nationalism* 5 (1999): 543-563.

²⁶ It supported the Contact Group's attempts to secure a peaceful resolution of the conflict which would include an enhanced status for Kosovo, involving a substantially greater degree of autonomy and meaningful self-administration. SC Res. 1160, UN Doc. S/RES/1160 (31 Mar. 1998), para. 5; SC Res. 1199, UN Doc. S/RES/1199 (23 Sep. 1998), (preamble); and SC Res. 1203, UN Doc. S/RES/1203 (24 Oct. 1998), preamble.

that the frontiers that existed at the dawn of a new millennium should be maintained forever. Aren't other values – preserving cultural identity, increasing meaningful and effective participation – equally important?"²⁷ In many ways the Kosovo crisis even going back to the 1990s already raised questions for the discipline of international law in highlighting so starkly the paradoxes and inconsistencies which attend the right of self-determination, questions that would only come to a head as the final status of the territory became an imperative concern.²⁸

b. Towards a Political Solution

As has been mentioned, the year from March 1998 to March 1999 was notable for the degree of international co-operation and the development of an integrated strategy with which the international community sought to approach the Kosovo problem. This is evident in the use of sanctions which began with the Contact Group calling for an arms embargo in March 1998, and which also led to the imposition of economic sanctions as the Contact Group attempted to encourage an agreement on Kosovo's status. This approach was set out by the Contact Group at its meeting of 9 March as follows: "Unless the FRY takes steps to resolve the serious political and human rights issues in Kosovo, there is no prospect of any improvement in its international standing. On the other hand, concrete progress to resolve the serious political and human rights issues in Kosovo will improve the international position of the FRY and prospects for normalisation of its international relationships and full rehabilitation in international institutions."²⁹ In this regard President Milošević was given an ultimatum, "to take rapid and effective steps to stop the violence and engage in a commitment to find a political solution to the issue of Kosovo through dialogue."³⁰

Since the Dayton Agreement concluded on 14 December 1995, and largely in consequence of the unsatisfactory situation in Kosovo, an 'outer wall' of United States-led sanctions against the FRY had remained in place which prevented the FRY's admission to the World Bank and the IMF; and now pressure mounted to extend these restrictions. Initially in April 1998, as tension grew, the Contact Group imposed a freeze on FRY assets held abroad.³¹ Tying these sanctions to its wider agenda, the Group confirmed that, on the one hand, the freeze would be lifted immediately if Belgrade took the necessary steps, as outlined by the Group, to engage in political dialogue with the Kosovo Albanian leadership; but that, on the other hand, a failure to engage in dialogue would result in further sanctions aimed at halting new investment in the FRY.³² In other words, sanctions were being used to pressurise Belgrade into an autonomy agreement. Throughout the spring of 1998 it was

²⁷ Hurst Hannum, *Territorial Autonomy: Permanent Solution or Step Toward Secession?* (ZEF Bonn: Centre for Development Research, 2000), 4.

²⁸ P. Hilpold, "The Kosovo Case and International Law: Looking for Applicable Theories," *Chinese Journal of International Law* 8 (2009): 47-62.

²⁹ Contact Group Statement, 9 March 1998, para. 8.

³⁰ Treating Milošević as personally responsible for the situation, the Contact Group made clear that he should within 10 days: "...commit himself publicly to begin a process of dialogue... with the leadership of the Kosovar Albanian community and co-operate in a constructive manner with the Contact Group in the implementation of the actions specified [in the Statement]... which require action by the FRY government." Contact Group Statement 9 March 1998, para. 7.

³¹ This was imposed immediately on 29 April 1998. "Big Powers back New Sanctions on Yugoslavia," *Reuters*, 29 April 1998.

³² *Ibid.* It should be noted that there was a general lack of enthusiasm for these measures from Russia, which indicated an underlying tension within the Contact Group which would eventually split the Group with the commencement of NATO's air-strikes in March 1999.

repeatedly evident that sanctions were being employed as both threat and inducement in an attempt to broker a political deal. For example, since negotiations had not begun by 9 May 1998, on that date the Contact Group indicated that it would impose the investment ban on the FRY;³³ however, two weeks later, on 23 May, with talks having begun between Milošević and Rugova on 15 May, the Group eased sanctions and decided not to put this ban into effect.³⁴

The Contact Group's strategy on the use of sanctions was endorsed by other actors. For example, the UN Security Council followed the Contact Group lead, not only by imposing an arms embargo, but also by endorsing its attempt to produce a political settlement.³⁵ Hence both Security Council Resolutions 1160 and 1199 had three main aims: the two short-term goals of conflict control and alleviation of the growing humanitarian crisis; and thirdly, the more ambitious objective of securing a political resolution to the dispute. In this context, the Security Council called upon the authorities in Belgrade and the leadership of the Kosovar Albanian community, "urgently to enter without preconditions into a meaningful dialogue on political status issues".³⁶ Furthermore, it set out its intention to review the situation on the basis of reports by the Secretary-General who would assess whether the Government of the FRY was co-operating with the UN's demand that it begin a substantive dialogue,³⁷ which should include the participation of an outside representative or representatives (notably of course also a Contact Group demand).³⁸ The Security Council's call for talks on autonomy again raises the issue of self-determination in relation to Kosovo. In a report written for NATO, Dajena Kumbaro argued that the call in SC Res. 1160 for a meaningful dialogue on political status issues, and its, "support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration",³⁹ is recognition of Kosovo's status as a 'people' with a right of 'internal' self-determination.⁴⁰ Certainly Security Council resolutions

³³ "West Imposes Sanctions on Yugoslavia," *Reuters*, 9 May 1998. Once again Russia dissented from the decision.

³⁴ The Group undertook to consider later in May whether to continue with the freeze on the FRY funds held abroad as well as with the other sanctions still in place – "Serbian Sanctions put on Hold," *Reuters*, 19 May 1998. The Contact Group was now faced with a situation in which it had relaxed sanctions against the FRY only to see the Kosovo Albanians suspend the talks scheduled for June 5 in the face of the advancement by Serbian/FRY forces on civilian population centres, a scenario which prompted Albania's Foreign Minister Pascal Milo to comment: "Unfortunately the Contact Group of countries has given Milosevic much more carrot than stick." "Big Powers plan Kosovo Meeting Next Week," *Reuters*, 4 June 1998. It was widely suspected that Belgrade was in fact using the talks as a smoke-screen to continue its military campaign in Kosovo whilst at the same time benefiting from an easing of sanctions.

³⁵ It would also in due course endorse the October Agreements which were eventually brokered by the Group in the autumn of 1998 (see below).

³⁶ SC Res. 1160, UN Doc. S/RES/1160 (31 Mar. 1998), para. 4.

³⁷ *Ibid.* para 16 (a).

³⁸ *Ibid.* para. 16. Reiterating that the FRY could either improve or weaken its international standing by the action it took, the Resolution affirmed that: "concrete progress to resolve the serious political and human rights issues in Kosovo will improve the international position of the Federal Republic of Yugoslavia and prospects for normalisation of its international relationships and full participation in international institutions", (para 18), but also affirmed that, "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures" (para 19).

³⁹ SC Res 1160, UN Doc. S/RES/1160, para 5.

⁴⁰ Kumbaro, note 14 above, 40.

throughout the period to March 1999 combined concerns with the worsening security situation with calls for Kosovar autonomy.⁴¹

Both the EU and OSCE were also involved in attempting to stimulate dialogue between the parties in terms of paragraph 16(a) of Res. 1160. Belgrade continued to insist that negotiations should be conducted by the Republic of Serbia and not by the FRY, which was another way of reinforcing the point that Kosovo was constitutionally part of Serbia. Kosovo Albanians objected to this arrangement since they wanted to negotiate directly with the federal FRY government. Another problem remained in Belgrade's opposition to the involvement of an independent third party in negotiations; instead, Serbia offered 'mediation' by a representative of the FRY government and insisted that a solution must be found within the constitution of the Republic of Serbia. On 27 March 1998, the Chairman-in-Office of the OSCE Bronislav Geremek visited the FRY where he met authorities in Belgrade, Pristina, and Podgorica (the capital of Montenegro). During his talks with President Milošević in Belgrade, Milošević confirmed that the FRY would not be ready to accept OSCE demands concerning international mediation before taking back its seat in the Organisation. He indicated that he would be willing to negotiate with Mr. Gonzalez, on the condition that Gonzalez's mandate would be limited to the question of re-admittance of the FRY to the OSCE. As far as the EU was concerned this amounted to the establishment of a precondition,⁴² which the Security Council had declared to be unacceptable in paragraph 4 of Resolution 1160 (1998). In this early period, therefore, Western ire within both the EU and OSCE was raised as much by the failure to make progress towards a constitutional agreement as by humanitarian concerns.⁴³

As the security situation deteriorated in the summer of 1998,⁴⁴ and in light of the continuing failure on the part of the FRY to initiate talks, the Contact Group began to draw up a new peace plan which was to involve a much more detailed level of international pressure, including an elaborate plan for a constitutional solution to the perceived problem of Kosovo's status. For example, a Contact Group statement of 12 June 1998 set out further demands,⁴⁵ and by 9 July the group had prepared an outline

⁴¹ SC Res. 1199, UN Doc. S/RES/1199 (23 Sep. 1998) and SC Res. 1203, UN Doc. S/RES/1203 (24 Oct. 1998).

⁴² UN Doc. S/1998/361 (1998), Annex 1, paras. 2-4. The OSCE took the same view, (Annex II para. 4).

⁴³ It would, however, be artificial to attempt to separate these two issues too rigidly; one of the reasons a political settlement was sought was that it would help solve the humanitarian problems. Nonetheless the degree of international immersion in the details of such a solution indicated Western preoccupation with the constitutional issue.

⁴⁴ A large number of FRY troops were moved into Kosovo on 13 June. UN Doc. S/1998/470 (1998), paras. 19-20. Throughout the Spring and Summer of 1998 the Security Council continued to receive the Secretary-General's reports pursuant to Res. 1160, S/RES/1160 (31 Mar. 1998), which described mounting tension on the ground and continued fighting, echoing the findings of the EU and OSCE, e.g. UN Doc. S/1998/470 (1998), paras. 13-15. This report also noted human rights abuses by both sides (paras. 16-18), and an increase in the number of internally displaced persons leading to a significant flow of refugees to Albania from May onwards. Furthermore, the Secretary General identified the failed talks of May 1998 and the continued refusal of Belgrade to accept the participation of Felipe Gonzalez as problematic, and he expressed his grave concern that in light of this failure, mounting violence in Kosovo might overwhelm political efforts to prevent further escalation of the crisis. UN Doc. S/1998/470 (4 June 1998). See also: UN Doc. S/1998/608 (1998), para. 10; and *Information on the Situation in Kosovo and on Measures taken by the Organisation for Security and Co-operation in Europe, submitted pursuant to paragraphs 13 and 16 of SC Resolution 1160 (1998)*, UN Doc. S/1998/712 (1998), paras. 11-14.

⁴⁵ A British Foreign Office spokesman announced the demand by Contact Group ministers of an immediate cessation of all action by the security forces against civilians, unimpeded access for

peace agreement based on a plan of autonomy for Kosovo. This plan would have entailed substantial self-government for Kosovo but continued to rule out independence as an option.⁴⁶ Throughout the summer this plan was the basis of increasingly urgent and proactive international demands for a detailed constitutional solution; but, once again, as had occurred in May, moves towards political dialogue were soon undone by events on the ground, and by the end of July fighting had intensified as a result of a massive Serbian/FRY offensive against the KLA, which led ultimately to the collapse of this initiative.⁴⁷

This offensive reminded the Security Council of the need to force the political pace, and, in yet another display of the international co-operation which prevailed at this time, the Security Council endorsed the Contact Group's June initiative by way of Res. 1199 (1998).⁴⁸ One particular catalyst for this further Security Council resolution was the Secretary-General's report to the Security Council of 4 September, which contained a dramatic depiction of the declining humanitarian and security situation resulting from the ongoing summer offensive against the KLA. The prospect of new talks had further diminished from the already unpromising position which had prevailed in the spring of 1998,⁴⁹ and, therefore, in a more urgent tone, Security Council Resolution 1199 called upon the authorities in the FRY and the Kosovo Albanian leadership to enter immediately into a meaningful dialogue.⁵⁰ This resolution echoed several of the Contact Group's demands originally contained in the Group's statement of 12 June 1998, for example: that these talks should take place without preconditions and with international involvement; that they should involve

international monitors and humanitarian organisations to Kosovo, the right of refugees to return to their homes and rapid progress towards a dialogue with the Kosovo Albanian leadership. Contact Group Statement, 12 June 1998. "Russia Opposes NATO Force against Serbia," *Reuters*, 12 June 1998.

⁴⁶ "Serbian Parties Hail Kosovo Plan, US Warns of War," *Reuters*, 9 July 1999.

⁴⁷ This led to a growing pessimism among the Contact Group powers. "Despair in West as Prospects for Peace Diminish," *Reuters*, 28 July 1998; Kosovo Faces All-out War as Serb Tanks Shell Rebels," *Daily Telegraph* (London), 27 July 1998. On 23 July the OSCE reported that it had failed to persuade the FRY government to allow a permanent OSCE diplomatic mission to return to Kosovo or to accept the mediation of Felipe Gonzalez without a restoration of Yugoslavia's full membership of the OSCE. "Milosevic Refuses Permanent OSCE Mission," *Reuters*, 23 July 1998. By 5 August Reuters reported that the West was growing increasingly frustrated and that again NATO was drawing up contingency plans. "West warns Milosevic on Kosovo," *Reuters*, 6 August 1998. On 6 August the Albanian parliament appealed to the international community to intervene militarily in Kosovo, "Albania urges Western Military Action in Kosovo," *Reuters*, 6 August 1998.

⁴⁸ SC Res. 1199, UN Doc. S/RES/1199 (23 Sep. 1998), para. 4.

⁴⁹ The Secretary-General's report in August followed the collapse of the Contact Group's July initiative to broker a settlement, and included a report from the OSCE which highlighted that the Republic of Serbia continued to maintain the precondition that dialogue should be conducted within the framework of both Serbia and the FRY and that the territorial integrity of the FRY should first be guaranteed. UN Doc. S/1998/712, (1998), Annex I, para. 12. The Secretary General's reports were very influential: for example, UN Doc. S/1998/470, (4, June 1998); UN Doc. S/1998/608 (1998); UN Doc. S/1998/712 (1998); UN Doc. S/1998/834 (4 September 1998). His reports continued up until the air-strikes of March 1999: UN Doc. S/1998/912 (3 October 1999); UN Doc. S/1998/1068 (12 November 1998); UN Doc. S/1998/1221 (24 December 1998); UN Doc. S/1999/99 (30 January 1999); UN Doc. S/1999/293, (17 March 1999).

⁵⁰ This resolution adopted much stronger language than Security Council Resolution 1160 (1998) in demanding that all parties cease hostilities. SC Res. 1199, UN Doc. S/RES/1199 (23 Sep. 1998), para. 1. As such it affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region. SC Res. 1199, Preamble.

rapid progress to a clear timetable; and that they should lead to an end to the crisis and to a, “negotiated political solution to the issue of Kosovo.”⁵¹

The worsening situation towards late summer⁵² eventually led to the hardening of the West’s attitude when it came to commitments undertaken by the FRY in October which were secured against the back-drop of a NATO ultimatum on the use of force. This followed the issue on 24 September of an Activation Warning by the North Atlantic Council, which made the prospect of military operations ever more real. The NATO ultimatum was taken seriously by Belgrade and led to a cease-fire and then to a political settlement brokered by Richard Holbrooke.⁵³ The October process had two main elements: first, was a two-part verification agreement whereby the FRY undertook to reduce its forces in Kosovo to pre-conflict levels, and assented to mechanisms by which this process could be verified;⁵⁴ and secondly, (and very significantly given the Contact Group’s agenda over the previous eight months), was the main agreement which envisaged a political settlement to the crisis, signed on October 12.⁵⁵ This latter agreement emerged from the paper prepared by the Contact Group which proposed autonomy for Kosovo within the FRY. It was then promoted by the US Ambassador to Macedonia, Christopher Hill in a process of shuttle diplomacy over the summer of 1998. The substance of the agreement was a guarantee of autonomy for Kosovo for an interim three year period at the end of which the agreement would be re-assessed.⁵⁶ The Contact Group was keen to entrench this settlement quickly and, therefore, the agreement included a public commitment by the FRY to complete negotiations on a framework for a political settlement by 2 November ; by 9 November the detailed rules and procedure for an election were to be agreed, and the election itself was to be held within nine months under OSCE supervision. Finally, the integrated nature of the international approach was further reinforced by the Security Council in Res. 1203 (1998) which endorsed these Agreements.

3. The Dissolution of Yugoslavia and Western Intervention

Having reviewed the intensity of Western efforts to secure an autonomy agreement for Kosovo from spring to autumn 1998, it is interesting to reflect upon why the international community reacted with such dedication and forcefulness in seeking to reach such an autonomy settlement, bearing in mind that the rights of disgruntled minorities elsewhere have not attracted such attention. The recent history of Yugoslavia seems to have been instrumental to the interest which Kosovo generated, since the international community was very conscious both of UN inertia in failing to

⁵¹ SC Res. 1199, para. 3. The Security Council’s language was, by 24 October 1998, to become even more imperative in Resolution 1203 (1998) which stressed the ‘urgent’ need for such dialogue. SC Res. 1203, S/RES/1203 (24 Oct. 1998), para. 5.

⁵² Notably, however, although there were a large number of displaced persons, in terms of the fighting itself Tim Judah comments: “[t]here were few casualties on either side.” Tim Judah, *Kosovo: War and Revenge* (New Haven and London: Yale University Press, 2000), 171.

⁵³ By this agreement the FRY agreed to comply with the demands of the Security Council.

⁵⁴ These two agreements were signed on 15 and 16 October.

⁵⁵ All three agreements were endorsed by Serbia.

⁵⁶ An interim three year settlement was of course central to the Rambouillet Agreement eventually signed by the Kosovo Albanians on 18 March 1999. See Marc Weller, “The Rambouillet conference on Kosovo” *International Affairs* 75 (1999): 219-220, 226 and 244-245

prevent the wars which marked Yugoslavia's collapse (in particular the war in Bosnia), and of the EC's approach to state recognition from which Kosovo was excluded. The removal by both Serbia and FRY of much of the autonomy which Kosovo had enjoyed under the SFRY constitution of 1974, served only to cast Kosovo's misfortune in an even starker light.

a. The Spectre of Bosnia

For the Contact Group, the emerging crisis in 1998 was an unwelcome reminder of the aftermath of Yugoslavia's collapse from 1991-2 and the mistakes of hesitancy and confusion which characterised, in particular, the international reaction to the ensuing war in Bosnia.⁵⁷ There is certainly a sense in which the Western powers, in their approach to the political situation in Kosovo from March 1998, were partly driven by a sense of guilt stemming from the UN's failure to do more to prevent the Bosnian conflict. For example, British Foreign Secretary Robin Cook announced early in the crisis that there should be "no more Bosnias";⁵⁸ while, as the situation deteriorated in April 1998, US Secretary of State Madeleine Albright stated dramatically that, "we are on the road back to hell".⁵⁹ On one level, the memory of Bosnia as a killing field is a fairly obvious motivating factor in the international approach to Kosovo given that it represented a recent event in the same region, and one clearly marked by international inaction. It seems, however, that the fall-out from Bosnia was significant in another sense: namely in the legal context of Yugoslavia's collapse and the international approach to the emergence of new states; a process in which Kosovo felt itself to be the real loser.

It is worth recalling the lead taken by the EC as Yugoslavia collapsed, and to revisit briefly the legal issues involved – in particular, those surrounding the recognition of new states.⁶⁰ The Arbitration Commission established by the EC to adjudicate on the legal implications of the Yugoslavia crisis of the early 1990s, with Robert Badinter the President of the French *Conseil Constitutionnel* as chairman,

⁵⁷ Articles which have chronicled the international response to the collapse of the FRY include: Christine Gray, "Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences," *British Yearbook of International Law* 68 (1997): 155-197; Dominic McGoldrick, "Yugoslavia – The Response of the International Community and of International Law," 49 *Current Legal Problems* 375-394 (1996); S. Stojanovic, "The Destruction of Yugoslavia," *Fordham Journal of International Law* 19 (1995-6): 337-362; Stephen Tierney, "In a State of Flux: Self-Determination and the Collapse of Yugoslavia," *International Journal on Minority and Group Rights* 6 (1999): 197-233; Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," *American Journal of International Law* 86 (1992): 569-607.

⁵⁸ He stated: "We are showing a degree of urgency in Kosovo which was unfortunately not present when the Bosnian crisis broke out in 1991". *The Guardian* (London), 4 March 1998.

⁵⁹ US News On-line World Report 13 April 1998. See also Judah, note 52 above, 150. Stephen Tierney, "The Road Back to Hell: the international response to the crisis in Kosovo," in *Accommodating National Identity: New Approaches in International and Domestic Law* ed. Stephen Tierney (Leiden: Kluwer Law Publishers, 2000), 89-130.

⁶⁰ In many ways the dissolution of Yugoslavia began with events in Kosovo in the late 1980's. See Noel Malcolm, *Kosovo: A Short History*, (Basingstoke: MacMillan, 1998), i. Commentaries on the legal implications of the SFRY's dissolution include: Colin Warbrick, "Recognition of States," *International and Comparative Law Quarterly* 41 (1992): 473-82; Colin Warbrick, "Recognition of States Part 2," *International and Comparative Law Quarterly* 42 (1993): 433-42; Weller, note 57 above; Matthew Craven, "The European Community Arbitration Commission on Yugoslavia," *British Yearbook of International Law* 66 (1995): 333-413; Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union," *European Journal of International Law* 4 (1993): 36-65; Dominic McGoldrick, note 57 above.

declared in its first opinion that the SFRY was dissolving, thereby circumventing the difficult issue of secession.⁶¹ In light of the SFRY's collapse, the Arbitration Commission turned its attention to the recognition of new states in a process which would see Croatia, Slovenia, Bosnia-Herzegovina and Macedonia eventually emerge as independent entities.⁶² What is interesting is that the EC, in the Guidelines it proposed for recognition of new states, decided to include additional requirements which went beyond the minimal standard for recognition of new states laid down in the Montevideo Convention of 1933. Article 1 of this Convention contains what is essentially a value-neutral test of an aspiring new state's viability; in short, this establishes a duty on states not to recognise a new state unless it satisfies fundamental, but largely pragmatic, requirements of statehood. In particular, the new state must be able to demonstrate that it exercises governmental control of a clearly defined piece of territory with a clearly defined population; and hence that it has the capacity to enter into relations with other states.⁶³ The EC super-imposed upon the classical Montevideo Convention test several additional criteria. For example, it required the republics of Yugoslavia which were applying for recognition by EC member states to demonstrate that they had a democratic mandate for independent statehood, and that they had put in place constitutional guarantees for human rights, particularly minority rights. Leaving to one side the question of whether recognition can be constitutive of statehood or is in fact merely declaratory,⁶⁴ as a matter of political reality, recognition by the EC had important consequences for the four republics mentioned, and certainly hastened the process of UN membership for at least three of them. In a sense it is also possible to view the approach taken by the EC to the recognition criteria and its application as a form of intervention, since super-imposing criteria such as democratic and human rights considerations upon the standard recognition principles was a subtle way of directing the constitutional futures of the newly emerging states.⁶⁵ Another example of the way in which recognition was applied politically came in respect of Macedonia where Greek concerns about the new state prevented its full recognition for several years.

The Arbitration Commission's work remained fresh in the minds of Kosovar nationalists who considered it to be unfair. Although the EC had marked new departures in recognition policy by declaring the protection of minority rights by new states to be essential, it had also drawn a line in terms of the type of entity which could seek statehood. Independence was only available to *republics* of the FRY (as defined by the SFRY constitution of 1974) who met the recognition criteria. Applying the principle of *uti possidetis juris* which preserves existing boundaries, the EC determined that for the purposes of its recognition policy, Yugoslavia's internal

⁶¹ Arbitration Commission, Opinion No.1, *International Legal Materials* 31 (1992): 1497. See also, European Community: Declaration on Yugoslavia, *International Legal Materials* 31 (1992): 1485-86, and Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union," *International Legal Materials* 31 (1992): 1486-87.

⁶² The final status of the other two SFRY republics (Serbia and Montenegro) was not settled as far as the EC was concerned until the Dayton Agreement in 1995.

⁶³ Montevideo Convention on the Rights and Duties of States of 1933 *League of Nations Treaty Series* 165, 19.

⁶⁴ In other words the debate as to whether recognition by other states can actually create a state or whether the question of a state's existence is simply one of fact with recognition serving only to evidence that fact.

⁶⁵ Zoran Oklopcic, "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood," *Leiden Journal of International Law* 22 (2009): 677

republican borders would be decisive.⁶⁶ Kosovo, as an Autonomous Province of the Republic of Serbia was not entitled to apply for statehood. On 15 June 1992 the EC stated: “frontiers can only be changed by peaceful means and [the EC states] remind the inhabitants of Kosovo that their legitimate quest for autonomy should be dealt with in the framework of the EC Peace Conference.”⁶⁷ As a consequence, Kosovo had a right only of internal self-determination and its formal application for recognition, delivered in a letter by Dr. Rugova, to the chairman of the peace conference convened by the EC at the Hague, was not considered.⁶⁸

Kosovo’s grievances were increased by the inconsistency of the Western approach to Yugoslavia’s collapse. The Hague conference which met in September 1991, at the very start of the crisis, had initially sought ways to preserve the state of Yugoslavia intact, before in the end being forced to recognise that this was not possible.⁶⁹ The way in which the West had changed its approach in 1991 continued to fuel Kosovan nationalist ambitions for recognition even though the West consistently ruled out this possibility; as the Kosovars reasoned, if the Western powers had changed their minds once they could do so again.⁷⁰ This notion that Kosovo’s status remained to be finalised was further encouraged in Kosovan minds by the Dayton Agreement, where once again Western intervention in the former-Yugoslav lands continued. The creation of two Bosnian entities was widely seen as a stop-gap measure which would only prevent temporarily the incorporation of Serb and Croat regions of Bosnia and Herzegovina within Serbia and Croatia respectively. Again, therefore, the fall-out from Yugoslavia’s collapse seemed to be unfinished, and Kosovars continued to hold out hope for independence in part through the further intervention of the western powers.⁷¹ Furthermore, the substance of the Dayton Agreement was in itself also a source of grievance to Kosovar nationalists who felt that in reality it violated the *uti possidetis* principle set out in the EC’s recognition policy, particularly if the Bosnian Serb entity would one day be permitted to join with the FRY. Whether or not this was a realistic complaint, the wide autonomy accredited to the Republika Srpska suggested that Bosnian Serb aggression had gained for them advantages which Kosovo, despite its discrete constitutional identity under the old SFRY constitution, had not received. As Tim Judah puts it: “While they [Kosovo] had had an entity, which had played its part as a federal unit in the old Yugoslavia, they were now without rights while, in their view, the campaign of genocide led by Bosnian Serb leaders was being rewarded.”⁷² The final insult was that the issue of Kosovo’s status was excluded from the Dayton process; instead, the EC states recognised the FRY as a state despite the process of constitutional centralisation carried out by Belgrade since the late 1980s, and despite the fact that Kosovo languished within both the FRY

⁶⁶ Arbitration Commission, Opinion No.3, *International Legal Materials* 31 (1992): 1500.

⁶⁷ EC Press Statement, Luxembourg, 15 June 1992.

⁶⁸ Letter to Lord Carrington, dated 22 December 1991 (for the text of this letter see Krieger, note 16 above, 118).

⁶⁹ See Judah, note 52 above, 156. The decision of the Badinter Commission that the SFRY was in a state of dissolution (Arbitration Commission, Opinion No.1) has been called into question by the IIC. IIC Report, note 4 above, 58.

⁷⁰ The Hague Peace Conference gave some support for Kosovan autonomy in terms of a paper which stated that: “the republics shall apply fully and in good faith the provisions existing prior to 1990 for autonomous provinces...” Peace Conference on Yugoslavia, Carrington Draft paper, “Treaty Provisions for the Convention”, UN Doc. S/23169 (18 October 1991), Annex VII, para. 6.

⁷¹ V. Surroi, “Kosova and the Constitutional Solutions,” in *Kosovo: Avoiding Another Balkan War* ed. T. Veremis and E. Kofos (ELIAMEP: Athens, 1998), 162 and 168.

⁷² Judah, note 52 above, 125

and Serbia stripped of constitutional autonomy (see below) – a situation which seemed to contradict the EC's commitment, enshrined in the 1992 Guidelines on recognition, to ensuring that minority rights are guaranteed before recognition is accorded to new states. It is perhaps not surprising that the IIC Report judged that Dayton, by giving, "the FRY a free hand in Kosovo", demoralised and weakened the non-violent movement in Kosovo, and, "led directly to a decisive surge of support among Kosovars for the path of violent resistance as the only realistic path to independence."⁷³ It seems, therefore, that the long intervention by the Western powers since the initial period of the SFRY's dissolution had heightened expectations within Kosovo that international powers would take a hand in securing constitutional protections for Kosovo; it was in this context that Dayton proved to be such a disappointment for Kosovars, serving to raise the stakes in their quest for autonomy.

b. The Constitutional Status of Kosovo: Serbian Centralisation and the Development of Kosovo Albanian Separatism

The failure of Kosovo to secure statehood through the Badinter process was compounded by the deteriorating condition of Kosovo's constitutional status, and in particular, by the way in which the autonomy it enjoyed under the 1974 SFRY Constitution was dismantled. Under the 1974 constitution Kosovo held the status of an Autonomous Province within Serbia and enjoyed political control over many areas of internal administration. However, crucially as it would turn out, Kosovars did not constitute a 'nation' in terms of the Constitution, which described the state as 'having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous provinces of Vojvodina and Kosovo'.⁷⁴

When it came to the Badinter process, the reference to 'nations' in the Constitution would be crucial due to the connection between 'nations' and 'their Socialist Republics'. 'Nations' in the SFRY were peoples having 'their own' republics, and a republic was defined by the 'nation' which formed the majority of its population (Serbs, Croats, Slovenians, Macedonians and Montenegrins). They were distinguished under the Constitution from 'nationalities'; namely minority groups within the SFRY, whose ethnic group formed the majority population of neighbouring states such as Hungary and Albania. This distinction was important constitutionally, since, with the status of 'nation' came the constitutional right of self-determination;⁷⁵ and, as has been observed, so too would come recognition by the EC as the FRY dissolved.⁷⁶

The absence of republican status for Kosovo was, however, compensated for by two factors in the 1974 constitution. First, as members of a 'nationality', Albanians in Kosovo and elsewhere in the SFRY were protected by extensive rights guarantees which also applied equally to Yugoslavia's 'nations'. Nationalities, for example, enjoyed comprehensive language rights; discrimination on grounds of nationality, race, and language was outlawed; and incitement to racial hatred and intolerance were proscribed as unconstitutional. Secondly, Kosovo, as an Autonomous Province of Serbia, enjoyed substantial executive, legislative and judicial autonomy; it possessed

⁷³ IIC Report, note 4 above, 59.

⁷⁴ Constitution of the Socialist Federal Republic of Yugoslavia, 1974, Art. 1.

⁷⁵ Constitution of the Socialist Federal Republic of Yugoslavia, 1974, Basic Principles.

⁷⁶ The distinction between nations and nationalities can also be found in the Spanish constitution of 1978, Art.2: "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."

its own constitution, and had legislative jurisdiction which extended to defence and even foreign affairs. Although not a full republic, Kosovo also held a seat in the Federal Parliament of the SFRY, together with a seat on the Constitutional Court and on the Presidency.⁷⁷

From the late 1980s onwards, a series of political and constitutional developments took place within both the FRY and the Republic of Serbia by which much of the autonomy Kosovo had enjoyed under the 1974 constitution was dismantled. Serbian nationalism re-emerged as a force following the death of Tito in 1980, and central to the Serbian idea of nationhood was Kosovo. It was the scene of the famous Turkish defeat of the Serbian Army at the battle of Kosovo Polje in 1389, which was exploited by Milošević to emphasise the importance of Kosovo to Serbia; in a speech to a rally in Belgrade on 19 November 1988, he declared: “Every nation has a love which eternally warms its heart. For Serbia it is Kosovo. That is why Kosovo will remain in Serbia.”⁷⁸ Between 1989 and 1992, both Serbia and the SFRY embarked upon a process of constitutional centralisation which terminated Kosovan autonomy, a process which in turn led to the emergence of the strong separatist movement within Kosovo.⁷⁹ This process began in 1989 with constitutional changes, approved by the Parliament of Serbia on 28 September, and eventually entrenched in the Constitution of the Republic of Serbia adopted in 1990. These changes required the approval of Kosovo’s legislative assembly, and by the placing of pro-Milošević personnel in the assembly and by the threat of force, this approval was achieved.⁸⁰ The process extensively centralised many important areas of power, thereby reducing substantially the powers of Kosovo as an Autonomous Province.⁸¹ As the Special Rapporteur of the Commission on Human Rights noted: “Under its [i.e. the 1990 Constitution’s] provisions the ‘autonomous provinces’ retained some authority over the provincial budget, cultural matters, education, health care, use of languages and other matters, but the authority was thenceforth to be exercised only in accordance with decisions made by the Republic. In fact, the new Constitution gave the Republic the right directly to execute its decisions if the provinces failed to do so.”⁸² Tim Judah also observed: “Although legally the province still existed, the changes meant they were no longer autonomous.”⁸³ In fact the formal constitutional status of Kosovo as an autonomous province (although one stripped of any substantive autonomy) was useful to Milosevic at this time, since with Montenegro, Kosovo and Vojvodina under his influence, he controlled four of the eight seats on the federal presidency.⁸⁴ In addition, a new federal constitution was promulgated in 1992 which also served to consolidate Kosovo’s emasculation within the FRY as a whole.⁸⁵ Crucially, both constitutions

⁷⁷ See *Situation of Human Rights in the Territory of the Former Yugoslavia: Special Report on Minorities*, Periodic Report submitted by Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 45 of Commission Resolution 1996/71, Report of the Commission on Human Rights, UN Doc. E/CN.4/1997/8, (25 October 1996), Chapters I and II; and Krieger, note 16 above, 2-12.

⁷⁸ Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (London: Penguin, 1996), 63.

⁷⁹ Surroi, note 71 above.

⁸⁰ Judah, note 52 above, 55-6.

⁸¹ Kofos, note 3 above, 55.

⁸² Rehn, note 77 above, Chapter II(c).

⁸³ *Ibid.* 56.

⁸⁴ *Ibid.*

⁸⁵ For the relevant amendments to both the Serbian and FRY constitutions see Krieger, note 16 above, 8-10.

outlawed secession from Serbia and the FRY respectively,⁸⁶ thereby combining to preclude the possibility of Kosovo gaining either independent statehood or the status of a republic within the FRY but independent of Serbia.

Kosovo opposed these changes strongly, and a defining moment in this campaign of resistance came on 2 July 1990 with a political declaration by the Parliament of Kosovo which declared the Autonomous Province to be a republic of the Yugoslav Federation.⁸⁷ Shortly thereafter the parliament and government of Kosovo were dissolved by the Republic of Serbia which in turn led a number of deputies from the Kosovo provincial parliament to issue a declaration of independence; this resulted in the proclamation of the Constitution of the Republic of Kosovo on 7 September 1990 shortly before the adoption of Serbia's new Constitution. On 22 September 1991, with war having broken out in Croatia, an unofficial referendum was held in Kosovo to validate this declaration of independence.⁸⁸ Backed by the overwhelmingly positive result in the referendum,⁸⁹ the Kosovo Albanian leadership pressed on with its quest for independence, holding presidential and parliamentary elections for the 'Republic of Kosovo' on May 24, 1992 which resulted in the election of Ibrahim Rugova of the LDK as President.⁹⁰ This attempt by Kosovo Albanians to implement their unilateral declaration of independence led first, to a boycott by most Kosovo Albanians of both Serbian and FRY elections, and secondly to the establishment of institutions by the self-styled Republic, which now operated a separate system of public administration running parallel to the Serbian system in a very elaborate process of civil disobedience.⁹¹ Following these developments, relations between Kosovo and both Serbian and Federal authorities in Belgrade effectively broke down, leading ultimately by the spring of 1998 to the armed conflict which prompted the diplomatic initiatives of this period.

It is important again to contextualise these constitutional upheavals, and the way in which they presaged the military conflict of the late 1990s, within the broader theatre of the West's involvement. The deterioration of relations between Belgrade and Kosovo took place over a ten year period in which the international community was elsewhere heavily involved in the detritus of Yugoslavia's collapse. As such, those international organisations which became involved from March 1998 onwards were fully aware that the sense of injustice felt by Kosovo Albanians was a direct result of both the constitutional centralisation practised by Belgrade since 1989 and the disproportionate outcome of the Badinter process which had failed to offer Kosovo any practical succour. Despite the lip-service offered to Kosovo's right to internal self-determination, it was clear that Belgrade, able to hide behind its territorial integrity, had in effect *carte blanche* to ignore the EC's plaintive demands for Kosovar autonomy; Milošević could rely upon the *uti possidetis* rule applied in 1991-

⁸⁶ Constitution of the Republic of Serbia, 1990, Arts. 4 and 44; 1992 Constitution Article 3, 38 and 42.

⁸⁷ Surroi, note 71 above, 150.

⁸⁸ The referendum was conducted between 26 and 30 September 1991 and was largely clandestine.

⁸⁹ Of 1,051,357 eligible voters, 87% participated and 99.87% voted for an independent Republic of Kosovo. See International Crisis Group, *Kosovo Report*, 10 March 1998; Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (New York: Columbia University Press, 1998), 251-2; Kumbaro note 14 above, 39. Rehn, note 77 above, Chapter II(c) also confirms that over 90% of those taking part opted for independence.

⁹⁰ His party is reported to have polled 76.4% of the vote in the unofficial election. International Crisis Group, note 89 above, 12.

⁹¹ Vickers, note 89 above, 251-264 and Kofos, note 3 above, 72-76. This government attempted to function abroad, see International Crisis Group at 15, but its real influence has been perceived to be marginal, *Ibid.* 73.

2 which did nothing to mitigate, and thereby could be seen tacitly to approve, Belgrade's earlier policy of constitutional centralisation.⁹²

Therefore, in spite of its status as an Autonomous Province of the Republic of Serbia under the 1974 Constitution, Kosovo was not eligible to apply to the Badinter Commission for recognition; and for Kosovars, conscious of the autonomy they had enjoyed under the 1974 Constitution, (which in their eyes accorded Kosovo *de facto* republican status), and bearing in mind that Kosovo with a population which was approximately 90% ethnic Albanian was the most ethnically homogeneous autonomous unit in the Federal Republic apart from Slovenia, it seemed particularly unjust that Kosovo should be excluded from any possibility of statehood simply on account of a formal distinction in the 1974 SFRY constitution between republics and autonomous provinces.⁹³

This also brings us back to the question of self-determination. For Kumbaro who saw in SC Res. 1160 and subsequent resolutions a recognition that Kosovars constituted a people with a right of internal self-determination, this constitutional process constituted a denial of this right.⁹⁴ From this she concludes that Kosovo Albanians are entitled to invoke the 'saving clause' of the General Assembly 'Declaration on Friendly Relations' which, she argues, "recognises a right to external self-determination if a people is completely denied from (sic) meaningfully exerting the right to self-determination internally."⁹⁵ A similar argument is presented by the IIC in its Follow Up Report of 2001 which reiterates the argument made in the Report of 2000 that Kosovo is entitled to 'conditional independence'. This argument is based on, "a normative foundation: namely, the case for self-determination arises from the systematic abuse of the human rights of Kosovo Albanians over a long period and the consequent withdrawal of the consent of the Kosovar Albanians to Serbian rule."⁹⁶

It seems, therefore, that the Kosovo crisis highlights more than many other case studies the inconsistencies and the lack of principle within application of the right of self-determination as it has been applied since the end of the Second World War. As critics have argued, when a viable, culturally differentiated group is unable to escape an oppressive state, particularly when other less homogeneous groups have been able to do so due either to their successful use of force, or to an arbitrary application of the *uti possidetis* principle by states exercising their power of recognition, then a major question concerning the legitimacy of the principle of self-determination as presently applied arises.

c. The Rambouillet Process

In a sense then, both the disadvantageous outcome which resulted for Kosovo from the EC Arbitration process, and the constitutional changes in Serbia and the FRY which served to aggravate this outcome, may help explain why the international

⁹² Kumbaro, note 14 above, 37, and IIC Report, note 4 above, 55-6.

⁹³ A distinction described by Tim Judah as "constitutional sophistry" Judah, note 52 above, 37. On the attitudes of Kosovars to this perceived injustice see Surroi, note 71 above, 162 and 168.

⁹⁴ Kumbaro, note 14 above, 41-2.

⁹⁵ This is a reference to UN General Assembly Declaration 2625 which in a general commitment to the territorial integrity and political unity of sovereign and independent states hints that a state's entitlement to territorial integrity might be weakened if the state is not conducting itself, "in compliance with the principle of equal rights and self-determination of peoples", and specifically where it is not, "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

⁹⁶ *The Follow-up to the Kosovo Report: Why Conditional Independence?*, IIC (2001), 10.

response to the Kosovo crisis involved a diplomatic effort not only to restore peace and alleviate humanitarian problems, but also to bring about a detailed constitutional settlement which would restore to Kosovo the extensive powers of self government it had lost since 1989. It is difficult to conclude that considerations like those which preoccupied the Independent Report were not also at work in motivating Western governments as they made strenuous efforts to reach an autonomy solution for Kosovo. The international initiative begun in March 1998 became nothing less than an attempt to impose an overall constitutional settlement which would restore Kosovo's autonomy to at least its pre-1990 position, and in doing so, perhaps undo some of the injustice Kosovo felt with regard to the Badinter process and the unfulfilled assurances of minority rights and internal self-determination which it had purported to deliver. This is evident if we return to our account of events towards the end of 1998. Although the aftermath of the October Agreements and of SC Res. 1203 initially saw a stabilisation in the situation on the ground with a cautious welcome accorded to it by both sides,⁹⁷ things soon began to deteriorate and in particular, the November dead-lines for electoral rules etc. were not met.⁹⁸

From the beginning of 1999 ominous signs of a breakdown in the political process began to appear; by the end of 1998 little progress had been made and by January 1999 Western patience was wearing thin particularly as occasional atrocities continued to be committed by the security forces.⁹⁹ However, although the political agreement brokered by Holbrooke fell apart, it would be wrong to say that there was a sudden lurch towards humanitarian catastrophe; rather it was the failure of the political deal hatched in October which seemed to set in motion the final diplomatic push for a solution to the crisis. NATO held an emergency meeting on January 17,¹⁰⁰ which was followed by a Contact Group meeting of January 22, and a call to both sides to come to peace talks soon followed. At a subsequent meeting on January 29, the Contact Group summoned representatives from the FRY, Serbia and the Kosovo Albanians to meet at Rambouillet by February 6, "to begin negotiations with the direct involvement of the Contact Group."¹⁰¹ This call, backed by a threat of NATO

⁹⁷ UN Doc. S/1998/1068 (12 November 1998) paras. 6-11.

⁹⁸ By the end of December, there was still no progress on reaching a political settlement despite the deadline of 9 November having come and gone. The Secretary-General reported, "alarming signs of potential deterioration". UN Doc. S/1998/1221 (24 December 1998), para. 4, and that violence had reached its highest level since the October 16 Agreement. Similarly the humanitarian problems remained very severe with the UNHCR estimating that 200,000 people remained displaced within Kosovo. *Ibid.* para. 7.

⁹⁹ The build up to the Rambouillet process and the final ultimatum from NATO which eventually triggered air strikes can be traced to a massacre reported on 16 January 1999 where at least forty five people from the village of Racak near Pristina were reported to have been killed by the security forces. President Clinton declared: "This was a deliberate and indiscriminate act of murder designed to sow fear among the people of Kosovo... it is a clear violation of the commitments the Serbian authorities have made to NATO. There can be no justification for it." US Ambassador William Walker, the head of the OSCE force monitoring the cease-fire also accused Serbian security forces of mass murder. "Villagers Slaughtered in Kosovo 'Atrocity' Scores Dead in Bloodiest Spree of Conflict," *The Washington Post*, 17 January 1999. For reports of earlier violence on both sides see also OSCE Press Release No. 78/98, 15 December 1998, and U.S. Department of State Office of the Spokesman, Statement, 18 December 1998.

¹⁰⁰ "US: NATO Set To Strike Vs. Serbs," *Associated Press* (18 January 1999). The OSCE also held an emergency meeting on 18 January, "Kosovo Massacre: OSCE Calls Emergency Meeting," *Associated Free Press*, 18 January 1999.

¹⁰¹ Contact Group statement, London, 29 January 1999. On the background to this meeting see, "Big Powers To Summon Kosovo Sides To Peace Talks," *Reuters*, 26 January 1999; "US Discloses Plan To Impose Kosovo Settlement," *Reuters*, 27 January 1999.

military action,¹⁰² was again hedged in the language of humanitarian problems, with the statement of 30 January issued by the NAC suggesting that NATO's strategy was designed to avert a, "humanitarian catastrophe".¹⁰³ What is remarkable about this final attempt to broker a settlement is that, as talks got under way at Rambouillet in France in February, both sides were presented with what amounted to a virtual *fait accompli*: a detailed agreement, which included a fully detailed autonomy model for Kosovo, and provision for an international peacekeeping force in the region, which both sides were expected to accept. Furthermore, this was backed up by the threat of force directed in particular at the FRY side. As a Washington spokesman put it: "If the Serbs fail to agree to the ... plan and the Kosovar Albanians do... the Serbs will be subject to air strikes".¹⁰⁴ Tim Judah's laconic summation of the situation was: "both sides were being told: 'Sign or die.'"¹⁰⁵ After weeks of negotiation the Kosovo Albanian side did indeed sign an agreement on 18 March and the FRY's refusal to do so led directly to air-strikes, following a final intervention by the OSCE,¹⁰⁶ commencing on March 24 in Operation Allied Force.¹⁰⁷

Perhaps more than any other initiative over the previous twelve months, the Rambouillet process highlights the Western preoccupation with Kosovan autonomy. It emerged at a time when the refugee situation was getting worse but in other ways the situation on the ground was arguably less serious than it had been in the late summer/autumn of 1998.¹⁰⁸ Furthermore, it provided a programme of detailed autonomy for Kosovo, but only for three years, stating that: "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures".¹⁰⁹ Despite the commitment to

¹⁰² At the same time NATO issued fresh warnings, and expressed its preparedness to back with force the final political initiative launched by the Contact Group on 29 January. Javier Solana announced, "NATO stands ready to act and rules out no option... The North Atlantic Council has decided to increase its military preparedness to ensure that the demands of the international community are met." Hence an ultimatum was issued to both sides that they must agree to meet for peace talks within a week or face the consequences. "NATO Warns Both Sides in Kosovo," *Reuters*, 28 January 1999; "Major Powers To Give Ultimatum On Kosovo," *Reuters*, 29 January 1999.

¹⁰³ On 30 January, the NAC agreed that Secretary-General Solana could authorise air strikes against targets on Yugoslav territory. He stated, "NATO stands ready to act. We rule out no option to ensure full respect by both sides in Kosovo for the requirements of the international community". Statement by NATO Secretary-General, NATO Headquarters, 30 January 1999.

¹⁰⁴ "Washington Renews Warnings to Serbs over Accepting Kosovo Agreement," *Associated Free Press*, 10 February 1999.

¹⁰⁵ Judah, note FILL IN above, 233.

¹⁰⁶ The OSCE reported that Chairman-in-Office Norwegian Foreign Minister Knut Vollebaek, telephoned President Milošević on 24 March and urged him to accept the Rambouillet interim agreement and put an end to the excessive use of force by FRY and Serbian forces in Kosovo. OSCE Press Release, Vienna, 26 March 1999.

¹⁰⁷ Javier Solana, NATO Secretary-General announced the commencement of air operations against the FRY on March 24. NATO Press Release (1999) 041, 24 March 1999. For a discussion of the Rambouillet process and the agreement see Weller, note 56 above.

¹⁰⁸ The IIC Report notes the lack of verified data at this time, but still concludes, "apart from the shocking exception of the Recak/Racak [applying both Albanian and Serb place names] massacre, it is reasonable to assume that the number of civilian killings was significantly lower... than during earlier months." ICC Report, note 4 above, 83.

¹⁰⁹ Chapter 8, Article 1(3).

Kosovar autonomy, reference to the Helsinki Final Act once again illustrates the West's ambivalence on the self-determination question, in particular on the question of statehood for Kosovo. On the one hand, on offer was a final solution in three years which Kosovar nationalists hoped would lead to independence, but the reference to the Helsinki Final Act was a reminder of the commitment in that document to the territorial integrity of existing states.

Nonetheless it is notable that air-strikes commenced in direct consequence of the failure of the FRY to sign the agreement. Although the language of justification was couched in humanitarian terms (and humanitarian concerns were certainly real with the UNHCR reporting on 19 March that 250,000 persons in Kosovo were still displaced), it seems that references to humanitarian problems were also instrumental in that they served as legal justification for military intervention.¹¹⁰ Also crucial to the commencement of bombing was the collapse of Rambouillet, the importance of which is seemingly borne out by the recollections of Richard Holbrooke from his last meeting with Slobodan Milošević shortly before the bombing started. As Judah notes: "Instead of mentioning that tens of thousands were again in flight, he says he told Milosevic that Serbia would be bombed: 'if you don't change your position, if you don't agree to negotiate and accept Rambouillet as the basis of the negotiation.'" ¹¹¹ This leads Judah to conclude that the West's motives were mixed: "The humanitarian catastrophe *was* a part of the reason but the other part was a modern-day version of gun-boat diplomacy."¹¹² Gun-boat diplomacy, it is submitted, which had as its primary aim an autonomy settlement for Kosovo.

4. Concluding Remarks

The Kosovo intervention suggests that the Badinter process has cast a long shadow with its application of the *uti possidetis* principle and with recognition being accorded exclusively to sub-state constitutional republics as Yugoslavia dissolved.¹¹³ This restriction has sown predictable seeds. The war in Bosnia was one, and the endless machinations over the final status for Kosovo is another. As the international community attempts to arrive at a final status for Kosovo today the Badinter process hangs over it. But this is not to suggest the issue is anything but complex. Even those who advocate recognising Kosovo as an independent state are mindful of the need to provide adequate protections for the minority rights of non-Albanians are guaranteed.¹¹⁴ But these critics of the EC approach to recognition and of its

¹¹⁰ Judah, note 52 above, 233.

¹¹¹ Ibid. 233.

¹¹² Ibid. 233. What is also notable is that the Security Council seemed to support the Rambouillet initiative; when the Contact Group issued its demand on 29 January 1999 that the parties meet at Rambouillet, this was supported by a Security Council Presidential statement on the same day. UN Security Council Presidential Statement, 29 January 1999. See Weller, note 56 above, 222. The Contact Group statement of 29 January had also repeated the demands that the FRY comply with existing Security Council resolutions.

¹¹³ For example, the contrasting fortunes of the self-confident, internationally-active, EU Member State Slovenia and those of Kosovo remain today very stark.

¹¹⁴ Kumbaro, note 14 above; IIC Report, note 4 above. See also the House of Commons Foreign Affairs Committee Report which states: "Independence is... out of the question *until the safety of Kosovo's minorities can be guaranteed*." (emphasis added), HC Foreign Affairs Committee Fourth Report, 27 March 2001, para. 138; and again: "independence should be ruled out until the other elements of UNSCR 1244 have been achieved – in particular a 'safe environment for all the people in Kosovo'[i.e.

implications for Kosovo have marshalled the principle of self-determination in forming their arguments. Kumbaro's contention that Kosovar Albanians as a people are entitled to external self-determination given that the internal manifestation of this right has been so egregiously denied by the FRY, has been noted above.¹¹⁵ Kumbaro finds the legal basis for this assertion in the Declaration on Friendly Relations. A similar approach was taken by the IIC Report which makes no explicit reference to the UN declaration but which, in substantive terms, offers a similar argument to Kumbaro's: "it is important to emphasise the normative case for Kosovo's independence. In legal terms, the case for self-determination of Kosovar Albanians arises for systematic abuse of human rights over a long period."¹¹⁶ This led the IIC to recommend 'conditional independence' for Kosovo,¹¹⁷ and we saw how prominent states began to move their positions in this direction. The British House of Commons Foreign Affairs Select Committee Report, for example, in 2001 offered cautious encouragement: "This is in many ways an attractive model, although we know of no precedent for such an arrangement."¹¹⁸

The application of a right of external self-determination to Kosovar Albanians does not, according to either Kumbaro or the IIC, necessarily raise the age-old Pandora's Box threat of widespread secession.¹¹⁹ Kumbaro's reference to the Friendly Relations Declaration suggests that for her, Kosovo represents an extreme case of human rights abuses, and that Kosovo's entitlement to exercise external self-determination is not one likely to be shared by many other sub-state peoples throughout the world. The IIC Report was explicit on this point; referring to the, "systematic abuse of human rights over a long period".¹²⁰ The Report continues: "The same claim cannot be made by Serbs in Bosnia or by Albanians in Macedonia. Indeed, any group that has the temerity to claim that its situation is comparable to that experienced by Kosovar Albanians before 1999, as in Macedonia for example, should be sharply disabused."¹²¹

Nonetheless, as Kosovo moves towards full recognition as an independent state questions are being raised as to whether or not the international community is taking a wider approach to the self-determination principle than the vigorous delimitation of this principle through the post-war colonial model would seem to permit. It would also suggest that the act of recognition of a new state can itself be an instrument of

1244 Annex 2.4].” (para. 143). Ironically, this was the very same proviso attached to provisional recognition of Croatia by Badinter – Arbitration Commission, Opinion on the Recognition of the Republic of Croatia by the European Community and its Member States, Opinion No.5, *International Legal Materials* 31 (1992): 1505. See also Laponce, note 25 above.

¹¹⁵ Kumbaro, note 14 above, 39 and 48.

¹¹⁶ IIC, note 96 above, 15. This conclusion highlights a possibly emerging relationship between the recognition criteria applied in 1991 and the Friendly Relations Declaration. If in terms of the 1991 criteria, a state should only be recognised if it respects human rights (in particular, minority rights), this seems to bolster the arguments of those who, in reading the Friendly Relations Declaration argue that it implies that a state might forfeit its territorial integrity in respect of an internal people possessed of a right to internal self-determination which it systematically denies them.

¹¹⁷ IIC, note 4 above, 9-10.

¹¹⁸ HC Report 27 March 2001, para. 139.

¹¹⁹ Thomas Franck's nightmare world of 2000 states. Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999), chapter 2. Indeed the declaration of independence issued by Kosovo states; 'Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation...'

¹²⁰ IIC, note 96 above, 15.

¹²¹ Ibid.

intervention.¹²² This scenario begins to beg the question whether we might see within international customary law the emergence of a limited right of secession perhaps along the lines advocated by Hurst Hannum who argues that: “such a right should be supported, but only under very narrow conditions. These conditions might include situations where secession is the only plausible response to continuing, massive, discriminatory human rights violations (arguably the case for Kurds in Iraq and Turkey in the 1980s and Tibetans in China during the Cultural Revolution) or where secession might be employed retroactively as a means of punishing egregious violations of humanitarian law (as occurred in Kosovo).”¹²³ This idea of a right emerging under this latter scenario, as a punitive device, seems unlikely given the vehement opposition to Kosovo’s secession by a number of states¹²⁴, and indeed highly incommensurable with the existing principle of self-determination; in addition, it would lead to an even greater politicisation of the law of self-determination than that which already prevails. Instead, if a wider approach to the external application of the self-determination principle is to emerge, the scenario offered by both Kumbaro and the IIC would seem to offer the basis for a more principled way to proceed, and one which more faithfully reflects the spirit of the Friendly Relations Declaration.

Certainly the present position in Kosovo seems untenable as was recognised a decade ago.¹²⁵ The paradox today is that Western intervention was clearly motivated, at least in part, by the removal of Kosovo’s autonomy by Belgrade, but that, with Belgrade’s authority over Kosovo effectively ended, the United Nations Interim Administration Mission in Kosovo (UNMIK) in effect performed the role of preserving the FRY’s technical territorial integrity in the face of a clear desire for independence by Kosovar Albanians. The West, having struggled for so long to restore Kosovo’s autonomy from the grip of constitutional centralisation, was left with the task of trying to secure the FRY’s territorial integrity in the face of *de facto* independence for Kosovo on the ground; a position which ten years on is unsustainable.

Ultimately the reasons behind Western determination to secure autonomy for Kosovo are complex. The most important factor seems to have been the history of Yugoslavia over the past decade in which the West has been so heavily embroiled, but this does not provide a complete answer. Another factor, and one with potentially wider implications, is a growing sense, certainly within Europe, that national minorities are entitled to better recognition of their rights as minorities, and perhaps even to a right of autonomy. Various instruments have made a move in this direction: for example, the CSCE Copenhagen Document of 1990;¹²⁶ the Council of Europe Framework Convention for the Protection of National Minorities 1995; and the Lund Recommendations on Effective Participation by National Minorities in Political Life, adopted in 1999.¹²⁷ These initiatives which were being implemented at the same time

¹²² Nikolaos Tsagourias, “International Community, Recognition of States, and Political Cloning,” in *Towards an 'International Legal Community'? The Sovereignty of States and the Sovereignty of International Law*, eds. Stephen Tierney and Colin Warbrick (London: British Institute of International and Comparative Law, 2006), 211.

¹²³ Hannum, note 27 above, 6.

¹²⁴ E.g. Russia. A number of EU states have not yet recognised Kosovo including Spain which perhaps fears setting a precedent for its own internal national minorities.

¹²⁵ Robert Jennings, “Kosovo and international Lawyers,” *International Law Forum* 1 (1999): 166.

¹²⁶ *International Legal Materials* 29 (1990): 1305.

¹²⁷ *Foundation on Inter-Ethnic Relations, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* (The Hague: Foundation on Inter-Ethnic Relations, 1999).

as Belgrade was consolidating its grip on Kosovo made the removal of that province's autonomy even more embarrassing for the European powers – particularly as they were still smarting over their failures in Bosnia.¹²⁸ It seems therefore, that one of the long-term implications of the Kosovo intervention is the consolidation of a growing European commitment to the rights of internal minorities; in this context the final solution to Kosovo's status when it comes may bring with a wider and more expansive approach, at least within Europe, to the right of autonomy for national minorities.

¹²⁸ Paradoxically the initiative of promoting autonomy for national minorities as in the Lund Recommendations, may in fact have been undermined by the Badinter process. For example, unitary states may now be very wary of introducing federal arrangements given that it was their status as federal republics in both the USSR and SFRY which permitted territories to apply for recognition as independent states, as these two federations collapsed. Indeed throughout the negotiations on Kosovo's future, Belgrade was reluctant to concede republican status to Kosovo by way of a so-called 'three republic' solution, one reason being that it was felt that republican status would be used by Kosovo as a stepping stone to full independence.