Chapter 3 From Province to Protectorate to State: Sovereignty Lost, Sovereignty Gained?

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1 Introduction

The province of Kosovo – 2 million people in 11,000 square kilometres of territory nestled between Serbia to the North and Albania and Macedonia to the South – was thrust into the international limelight when Serbian actions to repress Kosovo Albanian calls for autonomy made it a subject of international concern at the end of the 1990s. Although Kosovo claimed independence in September 1991, the Badinter Commission’s insistence on maintaining the existing borders of the federal republics of the dissolving Yugoslavia suggested then that the topic of Kosovo was likely to depart the international agenda as quickly as it had arrived.¹ Yet while Kosovo is not unique in becoming well-known for suffering the repressive actions of a parent state, and while it has not even enjoyed the distinction of being the only territorial administration of its time,² its potential impact on the fundamental doctrines of international law means this small would-be state has found itself at the centre of international legal concerns for over a decade.

On a number of levels, the international community’s response to the situation created by Milošević’s actions and NATO’s intervention threaten to call pillars of the post-World War II order into question. For example, while it remains too early to come to any conclusion on whether NATO action in Kosovo sans Security Council approval in some measure paved the way for an emerging doctrine of ‘humanitarian intervention’, it seems not implausible to suggest that the apparent success of unauthorised military intervention in Kosovo in stopping mass human rights violations

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² See Bernhard Knoll, The Legal Status of Territories Subject to Administration by International Organisations (Cambridge: Cambridge University Press, 2008) for an overview.
emboldened politicians on both sides of the Atlantic in side-stepping the formal legal path in relation to Iraq in favour of their moral instincts.

However, the focus of this chapter will not be on the consequences for resolving Kosovo’s final status of the likely illegality of the military intervention leading up to the international administration. While the proceedings before the ICJ focused upon the legality of the Declaration of Independence and whether a people of Kosovo have the right or not to self-determination and thereby the right, or not, to secede from Serbia, the issue of how Serbia may have lost its sovereignty over Kosovo has received little direct attention. If the outcome is, as seems likely, that Kosovo is on the path to independent statehood, international lawyers need to account for how, in the absence of Serbian consent, its sovereign ties to Serbia have been or will be severed. It is this aspect of the Kosovo question that this chapter will attempt to draw out.

The decision to approach the question from this angle is grounded in the view that Security Council Resolution 1244 did not resolve the question of Kosovo’s final status. Although the meaning of the wording of the resolution was the subject of much comment before the ICJ, the view of this author is that it makes little sense to interpret the resolution as authorising independence in the absence of a negotiated outcome. Whether or not Resolution 1244 left an opening for independence in referring to the Rambouillet Accords or whether it in fact closed the door to a unilateral declaration of secession by reference to Serbia’s territorial integrity, it seems to require an almost wilful misreading of the emphasis on a negotiated conclusion to suggest that the failure of the Council to expressly forbid a unilateral outcome was in fact to authorise it. Moreover, one would need to accept that the ‘final status’ that the political process authorised by the resolution was intended to determine was in fact pre-determined by the Council, i.e. that ‘final status’ was actually code for independence. That such an interpretation of the resolution is untenable is suggested by both the present disagreement between members of the Security Council over what they had agreed to in Resolution 1244, as well as statements at the time of adoption as to what the Council was authorising, notably including the fact that not a single state spoke at the time of what a permanent solution may entail.

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4 For example, the view of the UK government as advanced by their representative to the Security Council in a document circulated prior to the SC debate entitled ‘Kosovo: Legal Questions’. In the document, the UK expresses a reading of Security Council resolutions very similar to its interpretation of Resolution 1441 on Iraq – that which is not expressly precluded in the resolution is permitted – and there is nothing in Resolution 1244 excluding independence. Discussed in Warbrick, note 3 above, 688. Such an interpretation is clearly based upon the Lotus principle, that restrictions on the independence of States cannot be presumed; The Lotus Case, 1927, PCIJ, Series A, No. 10, 18 (7 September).

5 For example, France’s statement at the time of adoption that simply: “the Security Council will remain in control”, S/PV.4011 (10 June 1999), 12.