
Lessons From Kosovo

The Law of Statehood and Palestinian Unilateral Independence

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I. Introduction

On 17 February 2008, the Republic of Kosovo declared independence. This declaration was met with mixed international reaction, and raised questions regarding the international law of statehood. At the heart of the controversy over Kosovo lie concerns as to the possible effect and precedential value that the case of Kosovo may have on this body of international law. In this paper we examine the international law of statehood as it has developed over the last century. We then go on to analyze the particular circumstances of Kosovo, and the degree to which it fulfills the legal requirements for statehood. Next, we attempt to define the possible implications of the recognition of Kosovo as independent on the law of statehood. Finally, we examine whether such implications may have affected the prospects of a unilateral declaration of independence by the Palestinian Authority.

II. The International Law of Statehood

1. *The Classical Conditions for Statehood: Effectiveness*

Statehood is the primary form of legal personality in international law, affording an entity exclusive competence regarding its internal and external affairs.¹ Despite the lack of a 'generally accepted and satisfactory legal definition of statehood,'² states have long acknowledged the existence of other states by means of recognition.³ Recognition is today predominantly considered declaratory and not constitutive.⁴ This may indicate that the recognition by other states that an entity has conformed to the requirements of statehood carries significant weight in borderline cases.⁵

The most accepted formulation of criteria for statehood is found in Article 1 of the 1933 *Montevideo Convention on the Rights and Duties of States*, which stipulates the following conditions for statehood: '(a) a permanent

¹ UN Charter, art. 2(1), 2(7); *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, UN GAOR, UN Doc. A/5217 (1970) 121 [*Declaration on Friendly Relations*].

² James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2006) at 37 [Crawford 2006].

³ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 42 [Higgins 1994].

⁴ On the various formulations of the constitutive and declaratory approaches to recognition, see Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1948) at 38-63.

⁵ *Opinion No. 8, Conference on Yugoslavia* (1992) 92 I.L.R. 199 at 201 [*Opinion No. 8*]; Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 189, 369 [Shaw 2003].

population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.’⁶ The principle underlying these criteria is the effectiveness of the territorial unit; namely, its ability to function as an independent self-governing entity.⁷

The ‘permanent population’ qualification has been understood to require a stable community of any size, residing in a given territory. Similarly, the ‘defined territory’ of a state may be extremely small, fragmented, or even an enclave within another state. Furthermore, precise demarcation of boundaries is not necessary.⁸ The ‘government’ requirement refers to the effective exercise of authority with respect to persons and property within a territory, while the ‘capacity to enter into relations’ is the right and ability to exercise that authority with respect to other states.⁹ Together, these last two requirements form the central condition of effectiveness, which is assessed formally and substantively.¹⁰

2. *Trends and Additional Considerations: Legality and Legitimacy*

A survey of the relevant international practice reveals a number of cases in which the Montevideo requirements were not the only considerations applied by states. Entities which did not fully meet the classical criteria were at times recognized as independent, while in other cases, entities which seemed to fulfill the criteria were denied such recognition. An emerging set of additional considerations, based on principles of legality and legitimacy, had a decisive effect on recognition of independence in these cases.¹¹ After briefly outlining these principles, we turn to past cases demonstrating their application.

a. *Legal Principles Affecting Statehood*

The legal principle which has had the most profound impact on the willingness of states to recognize an entity's statehood is the principle of self-determination. This principle originated as the basis for state demands of

⁶ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19; Crawford 2006, *supra* note 2 at 46.

⁷ Crawford 2006, *ibid.*

⁸ Crawford 2006, *ibid.* at 46-47, 52; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 70 [Brownlie]; *North Sea Continental Shelf* (Germany/Denmark) [1969] I.C.J. Rep. 3 at para. 46.

⁹ Crawford 2006, *supra* note 2 at 55, 62-66.

¹⁰ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963) at 25-26; Crawford 2006, *supra* note 2 at 67-89.

¹¹ Shaw 2003, *supra* note 5 at 178; Brownlie, *supra* note 8 at 70; Crawford 2006, *supra* note 2 at 97-99.

equal rights, specifically in the context of decolonization.¹² It has broadened over time to include post-colonial contexts.¹³ The exercise of the right to self-determination does not necessarily compel the establishment of a new state; it may be exercised 'internally' within a state, for example, through autonomy or certain cultural rights.¹⁴

International law is reluctant to recognize a general right to 'external' self-determination (i.e. unilateral secession from a state), as it is at odds with the fundamental principle of territorial integrity.¹⁵ However, certain circumstances arguably establish a right to 'remedial secession'.¹⁶ The 1970 *Declaration on Friendly Relations*, while upholding the principle of territorial integrity, implicitly acknowledges an exception to its protection when a government denies a people the right to self-determination and equality.¹⁷ This is further supported by the Supreme Court of Canada in its reference decision regarding Quebec.¹⁸ Consequently, some writers have argued that international law allows for 'remedial secession' in exceptional circumstances,¹⁹ for example, when a minority residing in a defined territory is persistently denied the right to internal self-determination, or when grave human rights violations indicate that internal solutions are not possible.²⁰

¹² UN Charter, art. 1(2), 55, 73(b) & 76(b); Crawford 2006, *supra* note 2 at 114; Higgins 1994, *supra* note 3 at 111-14. See also *Declaration on the Granting of Independence to Colonial Countries and People*, GA Res. 1514 (XV), UN GAOR, UN Doc. A/4684 (1961) 174.

¹³ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S 171, art. 1; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 65-66, 118-24 [Cassese].

¹⁴ *Declaration on Friendly Relations*, *supra* note 1; David Raič, *Statehood and the Law of Self Determination* (The Hague: Kluwer Law International, 2002) at 226 [Raič].

¹⁵ UN Charter, art. 2(4); Crawford 2006, *supra* note 2 at 390.

¹⁶ Raič, *supra* note 14 at 324, 332; Lee C. Bucheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 220.

¹⁷ *Declaration on Friendly Relations*, *supra* note 1; cf. *Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23 at para. 2; *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, 24 October 1995, GA Res. 50/6, UN GAOR, UN Doc. A/RES/50/49.

¹⁸ *Re Secession of Quebec* (1998), 115 I.L.R. 537 at para. 130 (Canada, S.C.); see also *Loizidou v. Turkey*, no. 15318/89, [1996] VI E.C.H.R. 2216 at 2241, Wildhaber J., concurring opinion.

¹⁹ Christian Tomuschat, 'Secession and self-determination' in Marcelo G. Kohen, ed., *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 41 [Tomuschat]; John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Kohen, *ibid.* 94 at 109-10 [Dugard & Raič].

²⁰ Dugard & Raič, *ibid.* at 109.

Other writers have denied the existence of a right to remedial secession, pointing to a lack of international practice and *opinio juris*.²¹

The effect of the principle of self-determination on the law of statehood is such that in cases where the right to self-determination of a people is recognized, it may mitigate the necessary level of fulfillment of the classical criteria of statehood, especially in the context of decolonization.²² It may also be seen as a prerequisite to statehood, rendering invalid the establishment of a state in violation of this right.²³

Another legal principle which has gained importance with regard to the law of statehood is the requirement to adhere to peremptory norms of international law. When a state is founded through a breach of a peremptory norm of international law, other states are arguably obligated to not recognize it.²⁴

Further considerations are based on notions of legitimacy, as may be evidenced by the guidelines on recognition of new states, adopted by the European Community in 1991, which conditioned the recognition of new states on their establishment of democratic institutions and respect for human rights.²⁵ However, it is doubtful whether these suggested requirements have become peremptory norms disqualifying an already recognized entity's statehood.²⁶ Nevertheless, they may have an impact on the willingness of states to recognize new entities.

b. Relevant Past Cases

While each case of the attainment of statehood is unique, it is interesting to focus on cases where statehood was attained despite deficiencies with regard to the classical criteria. In some cases the principles mentioned above may have played a role. For our purpose, it would be specifically helpful to

²¹ Cassese, *supra* note 13 at 118-24; Crawford 2006, *supra* note 2 at 417-18; also see Rosalyn Higgins, 'Postmodern Tribalism and the Right to Secession, Comments' in C. Brölmann *et al.* eds., *Peoples and Minorities in International Law* (Dordrecht: Nijhoff, 1993); but see Raič, *supra* note 14 at 362-66.

²² Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986) at 151-62.

²³ Shaw 2003, *supra* note 5 at 184-85.

²⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/10 (2001), art. 41(2); UN Charter, art. 2(4); Crawford 2006, *supra* note 2 at 155. The non-recognition of the Bantustan states, set up by South Africa in pursuit of its apartheid policy, is considered to be a manifestation of this principle.

²⁵ *Opinion No. 4, Conference on Yugoslavia* (1992), 92 I.L.R. 173.

²⁶ Crawford 2006, *supra* note 2 at 155.

examine cases that share certain characteristics with Kosovo or Palestine. Among several examples, the following cases warrant special attention.

In 1971, the Bangladesh secessionist movement was brutally repressed by the Pakistani government in a campaign that included severe human rights violations. In response, Indian army forces invaded Pakistan, effectively paving the way for Bengali independence.²⁷ The case of Bangladesh has been used to support the possibility of remedial secession, aided by foreign military might, in light of political repression and grave human rights violations.²⁸

The most prevalent case of the creation of new states in recent decades is that resulting from the dissolution of federative states: the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY).²⁹ The previously constituent units were internationally recognized as new states because the federal entity no longer existed³⁰ and thus its integrity no longer warranted protection. However, the emergence of these former federal states as independent states did not fulfill all existing aspirations for independence. Other groups, demanding independence through further disintegration, were not recognized at that point. Kosovo, as will be discussed below, is one example; Chechnya is another. An autonomous region within the Russian Soviet Federated Socialist Republic, Chechnya's declaration of independence in 1991 was not recognized by Russia, which later forcefully regained control over it. The international response focused on condemnation of the Russian Federation for conducting human rights violations, and not on support for the Chechen demand for independence.³¹

Eritrea was granted autonomy under the Ethiopian crown by the UN General Assembly.³² In 1962, Ethiopia abolished Eritrean self government, inciting a war between the Ethiopian government and the Eritrean People's Liberation Front (EPLF). In 1991, The Ethiopian People's Revolutionary Democratic Front, an Ethiopian movement, succeeded in overthrowing the Soviet-backed regime of Mengistu Haile Mariam. The transitional government in Ethiopia agreed that Eritrea, effectively controlled by the EPLF by then, had a right to determine its status in a plebiscite. Finally, in

²⁷ Tomuschat, *supra* note 19 at 29-30.

²⁸ Raič, *supra* note 14 at 338-41. See Crawford 2006, *supra* note 2 at 141, 393. Admittedly, Bangladesh was only admitted to the UN after being recognized by Pakistan in 1974.

²⁹ Crawford 2006, *supra* note 2 at 395.

³⁰ *Opinion No. 8*, *supra* note 5 at 202.

³¹ Tomuschat, *supra* note 19 at 31; Crawford 2006, *supra* note 2 at 408-10.

³² GA Res. 390 A(195), UN GAOR, 5th Sess. (1950).

1993, Eritrea achieved independence.³³ This is a case where the revoking of a prior autonomy led, admittedly only after years of fighting and a change of government in Ethiopia, to international recognition of secession.

In Timor Leste (East Timor) independence was declared after the Portuguese withdrawal in 1975.³⁴ However, Indonesia immediately seized control. The UN Security Council and General Assembly affirmed the East Timorese right to self-determination, denouncing the Indonesian occupation,³⁵ but did little else,³⁶ despite grave violations of human rights. Following a 1999 referendum, the UN established the United Nations Transitional Authority for East Timor (UNTAET),³⁷ in order to guide the reconstruction of an independent state after the Indonesian 'scorched earth' withdrawal.³⁸ Timor Leste serves as a case in which a people, whose right to self-determination was recognized in the context of decolonization, was then subject to occupation and human rights violations. The international community recognized its right to self determination and formed a UN administration, guiding it towards self-government.

c. International Law of Statehood Prior to Kosovo

The above description of the evolution of the international law of statehood could possibly support an argument asserting that the classical criteria are no longer relevant, and that currently they serve only as rhetoric masking the real political or other motives of states when considering recognition of new entities. It is our position, however, that this underestimates the continued importance and influence of the classical criteria. Rather, we submit that while the classical criteria still form the initial and basic normative requirements for assessing statehood, their complete fulfillment is no longer the only yardstick. The classical criteria remain important because they fundamentally capture the elements essential for an entity to effectively function as a state. Therefore, an entity striving for statehood and not meeting the classical criteria must present compelling additional considerations in order to be recognized. The introduction of these additional criteria to the law of statehood does not, however, imply complete

³³ Tomuschat, *supra* note 19 at 28; Crawford 2006, *supra* note 2 at 402.

³⁴ GA Res. 1542 (XV), UN GAOR, UN Doc. A/4684 (1960).

³⁵ SC Res. 384, UN SCOR, UN Doc. S/RES/384 (1975); GA Res 3485 (XXX), UN GAOR, 30th Sess. (1975).

³⁶ Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008) at 178-80 [Wilde].

³⁷ S.C. Res. 1272, UN SCOR, UN Doc. S/RES/1272 (1999).

³⁸ See Wilde, *supra* note 36 at 180-88; Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2002) 50 Int'l & Comp. L.Q. 613.

abandonment of the classical criteria. An indication of their continued relevance can be found in the international community's efforts to ensure eventual achievement of effectiveness in recognized entities whose effectiveness is deficient.³⁹

Having briefly outlined the development of the law of statehood and a number of relevant cases, we now turn to examine the circumstances leading up to the Kosovo declaration of independence in order to better ascertain if Kosovo can be seen as the continuation of a trend of application of the additional considerations.

III. Kosovo's Declaration of Independence and the Classical Criteria

1. *Historical Background*⁴⁰

a. *Kosovo Before 1999*

Kosovo is considered by Serbs to be the birthplace of their state and culture. However, as a result of centuries of Albanian immigration under Ottoman rule, its population is comprised today of 90% ethnic Albanians and only 6% ethnic Serbs.⁴¹ With the establishment of the SFRY, Kosovo was defined as an autonomous region within the constituent Republic of Serbia and not as a constituent Republic of itself, despite such aspirations of the Kosovar Albanians. In 1974, a new constitution granted Kosovo greater autonomy within the SFRY and rights almost equal to those of the constituent republics. However, in 1989, Slobodan Milošević, the new Yugoslav President, abolished Kosovo's autonomy. In 1991, the Kosovo local assembly declared Kosovo independent. In response, the assembly was dissolved, and many Albanian government employees were fired. The break-up of the SFRY, the ensuing Bosnian wars and the negotiations towards the 1995 Dayton agreements ending the wars did not affect the status of Kosovo.⁴²

b. *International Intervention*

In 1998, in response to attacks by the separatist Kosovo Liberation Army (KLA), Serbia unleashed a brutal campaign in Kosovo, described by some as

³⁹ See *supra* note 37; Jean D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 Leiden J. Int'l L. 649 at 654 [D'Aspremont].

⁴⁰ See generally Iain King & Whit Mason, *Peace at Any Price: How the World Failed Kosovo* (Ithaca: Cornell University Press, 2006) [King & Mason]; Alex J. Bellamy, *Kosovo and International Society* (New York: Palgrave Macmillan, 2002).

⁴¹ 'Kosovo', online: Government of Kosovo <<http://www.rks-gov.net/en-US/Republika/Kosova/Pages/default.aspx>>.

⁴² Crawford 2006, *supra* note 2 at 408; SC Res. 777, UN SCOR, UN Doc. S/RES/777 (1992).

‘ethnic cleansing’, and resulting in the displacement of hundreds of thousands.⁴³ International mediation efforts lead to the proposed ‘Rambouillet Accords’, which called for Kosovar autonomy and deployment of peace-keeping North Atlantic Treaty Organization (NATO) troops. Serbia (then the Federal Republic of Yugoslavia, FRY) rejected the proposal. Following the rejection, a 78-day NATO bombing campaign brought about the withdrawal of Serbian forces from Kosovo on 10 June 1999. The same day, the UN Security Council passed Resolution 1244 deciding on the deployment of an ‘international security presence’ (the Kosovo Force, KFOR) and an ‘international civil presence’ in Kosovo (UN Mission in Kosovo, UNMIK). UNMIK was charged with providing an interim administration for Kosovo, facilitating Kosovar ‘substantial autonomy’ and ‘meaningful self-administration’. Resolution 1244 also mandated, without setting a deadline, a political determination of a final status. On the other hand, the Resolution’s preamble reaffirmed the ‘sovereignty and territorial integrity’ of the FRY.⁴⁴

In 2001, UNMIK issued Regulation No. 2001/9⁴⁵ which outlined and created the Provisional Institutions of Self Government (PISG), including an elected assembly. As the PISG were slow in assuming ‘functional responsibilities’, and following an outbreak of sectarian violence within Kosovo in March 2004, UNMIK together with Kosovo’s Provisional Institutions published the Kosovo Standards Implementation Plan, detailing concrete steps to be taken in eight fields, including building of democratic institutions, rule of law and freedom of movement.⁴⁶ Addressing the issue of political dialogue between Serb and Kosovar working groups which had begun at a 2003 EU summit, The Plan described the dialogue as one that must be ‘restarted’ and must first focus on practical immediate issues such as missing persons, displaced persons returns and transportation. The report mentioned no progress towards a political determination of the final status of Kosovo as envisioned by Resolution 1244.

c. The Lead-up to the Unilateral Declaration of Independence

In a 2005 declaration, France, Germany, Italy, Russia, the UK and the USA set parameters for the desirable final status of Kosovo, which included

⁴³ ICRC *Position Paper on the Crisis in Kosovo* (1998), 325 I.R.R.C. 725; ‘Nato’s Role in Relation to the Conflict on Kosovo’, online: NATO <nato.int/kosovo/history.htm>.

⁴⁴ SC Res. 1244, UN SCOR, UN Doc. S/RES/1244 (1999), preamble, paras. 9-11.

⁴⁵ Regulation No. 2001/9, *On a Constitutional Framework for Provisional Self-Government in Kosovo*, UN Doc. UNMIK/REG/2001/9 (2001), online: <www.unmikonline.org/regulations/2001/reg09-01.htm>.

⁴⁶ *Kosovo Standards Implementation Plan*, 31 March 2004, online: <www.unmikonline.org/pub/misc/ksip_eng.pdf>.

protection of human rights and democracy, and stated that Kosovo could not return to the pre-1999 situation and not be partitioned or form a union with any other state.⁴⁷ Later talks on Kosovo's future mediated by the Secretary General Special Envoy to Kosovo, former Finnish president Martti Ahtisaari, eventually failed, leading him to conclude that an agreed settlement would be impossible. In March 2007, Ahtisaari presented the Security Council with the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan), claiming that 'the only viable option for Kosovo is independence, to be supervised for an initial period by the international community'.⁴⁸ The Security Council failed to reach an agreement regarding the proposal. Albanian leaders in Kosovo accepted the proposal, while Serbian leaders rejected it. A new round of 'intensive engagement' in August 2007 also failed.⁴⁹ On 17 February 2008, the Assembly of Kosovo declared the independence of The Republic of Kosovo. The declaration fully accepts 'the obligations for Kosovo contained in the Ahtisaari plan' and declares Kosovo a democratic, secular and multiethnic republic.⁵⁰ Kosovo's assembly also adopted a new constitution which, while establishing Kosovar institutions, also included provisions maintaining the precedence of the Ahtisaari plan and the supreme authority and status of the international civilian and military presence.⁵¹

2. *The International Reaction to the Declaration of Independence*

Kosovo's declaration of independence received a mixed reaction. Some sixty states have so far formally recognized Kosovo. Among these were the USA, a majority of the European Union, as well as a majority of NATO members.⁵²

Serbia deemed the declaration a forceful and unilateral secession of part of its territory, in violation of Security Council Resolution 1244, and therefore null and void.⁵³

⁴⁷ *Guiding Principles of the Contact Group for a Settlement of The Status of Kosovo*, online: <www.unosek.org/docref/Contact%20Group%20-%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf>.

⁴⁸ *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, 26 March 2007, UN Doc. S/2007/168 at para. 5 [*Special Envoy Report*].

⁴⁹ *Report of the Secretary General on the United Nations Interim Administration in Kosovo*, 12 June 2008, UN Doc. S/2008/354 at para. 3 [*Secretary General Report*].

⁵⁰ *Kosovo Declaration of Independence*, 17 February 2008, online: Republic of Kosovo Assembly <www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> [*Kosova Declaration*].

⁵¹ *Constitution of The Republic of Kosovo*, arts. 143, 146, 147, 153 & 161, online: <<http://kushtetutakosoves.info/?cid=2,1>> [*Kosovo Constitution*].

⁵² See online: <www.rks-gov.net/sq-AL/Pages/ShtetKaneNjohurKosoven.aspx>.

⁵³ *Letter of the Permanent Representative of Serbia to the United Nations Secretary-General*, 19 February 2008, UN Doc. S/2008/111 [*Letter of the Permanent Representative of Serbia*].

Serbian-backed resolution referring the following question to the International Court of Justice (ICJ): 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with International Law?'⁵⁴ The Russian Federation and the People's Republic of China are also firm opponents of Kosovo's independence,⁵⁵ and a number of EU member states, such as Spain, Cyprus and Slovakia, expressed disapproval of Kosovo's unilateral declaration.⁵⁶ Commentators interpreted this disapproval as related to domestic concerns.⁵⁷ Even supporters of Kosovo's independence have found it necessary to emphasize the uniqueness of the case of Kosovo, saying it is *sui generis* and does not create a precedent.⁵⁸

UN Secretary General Ban Ki-moon, despite initially expressing support of the Ahtisaari plan,⁵⁹ subsequently clarified that the UN and its mission are officially 'status neutral'. He did, however, announce an 'adjustment to the structure and profile of UNMIK', introducing more EU involvement in Kosovo's administration through the European Union Rule of Law Mission in Kosovo (EULEX), justifying it under Resolution 1244.⁶⁰ Serbia and Russia objected, declaring the restructuring an improper bypass of Resolution 1244.⁶¹

3. *Kosovo and the Classical Criteria for Statehood*

If Kosovo were to be assessed solely according to the Montevideo requirements, it would be difficult to find that it has attained statehood. While its population and small territory seem to easily fulfill the requirements of a 'permanent population' and a 'defined territory', the

⁵⁴ GA Res. 63/3, UN GAOR, UN Doc. A/RES/63/3 (2008). On 8 October 2008, the UN General Assembly passed a

⁵⁵ Letter of the Permanent Representative of the Russian Federation to the United Nations Secretary-General, 19 February 2008, UN Doc. S/2008/108; UN SCOR, 5839th Mtg., UN Doc. S/PV.5839 (2008), at 6-7 [SC 5839th Mtg.].

⁵⁶ Reuters, 'Spain Says Won't Recognise Kosovo Independence', 18 February 2008, online: <www.reuters.com/article/latestCrisis/idUSBRB000542>.

⁵⁷ Christopher J. Borgen, 'Kosovo's Declaration of Independence: Self Determination, Secession and Recognition' (2008), 12 ASIL Insights, online: ASIL <<http://www.asil.org/insights080229.cfm>>.

⁵⁸ Cf. *Special Envoy Report*, *supra* note 48 at para. 15; US State Department, 'The Case for Kosovo', online: <state.gov/p/eur/ci/kv/c24701.htm> ['The Case for Kosovo'].

⁵⁹ Letter of the Secretary-General to the President of the Security Council, 26 March 2007, UN Doc. S/2007/168.

⁶⁰ *Secretary General Report*, *supra* note 49 at paras. 14-16; Cf. *Council Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo*, 4 February 2008, 2008/124/CFSP.

⁶¹ SC 5839th Mtg., *supra* note 55; Reuters, 'Russia: UN chief exceeded authority over Kosovo', 2 July 2008, online: <www.reuters.com/article/latestCrisis/idUSL02700778>.

requirements of 'government' and 'capacity to enter into relations with other states' seem more problematic. While UN and EU reports indicate significant progress in Kosovar institution-building, they also point out substantial shortcomings. Kosovo has formed a functional assembly and established a police force; however, other powers, such as the primary responsibility for law and order, customs or monetary policy, are still in the hands of international representatives. Local administration is still weak and ineffective; assessed in 2007 at 45 percent effectiveness by the World Bank Institute.⁶² The presence of international forces is still substantial; including some 13,000 NATO KFOR soldiers and some 1,600 law enforcement and justice EULEX personnel.⁶³ Kosovo's dependence on an international presence is acknowledged by proponents of its independence, and by Kosovar leaders, who have incorporated it into the constitution.

Similarly, with regard to the 'capacity to enter into relations with other states', as so many of Kosovo's institutions rely on the foreign presence, its ability to independently commit itself to any undertakings in its international relations is, at best, partial. Furthermore, even in this context, Kosovo's constitution recognizes the final authority of the head of the international military presence and the international civilian representative in military and civilian issues respectively.⁶⁴

Thus, the requirements of government and capacity to enter into relations with other states are not completely fulfilled, and Kosovo does not seem to meet the classical criteria for statehood.

However, proponents of Kosovar independence do not view these deficiencies as detrimental. Instead, they suggest that the international presence and the continuing process of institution-building ensure Kosovo's ability to become a viable independent entity, thus meeting the criteria. They point out that further development would only be possible when a final

⁶² *Secretary General Report*, *supra* note 49 at paras. 2, 17, 31-32; UNMIK, *Kosovo in February 2008*, online: <www.unmikonline.org/docs/2008/Fact_Sheet_February_2008.pdf>; European Union: European Commission, *Kosovo (under UNSCR 1244) 2007 Progress Report*, 6 November 2007, SEC (2007) 1433.

⁶³ *KFOR Contributing Nations and Troop Numbers*, online: NATO <www.nato.int/kfor/structure/nations/placemat/kfor_placemat.pdf>; *Report of the Secretary-General on the United Nation's Interim Administration Mission in Kosovo*, 10 June 2009, UN Doc. S/2009/300, at para. 6; Branislav Krstic, 'EU Mission Deploys in Kosovo Amid Tight Security', 9 December 2008, online: Reuters <www.reuters.com/article/latestCrisis/idUSL9673723>.

⁶⁴ *Special Envoy Report*, *supra* note 48 at paras. 11-13; *Kosova Declaration*, *supra* note 50 at paras. 3 & 5; *Kosovo Constitution*, *supra* note 51, arts. 143, 146, 147, 152, 153, but see 161; *Secretary General Report*, *supra* note 49 at paras. 14-16.

status is reached.⁶⁵ Finally, the international presence can be viewed as facilitated by Kosovar consent, thus indicating—and not disproving—its sovereignty. Nevertheless, objectors could argue that the fact that Kosovar authorities are devoid of constitutional capacity to demand the withdrawal of international forces, coupled with the fact that these forces hold discretionary authority to intervene in Kosovo's internal affairs, constitute a clear lack of independence, rendering its statehood questionable under the classical criteria.⁶⁶ In conclusion, if the classical criteria were the only considerations, it would seem that Kosovo's opponents hold the stronger argument.

IV. Possible Consequences of the Recognition of Kosovo

This section examines possible considerations beyond the Montevideo criteria, such as those raised by the states that have recognized Kosovo's independence, which may have played a role in the Kosovo case, and which may affect future cases.⁶⁷

1. *Can the Kosovo Case Serve as a Precedent? The Sui Generis Argument*

An oft-mentioned argument against recognition of Kosovo is that it would create a dangerous precedent for secessionist movements undermining the fundamental principle of territorial integrity. Serbian president, Boris Tadić, argued that the Kosovo declaration of independence 'runs afoul of the first principle of the Charter of the United Nations – the sovereign equality of all Member states' and warned: 'there are dozens of other Kosovos in the world, and all of them are lying in wait...'⁶⁸

Anticipating such an argument, the Ahtisaari Plan and the Kosovo declaration of independence both emphasize that Kosovo is a 'unique case' that 'does not create a precedent for other unresolved conflicts.'⁶⁹

⁶⁵ *Special Envoy Report*, *supra* note 48. It should be noted that some Kosovar leaders have recently expressed the position that the international administration has completed its mission and should leave Kosovo. See Reuters, 'Kosovo President Asks UN to End its Mission', 22 April 2009, online: <www.reuters.com/article/latestCrisis/idUSVAS243336>.

⁶⁶ Crawford 2006, *supra* note 2 at 71-72.

⁶⁷ See Section II.

⁶⁸ SC 5839th Mtg., *supra* note 55.

⁶⁹ *Special Envoy Report*, *supra* note 48 at para. 15; *Kosova Declaration*, *supra* note 50, preamble.

There are several problems with this *sui generis* argument which contends that Kosovo cannot serve as a precedent for other cases. First, asserting that Kosovo's independence cannot serve as a precedent does not itself prevent Kosovo from becoming one. Moreover, what seems to be the reluctance of states grappling with secessionist movements to recognize Kosovo for fear of creating a precedent, may in itself serve as an indication of its precedential potential.

Third, if we look to past cases where independence was sought, such as Timor-Leste, Bangladesh, Eritrea and the dissolution of the USSR, we find similar circumstances, indicating that Kosovo's characteristics are not as exceptional as argued. In some cases, such as Timor-Leste, where international administration was established following human rights violations, the result was independence. In other cases such as Chechnya, despite similar characteristics to the Kosovo case such as human rights violations and the dissolution of a federative state, independence was not attained. While no case is a carbon copy of Kosovo, there may be a sufficient number of similar cases in international law to view Kosovo as the most recent case in a series, indicating a trend, albeit not uniform, in the international law of statehood.

position is justified by the fact that attempts to create, at least in some cases, a special
circumstances that justify recognizing Koskazar and Ptoth, and others an
independence from Georgia, Russia compared them to Kosovo. The violent non-
circumstances, religious of the SFRY, grave human rights violations, international
minority in the general population but a majority within a specific region;
historical autonomy; the occurrence of human rights violations necessitating

⁷⁰ 'The Case for Kosovo', *supra* note 58; SC 5839th Mtg., *supra* note 55 at 8, 12; *Kosova Declaration*, *supra* note 50, preamble; Also see Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008), 12 Max Planck U.N.Y.B. 1 at 21.

an international (Russian) involvement; and the lack of prospects for reaching an agreed solution.⁷¹

In sum, it is clear that Kosovo has already had significant influence in international legal discourse. Hence, analyzing the different factors affecting its claim would be useful for assessing future cases.

2. *Additional Considerations of Significance in the Kosovo Case*

a. *Human Rights Violations and Remedial Secession*

If Kosovo is to be recognized as independent, this could serve as support for the argument that remedial secession can lead to lawful recognition and statehood under international law. Kosovo is a case where a distinct minority group, after being stripped of its autonomy, seeks to exercise its right to self-determination externally within a certain territory in which it forms the majority. Furthermore, the grave violations of human rights in Kosovo in 1998-99 may be seen as preventing a realistic prospect of finding an agreed solution within the borders of Serbia.⁷² These circumstances would seem to fulfill the requirements raised by supporters of remedial secession.⁷³ Kosovo would then join the cases of Bangladesh and Eritrea in supporting the existence of state practice allowing remedial secession.

b. *Federation Dissolution*

Another possible framework through which Kosovo's independence may be deemed legitimate is that of the dissolution of a federal state. Those who support this notion would view Kosovo as a final belated step in the dissolution of the SFRY. However, this view is problematic as Kosovo was not a constituent republic of the SFRY, but only an autonomous region within the Republic of Serbia. Moreover, during the significant years of SFRY's breakup, Kosovo was not recognized as independent and was considered an integral part of Serbia. Hence, in order to support Kosovo's independence under this framework, one would have to suggest that the SFRY's dissolution created a right to external self-determination not only for the constituent republics, but also for additional national groups comprising it, even at a price of further fragmentation. The underlying logic of this position would be that, as the federal state is disintegrating in any case, the

⁷¹ Security Council, 5969th Mtg., UN Doc. S/PV.5969 (2008).

⁷² *Special Envoy Report*, *supra* note 48 at para. 5.

⁷³ See Section II.2.a.

protection of its territorial integrity is no longer relevant. This view is not supported by practice, as indicated by the case of Chechnya.⁷⁴

c. The Significance of International Involvement and Administration

Supporters of Kosovo's independence point to the international involvement as strengthening its claim for independence, and as reflecting an international position that Kosovo should no longer be governed by Serbia in light of past violence and present stagnation. Moreover, the international involvement in the administration and institution-building in Kosovo may be considered as an important assurance that it will eventually fulfill the classical criteria for statehood.⁷⁵ If this is accepted, Kosovo would join Timor-Leste as a case where international administration and guidance in institution-building promoted the international recognition of statehood.

It is further argued that paragraph 11(a) of Resolution 1244, which states that Kosovo's substantial autonomy within the Federal Republic of Yugoslavia is merely an interim phase, places no limits on Kosovo's status outcome and allows for independence. This view is further reinforced by the fact that even the Secretary General-appointed envoy, whose mandate was established in Resolution 1244, supports the independence of Kosovo due to the failure of the negotiations.⁷⁶

On the other hand, the opponents of Kosovo's independence view the international involvement as forbidding Kosovo to declare independence unilaterally. They point to the language of the preamble of Resolution 1244 that explicitly reaffirms the sovereignty and integrity of the Republic of Serbia (then, FRY), suggesting that any solution must be brought before the Council.⁷⁷

d. Deadlocked Negotiations: a Last Resort?

Another argument used by supporters of Kosovo's independence is that, since the political process envisioned by Resolution 1244 has failed, independence is the only viable final status solution. An important component of this argument is a view expressed by Ahtisaari, according to which Kosovo's progress is inhibited by the political stagnation and instability caused by the uncertainty as to its future. This is reflected, for example, in Kosovo's difficulty in attracting foreign investment.⁷⁸

⁷⁴ Crawford 2006, *supra* note 2 at 406-08; see also the case of Republica Srpska, *ibid.*

⁷⁵ SC 5839th Mtg., *supra* note 55 at 12-13, 19; *Special Envoy Report*, *supra* note 48 at para. 5.

⁷⁶ *Ibid.*

⁷⁷ SC Res. 1244, *supra* note 44, preamble; *Letter of Permanent Representative of Serbia*, *supra* note 53.

⁷⁸ *Special Envoy Report*, *supra* note 48 at para. 16.

may be argued that an inability to reach an agreed solution may support an argument for the right to unilateral independence.⁷⁹

e. Avoiding Destabilization

The Ahtisaari Plan claims that reintegration of Kosovo into Serbia is not a viable option. In addition to mentioning the history of enmity between Kosovar Albanians and Serbs, it explains that the existing reality of the past eight years in which Serbia has not exercised any governing authority over Kosovo is irreversible. The report asserts that a return of Serbian rule over Kosovo, regardless of the degree of autonomy Kosovo would enjoy, would be unacceptable to the vast majority of the people of Kosovo and would provoke violent opposition.⁸⁰ The assumption at the root of this argument is that in a case where reaching an agreed solution is impossible, the solution causing the least violence and unrest should be chosen.

f. Additional Factors

Another possible factor that may strengthen a claim for independence is the existence of a comprehensive framework for the attainment of independence and continued institution-building: the Ahtisaari Plan. The existence of a detailed plan, which together with UNMIK's Kosovo Standards Implementation Plan form a comprehensive roadmap for institution building and increasing government functionality, may help alleviate doubts that Kosovo will meet the traditional requirements of statehood in the near future. This notion is reinforced by the professed support of the plan in the Kosovo Constitution.⁸¹

A further legitimizing factor for Kosovo's claim is the fact that the Kosovo Constitution creates a democratic multiethnic state and includes a commitment to the protection of human rights.⁸² The commitment to democratic institutions is significant in terms of legitimacy especially in light of the past human rights violations in Kosovo under Serbian rule, as well as past attacks directed against the Serb minority in Kosovo by Kosovar Albanians.⁸³

Thus, it

⁷⁹ Cf. *Kosova Declaration*, *supra* note 50.

⁸⁰ *Special Envoy Report*, *supra* note 48 at paras. 6-7.

⁸¹ *Kosovo Constitution*, *supra* note 51, preamble.

⁸² *Ibid.*

⁸³ King & Mason, *supra* note 40 at 276.

g. Conclusion: What Does It All Mean?

In sum, if the independence of Kosovo is to be recognized, it is reasonable to argue that the factors presented in this section have had a role in overcoming deficiencies with regard to fulfillment of the classical criteria of statehood. These factors—self-determination, a history of human rights violations, federal dissolution, international involvement and administration, deadlocked negotiations, the hope to avoid further destabilization, the existence of a comprehensive plan and the adoption of democratic institutions—all possibly serve as components of a principle of legitimacy. While it is likely that none of these factors can independently change the legal outcome, it is possible that together they may have a cumulative impact, allowing a claim for independence to overcome deficiencies in the fulfillment of the classical criteria.

V. Palestine: Before and After Kosovo

Analyzing the case of Kosovo, we found that it does not meet the classical criteria for statehood. We thus outlined possible additional considerations and circumstances which may nevertheless support international recognition of its independence. In this section, we first examine whether the Palestinian Authority (PA) meets the classical criteria of statehood. Later, we try to determine whether the possible new legal guidelines arising from the Kosovo case affect the prospects of a Palestinian unilateral declaration of independence.

Clearly, the cases of Kosovo and Palestine are not perfectly analogous, and each has its own unique characteristics. However, both strive for independence and do so within the legal framework of the international law of statehood. Thus, if the case of Kosovo has made an impact on this body of law or highlighted existing trends, we argue that the PA may benefit from such developments, notwithstanding possible differences in context or background between these cases.

Our reason for focusing on the PA is its likelihood to declare unilateral independence and to perhaps benefit from whatever precedential value Kosovo has.⁸⁴

⁸⁴ Reuters, 'Palestinian PM sets 2-Year Target for Statehood', 22 June, 2009, online: Ha'aretz <haaretz.com/hasen/spages/1094781.html> ['Palestinian PM sets 2-Year Target for Statehood'].

1. Does the Palestinian Authority Meet the Classical Criteria of Statehood?

The Palestinian population in the West Bank and Gaza Strip fulfills the requirement of a 'permanent population'⁸⁵ and is recognized as such by the international community,⁸⁶ including Israel.⁸⁷ The territory internationally regarded and accepted when considering Palestinian statehood⁸⁸ is the West Bank and the Gaza Strip, occupied by Israel in 1967. This would seem to be a sufficiently coherent territory, as its imprecise demarcation, limited size and fragmentation do not defeat the requirement.⁸⁹

On the issue of effective government, the common view seems to be that the PA does not fulfill the criterion. Crawford supports this conclusion by pointing out that the PA's control is over a population and not over a territory.⁹⁰ Others⁹¹

⁸⁵ John Quigley, 'Palestine: the Issue of Statehood' in Sanford R. Silverburg, ed., *Palestine and International Law* (Jefferson: McFarland & Company, 2002) 37 at 44 [Quigley]; James Crawford, 'Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States' in Guy S. Goodwin-Gill & Stefan Talmon, eds., *The Reality of International Law* (Oxford: Clarendon Press, 1999) 95 at 111 [Crawford 1999]; Francis A. Boyle, 'The Creation of the State of Palestine' (1990) 1 *Eur. J. Int'l L.* 302 [Boyle]; Tal Becker, 'International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas', online: Jerusalem Center for Public Affairs <jcpa.org/art/becker1.htm> [Becker].

⁸⁶ Council of League of Nations, *Mandate for Palestine*, arts. 2 & 3, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Mandate+for+Palestine.htm>; GA Res. 181, UN GAOR, 2d Sess., UN Doc A/RES/181 (1947); GA Res. 21/43, UN GAOR, 45th 43rd Sess., UN Doc A/RES/43/21 (1988).

⁸⁷ *Camp David Accords*, Israel and Egypt, 23 September 1978, Section A, online: <<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Camp%20David%20Accords>> [*Camp David*] and *Declaration of Principles on Interim Self-Government Arrangements*, Israel and PLO, 13 September 1993, art. 1, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> [DOP];

⁸⁸ *Ibid.*; *The Wye River Memorandum*, Israel and PLO, 23 September 1998, Sections IV & V, online: <www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Wye%20River%20Memorandum>; *The Initiative of the Saudi Crown Prince Abdullah, and the Performance-based Roadmap to a Permanent Two-state Solution to the Israeli-Palestinian Conflict* [Roadmap] adopted by SC Res. 1397, UN SCOR, UN Doc. S/RES/1397 (2002) and SC Res. 1515, UN SCOR, UN Doc. S/RES/1515 (2003), respectively.

⁸⁹ Crawford 2006, *supra* note 2 at 46-47, 52; but see Glenn E. Robinson, 'The Fragmentation of Palestine' (2007), 106 *Current History* 421 at 425-26 [Robinson]; *Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands)*, [1959] I.C.J. Rep. 209 at 212-13, 229; *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Merits, [1960] I.C.J. Rep. 6 at 27.

⁹⁰ Crawford 1999, *supra* note 85 at 120-22.

⁹¹ Omar M. Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' (1997), 26 *Denv. J. Int'l L. & Pol'y* 27 at 86 [Dajani]; Becker, *supra* note 85; but see Quigley, *supra* note 85 at 51; Boyle, *supra* note 85 at 301-03.

Palestinian hands are derived from agreements and not from an independently constituted Palestinian mandate.⁹²

While some believe the formal limitations on the PA's governmental capacity, set by the Israeli-Palestinian agreements, may no longer be valid,⁹³ these limitations are coupled by a practical dependency on Israel. Israel collects the tax revenues that comprise two thirds of the PA budget; the Palestinian economy is very dependent on the Israeli market for employment; the PA does not have its own infrastructure and receives its electricity and fuel from Israel; and Israel controls all exits and entrances to the PA.⁹⁴ Furthermore, Israel has not refrained from using its power over the PA, or applying pressure on its leaders, especially after the Hamas ascendance to power in 2006.⁹⁵ The 2006 reduction in the PA's potential left in effect a division of Israel into two Palestinian Agreements, the Gaza Strip and the Palestinian Liberation Organization (PLO)-controlled West Bank,⁹⁶ further weakening the PA's governmental capacity. Furthermore, after the swearing-in of the Hamas government in 2006, the Israeli cabinet froze all Palestinian tax revenues collected by Israel, pending Palestinian approval of the *Roadmap* prerequisites, such as combating terrorism.⁹⁷ In 2007, after declaring the Gaza Strip a 'hostile entity', the Israeli cabinet also significantly reduced the supply of electricity and fuel to Gaza.⁹⁸

The World Bank Institute has ranked the PA very low on all governance dimensions. Political Stability and Lack of Violence/Terrorism, and

⁹² DOP, *supra* note 87, Annex II, art. 3(b); *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, Israel-PLO, 28 September 1995, art. 1(1) 1(5), online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> [*Interim Agreement*].

⁹³ Cf. Geoffrey R. Watson, 'The Wall Decisions in Legal and Political Context' (2005), 99 A.J.I.L. 6 at 22-24 (arguing against this notion) [Watson].

⁹⁴ Neill Lochery, 'The Politics and Economics of Israeli Disengagement, 1994-2006' (2007), 43 Middle Eastern Studies 1 at 14-15 [Lochery]; Robinson, *supra* note 89 at 422.

⁹⁵ Robinson, *ibid.* at 421.

⁹⁶ See generally, Robinson, *ibid.* at 423.

⁹⁷ Israel Cabinet Decision 4705, 19 February 2006, art. A(1) online (in Hebrew): <www.pmo.gov.il/PMO/Archive/Decisions/2006/02/des4705.htm>; *Roadmap*, adopted by SC Res. 1551, *supra* note 88.

⁹⁸ Israel Security and Policy Cabinet Decision., 19 September 2007, cited in HCJ 9132/07 *al-Bassiouni et al. v. Prime Minister* (Unpublished, 27 January 2008), at para. 2 (Israel, S.C.) [*al-Bassiouni*].

Government Effectiveness were assessed in 2007 at an average of 10% effectiveness.⁹⁹

In sum, even if one were to consider the PA's formal scope of authority as sufficient in principle, the events of recent years have significantly undermined even the control formally possessed. In the current politically divided situation, it seems that neither Hamas nor the PLO can claim to control the entire designated Palestinian territory. While this is not a necessary condition, it may weaken, to some extent, the possibility of seeing the criterion of government fulfilled.¹⁰⁰

With regard to the requirement of 'capacity to enter into international relations', the Oslo Declaration of Principles and the Interim Agreement explicitly exclude 'foreign relations' from the PA's formal jurisdiction.¹⁰¹

Moreover, it is the PLO¹⁰² and not the PA, which has been the representative of the Palestinian people in the UN since 1974, holding observer status under the title 'Palestine' following the 1988 declaration of independence by PLO leaders.¹⁰³ Thus, today, when the PLO no longer fully controls the entire Palestinian population and territory, the Hamas-controlled sectors are not represented internationally. Furthermore, many states refuse to engage in any way with the Hamas government and leaders.¹⁰⁴ This raises further questions as to the Palestinian capacity to conduct international relations.

As mentioned, recognition may carry significant weight, and compensate for a non-decisive fulfillment of the Montevideo conditions. Today, while supportive of future Palestinian independence, many states and international bodies do not view the PA as a state. This view is implicitly expressed by the

⁹⁹ Online: <info.worldbank.org/governance/wgi/pdf/c238.pdf>.

¹⁰⁰ See Robinson, *supra* note 89 at 424-26.

¹⁰¹ *DOP*, *supra* note 87, art. IV & Annex II, art. 3(b); *Interim Agreement*, *supra* note 92, art. IX(5); Crawford 1999, *supra* note 85 at 120-22; Dajani, *supra* note 91 at 87.

¹⁰² *National Covenant of the Palestine Liberation Organisation*, 28 May 1964, online: <www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/11+National+Covenant+of+the+Palestine+Liberation+O.htm>; see also *Palestine National Council: Charter (1968)*, reprinted in Walter Laqueur & Barry Rubin, eds., *The Israel-Arab Reader*, 6th ed. (New York: Penguin Books, 2001) 117 [Laqueur & Rubin].

¹⁰³ Quigley, *supra* note 85 at 41; GA Res. 3236, UN GAOR, 29th Sess. (1974); GA Res. 3237, UN GAOR, 29th Sess. (1974); see also SC Res. 607, UN SCOR, UN Doc. S/RES/607 (1988); GA Res. 43/177, UN GAOR, 82nd Mtg. (1988); Crawford 1999, *supra* note 85 at 111.

¹⁰⁴ US Department of State, *Country Reports on Terrorism (2008)*, Chapter 6, online: <state.gov/s/ct/rls/crt/2007>; European Union Council Decision 2008/583/EC, 15 July 2008, OJ L 188, online: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:188:0021:0025:EN:PDF>.

Roadmap, which set Palestinian statehood as one of its goals. By consenting to the *Roadmap*, the PA itself, as well as the Security Council, Israel, the EU and the US, recognized the same.¹⁰⁵ In addition, many scholars read the ICJ Advisory Opinion regarding *The Wall* as founded on an evidentiary finding that the PA is a non-state entity, thus bringing about the rejection of Israel's claim of self-defence.¹⁰⁶ Furthermore, the PA and PLO's demands for state immunity in municipal courts were rejected by US and Israeli courts, which refused to acknowledge the PA as a state.¹⁰⁷ Interestingly, while considering *The Wall*, the ICJ allowed Palestine to submit written submissions and appear before it;¹⁰⁸ the ICC may follow suit.¹⁰⁹

An opportunity to assess the international recognition of Palestinian statehood, prior to creation of the PA, arose after the 15 November 1988 PLO declaration of Palestinian independence.¹¹⁰ The UN General Assembly, while affirming the declaration as the implementation of Resolution 181 and of the Palestinian 'need' to 'exercise sovereignty over their territory', did not admit 'Palestine' as a member.¹¹¹ Furthermore, while some states established missions in the Palestinian territories, these were not 'embassies',¹¹² and other states refused to recognize Palestinian independence, for, amongst other reasons, its refusal to recognize Israel.¹¹³ Some writers have since seen this international recognition, coupled with the implied Israeli acknowledgment of Palestinian self-government since 1993, as providing

¹⁰⁵ *Roadmap*, adopted by SC Res. 1551, *supra* note 88; Israeli Cabinet Decision 1996, 6 June 2004, online (in Hebrew): <www.pmo.gov.il/PMO/Archive/Decisions/2004/06/des1996.htm>.

¹⁰⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 139 [*ICJ Wall Advisory Opinion*]; cf. Higgins J., separate opinion at paras. 34-35, *ibid.*; Michla Pomerantz, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial' (2005), 99 Am. J. Int'l. L. 26 at 26-27.

¹⁰⁷ *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274 (2005), at 32-34 (U.S.A.), and the authorities mentioned there; H.C.J. 4060/03 *Palestinian Authority v. Dayan* (unpublished, 17 July 2007) (Israel, S.C.).

¹⁰⁸ *Written Statement Submitted by Palestine* (2009), online: <<http://www.icj-cij.org/docket/files/131/1555.pdf>>; Watson, *supra* note 93 at 22-24.

¹⁰⁹ Marlise Simons, 'Palestinians Press for War Crimes Inquiry on Gaza', 10 February 2009, *The New York Times*, online: <nytimes.com/2009/02/11/world/middleeast/11hague.html>.

¹¹⁰ *Palestine National Council: Declaration of Independence (November 15, 1988)*, reprinted in Laqueur & Rubin, *supra* note 102 at 354-58.

¹¹¹ GA Res. 43/177, *supra* note 103; Crawford 1999, *supra* note 85 at 111.

¹¹² Dajani, *supra* note 91 at 60; Quigley, *supra* note 85 at 47.

¹¹³ Quigley, *ibid.* at 42; Boyle, *supra* note 85 at 301-03; Crawford 1999, *supra* note 85 at 115-16; *Country Cooperation Strategy for WHO and the Occupied Palestinian Territory 2006-2008*, UN. Doc. WHO-EM/ARD/018/E/R (2005) 9.

evidence for Palestinian statehood.¹¹⁴ This uncommon position seems rather unconvincing.¹¹⁵

In sum, it seems that while the PA has been active internationally, it does not have 'formal independence', nor does it seem to have the capacity to effectively govern, necessary under the classical criteria.¹¹⁶ Nevertheless, it is important to note that following the 2005 Israeli disengagement,¹¹⁷ Israel no longer views itself as an occupier of the Gaza Strip.¹¹⁸ This may be used as a springboard for a Hamas or an all-Palestinian declaration of independence in the future, due to the fact that, at least in the Gaza Strip, no other sovereign entity now claims control. On the other hand, as stated above, Palestinian control there is also, at best, questionable. In conclusion, if the classical criteria were the only yardstick for appreciation, it would seem that the PA does not meet the prerequisites for statehood. We next turn to examine whether additional considerations and circumstances, which may support international recognition of Kosovar independence despite deficiencies in the classical criteria, may also play a role in the Palestinian context.

2. *Additional Considerations*

Arguably, some elements present in the Kosovo case are also evident in the Palestinian context and may have implications for a possible Palestinian unilateral declaration of independence.

a. *Self-determination*

The Palestinian people's right to self-determination was recognized internationally as early as 1947, in General Assembly Resolution 181 which envisioned two states in the territory of Mandatory Palestine: a Jewish state and an Arab state.¹¹⁹ Following the 1967 war, Security Council Resolution 242 emphasized the inadmissibility of acquisition of territory by war, and demanded the '[w]ithdrawal of Israeli armed forces from territories occupied', which included the West Bank and Gaza.¹²⁰

¹¹⁴ Quigley, *ibid*; Boyle, *ibid*.

¹¹⁵ Watson, *supra* note 93 at 23.

¹¹⁶ Crawford 2006, *supra* note 2 at 66; Shaw 2003, *supra* note 5 at 181-82.

¹¹⁷ Lochery, *supra* note 94 at 7, Israel Cabinet Decision 1996, *supra* note 105.

¹¹⁸ HCJ *al-Bassiouni*, *supra* note 98 at para. 12; Yuval Shany, 'Far Away, So Close: The Legal Status of Gaza After Israel's Disengagement' (2006), International Law Forum, The Hebrew University of Jerusalem, Research Paper No. 12-06, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923151>.

¹¹⁹ GA Res. 181, *supra* note 86, art. I.A.1

¹²⁰ SC Res. 242, UN SCOR, UN Doc. S/RES/242 (1967), preamble & art. 1; this was reaffirmed in SC Res. 338, UN SCOR, UN Doc. S/RES/334 (1973), art. 2.

indicate a possible international recognition of a Palestinian right to statehood, coupled with discontent with Israeli claims over the territories occupied. The 1978 Camp David Accords and the 1995 Israeli-Palestinian Interim Agreements later recognized the legitimate rights of the Palestinian people and envisioned some degree of autonomy for the Palestinians in the West Bank and Gaza.¹²¹ Finally, the US sponsored *Roadmap*, adopted by the Security Council and Israel,¹²² reflects the widely held international view that the Palestinians may eventually exercise their right to self-determination externally, i.e. by means of an independent state in the West Bank and Gaza. When compared to pre-independence Kosovo, it seems that a Palestinian right to external self-determination enjoys broader support, possibly indicating that even a unilateral declaration of independence would be recognized, despite deficiencies in fulfillment of the classical criteria. Possible resentment of unilateral declaration may be further mitigated in light of the fact that Palestinian statehood does not require secession and disintegration of a state, but rather the end of a frowned-upon occupation.

b. Remedial Secession

While Kosovo may be seen as a case clarifying the conditions and legality of remedial secession, such a development would not seem to affect the Palestinians, as remedial secession is not the suitable framework. The Palestinian territories are not a constituent unit of any sovereign state: Israel does not claim sovereignty, and Egypt and Jordan long ago forfeited any claims over Gaza and the West Bank.¹²³ In any case, it is questionable whether the Palestinian case meets the conditions for remedial secession, which may have crystallized in Kosovo, specifically the severity of human rights violations and deadlocked negotiations. Nevertheless, it is possible that international abhorrence of Israel's Operation in Gaza in December 2008¹²⁴ might serve to support a claim of human rights violations justifying unilateral independence. Moreover, Hamas's control of Gaza may indicate the weak prospects of eventually reaching an agreed solution. These Resolutions

However, this framework may be relevant as indicating that the Palestinian starting point is even more favourable than that of Kosovo, still considered by Serbia to be an integral part of its territory. If Kosovo sets a

¹²¹ See *supra* note 92.

¹²² See *supra* note 105.

¹²³ *Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan*, Israel and Jordan, 26 October 1994, art.3, online: <www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-Jordan+Peace+Treaty.htm>; *Camp David*, *supra* note 87, Section A.

¹²⁴ SC Res 1860, UN SCOR, UN Doc. A/RES/1860 (2009).

precedent for remedial secession, one may argue that in similar circumstances, an entity whose territory is not subject to competing claims of sovereignty, would *a fortiori* have a stronger argument.

c. International Involvement and Administration

As in the case of Kosovo, the international involvement in the Palestinian future is significant. On the one hand, the international position regarding the Palestinian future is that of a 'two state solution', determining that the Palestinians should be independent. In this regard the Palestinians are better situated than Kosovo was before its declaration. However, the international position still stipulates certain prerequisites, at least at this stage, including reaching an agreed solution with Israel.¹²⁵ In other words, while independence is internationally acceptable, a unilateral declaration of independence would not necessarily find favour. Moreover, the existence in Kosovo of a comprehensive plan for institution-building and achieving government capacity is not paralleled in the Palestinian context, a fact which may decrease the willingness to acknowledge its independence.

The nature and scope of international involvement is also different. In Kosovo, an international administration was fully responsible for all aspects of government; in the PA, despite substantive aid and guidance, international involvement does not reach similar magnitude. This difference may be significant, as the international community does not have the assurances it had in Kosovo of the continued development of government institutions ultimately leading to effectiveness.¹²⁶

d. Deadlocked Negotiations

While in the Kosovo case it was contended that negotiations had reached a dead end,¹²⁷ it is doubtful whether this is the case with regard to the Palestinians. Today, talks have not been renewed since Binyamin Netanyahu's return to power following the January 2009 parliamentary election.¹²⁸

¹²⁵ See *supra* note 88; ICJ *Wall Advisory Opinion*, *supra* note 106 at para. 162.

¹²⁶ D'Aspremont, *supra* note 39 at 654, 658.

¹²⁷ *Special Envoy Report*, *supra* note 48 at para. 3.

¹²⁸ 'Full text of Netanyahu's Foreign Policy Speech at Bar Ilan', 14 June 2009, online: Ha'aretz <<http://www.haaretz.com/hasen/spages/1092810.html>>; Kahled Abu Toameh, 'PA: Netanyahu has Buried Peace Process', 14 June 2009, *The Jerusalem Post*, online: <<http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1244371096340>>.

negotiations failed despite good faith engagement on their part.¹²⁹ They may even enjoy more support than did Kosovo, since the final outcome of Palestinian statehood is commonly accepted today. The claim would be even stronger if made by a unified Palestinian leadership.

e. Additional Considerations: Democracy and Human Rights

An issue which may tip the scale of international recognition of a unilateral Palestinian declaration is the character of the state established. PLO leaders, and in particular its present leaders, Mahmoud Abbas and Salam Fayyad, enjoy international sympathy, as opposed to Hamas leaders, who are viewed as extremists.¹³⁰ Thus, it may be reasonable to conclude that a PLO declaration of independence of a state committed to democracy and the protection of human rights will be acknowledged more easily than a similar Hamas declaration. As mentioned, the Kosovar constitution is committed to multiethnic democracy, guaranteeing human rights and minority rights. This may have served to mitigate certain obstacles hampering its recognition. A Palestinian commitment to democracy and human rights may have a similar effect.

VI. Conclusion: Palestine and Legitimacy

Examination of factors existing in the Kosovo case shows that, in some regards, the Palestinian case is in a more favourable position. For instance, no other entity claims sovereignty over its territory and the eventual outcome of statehood is widely accepted. However, it seems that at this stage, several obstacles still stand in the way of a Palestinian unilateral declaration of independence. As the underlying principle of these additional considerations is legitimacy, and as the feasibility of an agreed solution with Israel is not yet refuted, unilateralism may—at present—be detrimental to Palestinian independence.

However, this conclusion may change with time under a certain confluence of circumstances: failure of negotiations despite good faith engagement on the Palestinian side; genuine progress and democratic declaration of independence may find more sympathy, provided that the institution-building and commitment to the protection of human rights, Palestinians are able to convince the international community that the especially under international guidance. Finally, it seems that a crucial factor influencing the likelihood of international recognition would be the reconciliation of Palestinian political factions into a unified PLO-led

¹²⁹ 'Palestinian PM sets 2-Year Target for Statehood', *supra* note 84.

¹³⁰ Robinson, *supra* note 89 at 422; see *supra* note 104.

leadership, accepting the PA's international obligations, formally recognizing the existence of Israel and committed to peaceful coexistence.

The legal status of Kosovo, following its unilateral declaration of independence and the international mixed reaction to it, is not yet clear. The legalization of the question of recognition, which has long been thought to be one of fact and policy, evidenced by the referral of the Kosovo case to the ICJ, is an intriguing trend and the decision will hopefully shed light on this issue.

A recognition of Kosovo as independent will contain lessons for others. It may support the position that certain factors beyond the Montevideo criteria have been established. The circumstances present in Kosovo—self-determination, a history of human rights violations, federal dissolution and the hope to avoid destabilization, international involvement and administration, deadlocked negotiations, the existence of a comprehensive plan and the adoption of democratic institutions—may affect conclusions regarding statehood elsewhere. If we examine the existence of these emerging considerations in the Palestinian case we find that in some respects, a Palestinian claim to independence may have even better prospects than Kosovo, given that the internationally accepted solution envisions an independent State of Palestine. Nevertheless, the prospects for a Palestinian unilateral declaration of independence finding sympathy seem weaker, as the international community has not yet lost hope of achieving a negotiated solution between Israel and the Palestinians, and in light of unsatisfactory Palestinian governance. These suggest that unilateral independence would not find international recognition at present. However, if future negotiations prove fruitless, and the PA, as the sole legitimate representative of the Palestinian people, exhibits willingness to achieve governance goals, such a declaration may be met with international acceptance.