

## THE INEVITABLE INDEPENDENCE OF KOSOVO

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On 17 February 2008, Kosovo's Parliament declared Kosovo's independence. At the same time, it declared that Kosovo will still be bound by SC Resolution 1244 (1999), the one that established the international presence in Kosovo, and by the Ahtisaari plan<sup>1</sup> which provided for independence under international supervision. The declaration provoked mixed and contrasting reactions. Almost forty-seven states, amongst which the United States, recognised Kosovo whereas other states, among which Serbia, condemned the declaration as illegal and illegitimate. Kosovo has not yet been admitted to the United Nations, but, instead, the General Assembly has requested from the International Court of Justice an Advisory Opinion as to whether Kosovo's unilateral declaration of independence is in accordance with international law.<sup>2</sup> From the above, it transpires that Kosovo's declaration of independence has political as well as legal ramifications.

This short note will not deal with the legal or political issues raised by Kosovo's declaration of independence, not because I consider them unimportant or because I underestimate the legal as well as political fallout from the declaration. The main reason for not dealing with such issues is that they becloud the underlying question which is what should become of Kosovo. The point I would like to make here is that, irrespective of any political or legal reverberations, independence is inevitable because it is the outcome of a process that started almost 10 years ago and has been sanctioned by the international society and international law. More specifically, the international society engineered and supervised through the UN a legal, political, social and economic process in Kosovo which leads almost deterministically to independence. Thus, prevarications in accepting the end-product of that process are rather indefensible.

So what is the process I am referring to? It is territorial administration which is the modern version of the older system of mandates<sup>3</sup> and trusteeships.<sup>4</sup> The similarities between these institutions are striking.<sup>5</sup>

Both the mandates and territorial administration have an international dimension. The mandates were established by the League of Nations which

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<sup>1</sup> Comprehensive Proposal for the Kosovo Status Settlement 2007.

<sup>2</sup> GA Res 63/3 (2008).

<sup>3</sup> Article 22 of the League of Nations Covenant.

<sup>4</sup> See Chapter XI and XII of UN Charter.

<sup>5</sup> See N. Tsagourias, 'Humanism and the Mandates System: Its Modern Revival', *Hague YBIL*, 2001, p. 97.

also supervised the mandatory state, whereas territorial administration is established and is operated by the United Nations which also retains a supervisory role when powers are returned to local authorities.

Second, the aim behind the mandates was to create well-functioning entities. As President Wilson put it “the aim ... is to build a political unit that can take charge of its own affairs”. Likewise, the aim behind territorial administration is to transform a territory politically, legally, economically or socially and create an entity that can govern itself. For this reason, the UN has been endowed with full legislative and executive powers over Kosovo in order to reform local institutions, reform the judiciary and the legal system, introduce democratic self-governing institutions, introduce human rights and also achieve economic reconstruction. The ultimate aim behind this process is to attain internal and external peace, an aim that has also been shared by the mandates.

Third, and related to the above, mandates and territorial administration are designated as interim measures that apply to conflict situations before a final settlement is reached. The conflicts I am referring to are the ones caused by the clash between two powerful but often antithetical principles: the principle of self-determination and the principle of state sovereignty. More specifically, when people within a certain territory decide to exercise their right to self-determination, the realisation of this right may pose a threat to state sovereignty and integrity. In order to quell peoples’ claim to self-determination, the territorial sovereign often resorts to even more repressive and reprehensible methods. Such measures not only aggravate the internal situation but can also pose a threat to international peace and security. Faced with such a situation, international society and international law are paralysed because they cherish both the principle of self-determination and that of state sovereignty. Unable to make a decision by prioritising one principle at the expense of the other, international society opts for the transitional institution of territorial administration which tries to reconcile self-determination and state sovereignty by recognising and promoting the former whilst, at the same time, defending the latter. This is most evident in SC Res 1244 according to which Kosovo is promised self-government and self-determination whilst at the same time Serbia’s sovereignty and territorial integrity is reaffirmed.

However appealing such compromise may be at the beginning, it cannot be sustained for long because it does not solve the underlying problem which is the status of the referent territory and of its people. More than that, by transforming the political, social, economic, legal character of the administered territory, territorial administration nurtures and cultivates claims to self determination that take the form of nationhood and statehood. Thus, even if SC Res 1244 (1999) left the final status of Kosovo open and, even if self-determination does not always suggest complete independence, statehood and independence is the only option available for Kosovo. This

conclusion is also supported by reference to the mandates system according to which, the prospective independence of mandated territories was graded in line with their degree of development.<sup>6</sup> Kosovo under UN tutelage has reached the requisite level of development that can justify its existence as an independent state as eventually did all mandated territories.

A number of other points are also pertinent. Since 1999, the territory has been cut off from the rest of country (Serbia) culturally, legally, politically, economically, socially, or emotionally which makes difficult any rapprochement. Even Serbia is cognisant of the fact that at least since 1999 any feeling of affection and sharing of destiny between Kosovars and Serbs has been lost and, for this reason, its reaction to the declaration of independence is muted. Furthermore, any option other than independence is more risky. If Kosovo is to remain part of Serbia albeit as a substantially autonomous province, this can only cause more hardship because of the huge political and emotional gap that exists between the two parts or it may lead to a *de facto* (if not *de jure*) state within Serbia. For territorial administration to continue, on the other hand, is impossible because it will become part of the problem and, as was said above, it was only an interim measure placed between the Serbian past and the Kosovar future.

In conclusion, international society and international law should accept Kosovo's independence because this is the outcome of the process they themselves have set in motion. They have cultivated and strengthened dormant or weak claims to self-determination which have now matured and demand full recognition. It is for these reasons that Kosovo's independence has become inevitable.

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<sup>6</sup> Class A Mandates were the most developed; Class B Mandates were fairly developed and Class C Mandates were the less developed.