

THE IMPRINT OF KOSOVO ON INTERNATIONAL LAW

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In several respects, international responses to recent developments in Kosovo have had a significant—in some respects, profound—impact on international law. While that impact has been especially notable with respect to the law governing humanitarian intervention, responses to the Kosovo crisis have important implications for other areas of international law as well.

But, if recent developments vis-à-vis Kosovo have had a significant impact on international law, their implications remain unclear and can be assessed only in highly tentative terms. This is notably the case with respect to the law governing self-determination. Not until the final status of Kosovo is resolved will it be possible to even characterize the precedent established. Even so, responses to Kosovars' claim for independence bring into sharp relief a potentially profound, if subtle, evolution in the law governing separatist claims.

Contemporary challenges to bedrock principles of international law are reflected in the Security Council resolution establishing the terms of Kosovo's post-war governance, SC Resolution 1244 (1999).¹ That resolution includes a talismanic nod to time-honored principles of territorial sovereignty—and proceeds to eviscerate them. While reaffirming “the commitment of all [UN] Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia . . .,” the resolution provides for an “interim [United Nations] administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,” pending a final political settlement of Kosovo's status.²

At the risk of oversimplification, developments in the immediate aftermath of the military intervention by the North Atlantic Treaty Organization (“NATO”), as reflected in SC Resolution 1244, seem to signal an emerging norm: A state that severely, systematically, and persistently represses the rights of a segment of its citizens may thereby forfeit the right to exercise full sovereign authority over that population. But (and here is a crucial qualification), it does not necessarily follow that the oppressed population is entitled to secede—at least not immediately. Even so, responses to developments in Kosovo have moved external actors further down the road toward recognizing

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1. SC Res. 1244, ¶ 10 (1999).

2. *Id.*

that a presumptive legitimacy may attach to certain types of secessionist claims, particularly when the population in question has endured persistent, systematic, and severe repression at the hands of its *de jure* sovereign.

Before I elaborate, it may be helpful briefly to recall, as a baseline, widely accepted interpretations of the right of self-determination under international law. In brief, when the "principle of self-determination," formerly associated with the redrawing of Europe's borders following World War I, metamorphosed into a "right," the accepted meaning of "self-determination" also was transformed. It became a right of colonized territories to determine their political status. The "peoples" who enjoyed a right to secede were defined in territorial terms, and the territories whose populations could exercise the right of self-determination were colonies. Beyond this generally accepted interpretation, certain developments originating in the inter war period and continuing into the period of decolonization suggested that groups that were systematically repressed on a continuing basis: at least groups that were excluded from full political participation based upon their race and creed: might be entitled to secede.³ For reasons that need no elaboration, the latter possibility may have obvious relevance for Kosovars.

In recent years, scholarly views have begun to coalesce around another additional meaning for the right of self-determination, emphasizing its internal dimension.⁴ In multi-ethnic democracies, the right has often and increasingly been invoked to support greater autonomy for defined minorities within established states.

In an article published last year,⁵ I argued that these established interpretations may need to make room for a somewhat broader approach to the right of self-determination, one that reflects contemporary developments in international law first heralded seven years ago in an important article by Thomas Franck. "Democracy," he wrote, "is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes."⁶ Although Professor Franck's article did not examine

3. Particularly relevant to this interpretation of contemporary international law is the U.N. General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8018 (1970). For analysis of the implications of this resolution for separatist claims, See Antonio Cassese, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 108-24 (1995).

4. See, e.g., Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?* 16 MICH. J. INT'L L. 733 (1995); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 57-63 (1993); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

5. Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998).

6. Franck, *supra* note 3, at 46.

the significance of this nascent law for separatist movements, I believe that principles underlying the "democratic entitlement" have substantial implications for the legitimacy of their claims.

To put the case succinctly: Since the core idea of democracy is government by consent of the governed, it cannot be irrelevant to the legitimacy of a government that a defined portion of its population persistently rejects its authority to govern them. This much seemed plain to John Stuart Mill. Affirming that "the question of government ought to be decided by the governed," Mill continued: "One hardly knows what any division of the human race should be free to do, if not to determine with which of the various collective bodies of human beings they choose to associate themselves."⁷

This does not mean that the boundaries of states are perennially open to challenge. The continuing consent of the state's citizens can generally be assumed; indeed, this assumption is essential to the daily practice of democracy. But if consent is manifestly and irrevocably absent on the part of a significant portion of a state's citizens, the legitimacy of that state's sovereignty over the rebel population is surely placed in doubt.

This point becomes apparent when considered in light of a cardinal rule of international law: Alien states may not lawfully impose their rule upon non-consenting peoples. Put differently, international law no longer abides colonization or forcible annexation. If these forms of non-consensual rule are incompatible with accepted principles of self-determination, surely those same principles are at least challenged by a state's continued assertion of sovereignty over a defined population that has unambiguously and irrevocably rejected its sovereignty.

This basic point was acknowledged by the Supreme Court of Canada in an important decision rendered last year. Asked to advise on whether the province of Quebec could unilaterally secede from Canada, the Court concluded that, because Canada's political institutions "are premised on the democratic principle," an expression of the democratic will of Quebecois to secede would confer legitimacy on their quest: although not a right to secede unilaterally.⁸ Instead, Canada's other provinces would be obliged to enter into good faith negotiations over Quebec's status. What is noteworthy about this decision is the Court's concession that a region's democratically expressed will to secede obliges its national partners to take the claim seriously.

7. John Stuart Mill, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), in *UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 392 (Everyman's ed. 1993).

8. In the Matter of Section 53 of the Supreme Court Act (Reference re Secession of Quebec), [1998] 2 S.C.R. 217.

Turning to Kosovo, at the proverbial first blush it is difficult to discern a similar approach in the responses of states that attempted to broker a solution to the Kosovo crisis, including the United States. Throughout its failed efforts to secure a negotiated resolution of the crisis in the months preceding NATO's intervention, the United States made clear its unwillingness to endorse the claims of Kosovar separatists.

In even stronger terms, the Administration of then-United States President George Bush opposed in the early 1990s the secessionist claims of Slovenia and Croatia, the first of the former Yugoslavia's republics to proclaim independence. Some eight months after Slovenia made its first formal move toward secession, the United States as well as European states voiced strong support for Yugoslav unity. During a visit to Belgrade in mid-1991, then Secretary of State James Baker warned that the breakup of Yugoslavia "could have some very tragic consequences." Nor, he added, would the United States recognize the independence of Slovenia and Croatia "under any circumstances."⁹

Against this background, little-noted remarks of President Clinton during a visit to the capital of Slovenia in the immediate aftermath of NATO's victory take on special significance. Remarkably in light of United States policy at the time Slovenia sought to secede from the former Yugoslavia, President Clinton hailed the success of Slovenia's brief war of independence. "Eight years ago," he said, "Mr. Milošević triggered a military assault on your nation. But you resisted. You secured your freedom, and you proclaimed that it would never be the same again. Now, all the people, all the people of every part of Europe must be able to do the same thing."¹⁰

Although ostensibly addressing Slovenia rather than Kosovo, President Clinton's remarks in Ljubljana, coming a scant week and a half after NATO's victory in its war against Yugoslavia over Serbia's conduct in Kosovo, has to be seen as a statement of the principles thought to have been defended by NATO's intervention. But what principles, precisely, did President Clinton have in mind?

Here, again, we are thrown back upon the ambiguities of developments whose final outcome is not yet known. Yet it is difficult to avoid the conclusion that President Clinton's remarks expressed an implied claim—that Slovenia's secession from a non-democratic state was supported by internationally-recognized principles of democracy and personal liberty.¹¹

9. Quoted in *Talk of the Town*, NEW YORKER, Aug. 12, 1991, at 21.

10. William Jefferson Clinton, *Remarks to the People of Ljubljana*, June 21, 1999, reprinted in WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, June 24, 1999 Vol. 35, No. 25, pp. 1165-66 [hereinafter *Clinton's Remarks in Ljubljana*].

11. I do not believe that this is the sole implication of President Clinton's remarks to the Slovenians assembled to greet him in Ljubljana. Other aspects of his brief speech seemed to emphasize the nature of the democracy that Slovenia had established (as distinguished from the independence it had secured). For

Recalling “how many armies have marched through this square, how many flags have been raised over your city,” President Clinton continued, “Now, at last, the flag flying in this capital stands for independence and democracy and the better life you are building. Congratulations, and God bless you.”¹² By implicitly linking Slovenia’s quest for independence to democratic principles, President Clinton’s remarks in Ljubljana seem to partake of the same spirit as the position sketched out by Canada’s Supreme Court one year ago.

It remains to be noted that these signposts of an emerging approach toward separatist claims—an approach that recognizes the relevance of democratic principles in legitimizing at least some of those claims — raise a raft of vexing questions. If democratic principles are relevant to the claims of breakaway republics, what precisely are their implications? Would President Clinton have hailed Slovenia’s successful bid for independence in terms of democratic principles if the rump Yugoslavia had not been associated with campaigns of “ethnic cleansing” and military force?

Returning to the jurisprudence of the Canadian Supreme Court does the legitimacy of a separatist movement turn upon whether its claim is expressed through democratic processes? To the extent that the Court’s views rested upon what it saw as a duty on the part of all relevant actors to negotiate with each other in good faith, what would that Court counsel if one party refused to negotiate in good faith—or at all?

CONCLUSION

The complexity of these issues and the profound dilemmas they present once again highlight the importance of early intervention in addressing crises that might lead toward separation, perhaps violently, if not addressed in a timely and effective fashion. The implications of the emerging norms I have sketched in this essay are sobering indeed. Surely, we must be deeply unsettled by the specter that aspiring statelets such as Kosovo, and perhaps Montenegro next, may effectively be compelled to withdraw from their former sovereign in order to secure fundamental rights.

example, immediately following the remarks quoted *infra* at text accompanying note 2, President Clinton said: “All over the world, people seek the same kind of freedom and justice and peace that you have brought here — from Northern Ireland to the Middle East, to southern Africa, and in central and southeastern Europe.” In a similar vein, after congratulating Slovenians for “resist[ing] . . . Mr. Milošević [’s] . . . military assault on [their] nation,” President Clinton continued: “Democracy, tolerance, and human rights must prevail everywhere.” The focus on the nature of Slovenia’s democracy reflected in these remarks does not, however, detract from the inference that the statements quoted in the text express support — if only retrospectively — for Slovenia’s quest for independence from the former Yugoslavia.

12. Clinton’s Remarks in Ljubljana, *supra* note 10.