



FACULTY OF LAW
University of Lund

Susanna Hedenmark

Kosovo – Political Reality, Legal Fiction

*- An analysis of Kosovo and the legal implications of supervised
independence -*

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Supervisor: Göran Lysén

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Summary

Kosovo was administered by the UN for almost ten years before unilaterally declaring its independence on the 17th of February 2008. In order to gain support from some major international political players, the declaration of independence was made in line with a number of requirements, including continued external presences, resulting in a “supervised independence”. These requirements were outlined in a proposal formed by the UN Special Envoy for Kosovo Matti Ahtisaari. As the proposal was not accepted in the UNSC, it could not, however, replace the existing resolution mandating the UN – presence in Kosovo since 1999.

There has consequently been much confusion and uncertainty about the legal status of Kosovo and the tasks of the missions entrusted to international actors. The two documents now exist in parallel; the Ahtisaari-proposal is more of a political document enabling the presence of an International Civilian Representative with far-reaching executive authorities and the UN-resolution giving continued legal authority for the UN, KFOR and arguably the EU rule of law mission. Together these actors have executive authority in all branches of government and the monopoly to use violence still remains with the international military forces. As Kosovo did not have an effective government in control at the time of the declaration of independence, the criteria for statehood could be put into doubt as not to have been fulfilled at that point of time. The declaration was only recognised by approximately one third of all existing states and consequently such recognitions did not have a sufficiently mending effect. Influence exercised by external actors does not necessarily infringe upon statehood but if influence extends to a substantive control that cannot be brought to an end at the choice of the state in question, actual independence may be lost. Furthermore, the division between Kosovo Albanians and Serbs are still deep and the internal problems are ongoing and considerable.

Without economic, military and political support Kosovo could not possibly exist as a state today.

As Kosovo never came to reach independence from the external actors, their presence also currently impedes the achievement of statehood. Accordingly, the conclusion seems inevitable, that Kosovo is merely so far a politically created entity almost devoid of the necessary attributes to make it a state.

Sammanfattning

Kosovo administrerades under nära tio år av en FN-administration (UNMIK) före den ensidiga självständighetsförklaringen utropades den 17 februari 2008. För att få stöd från de huvudsakliga internationella politiska aktörerna utropades självständigheten i linje med ett antal krav från dessa, inkluderande en fortsatt internationell närvaro, vilket resulterade i en ”övervakad självständighet”. Dessa krav utformades av FN: s speciella sändebud för Kosovo, Matti Ahtisaari. Eftersom förslaget aldrig antogs av FN: s säkerhetsråd kunde det dock inte ersätta den existerande säkerhetsrådsresolutionen (1244) som givit mandat åt FN sedan 1999.

Det har följaktligen varit mycket osäkerhet och förvirring rörande Kosovos rättsliga status samt de internationella aktörernas uppgifter och mandat. De två dokumenten existerar nu parallellt, Ahtisaari-förslaget är mer ett politiskt dokument som möjliggör närvaron av en *International Civilian Representative* med vittgående befogenheter medan FN-resolutionen ger fortsatt mandat åt FN, KFOR och möjligen även EU: s rättsstatsmission. Tillsammans har dessa aktörer exekutiv makt i alla statens maktstrukturer, och monopolet för våldsanvändning finns fortfarande hos den internationella militära närvaron. Eftersom Kosovo inte hade en effektiv regering med kontroll över territoriet vid självständighetsförklaringen kan det ifrågasättas om kriterierna för att uppnå *statehood* var uppfyllda vid den tidpunkten. Självständighetsförklaringen erkändes endast av omkring en tredjedel av alla stater, och kan därför inte anses ha en tillräckligt reparerande effekt. Externa aktörers inflytande påverkar generellt inte *statehood*, men om sådant inflytande övergår i substantiell kontroll som inte kan avslutas genom statens fria vilja kan den faktiska självständigheten (*actual independence*) gå förlorad. Dessutom är splittringen mellan Kosovoalbaner och Kosovoserber alltfjämt existerande, och de interna problemen är pågående och allvarliga. Utan externt ekonomiskt, politiskt och militärt stöd skulle Kosovo inte kunna existera som en stat.

Eftersom Kosovo aldrig vunnit självständighet från de externa aktörerna, hindrar deras fortsatta närvaro uppnående av statsstatus för Kosovo. Slutsatsen verkar därmed oundviklig; Kosovo är en politiskt skapad entitet som i princip saknar de nödvändiga attribut som krävs för att en stat skall anses ha uppkommit.

Abbreviations

AAK	Alliance for the Future of Kosovo
CPS	Comprehensive Proposal Settlement
CRK	Constitution of the Republic of Kosovo
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EUMS	EU Member States
EUSR	EU Special Representative
ESDP	European Security and Defence Policy
FRY	Former Republic of Yugoslavia
ICO	International Civilian Office
ICR	International Special Representative
ICTY	International Criminal Tribunal for the former Yugoslavia
INTERPOL	International Criminal Police Organization
ISG	International Steering Group
KFOR	Kosovo Force
KP(S)	Kosovo Police (Service)
KSF	Kosovo Security Force
LDK	Democratic League of Kosovo
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Cooperation in Europe
PCG	Pre-Constitutional Working Group
PDK	Democratic Party of Kosovo
PISG	Provisional Institutions of Self-Government
PM	Prime Minister
SIDA	Swedish International Development Cooperation Agency
UDI	Unilateral declaration of independence
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	UN Security Council
UNTAC	UN Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
US	United States
USAID	U.S. Agency for International Development
SFRY	Socialist Former Yugoslav Republic of Yugoslavia
SPRK	Special Prosecution Office of the Republic of Kosovo
SRSG	Special Representative of the Security General
KLA (UCK)	Kosovo Liberation Army

1 Introduction

1.1 General Notes

The idea of states as fully sovereign territorial entities as envisaged in the Peace Treaty of Westphalia¹ has changed over time. Today the exercise of attributes to the notion of statehood can take various forms and be performed to different degrees, largely due to states and international organisations exercising influence not only on policies of foreign states but also on the ground on the territories of other states. These external actors relative to states have significant roles in both the creation and functioning of states. Kosovo, which after almost ten years of international administration declared its independence on the 17th of February 2008, is a recent example of these developments. Also after having proclaimed itself as an independent state, external actors still exercise some state functions on its territory and also have assumed certain relations vis-à-vis third states. With Kosovo as an example, this thesis will discuss these developments and their possible implications for statehood generally.

The growing interdependence amongst states increases the importance of support and recognition between them. A number of international regulations reflecting the common values of the international society² provide for common actions of states. These regulations affect the rights and obligations of states, both regarding their conduct towards other states and their own populations. The powers of the state can further be controlled and monitored through international actors taking part directly in various activities on the territory of other states.

¹ Peace of Westphalia, year 1648 - the modern sovereign state was seen as the only subject of international law, with absolute power over its territory (Malanczuk, Peter *Akehurst's Introduction to International Law*, 7 ed. Routledge, London 1997, p. 10)

² Throughout this thesis, the term 'international society' will be used as to include all sorts of international legal subjects not necessarily having common values or political rule, which may be implied by for example the term 'international community', see further, Lysén, Göran *Att studera folkrätt och EG/EU*, 2. uppl. (Studies in international Law, vol. 17) Iustus Förlag, Mölnlycke (2006) p. 23, footnote 1.

An effective government shall have control over territory and people and the capacity to entertain international relations with other states and subjects of international law, which are the key elements for achieving and also maintaining statehood.³ However, some competences, which usually lie within the exclusive realm of the state, may, under certain conditions, be handed over to external actors without statehood being lost. This thesis discusses whether there are any limitations as to the extent and contents of a state's powers that can be transferred to external actors without statehood or actual independence being lost. These issues may not only arise in a context such as in the case of Kosovo, but also in cases when states abstain from exercising their powers to the benefit of an international organization, e.g. the European Communities. How far can "...the actual exercise of authority, and the right to title to exercise that authority"⁴ be separated? One point of reference is the lease of territory, where the licensee may temporarily exercise the state functions instead of the licensor (the owner of the territory). To understand the complex context in which the state of Kosovo has emerged, a brief historical overview follows.

The history of Kosovo goes back centuries, and the territory has had many different administrators and shapes. The Ottoman Turks ruled Kosovo for centuries after the Serbs were defeated in the Battle of Kosovo in the late 14th century. After the Ottoman Turks were driven out of the Balkans in 1912 (during the first Balkan War), Serbia re-acquired Kosovo. In recent history,⁵ the struggle for Kosovo has been an issue between Serbs and Kosovo-Albanians. Both Kosovo-Albanians and Serbs regard Kosovo as the "cradle of their national and cultural identity".⁶

³ See Crawford, James *The Creation of States in International Law*, Oxford University Press, 2nd ed. (2007) "'Government' or 'effective government' is evidently a basis for the other central criterion of independence", p. 55

⁴ *Ibid.*, p. 57

⁵ Malcolm, Noel, *Kosovo – A Short History*, MacMillan Publishers Ltd. London (1998), see introduction xxix that the conflict has been ethnic for "the last 100 years or so".

⁶ Vickers, Miranda, *Between Serb and Albanian – A History of Kosovo*, Hurst and Company, London, (1998), preface *xiii*. Albanians and Serbs have different ideas about the ethnic (and historical) developments of Kosovo. The Serbs claim that Kosovo was almost uninhabited when they arrived in the sixth and seventh centuries, while Albanians claim that they are the original inhabitants of Kosovo, descendants of the ancient Illyrians.

In 1918 Kosovo was integrated into the newly established Kingdom of Serbs, Croats and Slovenes (from 1929 called Yugoslavia) as a province of Serbia. Tito ruled Yugoslavia after the Second World War, and the 1974 constitution granted substantial autonomy for Kosovo (within Serbia and Yugoslavia). After Tito died in 1981, Milosevic came to power and severely restricted Kosovo's autonomy in 1989 by an amendment to the 1974 constitution. At the break-up of Yugoslavia in the early 1990's, Kosovo was not granted independence as the majority of the republics were. The reason was that Kosovo lacked the same status as the republics. Only territories with status of republics, and not units within republics, had the right to secede according to the Badinter Commission which was set up to deal with secessionist claims of the Former Yugoslavia.⁷ The independent states of Croatia, Macedonia, Bosnia-Herzegovina and Slovenia were created. Serbia and Montenegro continued in union until 2006, when Montenegro left Serbia.

Discriminating Serb rule in Kosovo culminated in armed conflict in 1997 and in 1998 between the Kosovo Liberation Army (hereinafter KLA) and the Yugoslavian army and paramilitary police forces. Expulsions of Kosovo-Albanians, immense human rights violations, massacres and other atrocities took place mainly from the Serb side, but violence was also used by the Kosovo-Albanians. These violations caused NATO to intervene in June 1999 to force the Yugoslavian forces to withdraw. An international civil administration, United Nations Mission in Kosovo (hereinafter UNMIK) and a military security presence - Kosovo Force - (hereinafter KFOR) were set up in Kosovo in accordance with United Nations Security

However, during the 1990's, the number of Kosovo Albanians was over 90% of the population. The Albanian claim is mainly based on demography, and the Serb claim on "history and emotion". See also Malcolm, introduction *xxxii* and *xxxiv* and the discussion under 4.1.1

⁷ In 1992, the EC set up a commission to deal with secessionist claims, called the Badinter Commission (the Arbitration Commission of the Peace Conference on the Former Yugoslavia). It established guidelines for recognition of the new entities ("Guidelines on the Recognition of New States Established in Eastern Europe and in the Soviet Union", 16 December 1991). Also under the FRY Federal Constitution the republics "were the federating units and were alone entitled to secede", Kingsbury, p. 488

Resolution 1244 (hereinafter UNSC Res. 1244). The mission was established to “[facilitate] a political process designed to determine Kosovo’s future status...” but it also emphasised the “sovereignty and territorial integrity of the Federal Republic of Yugoslavia”.⁸ The civil presence established by UNMIK was “unprecedented in scope and complexity”,⁹ and the Special Representative of the Secretary General (hereinafter SRSG) was provided with all executive, legislative and judicial powers.¹⁰

After negotiations about the future status of Kosovo which started in 2005, a proposal for supervised independence (the Comprehensive Proposal for the Kosovo Status Settlement, hereinafter CPS) was outlined by UN Special Envoy Matti Ahtisaari. The CPS outlines the institutions of an independent state and envisages amongst other things a continued international presence with extensive executive authority and substantial minority rights. The CPS was never adopted in the United Nations Security Council (hereinafter UNSC) due to Russia and China’s resistance. Nevertheless, Kosovo declared itself independent on the 17th of February 2008 in line with the CPS and with strong support from the European Union (hereinafter EU) and the United States (hereinafter US).

The proclamation divided actors in the international society including the EU, of which five member states still have not recognised Kosovo as a state (Greece, Spain, Cyprus, Slovakia, Bulgaria and Romania). At present, 63 states have in total recognised Kosovo.¹¹

⁸ S/RES/1244 (1999) 10 June 1999, paragraph 11 (e) and preamble

⁹ Matheson, Michael J, “United Nations Governance of Postconflict Societies” *The American Journal of International Law*, (2001) vol. 95, no. 76, p. 79

¹⁰ UNMIK/REG/1999/1 of 25 July 1999, *On the Authority of the Interim Administration in Kosovo*, Section 1.1

¹¹ For full and updated list, including dates, see < <http://www.president-ksgov.net/?id=5,67,67,67,e,749>>, last visited 2009-12-04

1.2 Purpose and delimitations

The aim of this thesis is to analyse the following questions: *Who is really exercising the effective control in Kosovo? How much of its state functions can Kosovo transfer to other actors without losing its statehood? Has the continued international presence helped Kosovo to survive or has its influence conversely created a control that has hampered the very existence of statehood?*

The international administration that basically has governed Kosovo for nine years was mandated and exercised through complex political and legal arrangements. As no agreement could be met considering the future status of the territory, there is even more complex continued international presences in Kosovo after the UDI. For recognising actors the reconfigured presences as envisaged in the CPS are a fact, and for non-recognising actors the situation remains formally unchanged. It is not feasible to cover all actors of relevance acting in Kosovo, neither internal nor external.¹² The focus will be on the missions that derive a legal mandate for their presence either through UNSC Res. 1244 or the CPS and the authority furnished to them. The analysis will focus on whether Kosovo fulfilled the statehood criteria upon its UDI. This thesis does not cover an extensive discussion on the legality of the UDI, but the focus is on the situation at the UDI and developments after it. The discussion hence relates to whether at any point in time statehood has been achieved. Some historical aspects will be examined as to broaden the understanding of Kosovo status from the time of the SFRY.

¹² Various actors work with governance assistance (to improve governance) and with implementing different development agendas in Kosovo. These actors include various UN agencies (for example UN High Commissioner for Refugees, UN Development Programme), the U.S. Agency for International Development (USAID), the Council of Europe, the European Commission, the International Monetary Fund, the World Bank, a number of civil society organisations and NGO's. Certain states, especially the US, have significant influence in Kosovo through financial and political means (mainly through USAID and its embassy in Kosovo, and also through its military base)

1.3 Methodology and materials

The first two Chapters are mainly descriptive in order to form a basis for the part dealing with the analysis pursued in Chapters four and five. In Chapters two and three, the internal structures of the Kosovan state after independence and the major external actors will be accounted for respectively. The internal structure of the state of Kosovo will be outlined in line with the executive, legislative and judicial branches of power and the provisions in the constitution and the Comprehensive Proposal. The international presence will be examined in Chapter three by analysing the mandate and authority of these actors, which are UNMIK, the International Civilian office (ICO), the EU Rule of Law Mission in Kosovo (EULEX), KFOR and to some extent the Organisation for Security and Cooperation in Europe (OSCE). In the analysing part of the thesis, the concept of statehood will be discussed. The theoretical discussion will address the developments and practical realities in Kosovo, in order to answer the questions set out above.

Both empirical and theoretical materials have been used for the writing. During a field study in Kosovo,¹³ information on the present day situation was collected mainly through interviews. These interviews have served as a source of knowledge about the realities on the ground and have hence inspired the choice of focal points in this thesis while the facts have mainly been substantiated through academic and legal sources. A number of legal documents, resolutions and regulations have been included as well as various articles and books. One book - James Crawford's *The Creation of States in International Law* - deserves special mentioning as this book has served as the main theoretical source.

¹³ I would like to gratefully acknowledge the Swedish International Development Cooperation Agency (SIDA) for granting me a scholarship that enabled the undertaking of a Minor Field Study in Kosovo in August and September 2009

2 Kosovo's Constitutional Structure

2.1 The Constitution

In May 2001 the United Nations Mission in Kosovo - UNMIK - formed a Constitutional Framework for Provisional Self-Government, which set out the rules and the authority of Provisional Institutions of Self-Government (hereinafter PISG).¹⁴ The Constitutional Framework was mainly drafted by the UNMIK legal office and advisors from international organisations,¹⁵ and created a basis for a gradual transfer of power from UNMIK to Kosovo institutions, but the SRSG retained extensive powers. National elections were held for the PSIG Assembly in November 2001,¹⁶ and the PISG further consisted of a president, a government (with a Prime Minister and ministers) and courts.¹⁷

The administration of Kosovo continued under these arrangements until the Kosovo Assembly unanimously voted in favour of the establishment of an independent Kosovo on the 17th of February 2008.¹⁸ The unilateral declaration of independence (hereinafter UDI) was made after consultations with the “most important European states” and the US, and was drafted largely by the US State Department.¹⁹ In the beginning of 2009 the

¹⁴ Constitutional Framework for Provisional Self-Government: entered into force on 15 May 2001, UNMIK/REG/2001/9 (amended by UNMIK reg 2007/29 and 2002/9). The Kosovo authorities wished for a referendum on independence and for the code to be called an ‘Interim Constitution’, but the Constitutional Framework ended up not having higher legal authority than other legal documents. See further O’Neill, p. 32, Stahn, p. 546. UNMIK and its work is further discussed in chapter 3.

¹⁵ Weller, Marc *Contested statehood: Kosovo's struggle for independence* Oxford, New York, Oxford University Press, 2009, p. 242

¹⁶ The Kosovo Assembly was intentionally called an Assembly rather than a Parliament as this was not seen as much as being a sign of sovereignty, see Weller, p. 243

¹⁷ Constitutional Framework, art. 1:5 and 9:3.4

¹⁸ 109 out of 120 members in the Assembly voted in favour, the 11 Serb representatives boycotted the vote, see Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, 12 June 2008, para. 3

¹⁹ International Crisis Group, Europe Briefing N°47, 18 March 2008 *Kosovo's First Month*, p. 5

European Parliament adopted a resolution encouraging all EU member states to recognise the independence of Kosovo.²⁰

At the time of the UDI, a constitution for an independent Kosovo did not exist but was in its drafting. The work with the drafting of the constitution started (more comprehensively)²¹ after the final version of Matti Ahtisaari's Comprehensive Proposal Settlement - CPS - for supervised independence was presented on the 26 March 2006.²² The CPS regulates the constitution-making process; "...the President of Kosovo, in consultation with the Presidency of the Assembly of Kosovo, shall convene a Constitutional Commission to draft a Constitution, in consultation with the International Civilian Representative (ICR)".²³ The ICR is the head of the international civil presence in Kosovo (International Civilian Office, ICO) as envisaged in the CPS and his functions will be further explained below. The unclear outcome of the CPS and status-negotiations led to the creation of a 'Pre-Constitutional Working Group' - PCG - doing preparatory work during 2007.²⁴ On the 19th of February 2008, two days after the UDI, the PCG was transformed in to the Constitutional Commission. The drafting process has, despite this commission consisting entirely of locals, been said to have had

²⁰ European Parliament resolution on Kosovo and the role of EU, 5 February 2009, p. 3, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0052+0+DOC+XML+V0//EN&language=EN>>, accessed 2009-10-19

²¹ Weller points out that since 1999, "most of the major political parties had ready-made constitutions for an independent Kosovo waiting in their desk drawers" and that "...the field of eager contenders [including diaspora organisations and NGO's] in relation to any constitution-making venture was ... quite dense, long before the question of a definite Kosovo Constitution ever arose, p. 240

²² Comprehensive Proposal of the Kosovo Status Settlement, letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, UN Doc. A/2007/168/Add.1, 26 March 2007, addendum

²³ CPS, art. 10:1. The Constitutional Commission was to be composed of 21 Kosovan members, see 10:2 for its composition: "Fifteen (15) members shall be appointed by the Resident of Kosovo, in consultation with the Presidency of the Assembly of the Kosovo. Three (3) members shall be appointed by the Assembly members holding seats reserved for the Kosovo Serb Community, and three (3) members appointed by the Assembly members holding seats reserved for other Communities that are not in the majority in Kosovo."

²⁴ The interim strategy was established by the US Office in Pristina, which created the PCG Participation by external experts was discouraged to ensure local ownership, and only one international expert (as well as representatives from international organisations) was included. Weller, p. 247

“heavy international involvement”.²⁵ After a period of public consultations, the draft was certified by the Kosovo government and the ICR (as regulated in CPS 10:4) and finally adopted by the Kosovo Assembly on 9 April 2008. The Constitution of the Republic of Kosovo (hereinafter CRK) entered in to force on the 15th of May 2008, fully implementing the Comprehensive Proposal.

The CRK declares that Kosovo is an independent, sovereign and unique state “... based on the principles of separation of powers and the checks and balances among them”.²⁶ According to the theory of Montesquieu, all democratic states should have its powers separate in three independent branches of government; the executive, legislative and judicial.²⁷ The constitution of Kosovo divides these powers between the President, Prime Minister, Assembly and courts, and this will be outlined below. The separation of powers is a way of self-restraining the state and its inherent powers, by ensuring independence within and accountability between the different branches of government. Consequently, the legitimacy and hence efficiency of the state may increase.

2.2 The Comprehensive Proposal

As mentioned in the introduction, a proposal for supervised independence was advanced as a solution to the status issue. It was not endorsed in the UNSC, due to a Russian veto, and is thus rather a political then legal document. However, it still has important consequences as it served as a basis for the UDI and “...as it reflects some abiding contemporary tendencies in terms of statehood” ... “[by confirming] the contemporary

²⁵ Weller, p.258 – writes that the process was “backed up by a team of advisers from the international implementation agencies present in Kosovo, and tightly managed by the US mission in Pristina”

²⁶ CRK, articles 1 and 4

²⁷ Montesquieu, Baron de, *Spirit of Laws*, J.V Pritchard, ed. Bell and Sons, London 1914, p. 162, (Book, XI, p. 6): “There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”

[trend] of the international community of states to determine all the features of any newborn entity”.²⁸ Furthermore, it is endorsed in the Kosovo Constitution. The CPS was submitted by the UN Secretary General (UNSG) to the UNSC on 26 March 2007 together with a separate report with recommendations on the status.²⁹ Independence (supervised such) is only directly recommended in the separate report and not in the CPS, according to Weller deliberately so in order for the UNSC to be able “...to endorse the substance of the settlement without necessarily confirming the status”.³⁰

Declaring independence under the guidelines of the CPS was necessary to ensure the support from the external actors that enabled the UDI in the first place. The CPS “...provided Kosovo with the basic elements of statehood, without addressing the issue of status directly”.³¹ It “...lays down the constitutive elements of an entity that is a state in all but name”,³² and outlines the form of government.³³ UNMIK emphasised similar principles of government - i.e. market economy, human rights, rule of law, minority protection and democracy - when initially establishing provisional institutions in Kosovo under the Constitutional Framework.³⁴ The CPS asserts that Kosovo shall have the right to its own flag, national symbols and the right to seek membership in international organisations and to conclude

²⁸ D’Aspremont, Jean “Regulating Statehood: The Kosovo Status Settlement” *Leiden Journal of International Law* vol 3, issue 20 (2007) p 649-668, p. 653 and 668

²⁹ Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, UN Doc. S/2007/168 (2007), para. 10 See also para. 15 of the report, where Kosovo’s circumstances are called extraordinary

³⁰ Weller, p. 216.

³¹ Weller, p. 237

³² D’Aspremont, p. 654, explaining that the term ‘society’ is used throughout the CPS instead of references to ‘statehood’

³³ According to the CPS the Kosovo institutions must:

- be democratic (Arts. 1.1 and 1.3 and Annex I)
- work with the rule of law (Arts. 1.1 and 13, Annexes I and IV)
- respect internationally recognized human rights (Arts. 1.2 and 2, and Annex I)
- be multi-ethnic and respect the rights of communities and their members (Arts. 1.1 and 3, Annexes I, II, and V), have both Albanian and Serbian as official languages (Art. 1.6);
- provide for an open market economy with free competition (Art. 1.4 and Annex I)
- be decentralized and ensure local governance (Art. 6, Annexes I and III)

³⁴ See the Constitutional Framework preamble and chapters 2, 3 and 4 emphasising market economy, democracy, human rights, rule of law, rights of communities. Weller argues that the new Constitution and the Constitutional Framework did not differ substantially, and that the political system after independence continued more or less as before (p. 258)

international agreements (CPS, art. 1:5, 1:7). Kosovo has since the UDI become a member of the World Bank and the International Monetary Fund. It is responsible to manage “its own affairs” (CPS, annex IX, art. 1:1). However, Kosovo is continuously bound by the international agreements in the area of international cooperation concluded by UNMIK on behalf of Kosovo “on the basis of reciprocity”.³⁵ It is also stated that the “international community ... [shall] have all necessary powers to ensure effective...implementation of [the] settlement” and that they shall be invited to operate on Kosovo territory (CPS, 1:11). The CPS takes precedence over the constitution (CRK, 143:2)³⁶ and its provisions are implemented through the constitutional text itself and by the ‘Transitional Provisions’ in Annex XIV of the CRK. These provisions may give the impression that they are conditions only applicable until the end of the international supervision of the implementation of the CPS. However, as rightly pointed out by Weller, these include permanent obligations as the Kosovo authorities accepted this “self-limitation of sovereignty” in the UDI, and as the CPS take precedence over the constitution.³⁷

The CPS outlines the international presence in the form of an International Civilian Office (ICO), represented by an International Civilian Representative (ICR), an International Military Presence (hereinafter IMP) and a EU-mission to work with implementation of the rule of law (CPS, annexes IX, X and XI). These actors will mainly be discussed in Chapter three.

The CPS limited itself to regulating “...those provisions in which Serbia, or the organized international community, had a legitimate interest” instead of

³⁵ CPS, Art. 15.2.2

³⁶ See also Weller, p. 250-251. For a discussion on how art. 143 can be amended, see p. 251 - Weller notes that such amendments may be possible (if the rights and freedoms set out in Ch. 2 are preserved) but that the community representatives can veto such a change, and during the time of supervision, no amendments can be made without the consent of the ICO

³⁷ Weller, p. 250. He points out a two areas where Kosovo’s freedom of action is permanently restricted: the human rights guarantees and the abandonment of any territorial claims in relation to neighbouring states. He also mentions the agreement not to seek union with another state, see p. 213

serving as a basis for a full constitutional text.³⁸ This interest is clearly primarily linked to community rights (minorities are referred to as communities throughout all relevant documents).³⁹ Before reaching any agreement on status there was thus an interest in ensuring that the minority populations would get sufficient protection in the new state. It was also a way for Serbia to keep some control in Kosovo. This protection is ensured in the CPS through representation and participation within the government, the legislature and the court system and through specified community rights. These rights are, for example, enshrined in a special Chapter on community rights in the Constitution. Certain other legislative provisions that ensure minority rights are described below in Chapter 2.3.2. The CPS outlines a process of decentralisation in Kosovo, which gives the different municipalities a certain degree of local self-government (CPS art. 3:1). Serb majority municipalities are created in order to give minority areas enhanced autonomy within Kosovo, through ensuring exclusive competences in certain areas. These municipalities have extensive authority over its education, health care, responsibility for cultural affairs and enhanced participatory rights in the appointment of Police Station Commanders (CPS, art. 4). These municipalities are also entitled to receive financial assistance from Serbia (CPS, art. 11:1). There is also a Chapter in the CPS regulating religious and cultural heritage, for example stating that Kosovo shall respect the Serbian Orthodox Church and establish certain protective zones (Ch. 5).

Apart from regulating the international presence, security issues, community rights and decentralisation, the CPS also regulates a number of other issues. Governance in a democratic manner, respect for human rights and the rule of law are emphasised. Other issues that are regulated include: the judiciary (the reappointment process of judges and prosecutors and the Kosovo Judicial Council - KJC -which will be further explained below, CPS annex IV), international debt (settling of the financial debt with Serbia, annex VI),

³⁸ Weller, p. 244

³⁹ *Ibid.* p. 215, Weller notes that community rights were emphasised by Ahtisaari throughout the negotiation process. See also p. 251 about terminology in relation to minorities

property (regulating socially and publicly owned enterprises, annex VII) and archives (that should be returned from Serbia, “including cadastral records and other documents relating to Kosovo and its inhabitants” annex VII, art. 7). It further states that the Kosovo authorities shall consult with the ICR when preparing its budget and “...shall establish with the European Commission and in close cooperation with the International Monetary Fund, a fiscal surveillance mechanism” (CPS, art. 8:1).

2.3 State Structure

2.3.1 Executive power

The government, together with its ministries, the police and military creates the executive branch of government. The government is responsible, amongst other things, to propose legislation and ensure that policies are properly implemented and laws enforced. In Kosovo, the government consists of the prime minister (head of government), deputy prime ministers and ministers (CRK, art 92:1-2). There is also a president, who, acting as head of state represents the state internally and externally, promulgates laws, leads the foreign policy, appoints various state officials and performs other tasks in accordance with the constitution (CRK, art. 84). The government is subject to parliamentary control (CRK, art. 4:4). The major parties are the Democratic Party of Kosovo⁴⁰ (PDK) and Democratic League of Kosovo (LDK), which are in a coalition at the time of writing. The Alliance for the Future of Kosovo (AAK) also has a great deal of influence. There have been no state elections since the declaration of independence, and no date has been set for the next (central) elections.⁴¹

⁴⁰ The party “emerged from a segment of the KLA” according to Weller, p. 240. Also AAK is linked to the KLA as it was established by a former KLA commander (Ramush Haradinaj), Tansey, p. 155

⁴¹ However, according to the CPS, general and municipal elections was supposed to be held no later than nine months after the entry into force of the settlement (CPS) art. 11. Local elections are planned for the 15th of November 2009

Kosovo is envisaged to have its own police, security force (Kosovo Security Force – hereinafter KSF) and intelligence agency,⁴² overseen by the Assembly (CRK, art. 125:4, 126, 128 and 129). The police is “...under the authority of the Minister of Internal Affairs and under the control and supervision of the General Director of the Police”.⁴³ The police is organised in central and local levels, where the General Police Directorate represents the central level and the local level consist of Regional Police Directorates, Police Stations and substations.⁴⁴

At the moment, there is an International Military Presence (hereinafter IMP) that has absolute authority with respect to any use of force (hence including the issue of using military force) which it may deem necessary to employ, without any special permission (CPS Annex XI, 2:2).⁴⁵ NATO has the authority over IMP: “[t]he IMP will operate under the authority and be subject to the direction and political control of the North Atlantic Council through the NATO Chain of Command” (CPS annex XI, art. 1:8, also CRK art. 153). The KSF will continue to be under the authority of the IMP until deemed self-sustaining “...by the IMP, in coordination with the ICR” (CPS, Annex XI, 1:3) and will then consist of around 2500 personnel, armed however but without any heavy weapons (Annex VIII, 5:2). The force will primarily be responsible for crisis response, civil protection etc., i.e. “...functions not appropriate for the police or other law enforcement organizations” (Annex, VIII, 5:3). Protection against external threats is only mentioned in relation to the tasks of the IMP (Annex, XI, 1:1).

⁴² “The Kosovo Intelligence Agency shall identify, investigate and monitor threats to security in the Republic of Kosovo.”, CRK art. 129

⁴³ Law on Police, Law Nr. 03/L-035, adopted by the Kosovo Assembly 20th of February 2008, art. 5. For more detailed information on the tasks and duties of the General Director, see art. 37

⁴⁴ *Ibid.* art. 31:1, The powers of the police are regulated in art. 11 (regarding criminal investigation, other codes such as the Criminal Code, are applicable as well) and the use of force is regulated in art. 25.

⁴⁵ It is stated that “[the IMP has the right to] to carry out its responsibilities as it deems appropriate, including the use of all necessary force where required and without further sanction, interference or permission”

2.3.2 Legislative power

The Assembly is the legislative institution (CRK, art. 63) and passes legislation, drafted by the ministries, and adopted “...by a majority vote of deputies present and voting” (CRK, art. 80). There are still thousands of UNMIK regulations in force, which are valid until new laws are adopted in order to avoid a legal vacuum (CPS, art. 15:2:1).⁴⁶ These laws may serve as blue print for national legislation.⁴⁷ As mentioned above, Kosovo continues to be bound by all international agreements concluded by UNMIK on behalf of Kosovo (CPS art. 15:2:2).

UNMIK created its own legal system in order to be able to carry out its functions during its administration. UNMIK, headed by the SRSG, therefore drafted, promulgated, and enforced regulations that had the power of law in Kosovo, in areas that would normally fall within the national competence.⁴⁸ Initially, the laws applicable on the entry into force of UNSC Res. 1244 would apply *mutatis mutandis*⁴⁹ as long as they did not conflict with international human rights standards or conflict with the mission’s mandate (UNSC reg. 1999/1). However, this spurred protest amongst the Kosovo Albanians as these laws were seen as having been a tool in the discriminatory practise towards them. This regulation was therefore replaced with regulation 1999/24, stating that the applicable laws would be those who applied before 22 March 1989 - the date when Kosovo’s authority was removed. UNMIK regulation 1999/24⁵⁰ lists the following as

⁴⁶ Continue to apply “...until their validity expires, or until they are revoked or replaced by legislation regulating the same subject matter in accordance with the provisions of this Settlement.”

⁴⁷ Many UNMIK regulations have served as basis for new Kosovo laws, such as the Criminal Code and the Criminal Procedure Code, where the only change was that the word ‘provisional’ was taken away in the title. That this may be the practise in similar situations is discussed by: Strohmeyer, Hansjorg “Collapse and Reconstruction of a Judicial System: The United Nations Missions in East Timor and Kosovo” *The American Journal of International Law* Vol. 95 No. 1 (Jan. 2001) pp. 46-63, note 4, p. 47.

⁴⁸ Strohmeyer, note 4, p. 47, noting that UNMIK was mandated to do so, see further UNSC res. 1273, para. 6

⁴⁹ “the necessary changes having been made”

⁵⁰ UNMIK regulation 1999/24, 12 December 1999, On the law applicable in Kosovo, art. 1:1 and 1:2

applicable law: UNMIK regulations, Kosovo Assembly laws⁵¹ and the laws in force on 22 March 1989.⁵² The UNMIK regulations had the highest legal authority during the UNMIK-administration. Laws drafted by the Kosovo authorities had to be promulgated by the SRSG (laws were promulgated by an UNMIK regulation “issued in order to promulgate Kosovo law...”). After the Constitution came into force, laws initiated by the Kosovo institutions must no longer pass through the SRSG for promulgation.⁵³ Today other international actors, notably the ICO/ICR, still exert some influence over the legislative process which is described below.

The Assembly elects and supervises control over the government, elects the president and approves the budget of Kosovo (art. 65). There are 120 seats in the unicameral assembly. In accordance with the CPS, the composition of the Assembly must be representative with regards to the various ethnic communities, and it lists certain laws that for its adoption, amendment or repeal “...require... both the majority of the Assembly members present and voting and the majority of the Assembly members present and voting belonging to parties, coalitions, citizens’ initiatives and independent candidates having declared themselves to represent Communities that are not in the majority in Kosovo” (CPS, art. 3:7). A legislative agenda is outlined in the CPS (annex XII) mainly relating to the security sector, minority protection and decentralisation. This legislation is adopted in packages with little debate in the Assembly, a procedure which according to the International Crisis Group was only just approved by the Assembly and

⁵¹ I.e. Provisional Interim Kosovo Government laws - as promulgated by UNMIK SRSG, see Constitutional Framework 9:1:1 and 9:1:45. “The President [signed] each law adopted by the Assembly and [forwarded] it to the SRSG for promulgation”. The laws “... [became] effective on the day of their promulgation by the SRSG” art. 9:1:44 and 45

⁵² Also laws promulgated in Kosovo after March 1989 were applicable, insofar they covered a matter not covered in the other laws, were non-discriminatory and not in breach of internationally recognised human rights standards.

⁵³ That the various applicable laws are still applied however can be seen for example in the law on the Special Prosecution Office of Kosovo, which lists crimes for example in UNMIK regulations, the Criminal Code of the Socialist Federal Republic of Yugoslavia, and the Criminal Law of the Socialist Autonomous Province of Kosovo, as well as the Kosovo Criminal Code, falling within its competence. See Law No. 03/L-052 “On the Special Prosecution Office of the Republic of Kosovo”, paras. 9:1-2

only after pressure.⁵⁴ Important laws are drafted under the supervision or/and influence of various international experts to ensure compliance with the CPS, international standards and interests.

2.3.3 Judicial power

The judicial power is exercised by a number of courts (CRK, art. 102). The Supreme Court has the highest judicial authority (art. 103:2), the first instance level are the municipal courts followed by district courts. The president of Kosovo handles appointment and removal of judges after proposal from the Kosovo Judicial Council (hereinafter KJC, CRK article 104). The KJC is responsible to ensure that the Kosovo courts are independent, professional and impartial. The council has tasks related to judicial inspections, judicial administration, developing and overseeing the budget of the judiciary, recruiting and proposing candidates for appointment and reappointment to judicial office and for transfer and disciplinary proceedings of judges (CRK, art. 108).⁵⁵

There is a State Prosecutor⁵⁶ (CRK, art. 109) and a Prosecutorial Council that "...shall ensure that the State Prosecutor is independent, professional and impartial and reflect the multiethnic nature of Kosovo..." and "...recruit, propose, promote, transfer, reappoint and discipline prosecutors in a manner provided by law (CRK, art. 110). A Constitutional Court for Kosovo is envisaged (CRK, art. 112) with nine judges appointed by the

⁵⁴ International Crisis Group, Europe Briefing N°47, p. 4, this practise was also confirmed by OSCE interviews; that most laws passed since independence are drafted with heavy international influence and adopted with little debate at Assembly level

⁵⁵ As mentioned above, there are certain 'transitional provisions' included in the Constitution (Chapter XIV). These provisions are temporarily applicable (mostly phrased as "[u]ntil the end of the international supervision of the implementation of the [CPS]") until a certain development has been ensured in accordance with the CPS. For example, until the end of the supervision of the implementation of the CPS, there will be a 'temporary composition' of the KJC. Out of the thirteen members, "[f]ive ... members shall consist of the Kosovan members of the Independent Judicial and Prosecutorial Commission", the remaining eight will be elected by the Assembly, as envisaged in the normal composition, but two must be internationals. The five members elected from the ICPC during the transition period will after this period be "elected by members of the judiciary" (CRK, art. 108:6 and 151:1 and 2)

⁵⁶ The State Prosecutor is "...an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law." CRK, art. 109

President upon proposal from the Assembly (CRK, art. 114). Just like the KJC, the Constitutional Court has a ‘temporary composition’ during the transitional period. Three of the nine judges will be international judges appointed by the ICR, until the ICR decides that all nine judges are to be appointed “...as set forth in the Constitution” (CRK, art. 152).

A review and reappointment process of all Kosovo judges was initiated by UNMIK in 2008 “...for the purpose of conducting a one-time, comprehensive, Kosovo-wide review of the suitability of all applicants for permanent appointments”.⁵⁷ This process is continued in accordance with the CPS (CPS annex IV, art 3, CRK, art. 150) by the Independent Judicial and Prosecutorial Commission (ICPJ) that was established by UNMIK as an autonomous body of the KJC to propose candidates for (re)appointment. The commission is still (at time of writing) in its first phase, and initially consists of five international members, when selecting judges for the Supreme Court of Kosovo and public prosecutors for the Office of the Public Prosecutor of Kosovo, including the Kosovo Special Prosecutors Office.⁵⁸ In the second and third phase, when the IJPC will for example elect judges for the municipal and district courts, local judges and prosecutors will also be included.⁵⁹

2.4 Territory

The established borders of Kosovo are set out in the CPS, annex VIII, article 3:2:

“The territory of Kosovo shall be defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugo-

⁵⁷ UNMIK administrative direction 2008/02, UNMIK/DIR/2008/2, 17 January 2008, para. 1:1

⁵⁸ UNMIK/DIR/2008/2, para. 1:4 and 2:3

⁵⁹ *Ibid.*, para. 7:3 and 4

slavia and the former Yugoslav Republic of Macedonia on 23 February 2001.”⁶⁰

Border control is to be handled by the Kosovo Police after a “phased hand-over of responsibility” in coordination with the IMP and ICR according to the CPS (annex VIII, art. 3:1). Kosovo is accepted, also by Serbia, as a separate customs area after the SRSB declaration of Kosovo as such in his report to the UNSC on the 24 November 2008.⁶¹ Serbia does not see the boundary line as an international border however, and Kosovo does not have full control over the border gates in the northern parts of its territory (Gates 1 and 31) where instead internationals control the movement in and out.⁶²

Kosovo is an ethnically divided state, and in the north, the city of Mitrovica is divided in a Serbian and Albanian part. In June 2009, the UNSG reported that “[t]he municipalities in the north of Kosovo, as well as northern [Mitrovica] continue to operate largely separately from the rest of Kosovo”.⁶³ A redrawing of the borderline south of the Serb-majority part of Mitrovica was suggested by some actors.⁶⁴ However, the legal doctrine of *uti possidetis* emphasis that borders shall remain in their original form.⁶⁵ Apart from the problems in the north, the Kosovo authorities have some problems controlling enclaves with Serb majority populations throughout the territory, making Kosovo an ethnically divided state. The enclaves often

⁶⁰ The 2001 border agreement was protested against by the PSIG, because it “allegedly transferred 2,500 hectares of land from Kosovo to Macedonia”, but UNMIK found that the Kosovo Assembly “lacked the necessary legislative competences in the field of ‘territorial integrity’ under Chapter five of the Constitutional Framework” for such protest to have effect, Stahn, Carsten, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Oxford University Press, New York 2008, p. 552

⁶¹ S/2008/692, para. 35

⁶² Paul Acta, EULEX Head of Customs, e-mail interview 2009-10-11

⁶³ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 10 June 2009, S/2009/300, para. 9 available at:

<http://www.un.org/Docs/sc/sgrep09.htm>, accessed 13 October 2009

⁶⁴ See further Gow, James “Kosovo - The Final Frontier? From Transitional Administration to Transitional Statehood”, *Journal of Intervention and Statebuilding*, Vol. 3 no. 2, (1998), p. 250-251, presenting arguments and counterarguments on this issue

⁶⁵ *Uti Possidetis Juris*, that parties should retain possession of what they have acquired, see Kingsbury, page 487, footnote 23. This principle was applied at the dissolution of the SFRY, as the Badinter Commission relied on the principle “...with respect to the frontiers among the former republics”, see Turk, Danilo “Recognition of States: A Comment” *European journal of International Law*, No. 4 (1993), p. 70

have parallel institutions and elections, and the decentralisation process envisaged in the CPS grants them a great deal of autonomy. To have a defined territory, which can be controlled, is one of the criteria for statehood. Uncertainty as to certain border issues does not normally affect statehood,⁶⁶ but the territory must be effectively governed (see discussion on effective governance in Chapter four). To have control over natural resources is furthermore a part of having control over territory. According to the Constitution, Kosovo may “...enjoy the natural resources ... [as long as it does] not infringe on the obligations stemming from international agreements on economic cooperation” (CRK, art. 122:1). Kosovo may have full “...ownership, responsibility and accountability for its airspace” (CPS, annex VIII, art. 7) Military control is discussed elsewhere in this paper (see the parts on IMP and KFOR).

⁶⁶ Malanczuk, p. 76 and Crawford, p. 50 referring to the *North Sea Continental Shelf* – case and subsequent cases

3 International Presence

The CPS envisages a presence consisting of ICO/ICR, EULEX (and OSCE) and KFOR (IMP). UNSC Res. 1244, which is the continued legal basis for the international presence as the CPS was not implemented in the UNSC, includes a mandate for UNMIK, KFOR (and OSCE) and has been interpreted as also including a mandate for EULEX. After the UDI, all actors under the UN-framework work with a status neutral approach in line with UNSC Res. 1244, which means that they still see Kosovo as an administrated territory with a Constitutional Framework, PISG and UNMIK regulations having the highest authority (and thus does not - at least not in theory - recognise new laws passed by the Republic of Kosovo).⁶⁷ This is also the case for non-recognising states and Serbs in Kosovo. The ICO however, derive its powers from, and act under, the CPS and the Constitution, and therefore (as recognising states do) works with Kosovo as an independent state. Consequently, there are two legal universes in Kosovo.

3.1 KFOR

Also after its initial task of regaining control over the territory and keeping the security situation under control, KFOR has had an important role as the provider of security for the civil administration to function. KFOR draws its initial mandate from UNSC Res. 1244, but its presence after independence is also regulated in the CRK (art. 153) and the CPS (Annex XI) as an International Military Presence - IMP. The IMP is under the authority and command of NATO (CPS Annex XI art. 1:8) and responsible for “ensuring

⁶⁷ It is interesting to note however that laws adopted by the Kosovo Assembly are applied by EULEX in their work, for example the Law on Jurisdiction and Case Allocation (see below). Furthermore, for example the Criminal Code and the Criminal procedure Code are used, but has not caused much problem since they are more or less identical with the codes drafted by the status neutral UNMIK, and therefore can be used by the in theory also status neutral EULEX. As new laws are passed by the Kosovo authorities however, especially when there is no similar UNMIK-regulation that can be applied, it becomes more difficult for EULEX-staff to formally preserve their neutrality and still be able to carry out their work. The question of applicable law accordingly complicates the work of EULEX.

the security of Kosovo from external threats, until Kosovo's institutions can take responsibility" (XI, art. 1:1:a). The IMP can use "all necessary force where required" (XI, Art. 2), and is the 'third responder' when there is a security incident (the 'first responder' is the Kosovo Police and the second the EULEX Police). Their function as third responder has been used a couple of times relating to incidents in northern Kosovo.

There is no own army envisaged for Kosovo, and it is only the IMF that have heavy weapons. As mentioned above, the IMP will enable the establishment of an internal force, KSF. However, as mentioned above this force may be seen more as a "token of sovereignty" with limited powers.⁶⁸ In January 2010 the KFOR troops will be decreased to 10,000 (from initially almost 16,000) and they now see their role as "deterrence presence".⁶⁹ They have a "narrow view of the mandate", and stay out of policing and border controls.⁷⁰

3.2 UNMIK

3.2.1 UNMIK from 1999 to independence

UNMIK, together with KFOR, formed and exercised basically all state functions the first years after the NATO intervention in 1999. This mandate was based on the UNSC Res. 1244, arguably consented to by the FRY.⁷¹ There were basically no functioning state institutions after the war in Kosovo. UNMIK organised its activities (with help from the EU and the OSCE working under the 'UN-umbrella') around four pillars; police and justice (UN), civil administration (UN), democratisation and institution building (OSCE), and economic reconstruction (EU). As mentioned above, the PSIG shared some of the authority after 2001.

⁶⁸ Interview with the EULEX counterpart to the Deputy Director of the Kosovo Police (W. Doig) 2009-09-11

⁶⁹ UNMIK Media Monitoring 2009, 10 and 12 June.

⁷⁰ ICG report, see note 18, pp. 14-15

⁷¹ See further Brown, Bartram S., "Human Rights, Sovereignty and the Final Status of Kosovo", *Chicago Kent Law Review*, vol. 80 (2005), p. 240

The status quo created by the vague text in the resolution on the future status of Kosovo eventually created impatience amongst the Kosovo population, as no developments towards a solution was made and the international presence and authority continued.⁷² In 2002, the current SRSG established a list of conditions to be fulfilled before status talks could begin. These conditions were formally called “Standards for Kosovo”, but became known as ‘Standards before Status’.⁷³ The document listed eight standards in the area of democratic governance, the rule of law, freedom of movement, rights of ethnic communities, property rights, economy, cultural heritage, and dialogue.⁷⁴ These developments went slow, and after riots against ethnic Serbs and Serb religious and cultural monuments in March 2004, the standards were reviewed even though not fulfilled. A political process on the status issue was initiated in 2005 and the UNSG appointed Matti Ahtisaari as his Special Envoy for the Future Status Process for Kosovo.

Long and difficult negotiations followed. Many fundamental principles of international relations and law were brought to the fore in the discussions. Serbia and its supporters highlighted the principles of territorial integrity, the importance of state consent and the risk of independence leading to a proliferation of self-determination claims. As Weller points out, the UNSC “...has been very reluctant to use its enforcement powers to impose a territorial solution to a conflict in the absence of state consent”.⁷⁵ On the other hand, changing notions of state sovereignty, as mentioned in the introduction, and increased emphasis on the rights of peoples, put independence as an option in the discussions. The lengthy international administration and the fact that grave human rights violations had taken place also put resistance to the idea that Kosovo would again be governed

⁷² Weller, p. 185

⁷³ Statement by the President of the Security Council, UN Doc. PRST/2002/11, 24 April 2002; also S/PRST/2003/1, 6 February 2003, where the terminology of ‘standards before status’ was formally adopted (Weller, p. 186, note 4)

⁷⁴ See < http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf >

⁷⁵ Weller, p. 192

by Serbia,⁷⁶ and states favouring independence considered it as giving the situation a *sui generis* status (thus not creating a precedent).

3.2.2 UNMIK after independence

As the CPS was never implemented in the UNSC, Res. 1244 remains in force. Initially it was envisaged that UNMIK would be replaced, but with their original mandate still in force, UNMIK was rather reconfigured and still exercises some functions in Kosovo.⁷⁷ UNMIK was originally authorised to have near 5000 staff, but it has today about 500.⁷⁸ The UNMIK SRSG outlined the continuous competence of UNMIK in June 2008.⁷⁹ In this report, it is amongst other things envisaged that UNMIK will have a role in communicating with non-recognising entities, including “facilitating, where necessary and possible, arrangements for Kosovo’s engagement in international agreements” and having a “dialogue between Pristina and Belgrade”.⁸⁰ UNMIK also keeps some external relations in the justice area, such as cooperation with the International Criminal Police Organization (INTERPOL) and the International Criminal Tribunal for the former Yugoslavia (ICTY).⁸¹ Furthermore, UNMIK still play a role with regard to the Serbs in Kosovo, particularly in the North where EULEX has had problems reaching out amongst the more UNMIK friendly Serbs. In the SRSG report from June 2009 it was stated that UNMIK can “...continue to play an effective and useful role in mediating between communities”.⁸² UNMIK also has a role in ensuring human and community rights in Kosovo.⁸³

⁷⁶ See for example the draft resolution put forward by Belgium, France, Germany, Italy, the UK and the US in July 2007, UN Doc. S/2007/437, 17 July 2007

⁷⁷ The SRSG has exercised state authority even after independence; an example is that the last UNMIK regulation was promulgated by the SRSG in January 2009.

⁷⁸ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/300, 10 June 2009, para. 18

⁷⁹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/354, 12 June 2008

⁸⁰ S/2008/354, 12 June 2008, para. 16

⁸¹ S/2009/300, 10 June 2009, para. 22

⁸² *Ibid.*, para. 44

⁸³ That ensuring human and community rights has been given great importance has been discussed above, and these rights are also enshrined in the adoption of international human

3.2.3 OSCE

UNSC Res. 1244 has also provided mandate for an OSCE Mission in Kosovo, acting under the UN-umbrella since 1999.⁸⁴ However, after Kosovo's UDI, the mission mandate must be renewed every month, by a decision in the Permanent Council since not all member states have recognised Kosovo (before the UDI, the mandate was extended on a yearly basis).⁸⁵ OSCE is also included in the international presence outlined in the CPS "...to support the democratic development of Kosovo and the work of the ICR and his/her Office".⁸⁶ At time of writing, OSCE has a presence of around 800 staff, but a decrease in numbers is envisaged and "urged by the USA".⁸⁷ The OSCE Mission in Kosovo primarily works with human rights, protection of minorities and election supervision. During the UNMIK-administration it had an important role in democracy and institution building, and today it monitors and reports on the work within these institutions.

3.3 ICO

The non-implementation of the CPS means that it lacks international legal standing. As mentioned above, however, the CPS was endorsed in the UDI, and is implemented in the Constitution and creates the basis for the establishment of the ICO. The ICO, headed by the ICR, is established in order to ensure the implementation of the CPS: "to supervise the implementation of [the] Settlement and support the relevant efforts of Kosovo's authorities" (CPS, annex IX, art. 1). The contents and principles

and community rights treaties. However, the active role of human rights monitoring and implementation bodies can not be ensured if Kosovo can not become a part of these treaties as it is not fully recognised, and thus, UNMIK can fulfil a role as reporting body, Weller, p. 256

⁸⁴ See also the document with the decision from the OSCE Permanent Council on the establishment of OSCE Mission in Kosovo under the UNMIK framework, PC.DEC/305, 237th Plenary Meeting, 1 July 2009

⁸⁵ See the OSCE Mission in Kosovo webpage, under Mandate: <<http://www.osce.org/kosovo/13197.html>>, accessed 2009-10-28

⁸⁶ CPS, annex IX, art. 3:2

⁸⁷ Džihčić, Vedran and Kramer, Helmut, *Kosovo after Independence*, International Policy Analysis, Friedrich Ebert Stiftung, July 2009 p.19, also footnote 31

outlined in the CPS have been described above, and therefore only a short description of the ICO/ICR powers will follow.

An International Civilian Representative, ICR, heads the ICO (at time of writing Pieter Feith). The ICR has extensive powers, and he or she can:

“[t]ake corrective measures to remedy, as necessary, any actions taken by the Kosovo authorities that the ICR deems to be a breach of [the] Settlement, or seriously undermine the rule of law, or to be otherwise inconsistent with the terms or spirit of [the] Settlement; such corrective measures may include, but are not limited to, annulment of laws or decisions adopted by Kosovo authorities”, and;

“[i]n cases of serious or repeated failures to comply with the letter or spirit of [the] Settlement, and/or in instances of serious obstruction in the work of the ICR and/or ESDP Mission, the ICR shall have the authority to sanction or remove from office any public official or take other measures, as necessary, to ensure full respect for this Settlement and its implementation”⁸⁸

Furthermore, the ICR has the authority to appoint a number of high-ranking officials, such as the Auditor General, the international judges and prosecutors and the Director-General of the Customs Service.⁸⁹ The ICR has the final authority to interpret these provisions (CPS general provisions, art. 12:3). In practise, the ICO would not often have to undertake the measures provided for since the process leading up to decisions linked to the implementation of the CPS is closely supervised. A decision where the ICR would use his authority in this way may also be seen as a sign of Kosovo’s independence being in doubt, which would not be in line with the aims of the ICO. In theory however, the ICR does clearly have very wide executive powers and the Kosovo authorities must cooperate fully with the ICR.⁹⁰ The mandate of the ICR/ICO will remain until the International Steering Group,

⁸⁸ CPS annex IX, art. 2:1 c and d

⁸⁹ CPS annex IX, art. 2:2

⁹⁰ CPS, annex IX, art. 6

“comprising key international stakeholders”, determines that Kosovo has fulfilled the conditions in the CPS (CPS, art. 12:1 and 12:6).

3.4 EULEX

3.4.1 Establishment

EULEX is a rule of law mission, set up by the EU to work within three areas: judiciary, police and customs. Initially, EULEX was supposed to take over from UNMIK after the UDI and to work under the CPS, accepting Kosovo as an independent state.⁹¹ As the CPS was not implemented in the UNSC, however, another legal basis for EULEX was needed. Long negotiations between UN, EU and Serbia followed. Serbia insisted on a continued status neutral international presence, acting under UNSC Res. 1244. A compromise was made with Serbia,⁹² and it was decided that EULEX would act under UNSC Res. 1244.⁹³ The fact that not all EUMS recognised Kosovo also motivated a status-neutral work of the mission. Even though not accepting independence, the UN decided to adjust operational aspects of the international civil presence in Kosovo, accepting enhanced EU-presence under UN-authority.⁹⁴ The Kosovo local authorities continues to act as EULEX’s initially envisaged mandate is in force in line with the CPS and its constitution, while the mandate according to Serbia (and actors under the UN-framework) is UNSC Res. 1244. According to

⁹¹ In the CPS, EULEX is outlined as a European Security and Defence Policy (ESDP) mission working with rule of law, directed by the EUSR. The mission was in the CPS envisaged to have, amongst other things, “[i]n consultation with the ICR, authority to reverse or annul operational decisions taken by the competent Kosovo authorities, as necessary, to ensure the maintenance and promotion of the rule of law, public order and security.” However, as mentioned the legal basis for EULEX became UNSC Res. 1244

⁹² See the so-called “Six Point Plan” where Serbia was granted control over some areas related to the Serbian minority (mentioned in the UNSG report of 12 June 2008 UN.Doc, S/2008/354, 12 June 2008, the points include the police, courts, customs, transportation and infrastructure, boundaries and Serbian patrimony, see Annex I.) The Kosovo authorities were not included in the negotiations with Belgrade, and do not accept these six points see; International Crisis Group, Report on Kosovo’s Independence, updated February 2009, part 1, accessible at: <<http://www.crisisgroup.org/home/index.cfm?id=3225&l=1#reports>>, last visited 2009-10-20

⁹³ See para. 8 in the 12 June report where it is stated that EULEX will work “within the framework provided by resolution 1244 (1999)” also para. 12

⁹⁴ S/2008/354, para. 14 and 15

EULEX, UNSC Res. 1244 provides sufficient legal basis for its existence.⁹⁵ D'Asperemont points out that a practise of wide interpretation of UNSC resolutions may undermine the future use of UNSC Chapter VII powers, and undermine the legitimacy of the international presence in Kosovo.⁹⁶

The Council of the EU adopted a 'Joint Action Plan' for EULEX's establishment.⁹⁷ An invitation from the Kosovo authorities for continued international presence serves as a ground for authorising the presence (as mentioned above, an invitation was a requirement in the CPS). However, the importance of the invitation is in theory nullified by the continued existence of UNSC Res. 1244, which would remain in force as a basis for the international presences even if the invitation would be withdrawn. This aspect is further analysed below. The fact that some actors apply Kosovo laws and others UNMIK applicable laws naturally creates frustration for a rule of law mission, as it is amongst other things its task is to ensure the implementation of laws. That some Serbian laws are applied in the parallel structures throughout Kosovo further complicates this issue.⁹⁸ EULEX emphasises its technical approach, conducting only 'mentoring, monitoring and advising', but in reality its staff works with the independent institutions of Kosovo and its laws.⁹⁹ According to Gow, "...in practice, [the EU]

⁹⁵ ICG, see note 18, p. 16. One can also note that the five EUMS that has not recognised Kosovo did not stop the employment of the EULEX mission. All EUMS did agree, but Gow points out that not much chance of disagreeing was given, p. 241

⁹⁶ D'Asperemont, p. 668. According to D'Asperemont, UNSC Res. 1244 could only be used as mandate until the reorganisation of the civil administration of Kosovo (including the envisaged 120-days transition period for reconfiguration, p. 667). After this period, when Kosovo actually started functioning as a state, a new invitation or a fresh resolution would have been needed. The reason is, according to D'Asperemont, that 1244 only provides mandate for international presence during the interim administration period: "This resolution was not alluding to the post-interim-administration period, since it was only devised to regulate the provisional administration itself", p. 653

⁹⁷ Council Joint Action, 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo. The joint action states that "the Kosovo Institutions are those institutions established under 1244" (preamble para. 2).

⁹⁸ See Freedom House, *Nations in Transit 2009 - Kosovo*, 30 June 2009, available at: <<http://www.unhcr.org/refworld/docid/4a55bb3e37.html>> accessed 1 November 2009

⁹⁹ It would otherwise be difficult to fully function as a rule of law mission. A parallel can be made with the difficulties for UNMIK staff, identified by Strohmeyer, p.55, as to how the UN police and judiciary had to apply the existing legislation on a daily basis "...but [struggled] to do so in accordance with the requirements" in the UNMIK regulation

supported independence for Kosovo”¹⁰⁰ and the mission aims at creating legitimate and effective institutions necessary for a functional state.

EULEX officially commenced on 9 December 2008 (but reached full operational capability in April 2009). EULEX is EU’s biggest civilian foreign mission so far¹⁰¹ with some 2500 staff (including around 900 locals).¹⁰² EULEX Joint Action (paras. 12:1 and 2) states that “[t]he PSC [EU Political and Security Committee] shall exercise, under the responsibility of the Council, political control and strategic direction of EULEX...” and that the PSC also decides on its termination.

3.4.2 Mandate

The tasks for EULEX are outlined in a Joint Action Plan, as well as in an Operation Plan which is restricted to the public.¹⁰³ The Operation Plan develops “... technical instruments necessary to execute the mandate of EULEX...” (Joint Action Plan, art. 4:4) The mandate of the EULEX judiciary branch is laid down in the law ‘On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo’,¹⁰⁴ the Law on the Special Prosecution Office,¹⁰⁵ and some arrangements on cooperation between EULEX staff and their local counterparts and transfer of cases from UNMIK. The law on jurisdiction gives EULEX judges and prosecutors the right to exercise exclusive executive authority in certain cases and on certain grounds. It also applies to EULEX police and custom during investigation and other law enforcement activities. EULEX can monitor all cases in Kosovo (Law on Jurisdiction, art. 7:3) and regarding certain serious crimes, EULEX have parallel jurisdiction with its local

¹⁰⁰ Gow, James, 2009 “Kosovo - The Final Frontier? From Transitional Administration to Transitional Statehood”, *Journal of Intervention and Statebuilding*, vol. 3, no. 2, (2009) 239-257p. 253

¹⁰¹ Džihic and Kramer, p. 15

¹⁰² Apart from EULEX, the EU presence further consist of the office of the European Union Special Representative (EUSR) and the European Commission Liaison Office

¹⁰³ Operation Plan for the European Union Rule of Law Mission in Kosovo, 6256/2/08 REV2, Brussels 12 February 2008

¹⁰⁴ Law No. 03/L-053, 13 March “On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo”.

¹⁰⁵ Law No. 03/L-052 “On the Special Prosecution Office of the Republic of Kosovo”.

counterparts if needed to ensure the proper administration of justice.¹⁰⁶ It also has parallel jurisdiction if the proper administration of justice may be disturbed for inter-ethnic reasons/discrimination (art. 3:4). In cases with parallel jurisdiction, EULEX judges work in mixed panels consisting of two EULEX judges and one local judge, presided by a EULEX judge (art. 3:7, civil cases 5:2-3). The same arrangements apply for EULEX prosecutors, working in mixed teams (art. 9:1) with jurisdiction over the crimes listed in art. 3:3 (see footnote 106, including attempt and collaboration), and crimes that fall under the exclusive competence of the Special Prosecution Office (SPRK)¹⁰⁷ (art. 5:1-2, 8:1). Hate-motivated crimes can be exclusively dealt with by EULEX prosecutors (art. 11), as well as crimes where the local prosecutors are deemed unable or unwilling to properly deal with a case (art. 12). So long as EULEX is present in Kosovo, the SPRK will include five EULEX prosecutors (out of ten) and be headed by a EULEX prosecutor.¹⁰⁸ SPRK has exclusive competence over certain crimes (articles mentioned above, plus cases referred by international tribunals), and there is a subsidiary competence over a number of crimes included in art. 3:3 in the Law on Jurisdiction (Law on SPRK, art. 9:1). There is only around 300 staff working within the justice component (including ideally 40 judges and 20 prosecutors) despite being one of the most problematic sectors in Kosovo.¹⁰⁹ EULEX court staff is primarily located in the five district courts.

As mentioned above, the majority of the border crossings are staffed with Kosovo Police staff, although under EULEX supervision. EULEX customs staff consists of around 30 internationals and 20 nationals. In the northern

¹⁰⁶ For criminal cases: art. 3:3, the crimes listed in a-u, for civil cases: art 5:1 art. a-iii (3:3 including for example smuggling of migrants; torture; inciting racial, religious or ethnic hatred; abusing official position or authority; unauthorised purchase, possession, distribution, sale of drugs. 5:1 include property-related issues or cases where the local judiciary may be partial, unable etc.)

¹⁰⁷ Including war crimes, terrorism, organised crime, corruption, inter-ethnic-crime, financial/economic crimes, genocide, crimes against humanity

¹⁰⁸ Law No. 03/L-052, art. 16:1 and 3

¹⁰⁹ See for example Freedom House Report *Nations in Transit 2009 - Kosovo*, 30 June 2009, available at: <<http://www.unhcr.org/refworld/docid/4a55bb3e37.html>> accessed 1 November 2009, p. 14 (footnote 99) “The judiciary is considered one of the weakest links in Kosovo's rule of law” and EULEX Six months report, p. 14: “Compared with the Kosovo Police, the criminal justice system and judiciary as a whole are considerably weaker in their ability to uphold their independence...”

part of Kosovo EULEX staff exercises some executive functions and carry arms. EULEX customs may “where appropriate” in mixed teams carry out customs law enforcement executive responsibilities as provided for in applicable law in Kosovo according to the OPLAN. EULEX customs are also generally and briefly referred to in the ‘Customs and Excise Code of Kosovo’.¹¹⁰

The EULEX police have some corrective powers mainly related to human rights protection and in cases where operational or administrative handling by the Kosovo Police is considered inappropriate. EULEX police further has executive functions as enumerated in a list, for example, where the Kosovo police force lacks all capacity or where EULEX decides that it needs to have the possibility to work without the local police on a case-by-case basis. EULEX police has staff throughout most of the police stations and departments in Kosovo. The absolute majority part of the EULEX staff is deployed within the police. Out of approximately 2500 EULEX staff, some 1400 works within the police according to the EULEX webpage.¹¹¹

3.5 Present Problems and Future Prospects

The initial motive for the international presence was to put an end to the ongoing violence. Its continuance is a way of ensuring that all developments in the area take place in a manner consistent with the desire of the international society to prevent the coming into existence of weak states and to promote good governance. This is done in hope of limiting the risk of relapse into conflict and maintaining peace and security. The main aim of the

¹¹⁰ Code No. 03/L-109, 10 November 2008:

Article 310

EULEX shall have such responsibilities in the field of customs as are set forth in the relevant legal instruments defining its mandate

Article 311

Notwithstanding any provision of this Code or any other law, Customs may delegate to a third party the authority to perform functions assigned to it by this Code or any other law, subject to arrangements between Customs and such third party

¹¹¹ EULEX homepage, police <<http://www.eulex-kosovo.eu/?id=9>> for numbers on customs and justice, click on their main pages, last accessed 2009-10-21

international actors may be “...to achieve effective, rather than merely juridical, statehood”,¹¹² which may create divides between the internationals and locals. (These concepts are closely interlinked, however, and will be discussed more generally relative to international governance and statehood in the next Chapter.) Such divides may surface in the future, for example, as to whether there will be resistance in implementing the numerous laws that were required to be adopted by the Assembly for independence in order to obtain support from international actors.

After ten years of external presence in Kosovo, the internal problems remain substantial. In July 2009 it was stated in a report that: “[t]he situation in Kosovo is still critical and highly unstable with regard to every important aspect of society...”,¹¹³ and in May 2009 the president of the LDK Women’s Forum said that “criminals are ruling Kosovo” and that the LDK is “completely ineffective”.¹¹⁴ There are also problems with enforcing the laws and with political interference in, for example, the judiciary. Problems with corruption and organised crime (drug, cigarette, and petrol smuggling, human trafficking etc.) are severe on all levels in society, and there is no democratic political culture.¹¹⁵ The problems are therefore deep-rooted, both because of the severe socioeconomic situation and because there has been no tradition of rule of law, but instead of “...an inefficient and heavily politicized administration and judiciary” and corruption, remaining from the Yugoslav system.¹¹⁶ In June 2009, the US State Department estimated that

¹¹² See Caplan, Richard “From collapsing states to neo-trusteeship: the limits to solving the problem of ‘precarious statehood’ in the 21st century” *Third World Quarterly*, vol. 28:2 (2007), p. 236, discussing possible problems regarding cooperation between the internationals and the local population in Bosnia-Herzegovina. See also D’Aspermont emphasising that supporting independence for Kosovo is motivated (by international actors) by a wish to preserve stability in the region, rather than being based on a right to such, stemming from for example human rights violations, p. 658

¹¹³ Džihic and Kramer, p. 7

¹¹⁴ UNMIK Media Monitoring, 4 May 2008, <http://www.unmikonline.org/dpi/localmed.nsf/f0300?OpenForm&Seq=1#_RefreshKW_Media> (accessed 2009-10-13)

¹¹⁵ Džihic and Kramer, p. 7

¹¹⁶ Bergling, Per Nordic “Judicial Reform under International Law: Notes from Bosnia and Herzegovina”, *Nordic Journal of International Law*, No. 70 (2001), p. 491. See also Caplan, p. 237 “[Kosovo]... arguably lack a political culture conducive to the development of a liberal democratic state.” and Strohmeyer, p. 55; “...a society that had never before

the unemployment rate in Kosovo was around 45%, that 35% of the population lives below the poverty line, and that 15% live in extreme poverty.¹¹⁷ The ethnic divides continue to create problems, especially in the North. The extensive self-governance in Serb municipalities provided for in the CPS may spur the ethnically divided state. The above-mentioned problems create a *raison d'être* for the international presence on the territory of Kosovo, and one may wonder if *without* their presence, Kosovo could function as a state. However, also *with* its presence its status as an independent state may be doubted considering the extensive executive powers this international presence possesses. This issue will be further discussed in the following Chapters.

In Kosovo, the attitude toward the international presence is generally positive except for UNMIK, since it emphasises status neutrality.¹¹⁸ There are critical voices and some impatience amongst the population, wanting to see substantial improvements after many years of international administration and independence to be preserved. Reluctance by both UNMIK and EULEX to deal with issues of organised crime and corruption has been noted,¹¹⁹ as well as critical voices concerning the continued international presence. One critical voice regarding continued international presence comes from the Kosovan Vetëvendosje (translates to independence) movement. The organisation argues that the fact that the declaration of independence is tied to the CPS, the executive supervision of two international missions (EULEX and ICO) and that Serbia was granted continued control over some areas infringe heavily on Kosovo statehood.¹²⁰ The fact that EULEX decided to negotiate on behalf of Kosovo with Serbia on protocols regarding cooperation on justice, police and customs spurred

experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual”

¹¹⁷ US Department of State, <http://www.state.gov/r/pa/ei/bgn/100931.htm>, June 2009, accessed 2009-10-10

¹¹⁸ Džihic and Kramer, p. 17

¹¹⁹ *Ibid.*, p. 18

¹²⁰ Kurti, Albi, leader of Vetëvendosje

<http://www.newkosovareport.com/index2.php?option=com_content&task=view&id=1639&pop=1&page=0&Itemid=121>, accessed 2009-10-21

protests and vandalism of EULEX cars. A possible split between locals and internationals may be created because of the vast differences in salaries, differences in culture and language, and the fact that the international staff working with implementing the rule of law has immunity from Kosovo laws.

The work of the mission is analysed in six-month reports (EULEX Programme Report), compiled by the EULEX Programme Office. The first report is dated July 2009. EULEX has had a somewhat slow start, and the report outlines continued problems in all areas. For Kosovo to realise required reforms is necessary for acquiring EU membership, which is highly desired for integration and assertion of its status. The Stabilisation and Association Process (SAP) is the EU framework for integrating the Western Balkan states in to EU. The first step for states entering this process is to sign a Stabilisation and Association Agreement (SAA, and start the Stability and Association Process - SAP) with the EU, and so far, Kosovo is the only state in the Balkans that has not yet signed such an agreement.¹²¹ Kosovo's unclear status creates obstacles in impeding it from following the traditional accession process, and a parallel process is therefore established to not isolate Kosovo from the European integration process (for example where SAP instead is called Stabilisation Tracking Mechanism).¹²²

Another issue that may have an impact on the developments in Kosovo is the advisory opinion on the legality of the unilateral declaration of independence, pending in the International Court of Justice – ICJ (article 96(1) UN Charter). The UN General Assembly adopted a resolution on 8

¹²¹ Džihić and Kramer, p. 19

¹²² In Kosovo, the European Commission has an office which is called a liaison office (ECLO) (instead of delegation) because of the status, and because there is no contractual relationship between the Kosovo authorities and the EU. The European Commission submits reports on how the accession process is forthcoming, and in November 2008 the last report for Kosovo was submitted (Kosovo (under UNSCR 1244/99) Progress Report 2008), Brussels, 5.11.2008, SEC (2008) 2697.

October 2008,¹²³ where it requested the ICJ to render an advisory opinion on the issue. The oral proceedings are scheduled to start on the 1st of December 2009.¹²⁴ The outcome will not be binding.

¹²³ Resolution 63/3 (A/63/L.2) posing the following question: Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

¹²⁴ The written statements are not yet made public, and the Court will decide when to do so, possible in relation to the start of the oral hearings, ICJ press release the 21st of April 2009, No 2009/17

4 The Creation of States

Acquisition of territory can take place in various ways,¹²⁵ and since a state is its territory, "...the birth of the state and transfer of territory are inseparable".¹²⁶ As the decolonisation process has ended and no territory (except for remote part such as Antarctica, where territorial claims, indeed, have been made) is any longer *terra nullius*. The creation of new states necessarily implies the diminution or disappearance of already existing states. A claim to statehood must be qualified by legal facts and the formal criteria for statehood must be analysed. A part of a state may claim it has become a new state without having the existing state's consent. Such an attempt to secession is neither prohibited nor permitted in international law.¹²⁷ Malanczuk notes that since international law is neutral with regards to secession, "...it follows reality and the principle of effectiveness".¹²⁸ When the predecessor state opposes such developments it is generally not successful.¹²⁹ However, if there is effective control over the territory concerned statehood may nevertheless have been established and the context in the specific case has to be considered.

4.1 Statehood

According to Crawford, there is "...no generally accepted and satisfactory legal definition of statehood".¹³⁰ As the criteria are not very specific,

¹²⁵ See, for example, Lysén, G., "Some Reflections on International Claims to Territory" in *Current International Law Issues, Nordic perspectives, Essays in Honour of Jerzy Sztucki*, Gothenbourg 1994, pp. 109-34.

¹²⁶ Akehurst, Michael *A Modern introduction to International Law*, 5th ed. George Allen & Unwin (Publishers) Ltd., London (1984), p. 141

¹²⁷ Crawford, p. 390

¹²⁸ Malanczuk, p. 336

¹²⁹ Crawford, "State Practice and International Law in Relation to Secession", *BYIL*, 85-117, (1998) referred to in Aust, Anthony *Handbook of International Law*, Cambridge University Press, New York (2007), p. 23

¹³⁰ Crawford, p. 37. T.D Grant points out that the concept is extensively discussed in academic literature, but that what is lacking are authoritative legal sources for statehood (pointing out that academic writing is not the most authoritative source of international law. p. 413 footnote 44

Cassese suggests they should merely be considered a “general yardstick”.¹³¹ Crawford defines what constitutes statehood in international law through looking at its separate legal personality from other entities, but he also emphasises that the definition is subject to the context of the facts on the ground,¹³² and one should consequently not rely solely on formal criteria. Having international legal personality, the state possesses full legal capacity with ensuing rights and obligations under public international law. What law a newly born state actually is bound by may be discussed. As a separate legal entity it has “a degree of centralization” and exclusive executive and legislative authority (“...in a particular area”) that is independent of other “state legal orders”.¹³³ External involvement in a state by other states usually does not invalidate statehood or the legal personality of the state. An actor can have a legal right to another territory than its own, for example, through a leasing agreement, where the external actor acts as a ‘deputy’ for the legal owner (Hong Kong was for example under lease from China to Great Britain for 99 years, until 1997). It is thus not necessarily the same actor having ‘titular sovereignty’ and exercising actual powers over the territory. This was the case during the UNMIK-administration in Kosovo. Some of the functions of government may be exercised by external actors on the basis of agency without statehood being lost. However, when involvement becomes control and an external actor legally can impose its will, it may be considered to hamper the existence of the state. These circumstances will be further discussed below.

The state as a factual physical entity can be described through some general characteristics. Crawford outlines five such general characteristics of States; they have “...competence in the international sphere”, they are “...exclusively competent with respect to their internal affairs...”, “...not subject to compulsory international process, jurisdiction, or settlement”, and “...at a basic level, States have equal status and standing...” and further,

¹³¹ Cassese, *International Law* 2nd ed. Oxford University Press, New York (2005), p. 73

¹³² Crawford, p. 41-43

¹³³ Brownlie, Ian *Principles of Public International Law*, 7th ed., Oxford University Press, New York (2008), p. 72

“derogation from these principles will not be presumed”.¹³⁴ The criteria for achieving statehood can be established with a legal definition of what constitutes a state.¹³⁵ Traditionally, the criteria in the Montevideo Convention on Rights and Duties of States of 1933 that include a defined territory, a permanent population, an effective government and capacity to enter into relations with foreign states have been emphasised.¹³⁶ These qualifications were deemed necessary for a state to fulfil in order be considered a person in international law (Montevideo Convention, art. 1), hence “[t]he simultaneous occurrence of these elements creates a sovereign entity possessing international personality”.¹³⁷ The Montevideo Convention never entered in to force, as it was ratified by only five states and signed by 19,¹³⁸ but it has “...exercised great influence on the way in which the legal characteristics of statehood have been understood since”.¹³⁹ There is no need for a state that fulfils these criteria to formally assert its statehood in any way; their mere existence is enough for statehood to have been established.¹⁴⁰ However, emphasis is placed on certain of these criteria today, read territorial effectiveness,¹⁴¹ and new elements are considered today including recognition of the new state, “willingness to observe international law”, and democratic rule.¹⁴² Even though no legal criteria can be said to have been added, a tendency to focus on other, and more political criteria than the traditional ones can be seen in the discussion on recognition below.¹⁴³ It will also be shown that when certain criteria are absent,

¹³⁴ Crawford, p. 41

¹³⁵ *Ibid.*, p. 44

¹³⁶ Brownlie, p. 70

¹³⁷ Kaczorowska, Alina *Public International Law*, 3rd ed. Routledge Cavendish, Oxon, England (2005), p. 53

¹³⁸ Grant, Thomas D. "Defining Statehood: The Montevideo Convention and its Discontents" *Columbia Journal of Transnational Law*, vol. 37, no. 2 (1999) pp. 403-57, p. 456

¹³⁹ Warbrick, Colin in Evans, D. Malcolm (ed.) *International Law*, 2nd ed. Oxford University Press, New York (2006), p. 231

¹⁴⁰ Dupuy, Pierre-Marie *Droit International Public*, Dalloz-Sirey, Paris (1992), p. 64

¹⁴¹ See for example Malanczuk “...it is agreed what matters in essence is territorial effectiveness” p. 80, and Shaw, 5th ed. p. 178

¹⁴² But as Brownlie has observed, the latter criterion is illogical since only a (existing) state can take on such capacities to observe international law. Brownlie, p. 75

¹⁴³ According to Crawford, there is a “political reluctance” to create clear definitions on what constitutes a state as decisions on an *ad hoc* basis may ensure some (political) flexibility. He therefore emphasise the importance of establishing objective criteria to avoid

statehood may nevertheless be achieved by other factual developments, especially when there is political will to support a state. The opposite is also true.

4.1.1 Population and territory

A state must have a territory, but there is no requirement of the size. Kosovo is a territory covering 10,908 square kilometres. Small states like the Vatican State, Monaco, Liechtenstein and Andorra have been accepted as states and joined the UN. Boundaries must not necessarily be fixed as mentioned above. It must nevertheless be a territory “...which do not belong, or no longer belongs, to any other sovereign State, with a community whose members do not owe allegiance to other outside authorities”.¹⁴⁴

The territory today referred to as Kosovo has been through geographical and political changes over time, as Kosovo has amongst other been under Ottoman, Italian-occupied Albanian and Serbian rule. The borders of Kosovo as an ‘autonomous province’ in SFRY, as a consequence of “political history”, were set out in the “...post-1945 Yugoslav constitutions” “...and...” correspond more or less to a physical fact ... [as]...Kosovo forms a geographical unit because it is ringed by ranges of mountains and hills”.¹⁴⁵ Kosovo has hence existed as a kind of political and territorial unit since 1945, with some minor changes to its geographical lines as for example described under ‘Territory’ above.

There must be a more or less permanent (settled) population in the territory, but there is no minimum number of people required. It is not an easy task to determine the exact origin and movements of ethnic groups throughout history and especially when there are differing versions between these very

states being granted statehood on a discretionary political basis. Crawford, p. 31 note 1, and p. 45

¹⁴⁴ Cassese, p. 73

¹⁴⁵ Malcolm, p. 1, “...the name Kosovo was not used as a territorial name under the medieval kings, but first appears in accounts of the great battle of 1389”, Kosovo during the Titoist period was commonly called ‘Kosovo and Metohija’, p. 3

groups. It seems that the Albanians were in a minority in medieval Kosovo,¹⁴⁶ and that a migration of Albanians into Kosovo arguably commenced during the early Ottoman period (around year 1500).¹⁴⁷ It has further been argued that it was only after 1690, when many Serbs migrated with the Austrian forces that were defeated after an attempted invasion, that Albanians came “flooding in”.¹⁴⁸ In 1912, when Serbia retook Kosovo from the Ottomans, the majority population in Kosovo consisted of Kosovo Albanians and there was a “...steady rise in the proportion of Albanians in the population of Kosovo from the 1960s onwards” because of Serb emigration and high birth rates among the Albanians.¹⁴⁹ As mentioned in the introduction, the population today consists of around 90% Kosovo Albanians. There is no requirement that the population must be homogenous however, and “[t]he notion of a nation state is of historical interest only”.¹⁵⁰ If a society is not homogenous and there are tensions between different groups however, it may create security-issues complicating the control over the territory. In Kosovo, the religious and ethnic tensions between Serbs and Albanians that have been a fact throughout history are indeed present also today. After the UDI Serbs became the minority in Kosovo, instead of Albanians being the minority in Serbia. Kosovo does not have full control over the population or the territory it claims as Serbia continues to influence,¹⁵¹ and support the parallel structures within the enclaves (see 2.4 above). Serbia basically lost all administrative powers (as they were exercised by UNMIK and the PSIG) by the time Kosovo declared its UDI, but Serbia (FRY) was still the state holding legal title to Kosovo.

¹⁴⁶ Malcolm., p. 52

¹⁴⁷ *Ibid.*, p. 112-114, he also points out that many of the Albanians became Muslims in the Turkish ottoman empire

¹⁴⁸ Malcolm, p. 140

¹⁴⁹ *Ibid.*, p. 356 and 331

¹⁵⁰ Kaczorowska, p. 54, see also Malanczuk, p. 77

¹⁵¹ ”Belgrade remains a major player in Kosovo politics”, see Tansey, Oisín “Kosovo: Independence and Tutelage” *Journal of Democracy* Vol. 20, No. 2 (April 2009) p. 153, p. 163

4.1.2 Effective government

The criterion of government is often used in a way claiming that such government must also be in effective control over its territory and population. An existing government with competence to govern indicates a certain legal status and enables the fulfilment of other statehood-criteria, such as control over territory and capacity to enter in to relations with other states. According to Crawford, "... [a] government has two aspects: the actual exercise of authority, and the right or title to exercise that authority".¹⁵² As already mentioned, these two aspects can be separated and carried out by different actors in reality. Crawford further points out that "...a state must make its own title to recognition",¹⁵³ and in the case of secession, as in Kosovo, "...statehood can only be obtained by effective and stable exercise of governmental powers".¹⁵⁴

The state must have "...general control over its territory, to the exclusion of other entities not claiming through or under it".¹⁵⁵ An effective government must be in control over its territory and its population, but "...international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions".¹⁵⁶ An effective government is by some authors defined as having administrative and legislative organs and competence.¹⁵⁷ Warbrick states that "...the core of the idea [of effective governance] is the preservation of public order".¹⁵⁸ Fukuyama argues that "[t]he essence of stateness is... *enforcement*" (his emphasis) including the ability to carry out laws and policies.¹⁵⁹ Consequently there must be a certain independent control over the territory and population upheld by military and police and internal governmental (power) structures. The type

¹⁵² Crawford, p. 57

¹⁵³ I.e. fulfil the statehood-criteria so other states can consider the entity a state

¹⁵⁴ Crawford, p. 57-58

¹⁵⁵ *Ibid.*, p. 59

¹⁵⁶ *Ibid.*

¹⁵⁷ See for example, Wallace, p. 63, Brownlie, p. 71

¹⁵⁸ Warbrick, p. 233

¹⁵⁹ Fukuyama, Francis *State-Building: Governance and World Order in the Twenty-First Century*, Cornell University Press, New York (2004), p. 6

of government or administrative conditions in a state is not of relevance for the establishment of the state however,¹⁶⁰ so long as it has a central structure capable of exerting effective control.

The requirement of governmental control may in some cases be less strictly applied. For example, when a territory attempts to secede that claim a right to self-determination; it seems its effectiveness does not have to have the same dignity. Warbrick argues that if a state is created in compliance with an established right to self-determination “their status [is] preserved even if the effectiveness of the government [fall] below the previously established expectation”.¹⁶¹ If such a right to external self-determination exists in a non-colonial context is questionable, and the Kosovo status issue has not generally been discussed in line with such possible right.¹⁶² The UNSC Res. 1244 merely mentioned a political solution and emphasised the territorial sovereignty of FRY, and did hence not mention any right for the Kosovo Albanians to (external) self-determination. The letter from Ahtisaari accompanying the CPS emphasised “...Kosovo’s recent history, the realities of Kosovo today and ... the [unsuccessful] negotiations with the parties”¹⁶³ when promoting independence.

Once a state is established with effective government, a temporary loss of effectiveness or control does not affect statehood. It will consequently not affect the state as a legal entity if its effective control is slacked by the lack of effectiveness, military occupation by another state or civil war (not involving secession).¹⁶⁴ For example, Somalia has so far not lost its statehood when it has been without effective government during the civil war between 1991 and 2004, and is still afflicted by chaos despite attempts

¹⁶⁰ See for example Malanczuk, p. 79

¹⁶¹ Warbrick, p. 234

¹⁶² For a discussion on whether the Kosovo-Albanians could claim such a possible right see: Quane, Helen “A right to Self-Determination for the Kosovo Albanians?” *Leiden Journal of International Law*, No.13 (2000) pp. 219-227

¹⁶³ “Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence...” S/2007/168, para. 5

¹⁶⁴ Aust, p. 17, Crawford, p. 63. Brownlie, p. 71

to establish a government in control. It is still considered as having legal capacity, although it cannot in practical terms exercise it.¹⁶⁵ The important question is, of course, for how long time this state of affairs can continue without affecting the legal construction of this state (such as through a dissolution into new states).

It has happened that the international society decides to recognise a state despite not entirely fulfilling the criterion of governmental control upon establishment. For example in Bosnia-Herzegovina, a structure was put in place by the international society to create a state, which had never existed before (at least in recent times).¹⁶⁶ This example will be further discussed under 'Recognition'. It may also be the case that effective control is insufficient to support statehood "...since this leaves open questions of independence and representation by other states".¹⁶⁷ In the case of Kosovo, the structures in place when declaring the UDI had completely been created by external actors (UNMIK) and the local actors were still under their control. Hence, Kosovo did not initially have effective control. It must therefore be examined whether effectiveness has been created since the declaration of independence made by Kosovo, on the assumption that it did not exist before that point of time. These developments will be further considered in Chapter five.

4.1.3 Capacity to enter in to relations with other states

Capacity here refers to a legal authority to enter into inter-state relations. This "...permits the government to make the arrangements it wishes with foreign states and to give effect to them domestically where it is necessary".¹⁶⁸ A capacity to enter into relations with other states is facilitated when the state is recognised by other states with which the state can exercise such capacity. Recognitions by other states will be further

¹⁶⁵ Wallace, Rebecca M.M. *International Law*, 5th ed. Thomson Sweet and Maxell, London (2005), p. 63

¹⁶⁶ Warbrick, p. 246

¹⁶⁷ Brownlie, p. 71

¹⁶⁸ Warbrick, p. 240

analysed below and this is not a formal criterion for statehood. The emphasis is instead put on having the capacity or ability to enter into such relations, and hence the actual existence of such relations may be secondary.¹⁶⁹ Such capacity exists when a state has an internal structure able to handle such relations (effective government) and when it is the state itself having these abilities and not another actor (independence).¹⁷⁰ As UNMIK represented Kosovo in international relations at the time for the UDI, and Kosovo did not possess an effective government, it consequently lacked institutional capacity to enter into international agreements. An examination of the degree of independence can be made through looking at formal versus actual independence. A state may be formally independent, "...where the powers of government of territory are vested in the separate authorities of the putative state" but the actual exercise of powers may in fact be under the direction of another state implying that there is a lack of actual independence.¹⁷¹ As mentioned above, it does generally not affect the state as such when it enters into agreements or joins international organisations. In the *Nottebohm* case¹⁷² it was stated that despite Liechtenstein having delegated a number of state powers to Switzerland, it was still unaffected and, of course, recognised as a state. Formal independence can be at risk either "...where a state claims the right to exercise governmental authority over a territory" or when an external actor has "...discretionary authority to intervene in the internal affairs of the putative state".¹⁷³ Actual independence is lost by substantive external control that can not be ended by the will of the state.

Even if independence is established through fulfilment of the criteria for statehood, and the state in question formally shows all signs of independence, it can be questioned if there is de facto control over the state by another state.¹⁷⁴ Judge Anzilotti notes that even extensive obligations

¹⁶⁹ Crawford, p. 62

¹⁷⁰ *Ibid.*, p. 62

¹⁷¹ *Ibid.*, p. 67

¹⁷² *Nottebohm* (Liechtenstein v. Guatemala), ICJ Reports 1955, p. 375

¹⁷³ Crawford, p. 71

¹⁷⁴ Lysén, p. 30

does not take away independence, neither contractual agreements or restrictions flowing from international law, but that it is a matter of the state not being subject to the legal authority of another state.¹⁷⁵ However, a state would be classified as dependent when there is a relationship with other states meaning that external actors “can legally impose [their] will and the state ... is legally compelled to submit to that will”.¹⁷⁶

According to Brownlie, independence is in doubt when “foreign *control* [overbears] the decision-making of the entity concerned on a wide range of matters and [do] so systematically and on a permanent basis” (his emphasis).¹⁷⁷ The entity “must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law”.¹⁷⁸ Shaw argues that the limit is drawn when the “...state is formally compelled to submit to the demands of a superior state”¹⁷⁹ and Malanczuk when the state enter “...into a treaty or other legal commitment whereby it agrees to act under the direction of another state or to assign the management of most of its international relations to another state”.¹⁸⁰

4.2 Recognition

There is no rule that a state must be recognised to be considered a state and it is not one of the statehood criteria. In the Montevideo Convention (art. 3) it is stated that “...the political existence of the state is independent of recognition by the other states”. Hence a state becomes a state at the moment when the statehood criteria are fulfilled. However, in practise it would be difficult for a state to uphold internal, and particularly external,

¹⁷⁵ *Austro-German Customs Case*, PCIJ ser A/B no 41 (1931), 57-8, referred to in Crawford, see p. 66, footnote 134

¹⁷⁶ Judge Anzilotti, *ibid.* (*Austro-German Customs Case*), p. 57, but referred to by Crawford on p. 283, footnote 2

¹⁷⁷ Brownlie, p. 72. However, the crucial point is that the agreement can be withdrawn, as is the case with the EUMS that has entered into many and heavy commitments

¹⁷⁸ Brownlie, p. 72

¹⁷⁹ Shaw, Malcolm N *International Law*, 6th ed., Cambridge University Press, New York (2003), p. 211

¹⁸⁰ Malanczuk, p. 79

relations if not recognised by other states. The fourth criterion in the convention, referring to the capacity to enter into relations with other states, is therefore connected to recognition. The importance of recognition has been disputed, which is manifest in two different approaches to recognition: the declarative and the constitutive approaches. According to the constitutive approach, the act of recognition actually creates (constitutes) the state (irrespective of how it was created). According to the declarative approach “...recognition is merely an acceptance by states of an already existing situation” meaning that the capacity as a subject of international law is created by the factual situation, not by recognition.¹⁸¹ Crawford notes that “neither theory of recognition satisfactorily explains modern practice”¹⁸² and Shaw argues that actual practise leads to a middle position.¹⁸³ Brownlie argues that “...to reduce...the issues to a choice between the two opposing theories is to greatly oversimplify the legal situation”.¹⁸⁴ Recognition has understandably been called “...one of the most difficult topics in international law”.¹⁸⁵ It is not necessary for a state to be recognised in order to exist but recognitions may help the state to become established or effective. Recognition may be claimed as evidence for statehood,¹⁸⁶ and in borderline cases recognition may have decisive effect.¹⁸⁷ In cases where the predecessor state protested against secession and a separate part of the territory therefore unilaterally declared its independence, as in Kosovo, recognitions from other states may have a great deal of importance. It is not common for such states to be recognised or successfully established however. Since 1945 no new State formed “...outside the colonial context has been admitted to the UN without the consent of the predecessor State” and State practise show “...extreme reluctance” to recognise such new states.¹⁸⁸ In the case of Quebec it was claimed that such acts do depend on recognition:

¹⁸¹ Shaw, 6th ed. p. 446

¹⁸² Crawford, p. 5

¹⁸³ Shaw, 6th ed. p. 446

¹⁸⁴ Brownlie, p. 88

¹⁸⁵ Akehurst, p. 57

¹⁸⁶ Malanczuk, p. 80, Akehurst, p. 54, Shaw, p. 449

¹⁸⁷ Akehurst, p. 54

¹⁸⁸ Crawford, p. 415

“[A denial of the right to secede] does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such secession would be dependent on recognition by the international community . . .”¹⁸⁹

Recognition has been claimed to be a “political tool with legal implications”.¹⁹⁰ Indeed, recognition is often linked to political realities and can be used as a political tool, for instance when recognitions are conditional. That recognition is conditional does not make it less valid however.¹⁹¹ At the break-up of the SFRY, recognitions were guided by certain European Community Guidelines on recognition.¹⁹² These guidelines requested the aspiring states to give assurances related to certain issues as democracy, human rights, the rule of law and minority issues in order to be recognised. Hence other, more political, criteria than the traditional formal statehood criteria were given emphasis. Some of these states were recognised despite not fulfilling all of the traditional statehood criteria, particularly the requirement for effective government.¹⁹³ One such example was Bosnia-Herzegovina and as stated by Rich, “[t]here can be few better examples of the attempt to constitute a state through widespread recognition than the case of the Republic of Bosnia and Herzegovina”.¹⁹⁴ Consequently it seems recognition may have a healing effect in certain cases where the entity does not fulfil the statehood criteria (for example lack of effective control) but there is a political will to allow for the full functioning of new states.¹⁹⁵ It is also true that states fulfilling the traditional statehood

¹⁸⁹ Referred to in Crawford, p. 389 *Reference re Secession of Quebec* 1998 SCJ No 61, para. 155, 115 ILR 537, 595

¹⁹⁰ Shaw, 6th ed., p. 470, Akehurst, p. 57

¹⁹¹ Crawford, p. 385

¹⁹² Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, issued by the European Community on 16 December 2001

¹⁹³ Turk, p. 68. In the case of Croatia, it was recognised without having fulfilled the special conditions; it had not given sufficient guarantees with regards to minority protection for example. Kaczorowska, p. 80

¹⁹⁴ Rich, Roland “Recognition of States: The Collapse of Yugoslavia and the Soviet Union” *European Journal of International Law*, no. 4 (1993), p. 56

¹⁹⁵ Lysén, p. 32

criteria may not be able to exercise the rights granted them if denied recognition, for example Taiwan, Southern Rhodesia and Biafra.

In Kosovo it was of considerable importance to be given external support to be able to attain the rights accompanying statehood. Third states may recognise new states if it fulfils the basic requirements of statehood, but there is no obligation to do so.¹⁹⁶ The unclear facts and possible illegality of the creation of Kosovo has created a division in opinions within the international society, where differing attitudes are reflected in recognition or non-recognition of the state. Choosing to recognise or not "...is a way [for the state to declare] how it understands the situation".¹⁹⁷ There are 63 states that have recognised Kosovo as to date, and have consequently established diplomatic relations with Kosovo through embassies or other diplomatic representation.¹⁹⁸ There is no practise stating that a certain number of recognitions would be required for such to be considered in some sense constitutive. Aust argues that "...unless an entity is accorded recognition as a state by a *sufficiently large number* [my emphasis] of states, it can not realistically claim to be a state with all the corresponding rights and obligations".¹⁹⁹ Additional weight may be given to recognition by major powers.²⁰⁰ As mentioned above, supporting states tend to emphasise the *sui generis* status of Kosovo, created by the violent history and the lengthy international administration. On the other hand, the fact that no agreement was made between the parties and that the unilateral act therefore can be seen as a breach of Serbia's territorial integrity, served as a basis for many states choosing not to recognise Kosovo. A number of states also had concerns about their own minorities and possible break-away regions, and

¹⁹⁶ Brownlie, p. 80

¹⁹⁷ Shaw, 6th ed. p. 449

¹⁹⁸ Five EUMS have chosen not to recognise Kosovo, which makes 22 out of 27 EUMS having recognised Kosovo. Furthermore, two of the UNSC permanent members; China and Russia, have not recognised Kosovo, in the UN 63 out of 192 total members have recognised Kosovo. Some states that have not recognised Kosovo are: India, Brazil, Belarus, Egypt, Bosnia-Herzegovina, Indonesia, Iran, Iraq, Pakistan, South-Africa, Ukraine and Vietnam.

¹⁹⁹ Aust, p. 17

²⁰⁰ Ijalaye, David A., "Was "Biafra" at Any Time a State in International Law?" *The American Journal of International Law*, Vol. 65, No. 3 (Jul., 1971), pp. 551-559, p. 559

therefore feared that Kosovo would be seen as a precedent.²⁰¹ As T.D Grant points out, there may be legal grounds (officially) motivating non-recognition, but (based on) political considerations.²⁰² Political reasons may thus not necessarily be related to an actual opposition of the (legal) status of the territory.

Recognition does not give rights and duties to a state, but may enable the exercise of such: “[n]on-recognition with its consequent absence of diplomatic relations may affect the unrecognised state in asserting its rights, or other states in asserting their duties under [international] law but will not affect the existence of such rights and duties”.²⁰³ Consequently “... [f]or those states that have recognised Kosovo, the latter will be entitled to all the privileges and responsibilities of statehood in the international community and within the legal systems of the recognising states” but for the non-recognising states the “...international status of Kosovo will be controversial and disputed”.²⁰⁴ In the case of Kosovo, clearly the majority of states have not recognised its statehood. As the number of states that has recognised Kosovo is around a third of all existing states, it is doubtful whether such recognitions had a mending effect on the lacking criteria of effective control. It consequently will also hamper the criteria of capacity to enter in to relations with other states, and especially the ability to join international organisations.

²⁰¹ See for example **Greece** <http://www.mfa.gr/www.mfa.gr/Articles/en-US/290808_alp_1636.htm>, Greece Foreign Ministry spokesman, 2008-08-29 **India** <<http://meaindia.nic.in/pressbriefing/2008/02/18pb01.htm>> press briefing, Ministry of External Affairs New Delhi, 2008-02-18, **Romania** <<http://www.reuters.com/article/newsMaps/idUSL18447620080218>> “Romania will not recognise Kosovo independence”, Reuters, 2008-02-18, **Slovakia**, <http://www.spectator.sk/articles/view/30829/2/slovaks_divided_on_kosovo.html> “Slovaks divided on Kosovo”, The Slovak Spectator, 2008-02-25, **Cyprus** <<http://euobserver.com/9/25583>> “Romania and Cyprus confirm opposition to Kosovo independence”, The EU Observer, 2008-02-01 **Spain** <<http://www.euroresidentes.com/Blogs/2008/02/spain-will-not-officially-recognise.html>> “Spain will not officially recognise Kosovo”, News from Spain, 2008-02-18 **China** <<http://www.abc.net.au/news/stories/2008/02/18/2165989.htm>> 2008-02-18, “China ‘deeply concerned’ over Kosovo independence”, ABC News [all accessed 2009-11-13]

²⁰² T.D Grant, p. 453

²⁰³ Shaw, 6th ed. p. 471, unless however recognition can be seen to be constitutive for a legal entity, *ibid*

²⁰⁴ *Ibid.*, 6th ed. p. 453

In the next Chapter it will be analysed whether any developments has taken place over time that may make it possible to conclude that Kosovo is more than a fictive state. The discussion will focus on the external involvement in the state-building activities in Kosovo, and whether such involvement can at all be considered remedial. Initially the notion of internationally administered territory will be presented.

5 Does Kosovo exist as a state?

5.1 Internationally Administered Territories

The meaning of the state as a fully “sovereign” actor has, as mentioned in the introduction, decreased throughout history. The growing number of international organisations and international treaties has placed limitations on what was once considered the supreme authority of states, and increased concerns for human rights and emphasis on protecting individuals has made the state no longer the sole subject of international law. Certain values are claimed as universal or shared and are often linked to notions of human rights, democracy and the rule of law; “...shared values and interests [that are] incorporated in international law, [are] in particular those norms relating to peace and security and respect for human rights and human dignity”.²⁰⁵ By upholding these values a state can be accepted as a legitimate actor in the international arena, and in the broader context it is hoped that ensuring them will bring an increasingly peaceful and stable world. As these values are now international standards the international community can use its collective authority to ensure them.

²⁰⁵ Brus, Marcel in *State Sovereignty, and International Governance*, Editor in Chief Kreijen, Gerard, Oxford University Press, New York (2004), p. 10. This practise of “...collective management and governance...on the basis of values that are shared by all” (Brus, p. 5) may be linked to an aim “...to shape the law and institutions of societies along the guidelines of a Western liberal governing tradition.” (Stahn book, p. 19) This practise is often referred to as international territorial administration, global governance or similar. It has also been referred to as “modern trusteeship” or “neo-trusteeship” by some authors. (See O’Neill, William G *Kosovo - An Unfinished Peace* International Peace Academy Occasional Paper Series, Lynne Rienner Publishers, Inc. Colorado USA (2002), p. 31 and generally Caplan. According to Stahn however, the notion of international administered territory should be distinguished from the framework of the mandate and trusteeship systems. (Stahn *The law and Practise of...*, p. 535-536) On the other hand, the label of the territory is not what matters in a legal discussion on statehood. Such analysis should rather be based on “...an examination of the constituent documents and the circumstances of the case.” (Crawford, p. 284)

After the Cold War threats against states consisted less from external military threat and more from internal wars or weak state structures, and Fukuyama considered “[w]eak or failed states [to be] close to the root of many of the world’s most serious problems”.²⁰⁶ Furthermore, in a time of globalisation of international society the divisions between domestic and international decreased and political and economic ideals were promoted internationally. Increased cross-border activities lead to issues such as illegal trade, humanitarian crises, human trafficking and terrorism that more easily could spread and hence pose a threat to international peace and security. External actors that before mainly were concerned with peace keeping, now also engaged in promoting good governance and actual governance of territories, and “[s]tatebuilding [became] more externally than internally driven”.²⁰⁷

Since the end of the Cold War, the UN has, with consent of the state concerned or by using its enforcement powers under Chapter VII of the UN Charter, amongst other things used force to end violence, prosecuted criminals in international tribunals and set up international administration of territories. The UNSC can use enforcement powers in a situation it deems being a threat to the peace and security of states (UN Ch. art. 39) and these powers (non-exclusively listed in art. 41) can be widely interpreted.²⁰⁸

²⁰⁶ Fukuyama, “The Imperative of State-building”, *Journal of Democracy*, vol. 15, no. 2 (April 2004) p. 17

²⁰⁷ Krasner, p. 74. Stahn notes that international administration of territories is not a modern phenomenon, but that “...[a] more systematic revival of the technique of international territorial administration began ... in the 1990s when the performance of administrative functions became, inter alia, an essential component of multidimensional peacekeeping, which placed the objectives of democratisation, human rights protection and the promotion of justice on an equal footing with the traditional aims of ensuring security and promoting development” Stahn, Carsten, *The Law and Practice of ...*, p. 9

²⁰⁸ *Prosecutor v. Tadić*, Appeal on Jurisdiction, No. IT-94-AR72, paras. 32–38 (Oct. 2, 1995) The right to actually administer a territory in a non-colonial context may be disputed, see for example Kelsen: “the organisation is not authorised by the Charter to exercise sovereignty over a territory, which has not the legal status of a trust territory” (Kelsen, Hans, *The Law of the United Nations: A Critical Appraisal of Its Fundamental Problems* (1964; reprinted in 2004) p. 651 referred to in Stahn, p. 41 footnote 188) but according to Crawford, the “United Nations organs are authorised to administer territory, under Article 81 of the Charter and otherwise.” (p. 494)

The first major UN engagement exercising governance way was in Cambodia in 1991,²⁰⁹ where the UN was acting under UN Ch. XI and not XII and hence needed consent from the state.²¹⁰ The later case of international administration in East Timor and Kosovo is often mentioned as “unprecedented in scope and complexity”,²¹¹ but this qualification has been criticized as complex administrative undertakings have taken place earlier in history.²¹² However, in 1999 both these territories became subject to far-reaching administration by the UN, and both interventions were mandated through a UN Ch. VII mandate including exclusive administering authority. Furthermore, the UN in East Timor for the first time exercised authority independent of any other territorial subject having title to the territory.²¹³ Unlike in Kosovo, the predecessor state (Indonesia) in the case of East Timor had given up its claim to territorial sovereignty after a vote for independence by the local population. Another similar case to that of Kosovo is Germany in 1945 where an occupation regime was established by the Allied Powers “with an aim of restructuring the entire State-apparatus”.²¹⁴

Kosovo has been a clear example of the above mentioned developments. The entity’s (modern) historical status will be examined below to get a fuller picture of the developments leading to the present situation.

²⁰⁹ Matheson, p. 77. The mission was called UNTAC, UN Transitional Authority in Cambodia

²¹⁰ The 1991 Paris Peace Agreement entrusted UNTAC with “key aspects of civil administration” was signed by four Cambodian factions, Stahn *The law and Practise of...*, p. 9 footnote 42, and Matheson, p. 77

²¹¹ Matheson, p. 79

²¹² Stahn *The law and practise of...*, p. 11-12

²¹³ *Ibid.*, p. 11

²¹⁴ Tomuschat in Kreijen, Gerard (Editor in Chief) *State, Sovereignty, and International Governance*, Oxford University Press, New York (2004), p. 336

5.2 Status within FRY

When the Ottoman rule in the Balkans was ended after the Balkan wars in 1912, Kosovo was *de facto* annexed by Serbia.²¹⁵ When the Yugoslav state (The Kingdom of Serbs, Croats and Slovenes) was proclaimed in 1918, Kosovo was “...carried along in the process” as it was considered an “...integral part of the Serbian kingdom”.²¹⁶ After the World Wars, subsequent to again being divided and administered in various ways, Kosovo was outlined in its present geographical form in 1945, when integrated as a province of Serbia into the new SFRY.²¹⁷ During SFRY, Tito had control over a number of ethnically divided republics within the federation. It consisted of six ethnically different republics (Serbia, Croatia, Slovenia, Macedonia, Bosnia-Herzegovina and Montenegro) and two autonomous provinces within Serbia (Vojvodina and Kosovo). Kosovo was granted substantial autonomy in the 1974 SFRY Constitution and Kosovo “...enjoyed the status of an autonomous province of Yugoslavia, while being a constituent part of the Republic of Serbia”.²¹⁸ Under this Constitution, Kosovo was “...directly represented in the federal Parliament, the Presidency, and the Federal Constitutional Court” and “...had the right to maintain its own constitution, a parliamentary assembly, and its own judiciary, including a Constitutional Court and a Supreme Court”.²¹⁹ Kosovo did not possess the right to secede however, as the republics of the federation did, and was not “considered [bearer] Yugoslav sovereignty”.²²⁰

²¹⁵ However, according to Malcolm it was *de jure* not annexed at all, see introduction xxxiii and also page 265 onwards for a discussion on the illegality of Kosovo’s incorporation into Serbia.

²¹⁶ Malcolm, p. 264

²¹⁷ Through a resolution on the “annexation of Kosovo-Metohija to federal Serbia” in 1945, which was passed in Kosovo at its ‘Regional People’s Council’ without a vote and with pressure (only 33 of 147 members were Albanians) Malcolm, p. 315

²¹⁸ Stahn, “Constitution Without...”, p. 532

²¹⁹ *Ibid.* p. 532

²²⁰ Independent International Commission on Kosovo, p. 36. “This difference was explained by the fact that the Albanians, like the Hungarians of Vojvodina, were classified as a nationality (*narodnost*) rather than a nation (*narod*). Supposedly this was because their nation had a homeland elsewhere.”

When Tito died in 1980, Serbia tried to dominate the SFRY under Milosevic through a repressive regime which was met by armed resistance from the other republics. Serbia retained control over Kosovo as the SFRY disintegrated. Amendments to Serbia's Constitution in 1989 and 1990 severely limited the rights Kosovo had been given under the 1974 Constitution and "...[reduced] Kosovo's powers to the status of a municipality" and further "...removed Kosovo's control over areas such as the judiciary, the Kosovo police, education [and] the economic and social policy".²²¹ According to the 1974 Constitution, the Kosovo Parliament had to approve changes in the Serbian Constitution. However, as the Serbs surrounded the parliament with tanks, the Kosovo Albanians were forced to give in.²²² The Serbs basically shut the Kosovo Albanians out of society and the Kosovo Albanians therefore created their own parallel structures within Kosovo, established their own constitution and held a referendum of independence as well as proclaimed the "Republic of Kosovo" in 1992. The Serbs continued to obstruct these initiatives and Kosovo gained very little support internationally.²²³ The Kosovo Albanians put up resistance of violence which was met with massive human rights violations, and war broke out in 1998. In February 1999 the Rambouillet Accords outlined self-government for Kosovo (as a part of the FRY) which restored some of the authority lost in 1990.²²⁴ The Rambouillet Accords were rejected by FRY and the NATO intervention commenced in June 1999.

5.3 Status under UN-administration

UNSC Res. 1244 was (intentionally) not clear on the future status of Kosovo.²²⁵ One reason may be that it is doubtful if the UNSC has powers to

²²¹ Stahn, "Constitution Without..." p. 533

²²² *Ibid.* p. 534

²²³ For example Kosovo was not addressed in the Dayton Peace Accords as it had hoped, O'Neill, p. 22 see also Stahn, "Constitution Without..." p. 535

²²⁴ Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, France February 23 1999, Chapter 8 (3) stated this was a provisional solution and that a final settlement would be based on the will of the people due to a referendum to be held after three years. The arrangements were to be supervised by an international presence.

²²⁵ According to Stahn, p. 560, also p. 539 that UNSC res. 1244 was "remarkably vague on the issue of Kosovo's final status"

alter territorial rights.²²⁶ UNMIK was supposed to “[facilitate] a political process designed to determine Kosovo’s future status” (UNSC Res. 1244 art. 11:a). UNSC Res. 1244 emphasised the territorial sovereignty of Former Yugoslavia (FRY), and FRY was allowed to keep some military personnel at border crossings and within Kosovo (preamble para. 10 and annex 2:6). However, UNMIK made Kosovo an ‘internationalised territory’ where “title over the territory [did] not coincide with the exercise of the administering authority.”²²⁷ UNMIK held all basic state powers in Kosovo and according to the UNSG, UNMIK was the only legitimate authority in Kosovo.²²⁸ As mentioned above, UNMIK also created its own legal system. The Constitutional Framework, when created in 2001, contained no references to FRY organs in Kosovo at all.²²⁹ UNMIK hence acted both as “...a representative of the national institutions, on the one hand, and as an international legal person”.²³⁰

Even though a gradual transfer of power did take place after the adoption of the Constitutional Framework establishing the PISG, UNMIK and the SRSG retained extensive powers.²³¹ UNMIK continued to act as part in agreements with foreign governments and the SRSG promulgated legislation, could dissolve the Assembly and call for new elections as well as appoint judges and prosecutors.²³² The SRSG could also intervene and make corrections regarding any action deemed inconsistent with UNSC Res. 1244. The framework was enacted unilaterally by UNMIK and not by consent from the FRY. Brandt points out that “...the understanding that UNMIK [had] no obligations or vertical connections to the FRY, and

²²⁶ Stahn, “Constitution Without...” p. 541-542

²²⁷ *Ibid.*, p. 540. In Zimmerman and Stahn, Internationalised territory is defined as: “...territories placed under the supervision of an international organisation or a group of states”, p. 429 footnote 30.

²²⁸ See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, UN Doc. S/1250/1999 of 23 December 1999, para. 35.

²²⁹ Zimmerman and Stahn, p. 428

²³⁰ Stahn, “Constitution Without...” p. 541

²³¹ The SRSG did also use his retained powers “...to veto or invalidate a number of domestic acts, ranging from resolutions from the Kosovo assembly to acts of the executive branch of power and judicial decisions.” Stahn *The law and Practise of...*, p. 329

²³² The SRSG ultimate authority is regulated in the Constitutional Framework, in the preamble, para. 9 and ch. 12

therefore [could] exercise immediate authority normally attributed to a holder of sovereignty, seems to have been accepted in international law”.²³³

5.4 Status Today – Discussion

The PSIG did not hold the necessary control over territory and population for statehood to have been acquired at the time for the UDI; “[t]he mere existence of a government...in itself does not suffice, if it does not have effective control”.²³⁴ It was still UNMIK that was the right-holder in Kosovo and had ultimate control over the local authorities. Furthermore the new state was created under the auspices of external actors. The developments after the UDI must be examined in order to determine if these have had an impact on Kosovo’s statehood.

Apart from the continued exercise of powers by UNMIK and KFOR, new presences were established by the CPS, incorporated in to the Kosovo Constitution. The CPS provides an outline of an institutional structure that would be necessary to provide a functioning effective state. It can thus be seen as an instrument regulating Kosovo statehood. The CPS “...qualifies as one of the most extensive regulations of the emergence of a new state, since the future state of Kosovo is left with very little leeway in determining the form of its institutions”.²³⁵ The CPS grants full monopoly of violence to the IMP. Max Weber’s definition of the state includes a monopoly of legitimate violence.²³⁶ Kosovo does not have such monopoly, as the KFOR-soldiers and EULEX police and customs officers can lawfully interfere. Except for the executive power, also the judiciary is heavily influenced by external control. EULEX possess executive authority in a wide range of cases, and at times to the exclusion of local staff. Concerning the legislative it has been

²³³ Brand, Marcus G. “Institution-Building and Human Rights Protection in Kosovo in the Light of the UNMIK Legislation” *Nordic Journal of International Law*, Vol. 70 (2001), p. 463

²³⁴ Malanczuk, p. 77

²³⁵ D’Asperemont, p. 660

²³⁶ Max Weber, *Essays in Sociology* New York: Oxford University Press, 1946, p. 78, see also Plunkett p. 77

outlined above that there is a legislative agenda outlined by the external actors that the local authorities must comply with. Consequently, the governmental structures have been fully created by external actors, and these actors also have substantial influence in all branches of government.

The broad possibility of external actors to make decisions overbearing the authority of local institutions on a number of issues must be considered as the exercise of legal control. As shown under Chapter 4.3.1, independence may not exist when there is substantial external control and legal authority over the controlled state. Evidently the requirement of consent is crucial – i.e. that the interference take place on a voluntary basis. This implies that the state must be able to withdraw such consent. Kosovo's UDI depended on external support. Such was only given based on conditions and assurances from the Kosovo authorities. An invitation had to be made from the Kosovo authorities for continued international presence. Kosovo naturally agreed to the demands that the international players put up, having independence as an ultimate goal. The consent was therefore given under pressure. More importantly thus, as it is argued above that Kosovo never entered into existence as a state because of a lack of independence as well as of a government with effective control, it could arguably not give such consent in the first place. However, even if the consent is to be considered valid, it can not be withdrawn. This is the crucial point with regards to Kosovo. The country can not get rid of its supervisors when it wants to, and the external control is established in law. The supervision by the ICR is embraced in the constitution and UNSC Res. 1244 still stands unmodified.

Apart from the international presence impeding the fulfilment of statehood through its substantive control that cannot be revoked by Kosovo authorities, it is also for reasons of continuous internal inefficiency that Kosovo cannot claim to have effective control. The need for a 2 500 personnel rule of law mission in the territory with only approximately two million inhabitants is a clear sign that there are broad problems requiring an external fix-up. The existence of the major problems within the judiciary,

with corruption and organised crime are on-going, and this has been shown under Chapter 3.5. The obvious lack of administrative efficiency and control is also mirrored with regard to security issues and the fact that Kosovo itself could not ensure control over its territory. Kosovo further does not have full territorial control since Serbia exert substantive influence over the Serbian communities throughout Kosovo. The CPS also grants extensive rights and protection to the communities in Kosovo and the division between communities may become even deeper with the ongoing decentralisation process. Except for necessary political and military support, there is also economic dependence. It must therefore be questioned whether Kosovo would have been able to exist as a state without the external presences in the first place.

Kosovo would have needed to assert its statehood further by firm protest against the continued international presence. It is now in a dependency situation and Kosovo cannot achieve statehood neither without nor with the substantial external presence. Accordingly, Kosovo must render the *raison d'être* for these actors superfluous by creating an effective state. It can then establish for example external relations for further aid on a consensual basis. In cases where the survival of a state depends on other states, the state can be seen as a politically warranted “legal fiction” in the words of Cassese, which is “...warranted by the hope of recovering control over territory. Once this prospect vanishes, the other states discard this legal fiction”.²³⁷ In Kosovo the political position of the entity may have changed but not its legal status. That the state no longer has absolute sovereignty has been accepted but if the practise of state-building, or indeed, state-maintaining become “...consolidated within the international legal system, there might be the first stirrings of an international legal community of states”.²³⁸

²³⁷ Cassese, p. 73

²³⁸ Warbrick, p.247

6 Conclusion

Kosovo has given rise to many developments in international law since the NATO-bombings in 1999 were conducted with compromised legality for the benefit of legitimacy. The national independence of Serbia was put aside for the protection of human rights and an extensive UN-administration was put in place. Today Kosovo claims to be an independent state. When considering the emergence of new states, several considerations must be taken into account. One must examine the context and the case-specific situation, especially when the emergence of the new state is disputed and contested by the predecessor state. The claim made by Kosovo in February 2008 to fulfil the criteria of statehood must be considered in an analysis based on the facts on the ground, actual administrative effectiveness and third-party control, as well as level of recognition. This thesis has attempted to undertake such analysis. Clearly the idea of an independent Kosovo has had support of some major states. This support enabled the declaration of independence which was made conditional on continued international presence. The CPS outlines independent institutions of an independent state, a state with its own flag and the authority to enter into relations with other states. When examining the relevant documents and mandates however one finds that the executive authority of the external presence is wide. It ensures that external actors will have continued influence over the developments in Kosovo. As the CPS was not accepted in the UNSC, this document may be seen as primarily political. However, besides external political influence ensured by the national implementation of the document, the mandate for UNMIK as ultimate legal governor in Kosovo remains. As this mandate is manifested through an UNSC resolution the local authorities cannot choose to end this presence. Even if UNMIK and KFOR have started to decrease their activities, EULEX is argued to be able to base its mandate upon the same resolution and it is not likely that it will soon disengage.

Kosovo is hence not independent of its administrators. Upon the UDI no factual or juridical changes have taken place that would motivate a claim that Kosovo was an independent state. Its political position may indeed have changed, but not its legal status. It is a territory, at least formally separated from Serbia, but it is not independent. The attempt by various actors to build and maintain an effective state has not yet created substantial change in order to claim that Kosovo could function as an effective state independently of these actors. It can therefore arguably be concluded that Kosovo could not exist without the external presence, at the same time that this very presence is hampering its development to become an independent state. As Kosovo has claimed statehood for less than two years, longevity cannot be considered. It has been shown that political will may have a decisive influence on determining the fate of entities aspiring for statehood. However, the level of recognition by third states has not reached a third of all existing states. The need for acceptance by the international society is crucial for Kosovo, as can be seen from the very first claim of statehood. The international players will continuously be able to exert pressure on Kosovo as for example through the EU-accession process. The uncertain situation created by the confusion as to mandates and roles of the various actors in Kosovo has created an institutional and political chaos. Continued problems with corruption and organised crime, serious problems within the judiciary and the fact that Kosovo cannot itself protect its territory from external threat are substantial evidence for the conclusion made. The continued division between Serbs and Albanians render the effective control more difficult to ascertain. Moreover the ongoing decentralisation risk creating an even further divided state. It has been argued that statehood is not lost by external actors exercising influence on another territory, but there must exist not only formal independence but also factual. In Kosovo independence does not exist and will not do so until it asserts its own statehood by establishing effective independent control over its territory.

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