

KOSOVO PRECEDENT - APPLICABLE MANY PARTS OF THE WORLD, BUT NOT DIRECTLY IN THE SOUTH CAUCASUS

COMMENT BY

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Abstract

When it recognized the independence of South Ossetia and Abkhazia in August 2008, Russia implicitly referred to the independence of the Republic of Kosovo, which was recognized by most of the EU member states and by a total of 54 states of the 192 UN member states by January 2009. But is it really feasible to compare the two cases with each other? What arguments has “the West” used in order to justify the recognition of Kosovo? What legal arguments are there to justify the Russian position? This paper will take a closer look at the argumentation on both sides of the debate before it will analyse the reasons for the fact that a large number of states have so far rejected the idea of acknowledging Kosovo, South Ossetia and Abkhazia. The paper will conclude that for specific reasons, it is difficult to argue that the recognition of Kosovo’s independence set a clear precedent for the two breakaway provinces of Georgia. However, Kosovo might have set a precedent for more reasonable cases, which explains much better why the process of Kosovo’s recognition has come to a standstill. This is no good news for the government in Prishtina, which needs further recognition in order to become a member of various international organisations.

The Insolvable Dissent in International Law

The issue of an independent Kosovo entered the debate in international relations in June 1999 when UN Security Council Resolution 1244 established an international trusteeship in Kosovo. Since then, many efforts have been made by Kosovo Albanians and international organisations to establish a functional state in the former Serbian province (which it still is according to UNSCR 1244). The state-building process finally led to the declaration of independence by the Kosovan parliament and government in February 2008 and its recognition by a large number of EU member states shortly afterwards. Those states argue that Kosovo, after the atrocities in the past, can never become an integral part of Serbia again and refer to the right of secession, which is derived from the principle of self-determination of peoples. This is one of the principles in international law and is contradictory to the principle

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of state sovereignty and territorial integrity. Both concepts are principles of the UN Charter: While Article 1 argues that the “friendly relations among nations (are) based on respect for the principle of equal rights and self-determination of peoples”¹, Article 2 argues that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state (...)”.² There is an ongoing debate in the study of international law on the question of how to overcome the ambiguity of the UN Charter and its two contrary principles.

However, those states that have recognized Kosovo also argue that it is a case *sui generis* and that the recognition therefore did not set a precedent. In their view, it cannot be assumed that they will act similarly in similar cases. This legal conception is rejected by those states that oppose the recognition. They refer to the principle of state sovereignty and argue that the recognition has set a dangerous precedent for international law and international security. Many of them also consider the intervention in Kosovo in 1999 as a breach of the principle of non-intervention in international law, which is contained in Article 2 of the UN Charter, stating that “the United Nations or its member states are not allowed to intervene in matters that are essentially within the domestic jurisdiction of any state.”³

Although the norm of non-intervention is one of the key principles of the UN Charter, it was in practice often violated during the Cold War by both superpowers, the US and USSR. In the post-Cold war era, the principle was often superseded by the concept of humanitarian intervention. This is based on the argument that the sovereignty of states also includes the responsibility to protect its citizens. If the state fails to do so, it is the responsibility of the international community to intervene in order to prevent genocide, war crimes, ethnic cleansing and massive human rights violations. The “Responsibility to Protect” concept was adopted by the UN Security Council in April 2006 and commits the Security Council to act in order to protect civilians in armed conflicts. However, also prior to this resolution, the UN Security Council had the right to intervene in states in order to maintain or restore international peace and security, and could decide on enforcement measures by air, sea or land forces under Chapter VII of the UN Charter.⁴ Such a situation was, for example, given in the case of the Korean War.

The Western states’ argument that the Kosovo War was a humanitarian intervention was particularly rejected by the Russian and Chinese governments. Moscow and Beijing fear that “the West” will solely use humanitarian interventions in order to increase its strategic sphere of influence. They even worry that the West in the long run might also use the concept as a justification for an intervention in their territories. Therefore, they insist on a strictly legalistic view in the UN. However, the two permanent members of the UN Security Council primarily act according to this pattern because it is for their own purposes. China, for example, blocks a more coercive position of the UN towards the government in Sudan in order to stop the conflict in Darfur. It is apparent that Beijing is less interested in the humanitarian situation in the country than in its strategic value. China is especially interested in the rich mineral resources in Sudan and has close relations with the government in Khartoum.

¹ Charter of the United Nations, Art. 1, para. 2.

² Charter of the United Nations, Art. 2, para. 4.

³ Charter of the United Nations, Art. 2, para. 7.

⁴ Charter of the United Nations, Art. 42, para. 4.

The Serbian government, on the other hand, has learnt to use the Russian insistence on the principle of state sovereignty for its own purposes and has quite successfully argued on this track in the diplomatic sphere. In October 2008, it achieved an agreement in the UN General Assembly that the International Court of Justice (ICJ) will formulate a non-binding advisory opinion on the legality of Kosovo's declaration of independence from Serbia. Due to this, many states that have not yet recognized Kosovo will probably wait with a decision until the opinion of the ICJ is released. This might take at least a year. Also the EU – which claims to strengthen the UN – had to accept that Kosovo's independence is still an unresolved legal issue and could only deploy its police and rule-of-law mission in Kosovo under the umbrella of the UN mission and thus “status neutral”.

Many States Fear that the Recognition of Kosovo will Destabilize their Own Borders

Most countries that oppose Kosovo's independence argue that international law and the territorial integrity of all countries must be respected and that the Kosovo issue should be resolved through peaceful means, consultation and dialogue between the concerned parties. Furthermore, the EU does not have an official, unified position on the issue: Spain, Greece, Cyprus, Slovakia and Romania do not recognize Kosovo.

The legalistic debate overshadows the fact that the opposing states such as China mostly fear that recognizing Kosovo would foster the demands of minority populations within their territories for (further) autonomy rights. This is also true for some European countries: While the Spanish government fears further conflicts with the Basque and Catalan independence movements, Romania and Slovakia have large Hungarian minorities that might demand further autonomy rights. With the ongoing dispute with the Turkish Republic of Northern Cyprus, which is only recognized by Turkey, the Cypriot government fears that recognising Kosovo could undermine its own statehood. Greece supports the government in Nicosia in this. Furthermore, the traditional (Orthodox) alliance with Serbia might be of importance for the position of the Greek government.

In general, traditional alliances in international relations play an important role in the debate on the recognition of Kosovo. This explains to some extent the decision of most of the South American countries not to recognize Kosovo. First, most of them have close relations with Spain, which opposes Kosovo's independence. Second, many of the South American countries were members or observers of the Non-Aligned Movement during the Cold War, in which Tito's Yugoslavia played a crucial role. The relations of some South American states with Serbia as the successor state of Yugoslavia are in some cases closer than expected and might have some influence on their position in the Kosovo issue. Third, the South American states fear that their own territorial integrity might come under scrutiny. Argentina, for example, has argued that it will not acknowledge the independence of Kosovo for fear of the impact it could have on its own dispute with the UK over the Falklands. Bolivian president Evo Morales fears that Kosovo's recognition will foster the demands of leaders in Eastern Bolivian regions for greater autonomy.

Similar is the situation in most African states, for which the ideal of former solidarity is probably less important than the fact that their own borders might get into debate. Many

colonial powers defined the boundaries on the continent by often ignoring the people and ethnic groups that lived in the territories. This was and still is a reason for many conflicts in Africa, for example partly in the conflict in Darfur. Another example is the Democratic Republic of Congo, where the Rwandan general Laurent Nkunda has argued that the intervention of his troops in Eastern Congo was to protect the Tutsi people in neighbouring Rwanda.

There are to date only a few Asian countries that have recognized Kosovo. Former members of the Soviet Union like Kyrgyzstan or Kazakhstan usually have close relations with Russia; but they also fear separatist movements within their own borders (at least 25% of the Kazakh population is ethnic Russian). India opposes Kosovo's independence because it fears that such a decision will tighten the situation in Kashmir. In Sri Lanka, the civil war between the (Singhalese) government and the Liberation Tigers of Tamil Eelam, who demand independence for the Tamil regions in the north and east of the country, is still ongoing. In Indonesia, the central government has just settled a conflict with the province of Aceh, which strives for independence. Indonesia is a multiethnic state with much more potential for secessionist movements. China, which has never recognised Taiwan and which is having difficulty containing independence movements in Tibet, will certainly not accept Kosovo's independence.

Although most of the member states of the Organisation of the Islamic Conference (OIC) declared their solidarity and support for the Kosovo Albanians, most of them have not recognised Prishtina's independence (except for Afghanistan, Albania, Turkey, Senegal, the United Arab Emirates and Malaysia), arguing that international laws must be respected. The strictness of the Muslim states on the issue became apparent when Kosovo was not admitted to participate in an OIC conference in Cairo in November 2008. The opposition of the Muslim states can mainly be explained by the Arab-Israel conflict. Most of the Muslim states do not have official diplomatic relations with Israel. By recognising Kosovo, the Muslim states would also come under pressure to acknowledge Israel in the long term. Because of the conflict with the Palestinians Israel does not recognize Kosovo either.

Kosovo and South Caucasus Cases are Hardly Comparable

When Russia recognized South Ossetia and Abkhazia as independent states, the government in Moscow argued that this is a consequence of the unilateral Western move in the case of Kosovo. But it is questionable if Kosovo and the former Georgian provinces are comparable cases. First of all, Kosovo's leaders had some right to claim sovereignty as the Yugoslavian constitution of 1974 established the Socialist Autonomous Province of Kosovo, which was a de facto republic within the federation with a seat in the Federal Presidency. However, the province never gained formal status as a federal republic, which was the legal argument used by Slovenia, Croatia, Bosnia and Herzegovina, Macedonia and Montenegro in order to claim independence from Yugoslavia. Furthermore, the population of Abkhazia is estimated at around 200,000, while South Ossetia has today around 100,000 inhabitants. The Abkhaz population in Abkhazia accounts to about 43%, while 90% of the two million inhabitants in Kosovo are ethnic Albanian. Of course, as a result of violence and expulsion, those numbers have changed significantly during the last twenty years, but they at least vaguely indicate the demographic differences of the cases.

Regardless of these facts, the Russian argumentation that Kosovo set a precedent for Abkhazia and South Ossetia is not very comprehensible. Moscow has not adhered to the principle of state sovereignty, which it had still defended in the Kosovo case just some months earlier. By using a political argumentation instead of an argumentation based on international law, Russia has lost much of its credibility. It is no wonder that the Serbian government rejects the Russian demand to acknowledge the sovereignty of South Ossetia and Abkhazia.

In contrast to Russia, Belgrade insists on the abidance of international law, and it is easy to win allies on this issue. This has less to do with legal arguments but with the simple fact that many governments fear that a decision to recognize Kosovo will strengthen separatist movements within their own territories. There is certainly some logic behind this, and only time will tell what consequences for international peace and security are really connected with Kosovo's independence.