

AN AWKWARD SITUATION: KOSOVO, THE EU AND EU MEMBER STATES

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INTRODUCTION

The aim of this paper is to analyze the opposability of Kosovo's claim to statehood as against the EU and its Member States. While five EU Member States have adopted an official policy of non-recognition toward Kosovo, the *de facto* recognition of Kosovo by the EU has created confusion and uncertainty as to the position of these five Member States. This uncertainty is particularly apparent in light of the EU-Kosovo Stabilization and Association Agreement). The EU has adopted a very formalistic approach to international law in relation to Kosovo's statehood. However in practice its position is self-contradictory.

I.

The confusion as to the status of Kosovo has its origins in the Kosovo conflict of 1998. Initially the conflict was considered to be an internal affair of Serbia and Montenegro (the Federal Republic of Yugoslavia)¹. But as a continuation of the breakup of Yugoslavia, the conflict quickly ceased to be internal and became a concern for the international community. The atrocities of the breakup of Yugoslavia (including ethnic cleansing and genocide²) demonstrated the consequences of a failure to act. This is why, in relation to Kosovo, the international community (or at least part of it), bearing in mind its recent past, decided to take more concrete steps. As a result, a process of "humanitarian intervention" was initiated. After a call upon Serbia to cease ethnic

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¹ Hereinafter this is referred to as Serbia, having in mind the secession of Montenegro in 2006.

² Such as the Srebrenica massacre. See *Prosecutor v. Radislav Krstić* (IT-98-33), Appeals Chamber Judgment of 19 April 2004, par. 38.

cleansing in Kosovo was unsuccessful, on 24 March 1999 NATO commenced its bombardment of Belgrade. Christopher Greenwood explained the origin of this “humanitarian intervention”:

“The conduct of the Yugoslav and Serbian authorities in Kosovo created a situation which most people found intolerable. While there has been considerable debate about what actually happened in Kosovo before 24 March 1999, there was an almost universal recognition that, if the reports from bodies such as the Organization for Security and Co-operation in Europe were accurate, that behaviour was both morally and legally unacceptable. The military response by NATO, however, aroused more controversy than any use of force since the end of the cold war. NATO’s intervention was, in the end, effective in stopping the mass expulsion and persecution of Kosovo Albanians but it involved the large scale use of force against a State, not because of its aggression against other countries but because of the way it was treating its own citizens”³.

The concept of humanitarian intervention was necessary to legitimize NATO bombings⁴, because they were not based on a resolution of the UN Security Council. The Independent International Commission on Kosovo clarified this as follows:

“The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.”⁵

For completeness, it would be remiss not to mention the other justification for NATO’s actions, i.e. the concept of collective countermeasures⁶. However, from a strict legal perspective, according to Chapter VII of the UN Charter⁷ it is only the Security Council which is empowered to authorize the use of force in the event of a threat to the peace. The position of the Security Council was inconsistent with regard to the Kosovo crisis. While in a resolution the Security Council determined that the situation in Kosovo constituted “a threat to peace and security in the region”, no decision was taken to authorize the use of force⁸. In any event, according to the Security Council’s resolution Serbia was obliged to take necessary steps to improve the humanitarian situation in Kosovo. But this did not happen. As a result, NATO Secretary-General X. Solana stated on 9

³ C Greenwood, ‘Humanitarian Intervention: the Case of Kosovo’ (1999) X FYIL 143-144.

⁴ B Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 7.

⁵ See for instance *The Kosovo Report – Conflict – International Response – Lessons Learned – The Independent International Commission on Kosovo* (2000) 5.

⁶ B Simma (n 4) 14.

⁷ This argument is based on the assumption that the UN Charter is a constitution of the international community. For sake of clarity, it is treated here as an axiom.

⁸ SC Resolution 1199 of 23 September 1998. This inconsistency is a result of Russia’s veto.

October 1998 that:

- “[...] no concrete measures towards a peaceful solution of the crisis have been taken by [Serbia].
- The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.
- The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force”.

According to Serbia, several EU member states (namely Spain, Belgium, Portugal, Germany, Netherlands, and France) were involved and responsible for numerous violations of international law. These violations not only related to NATO’s bombing activity but related also, for example, to the intervention in the affairs of another State by “training, arming, financing, equipping and supplying terrorist groups, i.e. the so-called “Kosovo Liberation Army”⁹.

A temporary peacekeeping solution (which turned out to be permanent) was adopted on the basis of Security Council Resolution 1244 [in 1999]. This resolution has become a ‘quasi-constitution’ for Kosovo. It is difficult to question the binding force of Resolution 1244 because its legal basis derives from Chapter VII of the UN Charter. This resolution is binding on all UN Member States and therefore on the whole international community (including international organizations – and therefore on the EU). The UN Interim Administration Mission in Kosovo was established on the basis of the aforementioned Security Council resolution. In this way, while it being unorthodox, Kosovo became an autonomous “trust territory” under the management of the UN.¹⁰ Kosovo is free from effective control by Serbia, and enjoys broad self-government and autonomy under the authority of the UNMIK Assembly of Kosovo (which was established in 2001 as part of the Constitutional Framework for Provisional Self-Government) and in accordance with the “general principles on the political solution to the Kosovo crisis” (annex 1 of Security Council Resolution 1244). Among these “principles”, the following is especially relevant:

A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles

⁹ *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999 [1999] ICJ Rep 763.

¹⁰ J Friedrich described the legal situation in Kosovo before its declaration of independence as follows: “Resolution 1244 provides a mandate for the functionally necessary governmental powers, as long as the sovereignty of Serbia and Montenegro remains largely intact, i.e. as long as core issues of sovereignty are not regulated by UNMIK and as long as the future status is not predetermined”. See J Friedrich ‘UNMIK in Kosovo: Struggling with Uncertainty’ (2005) 9 Max Planck Yearbook of United Nations Law 242 - 243. Even then, the thesis according to which Kosovo is part of the territory of Serbia was not well founded.

of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK.

One thing is undisputed: Kosovo is no longer subject to Serbian territorial sovereignty. Furthermore, the presumption of the continuity of legal title of an ousted sovereign is not applicable in this case. The deprivation of part of Serbia's territorial sovereignty is legal *per se*, because this is the effect of Security Council Resolution 1244. The "effectiveness requirement" that a state demonstrates effective authority over its territory and population (discussed further below) does not play a significant role here.

II.

Maintaining Kosovo's autonomy and self-government will have the result of demonstrating sovereignty (and in the longer term – statehood for Kosovo). The fact that this happens outside of the UN framework is consistent with the international law of statehood. According to international law, statehood lies somewhere between "law" and "fact"¹¹, "ought" and "is", and there are very few grounds to allege "illegal statehood"¹². On 17th February 2008, the Assembly of Kosovo adopted its declaration of independence. As mentioned above, the Assembly of Kosovo is an organ created under the authority of UNMIK. This declaration of independence was adopted *ultra vires*. The issue of its legality was the subject of an advisory proceeding before the ICJ. In short, the ICJ concluded that the declaration of independence was not a violation of international law *per se*¹³. While the declaration of independence is a relevant factor in an assessment of statehood, it may also act as a trigger for the recognition of an "independent entity" as a State¹⁴. Over one hundred States have recognized Kosovo as a State.

¹¹ J Crawford, 'The Criteria for Statehood in International Law' (1976-1977) 48 BYIL 95.

¹² One such ground is the emergence of statehood by way of use of force. Kosovo is a case which does not fit this ground of "illegality" Even if UN Security Council Resolution 1244 can be described like an event of *force majeure*, this will not result in illegality, as there is a very firm presumption of the legality of UN Security Council resolutions which is a result of article 25 of the UN Charter.

¹³ Paragraph 123 of the advisory opinion *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Rep 403. The ICJ stated in paragraph 51 that the question as to whether the declaration of independence is in accordance with international law is not a question about the legal consequences of that declaration. Such a narrow interpretation of the question asked by the UN General Assembly led the ICJ to the conclusion that: "general international law contains no applicable prohibition of declarations of independence". For instance, the declaration of independence is not a violation of the principle of territorial integrity, because the "scope of the principle of territorial integrity is confined to the sphere of relations between States" (paragraph 80). Further, according to the ICJ opinion, declarations of independence have no legal significance. But if the question was about the "legality of statehood", would the answer of the ICJ be different?

¹⁴ Nonetheless there is no the rule in this respect. A significant example is the delayed recognition of Poland after telegraphed message starting with words: "the Polish state has arisen by the will

But for some States (albeit a minority) recognition of Kosovo as a State is premature, considering the lack of effective authority of the Kosovo Government resulting from the ongoing presence of UNMIK, KFOT and the EU Rule of Law Mission on Kosovo (EULEX), established in 2008¹⁵. Indeed, this makes Kosovo's claim to statehood contentious at the very least. But this "uncertainty" relates to the assessment of facts constituting the alleged statehood of Kosovo¹⁶, as its legality can be hardly undermined. The opinion of W.E. Hall¹⁷ on statehood remains pertinent:

"[...] communities become subject to law from the moment only at which they acquire the marks of a state, international law takes no cognizance of matters anterior to the acquisition of those marks, and is, consequently, indifferent to the means which a community may use to form itself into a state."

The issue of legality, according to Hall, is not related to the process of becoming a State as such, but rather turns on the newly emerged State's compliance with international law. In practice, the evidence of facts supporting a claim to statehood is key, not the legality of statehood as such. An important element of any claim to statehood is recognition, which in and of itself has evidential value. This is why "general recognition can [...] have a curative effect as regards deficiencies in the manner in which a new State came into existence"¹⁸. Any claim that Kosovo's declaration of independence is deficient cannot deprive Kosovo of its statehood (unless the formation of the state violates *jus cogens*). The only way to deprive Kosovo of its claim to statehood is to undermine the effective authority of Kosovo. The management and presence of UNMIK is relevant not only in relation to Serbia's territorial sovereignty but for Kosovo, too. Depriving Serbia of its territorial sovereignty over Kosovo will not affect the statehood of Serbia because Serbia undoubtedly enjoys effective control over a separate territory. Kosovo does not. It is not completely ill-founded to argue that Kosovo does not constitute a State on the grounds that the Government of Kosovo does not exercise effective control over Kosovo's territory.

of the whole nation". However, for political reasons recipients of this message delayed their answer. See J Kolasa 'Odzyskanie przez Polskę niepodległości w 1918 r. w świetle prawa międzynarodowego' (2008) 5 (88) Przegląd Sejmowy 21.

¹⁵ [2008] OJ L 42/92.

¹⁶ The effective authority of the Kosovo Government was not proved till now. The ongoing presence of UNMIK in Kosovo gives grounds to wonder how long Kosovo could function without that. See A Orakhelashvili 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 10.

¹⁷ WE Hall, *A Treatise on International Law* (Clarendon Press 1909) 20.

¹⁸ J Crawford, statement made during ICJ proceeding on the legality of Kosovo declaration of independence.

III.

Where a State adopts a policy of non-recognition, it must be implemented consistently. For example, resorting to *ius contrahendi* of a non-recognized entity should be avoided. Otherwise such a policy will be nothing more than a “paper protest”. Five Member States of the EU (namely Spain, Cyprus, Slovakia, Greece and Romania) do not recognize Kosovo as a State¹⁹. They expressly (therefore not only by omission) maintain a policy of non-recognition, although the EU Parliament has called on these Member States to recognize Kosovo as a State. Nevertheless, such non-recognition is legal and justifiable, in particular taking into account the issue of premature recognition. The principle of non-interference in the domestic affairs of a State (in this case: Serbia - sovereign *de iure*) is also relevant, and relates to the way these five EU member states define the preconditions of secession. For them, and this view is not limited to only these five States, there is no right of unilateral secession without the consent of the sovereign state²⁰. This view was presented by Spain, Cyprus and Romania during the proceedings before the ICJ relating to Kosovo’s declaration of independence. In any event, a policy of non-recognition is legal because there is no obligation in international law to recognize a state (or at least any such obligation is very contentious)²¹. The official position of these EU Member States has not changed to date - even after Serbia recognized Kosovo as a *de facto* State in 2013. This is particularly surprising given that Serbia and Kosovo have concluded the so-called Brussels Agreement on the normalization of relations and established quasi-diplomatic relations (e.g. exchanging *liaison officers*). However, Serbia has not formally recognized Kosovo as a State as was clearly highlighted by the Serbian *liaison officer* in Kosovo Dejan Pavićević, who in an interview conducted in 2013 stated: “Serbia has not recognized Kosovo, and nothing has changed

¹⁹ For completeness, there is a slight distinction between recognition “as” a state and recognition “of” a state. Non-recognition “as” a state has far-reaching effects because its intention is to deprive a non-recognized “entity” its fundamental rights as a state.

²⁰ The often quoted thesis of J Crawford is that “International law has always favoured the territorial integrity of States, and correspondingly, the government of a State was entitled to oppose the unilateral secession of part of the State by all lawful means”. J Crawford *State Practice and International Law in Relation to Unilateral Secession – Report to the Government of Canada concerning unilateral secession by Quebec*, 19 February 1997. This thesis is amplified by a famous judgment of the Supreme Court of Canada related to secession of Quebec (Reference re Secession of Quebec). The judgment states: “It is clear that international law does not specifically grant the component parts of sovereign States the legal right to secede unilaterally from their ‘parent’ State”. See *Reference re Secession of Quebec*, 115 ILR, para. 111.

²¹ T-Ch Chen, *The International Law of Recognition With Special Reference to Practice in Great Britain and the United States* (New York 1951) 118. The real problem with so-called “objective” obligation to recognize a state is related to the objectivity of given facts and if they exist objectively, the act of recognition becomes redundant. The weak spot of the aforementioned objectivity is the blurring of the concept of the state in international law. This is well depicted by Monaco and Andorra’s accession to the UN. J Crawford explained that in the case of Monaco: what matters is “wide spread recognition and acceptance as a State”. See J Crawford *The Creation of States in International Law* (OUP 2006) 293.

there”²². Rather, the reason for the apparent normalization of relations between Serbia and Kosovo was pressure from the EU. In addition, the framework of the quasi-diplomatic relations between Serbia and Kosovo is sustained by the EU. First of all, the seat of the Pristina liaison officer is the EU Delegation in Belgrade, and the seat of his counterpart is the office of the EU Special Representative in Kosovo. Therefore, the EU has a significant influence on the legal status of Kosovo. The relationship between the above mentioned five EU Member States and Kosovo cannot be separated from Kosovo-EU relations.

The immediate basis for Kosovo to establish *quasi*-diplomatic relations with Serbia is the Stabilization and Association Agreement (“SAA”) between Kosovo and the EU²³. The problems with the EU’s relationship with Kosovo are apparent from a review of this SAA. The SAA is an Associate Agreement, similar to the Associate Agreements concluded between the EU and other Balkan states. The SAA between Kosovo and the EU (as well all others Associate Agreements) are international agreements. This view is well founded in general international law and by the wording of Treaty on the Functioning of the European Union (“TFEU”), Namely articles 217 and 218 of the TFEU form the basis for the EU to conclude Associate Agreements, which can be found under the title “International Agreements”. Finally, Associate Agreements are concluded by the EU in its capacity as an international organization. Until now Stabilization and Association Agreements have been ‘mixed’ agreements²⁴, as have the other Associate Agreements in force. This means that a SAA is a multilateral treaty concluded between a non-member State, the EU (formerly the EC) and all EU Member States. However, the EU-Kosovo SAA is different. The choice between a mixed and a bilateral agreement is under normal circumstances an effect of the principle of conferral. In this case the principle of conferral does not apply.

Before considering what it is that makes the Kosovo SAA unique, first of all, the *ratio iuris* of the Kosovo SAA should be explained. The Kosovo SAA is a measure to stabilize the situation in Kosovo. Because of the importance of this goal, it was concluded regardless of its “legal formal problems”: this is the concept on which the Kosovo SAA is based. The Kosovo SAA is not a mixed agreement like other SAAs, because not all EU member States have recognized Kosovo as a State. The reluctance of these particular EU member States to conclude treaties with Kosovo is therefore understandable, as concluding a treaty with Kosovo would be an instance of implied recognition²⁵. Conclusion of an agreement with another “entity” inevitably results in the recognition of its subjectivity; otherwise it would undermine the notion of recognition. Such international subjectivity is opposable to the other parties of an agreement on the

²² <http://inserbia.info/today/2013/10/i-am-not-ambassador-to-kosovo-as-it-is-not-a-state-dejan-pavicevic/>. There is a well-established tradition of resorting to so-called *quasi*-diplomatic relations in such cases. A good example is the Republic of China (i.e. Taiwan). Above all functions of *quasi*-diplomatic missions are identical to functions of diplomatic missions which are listed in article 3 of Vienna Convention of Diplomatic Relations signed in 1961.

²³ [2006] OJ L 71/3.

²⁴ P Koutrakos *EU International Relations Law* (Hart Publishing 2006) 365.

²⁵ H Lauterpacht *Recognition in International Law* (CUP 1947) 375.

basis of the *pacta sunt servanda* principle. In this context, article 2 of the Kosovo SAA is particularly significant:

“None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step”.

The question arises as to whether the Kosovo SAA is a treaty to which law of treaties applies. An inherent feature of international law is that there are no strict rules related to the form of a treaty²⁶. It is also not a decisive criterion that the parties to a treaty must be states²⁷. However, it is an indisputable tenet of international law that international agreements are concluded by subjects of the international law²⁸ and are binding in relations between those subjects. The fact that the Kosovo SAA is an international treaty is undeniable. The so-called “duck test” (if it looks, swims, and quacks like a duck – it probably is a duck), can be applied to this SAA. It is a well-founded principle of EU Law to take into account the “object and content” and not just the title of a measure²⁹. Considering its content and legal basis, the Kosovo SAA does not differ significantly from other SAAs.

IV.

The lack of consistency between the content and form of the Kosovo SAA is surprising. The Kosovo SAA is exactly what certain countries, like Spain, wanted to avoid. Whatever the effect of this agreement may be for Spain, the SAA is “opposable” as against the EU. On one hand, the EU is a separate subject of international law. On the other hand, the decision on the conclusion of the SAA by the EU was taken unanimously by the Council³⁰. According to article 238 paragraph 4 of the TFEU, “abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity”. Regardless of whether the Kosovo SAA is *vel non* opposable against

²⁶ M Fitzmaurice, ‘The Identification and Character of Treaties and Treaty Obligations Between States in International Law’ (2001) 73 BYIL 149.

²⁷ *ibid* 160. M Fitzmaurice gives an example of treaties concluded between a state and non-state entity, namely the agreements between Israel and the Palestinian Liberation Organization.

²⁸ Practice indicates a degree of flexibility. For instance, there is an agreement between the European Community, on the one part, and the Government of Denmark and the Home Government of the Faroe Islands, on the other [1997] OJ L 53/1 signed on 22nd December 1991. The Kosovo SAA has very little in common with this agreement. This is because the aforementioned agreement was not concluded with the Faroe Islands acting solely and independently, but instead with Denmark together as the “contracting party”. Thus, the EU concluded an agreement with a “collective party”.

²⁹ Joined cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and others v. Council of the EEC* [1962] ECR 472.

³⁰ See article 218 paragraph 8 TFEU.

the aforementioned five EU member States³¹, the Kosovo SAA undermines their policy of non-recognition of Kosovo as a State. These five Member States did not prevent the conclusion of the Kosovo SAA. As a result, this indirectly makes their non-recognition policy a so-called paper protest³². Non-recognition of Kosovo due to its “illegality” is not consistent with supporting Kosovo’s ongoing existence separate from the sovereignty of Serbia. After all, the Kosovo SAA effectively forces Spanish authorities (among others) to have contact with their Kosovar counterparts and to recognize Kosovar documents. The distinction of international subjectivity of an international organization and its member states is, to some extent, artificial. While this distinction is justified and well founded in the theory of international organizations, in relation to the recognition of a state it seems overly formalistic³³. This is because for a policy of non-recognition to have any tangible and real effect, it must be conducted in a consistent and coherent manner. Non-recognition of the Kosovo “entity” as a state coupled with supporting (at least indirectly) the conclusion of the Kosovo SAA is neither consistent, nor coherent. Statements made by Cyprus, Spain, Romania and Slovakia during the 3445th meeting of the Council in Brussels on 12 February 2016³⁴ did not change this position. For instance, according to the statement of Spain³⁵:

“Spain’s position concerning the Council adoption of the decisions on the signing and on the conclusion of the Stabilization and Association Agreement with Kosovo is without prejudice to the Spanish position on the international status of Kosovo and is in conformity with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.”

Another example of the lack of consistency relating to the Kosovo SAA is the legal basis for conclusion of the agreement. Title V of Part Five of the TFEU is “International agreements” (which contains articles 217 and 218). The fact that the TFEU is an international treaty allows one to assume that the term “international agreements” should be understood to be synonymous with the term “treaties”. However, according to article 2 of the Kosovo SAA, the conclusion

³¹ Taking into account that recognition of Kosovo as a state is still a matter of controversy in the international community it is easy to come to conclusion that statehood is effective only in relation to states which recognized Kosovo as a state. This is of course based on the constitutive theory of recognition of states. See. T-Ch Chen *op.cit.* 14.

³² See eg IC McGibbon, ‘Some observations on the part of protest in international law’ (1953) 30 BYIL 314.

³³ J Klabbers, *An Introduction to International Institutional Law* (CUP 2007) 106. There is passage related to opposability against UN Members States admission of a new member state: “those who voted in favour would be estopped from claiming never to have recognized the applicant”. There is also a sort of “lifting the corporate veil” in case of responsibility of Member States for wrongful acts committed by an international organization. See. eg. O Murray ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’ (2001) 8 International Organizations Law Review 296.

³⁴ Draft minutes of 3445th meeting of the Council of the European Union: <http://data.consilium.europa.eu/doc/document/ST-6109-2016-INIT/en/pdf> [access: 20th of November 2018].

³⁵ Draft minutes (n 35) 9.

by the EU of the agreement with Kosovo does not equate to recognition of Kosovo as a state by the EU (and thus by Spain, Cyprus, Slovakia, Greece and Romania). This calls into question the status of Kosovo under international law, and into what category of subjects under international law it should fall. The legal position of Taiwan is similar. A. Aust described the situation of Taiwan as follows³⁶:

“The liaison offices (not diplomatic missions) in Taipei of over a dozen states, including Australia, the Netherlands, New Zealand, Sweden and the United Kingdom, have concluded “agreements” with Taiwan on matters such a double taxation. None of the states regard Taiwan as a state, and the agreements, though containing some treaty-type language, are certainly not regarded by them as treaties. In addition, the clear, public and repeated position of such states that they do not recognise Taiwan as the government of China, is anyway sufficient to dispel any idea that the agreements are treaties.”

Domestic law (or EU law) may limit the ability of States to conclude agreements of unspecified type with such non-State entities. The case of the Kosovo SAA is more complicated because articles 217 and 218 of TFEU relate to agreements with States and international organizations. In contrast to States, international organizations do not enjoy a presumption of their competence in international law³⁷, and this also applies to the EU³⁸. What is important in the context of articles 217 and 218 of TFEU is the fact that Kosovo is not an international organization, and according to article 2 of the SAA neither is it a State in relation to the EU. There are examples of agreements between States and other entities – such as agreements with “native princes or chiefs of peoples” or even with companies (for example, the Dutch East India Company), but even then such agreements were not considered to be international treaties even if they were “none the less facts of which that law must in certain circumstances take account”³⁹. It is therefore apparent that the rejection of Kosovo’s subjectivity in article 2 of the Kosovo SAA is contrary to the legal basis of the EU to conclude this SAA. The implied competence doctrine can be applied but it makes the legal basis of the Kosovo SAA contentious. This situation is an effect of political bias. There is a tension between the political necessity to conclude the Kosovo SAA, and the policies of non-recognition of Kosovo held by the aforementioned five EU Member States. Article 2 of the Kosovo SAA and its bipartite character is

³⁶ A Aust, *Modern Treaty Law and Practice* (CUP 2007) 61.

³⁷ In advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict the ICJ explained that “international organizations are subjects of international law which do not, unlike States, possess a general competence”. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78.

³⁸ According to article 5 para. 2 of the TEU “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. The principle of conferral or, in other words the doctrine of attributed powers, is well established in the case law of the CJEU, see e.g. Case C-317/04, *Parliament v Council* [2006] ECR I-04721.

³⁹ M Huber as the umpire in the case *Island of Palmas*, 4 ILR 3, 109.

a partial solution to that issue. This is, however, an abuse of international law; it is contradictory to invoke articles 217 and 218 of the TFEU as the legal basis of the Kosovo SAA. According to an EU Commission Communication, the Kosovo SAA is “governed by public international law”⁴⁰. This leads to the following conclusion: the Kosovo SAA is governed by the public international law, but it is not a treaty between EU and a subject of a category known under contemporary international law. Its legal basis and content are very similar to, for example, the Moldova SAA⁴¹. There are slight differences between the Kosovo SAA and the Moldova SAA. For instance, according to article 144 of the Kosovo SAA: “The Parties shall approve this Agreement in accordance with their own procedures”, while article 464 of the Moldova SAA reads: “The Parties shall ratify or approve this Agreement in accordance with their internal procedures”. The discrepancies in the wording are not a coincidence. It reflects the instructions provided to the draftsmen and highlights the issue of political bias. Taking into account the teleological concept of law (so familiar to international law) it exposes the excessive simplicity of that solution.

CONCLUSIONS

From the perspective of Spain, Cyprus, Slovakia, Greece and Romania, their non-recognition of Kosovo is redundant because their subjectivity as States is separate to the subjectivity of EU. Furthermore, the non-recognition policy set out in article 2 of the Kosovo SAA means that the distinction of subjectivity between the EU and its Member States is not taken seriously by these five Member States. Article 2 of the Kosovo SAA is not effective to protect the position of the five EU Member States who assert a policy of non-recognition. This is because, especially in the light of TFEU, the Kosovo SAA (for which the TFEU provides the legal basis) effectively amounts to recognition of Kosovo as a (de facto at least) state by the EU and, indirectly, by its Member States. Thus, article 2 of Kosovo SAA is ineffective and is based neither on international law nor EU law, rendering the legal effect of this provision very doubtful. The statehood of Kosovo is indeed opposable against the EU and its Member States. The conclusion of the Kosovo SAA with the support of the five EU Member States who have adopted a policy of non-recognition toward Kosovo reinforces Kosovo’s claim to statehood despite the principle of non-recognition expressed in article 2 of the Kosovo SAA and the bilateral character of the agreement. The fact that the five EU Member States who resist recognition of Kosovo’s statehood insist that there is no such opposability against them (or against the EU) is of no

⁴⁰ Communication from the Commission to the European Parliament and the Council on a Feasibility Study for a Stabilization and Association Agreement between the European Union and Kosovo, Brussels, 10.10.2012, COM(2012) 602 final 3. According to section 5 of Council Decision “[Kosovo SAA] is also without prejudice to the powers of the EU institutions conferred on them in the Treaties and the positions of EU institutions and Member States on competences”. ([2016] OJ L 71/1).

⁴¹ [2014] OJ L 260/4.

consequence for Kosovo's claim to statehood. Furthermore, the final reinforcement of Kosovo's claim to statehood is based on Kosovo's relationship with the EU common market. The apparent non-recognition policy toward Kosovo that is perpetuated by the five EU Member States has become a façade for both the EU and EU Member States.

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