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Book Review

Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence*, Oxford University Press, 2009 (321 pp.)

by Professor Sean D. Murphy¹

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How an area measuring no more than about 11,000 square kilometers could become arguably “ground zero” for the formation of post-Cold War international law is a bit of a mystery, but the province (and now country) of Kosovo, in the late twentieth/early twenty-first centuries, somehow managed to pull off that feat. Indeed, all of the big issues of contemporary international law arose with respect to Kosovo in that time period: the balancing of fundamental human rights against governmental authority; the efficacy of complex techniques of dispute settlement, undertaken against the backdrop of major-power diplomacy; the permissibility of a group of States using military force to protect persons from abuse by their own government, even in the absence of authorization from the U.N. Security Council (and, further, the permissibility of using such force *in anticipation* of human rights abuses); the means and methods of aerial bombardment in areas heavily populated by civilians; the techniques for and propriety of holding governmental authorities accountable before an international tribunal for war crimes and crimes against humanity, including by indicting a sitting head of State; the complexity of deploying

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under U.N. authority massive civilian and military “presences” to administer a conflict-ridden territory, displacing the existing governmental authorities; and the legality of a group of persons in that territory ultimately declaring the existence of a new State, to name just a few.

The end of the Cold War launched the various factors that led to Kosovo’s role in advancing international law in these areas. Once the constraints of the East-West conflict dissipated, both the Soviet Union and the Socialist Federal Republic of Yugoslavia (SFRY) collapsed, spinning off almost twenty new countries. Kosovo—an autonomous province within the SFRY Republic of Serbia rather than itself an SFRY “republic”—was not viewed by the international community in the early 1990's as entitled to a sovereign status, and hence remained within Serbia (which resided within the new Federal Republic of Yugoslavia (FRY), later renamed Serbia & Montenegro, and then just Serbia). Ironically, it was Serbia’s actions against Kosovo in 1989–90, stripping Kosovo of many of its rights under the SFRY Constitution, that led the other SFRY republics to fear an unacceptable imbalance in the SFRY federal system, prompting Slovenia, Croatia, and Bosnia-Herzegovina to pursue and win sovereign status. The cost of doing so, however, was to unleash the brutal Balkans conflict of the early 1990's, brought to a close only with the 1995 Dayton Accords.

After Dayton, Kosovar Albanians (the dominant ethnic group in Kosovo) continued to seek greater rights, and the Kosovo Liberation Army began engaging in violent tactics against Serbian authorities. Those tactics prompted in 1998 a major crack-down by Serbian authorities in Kosovo, which by 1999 became so threatening that NATO countries launched an air campaign against the FRY/Serbia to secure the withdrawal of all FRY/Serbian authorities from Kosovo. Belgrade ultimately relented, withdrawing its forces, and consenting to the deployment of both NATO forces and civilian authorities operating under U.N. auspices. From mid-1999 onward,

these international military and civilian authorities governed in Kosovo, transforming it into an “internationalized” territory, and in the process building up local Kosovar governing authorities. The end-game in Kosovo, however, was never clear, with possible final status solutions ranging from Kosovo as an autonomous province within Serbia with extensive, entrenched rights, Kosovo as a federal unit within the FRY on par with Serbia and Montenegro, Kosovo as an independent country, or other options in between. Final status talks led by the United Nations, and supported by the major powers (in the form of a “Contact Group”), failed to secure agreement between Belgrade and Pristina as to the final status, with the former seeking a provincial status and the latter a sovereign status. Ultimately, the relevant U.N. envoy concluded that further talks were pointless, but also that the existing interim status was not sustainable given the volatile political and ethnic tensions within Kosovo. With the Security Council unable to take any further steps (due to disagreement between the major powers over how to resolve Kosovo’s status), Kosovar authorities proceeded on their own to declare independence in February 2008, a status recognized over the next two years by some 70 States.

Incensed at this development, Serbia successfully lobbied the U.N. General Assembly in October 2008 to ask the International Court of Justice for an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Some thirty-five countries filed written statements to the Court on the matter (as did the “authors of the unilateral declaration of independence,” that is, Kosovo) , with roughly half supporting Kosovo’s independence and the other half supporting Serbia’s position that Kosovo’s declaration was unlawful, and that final status talks must continue. In December 2009, almost thirty States appeared before the Court,

including Kosovo, and in July 2009 the Court issued its opinion that the declaration of independence did not violate international law.²

The thumbnail sketch above is, of course, incomplete, and strong passions on both sides no doubt would emphasize certain points over others, as well as contest and rewrite particular assertions. Because of the importance of Kosovo as a cauldron for fermenting various aspects of international law, a more thorough account is needed, one that draws heavily upon the available documentary record, and that recognizes the concerns facing both Kosovo and Serbia.

Happily, that is exactly what Marc Weller has provided in *Contested Statehood: Kosovo's Struggle for Independence*. Weller, a lecturer in international law and international relations at Cambridge University, is a long-time student of the break-up of the former Yugoslavia, having edited extremely useful and well-received collections of documents on the region, including *The "Yugoslav" Crisis in International Law* (1997) (with Daniel Bethlehem) and *The Crisis in Kosovo, 1989–1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (1999). Building upon those documentary collections, Weller has produced in *Contested Statehood* the best history to date of the Kosovo crisis from the end of the Cold War up to the point that Kosovo's independence was declared (for Kosovo's history prior to the end of the Cold War, the best source is Noel Malcolm's *Kosovo: A Short History*³). Even the International Court itself, in its advisory opinion, avoided a lengthy account of Kosovo's contemporary history, hewing closely to just those facts and law necessary to answer the narrow

² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Advisory Opinion (July 22, 2010), *available at* www.icj-cij.org (hereinafter Kosovo Advisory Opinion).

³ NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998).

question before it. As such, anyone interested in the backdrop for the Court's advisory opinion would do well to keep *Contested Statehood* close at hand.

Though Weller touches upon some of the older history of Kosovo, starting as far back as the Middle Ages, he wisely avoids spending much time on contested accounts of which ethnic groups were where first, and with what rights. Rather, he principally begins his account at the end of the Second World War with the formation of what would become known as the SFRY. Weller briefly traces the constitutional developments within the SFRY as they relate to Kosovo, and the changes wrought by Serbian President Slobodan Milošević in 1989–90 that precipitated the Balkans crisis (Chapter 2). From there, he carefully recounts efforts made to resolve the Balkans crisis in the early 1990's, and the reasons for Kosovo's inability to advance its claim at that time to sovereign independence (Chapter 3). Stuck within Serbia throughout the 1990's, Kosovar Albanians experienced widespread denial of certain fundamental human rights. Weller ably draws upon the reports of international organizations and non-governmental organizations to describe the Serbian Government's general discrimination against Kosovar Albanians, steps taken by Serbia through resettlement programs to manipulate Kosovo's demography, the removal of Kosovar Albanians from public office and from commercial enterprises, Serbia's interference with the judicial and free press in Kosovo, and its arbitrary arrests, acts of torture, and other mistreatment of Kosovar Albanians (Chapter 4).

Providing a "neutral" account of the events of 1998–1999 is perhaps impossible, and Weller is certainly more sympathetic to the Kosovo cause than that of Serbia. However, Weller does an admirable job of trying to provide a balanced assessment of why a humanitarian crisis arose and why it was feared that even greater abuses might occur (Chapter 5). For instance, he

does not ignore the violent tactics undertaken by the Kosovar Liberation Army against Serbian authorities, but does seek to place them in context. He writes:

The change from [FRY/Serbian] repression to military assault which brought about the massive displacement of Kosovo Albanians in 1998 followed the increased activity of the Kosovo Liberation Army (KLA) in the autumn of 1997. That organization had previously consisted of tens or perhaps a few hundred individuals, mounting what were described as “terrorist” attacks. These attacks were generally targeted against police or other security installations, although the FRY/Serbian authorities indicated, with some justification, that these operations were part of a strategy of intimidation directed against Serb civilians. Attacks against Serb civilians did occur, although they remained relatively isolated incidents from which the KLA disassociated itself. (67)

No doubt those more sympathetic to Serbia’s cause would maintain that the KLA was a much more aggressive and indiscriminate force that merited a large-scale use of FRY/Serbian military and police authorities to crack-down on Kosovar Albanians. Yet Weller’s account of the FRY/Serbian authorities using the KLA as a convenient excuse for a massive crackdown is largely sustained by third-party reports. For example, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found, in a decision issued in February 2009 (about the same time as the publication of *Contested Statehood*), that:

The manner in which the [FRY and Serbian forces] dealt with the KLA was often heavy-handed and involved indiscriminate violence and damage to civilian persons and property, further exacerbating rather than ameliorating the situation in Kosovo. The consistent eye-witness accounts of the systematic terrorisation of Kosovo Albanian civilians by the forces of the FRY and Serbia, their removal from their homes, and the looting and deliberate destruction of their property, satisfies the Chamber that there was a campaign of violence directed against the Kosovo Albanian civilian population, during which there were incidents of killing, sexual assault, and the intentional destruction of mosques. It was the deliberate actions of these forces during this campaign that caused the departure of at

least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and beginning of June 1999.⁴

This rise in human rights abuses leading to a massive displacement of Kosovar Albanians, both within Kosovo and into neighboring States, forced Europe and the United States to confront squarely the lingering problem of what to do about Kosovo. In perhaps the richest historical part of *Contested Statehood*, Weller details the extended efforts at negotiation by U.S. Ambassador Christopher Hill (Chapter 6) and U.S. Special Envoy Richard Holbrooke (Chapter 7) in late 1998, and the aggressive efforts by the “Contact Group” (France, Germany, Italy, Russia, United States, and United Kingdom) to coerce a negotiated settlement at the Rambouillet conference in early 1999 (Chapter 8), none of which succeeded. Weller, however, succeeds in capturing the complex and fascinating political dynamics of the negotiations, including certain structural inequalities and procedural impediments that made it difficult to reach consensus. In hindsight, Weller concludes that had the FRY/Serbia accepted the proposed political settlement at Rambouillet (significant self-governance of Kosovo, with entrenched human rights, but *within* the sovereignty FRY/Serbia) and “offered, for example, to accept an OSCE or UN-led implementation mission of more limited dimensions, it is not at all certain that NATO could have maintained consensus on the threat or use of force” (148).

As it happened, the FRY/Serbia rejected the terms of Rambouillet, setting the stage for NATO’s aerial campaign against Belgrade. Weller carefully explains the difficulty, as a legal

⁴ *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgment*, 26 February 2009, vol. 2, para. 1178 (available on the ICTY website: <http://www.icty.org/case/milutinovic/4#tjug>). The Chamber was composed of Judge Iain Bonomy, Presiding, Judge Ali Nawaz Chowhan and Judge Tsvetana Kamenova.

matter, of justifying such a use of force in the absence of a mandate from the Security Council, the decision nevertheless by NATO to proceed, and the reaction by non-NATO States (Chapters 8 & 9). In an important section, Weller assesses not just the commencement and termination of the hostilities, but also the effect during them of the ICTY's indictment of senior FRY/Serbian leaders, including FRY President Slobodan Milošević. According to Weller, the issuance of the indictment during the hostilities "triggered a strategic shift," one in which the nature of the hostilities transformed from mere "coercive diplomacy" into outright "war" (167), a transformation perhaps not anticipated by NATO States. According to Weller, after issuance of the indictment

President Slobodan Milosevic, the most prominent of the indictees, and his close associates were no longer an indispensable element to a resolution of the Kosovo conflict. Instead, they were to be considered as probable war criminals that needed to be defeated militarily. Indeed, this fact was reflected in the fact that at the end of the conflict, no peace settlement as such was concluded with the Belgrade leadership. Instead, the peace terms were established by way of . . . Security Council resolution . . . (74).

Although the Security Council could not agree to authorize forcible action against the FRY/Serbia, it could agree upon the terms for concluding the hostilities, which were set forth in the complex provisions of Resolution 1244.⁵ Weller recounts the deployment under that resolution of NATO forces and UN administrators to Kosovo in 1999 (Chapter 11), a form of "humanitarian occupation" that has also played out in places such as Bosnia-Herzegovina, Eastern Slavonia, and East Timor.⁶ Under this external administration, Kosovo experienced the

⁵ S.C. Res. 1244 (June 10, 1999).

⁶ For an excellent account of this phenomenon, and its context historically, see GREGORY H. FOX, HUMANITARIAN OCCUPATION (2008).

adoption of a new governing framework and saw the emergence of a series of “provisional” institutions capable of exercising increasing levels of self-governance. While that self-governance, in theory, could have laid the foundation for a final status consisting of an autonomous province of Kosovo within Serbia, Kosovar Albanians—having tasted the wine of self-governance—had little interest in going back to even nominal Serbian rule. Hence, final status talks launched by the United Nations in 2005 failed, over the course of two years, to bridge the divide between Belgrade and Pristina, despite the valiant efforts of the U.N. Special Envoy, former Finnish President (and future Nobel laureate) Martti Ahtisaari. Weller carefully deconstructs the details of Ahtisaari’s final proposal, which envisaged Kosovo’s independence, subject to various human rights protections for Kosovar Serbs (Chapter 12).

When Serbia rejected the Ahtisaari proposal, the attempt at a mutually-agreed final status had run its course. Weller notes a further attempt by the Contact Group in late 2007, but then explains the move to independence by Kosovo’s democratically-elected leaders, culminating in the Declaration of Independence of February 2008 (Chapter 13). Thereafter, Kosovo’s leaders moved quickly to the adoption of a new constitution, which Weller concludes accepted essentially all the human rights and minority protections that had been envisaged by Ahtisaari (Chapter 14).

Weller’s detailed and nuanced historical account in *Contested Statehood* of Kosovo from the early 1990’s to independence alone is a valuable contribution. Yet Weller goes somewhat further in this volume by identifying, in its first and final chapters, certain broad categories where the lessons of Kosovo may prove of enduring significance. The categories he identifies are: the concept of the State; governance; human and minority rights; forcible humanitarian

intervention; secession; competencies/hierarchies among international actors; and the role of consent. In Chapter 1, he introduces these categories and invites the reader to consider them throughout the course of his account of contemporary events concerning Kosovo. In the final chapter, he returns to each category to advance his own views of how Kosovo may have affected the law and politics associated with each category. For example, while NATO's intervention in Kosovo resulted in enough backlash that it "gave the impression that the hesitant development of the doctrine of humanitarian intervention had been terminated" (266–67), Weller nevertheless concludes that, in the long-term, the Kosovo precedent will support a notion that such intervention "may be legitimate under exceptional circumstances of overwhelming need" (267).

Weller is to be commended for looking outside "the Kosovo box" in an attempt to identify broader ramifications, but he might be faulted for not spending a bit more time on this part of his analysis, since his assessment of some of these categories is rather thin. For instance, his assessment of Kosovo's effect on the doctrine of humanitarian intervention spans a mere two pages. Though he notes the potential for abuse of the doctrine (citing to Russia's 2008 intervention in Georgia purportedly to protect ethnic Russians), Weller simply asserts that "[i]nstances of abuse of this kind will not in the long term inhibit the strong power of attraction" to a doctrine favoring forcible humanitarian intervention, "provided the organized international community clearly identifies them as such" (267). A bald assertion of that kind begs for a bit more analysis, taking into account various events that ensued after the Kosovo intervention. Thus, Weller might have noted the 2005 U.N. high-level panel of experts appointed by the Secretary-General, which (writing in the wake of the 2003 U.S. intervention in Iraq) agreed that there existed an "emerging norm that there is a collective international responsibility to protect," but concluded that armed force may be used to fulfill the responsibility only if so authorized by

the Security Council.⁷ The U.N. Secretary-General generally endorsed the high-level panel's approach, as did the General Assembly in its 2005 World Summit Outcome document,⁸ though admittedly neither expressly ruled out the unilateral use of force.⁹ As such, it is not so clear whether there is a "strong power of attraction" to non-U.N. forcible humanitarian intervention, at least by governments, who may view their concerns with interventions in places like Iraq or Georgia as outweighing the benefits of interventions in places such as Kosovo.

Interestingly, although it was issued one year after publication of *Contested Statehood*, the International Court's advisory opinion on the legality of Kosovo's declaration of independence probably does not affect significantly the conclusions advanced by Weller in his final chapter. Limiting itself narrowly to the question of whether Kosovo's 2008 declaration of independence was *prohibited* by general international law or by the relevant U.N. Security Council resolution (Resolution 1244)—a *Lotus*-like approach lamented by Judge Simma¹⁰—the International Court avoided many of the big questions of international law, such as whether there was an affirmative right for the Kosovo people to declare independence based upon a right of self-determination or "remedial secession."¹¹ Although some of the individual judges of the

⁷ See U.N. Secretary-General, Report of the High-level Panel on Threats, Challenges and Change, para. 203, U.N. Doc. A/59/565 (Dec. 2, 2004); see also *id.* at paras. 196, 272.

⁸ In *Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, U.N. Doc. A/59/2005, para. 135 (Mar. 21, 2005).

⁹ For a general discussion, see Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *A.J.I.L.* 99 (2007).

¹⁰ Kosovo Advisory Opinion, Declaration of Judge Simma, para. 2 ("The underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the "*Lotus*" Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order ("*Lotus*", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18).").

¹¹ Kosovo Advisory Opinion, paras. 82–83.

Court discussed the right of self-determination,¹² the Court as a whole avoided the issue, and avoided being drawn into any other issues, such as advising Belgrade and Pristina that they should pursue further status talks.

In what way does the Court's advisory opinion add further to the story of Kosovo? In the wake of the Court's decision, Serbia maintained that it may spur secessionist movements worldwide.¹³ Yet the opinion appears not to have done so, any more than did the acceptance of Kosovo's declaration of independence in 2008 by a large number of States, including most members of the European Union. The Court's conclusion that international law does not prohibit declarations of independence says nothing about whether such declarations are authorized by international law, nor whether States, in the exercise of their political discretion, may or must accept such declarations. Consequently, as much as secessionist movements may wish to rely on the Court's opinion, they will find in it little support for their causes. Instead, perhaps the most enduring aspects of the Court's opinion will lie in its continuing presumption that restrictions on the conduct of both State and non-State actors cannot be presumed but, rather, must be demonstrated;¹⁴ in its conclusion that the "principle of territorial integrity" concerns only inter-State relations, not events internal to a single State, such as a declaration of independence by a segment of its population;¹⁵ and in its basic methodology for interpreting Security Council resolutions.¹⁶

¹² See generally Kosovo Advisory Opinion, Declaration of Judge Cançado Trindade.

¹³ See Dan Bilefsky, *World Court Rules Kosovo Declaration Was Legal*, N.Y. TIMES, July 22, 2010 (quoting Serbia's Foreign Minister, Vuk Jeremic, as saying that the opinion could make separatist movements elsewhere "tempted to write declarations of independence").

¹⁴ Kosovo Advisory Opinion, para. 56.

¹⁵ *Id.*, para. 80.

¹⁶ *Id.*, para. 94.

The story of Kosovo, of course, is still not complete. Many States have still not recognized Kosovo as a sovereign State, and while it has been admitted to some important international organizations, such as the World Bank and the International Monetary Fund, it has not been extended membership in the United Nations (due principally to resistance by Russia) nor in the European Union. Relations between Pristina and Belgrade remain bitter. Internally, economic progress is difficult, rule of law development is piecemeal, and ethnic tensions remain considerable, especially in northern Kosovo. Yet it can be hoped that Kosovo's independence represents the final stage in the disintegration of the former Yugoslavia, and that, over time, there will emerge a rapprochement between the Kosovo and Serbia that will allow both States to move forward as regional and European partners.