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National sovereignty and statehood in contemporary international law: the need for clarification

Report¹

Committee on Legal Affairs and Human Rights

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Summary

The lack of clear criteria for statehood and for lawful secession has encouraged the emergence of numerous secessionist movements and thereby threatens peace, stability and the territorial integrity of existing states, also in Europe.

It should be noted that the notions of national sovereignty and statehood have evolved in recent years.

A multilateral approach to the “responsibility to protect” is taking the place of arbitrary unilateral interventions and bilateral guarantees. Bilateral guarantees such as those in the context of the independence of Cyprus have not prevented conflicts. European integration and co-operation have led to a voluntary relinquishment of certain aspects of national sovereignty.

Self-determination should first and foremost be implemented by way of the protection of minority rights as foreseen in the Council of Europe Framework Convention for the Protection of National Minorities. All member states should therefore be invited to refrain from recognising or supporting in any way the *de facto* authorities of territories resulting from unlawful secessions, in particular those supported by foreign military interventions; the criteria for statehood, including those for the emergence of new states by legal secession, and the modalities of protection of national sovereignty and territorial integrity of states should be examined thoroughly in the framework of a follow-up conference to the International Commission on Intervention and State Sovereignty (ICISS).

¹ Reference to committee: Doc. 12251, Reference 3683 of 21 June 2010.

A. Draft resolution²

1. The Parliamentary Assembly observes that a number of territorial entities in Council of Europe member states are aspiring to be recognised as independent states.
2. It notes that the criteria for statehood remain a contentious issue in contemporary international law.
3. The lack of clear criteria for statehood and for lawful secession has encouraged the emergence of numerous secessionist movements and thereby threatens peace, stability and the territorial integrity of existing states, also in Europe.
4. The Assembly notes that the notions of national sovereignty and statehood have evolved in recent years. Key developments were summed up in 2001 by a high-level International Commission on Intervention and State Sovereignty (ICISS) under the aegis of the United Nations and supported by Canada; its findings were subsequently taken up by the United Nations General Assembly.
5. A multilateral approach to the “responsibility to protect”, as advocated by the ICISS, is taking the place of arbitrary unilateral interventions and bilateral guarantees:
 - 5.1. Military interventions such as those by Turkey in Cyprus in 1974, by the North Atlantic Treaty Organisation (NATO) in the Federal Republic of Yugoslavia in 1999 and by the Russian Federation in Georgia in 2008, whilst motivated – justifiably or not – by the need to stop serious human rights violations, have themselves led to numerous human rights violations and have not produced lasting solutions for the underlying problems;
 - 5.2. Bilateral guarantees such as those in the context of the independence of Cyprus have not prevented conflicts. On the contrary, in the case of Cyprus they were used as an excuse for unilateral military intervention, conflicting with Article 2 (4) of the Charter of the United Nations and a peremptory norm of international law prohibiting the use of force.
6. European integration and co-operation have led to a voluntary relinquishment of certain aspects of national sovereignty, in particular:
 - 6.1. The rights and freedoms of individuals are protected by the supervisory mechanism of the European Convention of Human Rights (ETS No. 5); states parties to the Convention have accepted the duty to implement the judgments of the European Court of Human Rights, with considerations of national sovereignty being of secondary importance;
 - 6.2. European integration, in particular the introduction of the euro, the official currency of the Eurozone, is obliging the majority of European Union member states to abandon their sovereignty concerning choice of fiscal and social policies. Increasing economic integration has similar effects even on countries which are not members of the eurozone or the European Union.
7. The Assembly considers that even if international law were to recognise a right of national or ethnic minorities to self-determination, such a right would not give rise to an automatic right to secession. The right to self-determination should first and foremost be implemented by way of the protection of minority rights as foreseen in the Council of Europe Framework Convention for the Protection of National Minorities (ETS No. 157).
8. The Assembly therefore:
 - 8.1. reiterates its invitation to those member states which have not yet done so to sign and ratify the Framework Convention as soon as possible;
 - 8.2. invites all member states to refrain from recognising or supporting in any way the *de facto* authorities of territories resulting from unlawful secessions, in particular those supported by foreign military interventions;
 - 8.3. proposes that the criteria for statehood, including those for the emergence of new states by legal secession, and the modalities of protection of national sovereignty and territorial integrity of states be examined thoroughly in the framework of a follow-up conference to the International Commission on Intervention and State Sovereignty.

² Draft resolution adopted unanimously by the committee on 13 April 2011.

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1. Procedure to date

1. The motion for a resolution on “National sovereignty and statehood in contemporary international law: the need for clarification” was transmitted to the Committee on Legal Affairs and Human Rights for report on 21 June 2010.³ At its meeting on 5 October 2010, the committee appointed Mr Holger Haibach (Germany, EPP/CD) as its rapporteur.

2. At its meeting on 16 December 2010, the committee held a hearing with the following experts:⁴

- Professor Helen Keller (University of Zürich, Switzerland)
- Professor Vladimir Kotlyar (State University of International Relations, Moscow, Russian Federation)
- Professor Alain Pellet (University of Paris Ouest – Nanterre, France)
- Professor Matthias Herdegen (University of Bonn, Germany)

3. At its meeting on 26 January 2011, the Committee appointed as its new rapporteur Ms Marina Schuster (Germany, ALDE).

2. Purpose of the present report

4. As indicated in the text of the motion for a resolution, the concepts of national sovereignty and statehood have in recent years undergone important transformations. Developments in actual state practice, including within and among member states of the Council of Europe, have shown that the criteria for statehood remain a contentious issue in international law. There is outright confusion as to the legality of certain recent developments, including the emergence of new entities that claim recognition as fully fledged states.

5. The most recent examples are the secessions from the Republic of Georgia declared unilaterally by South Ossetia and Abkhazia (Georgia), under the protection of the Russian military. The Russian Federation itself, which emerged from the generally peaceful breakup of the former Soviet Union, is still threatened by irredentist movements in its North Caucasus region. Moldova’s Transnistria region has not been under central Government control for many years. Spain is grappling with a separatist movement in the Basque country, Turkey with a powerful Kurdish nationalist movement. The former Socialist Federal Republic of Yugoslavia has split up after a violent war. The latest episode is the unilateral declaration of independence of Kosovo⁵ from Serbia. The Czech Republic and the Slovak Republic, by contrast, succeeded in “divorcing” peacefully. Belgium is in a state of permanent political turmoil pending a compromise solution between Flanders and Walloon. Cyprus’ independence, linked to an outdated trilateral guarantee arrangement, was the last act of decolonisation in Europe. The island has remained divided *de facto* for decades, despite the

³ Doc. 12251, Reference 3683.

⁴ I have also had the benefit of an interesting paper submitted by Professor Maria M. Kenig-Witkowska (University of Warsaw), who was unable to attend the hearing to which she was invited. The interventions of the experts have been declassified and can be accessed on the website of the Assembly’s Committee on Legal Affairs and Human Rights, <http://assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuJurEN.htm>.

⁵ All reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

quasi-unanimous non-recognition of the breakaway entity in the north, set up under the protection of the Turkish military.

6. These examples appear to show that lack of clarity of the criteria for statehood and of the meaning of national sovereignty poses a grave threat for peace and stability, even in Europe. The purpose of this modest report is to recall some basic principles of international law in this field and to mobilise support for further in-depth debate at the level of the United Nations, in the form of a follow-up conference to the International Commission on Intervention and State Sovereignty (ICISS), whose conclusions were published in 2001. Basing myself on the results of the hearing with the learned experts on international law in December 2010, I will begin by very briefly recalling the main generally accepted principles on criteria for statehood and national sovereignty and the conclusions of the ICISS. I will then draw some tentative conclusions as regards the practical issues raised in the motion for a resolution, highlighting the points to be clarified.

3. Basic principles governing statehood and national sovereignty

3.1. Criteria for statehood

7. As Professor Keller pointed out at the hearing, the definition of statehood given by Georg Jellinek in 1900⁶ is still generally accepted: a state requires a people, a territory and a state authority. The existence of these elements is seen as a merely factual issue.

8. According to the prevailing doctrine in public international law, the recognition of a new state by others is purely declaratory in nature. A state either exists, or it does not, regardless of recognition by others. The reason for this prevailing doctrine is that no state must be in a position to decide about the status of another state – this would be in contradiction with the sovereign equality of all states.

9. This being said, recognition by numerous other states, or its absence, constitutes a factual element that weighs heavily in the assessment of whether the necessary elements of statehood are actually present.⁷ Professor Herdegen pointed out in his presentation before the committee that the assessment of the required “effectiveness” of state authority necessitates a complex evaluation of all relevant factors, including a prognosis as to whether the new state authority will be able to prevail over the competing authority of the predecessor state in the long run. The result of such a prognosis may well be influenced by the attitude of other states and also of international organisations vis-à-vis the new state, in particular their readiness to cooperate with and support the new state.

10. Professor Herdegen pointed out that there is no duty under international law to recognise new states. This gives states and international organisations the opportunity to make recognition or accession to an organisation conditional upon the fulfilment of certain substantial criteria. I agree with Professor Herdegen that the Council of Europe should formulate certain substantive standards as preconditions for the recognition and accession of new states. In fact, the Assembly, in its more recent opinions on the accession of new member states, has shown the way: accession was made conditional upon a certain number of commitments whose implementation is being followed up by the Assembly’s Monitoring Committee. The Assembly’s criteria resemble those laid down in the “Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union”⁸ adopted by the Foreign Ministers of the European Union member states:

- respect for democracy, the rule of law and human rights;
- guarantees for ethnic groups and minorities;
- the recognition of the inviolability of existing borders;
- the recognition of existing commitments for disarmament and nuclear non-proliferation;
- the obligation to peaceful settlement of disputes.

11. In the discussion at the hearing, the question was raised whether recognition of a state can be “withdrawn” if the conditions under which it was granted are no longer fulfilled. Our learned experts did not think that recognition as such could be subject to withdrawal, but international organisations had the possibility of reacting to infringements of membership duties by withdrawing some or all of the rights linked to membership. We should indeed be aware of this possibility and not hesitate to make use of it in appropriate cases.

⁶ Georg Jellinek, *Allgemeine Staatslehre*, 1900.

⁷ For an authoritative overview, see Crawford J., *The Creation of States in International Law*, Oxford University Press, 2006, *passim*.

⁸ *International Legal Materials* 31 (1992), p. 1486.

3.2. Evolution of the notion of national sovereignty

12. Once a state exists, it is “sovereign”, both internally and externally, and has the right “freely to choose and develop its political, social, economic and cultural systems”.⁹

13. The classic definition of state sovereignty denotes the competence, independence, and legal equality of states. The concept is normally used to encompass all matters in which each state is permitted by international law to decide and act without intrusions from other sovereign states.¹⁰ This positivistic definition according to which international legal obligations derive exclusively from the consent of sovereign states still underlies the famous Lotus judgment of the Permanent Court of International Justice of 1927.¹¹

14. However, as former United Nations Secretary General Boutros Boutros-Ghali stated: “The time of absolute sovereignty ... has passed; its theory was never matched by reality.”¹² Professor Keller aptly summed up the modern understanding of state sovereignty as “sovereignty under law”, in other words, sovereignty rooted in and limited by law.

15. Ever since human rights and their international protection have been recognised and strengthened, there are increasing doubts as to whether respect for human rights may continue to be left to the states’ sovereign domaine réservé. A more human-rights oriented approach to national sovereignty was developed by former United Nations Secretary General Kofi Annan in his famous article in *The Economist*: “States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual ... has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”¹³

16. As regards the Council of Europe, whose members are all States Parties to the European Convention on Human Rights (ETS No. 5), the issue is resolved: violations of human rights protected under the Convention cannot be regarded as “internal affairs” of the states concerned. Such violations are subject to the scrutiny of the European Court of Human Rights, whose judgments must be implemented under the supervision of the Committee of Ministers. This clearly constitutes a voluntary relinquishment of sovereign rights.

17. Such voluntary relinquishment of aspects of national sovereignty is progressing, in particular in the framework of European integration. One of the consequences of economic globalisation is that any European state on its own would have great difficulties in asserting its own “independence” in international trade. European countries have relinquished parts of their sovereign powers in such policy areas as trade, tariffs, competition law and the like and allow the European Union to act on their behalf in these fields. More recently, states inside and outside the Eurozone having allowed fiscal deficits to accumulate for too long have come to realise that they are no longer free to set their social and other spending or their fiscal policies at will. Escalating risk premiums in the international financial markets have effectively curtailed national sovereignty – on a voluntary basis only to the extent that countries have at some point “chosen” to go into debt in an unsustainable way.

18. Another step further is the question of the legality of an intervention against the will of the state concerned in a case where the said state gravely violates human rights. This issue of the emergence of a “responsibility to protect” is the main subject of the report of the ICISS. As we know, this argument was fielded – rightly or wrongly – for the interventions by Turkey in Cyprus, by NATO in the Federal Republic of Yugoslavia and by the Russian Federation in Georgia. There is a danger that such a “responsibility to protect” can be abused in order to justify the use of force in cases where the true agenda is other than that of preventing or stopping serious, massive human rights violations. It is therefore necessary, on the one hand, to strictly define the scope and conditions of any intervention rights for humanitarian reasons. On the other hand, in the light of the Srebrenica massacre or of the genocide in Rwanda, the case for some kind of right

⁹ See the 1970 Friendly Relations Declaration (United Nations General Assembly Resolution 2625 (XXV), UN GAOR, 25th Session, No. 28 at 121, United Nations Doc. A/8028 (1971), adopted by consensus on 24 October 1970).

¹⁰ See “The Responsibility to Protect: supplementary volume”, Part I, Research Essays, Essay 1: State Sovereignty, p. 6; www.iciss.ca/report2-en.asp.

¹¹ www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

¹² Boutros Boutros-Ghali, *An Agenda for Peace*, United Nations, New York, 1992, paragraph 17.

¹³ Kofi Annan, *Two Concepts of Sovereignty*, *The Economist*, 18 September 1999: www.un.org/News/ossg/sg/stories/kaecon.html.

or even duty to intervene to prevent or stop massive human rights violations is very strong. But the precise definition of the legal basis and the scope of such a right to intervene would go beyond the framework of this report.

4. Summary of the ICISS conclusions

19. At the United Nations General Assembly in 1999, its Secretary General Kofi Annan pleaded with the international community to “forge unity” around the question of humanitarian intervention: “If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”¹⁴ It was in response to this challenge that the Government of Canada, together with a group of major foundations, announced at the United Nations General Assembly in September 2000 the establishment of the ICISS. The report’s central theme is reflected in its title, “The responsibility to protect”, namely, the premise that sovereign states have a responsibility to protect their own citizens from avoidable catastrophes such as mass murder, rape or starvation, and when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.

20. The conclusions, which it should be noted were adopted by consensus among the 12 ICISS commissioners, representing a wide geographical and political spectrum of academic and practical expertise in international law and international relations,¹⁵ are summed up in a synopsis in the Appendix.

21. The commission’s key finding is that state sovereignty implies responsibility. If the state itself is unwilling or unable to halt or avert serious harm to its population, the principle of non-intervention yields to the international responsibility to protect. The commission then breaks up the responsibility to protect into three sub-sets of responsibilities: to prevent, to react and to rebuild. Priority is given to the responsibility to prevent.

22. The exercise of the responsibility to prevent or to react should always involve the least obtrusive and coercive measures. Military intervention for human protection purposes should remain an exceptional and extraordinary measure. There must be “serious and irreparable harm” being inflicted on human beings, or “imminently likely to occur, in the form of a large-scale loss of life, or large-scale “ethnic cleansing”. The commission also lays down “operational principles” for any intervention, including clear objectives, a clear and unambiguous mandate at all times and resources to match.

23. Very importantly, the commission insists on the primary responsibility of the United Nations Security Council, whose authorisation should be sought prior to any military intervention. It appeals to the permanent members of the Security Council not to apply their veto powers to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise strong majority support. But the commission also addresses the situation in which the Security Council rejects a proposal or fails to deal with it in a reasonable time, leaving the door open to regional or sub-regional organisations under Chapter VIII of the Charter of the United Nations to take action subject to their seeking subsequent authorisation from the Council. Finally, the commission invites the Security Council to “take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and the urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby”. The commission thus leaves the door open for urgent action – albeit only in “conscience-shocking situations crying out for action” – without the approval of the United Nations Security Council.

24. The conclusions of the ICISS gave rise to debates at the 59th and 60th sessions of the United Nations General Assembly. At its 60th session, the General Assembly adopted a resolution¹⁶ confirming the principle of the “responsibility to protect” of every state and of the international community as a whole. It also defines four situations which may engage the responsibility of the international community, namely genocide, war crimes, ethnic cleansing and crimes against humanity. But as Professor Kenig-Witkowska stresses in her paper, the United Nations General Assembly resolution differs in several respects from the proposals of the ICISS report. In particular, it does not answer the question of what shall be done in the absence of a common position of the United Nations Security Council, and rejects the right to unilateral humanitarian

¹⁴ Quoted in the foreword of the report of the International Commission on Intervention and State Sovereignty, December 2001 (www.iciss.ca/report2-en.asp), henceforth cited as the “ICISS Report”.

¹⁵ See the list of commissioners and their backgrounds on the ICISS website (footnote 10 above); the Commission also held intensive round-table discussions in Beijing, Cairo, Geneva, London, Maputo, New Delhi, New York, Ottawa, Paris, St Petersburg, Santiago and Washington.

¹⁶ United Nations General Assembly Resolution 60/1 (24 October 2005), UN Doc A/RES/60/1.

intervention. There is clearly some “unfinished business” to be wrapped up in another conference, which could take account of the reception of the ICISS's 2001 proposals.

5. Practical issues pertaining to the evolution of the criteria for statehood and national sovereignty

5.1. Right to secession?

25. The question whether there is a (unilateral) right to secession is not new – and the standard answer has always been that there is no such right, in principle, as the state's territorial integrity prevails. However, unilateral declarations of independence have been considered as legitimate in state practice as part of the decolonisation process, in which peoples who had been subjected to foreign dominance and exploitation declared their independence from their colonial powers, as an expression of their right to self-determination.¹⁷

26. But outside the decolonisation process, the right to self-determination is not seen by the prevailing opinion as giving rise to a right for any regional minority group to secede from an existing state.¹⁸ Self-determination of minority groups should be realised rather by way of participation in the government of the state as a whole, and by the devolution of power through the development of regional autonomy, namely self-government in matters such as education, culture, etc., falling short of independence.

27. In view of the general recognition of the “responsibility to protect” (see above), the question arises whether a regional minority group may have a right to “remedial secession” when its legitimate claim to regional autonomy has been thwarted by the central authorities, especially when the denial of self-government goes along with serious human rights violations against the minority population. At least *de lege ferenda*, this point of view is widely defended in contemporary international law doctrine, which poses varying conditions, including the impossibility to realise self-government within the framework of the existing state by way of negotiations, and wide-spread human rights violations against members of the secessionist group committed by the state.¹⁹

28. The International Court of Justice (ICJ), in its Advisory Opinion of 22 July 2010 on “accordance with international law of the unilateral declaration of independence in respect of Kosovo”,²⁰ did not answer this question in a clear-cut manner.²¹ It interpreted the question asked by the United Nations General Assembly narrowly, limiting its opinion to the question whether the declaration as such violated either general international law or the framework of United Nations Security Council Resolution 1244 (1999) or the Constitutional Framework which was created in the framework of the United Nations Interim Administration Mission in Kosovo (UNMIK). The ICJ held that the declaration of independence of 17 February 2008 did not violate general international law, which it considers does not contain an applicable prohibition of declarations of independence (according to the ICJ, the declaration also did not violate Resolution 1244 or the UNMIK Framework). The ICJ drew an *argumentum a contrario* supporting this position from the fact that the UNSC had found it necessary to adopt specific resolutions condemning unilateral declarations of independence in individual cases.²² The ICJ also found that territorial integrity only concerned relations between states. But it did not go as far as to comment on the legal effect of this declaration of independence, namely whether it actually had as a consequence the emergence of a new state:²³ the ICJ “does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly”,²⁴ as the General Assembly, in particular, “does not ask whether or not Kosovo has achieved statehood”.²⁵

¹⁷ See the examples given by the International Court of Justice in its Advisory Opinion of 22 July 2010 on “accordance with international law of the unilateral declaration of independence in respect of Kosovo” (ICJ General List No. 141), paragraph 79.

¹⁸ See, for example, Professor Andreas Zimmermann, interview with Deutsche Welle, 2 August 2008 (concerning South Ossetia), www.dw-world.de.

¹⁹ See, for example, America's Regional Conference on Secession and International Law. Conclusions and Recommendations, www.scujil.org/volumes/v3n2/4; a strong case for a right to secession under certain conditions is made by Judge Cancado Trindade in his concurring opinion on the ICJ's above-mentioned Advisory Opinion.

²⁰ Available on the website of the ICJ (General List No. 141).

²¹ An omission Judge Simma regrets in his Declaration attached to the Advisory Opinion.

²² See the examples given by the ICJ in paragraph 81 of the Advisory Opinion: United Nations Security Council Resolutions 216 and 217 (1965) concerning Southern Rhodesia, Resolution 541 (1983) concerning northern Cyprus, and Resolution 787 (1992) concerning the Republika Srpska.

²³ As pointed out in the dissenting opinion of Judge Skotnikov (paragraph 18).

²⁴ Advisory Opinion (footnote 17 supra), paragraph 51.

²⁵ Ibid.

29. Even if one were to recognise a right to “remedial” secession in certain cases, recent examples such as the situation in Georgia/South Ossetia show how difficult the application of such a rule would be in practice. The divergent positions taken by different states, which were partly reflected in the positions taken by the experts at the hearing on 16 December 2010, show that the objective assessment of the facts is often overshadowed by political considerations. Furthermore, as the experts pointed out, if every more or less discontented minority group in Europe alone were granted the right to secede, international organisations, including the Council of Europe, would soon become ungovernable, and the political stability of many a member state would be seriously threatened. Also, as was pointed out, secession often does not solve a minority problem. Mostly, it simply results in the reversal of the minority/majority roles, and the new minority becomes subject to similar ill-treatment at the hands of the former minority (as is the case of Georgians in South Ossetia (Georgia)).

30. Also, the question arises for how long any “right to secession” due to the large-scale ill-treatment of a given minority would remain applicable once the ill-treatment ended. The question arose for example in Kosovo after the end of the Milosevic regime in Serbia and the readiness of the new Serbian authorities to negotiate a regime of autonomy falling short of outright independence. The International Court of Justice failed to provide guidance on this issue in its Advisory Opinion.

31. In view of the difficulties attached to a right to unilateral secession based on the right to self-determination of minority groups, the experts at our hearing were in favour of maintaining a strict interpretation of the conditions giving rise to unilaterally declared secession. In my view, the proper protection of minority rights as foreseen, in particular, in the Council of Europe’s Framework Convention on the Protection of National Minorities (ETS No. 157) is an appropriate way of implementing the right to self-determination.

5.2. *Consequences of unlawful secession*

32. What are the consequences of a secession which is in breach of international law? First and foremost, other states have a duty not to recognise the secessionist entity. This may result from an express resolution of the United Nations Security Council, as in the cases mentioned in footnote 22, or it may simply result from states’ duty to respect the territorial integrity of the state from which the secessionist entity is breaking loose.²⁶ The International Law Commission, in its “Articles on State Responsibility”,²⁷ formulates the duty of states to refuse recognising and promoting in any way a state of affairs caused by a serious violation of international law within the meaning of Article 40 as follows:

“No State shall recognise as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” (Article 41, paragraph 2)

33. The duty not to recognise states that owe their existence to a violation of the prohibition of the use of force was explicitly stated in resolutions of the United Nations Security Council in the case of northern Cyprus,²⁸ whilst such a resolution has not been adopted, for obvious reasons, in the case of Abkhazia and South Ossetia (Georgia). But as Professor Keller pointed out at the hearing in December 2010, the Assembly condemned the recognition of Abkhazia and South Ossetia by Russia as a violation of international law.²⁹

34. Also, as our experts pointed out, the state from which the secessionist entity has attempted to break loose continues to benefit from all rights and prerogatives concerning the whole of its territory, at least insofar as actual territorial control is not required. The Government of the Republic of Cyprus, for example, represents internationally the whole territory of the island – which is why the accession of Cyprus to the European Union on 1 May 2004 applied to the whole of Cyprus. But the inhabitants of the area which is not under the *de facto* control of the Cypriot Government cannot benefit from all the advantages of accession. Protocol 10 of the Accession Treaty suspends the application of EU legislation in this area. The situation will change once a Cyprus settlement enters into force and it will then be possible for EU rules to apply over the whole of the island.³⁰ Meanwhile, failure by Turkey to recognise the Republic of Cyprus (whilst being the only

²⁶ See Article 2, paragraph 4, of the United Nations Statute: “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, or in any manner inconsistent with the Purposes of the United Nations.”

²⁷ See Crawford J., *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge, 2002: <http://assets.cambridge.org/97805218/13532/sample/9780521813532ws.pdf>.

²⁸ United Nations Security Council Resolutions 541/1983 and 550/1984.

²⁹ Assembly Resolution 1633 (2008).

³⁰ http://ec.europa.eu/enlargement/turkish_cypriot_community/index_en.htm.

state recognising the so-called “Turkish Republic of Northern Cyprus”) constitutes a major obstacle in the path of Turkey’s own accession to the European Union.³¹

35. In order to guarantee the protection of human rights in the case of an unlawful secession, the European Court of Human Rights has developed a jurisprudence which holds the occupying power responsible for violations committed in the territory under its *de facto* control. The Court developed this case law in dealing with applications concerning the enforced disappearance of Greek Cypriots in the wake of the Turkish military intervention in 1974³² and in cases concerning the property rights of displaced Greek Cypriots³³ in view of the *de facto* control exercised by Turkey through the presence of a strong military contingent in this part of the Cypriot territory. It was also applied in the *Ilascu case*,³⁴ where the Russian Federation, alongside the Republic of Moldova, was held responsible for the unlawful detention of a political opponent of the *de facto* authorities of Transnistria, due to the territorial control exercised by the Russian military in this breakaway region of Moldova. This case law of the Court is fully in line with the above-mentioned³⁵ development of a more human-rights oriented understanding of national sovereignty.

5.3. Strengthening of multilateralism and bilateral guarantees

36. Another trend in the evolution of the notion of state sovereignty is the strengthening of multilateralism, as opposed to unilateral action.

37. As regards the “responsibility to protect”, we have already seen that a multilateral mandate, preferably based on a United Nations Security Council resolution, is required in order to justify a humanitarian intervention. The cautious exceptions advocated by the ICISS in case of a blockade in the United Nations Security Council would still require at least the support of a regional organisation. It may therefore be safely argued that unilateral interventions, or ones based on bi- or plurilateral guarantee agreements could no longer be in line with a modern understanding of public international law.

38. The example of Cyprus is a case in point. As Professor Herdegen noted at the hearing in December 2010, the continued validity of the 1960 “Treaty of Guarantee” for Cyprus is doubtful, as it may have become inoperative according to the principle of “*Wegfall der Geschäftsgrundlage*” (disappearance of the substantive circumstances on which the treaty was based) or because of a material breach by one party to the agreement (in the form of the unilateral military intervention by Turkey in 1974).

39. In fact, the Treaty of Guarantee for Cyprus could be considered as void, in line with the above argument put forward by Professor Herdegen, and as it appears to conflict with Articles 2.4 and 103 of the Charter of the United Nations and a peremptory norm of international law prohibiting the use of force. Article 2.4 of the Charter significantly limits the circumstances in which one state may lawfully use force on the territory of another. Article 2.4 of the Charter provides 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, or in any other manner inconsistent with the purpose of the United Nations.” It is quite likely that a treaty which purported to authorise military action in such broad terms on the territory of one of its parties, irrespective of whether that party consented to such action at the time, would be held contrary to a peremptory norm of international law (*jus cogens*), since the prohibition on the use of force contrary to Article 2.4 of the Charter has generally been regarded as the paradigm of such a peremptory norm. If so, such a treaty would be void under the principle stated in Article 53 of the Vienna Convention on the Law of Treaties.³⁶ It would also be rendered ineffective by Article 103 of the Charter of the United Nations, which reads: “In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

³¹ In December 2006, 8 of Turkey’s 35 negotiating chapters were suspended when it failed to open its ports to Cypriot ships (see BBC News, 11 December 2006: <http://news.bbc.co.uk/2/hi/4107919.stm>).

³² See *Cyprus v. Turkey*, Application No. 25781/94, judgment of 10 May 2001.

³³ See *Loizidou v. Turkey*, Application No. 15318/89, judgment of 18 December 1996.

³⁴ *Ilascu v. Moldova and the Russian Federation*, 2004.

³⁵ Paragraph 15 (Kofi Annan).

³⁶ Vienna Convention on the Law of Treaties (1969), Article 53: Treaties conflicting with a peremptory norm of general international law (*jus cogens*). “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

40. In any case, treaty-based instruments such as the Treaty of Guarantee for Cyprus are displaced by any intervention of the United Nations Security Council under Chapter VII of the Charter of the United Nations. The obsolescence of the Treaty of Guarantee may also put into question the continued legitimacy of the "Sovereign Base Areas" in Akrotiri and Dhekelia,³⁷ which are based on another element of the package of decolonisation treaties leading to the independence of Cyprus, the Treaty of Establishment. It is doubtful whether an "unequal treaty" which Cyprus was forced to enter into in order to shed colonial rule in 1960 can still justify withholding from Cypriot sovereign control such large tracts of territory, namely the "Sovereign Base Areas".

6. Conclusion

41. We have seen that the notions of statehood and national sovereignty have evolved. Statehood criteria have come to include such substantive criteria as respect for democracy, the rule of law and human rights, guarantees for ethnic groups and minorities and the obligation to settle disputes peacefully. Sovereignty has evolved into "sovereignty under law", that is to say sovereignty rooted in and limited by law, including international human rights norms. In the light of these developments, the International Commission on Intervention and State Sovereignty has developed the notion of a collective "responsibility to protect", which may, in certain circumstances, overcome entrenched notions of national sovereignty, and is taking the place of bi- or plurilateral "guarantees" that are becoming progressively obsolete.

42. The most important conclusion is that these new developments are far from being complete, and give rise to continuing disputes, both from a legal point of view and in terms of the assessment of the factual situations in question. The important contribution made by the ICISS to the further development and clarification of the "responsibility to protect" in my view shows the way forward: a follow-up conference to the ICISS, bringing together under the auspices of the United Nations leading practitioners and academics in the field of international law who represent all regions of the world and relevant traditions in this field, should take up those international legal issues that continue to give rise to conflict situations, including, but not limited to, those touched upon in this report.

³⁷ See Assembly Resolution 1555 (2007) on the situation of the inhabitants of the Sovereign Base Areas of Akrotiri and Dhekelia; in his explanatory memorandum, the rapporteur (Andreas Gross, Switzerland, SOC) presents the diverging viewpoints of the British and Cypriot Governments without taking position on the legal issues (Doc. 11232, paragraphs 3-9).

Appendix

Summary of the ICISS conclusions

The responsibility to protect – Report of the international commission on intervention and state sovereignty (December 2001)

Synopsis

The responsibility to protect: core principles

(1) Basic Principles

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) Foundations

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

- A. obligations inherent in the concept of sovereignty;
- B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- D. the developing practice of states, regional organizations and the Security Council itself.

(3) Elements

The responsibility to protect embraces three specific responsibilities:

- A. **The responsibility to prevent:** to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
- B. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
- C. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

(4) Priorities

- A. **Prevention is the single most important dimension of the responsibility to protect:** prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.
- B. The exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied.

The Responsibility to Protect: Principles for Military Intervention

(1) The Just Cause Threshold

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- A. **large scale loss of life**, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. **large scale 'ethnic cleansing'**, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

(2) The Precautionary Principles

- A. **Right intention:** The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
- B. **Last resort:** Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
- C. **Proportional means:** The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
- D. **Reasonable prospects:** There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

(3) Right Authority

- A. There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
- B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
- C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
- D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.
- E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:
 - I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and
 - II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.
- F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.

(4) Operational Principles

- A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.
- B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.
- C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.
- D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.
- E. Acceptance that force protection cannot become the principal objective.
- F. Maximum possible coordination with humanitarian organizations.