



Kosovo in Limbo: State-Building and “Substantial Autonomy”

Two presidents, a presidency, a prime minister, and an assembly, but not a country? As Kosovo’s majority Albanian population prepares for the election of “provisional institutions of self-government” on November 17 – and Serbia is welcomed back into the international community – the paper-thin compromise that saw the United Nations follow NATO into Kosovo is likely to become a permanent substitute for a solution.

By Simon Chesterman

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Executive summary

- Complex peace operations that involve state-building functions are difficult even when the political outcome is clear, as it is in East Timor. In situations such as Kosovo, where the final status of the territory under administration remains unclear, every aspect of state-building is more politically sensitive and more operationally complex. When this occurs in a highly militarized environment and in an unstable region, any departure from a supposedly “interim” solution becomes more difficult still.
- The Dayton Accords in Bosnia show the dangers of a difficult peace agreement evolving into a constitutional framework that is both unworkable and impossible to change. The conclusion of hostilities may provide the best incentive for belligerents to compromise, but it may subsequently become impossible to reopen such questions without the threat of renewed violence. Future peace agreements are therefore likely to contain state-building provisions that international institutions will assume the task of overseeing, in some situations without a clear political endpoint and exit strategy.
- In Kosovo, the elections slated for November 17, 2001, reflect a desire for measurable progress and an indication of when the mission will end. An April 2001 report by the UN Secretary-General on this topic was entitled “No exit without strategy”, warning that the UN has too often withdrawn or dramatically altered a peacekeeping operation, only to see the situation remain unstable or sink into renewed violence. Unfortunately, the attitude of lead actors within the Security Council is too often “no strategy without an exit”.
- State-building after a war will always take years, perhaps decades, and it is disingenuous to suggest otherwise to domestic publics. Elections and limited devolution notwithstanding, the international community will remain in Kosovo and Bosnia for the foreseeable future, certainly with a strong military presence and with at least a supervisory civilian authority. This is an undesirable outcome of what NATO styles as humanitarian interventions, but it is better than all the alternatives.
- The fact that UNMIK will remain in control of Kosovo for the foreseeable future raises the question of how it should govern. Within UNMIK, there is an increasing tension between those who regard respect for human rights and the rule of law as central to the institution-building aspect of UNMIK’s mandate, and those who see this as secondary to the over-riding concerns of peace and security.

About the Project on Transitional Administrations

This interdisciplinary project addresses how the United Nations' on-going and ad hoc involvement in "state-building" missions is contributing to the transformation of accepted norms of self-determination and state sovereignty. The starting point of the project is the concern – raised, though only in passing, by the Report of the Panel on UN Peace Operations (the "Brahimi Report") – that the United Nations is becoming involved in state-building projects without any clear institutional guidelines or political consensus. This has given rise to uncertainty of mandate in ongoing UN operations, as well as the potential for establishing precedents that may confuse the normative framework within which future operations take place.

On this basis, the two goals of the project are:

- (a) to develop clear guidelines on how United Nations transitional administrations can and should be used to further the self-determination aspirations of a given group; and
- (b) to examine how UN actions have contributed to the normative and practical transformation of self-determination and state sovereignty through the 1990s (in turn, perhaps, giving rise to more calls for self-determination by groups).

This is the first of three reports that will be used as the basis for discussion with key actors from the United Nations and its member states.

For more information, see www.ipacademy.org/ta

About the author

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Simon Chesterman in Pristina

Introduction: Kosovo through the looking glass

In one of his final speeches as head of the United Nations Interim Administration Mission in Kosovo (UNMIK), Bernard Kouchner likened heading the operation to being in Alice's Wonderland. It takes all the running you can do to keep in the same place, he observed – if you want to get somewhere else, you have to run at least twice as fast as that. Many things about Kosovo suggest a through-the-looking-glass quality to the UN protectorate. Where else does one find human rights activists arguing in favor of the imposition of martial law and reminiscing about the reign of Tito? Where else would one find the UN urging full cooperation with the Hague war crimes tribunal, even as it imprisons suspected terrorists for over a year without trial? Now, as Kosovo's majority Albanian population prepares for the election of "provisional institutions of self-government" on November 17 – and Serbia is welcomed back into the international community – the paper-thin compromise that saw the UN follow NATO into Kosovo is likely to become a permanent substitute for a solution.

The International Peace Academy (IPA) conducted interviews in Kosovo in the period June 20–July 2, 2001, and in the former Yugoslav Republic of Macedonia on July 2–3, 2001. Those interviewed included Albanian, Serb and Roma political leaders, senior officials from the UN and OSCE, representatives of local and international non-



UN flag outside UNMIK Government Buildings, Pristina

governmental organizations (NGOs), local media representatives, and others. As part of IPA's Project on Transitional Administrations, this report examines the particular difficulties of engaging in "state-building" activities where the final status of the territory under administration is unclear. In relation to Kosovo, this raises two particular sets of concerns in relation to Kosovo. First, what significance should be attributed to the elections scheduled for November 17? How will the ambiguous status of the bodies being constituted affect the long-term political stability of Kosovo and the rest of the region? Second, what obligations does the international community have in situations where it assumes political control of a territory for an undetermined period? In particular, to what extent should the international administration itself be accountable to the local population?

Box 1: State-building, nation-building, and transitional and interim administrations

The term "nation-building" is sometimes used to describe the operations considered in this project. "Nation-building", however, is a broad, often vague, and sometimes pejorative term. In the course of the 2000 US presidential campaign, Governor George W. Bush sometimes used it as a dismissive reference to the application of US military resources outside their traditional mandates. Within the United Nations, the term "peace-building" is generally preferred. In Secretary-General Boutros Boutros-Ghali's *An Agenda for Peace* (1992), this was said to include "reforming or strengthening governmental institutions"; by the time of his *Supplement to An Agenda for Peace* (1995), the essential goal was said to be "the creation of structures for the institutionalization of peace". Nevertheless, "peace-building" embraces a far broader range of activities than those particular operations under consideration here.

In this project, the term "state-building" is used to refer to extended international involvement (primarily, though not exclusively, through the United Nations) that goes beyond traditional peace-keeping and peace-building mandates, and is directed at developing the institutions of government by assuming some or all of those sovereign powers on a temporary basis. This highlights the linkage between recent events and earlier activities by the United Nations and its predecessor, the League of Nations, in exercising or supervising various forms of trusteeship over territory.

With regard to the operations themselves, there is a significant difference in terminology between the UN *Interim* Administration in Kosovo and the UN *Transitional* Administration in East Timor. The distinction is that Kosovo is not (technically, at least) in a state of transition. For the purposes of this study, however, the term "transitional administrations" will be used.

Six impossible things before breakfast

A measure of the speed with which the UN operation in Kosovo was established is the name itself. UN operations typically operate with an acronym, but “UNIAMIK” was dismissed as too much of a mouthful. “UNIAK” sounded like a cross between “eunuch” and “maniac” – associations judged unlikely to help the mission. “UNMIK” was the final choice, having the benefits of being short, punchy and clear. Only in English, however. Once the operation was on the ground, it was discovered that *anmik*, in the dialect of Albanian spoken in Kosovo, means “enemy”. No one within the UN was aware of the confusion until it was too late, at which time instructions went out to pronounce the acronym “oon-mik”.

UN Security Council resolution 1244 (1999) was adopted just hours after the last bomb was dropped in NATO’s Operation Allied Force. The resolution built upon principles adopted by the G-8 Foreign Ministers a month earlier, which in turn had been “elaborated” in a document finally agreed to by Belgrade. The military aspects authorized the deployment of KFOR – an international security presence with “substantial” NATO participation. Resolution 1244 also authorized an international civil presence in Kosovo, laced with the compromise language that was necessary to achieve consensus in New York. In the end, the resolution stated that UNMIK was to provide

an *interim administration* for Kosovo under which the people of Kosovo can enjoy *substantial autonomy within the Federal Republic of Yugoslavia*, and which will provide *transitional*



Hans Haekkerup, Special Representative of the Secretary-General



Tom Koenigs, Deputy Special Representative of the Secretary-General (Civil Administration)

administration while establishing and overseeing the development of *provisional democratic self-governing institutions* to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo. (Emphasis added.)

This created a near impossible mandate on the ground. Some UN officials report that Kouchner, head of the mission from July 1999 until January 2001, claimed to read the text of resolution 1244 (1999) twice every morning and still have no idea what “substantial autonomy” meant.

The central contradiction of UNMIK’s mandate is that it avoids taking a position on the key political question of Kosovo’s relationship to Serbia. With Milosevic in power, it was long an open secret within UNMIK that Kosovo would eventually be granted independence. Nevertheless, the authorizing resolutions and official statements continued to emphasize respect for the territorial integrity and political independence of the Federal Republic of Yugoslavia. Timothy Garton Ash referred to this at the time as “virginity and motherhood combined”. Every aspect of UNMIK’s role in Kosovo depends on the answer to this question, but it is generally acknowledged that the answer will be decided according to political considerations that have little or no relevance to what is happening in Kosovo.

In the wake of the October 2000 regime change in Belgrade, Yugoslavia increased cooperation with UNMIK, suggesting that some sort of autonomy arrangement might be possible within the Federal Republic, perhaps with Kosovo enjoying a status similar to that of Montenegro (if Montenegro does not itself

Box 2: State-building in Eastern Slavonia (Croatia)

The UN had undertaken temporary control of part of a state only a few years before UNMIK was established. Following Croatia's declaration of independence from the Socialist Federal Republic of Yugoslavia in 1991, three areas within Croatia in turn declared themselves independent of the new entity: the area surrounding the Krajina, western Slavonia, and eastern Slavonia. The first two areas were brought under Croatian control in 1995, but in response to international pressure the government abandoned plans to move into eastern Slavonia – the last Croatian region with a sizable Serbian community.

Following an agreement between Croatia and the Serbian authorities in eastern Slavonia, the Security Council established the United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) in January 1996. Its mandate was to supervise demilitarization and return of refugees, while establishing a temporary police force, assuming temporary control of public services and organizing elections. UNTAES was fully deployed in May 1996 and completed demilitarization in a month. Various development programs were undertaken in the following year, though there were few refugee returns. Incident-free elections were held in April 1997, with the newly formed Independent Democratic Serb Party (SDSS) winning an absolute majority in 11 of 28 municipalities. Following a military draw-down, UNTAES concluded its mandate on January 15, 1998, succeeded by a support group of 180 civilian police monitors.

Writing in 2001, force commander Johan Schoups observed that the relative success of the UNTAES operation could be partly explained by the very limited nature of its mandate. Crucially, it was based on a treaty that represented an unequivocal political resolution – peaceful reintegration into Croatia – to be achieved in a limited time. In addition, the military component was credible and unified, with broad rules of engagement (including the threat of NATO air power) to enforce the agreement if necessary. UNTAES also enjoyed relatively solid diplomatic support throughout preparation and implementation of its mandate, and broad support on the ground.

None of these factors was present in the far more troubled operation that was hastily arranged in Kosovo.

secede). The retreat from implicit acceptance of independence as inevitable has been confirmed by Hans Haekkerup, head of UNMIK since January 2001. Haekkerup is perceived as less in favor of independence than Kouchner, and has returned to a stricter interpretation of resolution 1244.

This has caused some anxiety within the Albanian population, but no one seriously believes that Kosovo will fall back under the jurisdiction of Belgrade. Most Kosovo Albanians look eagerly toward joining Europe – and are encouraged to do so, not least through the planned adoption of the Euro in January 2002 to replace the German Mark. Full membership of the European Union is unlikely anytime soon, of course. The most likely scenario is that Kosovo will remain an international protectorate of ambiguous status for some years to come.

In the course of drafting the framework for provisional self-government adopted in May 2001, these tensions put UNMIK officials in the odd position of having to resist Albanian attempts to include reference to the “will of the people”. Such a concept remains controversial in Kosovo

precisely because the one issue that exercises all parties – the final status of Kosovo – is the issue on which senior UN staff officially profess not to have an opinion. Given this political ambiguity, and given the fact that all political parties remain divided along ethnic lines (and that virtually no Serbs will vote in November), it bears asking why the UN and its partner the OSCE are so enthusiastic about staging elections at all.



Pristina looks towards Europe

Why elections, why now?

When questioned as to the purpose of the elections slated for November 17, UNMIK officials present a raft of different and sometimes inconsistent answers. Notably, traditional democratic principles of legitimacy and accountability in government are not first among their responses — in part because UNMIK itself is neither democratically legitimate nor accountable in any way to the local population. Instead, the attitude toward these elections reflects a tension that runs throughout the mission around the competing concerns of peace and security on the one hand, and the promotion of human rights and the rule of law on the other. For the most part, however, officials tend to use the language of democracy to justify ends based on a concern for peace and security.

First and foremost, UNMIK officials stress that elections provide a focus for non-violent political activity in Kosovo. With independence off the table, it is hoped that the election campaign and the transfer of limited civilian powers in Kosovo will keep the majority Albanian community engaged in a political process that is consistent with but not committed to independence. And, crucially, it is part of broader attempts to end the cycle of violence in both the short- and the longer-term. As a senior OSCE representative put it, “Elections will buy us three years of stability.”

Second, it is hoped that the structures being filled will encourage the emergence of politically moderate parties and credible leaders. Speaking in June 2001, Haekkerup said that a decision on the future status of Kosovo required a level of “political maturity” and readiness to compromise that the parties had not yet attained. The



Simon Chesterman with Sonki Nesot, Vice-President of the Roma Community of Kamenica Municipality



Fatmir Sejdiu, former General Secretary of the Democratic League of Kosovo (LDK) and LDK representative on the Joint Working Group on a Legal Framework for the Provisional Institutions of Self-Government in Kosovo

Constitutional Framework is specifically designed to require such compromises. A seven-member presidency of the Assembly will have control over procedure; it will include two members from each of the top two parties, one from the third party, as well as one representative from the Kosovo Serb community and one from a non-Serb minority group (comprising the Roma, Ashkali, Egyptian, Bosniac, Turkish, and Gorani communities). The government must include at least one Serb and one non-Serb minority representative in ministerial positions. The framework also provides for the appointment of a President of the Assembly, a Prime Minister, and, more controversially, a President of Kosovo.

These structures reflect the fact that politics in Kosovo continues to be fought strictly along ethnic lines. With the exception of the conflation of the Roma, Ashkali, and Egyptian (“RAE”) communities (comprising a total of perhaps three percent of Kosovo’s population), every active political party in Kosovo is ethnically “pure”. No one talks of reconciliation in Kosovo — on the second anniversary of UNMIK’s arrival in Kosovo, Haekkerup observed that the hatred that fuels interethnic violence “does not seem much diminished.” “A time will come for reconciliation between Albanians and Serbs,” says Fatmir Sejdiu, former General Secretary of the Democratic League of Kosovo (LDK). “But not yet.”

Quite apart from the implicit acceptance of ethnic politics, however, UNMIK’s stated hopes of inter- and intra-community compromise are not supported by the process that led to adoption of the framework. None of the local participants agreed to the text as finally adopted — a “compromise” that had to be forced on them



Hashim Thaci, President of the Democratic Party of Kosovo (PDK)

by Haekkerup. Nevertheless, the three main Albanian parties (Ibrahim Rugova's LDK, Ramush Haradinaj's Alliance for the Future of Kosovo (AAK), and, more reluctantly, Hashim Thaci's Democratic Party of Kosovo (PDK)) have agreed to take part in the elections, as will most of the non-Serb minorities. In this respect, the municipal elections held in October 2000 are rightly cited as an example of a successful election being held in Kosovo (albeit with negligible Serb participation), but do not provide much support for the view that compromises and power sharing will take place once representatives assume office. As the Secretary-General put it in a report to the Security Council in June 2001, coherent planning at the municipal level "remains hampered by a general lack of ability on the part of all political parties to organize their activities and engage in a constructive manner."

That being said, it is unlikely that there would be such international enthusiasm for elections were the pacifist Rugova not so popular. If, for example, Thaci's PDK were enjoying majority support, some officials concede that they would be more reticent about endorsing a process that put the former KLA leader in power.

A third purpose for the elections concerns the Kosovo Serb community. Virtually no one thinks that Serbs will participate in the elections in significant numbers — an OSCE democratization officer in a majority Serb area confesses that he would be shocked if they decided to vote. In fact, the decision is generally seen as one that will be made in Belgrade, from where most of the Kosovo Serbs continue to take their lead. The best hope of senior UN staff is that Belgrade will accept the inevitability of some form of partition and "gently turn its back" on the remaining Kosovo Serbs.

The constitutional framework may serve as a wedge in that relationship. In addition to the allocation of positions in the presidency and ministries to non-Albanians, the framework provides for guaranteed levels of community representation in the assembly. As the assembly treats all of Kosovo as a single electoral district and elects representatives on the basis of proportional representation, guaranteed representation should not be necessary. That is, if Serbs make up seven percent of the population of Kosovo, they should get seven seats in a free and fair election. Instead, the framework provides for an additional ten seats to go to Serb representatives, and a further ten to be divided among the other communities. Abedin Ferovic, a Bosniac law professor who was the "other communities" representative on the working group that drafted the framework says that he raised this question with the UN staff who had proposed the formula. He says that the provisions were included because the Serbs are not expected to vote in November's elections, but that this would guarantee them a minimum number of seats in order to encourage some sort of participation in the new structures. "As a consequence, other minorities get their seats," he observes with a shrug.

In addition, however, it is significant that the framework specifies that these seats will be distributed in proportion to the number of valid votes received by Serb parties in the election to the assembly. If only one party breaks ranks with the Kosovo Serb line and decides to encourage its constituents to vote, it will be virtually guaranteed ten seats in the assembly, as well as a position on the presidency. This, presumably intentionally, puts the Kosovo Serbs into something of a prisoner's



Abedin Ferovic, Minorities representative on the Joint Working Group on a Legal Framework for the Provisional Institutions of Self-Government in Kosovo

dilemma. The most likely intra-Serb division that will emerge — if not in this election, then perhaps at some later date — is between the Serbs living in enclaves such as Gracanica and those living in Northern Mitrovica (which borders Serbia proper). Such a split would increase the chances of an eventual partition of Kosovo itself, with the enclaves in the south remaining as cantons.

Ferovic and the Kosovo Albanian representatives on the working group agreed to the over-representation provisions, but pushed for an elected president of Kosovo and explicit reference to the “will of the people” in the text of the document that they proposed calling the “Provisional Constitution of Kosovo”. The framework now provides for a President of Kosovo appointed by the assembly (in addition to the President of the Assembly and a Prime Minister). But UNMIK could not accept text that stated that the purpose of the provisional institutions of self-government was to facilitate “the determination of Kosovo’s future status in conformity with the express will of the people”. Even such a guarded reference to the possibility of a referendum was regarded as unacceptable; the preamble now states that Kosovo’s future status will be determined “through a process at an appropriate future stage which shall, in accordance with UNSCR 1244 (1999), take full account of relevant factors including the will of the people”.

These aren’t quite truths that one would hold to be self-evident. But the reluctance to link Kosovo’s future status to the will of the people reflects a more general reluctance to involve Kosovo Albanians and other communities in the political process. In part, this stems from concerns about the delays that wider consultations would have posed, as well as the issues of “political

maturity” that the elections are intended to address. It bears asking, however, whether in the absence of such compromises on the structure of representation it is worth going through the substance of elections either.

This raises the fourth reason for elections: the absence of alternatives. In the words of one OSCE official, “elections are what we do”. Elections provide a quantifiable measure of the international community’s actions in Kosovo; in an area where significant progress seems unlikely in the short term, elections provide “instant gratification”. A senior US official in UNMIK says that elections are “about the only thing Washington gets excited about.” Such a transfer of authority also makes it possible to scale down the mission, satisfying domestic concerns for an “exit strategy”. Thus the UN and its partners remain committed to elections in territories under their control, even if they are destined to criticize the results after the fact. Bosnia marks the extreme case in this spectrum, where the High Representative has intervened to remove elected officials. It seems probable that a similar dynamic will follow elections in both Kosovo and East Timor. In East Timor, Fretilin is likely to assume power of a one-party state in elections to the constituent assembly on August 30, a situation that may encourage authoritarianism and much tut-tutting by the UN. In Kosovo, the UN seems likely to end up criticizing the Albanian political parties for continuing to fight for independence — a fight that NATO and others joined in 1999 but from which it has more recently resiled — and criticizing the Serb communities for continuing to regard Belgrade rather than Pristina as their capital — a position supported in all relevant official documents.

After Milosevic

Whatever Kosovo’s final status, the involvement of Serbs in the political process will remain an important measure of the international community’s activities in Kosovo. Apart from the formal recognition of Yugoslavian sovereignty over Kosovo, some international staff say they feel betrayed by the Kosovo Albanians who, when given the chance, are seen as having turned on their Serbian neighbors in a manner comparable to their own oppression.

The transfer of Slobodan Milosevic to The Hague has provoked complicated reactions among the various communities in Kosovo. Among the Serbs, many were angry at what was seen as a craven deal made under US



“Zone of Confidence,” Mitrovica



Momcilo Trajkovic, President of the Federal Republic of Yugoslavia Committee for Kosovo



Ramush Haradinaj, President of the Alliance for the Future of Kosovo (AAK)

pressure and the inducements of a \$1.3 billion package of aid and grants. Some Serbs, however, saw it as a necessary step in closing an unfortunate chapter in their history. Nevertheless, the date on which he was extradited – St Vitus’s Day – left a bitter taste in many mouths. Appropriately, perhaps, this was exactly twelve years after an inflammatory speech in Kosovo first raised Milosevic to national prominence. But that speech was made on the 600th anniversary of the Battle of Kosovo Polje, when Serb forces were slaughtered by their Turkish foe. It also marks the date on which a Serb assassin, Gavrilo Princip, assassinated Archduke Franz Ferdinand, sparking the First World War, and the date in 1948 that Stalin expelled Yugoslavia from the Communist Bloc. Such coincidences play into the conspiracy theories that are a daily staple in Serbia.

Complex emotions are at work within the Kosovo Albanian community also. On the one hand, many were pleased that Milosevic was going to be forced to answer for his actions in Kosovo. At the same time, however, some Albanians recognized that the new regime in Belgrade is attempting to draw a line between itself and the Milosevic era. And, the more Belgrade shirks off its pariah status, the less likely it is that the Kosovo Albanians will soon achieve their goal of formal independence.

One immediate consequence of Milosevic’s extradition was the collapse of the Yugoslav federal government. The extradition took place on the orders of Serbian Prime Minister Zoran Djindjic, while proceedings were still before the Federal Constitutional Court. This prompted criticism by Yugoslav President Vojislav Kostunica, and the resignation of the Yugoslav Prime Minister Zoran

Zizic and other members of his Montenegrin Socialist People’s Party. Ironically, it seems that Milosevic may have been the only thing holding the federation together. Now that his Montenegrin allies have fallen further from power, there is added support for Montenegro to secede from Yugoslavia. Milo Djukanovic, President of Montenegro, has been leading a push to remove the junior republic from what remains of Yugoslavia, a move opposed by the United States and others for fear that it would encourage a secessionist movement in Kosovo and in Republika Srpska in Bosnia. While there is speculation about what the final dissolution of Yugoslavia would mean for Kostunica (whose position as President of Yugoslavia would cease to exist), a further concern is the ongoing operation of Security Council resolution 1244. As it refers to the “sovereignty and territorial integrity of the Federal Republic of Yugoslavia” rather than Serbia, it is arguable that the final demise of the “South Slav” state would remove the formal hurdles to Kosovo’s independence.

Most stakeholders in Kosovo would prefer to avoid that argument. Veton Surroi, editor of the Kosovo daily *Koha Ditore*, writes of the “Taiwan scenario,” in which Kosovo, Montenegro and Serbia concentrate on developing the functioning of their respective states rather than on international recognition. Others prefer to use the example of Scotland – less for its limited devolution than for its location within Europe.

In fact, a better analogy is found much closer to Kosovo: Cyprus. UN peacekeepers were deployed in Cyprus in 1964, and since 1974 they have policed a line of partition brought about by Turkey’s occupation of the north of the island. A Turkish Republic of Northern

Cyprus was declared in 1983, but only Turkey has recognized this republic — the administration in the south remains recognized internationally as the legitimate Government of Cyprus. Security Council resolutions continue to call on all States to respect the sovereignty, independence and territorial integrity of Cyprus, and reaffirm the Council’s position that a settlement must be based on a State of Cyprus with “single sovereignty”. In June 1999, however, the Council requested the Secretary-General to invite the leaders of the two sides of the divided island to talks and spoke of a negotiation with “all issues on the table” and “full consideration of relevant United Nations resolutions and treaties” — language more acceptable to the Turkish Cypriots. In December 1999, the European Council stated that a political settlement to the Cyprus problem would facilitate accession to the European Union, but that it was not a “precondition” for entry.

Entry to the EU is unlikely to come soon to Kosovo, but the possibility is frequently used as a carrot to encourage a “European” approach to political life: “The way to Europe is not through ethnic separation but only, and I say *only*, through mutual tolerance,” Haekkerup recently warned Kosovars. As with Cyprus, moreover, the possibility of joining the EU is inspiring some creativity about the forms that a settlement enabling participation in the regional institution might take.

In the short term, however, Kosovo will stay as it is: an international protectorate with limited administrative powers devolved to the local population, and with an international military and civilian presence. In this respect, Bosnia remains the best analogy. Both Kosovo and Bosnia suffer from being governed by peace agreements that were aimed at stopping fighting rather



The ethnic divide, Mitrovica



Monument to a KLA/UCK fighter, Pristina

than consolidating peace, though Kosovo has the advantage of being a single political entity.

Sentence first — verdict afterwards?

The fact that UNMIK will remain in control of Kosovo for the foreseeable future raises the question of how it should govern. Within UNMIK, there is an increasing tension between those who regard respect for human rights and the rule of law as central to the institution-building aspect of UNMIK’s mandate, and those who see this as secondary to the over-riding concerns of peace and security. This is epitomized in the different approaches taken to the detention of persons under Executive Orders of the Special Representative of the Secretary-General (Haekkerup, and Kouchner before him).

The OSCE and the Ombudsperson in Kosovo have both issued reports criticizing UNMIK’s practice of holding arrested individuals in detention for extended periods of time before being brought before a judicial authority, and of extended detention prior to trial. Persons have also been held in continued detention despite a lawful order by a judicial authority to release them. The OSCE reports, for example, that a judge ordered the release of Shaban Beqiri and Xhemal Sejdiu in November 1999, but that they were nevertheless held in detention by order of the Commander of KFOR (a COMKFOR “hold”) until July 2000 and were brought to court in handcuffs.

The OSCE reports COMKFOR as arguing that its power to detain derives from resolution 1244, which gives KFOR

the responsibility of “ensuring public safety and order until the international civil presence can take responsibility for this task”. Two years into the mission, the *UNMIK News* argued that Kosovo still ranked as an “internationally-recognized emergency”. And, in such circumstances,

international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be presented to the court system.

Human rights law does provide for derogation from particular norms including the right to a fair trial, but this is generally limited to a time of “war or other public emergency threatening the life of the nation” and there must be some form of official notification of this situation. No such notification has been offered in Kosovo — apparently due to political reservations against admitting that Kosovo remains a “public emergency”. Rather, the view appears to be that a Chapter VII resolu-

tion adopted by the Security Council absolves the peacekeeping operation from certain human rights obligations. In any case, senior UNMIK personnel enjoy personal immunity, and there is no forum either in Kosovo or New York in which UNMIK’s actions might be challenged. In theory a complaint could be made through a report to the Security Council, but in practice such reports are written by the mission in the field. UNMIK officials have resisted moves to establish a more powerful ombudsperson with powers of investigation or a right of action against UNMIK. KFOR in turn is not subject even to UNMIK scrutiny.

One of the ironies of the current situation is that many of those who argue in favor of greater respect for human rights now argue that there should have been *less* respect for human rights at the start of the operation. Specifically, many international staff attribute the current difficulties in establishing UNMIK as a credible force for law and order to failures in the first weeks and months of the operation. General Wesley Clark writes that two days before KFOR entered Kosovo, one of the “measures of merit” he had established was to avoid

Box 3: What law?

Law and order in Kosovo was additionally compromised by uncertainty as to the laws in place in Kosovo upon UNMIK’s entry. The first UNMIK regulation established that the law in force prior to March 24, 1999 (the day on which NATO’s air campaign commenced) would apply, as long as this law was consistent with internationally recognized human rights standards and Security Council resolution 1244. The Albanian dominated judiciary that was put in place by UNMIK rejected this, however, stating that they would not apply “Serbian” law in Kosovo. Though they accepted federal laws such as the federal code of criminal procedure, the judges insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that these had been illegally revoked by Belgrade. (The judges nevertheless “borrowed” from the 1999 law to deal with cases involving crimes not covered in the 1989 Code, such as drug trafficking and war crimes.) In addition to destroying any hopes of Serb judges returning to office, this dispute greatly undermined the UN’s credibility — especially when it finally reversed its earlier decision in December 1999 and passed a regulation declaring that the laws in effect on March 22, 1989 would be the applicable law in Kosovo.

It became clear that the decision to apply the 1999 law had been a mistake, reportedly undertaken as a result of considerable political pressure from Russia to demonstrate Yugoslavia’s continuing sovereignty over Kosovo. An alternative approach, recommended in the Report of the Panel on UN Peace Operations (Brahimi Report), would be for the UN to impose a generic penal code and code of criminal procedure for the interim period. Such a code would be of particular use where the legal system itself is a source of political controversy, as it was in Kosovo.

UNMIK also had to reverse itself on the question of appointing international judges to oversee the legal system. Despite the resignation of Serb judges and concerns about ethnic bias and intimidation within the Albanian judiciary, UNMIK officials were reluctant to introduce international judges. A senior UN official reportedly responded to such a recommendation by stating: “This is not the Congo, you know.” By February 2000, a series of attacks against Serbs led to a regulation allowing Kouchner to appoint international judges to the district court in Mitrovica as an emergency measure. In May 2000 this was extended to every district court in Kosovo. International judges now serve as mentors and are broadly regarded as having a positive impact on the judiciary.

anarchy: “get all Serb forces out, stop any crimes of revenge or Serb ethnic cleansing”. Such orders, if they were made, were ineffective. Tim Judah reports coming across Albanians, including members of the KLA, looting and driving Serbs and Roma from their homes. When he approached KFOR soldiers who were watching this take place he was informed, “The orders are to let them plunder.”

The slow deployment of civilian police (CIVPOL) has affected almost every UN peace operation in which CIVPOL have been involved, and there is an increasing view among commentators that the faster deployment and greater resources of the military should be used in some capacity. The military are rightly reluctant to embrace law and order functions that are outside their expertise, but in many situations only the military will be in a position to exercise those functions. It is unlikely that the UN will soon be in a position where it has the capacity to deploy the necessary law and order “packages” comprising CIVPOL and mobile courts with a skeleton staff of lawyers and judges. In the meantime, future situations like Kosovo will present a choice



Pristina skyline

between increasing the initial role of the military and accepting a temporary law and order vacuum. As Kosovo shows, such a vacuum will quickly be filled by informal local arrangements that may undermine the credibility of the international presence when eventually deployed. By contrast, where KFOR adopted an aggressive but measured posture, violence tended to diminish.

Box 4: Law and order in East Timor

In the wake of the post-referendum violence in East Timor in September 1999, the Australian-led intervention force (INTERFET) had to decide how to respond to denunciations of alleged former militia. Such matters formally remained in the hands of the Indonesian police and judiciary, though this was on paper only. It was clear that this area would soon become the responsibility of UNTAET and an East Timorese judiciary, but these had yet to be established on the ground. INTERFET’s Security Council mandate was silent on its responsibility or authority to carry out arrests.

The Council resolution did, however, stress the individual responsibility of individuals committing violations of international humanitarian law and demand that they be brought to justice. INTERFET ultimately decided that its broad mandate to restore peace and security could encompass arrests of individuals accused of committing serious offences – failure to do so might encourage Timorese people to take the law into their own hands. INTERFET’s commander therefore issued a Detainee Ordinance, creating various categories of detainees. INTERFET troops were authorized to detain persons suspected of committing a serious offence prior to 20 September, and were required to deliver them to the Force Detention Center in Dili within 24 hours of the detention. If a detainee was held for more than 96 hours, he or she was provided the grounds for the detention, together with material considered by the commander of INTERFET as the basis for continuing detention. Defending Officers were available to assist the detainee to show why he or she should not be so held, and a number of detainees were released because of insufficiency of evidence. All detainees were handed over to the civil judiciary of UNTAET established on January 7, 2000.

Conclusion: All the King's horses and all the King's men

Just as generals are often accused of planning to re-fight their last war, so the United Nations experiments in state-building have reflected incremental learning. It is often said that Kosovo got the operation that should have been planned for Bosnia, and East Timor got that which should have been sent to Kosovo.

Ideally, such operations would be established after extensive preparation, with a clear political endpoint and a time-frame accepted by all parties. There should be sufficient time to plan, to obtain resources, to recruit and train appropriate staff, to establish partnerships with local actors, and to build political credibility. The operation's mandate should be flexible enough to accommodate to changing local conditions, and the leadership should be sensitive to the changing needs of local stakeholders. In reality, of course, such operations are likely to be established in situations of urgency, with limited time and resources, and in the absence of political certainty.

As Macedonia continues to smolder and Montenegro prepares to separate from Serbia, the international

community is showing an uncharacteristic reluctance to involve itself in the final acts of the death of Yugoslavia. The ineffective efforts in mid-2001 of NATO, the EU, and the US to forestall serious violence in Macedonia, including through a significant NATO preventive deployment, seem to confirm this disposition. The current interest in elections in Kosovo is driven, in large part, by the desire for measurable progress and an indication of when the mission will end. An April 2001 report by the UN Secretary-General on this topic was entitled "No exit without strategy"; it warned that the UN has too often withdrawn or dramatically altered a peacekeeping operation, only to see the situation remain unstable or sink into renewed violence. Unfortunately, the attitude of lead actors within the Security Council is too often "no strategy without an exit".

State-building after a war will always take years, perhaps decades, and it is disingenuous to suggest otherwise to domestic publics. Elections and limited devolution notwithstanding, the international community will remain in Kosovo and Bosnia for the foreseeable future, certainly with a strong military presence and with at least a supervisory civilian authority. This is an undesirable outcome of what NATO styles as humanitarian interventions, but it is better than all the alternatives.



Installation by the Balkan Sunflowers, Pristina

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