

Building a new state: the case of Kosovo
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“Kosovo is unique.” This mantra, in the period before and after Kosovo’s declaration of independence, provided the basis on which Kosovo’s international supporters justified addressing the independence of Kosovo without setting any precedents for other places.

Indeed, even ignoring the arguments made for Kosovo’s independence during the 1990s, and without addressing Serbia’s weak legal claim to Kosovo, Kosovo already operated *de facto* independently of Serbia and its theoretical integration into Serbia would have presented greater difficulties even if the Kosovars themselves had not been opposed. Kosovo institutions developed independently from Serbia, in a manner dissimilar from elsewhere in the former Yugoslavia. Thus, by 2008, the legal regime inside Kosovo not only had no continuity from what came before, but did not resemble it.

Furthermore, Kosovo had endured nine years of administration by the UN, under which it had built its own institutions, and its independence would come “supervised” by the international community acting as a guarantor. However, the case of Kosovo, representing the most recent state in Europe to achieve its independence, does provide lessons to apply in the case of other potential new European states.

A technical approach

Much discussion takes place with respect to whether specific peoples or territories have the right to independence, or, even if they have that right, whether they should in fact obtain it. Although often emotional and urgent for the stakeholders (both those in favor and those opposed), these discussions in practice normally take place in a theoretical or academic setting. Preparing the groundwork for independence, or any sort of state-building in the world today, requires a more mundane, even technical, approach.

This is especially true in the context of creating a new state in twenty-first century Europe. Any new European state would need – and want – to exist integrated within the European economic and political framework. All European states, inside or outside the European Union, are expected to conform to standards of democracy, the rule of law, and human rights embodied in international and European treaties and conventions. A new European state would achieve independence from its former state, not independence from the world. Therefore, a successful transition would ensure integration in European structures, which would directly impact expectations

other European partners would have on how the new state governs itself. Even if a newly-independent European state avoided joining – or approximating to – European structures, its citizens would still expect it to fulfill the same basic democratic principles.

Foremost among the requirements, the state must have legitimacy. Its own citizens must not only recognize its independence, but must also believe that the institutions which represent the interests of the state – even transitional institutions – do so legitimately. The state must receive sufficient international recognition. And it needs to reach at least a *de facto* accommodation with its now-neighbor, from whom it declared independence.

The process of building a new state must therefore involve broad participation of society. Although a certain degree of representation by a small core leadership is necessary to prevent political and constitutional processes from becoming unwieldy, these processes should remain transparent, and be subject to popular ratification. Ideally, especially in cases where minorities (often ethnic) loyal to the former state exist who may most vociferously oppose independence, the state-building process must reach out to them, to take their concerns into account. A democratic society today cannot simply expel such citizens, nor can it properly function by marginalizing them.

The applicability of Kosovo

The circumstances surrounding the birth of Kosovo, Europe's youngest state, are in many ways unique. However, the state-building exercise employed in Kosovo does provide lessons which could serve elsewhere. For this narrow purpose, it is necessary to disregard the history of Kosovo before 1999, starting instead from the blank slate of 1999, when Kosovo gradually developed its own institutional and legal system under the auspices of the United Nations. By the time it declared independence in 2008, Kosovo already had its own democratic structure, which it could add to, in order to establish sovereignty. This therefore distinguished Kosovo from many newly-independent states in the past, which either had no institutional structure at all, or had only governing institutions which had been created and often controlled by the former central state, or had to superimpose exiled or long-suspended governments or legal systems onto an existing reality.

Again, while the facts of Kosovo are unique, if new states do continue to form in Europe, in the absence of war and in the context of democracy, these states are likely to have existing democratic institutions, which may exercise varying degrees of autonomy under current constitutional arrangements, but which the new state could easily utilize as the core of its own sovereign institutions, pending its own constitutional reform process.

Institution-building in Kosovo, 1999-2008

In the context of the actual process of state-building, the history of Kosovo and of the grievances of Albanians who found themselves inside the former Yugoslavia become less relevant than the steps taken subsequent to Kosovo's liberation in 1999. Likewise, to a certain degree, so do international politics and diplomacy with respect to Kosovo's legal status, both in the period from 1999 until its declaration of independence in 2008, and subsequently.

The current framework for the Republic of Kosovo emerged in the aftermath of the Kosovo conflict upon the withdrawal of Serbian forces from the territory of Kosovo. As a result of international diplomacy, the UN found itself with the mandate to administer a territory for an undetermined duration, and without the benefit of a legitimate government within the territory from which the UN could succeed in authority or to which it could pass authority at the end of its mandate. Essentially, the UN took on the role of the government, and with that came the corresponding responsibilities.

The UN Department of Peacekeeping Operations lacked both experience and expertise. As such, the UN explicitly looked to share responsibilities and roles in Kosovo with other organizations which could contribute. Chapter VIII of the UN Charter foresaw a role for "regional arrangements" dealing with peace and security, and authorized the UN Security Council to utilize such regional arrangements for "enforcement action under its authority." In the European sphere, this meant primarily the North Atlantic Treaty Organization (NATO), the European Union (EU), and the Organization for Security and Cooperation in Europe (OSCE), each of which had its own role to play in post-conflict Kosovo. The UN High Commission for Refugees, numerous other UN agencies, and other international organizations such as the International Monetary Fund and the Council of Europe also played supporting roles.

The UN Security Council, through Resolution 1244, adopted on 10 June 1999, explicitly established the UN Interim Administration Mission in Kosovo (UNMIK) under Chapter VII of the UN Charter, which covers peace enforcement. However, the nature of UN Security Council Resolution 1244 demonstrated something quite broader, in authorizing the establishment of "an international civil presence in Kosovo in order to provide an interim administration."

Although authorized under Chapter VII of the UN Charter as a peace *enforcement* mission, UNMIK did not neatly fall within that framework. The concept of peace *keeping* had already emerged through several decades of UN practice, if not from any explicit model or arrangement set out in the UN Charter, falling somewhere between "peaceful settlement of disputes" under Chapter VI of the UN Charter and a peace enforcement mission under Chapter VII. UNMIK itself became in effect an even more hybrid mission, combining additional unusual elements, which further distinguished it from traditional peace *keeping* operations, and brought it more into a relatively recent category of peace *building* operations.

The concept of "International Trusteeship" from Chapter XII of the UN Charter also provided some legitimacy in effect, if not from any directly stated mandate. Meanwhile, the concept of trusteeship derived from the former League of Nations

mandates before the Second World War, where the League had mandated colonial powers to assume responsibility for territories seen as not yet able to govern themselves. However, a normal prerequisite for the UN to take on authorities within its field presence, generally under Chapter VI of the UN Charter with the consent of the host country, would arise in the form of a Status of Mission Agreement with the host country, strictly setting out what competences the UN would undertake. In the case of Kosovo, UNMIK itself took on the role of the host country, as the civil presence deployed in Kosovo upon the suspension of the authority of the former Yugoslavia under Security Council Resolution 1244. In this way, the UN invoked Chapter VII of the UN Charter to assert authority over the territory of Kosovo, to the exclusion of the former Yugoslavia (which retained nominal sovereignty), in order to delegate a mandate to its own Mission, which in turn included roles for other international organizations. This also led to the fundamental confusion of UNMIK attempting state-building without an agreed state.

UN Security Council Resolution 1244 set out eleven responsibilities for the mandate of UNMIK. These included “performing basic civilian administrative functions,” and “organizing and overseeing the development of” Kosovo’s own governing institutions, through explicitly “protecting and promoting human rights.”

The international administration of Kosovo therefore took on the role of the government, exercising administrative functions over the territory of Kosovo, but also having a mandate to ensure the creation of local governmental structures, without prejudice to the final status of Kosovo. The UN needed to create these local institutions, but at the same time UNMIK itself exercised ultimate authority in Kosovo. Therefore, UNMIK itself had the responsibility to ensure that the local institutions grew up within a human rights agenda and culture.

The OSCE, both by virtue of its own fundamental nature and because it had already operated throughout Kosovo prior to and during the conflict, formed a natural partner for the UN. The UN assigned to the OSCE the mandate for “institution-building” in Kosovo, which would encompass, among other things, promoting democracy, good governance and respect for human rights.

The very first piece of UNMIK legislation, UNMIK Regulation 1999/1, promulgated on 25 July 1999 but made retroactively applicable to the first day of UNMIK’s mandate on 10 June 1999, required that “all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards.” These “internationally recognized human rights standards” were elucidated in UNMIK Regulation 1999/24, citing the Universal Declaration on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, and six other international covenants and conventions. In this way, although Kosovo was not a party to any of these instruments, their contents became indirectly applicable in Kosovo. The Constitutional Framework for Provisional Self-Government in Kosovo, promulgated by UNMIK Regulation 2001/9 on 15 May 2001, incorporated these human rights standards further into the constitutional structure of Kosovo, binding the Kosovo authorities to observe them. This was important in a transitional setting, where

Kosovo could not become a signatory of these treaties and conventions, but wished to conform to them.

The UN also set out three phases for UNMIK: a period of direct administration, followed by local elections and transfer of limited competences, finally followed by full transfer of authority after a political settlement. The Constitutional Framework also delineated powers and responsibilities reserved to UNMIK, mostly connected to the exercise of sovereignty and ultimate authority, and otherwise set out the limits and parameters for Kosovo's "Provisional Institutions of Self-Government" (essentially the nascent executive and legislative branches of Kosovo's government) operating under UNMIK within the framework of UN Security Council Resolution 1244.

The OSCE's role differed from most components within UNMIK, in that, with only few limited exceptions, it did not exercise executive authority. The limited executive authority it did have came through the establishment of public institutions which ultimately fell within the competences which UNMIK could "transfer" to Kosovo's authorities. In these cases, the OSCE managed the respective institutions only until the Kosovo authorities had enacted the legislation necessary to assume local ownership. These institutions included the Kosovo Police Service School (later renamed the Kosovo Center for Public Safety Education and Development, taking on training responsibility for other public safety services in addition to the police), the Ombudsperson Institution of Kosovo, the Central Election Commission, the Independent Media Commission (managed by the OSCE as the Office of the Temporary Media Commissioner until the Kosovo legislation came into force), and the Kosovo Judicial Institute. Although created by the Government of Kosovo itself rather than by the OSCE, other independent oversight bodies including the Anti-Corruption Agency, the Police Inspectorate of Kosovo, and the Independent Oversight Board (for civil servants) all benefitted from input and support from the OSCE.

These institutions had direct roles in ensuring the functionality of democratic society, human rights, and the rule of law, through overseeing public safety and judicial training, overseeing elections, regulating media and ensuring freedom of expression in line with European standards, and providing a public human rights advocate in the form of the Ombudsperson. Constitutionally, these institutions remained outside the Provisional Institutions of Self-Government even as transferred authorities, and in many respects took over the role of international supervision in their respective fields, thus providing both continuity and sustainability within the future Kosovo structures.

In addition to establishing these public institutions, the OSCE also fulfilled its mandate by playing a role in such other projects as the founding of Radio-Television of Kosovo (the public broadcaster along a European model), as well as non-governmental organizations including the Kosovo Law Center (a public legal resource), the Criminal Defense Resource Center, the Press Council of Kosovo, and the Kosovo Media Institute. All of these organizations, once spun off from the OSCE's umbrella, could contribute to creating a sustainable democratic society in Kosovo, consistent with European standards encapsulated in human dimension commitments made by OSCE participating states.

Although UNMIK created the institutions of civil administration in Kosovo, the OSCE monitored and advised them. OSCE human rights monitors and advisors were present in every municipality in Kosovo, both working with the governmental authorities and with civil society. Within the institutions of central government, the OSCE advisors played substantive roles in assisting in the creation of a framework of good governance. Of particular note, OSCE advisors sat within most central ministries, where they could assist in the mainstreaming of a human rights agenda within ministerial policy and practice.

The OSCE mission produced countless reports on a range of human rights-related issues. However, unlike a human rights NGO, for example, the OSCE could benefit from working within the system. As a result, the OSCE had unhindered access to all public institutions in Kosovo, in fulfillment of its mandate, which facilitated information-gathering. Importantly, however, the OSCE acted as a partner of the institutions, not as an external critic, and therefore could quietly work alongside or from within the institutions to affect change and a human rights approach, without the need for critical reports or where critical reports might be seen as needlessly antagonistic or counter-productive. Reports could look at trends, and rather than merely voicing human rights violations could highlight improvements and provide detailed recommendations for action by the authorities.

To a certain extent, however, the OSCE approach brought a natural conflict with the rest of UNMIK. In that the OSCE did not hold executive authority, and was tasked to build Kosovo's democratic institutions and to carry out a human rights agenda, the OSCE could clash with UNMIK over issues where UNMIK held executive authority. These areas included both reserved powers, where UNMIK's administration itself might violate human rights, or through UNMIK's use of its overall authority in Kosovo to interfere with Kosovo institutions.

If the UN set up a mission to intervene in, and indeed take over implementation of, the internal matters of a UN member state based on the justification that sovereignty implied responsibilities to citizens which the former Yugoslavia had not fulfilled in Kosovo, then the UN itself should have the obligation to fulfill those responsibilities within the context of the administration it assumes over the territory over which it has assumed control. The OSCE pillar of UNMIK worked to assist building viable democratic institutions in Kosovo, but as long as the UN retained overall authority and carried out its ultimate executive, legislative, and judicial roles, then the work of the OSCE would naturally be frustrated.

As a UN peace keeping mission, UNMIK answered to the UN Department of Peacekeeping Operations in New York. However, assuming the authority to govern the territory of Kosovo, UNMIK would need to answer to the people it governed if it were to have any sort of democratic legitimacy. This created an inherent contradiction that UNMIK ultimately could not, by definition, reconcile. If the people of Kosovo viewed UNMIK's administration as effective, then it could have had some legitimacy in the short-term after the end of the conflict and for a determined or determinant transitional period. But as its mandate wore on, UNMIK had an increasingly harder task to justify its administration and to demonstrably govern Kosovo more effectively than Kosovo could govern itself.

In part to alleviate stagnation within UNMIK in 2002, the UN initiated a policy of “Standards before Status.” The concept was to establish and reaffirm fundamental standards of governance, which Kosovo could theoretically achieve without a defined status. As UNMIK transferred competences to Kosovo institutions, UNMIK would expect those Kosovo institutions to meet the necessary standards. Upon successful achievement of these standards, the issue of Kosovo’s status could be discussed and resolved. The UN Special Representative explained his proposal as both providing an exit strategy for UNMIK (which had no exit strategy) and an “entry strategy” into the European integration process. These standards were elaborated over the course of 2003 and a “Kosovo Standards Implementation Plan” produced on 31 March 2004. The fundamental problem with this concept, however, was that many of the standards required action by the UN itself as the holder of reserved powers, or action by the Republic of Serbia, or by other actors outside the control of the Kosovo institutions. Furthermore, the standards to be achieved were often not basic but rather set higher than many developed democracies had yet achieved. UNMIK ultimately phased out the concept completely in 2007 as no longer practical. In the meantime, in 2006, the Kosovo government had itself developed, together with the European Commission, a new “European Partnership Action Plan” geared towards European integration.

As Kosovo took on more and more executive competences, had an increasingly dynamic parliament, saw its judicial capacity improve, and had created a number of independent public institutions – either by assuming control of internationally-established ones or by starting its own – negotiations continued regarding Kosovo’s final status. Kosovo could continue its development regardless of progress on that front, and when the negotiations ultimately broke down, Kosovo declared independence with the structure of a state already in place.

Constitutional Process

From 2005-2007, the UN led a process intended to bring about a resolution of Kosovo’s final status. Kosovo assembled a “unity team,” including government and opposition parties, both at senior and working levels, to engage in the talks. While Serbia did not negotiate in good faith, Kosovo’s international backers encouraged Kosovo to make ample concessions. Ultimately, the UN process resulted in the “Comprehensive Proposal for the Kosovo Status Settlement” (known as the “Ahtisaari Plan” after chief mediator). The Ahtisaari Plan would have created an independent Kosovo bound by numerous conditions, especially with regards to Kosovo’s Serb minority and its relations with the Republic of Serbia. Serbia rejected this proposal outright. However, it became clear that if Kosovo wanted international support for its independence, it should unilaterally accept the conditions set out in the Ahtisaari Plan. So, after several months of more negotiations in a different format produced no other result acceptable to Serbia, Kosovo was on the verge of declaring independence.

In anticipation of independence, Kosovo began its own constitutional process. In this, it was openly supported by elements within the international community - primarily the United States, the European Union, and the OSCE. The United States maintained a large political influence Kosovo, and viewed its role in the process as ensuring that

the constitutional process would enshrine political consensus worked out among all parties under the auspices of the US Embassy. The European Union, which at that time assumed the UN-led negotiations on Kosovo's status would succeed and which expected to take on a leading role in Kosovo's post-independence European integration process, wished to ensure Kosovo's constitutional process would conform with its European perspectives. Because it further appeared that the EU would play the leading supervisory role in post-independence Kosovo, the EU also wished to ensure that Kosovo's constitutional framework would incorporate the compromises Kosovo had accepted in the course of negotiations with Serbia (whether or not Serbia made any reciprocal compromises) as embodied in the Ahtisaari Plan.

Finally, the OSCE justified its involvement based on its existing mandate to promote democracy, good governance, and human rights. While the OSCE could not endorse a specific outcome for Kosovo's status, the OSCE Mission in Kosovo took the view that if Kosovo planned to write a constitution, then the OSCE had an obligation to assist it to ensure democracy, good governance, and human rights. The OSCE role was also much more functional in terms of seeking practical solutions to the issues confronting the Constitutional Commission (whereas the Americans mostly cared only about the preservation of pre-agreed political consensus, and the Europeans essentially tried to cut-and-paste from the Ahtisaari Plan, which, even if they became binding, would not make for effective constitutional texts).

The Kosovars approached this constitutional process in a generally comprehensive and serious manner. Building on the lessons learned from the status negotiations process, a constitutional commission was established incorporating all political parties and representatives of civil society, with working groups (often chaired by representatives of opposition parties) focusing on individual chapters or themes. While working groups met in closed sessions, the commission did engage in public outreach, and drafts were published for comment and debate. The Kosovars intended to draft a document more along the lines of an American model (not in the sense of emulating the American constitutional system, but in the sense of drafting a constitution that established only the minimum-necessary framework to elaborate powers, with detail coming in the form of subsidiary legislation which would have to comply with the constitution), adding to this framework additional chapters to conform with European standards of fundamental human rights and freedoms, as well as any necessary provisions which would enable the Ahtisaari Plan.

Intervention from the EU, particularly its insistence on incorporating too much of the Ahtisaari Plan directly into the constitution, and the insertion of language that undermined the constitution's status as the highest law of the land, ultimately made the final draft somewhat unwieldy. But although the Kosovo constitution may not be a model constitution, it nevertheless serves its purpose as a document which has political legitimacy. Furthermore, as a testament to its political legitimacy, the bulk of the drafting took place in the period immediately ahead of Kosovo's general and municipal elections, which were clearly selecting the government that would have the honor of presiding over the declaration of Kosovo's independence.

On the other hand, there also existed a lack of real political engagement in Kosovo among the general population. Even those who exercised their right to vote found

themselves with a choice of political groups based more on personalities rather than political identities. The Americans attempted to fill this hole by getting political leadership from all main parties together to craft certain compromises on the structure of the future state. This then continued into the constitutional process in 2007. This process included all main political parties, including minorities (with the Serbs abstaining but communicating quietly via international intermediaries).

One advantage was that the constitution itself did not become a political document dominated by one party. Nevertheless, upon achieving independence, the parties were faced with the question of what issues they should then campaign on.

Albanian opposition to the state-building process

It is worth noting that there was not a complete power vacuum in Kosovo in June 1999, when the Serbian forces withdrew. Competing nascent indigenous Kosovo institutions did exist. On one hand, the parallel underground government of Kosovo which had existed in the 1990s could claim a degree of legitimacy, and had indeed run educational, health care, and other public welfare facilities serving Albanians in Kosovo who had been expelled from public life after 1989. On the other hand, the Kosovo Liberation Army had asserted control, especially within local *ad hoc* governments set up throughout the liberated areas. Neither of these two competing Kosovar Albanian groups initially accepted UN overlordship, but under pressure from international patrons and bowing to reality, both groups accommodated themselves to the new structures.

As a result, the Kosovo institutions built between 1999 and 2008 were mostly not indigenous. But they were run by Kosovars, and governments were selected based on free and fair elections. Therefore, in this sense, these transitional institutions were representative.

However, they were not comprehensive. Politics in Kosovo, similar to other transitional societies, remained personality-based rather than policy-based. The main political parties coalesced around their leaders. All of the main parties stood for independence, and most saw the need to demonstrate that they had good relations with the United States (and, to a much lesser extent, with the European Union). Beyond that, they looked like political parties in any transitional democracy. Voter turnout dropped to as low as 40% in the last elections immediately before independence, indicating a largely-disaffected electorate.

One political movement, *Vetëvendosje* (“Self-Determination”), emerged outside the party system and refused to participate in Kosovo institutions, seeing them as imposed by the international community rather than as indigenous. In this view, not only were the institutions of the new state illegitimate, but so were their concessions to the Serb minority.

Vetëvendosje rejected any negotiations with – or concessions to – Serbia. It rejected the Ahtisaari Plan outright, and then even more so when, after Serbia rejected the same plan and it had no legal validity, when all of the main Kosovo parties accepted

the Ahtisaari Plan unilaterally for Kosovo. Finally, *Vetëvendosje* rejected the constitutional process in 2007, believing that it also did not represent indigenous popular sentiment, but instead had begun based in part on consensus among the political elites brokered by the Americans, in part based on concessions to Serbia and a future EU-supervisory mission demanded by the European Union, and in part based on converting existed UN-created institutions into Kosovo institutions.

Vetëvendosje organized mass rallies and protests. During the constitutional process, it initially held more public meetings across Kosovo than the government, which then had to catch up (and, in turn, found its meetings flooded by activists from *Vetëvendosje*, who asked difficult questions during question-and-answer sessions, or who spread their own leaflets and information among attendees in order to divert the discussion). *Vetëvendosje* proved extremely effective at mobilizing public opinion and sympathy, if not support. Although *Vetëvendosje* was a non-violent movement, the UN regarded it as threatening the peace. This led to open confrontation in February 2007, when UN police opened fire on unarmed *Vetëvendosje* protestors (killing two, injuring eighty) and arrested *Vetëvendosje*'s leader, initially without charge and later essentially on charges of insulting the UN in contravention of UN regulations in place in Kosovo.

Since 2010, however, *Vetëvendosje* has been participating in elections and received 12.7% of the vote in the last legislative elections, good for third place. Although initially the group indicated it would not take its seats in the parliamentary assembly because it was unwilling to swear allegiance to Kosovo's Constitution, ultimately it did so. While *Vetëvendosje* continues to reject much of the framework of Kosovo's Constitution, it has now decided to operate from within the system, thus effectively recognizing the reality *ex post facto*. It is the only Albanian party in Kosovo that has opposed the manner in which the state-building process has been carried out. It is not clear, however, how many of the 12.7% of the voters who supported it in last year's elections did so for this reason, or merely because *Vetëvendosje* is the only Albanian political movement which makes policy-based opposition. *Vetëvendosje* has pointed out that even though turnout was higher in 2010, half of the electorate still did not vote, and therefore, in *Vetëvendosje*'s opinion, demonstrated opposition to the system and therefore passive support for *Vetëvendosje*. On the other hand, although there are indications of great disillusionment among the electorate, the passivity could just as easily mean acceptance of the constitutional order while waiting for a party – but not *Vetëvendosje* – to provide some political inspiration.

Because this opposition movement accepted nothing as legitimate – other than the concept of independence – they marginalized themselves from the transitional, political, and constitutional processes. However, like the Serbs, even they had to accept the reality of Kosovo institutions, and ultimately formed their own political movement, contested elections, and entered the parliamentary process in 2010. Such inclusive dialogue not only strengthens the legitimacy of the new state, but also of the state institutions necessary to develop Kosovo in a constructive and sustainable manner. In the end, state-building requires both compromise and resolution of contentious issues in order to achieve long-term stability.

Kosovo-Serb opposition and accommodation

Kosovo has an important, if small, number of minorities, including Serbs, Turks, Bosniaks (Serbo-Croatian-speaking Moslems), Gorani (Bulgarian-speaking Moslems), and three different groups of Gypsies (who call themselves Roma, Ashkali, and Egyptians). Their rights are guaranteed by law, and they have reserved seats in Kosovo's parliamentary assembly. With the exception of the Serbs, most recognize the independence of Kosovo and participate actively in Kosovo civil and public life.

The largest minority group, the Serbs, represent a special historical case, but even they make up no more than between 5-8% of the total population, depending on the estimate. About one third of the Serbs in Kosovo live in an overwhelmingly-Serb area in the north, bordering on Serbia. The remaining two-thirds of Kosovo's Serbs live scattered across the rest of the country. The northern Serbs have, due both to their large concentration and to their border with Serbia, successfully resisted inclusion in Kosovo's structures – including during the period of UN administration – and have created an essentially-lawless enclave for themselves. On the other hand, the Serbs living scattered across most of Kosovo have on the whole seen the need to be more pragmatic in their dealings with the Kosovo authorities, despite heavy pressure from Belgrade (exercised through official and unofficial Serbian government agents openly operating inside Kosovo) not to integrate in any way.

Thus, most of Kosovo's Serbs have needed to reach accommodation with Kosovo institutions. Serbs have a guaranteed over-representation in the parliamentary Assembly, and have formed part of coalition governments both before and after Kosovo's independence. In declaring independence, the Government of Kosovo unilaterally assumed for itself obligations, not just in terms of implementing European legal instruments that Kosovo cannot legally sign until formally recognized by the respective international bodies, but Kosovo also unilaterally adopted an independence plan proposed by UN negotiators but rejected by Serbia. This plan provided not only for special safeguards for Serbs in Kosovo, but also allowed these Serbs to maintain their direct links with Serbia.

In general, Serbs in Kosovo recognize that any democratic resolution of Kosovo's status would still leave them as a small minority in the territory. Despite heavy pressure from Belgrade to boycott Albanians and Kosovo institutions, most Serbs continued with their lives alongside their Albanian neighbors. This included abiding by Kosovo law, getting licenses and documents from Kosovo authorities, and selling their produce in the markets. The realistic politically-minded Serbs actively took part in Kosovo institutions, including the parliamentary Assembly and within coalition governments, where they have held ministerial posts both before and after Kosovo's declaration of independence. It is hard to get a sense of how representative these Serbs are, since voter turnout in Serb areas has generally been low due to calls from Belgrade to boycott (and active intimidation by agents of Serbia to discourage Serbs from voting). However, since most Serbs in Kosovo abstain from politics in general, and do indicate a willingness to just go about their lives even if they might prefer that Kosovo were part of Serbia, these Serb politicians are probably reasonably representative. Furthermore, by working within the Kosovo institutions to press for

Serbian rights and interests, and achieving effective results, they have increasingly gained the trust of Serbs scattered throughout the most of Kosovo.

In turn, the Kosovo parties (with the exception of *Vetëvendosje*) have generally demonstrated great tolerance and have been willing to recognize their difficult predicament (so, for example, Serbs serving as legislators and ministers in the Kosovo assembly and government were present in Pristina but absent during the vote on the Declaration of Independence, and did not use their right under applicable law relating to the interests of minorities to challenge this declaration). Kosovo Albanian civil society has also generally embraced a non-ethnic character for Kosovo. Even *Vetëvendosje* has not demonstrated anti-Serb tendencies, only tendencies which are anti-Serbia, and has opposed any special rights for minorities.

The international community has also heavily focused on ensuring the rights of Serbs. Thus, where many Serbs in Kosovo feel that Belgrade's politics have not made a positive difference in their lives, but who do not wish to openly support those Serb leaders who have actively cooperated with Kosovo institutions, the presence of the international community has allowed for additional dialogue and assurance that the concerns of Serbs in Kosovo would be met. On the other hand, the international community also dealt more often with Serb hard-liners (often in the service of Belgrade and sometimes not even from Kosovo) rather than average Serbs.

International checks

Although it can certainly be argued that it has been done incorrectly, the concept of "international supervision" itself does represent one intermediate option between immediate and delayed statehood. In the case of Kosovo, it allowed Kosovo to be governed from Pristina and not from Belgrade, until its institutions had matured sufficiently to declare independence. Also in the case of Kosovo, not only did these institutions not previously exist, but Kosovo had never had a tradition of democratic government, let alone democratic self-government. In the case of Kosovo starting in 1999, it is important to remember that in Kosovo they needed international supervision, in the sense that there was very little local expertise. This would not be the same everywhere.

In practice, there were serious flaws in the implementation of international administration. The UN administrators were often not capable, came from countries without European democratic traditions or experiences, and were prone to corruption. Where the UN either directly administered certain powers, or exercised its reserved powers in such a way as to prevent indigenous legal developments, there was indeed a lack of democratic legitimacy. The fact that the UN administration remained unaccountable to the people being governed – not only in that it was not elected, but that it indeed enjoyed immunity. The Kosovars were treated as second class. Since they did not share in the responsibility of government, they did not gain the responsibility that legitimate government entails. Furthermore, the electorate did not hold the Kosovo institutions as ultimately accountable. This meant that the parliamentary assembly could pass irresponsible legislation for political gain,

knowing that the UN would simply change it to make it appropriate, and the Kosovo politicians could then blame the UN for any resultant unpopular result.

If Kosovo's ultimate sovereignty had been established in 1999, with the UN exercising mandatory powers – even for an indefinite period – then there could have been real democratic development. Since the Kosovars would have had responsibility, the political parties would have had to coalesce around political positions and face the voters on policy. While not a fast development in transitional countries, at least it would have begun in 1999. Instead, with all major parties standing for independence and representing cadres surrounding leading personalities, there was in practice little democratic political development. Parties said they would place the achievement of independence first, but then they did not explain what sort of state they wanted to create after independence.

Where the former state has granted the new state independence, less need exists to legitimate the new state through its own effective government. The success or failure of the new authorities will, in those cases, remain a separate issue from that of the state itself. But where a new state has not come into creation through mutual consent of the former state, the institutions of the new state must demonstrate legitimacy. Thus, they need to show that they have the consent of the population, and that they can effectively govern the territory they claim. This provided a further reason for institution-building in Kosovo pending final status, and strengthened Kosovo's ultimate position when it did declare independence.

The presence of the International Civilian Office, as supervisor to Kosovo's independence, can on one hand undermine Kosovo's claim to full sovereignty. However, had Serbia agreed to the Ahtisaari Plan or some other settlement calling for retaining an international presence in Kosovo, this would be no less fatal because Serbia would have, in the process, recognized Kosovo and the temporary supervisory powers would be entered into through an instrument of international law.

As it happened, Serbia rejected the settlement proposal. Kosovo's international allies, however, still wanted Kosovo to respect the compromises it had made (even though it had received no reciprocal compromises from Serbia, and even though the settlement, once rejected by Serbia, was non-binding). Therefore, as a condition for recognition of Kosovo's independence, Kosovo had to undertake these commitments unilaterally. This included introducing appropriate provisions into Kosovo's constitution, and inviting a new international supervisory presence. The International Civilian Office has legal standing only within Kosovo, and based on the invitation of the Kosovo government (which cannot politically withdraw the invitation, although legally Kosovo could expel the international presence if it wished to suffer the political consequences that would result). In this sense, Kosovo remains sovereign, and the states which participate in the supervision of Kosovo's independence recognize Kosovo as sovereign.

Also in this sense, a continued international presence in Kosovo does not undermine Kosovo's claim of independence, but rather acts as a guarantor of its independence where the former power disputes that independence.

Brief comparative examples

Brief examples of other transitions serve for sake of contrast, to underscore the necessity for legitimacy in the state-building process.

Spain

Spain, of course, already had a state when Franco died. But the institutions it inherited from the Franco Regime lacked legitimacy. Nevertheless, because Spaniards generally wished to avoid a repetition of the violence and destruction of the 1930s, broad consensus existed to find another solution to transition to democracy. The legitimacy of the process therefore legitimized the transitional institutions, until a new constitution came into force and new democratic institutions could be constructed.

Spain was also not separating from another state, but nevertheless had to deal with its own regional minorities, such as the Catalans, who did not necessarily accept the legitimacy of the Spanish state. However, involving them in the constitutional and state-building process also ensured its legitimacy, and put off many of the questions regarding regional self-determination. The Spanish Constitution of 1978 ended up with 169 articles, which both regulate minutiae and sometimes contradict other articles in other sections, because the framers were eager to achieve political compromise. The success of the transition in Spain therefore emerged from the legitimacy of the process rather than the details. Spain's constitution, despite its flaws, was largely accepted.

However, it did not resolve many of the fundamental issues in the long term, including functional regional autonomy (let alone claims for regional self-determination, and the long-problematic Catalan Question in particular). Nevertheless, those issues are unlikely to provoke armed conflict, as they once were. Since a potential future Catalan state is less likely to emerge as a result of armed conflict, it is also less likely to have its existing public institutions – established under the Spanish constitution structure of 1978 – swept away. And it is less likely to see itself governed by international organizations pending some agreement on its independent status.

Nevertheless, in one way Catalonia can be said to resemble Kosovo, with the Spanish democracy in the post-Franco period playing the role of the United Nations in Kosovo. In other words, Catalonia's democratic institutions have developed under the auspices of Spain, and subject to the sovereignty of Spain. Depending on the manner in which Catalonia would achieve its independence, it would likely still see itself within the European context, and given European law would need to develop institutionally within that framework. Whereas in Kosovo "European integration" means looking to some future date, Catalonia is already integrated. While there is some legal debate as to whether Catalonia would necessarily become an EU member state, especially over Spain's objection, not to mention other bodies such as the Council of Europe and the OSCE, Catalan law and practice would need to conform. And, in this way, not only would the EU need to remain a partner in any state-building

process, but other organizations such as the OSCE and the Council of Europe could also add their expertise as they have in Kosovo, in non-executive advisory roles.

Palestinian Authority

The Palestinian Authority represents another set of challenges. In this case, broad support exists for the concept of a Palestinian state, and public institutions exist, but the process itself lacks legitimacy. The embryonic state, in the form of the Palestinian Authority, may exist, but is not recognized by the party which won the most votes in the last (and only) parliamentary elections and which effectively governs one portion of the Palestinian Authority's territory to the complete exclusion of the internationally-recognized government of the Palestinian Authority. The Palestinian Authority's own institutions exist in theory, but have not been fully constructed nor achieved functionality in reality, and do not provide the desired services even to the people who nominally recognize them, thus further undermining support. And although democracy means more than just holding elections, even the election process has been completely subordinated, both in the outcome of the prior parliamentary elections and in the fact that the Palestinian Authority has made no attempt to hold further elections after the mandates of the previous elections have expired.

Finally, the Palestinian Authority has decided to go to the United Nations to have independence conferred on it, without actually declaring independence itself – a fully backwards approach (normally a declaration of independence is followed by recognitions, leading to memberships in international organizations, as opposed to the reverse). In taking this approach, the Palestinian Authority seems to be following an example that international friends of Kosovo had advised Kosovo to take, but which had failed. After the process to have Kosovo's independence granted through the United Nations failed, the Kosovars took matters in their own hands and declared independence despite some international pressure not to; this led to recognition by a large number of countries, but not yet to membership in the United Nations. However, even without membership in the United Nations, Kosovo functions internally as an independent state and enjoys sufficient international recognition to function as one internationally as well.

Therefore, the example of the Palestinian Authority serves to demonstrate how *not* to achieve independence. Achieving independence – regardless of international recognition or membership in the United Nations – rather requires beginning with internal legitimacy and building functional state institutions.

Concluding general remarks

To relate to connect the Case of Kosovo with practical issues assessed and developed during the morning workshop on state-building:

Legitimacy of process, not only content

- *Guidelines agreed in advance*

- *Rupture, consensual break, evolution*
- *How much will need to be done*
- *How fast*

- *broad representation or consultation*
 - o *parties*
 - o *civil society*
 - o *language-group participation*
 - o *minorities (including indigenous and immigrant groups)*
 - o *any other groups likely to object*

Constitutional commission, limited membership but consultative process

Involvement of foreigner advisors?

- *In their institutional or individual capacity?*
- *Sufficient local expertise v. international legitimacy*

American-style or French-style constitution

International treaties and conventions

- *direct incorporation, or*
- *limited direct incorporation with constitutional supremacy, or*
- *non-automatic incorporation;*
- *also issue of pre-incorporation depending on transitional circumstance*

Institutions

- *what institutions do not exist now but are necessary*
- *what institutions exist now but need to be de-coupled from central state*
- *what institutions already exist indigenously*

Oversight

- *role of independent institutions*
- *role of international organizations (EU, OSCE, CoE...)*

And what about “neo-separatism?”