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External State Building in Kosovo –
from Humanitarian Intervention to State Creation

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Introduction

Kosovar Albanian Assembly has proclaimed independence from the Republic of Serbia on Sunday, 17 February 2008, thus making Kosovo the world's 193rd nation-state. The move followed the failure of the final round of negotiations between Pristina and Belgrade (led by the Troika of the EU, U.S. and Russia) to deliver a compromise on Kosovo's future status by the 10 December 2007 deadline. Almost four months after the Kosovo Declaration of Independence,¹ however, the UN member-states continue to be split over the question as to whether to recognize the newly minted state or not. On the one side, are the so-called friends of Kosovo, the USA, France and Britain, while on the other are the countries that are trying their best to spoil the independence party: Russia and, of course, Serbia. Despite strong support for Kosovo independence among major Western countries, voices of concern over Kosovo's final status have been also raised by many other countries that do not have any apparent interest in the conflict between Serbs and Kosovar Albanians. Thus, India, Spain, Slovakia, Greece, Romania, to name just a few, have all been apprehensive about the way Kosovo has become independent. Interestingly enough, major Muslim states (with the exception of Turkey) have thus far failed to support the Kosovo independence even though its population is almost exclusively Muslim (with the exception of a tiny Serbian Christian minority).²

This is not so surprising, after all. The proclamation of independence and, even more so, a full spectrum of discordant voices over Kosovo independence raises a series of very important questions: First, is the proclamation of Kosovo independence in accordance with the basic precepts of International Law (IL)? Also, has the politics of external state-building undermined the principles of self-determination and state sovereignty that are traditionally being understood in terms of the right of people to self-government? Finally, what is the ultimate objective of external state building projects: the support for the creation of an independent state out of potentially secessionist regions, or institution-building within the confines of an existing state, but under the principles of liberal democracy and human rights protection? In addition to these general questions, Kosovo independence also raises the question as to what it means for the stability of the entire region. What are the regional policy implications of the "final" solution to the Kosovo conflict in Serbia itself, but also in Bosnia and Macedonia? And, finally, is Kosovo independence truly a final solution to the conflict that rages the Balkans for the past twenty years, as the US and the EU representatives would like us to believe, or is it just a new chapter in the old book of mutually exclusive national-territorial claims in Kosovo and surrounding areas? All of these questions are intertwined, but the paper will focus more exclusively on the first basket of questions.

¹ For a full text of the declaration, see <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en>, accessed on 18 March, 2008.

² At this point, only 40 states (half of them members of the EU), have recognized the independence of Kosovo. This is certainly disappointing from the perspective of the USA and the EU. American and European officials were hoping for a snowball effect that thus far has not materialized. Accordingly, the USA and the EU are currently trying to persuade Middle Eastern and other Muslim states to support Kosovo independence. Their objective is to have half of the UN members recognize Kosovo by September 2008 (before the annual meeting of the General Assembly of the UN), which will make Kosovo effectively *de facto* independent, if not *de jure*. See Intervju sa Piterom Fejtom, *Vecernje Novosti*. Web: <http://novosti.co.yu>. Accessed on 11 March, 2008.

From Humanitarian Intervention to R2P

It is hard to argue with the oft-repeated view that Kosovo has always been subject(ed) to two irreconcilable claims to sovereignty. On one side, Albanians perceive Kosova as the birthplace of modern Albanian nationalism, only left out of Albania because of Serbian occupation in 1912. On the other, Serbs view Kosovo as the crucible of Serbian nationhood, justly liberated and reintegrated with Serbia in 1912 after five centuries under the Ottoman Turkish “yoke.”³ In addition, in the past ten years we have witnessed the armed Serbian-Albanian conflict in Kosovo in 1998, the NATO military air raids against Serbia in March-June 1999, Serbian efforts at ethnic cleansing of Kosovo Albanians during the NATO military intervention and reversed ethnic cleansing of local Serbs and Roma population from Kosovo by local Albanians immediately after the intervention,⁴ and the list goes on... It would seem that neither side leaves space for the existence of the other in the region; each being a mirror image of the other. Kosovo, or Kosova (in Albanian transliteration), could be either Serbian or Albanian, but never both.⁵

The “last” stage in this long saga started on 10 June 1999, when the Security Council adopted the Resolution 1244. Its main effects were to: 1. place Kosovo under interim UN administration (UNMIK), 2. authorize a NATO led peacekeeping force in the province (the so-called Kosovo Force, KFOR), 3. establish provisional institutions of local self-government (PISG), 4. authorize UN to start negotiating process regarding Kosovo future status (under the auspices of the UN Special Envoy and former Finish President Martii Ahtasaari, and 5. reaffirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (later on, its successor state, Serbia), as set out in the 1975 Helsinki Final Act (allowing only for mutually agreed and peaceful changes of borders) and the Annex Two of the Resolution that defines the Kosovo status process and takes full account of

³ Kosovo has become part of Serbia as the result of the Balkan wars in 1912/13, when Serbian forces took control of the formerly Ottoman province. In Serbian historiography, the event is celebrated as the liberation of the “sacred Serbian land” or the Serbian reconquista, while in the Albanian accounts it is presented as the occupation of the Albanian historic territory that was already at that time mostly populated by Albanians. International peace treaties of London and Bucharest, which ended the first and second Balkan wars in May and July 1913, confirmed Serbia's new borders, which included the present-day Kosovo. During WWI, this territory was not under Serbian control. However, the international community (or the great powers of the day) recognized Kosovo to be a legitimate part of Serbia after WWI during the Paris Peace Conference. Or more accurately, Kosovo became a legitimate part of the Kingdom of Serbs, Croats and Slovenes, since at that time Serbia has already become fused into a new state that, as of 1928, became known as the Kingdom of Yugoslavia. For an overview of Kosovo history, see: Noel Malcolm, *Kosovo: A Short History* (New York: New York University Press, 1998); and Miranda Vickers, *Between Serb and Albanian: History of Kosovo* (New York: Columbia University Press, 1998).

⁴ For an excellent overview of the NATO intervention and its aftermath, see Florian Bieber and Zidas Daskalovski (eds.), *Understanding the War in Kosovo* (London: Frank Cass Publishers, 2003).

⁵ On similarities of Serbian and Albanian national discourses (or in a more old-fashioned terminology, nationalist rhetoric), see Zidas Daskalovski, “Claims to Kosovo: Nationalism and Self-Determination,” in *Understanding the War in Kosovo*, eds. Florian Bieber and Zidas Daskalovski (London: Frank Cass Publishers, 2003), 13-30; and Lene Kuhle and Carsten Bagge Laustsen, “The Kosovo Myth: Nationalism and Revenge,” in *Kosovo between War and Peace*, eds. Tonny Brems Knudsen and Carsten Bagge Laustsen (London and New York: Routledge, Taylor and Francis Group, 2006), 19-36. Vjeran Pavlakovic and Sabrina Petra Ramet, on the other side, emphasize ideological differences between the two. See their “Albanian and Serb Rivalry in Kosovo,” in *De Facto States*, eds. Tozun Bahcheli, Bary Bartmann and Henry Srebrnik (London and New York: Routledge, 2004), 74-101.

the Rambouillet accords that were rejected by the Serbian delegation prior to the NATO bombing campaign. The Resolution also calls for the safe return of refugees and for the disarmament of the Kosovo Liberation Army⁶

What are the achievements of the Resolution so far? The first immediate “achievement” of the Resolution was in legitimizing the NATO bombing campaign against another sovereign member state *ex post facto*. Previously, the US and Britain, as the main proponents of the military action against Serbia (at that time still in federation with Montenegro), have bypassed the UN Security Council, fearing the paralysis of the UNSC (read, due to the possible threat of the Russian veto). This, however, made the military intervention illegal from the perspective of IL. Still, one should not forget that those were also the years of “triumphant liberal interventionism” preceding its blunders in Iraq and Afghanistan. So, despite its illegality, the general mood in western governments was that the NATO action was legitimate in principle.⁷ After all, its ultimate purpose has been not to challenge the basic foundation block of IL – state sovereignty, but to halt repression and ethnic cleansing of local Albanian population. Once the situation returns to normal, the state under attack (that will in the process somehow turn into a tolerant democratic state) will resume full control over its territory; in this case, Serbia over Kosovo. Whether the military intervention was successful in halting ethnic cleansing is a moot point, for, even though ethnic cleansing of local Albanians was reversed, close to one hundred thousand local Serbian and Roma population was not so lucky. Even more so, the reversed cleansing happened during the NATO watch; that is when the NATO troops were already situated in the province, thus allowing permanent alterations in the demographic picture of Kosovo.⁸ Nevertheless, on the question of the sovereignty of Serbia over Kosovo, the American officials were remarkably clear. Throughout this period, there was not one public statement of any US official that could be interpreted that the ultimate objective of the NATO intervention was permanently to alter the borders of Serbia. And, as we have seen, this sentiment has also found its place in the very text of the UNSC Resolution 1244.

The NATO bombing campaign and the UNSC Resolution 1244 have also sparked debate over the issue whether humanitarian intervention can be perceived as possibly the new principle of conduct in IR and in IL.⁹ Not surprisingly, the general consensus among

⁶ See the full text of the UNSCR 1244 on the following weblink:

<http://www.unmikonline.org/press/reports/N9917289.pdf>. Accessed on 11 March, 2008.

⁷ See Part III on the NATO intervention in Yugoslavia and Kosovo in Bieber and Daskalovski, *Understanding the War in Kosovo*.

⁸ At one point, during 77 days of NATO bombing campaign, there were more than 800.000 Kosovar Albanians expelled from the province to neighboring Albania, Macedonia and Montenegro. Most of them were expelled after the bombing campaign has already started rather than before, thus making US government’s claims of the need to halt ethnic cleansing rather dubious. Nevertheless, as Zivorad Kovacevic points out, Mr. Milosevic’s government has clearly prepared plan of ethnic cleansing of local Albanian population in cases of “emergency.” There is simply no other way to understand why the Serbian Army has not engaged in fighting the Albanian Liberation Army in Kosovo, but instead the entire world witnessed mass expulsion of Kosovo Albanians. Hence, the American arguments that Mr. Milosevic could not be trusted proved prophetic, but only in hindsight. See, Zivorad Kovacevic, *Amerika i raspad Jugoslavije* (Beograd: Filip Visnjic, 2007), 275-375.

⁹ On the development of the concept and practice of military humanitarian intervention in the 1990s, see Thomas G. Weiss, *Humanitarian Intervention* (Cambridge: Polity Press, 2007); Simon Chesterman, *Just*

NATO countries has been that in situations of humanitarian catastrophe, the international community (or those, who self-appointed themselves as guardians of the international order; the NATO in the case of Kosovo) have moral responsibility to act even though it means undermining the principle of equality of all sovereign states. Given the controversial nature of such claims in support of morality of humanitarian intervention, two leading scholars in the field of IL, Bruno Simma and Antonio Cassese, made their views public on the legality of the entire endeavour. According to Simma, IL does not allow for “threat or use of armed forces” against the states committing breaches of human rights. The only exception is in the case of genocide, which did not take place in Kosovo.¹⁰ Still, Simma is fully aware that there are situations of grave humanitarian crises (Rwanda, Srebrenica in Bosnia) in which something has to be done, particularly in the case of a passive UNSC. However, rather than being in favour of the blanket legitimization of humanitarian intervention as a new branch of IL, his response is much more cautious. For, Simma advocates a case-by-case approach: “a careful assessment will have to be made of how such illegality [unauthorised military intervention] weighs against all the circumstances of a particular concrete case”... and that the efforts should be “as close to the law” as possible. In the case of Kosovo, Simma argues that there was a “thin red line” dividing NATO intervention from illegality, but that at the same time “we should not set new standards only to do the right thing in a single case,” since “hard cases make bad law.”¹¹

Cassese, on his part, is clear that the intervention was illegal from the perspective of IL, but that in the near future this may not be the case anymore. He sets up six conditions that will align humanitarian intervention to new political realities of the world after the end of the Cold War. These are: 1. the humanitarian crisis amounts to the crimes against humanity (a standard of lower magnitude as compared to genocide); 2. the state itself is unable to protect the population, or is itself a perpetrator of crimes; 3. the UNSC is paralyzed (under the threat of veto); 4. peace efforts must precede any threat of force or military action (last resort clause); 5. the intervention cannot be done by a “single hegemonic power [that is, only by the USA or, hypothetically speaking, Russia, or in the future, liberal-democratic China];” and most importantly, 6. the purpose of the intervention is to stop the atrocities and restore respect for human rights, “not for any goal going beyond this limited purpose [such as self-determination].”¹² Hence Cassese offers evolutionary understanding of IL that, in principle, allows realignment of IL with post-Cold War international realities and thus can be used to justify not only the NATO intervention in Kosovo *ex post facto* but also humanitarian intervention in general.¹³

War or Just Peace? Humanitarian Intervention and International Law (Oxford: Oxford University Press, 2002); and Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

¹⁰ See Bruno Simma, *NATO, the UN and the Use of Force, Legal Aspects*, *European Journal of International Law*, No 10 (1999): 1-22.

¹¹ Simma, 23.

¹² *Qt. in Srdjan Cvijic, Self-Determination as a Challenge to the Legitimacy of Humanitarian Intervention: the Case of Kosovo*, *German Law Journal*, 8.2 (2007): 68.

¹³ In the light of Kosovo independence, however, the NATO intervention looks less “just” from the perspective of Cassese’s sixth criterion.

A further elaboration of Cassese's evolutionary logic in the context of the development of the doctrine of humanitarian intervention represents the precedent-setting Report of the International Commission on Intervention and State Sovereignty (ICISS).¹⁴ In nutshell, the Report redefines the very term of "sovereignty." Rather than being understood solely in terms of the right discourse, the state practices should be perceived/evaluated/judged from the perspective of the principle of responsibility to its citizens' needs and rights. In other words, a dual concept of sovereignty is being introduced allowing for the interplay between the state and individual sovereignty. In the cases of humanitarian catastrophes, when a state, in the words of the former Chair of the Commission, Gareth Evans, "abdicates that responsibility – through their incapacity or ill-will – [such a responsibility] shifts to the wider international community. ... It is not a matter of any state having the 'right to intervention;' the issue is rather the right of every man, woman and child threatened by the horror of mass violence to be protected and ultimately rescued by a responsible international community."¹⁵ Also the authors of the Report have changed potentially divisive term of the right to "humanitarian intervention" to the catchy phrase – "responsibility to protect (R2P)," which in itself incorporates three Rs: responsibility to prevent, react and rebuild societies after the intervention. Yet another recommendation of the Report has been in leaving open the possibility that, under certain circumstances, humanitarian intervention should not be totally dependent on procedural rules as set up in the UN Charter (Chapter VII).¹⁶

A careful reading of the Report, however, once more shows the effort to fine-tune a balance between the right to state sovereignty and the right to protect (based on the urgent need to prevent or stop a humanitarian catastrophe):

...the responsibility to protect is fundamentally a principle designed to respond to threats to human life, and not a tool for achieving political goals such as greater political autonomy, self-determination, or independence for particular groups within the country (though these underlying issues may well be related to the humanitarian concerns that prompted military intervention). The intervention itself should not become the basis for further separatist claims.¹⁷

Hence, on balance, the ICISS's stand could be interpreted to be in favour of NATO intervention as a legitimate action as long as its ultimate objective is not undermining the territorial integrity of FR of Yugoslavia. In similar fashion, the UNSC Resolution 1244

¹⁴ The International Commission was established by the Government of Canada in September 2000 to respond to the United Nations Secretary-General Kofi Annan's report to the 2000 General Assembly, when he challenged the international community "to try to forge consensus, once and for all, around the basic questions of principle and process involved: when should intervention occur, under whose authority, and how." For the background information on the work of the Commission, and the full text of the Report on the *Responsibility to Protect* (2001), see: <http://www.iciss.ca/menu-en.asp>.

¹⁵ See, Forward to Weis, *Humanitarian Intervention*, ix-x.

¹⁶ For an excellent overview of the ICISS's development of the concept of "responsibility to protect," see Philip Cunliffe, "Sovereignty and the Politics of Responsibility," in Christopher Bickerton, Philip Cunliffe and Alexander Gourevitch (eds), *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: University College London Press, 2007), 39-57.

¹⁷ *The Responsibility to Protect*, 43. Similar cautious attitude towards the legitimate objectives of R2P found the way in the document of the 2005 World Summit, celebrating 60 years of the UN. In fact, the Summit offered a more restrictive reading of the ICISS's R2P by linking it firmly to the UN Charter procedures, urging Weis to call it R2P Lite. See, Weis, 112-118.

objectives towards peace and society building in the region were fully in line with the R2P doctrine, particularly its emphasizing the responsibility to rebuild societies under international governance. However, whatever side one takes in the debate over legality of humanitarian intervention in Kosovo, the NATO intervention effectively suspended the Serbian sovereignty over Kosovo, with the exception of a more indirect influence on the northern chunk of Kosovo, where most of the remaining Kosovar Serbs are situated (15% of Kosovo territory). Furthermore, despite its nominal support for the territorial integrity of Serbia, the 1244 UN Resolution allowed/legitimized for such unprecedented development to take place. But, on its own, neither intervention nor the UN Resolution alone could not justify such development, nor the justification for such an outcome could be found in the ICISS's R2P document and the following UN documents further elaborating on the R2P doctrine.

The answer lies primarily in the American and the EU's change of policy on Kosovo after Albanian riots on March 2004. Brussels and Washington officials interpreted mass anti-Serbian demonstrations as a warning to the UN representatives in the province that Kosovo could never be integrated into Serbia again and that democratization process should take backstage until the question of the province's final status is resolved.¹⁸ Arguments to support a change of heart were readily available to them. A growing number of NGOs and western policy makers involved in Kosovo were already at that time operating from the perspective that R2P should not be interpreted in a restrictive manner that posits the principle of sovereignty as superior to the right to self-determination. The most vociferous in that context was one of the most influential NGOs in the region, International Crisis Group (ICG). Authors affiliated with ICG left no doubt that the right to self-determination is a quintessential human right and as such it can and has to take precedence over the state sovereignty principle. Also, if such a state lacks capacity to govern society, it is the responsibility of the international community to help rebuild such a state. In other words, analysts close to ICG argued that such a state should gradually earn sovereignty until it is deemed capable to govern itself.¹⁹ In the following section I will elaborate on both, traditional legal thinking on the question of state recognition and self-determination, but also the ICG's concept of "earned sovereignty" and how it relates to/or undermines our traditional understanding of the concept of state sovereignty.

The Right to Self-Determination and Earned Sovereignty

¹⁸ Tensions between two communities exploded in March 2004 in Kosovo, with Albanian rioters targeting the Serb population and UNMIK. They started as the result of the unfounded allegations of Serbs drowning Albanian children. Fighting spread quickly in various parts of Kosovo, particularly in the split town of Mitrovica, when Albanians tried to enter the Serbian part of the city. After two days of Kosovo-wide riots, 19 people were killed and 900 wounded. Also, a great number of Serbian monasteries have been burned down. The responses from NATO forces (KFOR) and UNMIK were disorganised. Their credibility has never been fully recovered amongst local Serbs.

¹⁹ For information pertaining to the work of the International Crisis Group, see their website: <http://www.crisisgroup.org/home/index.cfm>. President of the ICG is the former Australian Foreign Minister and Chair of ICISS, Gareth Evans. Given his involvement in both of these organizations, ICISS and ICG, Mr. Evans should be considered instrumental in interpreting R2P in terms of the concept of shared/earned sovereignty.

In IL, the principle of self-determination is usually perceived in a twofold sense: first, as the right of a nation to attain statehood, and secondly, as a general right to political autonomy. Both variants are concerned with the relationship between the nation and the state, but at different levels. The right of nations to statehood incorporates right to secession and is a powerful claim that can de-legitimize every multinational state on the basis of the nationality principle. Political autonomy, however, may not infringe upon the external state borders, serving rather to legitimize national minority claims for some form of self-administration and free development of their (sub)cultures within the dominant societal culture of a multinational state. No wonder then that the UN has opted to support the so-called internal right to self-determination, incorporating various forms of territorial and political autonomy, rather than giving credence to a more disruptive right to secession. Thus, the 1970 UN Declaration regarding the right of secession, for example, makes clear that the UN opposes “any action aimed at the partial or total disruption of the national unity and territorial integrity of any other states or country.”²⁰

Even when the world has seen the birth of more than twenty states following the dissolution of the former Soviet Union and Yugoslavia, nothing changed in regards to the international understanding of the question of self-determination. In response to the potential hazards of the violent solution of the Soviet Union, the U.S. and the EU at first emphasized its territorial integrity. However, once it became clear that the dissolution of the Soviet Union was inevitable, they responded by their strong support for the basic principle of the 1975 Helsinki Act, which allows for a formal agreement for independence and changes in territorial borders so long as it was based on the consent of all those concerned.²¹ Given that the dissolution of the Soviet Union was formally accomplished with the consent of all its constituent parts, the internal boundaries of the former constituent republics were simply recognized as the international boundaries of the new successor states.²² In other words, the dissolution of the Soviet Union has only confirmed the Helsinki Act (and major UN documents) in favour of the territorial principle against the ethnic right to self-determination.

The U.S. and the European Community responded in similar fashion to the crises in Yugoslavia in 1990-1991. Once the dissolution of the country appeared to be inevitable, the IC pushed for the maintenance of internal boundaries and refused to accept changes to frontiers by non-peaceful means.²³ In response to the crisis, the EU Commission (the so-called Badinter Commission) was asked to rule regarding the validity of secessions from Yugoslavia. The Commission declared Yugoslavia to be a federation in the process of dissolution – a process that permitted the constituent republics to secede intact, incorporating their minority groups into a newly formed independent state. As a result, both the U.S. and the European Community eventually recognized the constituent republics. Overall, the U.S. and European Community’s response to the dissolution of the Soviet Union and Yugoslavia was principled, as they tried to find a legal means to justify

²⁰ Alexis Heraclides, *The Self-Determination of Minorities in International Politics*, (New York: Routledge, 1991) 21.

²¹ Thomas Musgrave, *Self-Determination and National Minorities*, (New York: Oxford University Press, 1997) 111.

²² Musgrave, 111.

²³ Musgrave, 116. For a detailed evaluation of the European approaches to the disintegration of Yugoslavia, see Peter Radan, *The Break-Up of Yugoslavia and International Law* (London: Routledge, 2002).

the creation of new states that will, at the same time, not lead to the emergence of a legal precedence in regards to the right to secession. The principle of mutual consent (in the case of the Soviet Union) and the principle of inviolability of the territorial borders of the formerly constituent republics of Yugoslavia and the Soviet Union (in the jargon of IL, *uti possidetis* principle) have once more confirmed that the territorial integrity is superior to the external right to self-determination.

This also explains why Kosovo (or Chechnya's appeal to recognition later in January 1995) was not granted independence in 1992 by the major European countries. In fact, the Badinter Commission openly rejected to discuss the question of Kosovo independence, on the grounds that its status was one of the autonomous regions within Serbia (the other one being Vojvodina), rather than a constitutive republic of the former Yugoslavia.²⁴ Still, in one respect, the recognition of the formerly constituent republics of the Soviet Union and Yugoslavia went beyond the Helsinki Act. If the external right to self-determination (secession) has been rejected, the IC (that is, the USA and the EU) fully recognized and demanded the implementation of the guarantees of the minority rights protection (various forms of language, religion and cultural protection, including, in some case, various forms of territorial autonomy), as a necessary precondition for the newly emerging states to be fully accepted as sovereign members of the IC.²⁵

And yet, both the USA and EU officials emerged in the past four years as the staunchest supporters of Kosovo independence. Their official statements do not provide, however, good arguments explaining Kosovo "uniqueness,"²⁶ or why would the US and the EU apparently contradict the international norms in regards to the primacy of state sovereignty over external self-determination. In fact, the most elaborate interpretation of the US support for independence of Kosovo has been written a few years before the very act of independence and could be found in the International Crisis Group's working papers on Kosovo that are based on a consistent application of the concept of "earned sovereignty." The following pages draw heavily on the ICG's working papers, as well as the works by James Hooper and Paul Williams who, in their articles on "earned sovereignty" have offered the most elaborate defence of the concept as a "conflict resolution approach," whose application in Kosovo has effectively paved the way for the US and EU officials to argue that independence is legitimate and in accordance with IL.²⁷

Hooper and Williams identify three core elements in their conflict resolution approach to earned sovereignty: shared sovereignty, institution building and determination of the final status of the sub-state unit in question. The underlying rationale uniting all three core

²⁴ See Caplan, 95-146.

²⁵ See, Hurst Hannum, "Self-Determination in the Twenty-First Century," in *Negotiating Self-Determination*, eds. Hurst Hannum and Eileen F. Babbitt (Lanham: Lexington Books, 2006), 70-74.

²⁶ The so-called non-precedence clause has also found its way in Kosovo Declaration of Independence: "Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation..."

²⁷ See James R. Hooper and Paul R. Williams, "Earned Sovereignty: The Political Dimension," *Denver Journal of International Law and Policy* 31, no. 3 (Summer 2003): 355-373; and Paul R. Williams, "Earned Sovereignty: The road to Resolving the Conflict over Kosovo's final Status," *Denver Journal of International Law and Policy*, 31, no. 3 (Summer 2003): 387-430. Paul Williams has participated in number of major international peace negotiations on the former Yugoslavia (Dayton, Rambouillet/Paris, Ohrid/Skopje and Belgrade/Podgorica negotiations).

elements is that the nineteenth-century concept of absolute sovereignty does not correspond to the realities of the twenty first century that requires sovereignty to be shared at different levels (sub-state, state and international). In situations of conflict between the state and one of its sub-state units (Serbia and Kosovo, for example), these different elements or stages of development have the potential to reduce the conflict. How do they work together? The purpose of the **shared sovereignty** is for the state and sub-state entity to exercise sovereign authority together over a defined territory. The international community can also exercise such authority with the acceptance of the parent state (Serbian acceptance of the UNMIK in Kosovo). **Institution building** comes prior to the determination of the final status and allows for the institutions of self-government to emerge at the territory of the sub-state entity. Finally, in the third stage, the determination of the **final status** of the sub-state entity should be achieved through referendum, a negotiated settlement, international mediation, and so on. Ultimately, the determination of the final status involves its international recognition that makes it legally binding and legitimate.²⁸

However, the authors do not seem to recognize (or, this is simply not their intention) that even though it is possible to envision a solution to the conflict that does not involve severing complete links between the state and its sub-state entity, the very terms “earned” implies that the more sub-state entity cooperates with the international community the more it will be rewarded for such a behaviour. The ultimate award is, of course, achieving absolute sovereignty that the concept of earned sovereignty is trying to bypass. Or, to put it more precisely, the sub-state entity may not enjoy a full-fledged sovereignty in regards to the international monitors of its sovereignty, but this conflict approach has built-in bias towards completely severing links with the “parent” state. At least, this is what the ICG’s work on Kosovo implies.

As early as 1998, the ICG called for international intervention in Kosovo and for overseeing of its transition in the period of three to five years. At that time, such “conflict resolution” approach was called intermediate sovereignty. In essence, this proposal called for Kosovar substantive autonomy (legislative, executive and judicial) over all internal affairs. In exchange for the exercise of these rights, Kosovar Albanians should guarantee minority rights to all minority populations in Kosovo. They should also accept the borders of the 1974 Yugoslav Constitution. This simply implies that they would recognize territorial integrity of Macedonia with its substantive Albanian minority that is territorially concentrated in the West at the borders with Kosovo and Albania, and that they should give up on territorial unification with Albania.²⁹ So, as is clear from this ICG’s policy recommendations, the ultimate solution to the status of Kosovo should be its independence from Serbia, while Kosovar Serbs should keep quiet about their denigrated status to the position of a national minority. The justification of this approach was found in the similarity in the Kosovo’s legal position in the former Yugoslavia to that of other republics. Even though Kosovo was not a republic, but part of Serbia, it enjoyed direct constitutional links through its representatives in the major Yugoslav institutions.

²⁸ Hooper and Williams, 355-365.

²⁹ Williams, 399-401.

This argument, however, is on the shaky grounds. One of explicit claims of the 1974 Yugoslav Constitutions is that only republics have the status of constitutive entities in the Yugoslav federation, a principle that was fully accepted by the Badinter commission and that explains why the Commission didn't even discuss Kosovo independence (see the previous section of the paper). Emphasizing Kosovo's *de facto* republican status in the architecture of the former Yugoslavia rather than its *de jure* status as a Serbian province, the ICG is simply engaged in justifying one particular policy option (Kosovo independence) at the expense of evaluating other alternatives to the Kosovo conflict. Moreover, it did so in a way that challenges and changes traditional understanding of the right to self-determination and sovereignty. For, ICG's recommendations make only sense if the traditional idea of sovereignty as autonomy is being replaced in terms of the twin concepts of capacity-building and qualified responsibility. That is, in the current context of internationally sponsored states, international monitors should spoon-feed independence only as much as international "protectorates" or would be states are deemed capable, or as much as the international supervisors think that that they should be rewarded for certain type of behaviour. Either way, the sovereignty-switch mechanism is clearly under international control, despite local claims to independence/autonomy. The point here is not that Kosovo should not, or is not fully capable, of becoming independent, but that the ICG's approach implies that independence should be understood as a gift by the international community rather than the right based on the political will of the Kosovo Albanians (or Kurds, Palestinians, or any other ethnic group currently fighting for the same right).

Central elements of the so-called sovereignty as responsibility (or shared sovereignty) have already found its way both in the Rambouillet Accords preceding the NATO intervention (February 1999) and the UNSC Resolution 1244, but they were also, at the same time, "tamed" by their recognition of Yugoslavia (and Serbia as its constitutive part) as a sovereign state and Kosovo as its province. Still, Wilson is right to argue that the Rambouillet Accords represents the precedent for diminishing Yugoslav sovereignty and "accruing certain sovereign responsibilities unto [the international community]."³⁰ At the Rambouillet meeting, the Serbian side agreed with the substantial autonomy for Kosovo, and with the presence of the international forces in Kosovo in charge of monitoring the agreement. Nevertheless, it rejected the entire agreement because of the secret Appendix B that among others stated that "NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the Federal Republic of Yugoslavia including associated airspace and territorial waters."³¹ Once the Albanian side said yes to the Agreement, everything was set for the NATO air raids against Serbia.

The following UNSC Resolution 1244 confirmed the Rambouillet Accords (also known as an Interim Agreement for Peace and Self-Government in Kosovo) as one of the guides to solving the Kosovo final status. Interestingly, however, the Resolution went far beyond the Rambouillet Accords in regards to taking away sovereignty from Serbia. In fact, Branislav Krstic argues that The Rambouillet Accords were far better deal for Serbia and that, by agreeing to the Resolution, Serbia effectively amputated Kosovo from its own

³⁰ Wilson, 405.

³¹ Kovacevic, 250-255.

territory, for the sovereignty was firmly placed in the hands of the UN.³² Even cursory comparison between two documents proves Krstic right. Article One of the Interim Constitution (part of the Rambouillet Agreement) identifies the Federal Republic of Yugoslavia competences over the areas such as: (a) territorial integrity, (b) maintaining a common market within the Federal Republic of Yugoslavia, which power shall be exercised in a manner that does not discriminate against Kosovo, (c) monetary policy, (d) defense, (e) foreign policy, (f) customs services, (g) federal taxation, (h) federal elections, and (i) other areas specified in this Agreement.³³ Also, the Rambouillet Agreement allows certain number of Serbian police and army to remain in Kosovo, while at the same time it explicitly asks for the complete disarmament of the Kosovar Liberation Army. In fact, due to these clauses, the Albanian delegation first rejected the agreement. Only after the American side entered the clause supporting free will of the Kosovar Albanian people in a three year period, they signed the agreement.³⁴

The UNSC Resolution 1244 is much harsher in every respect for the Serbian side. First, The Resolution does not mention Serbia; it refers only to the Federal Republic of Yugoslavia. Secondly, all previously accepted Yugoslavia's competences over Kosovo in the Rambouillet Agreement have been suspended, that is transferred to the UNMIK. Thirdly, the language justifying the presence of the international troops is much firmer, demanding complete and verifiable phased withdrawal from Kosovo of all Yugoslav military, police and paramilitary forces. Finally, Kosovo Liberation Army is recognized by its name, while in the Rambouillet Agreement it was referred to as the "other forces." Resolution requires its disarmament but in language that is much more polite than previously. Overall, Resolution 1244, despite its commitment to the territorial integrity of Yugoslavia, created a situation where the focus was primarily on building the institutions of self-government in Kosovo rather than working on the possible integration of the region within Yugoslavia, and more importantly, unlike Rambouillet, it was fully accepted by the Yugoslav side.

The next stage in creatively applying the concept of "earned sovereignty" represents two Proposals by the Independent International Commission on Kosovo (the so-called Goldstone Commission).³⁵ The first report (2000) takes the position that, after 1998 atrocities of Milosevic's regime against Kosovar Albanians, one cannot expect Kosovar Albanians to accept Serbian state as a legitimate one anymore. Hence, the question is only as to what venue to pursue to achieve Kosovo secession, and the answer is found in the process leading to the so-called conditional independence.³⁶ Under this proposal,

³² Branislav Krstic, *Amputirano Kosovo, odbrana Milosevica koja traje* (Beograd: Dan Graf, 2007), 37.

³³ See: http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html.

³⁴ The clause is more ambiguous, however: "Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people opinions of relevant authorities, each party's effort regarding the implementation of the agreement, and the Helsinki Final Act." Thus, free will of the people (read, right to self-determination) is thus one of the criteria to be used in addition to principle of state sovereignty and inviolability of state borders without the consent of all sides involved (read, Helsinki Final Act).

³⁵ The Commission was created at the initiative of the Swedish and Canadian government. It was chaired by Judge Richard Goldstone of the South African Constitutional Court. The report was presented to the Secretary-General of the UN on 23 October 2000.

³⁶ See, The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford: Oxford University Press, 2000).

Kosovo would “gradually acquire the rights of a state” as it develops institutions that will allow its people to live in peace and in respect with each other.³⁷ The second report (2001) goes further and rejects the idea of an indefinite protectorate as counterproductive to the very objectives of the IC in Kosovo. Fearing that indefinite protectorate could only increase tensions between local Albanians and Serbians, but also with the international administrators of Kosovo, The Goldstone Proposal argues for the “rapid devolution of important powers from the SRSG (Special Representative of the Secretary General) to the Kosovar government.”³⁸ The underlying idea behind the proposal was that of empowering local population in certain areas before granting them sovereignty. In other words, the proposal simply reiterated suggestions that have already been the official policy of the ICG throughout this period.³⁹

Finally, in 2002 and 2003, the UNMIK accepted the ICGs approach by incorporating its key elements into its own “standards before status” approach.⁴⁰ This policy, in William’s words, “sought to ensure that Kosovo possessed sufficient institutions to govern an independent state, and that it would be a democratic state which protected human and minority rights.”⁴¹ The main identified standards, or areas needed improvement, were: functioning democratic institutions, rule of law, freedom of movement, sustainable return of internally displaced persons and refugees, market economy, property rights, dialogue between Belgrade and Kosovo provisory government, and a fully functioning multiethnic Kosovo Protection Corps (future Kosovo Army) and police.⁴² However, standards before status approach still relied on the full compliance with the Resolution 1244 and 2001 Kosovo Constitutional Framework, with caveat that any unnecessary prolongation of the final solution will ultimately destabilize the region.

In the light of the riots of March 2004 and an extensive review of their causes and consequences, the UN authorities in Kosovo gave priority to those standards supporting "sustainable multi-ethnicity." Ultimately, such approach failed, for Kosovo remained divided along ethnic lines as it was before 2004. However, the most important post-2004 conclusion was the one reached among the USA policy makers that completely sided with the ICG understanding (see their 2002 Report on Kosovo Roadmap) that Kosovo’s future lies outside the framework of Serbia and that it is a unique case that does not have potential to encourage other separatist movements (given its “state-like” status in the former Yugoslavia and its status as a international protectorate). Hence, when the negotiations between the Serbian and Kosovar Albanian sides finally started in November 2005, under the auspices of the UN Secretary General Representative Martti Ahtisaari, the USA has finally openly supported option of an internationally monitored independence for Kosovo.

³⁷ *The Kosovo Report*, 271-275.

³⁸ Williams, 421.

³⁹ The ICG’s reports that explicitly link Kosovo final status to the notion of earned/conditional sovereignty are: *Kosovo’s Roadmap (I)*, No. 124 (2002); *Kosovo, Towards Final Status*, No. 161 (2005); *No Good Alternative for Ahtisaari Plan*, No. 182 (2007). Available at <http://www.crisisgroup.org/home/index.cfm?id=1243&l=1>.

⁴⁰ UNMIK, *Standards for Kosovo*, 2003-2007. Available at <http://www.unmikonline.org/standards/index.html>.

⁴¹ Williams, 427.

⁴² UNMIK, *Standards for Kosovo*.

The negotiations went downslide already in 2006, when the UN mediator was accused by the Serbian side to be biased towards the monitored independence option.⁴³ In February 2007, Ahtisaari delivered a draft status settlement proposal, which was indeed based on the model of “supervised independence” for the province; a model that was a mirror image of the ICG’s recommendations previously discussed. By July 2007 the talks were completely stalled. In response to the ensuing deadlock, the last ditched effort to salvage talks have been organized by the so-called Kosovo troika, made up of the EU, the US and Russia. They dragged on for four months, but by December 2007 it was obvious that the latest round of talks didn’t bring anything new at the negotiating table. The USA and the EU continued supporting Ahtisaari plan of conditional independence, while the Russians were equally firmly backing the Serbian proposal of substantive autonomy for Kosovo, but within Serbia. The Gordian knot was cut by the Kosovar Assembly on February 17, 2008, when Kosovo independence was finally proclaimed. So, what kind of a state emerged out of all this international wrestling?

How is Kosovo a State?

According to Weber, a state is a composite of territory, population and a (legitimate) government in control of the means of violence. Weber himself approached the “state” as a heuristic device (according to his understanding of concepts as ideal types) to help him understand and compare modern European experiences.⁴⁴ However, the twentieth century trends (national liberation and decolonization movements) have turned the question what is a state into a different question altogether – when and how is a state a state? And, if previously, for Weber, the “state” has been just an approximation of reality, in the twentieth century, its composite parts have become understood as the facts or ingredient necessary for the process of state building. This change of analytical perspective to a more pragmatic one that is, paradoxically, based on the deification and metamorphosis of abstract concepts into “facts” on the grounds was already recognized at the 1933 Montevideo Convention on Rights and Duties of States. The Convention, which still represents an undisputed formulation of criteria of statehood in international law, offers a “shopping list” of necessary state building blocks: a) a permanent population, b) a defined territory, c) government, and d) a capacity to enter into relations with other states.⁴⁵

But, it is hard to argue that Kosovo qualifies as a state under the Montevideo Convention. In regards to population and territory, 15% of the territory is controlled by local Serbian population in the northern parts of Kosovo who do not want to become citizens of the Kosovo state any less than Albanians want to be citizens of Serbia. In fact, after 2004 Kosovo riots, local Serbs have opted for parallel life in Kosovo, economically, socially and politically relying on Serbia, while at the same reducing their contacts with Albanian officials to bare minimum. Links with UNMIK representatives and KFOR are maintained but only to the extent that international presence provides security from a repeat of yet

⁴³ Nicholas Wood, “Serbs Criticize U.N. Mediator,” *The New York Times* (September 2, 2006).

⁴⁴ See, Joel S. Migdal and Klaus Schlichte, “Rethinking the State,” in *The Dynamics of States, The Formation and Crisis of State Domination*, ed. Klaus Schlichte (London: Ashgate, 2005), 2-4.

⁴⁵ Richard Caplan, *Europe and the Recognition of the New States in Yugoslavia* (Oxford: Oxford University Press, 2005), 52.

another anti-Serbian 2004 riots. In many respects, their approach mirrors those used by Kosovar Albanians against the Serbian regime in the 1990s.⁴⁶

Moreover, according to the World Bank, Kosovo is the poorest country in Europe, with the GDP per capita only half the regional average (\$2,200 per capita in 2006 as compared to Serbia's \$7,200). More than 40 percent of Kosovo population is unemployed, while 45 percent of the population in Kosovo is poor, with another 18 percent vulnerable to poverty; all these in a country where the average population age is only 24 years. In addition, the growth rates slowed down after the initial burst in 2000 of more than 10 percent, to the levels in 2006 and 2007 of 3 percent that cannot pull population out of poverty. Finally, the access to health and social care is severely limited, while only half of the population has elementary education.⁴⁷

In addition to the unresolved problem of ethnic tensions in Kosovo, the single most important issue is that of organized crime and corruption. According to the estimate of the United Nations Mission in Kosovo (UNMIK), organized crime accounts for some 15-20 percent of the Kosovo economy. Moreover, some of Kosovo's leading politicians have been accused of connections to organized crime networks. Thus, recent reports in German media have accused former Prime Minister Ramush Haradinaj of being a key figure that connects politics and organized crime.⁴⁸ According to Avni Zogiani, from Pristina-based NGO Wake Up, there are two crime networks in Kosovo. One is linked to political parties and their target is public funds that they are siphoning from the state for their personal gains (as one of few stable sources of state income, customs revenues are particularly under attack). The other crime network is relatively independent from the political structures and is involved in human and drug trafficking. Both networks, however, enjoy the protection from the corrupt judicial system. Zogiani also noted that the UNMIK itself is partially guilty for such situation for at least two reasons: a) from the perspective of UNMIK, it is easier to control politicians who have police files, and b) there is a real fear that criminal structures, particularly those with political contacts, can derail the stability and security in Kosovo, if they are "handled" with firm hand.⁴⁹

The dual failures of providing social and economic stability in Kosovo, as well as a prevailing sense of corruption in society, reflect poorly on the legitimacy of both the international and Kosovo structures of government. Political lethargy reached such peak that the ultimate turnout in November 2007 parliamentary election in Kosovo was under 45 percent, the lowest recorded since the 1998-99 war, despite general understanding that "independence was behind the corner." Another reason for not being engaged in politics is public perception that they cannot influence political decision making because the most important decisions are non-political; that is outside the political process and in the hands of international community representatives. In the context of four separate governmental

⁴⁶ Dusan Janjic, *Ogledi o Kosovu* (Beograd: Draslar partner, 2007), 137-164.

⁴⁷ World Bank Kosovo Website:

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KOSOVOEXTN/0,,menuPK:297775~pagePK:141159~piPK:141110~theSitePK:297770,00.html>

⁴⁸ Qt. in John Rosenthal, "An Interview with Avni Zogiani on Corruption and Organized Crime in Kosovo," *World Politics Review* (February 2, 2008). Available at <http://www.worldpoliticsreview.com/article.aspx?id=1559>.

⁴⁹ Qt. in Rosenthal.

structures competing in Kosovo (newly minted EULEX – EU Police and Justice Mission in Kosovo, UNMIK, KFOR and Serbian ghost-like presence in the north), the Kosovo institutions are usually the fifth and the last choice to be asked for any help or support. Ordinary people's experience is that of living in a dysfunctional state and their rational day-to-day concerns are primarily linked to the art of survival on meagre salaries rather than being engaged in politics. Overall, seven years of living in the lethargy-inducing international protectorate proved once more that international administration is by default antithetical to democracy and self-government.⁵⁰ The new question is thus is independence a solution; that is can independence lead out of the deadlock towards developing more autonomous and self-governing structures in the country?

The argument in favour of such development would be that independent Kosovo will finally allow for strengthening self-government, rule of law and civil society; in other words, it will lead to the creation of the political system accountable to its citizens. The UNMIK goals are the mirror image of these ones. And yet, its immanent concerns remain unchanged in the past seven years: 1. Kosovar Serbs do not recognize Kosovo as a home-state, while at the same time Northern Kosovo represents a real threat to the territorial integrity of a new state 2. crime and corruption are endemic and 3. the economy of Kosovo is in dire straits. All of these amount to the securitization of every aspect of Kosovo's politics, thus postponing democracy building incentives indefinitely. After all, none of institution building standards have been implemented in the past three years in areas of the rule of law, market based economy, security for minorities, etc. Hence, even though the USA and the EU are indeed publicly supporting Kosovo independence, at the same time they are acting on the grounds as if the questions of institution building standards are not important whatsoever. What is then the rationale for the nominal proclamation of independence?

The best known secret in Kosovo is that the UNMIK has been badly bruised by its failures in attracting and keeping trust among Kosovo populace. Under such conditions, the US and EU support of Kosovo independence should not be understood solely in terms of their defence of the principles of shared sovereignty or the right of the Kosovo Albanians to a state of their own against the predatory Serbia. Kosovo independence has become the quickest and the only remaining way to reenergize and re-legitimize the international administration in Kosovo. In future, however, continuing failures of the international administration (as of June 15 under the EU guidance) to introduce working reforms would be their own, for the trump card of independence has already been used, thus leaving UNMIK, KFOR and EULEX vulnerable to the public outburst of dissatisfaction of economically and socially disfranchised local Serbian and Albanian population.

Conclusion

The paper deals with the twin process of external state building and democratization in Kosovo. The "normative" arguments in favour of the Kosovo independence were evaluated in their relationship to the principles of IL, followed by the overview of concrete external state building practices in Kosovo. From the "normative" perspective, Kosovo independence appears to be about the conflict between the fundamental

⁵⁰ See David Chandler, *Empire in Denial, The Politics of State Building* (London: Pluto Press, 2006).

principles in international relations and International Law: human rights protection, the right to national self-determination and the principle of the inviolability of state borders. They all, however, represent the norms considered fundamental to the values of the international community. Thus, for the external state builders' actions to be deemed legitimate, it was necessary to reinterpret those norms in a way that will prioritize human rights concerns over the traditionally understood principle of state sovereignty. Rewriting of humanitarian intervention in terms of responsibility to protect was a necessary step in this direction, particularly because R2P posits responsibility to rebuild failed or weak states as one of its primary objectives.

Kosovo case, however, necessitated one more step – the reinterpretation of the principle of state sovereignty through the prism of the so-called “earned sovereignty,” as developed by the ICG, one of the leading NGOs propagating the ideals of liberal interventionism worldwide. UNMIK's acceptance of the “earned sovereignty” approach to conflict resolution in Kosovo achieved two goals: a. it defined Kosovo as “would-be-state” in terms of its (lack of) capacity to govern its population, and b. it legitimized secession of Kosovo from Serbia on the basis of its previous roguish behaviour and the loss of “moral capacity” to govern the province in the future. The first step was necessary to justify the international continuing presence in Kosovo, while the other legitimized the international presence in the eyes of the Kosovar Albanian population (even though at the same time it delegitimized it in the eyes of the local Serbian minority). From the perspective of the Serbian side, there is nothing left but persistently to point out that the “earned sovereignty” approach has not yet been accepted as international legal standard, and that the act of independence is in violation of IL norms. Admittedly, to the extent that the most important principle of IL is still the principle of inviolability of state borders, the Serbian government has a very strong case. However, it is hard not to conclude that even though Serbia may be winning the legal normative argument, it is still losing the territory.

The last section of the essay has dealt with the gritty details of actual state building practices. Within this real-political approach, normative arguments receded into the background under the weight of day-to-day problems on the ground. Still, the very terms of human rights, right to self-determination, loss of moral capacity to govern and shared/conditional/earned sovereignty remained extremely important as ideological devices in the rhetoric of major international actors in Kosovo, for they allowed one type of action or the other to be presented as legitimate or not (whether from American, Kosovar Albanian or Serbian perspective). The evaluation of the UN mission in Kosovo however also shows an interesting dynamics between Serbian authorities, local Albanian and the IC governors in Kosovo. Despite different normative arguments in favour or against Kosovo independence, the patterns of their behaviour on the ground are rather similar. Non-political, bureaucratic administration of the region by the IC representatives and its Kosovo Albanian junior partners is matched by its Serbian counterparts in Serb-populated northern part of Kosovo. Hence, the evaluation of Kosovo twofold process of external democratization and state building brings back the question of power and responsibility of those who exercise it without any accountability to the population concerned (Albanian and Kosovar Serbian alike). In the telling words of Philip Cunliffe: “True responsibility involves claiming authorship for one's own position and status. The principle of the ‘responsibility to protect’ nullifies the political responsibility of individuals for their own societies, and makes power in the garb of morality. Arbitrary

power cannot be held to account: and power that cannot be held to account is ultimately irresponsible power.”⁵¹ On this account, every major principal player in Kosovo has thus far failed.

⁵¹ Cunliffe, 55.