

A Premature Kosovo in the Cradle

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In view of Kosovo's unilateral declaration of independence following the Parliamentary elections to the Kosovo Assembly in November 2007, this paper examines the legal basis to Serbia and Russia's non-recognition as well as their claim that such a declaration of independence and recognition thereof amounts to a violation of international law. The discussion begins by discussing a number of historical events and documents that support Serbia's claim that it has had continuous sovereign title over the principality of Kosovo. This leads to a contemporary legal analysis which suggests that Serbia possesses full and entire sovereignty over Kosovo, it has no intention of ceding and abandoning that sovereignty and that this sovereignty has been recognised under international law. Kosovo's declaration of independence and recognition thereof has subverted the internationally agreed political process intended to restore a greater degree of autonomy and meaningful self-administration to Kosovo and has thus violated Serbia's sovereignty and territorial integrity. It is suggested that such an assault on the international legal order is potentially antithetical to long-term peace and security both regionally and internationally.

“...the non-recognition by other nations...is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such”¹

On the 17th of February 2008, Kosovo's Prime Minister Hashim Thaci made the following unilateral declaration of independence before the Kosovo Assembly purporting succession from the sovereign state of Serbia:

“We have waited for this day for a very long time...from today, we are proud, independent and free”.²

On its facts, Kosovo has some, but not all, of the characteristics pertaining to such independent statehood as set out in the 1933 Montevideo Convention on the Rights

¹ Tinoco Concessions (*G.B. v. Costa Rica* 1923) per. W.H. Taft, RIAA, I, 381.

² BBC News, 'Kosovo MPs proclaim independence', 17/02/2008, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/Europe/7249034.stm>.

and Duties of States in that it has an elected 120-member assembly which has limited independence and control over a permanent population of approximately two million people and a territory which has been defined as the ‘[t]he Autonomous Province of Kosovo and Metohija... located in the southern part of the Republic of Serbia, a constituent republic of the Federal Republic of Yugoslavia’.³ Although, as can be seen historically from France’s control over the internal and external affairs of its former Maghreb protectorates, the limitations that are alluded to here, and discussed further below, are not necessarily inconsistent with independent statehood. What is at issue here is the substantial non-recognition of this purportedly “independent and free” entity, particularly from Serbia and Russia. In this particular instance, this non-recognition is probative of the irresistible proposition that Kosovo’s unilateral declaration of independence and a range of States’ recognition thereof amounts to “the subversion of all the foundations of international law...”⁴ In particular, given Serbia’s historical and legal claim to sovereignty over Kosovo, are these acts in breach of “the imperatives of general international law,”⁵ namely, that there be “respect for the inviolability of all frontiers ‘which can only be changed by peaceful means and by common agreement’”⁶ in accordance with the legal principles of the UN Charter?

The historical context: “Kosovo is Serbia”?

Serbia’s claim that Kosovo is ‘the cradle of its civilization’ has been disputed by Oxford historian Noel Malcolm who states that, “history, for the Serbs, started in the early 7th century when they settled in the Balkans...[t]heir power base was outside Kosovo, which they fully conquered in the early 13th...”⁷ This indicates that there has been a historic legacy of ongoing tensions leading up to conflicts that have, over time, resulted in the territory of Kosovo being absorbed into different empires and federations.

³ *Prosecutor v. Slobodan Milošević*, revised indictment of 8 October 2000 and 22 November 2001.

⁴ Sergei Larov, Russian Foreign Minister, RIA Novosti News Agency, Moscow, 12/02/2008.

⁵ Arbitration Commission, Opinion No.10, of 4 July 1992.

⁶ EC Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union’, 4 EJIL (1993) at 74-7. ‘Declaration on Yugoslavia’ *ibid.*, at 74-6.

⁷ Is Kosovo Serbia? We Ask a historian. Noel Malcolm, The Guardian, Tuesday February 26 2008.

From the late 14th to the mid-15th centuries, decisive battles brought Kosovo into the fold of the Ottoman Empire. The Balkan Wars of the early 20th century saw Serbia reconquer Kosovo and in 1918 it became part of the Kingdom of Serbia. Following World War II, Josip Broz Tito established the pan-Slavic Federative People's Republic of Yugoslavia. Its Constitution, adopted in 1946, specifically declared that, "[t]he People's Republic of Serbia includes the autonomous province of Vojvodina and the autonomous Kosovo-Metohijan province," contradicting Noel Malcolm's claim that Kosovo "was incorporated, not into a Serbian state, but into a Yugoslav one."⁸ However, it is the case that the 1974 Constitution of a reconstituted Socialist Federal Republic of Yugoslavia (SFRY) devolved powers to its six federal republics and granted greater autonomy to the Serbian provinces of Kosovo and Vojvodina to administer their own educational and legal systems. Furthermore, it provided limited self-government in the form of provincial assemblies and representation at the Federal Assembly, the Constitutional Court and the Presidency of the SFRY.⁹ Nevertheless, the 1974 Serbian Constitution decreed that "the Socialist Republic of Serbia comprises the Socialist Autonomous Province of Vojvodina and the Socialist Autonomous Province of Kosovo." Additionally, the Constitution of the Socialist Autonomous Province of Kosovo recognised that even though "[t]he Socialist Autonomous Province of Kosovo is an autonomous, socialist, democratic, socio-political and self-managing community," it still remained "part of the Socialist Republic of Serbia and the Socialist Federal Republic of Yugoslavia."

It is not only on this basis that claims such as those made by Noel Malcolm can be deemed erroneous. In the late 1980s, Slobodan Milosevic gained control of the Central Committee of the League of Communists of Serbia and was elected as Chairman of the Presidium of the Central Committee of the League of Communists of Serbia. Whilst he was in high ranking office with broad-based support from Serbian nationalists in both Serbia and Kosovo, the Assembly of Serbia made changes to the 1974 Constitution which significantly curtailed Kosovo's autonomy. In addition, Milosevic used his increasing political power and support to stage a massive coup of ethnic Albanian leaders from the provincial and republican governments and install

⁸ *Ibid.*

⁹ *Op cit.* at iii, para.3.

political figures loyal to him so as to halt the separatist moves towards an independent Kosovo. By March 1989, the SFRY Presidency viewed Kosovar separatists as such an insurgent threat to the sovereignty of Serbia that it introduced 'special measures' that brought state security functions under the exclusive jurisdiction of the SFRY. The final stages of that year also saw Milosevic elected President of Serbia which led to a number of significant changes. The Socialist Republic of Serbia adopted a new Constitution in 1990 which, *inter alia*, changed its name to the 'Republic of Serbia' and that of the 'Socialist Autonomous Province of Kosovo' to the 'Autonomous Province of Kosovo and Metohija'. In April of that year, the Republic of Serbia took charge over policing in Kosovo from the SFRY Presidency, and in July, the Assembly of Serbia voted to suspend the Assembly of Kosovo.

Despite the succession of Slovenia, Bosnia and Herzegovina and Croatia during the course of 1991-92 that ultimately led to a wide-scale war resulting in the dissolution of the SFRY, the Republics of Serbia and Montenegro claimed that they were a continuation of the SFRY, albeit within a massively truncated territory. This claim was subsequently rejected in Opinion No.8 of the Arbitration Commission and UN Security Council Resolution 777 of 1992 which ruled that, "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist." This notwithstanding, the Republics of Serbia and Montenegro reconstituted themselves as the Federal Republic of Yugoslavia (FRY) which was subsequently admitted to the United Nations in 2000 pursuant to General Assembly Resolution 55/12. The armed forces of the SFRY (JNA) became the Armed Forces of the FRY (VJ). The international community negotiated a range of peace plans and agreements with Milosevic as he was President of the FRY and the Republic of Serbia during the 1991-92 wars of succession.

Throughout the 1990s, the international community witnessed various military, police and civilian leaders under Milosevic using the repressive state apparatus of the FRY and the Republic of Serbia to strip Kosovo Albanians of their civil, political, social, cultural and economic rights. In response to this, Kosovo Albanian leaders such as Ibrahim Rugova established unofficial 'parallel' civil and political institutions. The Serbian-controlled police forces belonging to the Ministry of Internal Affairs of Serbia (SUP) and the FRY (MUP) began a systematic campaign of cracking down on

these institutions and subjugating the majority Kosovo Albanian population. A faction of Kosovo Albanians established the Kosovo Liberation Army (KLA) which waged an armed insurgency against this subjugation. This armed conflict escalated in mid-1998 when Serbian Federal- and Republican-controlled military, police and paramilitary forces responded to this insurgency by carrying out planned and coordinated attacks against KLA targets, and in the process of doing so, carried out a catalogue of crimes against mostly Kosovo Albanian civilians and civilian property in contravention of international treaties and customs.

In 1998, negotiations took place between Milosevic, NATO and the Organization for Security and Co-operation in Europe (OSCE) in order to bring about an end to the escalating armed conflict which *inter alia* led to the ‘Agreement on the OSCE Kosovo Verification Mission’ permitting OSCE verifiers to be deployed in Serbia’s Autonomous Province of Kosovo. There, OSCE verifiers documented and reported a range of crimes being committed by Serbian forces against Kosovo Albanian civilians such as murders, rapes and forced expulsions. The report produced by the Kosovo Verification Mission was a key factor leading to the unmandated NATO attack on Serb forces, which commenced the 24th of March 1999.

The legal context: perverting “the imperatives of general international law”¹⁰ and “a political process designed to determine Kosovo’s future status”¹¹?

Consequently, Security Council [‘SC’] Resolution 1160 of 31 March 1999 condemned this “use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army.” Nevertheless, it went on to recognise that:

“[T]he principles for a solution of [this] Kosovo problem *should be based on the territorial integrity of the Federal Republic of Yugoslavia* and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and

¹⁰ Arbitration Commission, Opinion No.10, of 4 July 1992.

¹¹ United Nations Security Council Resolution 1244, SC/RES/1244 (1999), 10 June 1999.

Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo.” (Emphasis added)

Accordingly, the clear and unambiguous terms set out within SC Resolution 1160 respected, *ab initio*, the constitutional framework set out in the above-mentioned successive Yugoslav constitutions and moreover, accord with the subsequent 2003 and 2006 Constitutional Charters of Serbia and Montenegro. This refutes Noel Malcolm’s assumption that Kosovo “remained part of some sort of Yugoslav state until June 2006”¹² - an unfounded claim which thus can not be used in the attempt to legitimise this unilateral declaration.

SC Resolution 1160 instigated the process of establishing an international civil and security presence in Kosovo in the attempt to restore peace and security. In doing so, it recognised Serbia’s enduring sovereignty over Kosovo. As such, it went no further than to express support for an “enhanced status” for Kosovo consisting of “a substantially *greater degree of autonomy and meaningful self-administration*” (emphasis added). These principles were echoed within the Concluding Statement of the Chairman at the meeting of the G-8 Foreign Ministers made on 6 May 1999 as well as The Paper presented to the FRY in Belgrade on 2 June 1999, both of which called for the following:

“[a] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia...”

Insomuch that Serbia accepted this demand is evidenced in document S/1999/649, circulated at the Security Council on 7 June 1999, stating that “[t]he Government of the Federal Republic of Yugoslavia and the Assembly of the Republic of Serbia accepted [the above-mentioned agreement on principles dated 6 May and 2 June

1999] on 3 June 1999.” Moreover, as indicated in a speech made by the former FRY President Slobodan Milosevic on 9 June 1999 (the day prior to the adoption of SC Resolution 1244), the FRY’s consent to this arrangement was based upon the explicit understanding that Serbia was to retain its sovereignty over Kosovo:

“We have not given up Kosovo. The Group of Eight most developed countries of the world and the United Nations guarantee the sovereignty and territorial integrity of our country. This guarantee is also contained in the draft resolution. The Belgrade agreement has closed the open issues of the possible independence of Kosovo at the time prior to the aggression. The territorial entirety of our country cannot be threatened ... the political process, which will be based on the principles which stem from previously conducted discussions [is] also equally based on the sovereignty and territorial integrity of our country. This means that only autonomy, and nothing else outside that, can be mentioned in this political process.”¹³

In accordance with these binding international agreements and understandings, on 10 June 1999, the Security Council passed SC Resolution 1244 which warranted the territory of Kosovo being placed under the auspices of the United Nations. Instrumental to this “political process” were two measures overseen by the United Nations: firstly, “the Federal Republic of Yugoslavia... begin and complete a complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized”; secondly, the establishment of “an interim administration for Kosovo under which the people of *Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia*,” (emphasis added). Albeit it being encumbered with Serbia’s recognised reversionary and overriding interest, it is on this basis that the United Nations Mission in Kosovo (UNMIK) has since had exclusive yet transitional control of Kosovo.

¹³ "Yugoslav President Slobodan Milosevic's Address To The Nation", *Borba*, 10 June 1999; quoted in Stephen T Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, p. 118 (Rand Corporation, 2001).

Indeed, SC Resolution 1244 explicitly reiterates the agreed formulations of “substantial autonomy” and “meaningful self-administration” for Kosovo. Such formulations, combined with the consistent omission of any reference to the principle of self-determination, conclusively indicates that there is no legal basis whatsoever for the type of independent statehood that has been unilaterally declared and recognised. This lends credence to the claims that this unilateral declaration and recognition thereof violates both international law and Serbia’s sovereignty. Moreover, in making the unilateral declaration of independence and adopting The Constitution of the Republic of Kosovo, Kosovo’s Assembly has acted *ultra vires*. In case there is any doubt, the UNMIK ‘Constitutional Framework for Provisional Self-Government’¹⁴ confirms that Kosovo’s “Provisional Institutions of Self-Government” had no powers to act in the foregoing ways. To do so is to be in breach of the obligation to in no way “affect or diminish the ultimate authority of the SRSG [Special Representative of the Secretary General] for the implementation of UNSCR 1244(1999)”. In this respect, as Chapter 8 Para. 2 of the UNMIK ‘Constitutional Framework’ reserves powers to the SRSG in the domains of defence, justice, legal affairs and foreign affairs, to name just a few, it is suggested that the provisions within The Constitution of the Republic of Kosovo such as Article 2, Article 65 paragraph (12), Article 84 paragraphs (7), (10), (12) and (15) – (25), Article 93, Article 131, Article 151 are contradictory, unlawful and untenable.

In view of these aforementioned limitations, for this to be any other way remains contingent upon “the determination of Kosovo's future status through a process at an appropriate future stage”¹⁵ which adheres to the “general principles on a political solution to the Kosovo crisis” as stated in Annexes 1 & 2 of SC Resolution 1244. Should it be argued that the provision within the ‘Constitutional Framework’ to “take full account of all relevant factors including the will of the people” provides a window of opportunity for a referendum on the issue of Kosovo’s independent statehood, it is worth remembering that SC Resolution 1244 has precedence over this mere ‘Framework’. Furthermore, this provision is expressed in a non-imperative and non-binding manner and it makes neither express nor implied reference to the applicability

¹⁴ CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT

UNMIK/REG/2001/9 - 15 May 2001.

¹⁵ *Ibid.*

of the right of self-determination within the requisite prospective mechanism for final status. Thus, to have gone beyond its clear and unambiguous limits of SC Resolution 1244 amounts to a perversion of the administration of international justice.

Conclusion: ‘Things are going to slide in all directions. Won't be nothing, nothing you can measure any more...’¹⁶

Any claim that ‘Kosovo’ sets no precedent because it is a ‘special case’ is reckless as to the foreseeable consequences of such a cynical and poorly calculated move to evade international law. It is suggested that Russia’s invasion of Georgia and the ongoing conflict over South Ossetia and Georgia's second breakaway territory of Abkhazia should be viewed in this political context. The dialectical opposition between Serbia’s claim of sovereignty and Kosovo’s unilateral declaration of independence, as well as the wider imperial strategies currently being played out between Russia, the EU and NATO, can only find their solution in a mechanism for final settlement that is in accordance with the agreed and legally binding principles discussed above. Even though the mechanics of such a mechanism have yet to be designed and manufactured, any full and frank discussion will always be tautologous in the sense that unless Serbia decides to renounce its sovereignty by consenting to the succession of Kosovo, one has to accept as being firmly rooted in international law the argument that, “only autonomy, and nothing else outside that, can be mentioned in this political process.”¹⁷ Admittedly, the perspective that Kosovo Albanians have been “victims of unimaginable atrocities that deeply shock the conscience of humanity”¹⁸ potentially renders such a stark realisation insuperable and intractable. Be that as it may, but from two more compelling perspectives, this need not be the case: *ex injuria jus non oritur* – a unilateral declaration of independence and recognition thereof, standing as they do on unlawful foundations, and essentially put in place by NATO force contrary to Chapter I art. 2(4) of the UN Charter, are insupportable; “fair is foul and foul is fair” – a succession imbroglio of the type currently unfolding, in spite of its superficial attractions that are often unhelpfully couched in ‘enlightened’ rhetoric,

¹⁶ Leonard Cohen, *The Future* (1992).

¹⁷ "Yugoslav President Slobodan Milosevic's Address To The Nation", *Borba*, 10 June 1999; quoted in Stephen T Hosmer, *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did*, p. 118 (Rand Corporation, 2001).

¹⁸ Rome Statute of the International Criminal Court. 2002. Preamble.

is antithetical to long-term peace and security in the region, especially when considered in the context of a ‘mean spirited’ history that has been all too often characterised by atrocities stemming from disputes over the boundaries of sovereignty. As any decent chess player will testify, what occurred on 17 February 2008 as well as the international recognition thereof, can be viewed as an ongoing and flawed opening repertoire because despite any planned traps or anticipated strategic advantages it may bring in the short term, without a sound understanding of the theory and practice of endgame, there is no satisfactory conception that both sides can progress towards. Furthermore, as games such as chess can be viewed as sublimated human activities, subverting the principles and rules of this game is deleterious to the process of transitional justice needed to bring about sustainable international peace and security.