

Miodrag A. Jovanovic
Law Faculty, University of Belgrade

Is Kosovo and Metohija Indeed a ‘Unique Case’?*

Introduction

One statement in the contemporary international politics tends to acquire the status of *mantra*, namely the claim that the recognition of the unilateral declaration of independence of Kosovo Albanians must be perceived as a ‘unique case’ and that as such cannot and should not affect any other similar case around the globe. The illustration of this position can be found, for instance, in the vehement proclamation of ten former foreign ministers – ‘*Kosovo must be independent*’ – which was published on June 16, 2007 in International Herald Tribune. In one of the sentences, it is said: “Kosovo is a unique situation that has required a creative solution. It should not create a precedent for other unresolved conflicts.” The European Union’s representatives, for their part, reiterated on more than one occasion that the basis for solving the Kosovo issue were the principles and the framework for talks set up by the Contact Group. There, it is stated that “the Kosovo case is unique”, so it cannot serve as a precedent for any other situation. (Statement by Krisztina Nagy, spokesperson for European Commissioner Olli Rehn, October 29, 2007)

When all statements of this sort considered, one may notice that the main arguments for advancing the ‘unique case’ position are the following ones:

1. the Kosovo Albanian ethnic minority was in the recent history subjected to institutional discrimination and protracted violence by the central government;
2. as a consequence to that, NATO undertook a ‘humanitarian intervention’ in order to prevent an ‘ethnic cleansing’;
3. the UN involvement was immense, and the province was for the last eight years – both in civil and military terms – administered by the UN;

* This presentation was initially prepared for the international conference “*Kosovo and Metohija as a Global Problem*“, which was organized from 15 to 18 November 2007 at the Law Faculty, University of Belgrade

Let me try to offer plausible responses to each of these three arguments, though in somewhat reverse order. I will start with the first of them, then proceed with the third one and finish with the second argument.

Re: Argument No. 1

As for the claim that the unique character of Kosovo stems from the fact that the relevant minority was exposed to a prolonged politics of discrimination and human rights violations, it would be justifiable *if and only if* no other case can be said to resemble that of Kosovo. However, this argument obviously fails to pass such a test of coherence. For example, it is widely recognized that the protracted conflict between the Government of Indonesia (GoI) and the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM) in the province of Aceh, Indonesia, constitutes one of the longest and bloodiest conflicts in Southeast Asia. The 1999 Amnesty International Report sheds light on the nature of that conflict, by saying: “Aceh was classified as an Area of Military Operation (*Daerah Operasi Militer*, DOM) from 1990 to August 1998. The DOM status was used to justify counter-insurgency operations against *Aceh Merdeka*. In the context of these counter-insurgency operations large-scale human rights violations occurred including extrajudicial executions, ‘disappearances’, torture and rape, imprisonment of peaceful activists and unfair political trials. The situation was exacerbated by an atmosphere of fear in which those seeking to challenge the authorities were subjected to threats and intimidation. Human rights monitoring by domestic and international non-governmental organizations was prevented by the authorities.” Despite certain positive internal political dynamics in 2005, the then yearly report of the same international non-governmental organization was no less dramatic: “The downgrading in May of the military emergency to a civil emergency had little impact on the human rights situation. Cases of extrajudicial executions, arbitrary detention, torture, sexual violence and destruction of property continued to be reported.”

Irrespective of this disastrous legacy of the central government’s politics towards its minority, on August 15, 2005, the GoI and GAM signed a peace agreement in Helsinki, referred to as the Memorandum of Understanding (MoU). In the pre-negotiating phase, GAM demanded independence, but eventually the MoU foresees *inter alia* a new Law on the Governing of Aceh (without using the terms self-government or special autonomy), the right to form local political parties in Aceh,

direct democratic elections in Aceh in 2006 (Head of Aceh Administration and other elected officials) and 2009 (Aceh Legislature) and a share of 70% of revenues from hydrocarbon deposits in Aceh. The MoU emphasizes that Indonesia remains a unitary country.

As indicated in one report on this document: “The MoU reflects a strong willingness from both sides to make compromises. It

- Agrees on a federal-like and complete autonomy for the final status of Aceh within the Republic of Indonesia
- Allows GAM transformation and political participation
- Agrees the force level for the TNI troops to remain in Aceh, with its main responsibility to uphold external defence of the province
- Agrees to focus on building confidence and trust, before taking on the problems of human rights abuses.” (Rizal Sukma, *Resolving the Aceh Conflict: the Helsinki Peace Agreement*)

This agreement was internationally mediated by the EU and ASEAN with involvement of Switzerland, and the chief mediator was the same as in Kosovo talks – Marti Ahtisaari.

Re: Argument No. 3

One of the arguments that is employed for the justification of the ‘unique case’ thesis concerns the alleged unprecedented involvement of the United Nations in Kosovo. It is often used as the starting premise for the subsequent conclusion that, since Serbia’s effective rule over the province was suspended for such a long time (eight years), the only sustainable final outcome for the ‘outside world’ would be to acknowledge this ‘new reality’ and recognize Kosovo’s independence. Unlike the first claim, this argument seems to consist of two parts. Using the terminology of Neil MacCormick (*Institutions of Law – An Essay in Legal Theory*, 2007), one might notice that the first part refers to the ‘operative facts’ (unprecedented involvement of the UN), while the second one concerns the ‘normative consequences’ (recognition of the ‘new reality’ in the form of the independent statehood).

As for the ‘operative facts’ part of the argument, first, it should be borne in mind that currently there are various forms of the United Nation’s involvement in different parts of the world (the list of all current UN missions are available at <http://www.un.org/Depts/dpko/dpko/currentops.shtml#africa>) Some of these missions

include heavy military presence of the UN peacekeeping troupes (e.g. United Nations Interim Force in Lebanon, UNIFIL, which currently has 12.445 military personnel, or United Nations Mission in the Sudan, which at the moment has 9.891 total uniformed personnel, including 8.715 troops, 537 military observers, and 639 police), while in some cases the UN bodies and representatives decisively affect the civilian affairs of the respective polity (e.g. UN High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina). Furthermore, the UN involvement does not amount only to the immediate presence – military and/or civilian – in certain areas, but also in the active deliberative engagement of the relevant UN bodies in an attempt to contribute to the solving of some conflicting situations around the world.

Having all that mind, can one really qualify the United Nations Mission in Kosovo (UNMIK) as unprecedented? I would say hardly. For instance, United Nations Peacekeeping Force in Cyprus (UNFICYP) was established in 1964 to prevent a recurrence of fighting between the Greek Cypriots and Turkish Cypriots and to contribute to the maintenance and restoration of law and order and a return to normal conditions. Though substantially decreased in number (925 total uniformed personnel, including 859 troops and 66 police; supported by 37 international civilian personnel and 106 local civilian staff), this mission is nevertheless still active on this divided island. As for other aspects of the UN involvement in the Cyprus frozen conflict, it should be added that from 1964 until 2006, there were 122 UN SC Resolutions, 7 UN GA Resolutions, and several more on missing persons and human rights. Finally, on April 24, 2004, the peoples of Cyprus were asked to choose between ratifying or rejecting a 5th revision of a United Nations proposal to settle the Cyprus dispute, which is widely known as *Annan Plan for Cyprus*. The plan failed due to the rejection of the Greek Cypriots, who largely (75,83 %) voted against it.

Following the reasoning of those who argue in favor of Kosovo's independence, one might expect that almost 45 years of the UN involvement in Cyprus, during which the central government did not have effective control over its northern part, as well as the 'uncooperative' role of the majority community in the referendum process, would trigger the reaction of the international actors in terms of attaching 'normative consequences' to these 'operational facts' and recognizing the self-proclaimed independence of the Turkish part. As we all know, this was not the case. To the contrary, Cyprus even entered the European Union. It is interesting to see what 'normative consequences' the EU drawn from the aforementioned 'operative

facts': *"In light of Protocol 10 of the Accession Treaty 2003 Cyprus as a whole entered the EU, whereas the acquis is suspended in the northern part of the island ("areas not under effective control of the Government of the Republic of Cyprus"). This means inter alia that these areas are outside the customs and fiscal territory of the EU. The suspension has territorial effect, but does not concern the personal rights of Turkish Cypriots as EU citizens, as they are considered as citizens of the Member State Republic of Cyprus"*

Re: Argument No. 2

Faced with the aforementioned rebuttal of the previous argument, many would resort to the claim that the 'uniqueness' of the recognition of Kosovo's unilateral act of independence stems in fact from the NATO's 'humanitarian intervention', which was undertaken to prevent an 'ethnic cleansing'. On February 6, 2007, Daniel Fried, U.S. Assistant Secretary of State, endorsed this argument in the following way: "Kosovo is a unique situation, because NATO was forced to intervene to stop and then reverse ethnic cleansing. The Security Council authorized Kosovo to be ruled effectively by the United Nations, not by Serbia. UN Council Resolution 1244 also stated that Kosovo's final status would be the subject of negotiation. Those conditions do not pertain to any of the conflicts that are usually brought up in this context. It's not applicable to Abkhazia, or South Ossetia, or Transdniester. Nor is it applicable to Chechnya or to any separatist conflicts in Europe."

From the preceding statement, it seems to be clear that what eventually "forced" NATO to intervene were severe atrocities and human rights violations performed by the Serbian forces. However, could the situation on the ground really be characterized in such a manner? When answering this question, a rational thing to do would be to turn to the reports of the special OSCE Kosovo Verification Mission, which was in 1998 established precisely to monitor situation on the ground. Let us then see how the retired general of the German *Bundeswehr*, Heinz Loquai, who was member of the OSCE mission, comments these last reports, sent between March 15 and 19, 1999, before the final withdrawal of this organization from the province. His conclusion is that these reports "permit the following summary: the armed disputes are local and of limited duration; they are concentrated in the areas around Priština and Mitrovica. The Yugoslav army is bringing in new troops and expanding the defence positions on the border to Albania and Macedonia. The Kosovo Albanian

civilian population leave territory being fought over but return to their villages when the danger is past and start reconstruction work. There has been considerable violation of the October agreements by both sides. Developments are again moving towards a crisis.” (Heinz Loquai, *Kosovo - A Missed Opportunity for a Peaceful Solution to the Conflict?*, OSCE Yearbook, 1999) In particular, the OSCE report from March 17, only a week before the start of the NATO operation, stated that “humanitarian situation is hard, but under control. For now, there is no so called humanitarian catastrophe, nor it is expected.” Furthermore, one may find the similar perception of the situation in some of the NATO countries. For instance, Loquai reports about the decision of the German higher court in Münster, in a case of the Kosovo Albanian asylum seeker. In that decision, from March 11, 1999, the court stated that Kosovo Albanians in Yugoslavia were not exposed to persecution, “not now, nor they were in the past, neither in the State as a whole, nor regionally.” (Heinz Loquai, *Der Kosovo-Konflikt — Wege in einen vermeidbaren Krieg (Die Zeit von Ende November 1997 bis März 1999)*, 2000).

However, even if we assume that the ground conditions were such as to legitimize a ‘humanitarian intervention’, what could have been the final objective of that intervention other than the one mentioned by Fried himself – “reversing ethnic cleansing”? In the August 1999 speech, the then US Deputy Secretary of State, Strobe Talbott, emphasized this point by saying that in Kosovo, “we have suspended Belgrade’s powers as the administering authority over the province. But that does not mean we support Kosovo’s independence. Quite the contrary, we feel that secession would give heart to separatists and irredentists of every stripe elsewhere in the region. Most of all, secession would encourage proponents of Greater Albania — a single state stretching across the Balkan peninsula from Albania proper to northwestern Macedonia, with its own sizeable ethnic Albanian population. Greater Albania would be no less anathema to regional peace and stability than Greater Serbia” (*Address at the Aspen Institute*, August 24, 1999)

The fact that the United States decided to radically change this position and eventually recognize the unilateral act of Kosovo’s independence can only discredit the institute of ‘humanitarian intervention’ in the eyes of those committed to the adamant fight for the human rights protection. Namely, if the NATO bombing is to end up as an ‘intervention for the secessionists’ independence’ then we should remind ourselves of Hedley Bull’s cautious remarks about ‘humanitarian intervention’, who

warned some times ago that “particular states or groups of states that set themselves up as the authoritative judges of the world common good, in disregard of the views of others, are in fact a menace to international order, and thus to effective action in this field.” (Quoted in Noam Chomsky, *The Current Bombings: Behind the Rhetoric*, *ZNet*, March, 1999) In any way, this move cannot constitute grounds for the claim that Kosovo case should not serve as a precedent. To the contrary, it is more reasonable to expect that other violent secessionist movements around the globe would follow the Kosovo Liberation Army’s route in an attempt to provoke one such similar ‘humanitarian intervention’ and eventually acquire independence.

Conclusions

The whole point of raising the ‘unique case’ thesis is that the recognition of Kosovo’s unilateral act of independence should not be regarded as a precedent for future cases. According to the Oxford Dictionary of Law, precedent is “a judgment or decision ... used as an authority for reaching the same decision in subsequent cases.” The decision-maker in a future case “is not bound by all aspects of a previous decision but only by those parts of the judgment that constitute the principles of the decision (*ratio decidendi*) and are not merely passing comments (*obiter dicta*)...” Consequently, the following points summarize my position:

- The Kosovo and Metohija case can be said to represent a ‘unique’ one in a trivial sense that no case is identical to some other, in terms of its specific socio-historical facts and developments;
- Thus, the Kosovo and Metohija case is in the most important aspect similar to many other cases, insofar as *it involves the strive of a minority ethnic group for independent statehood without the consent of the parent state*;
- It is completely contrary to the logic of precedent to claim that no subsequent case “should be” of such a nature as to justify the implementation of *ratio decidendi* of the already adjudicated case. Accordingly, whatever *principle*, which goes outside the existing framework of the international law, guides the solution of the Kosovo case (note that ‘pragmatism’ itself can also serve as that higher guiding principle, but this leads to the repudiation of any legal order!), *it will decisively affect all essentially similar cases around the globe*. After all, how comes that the Kosovo independence would not be a precedent, while, for instance, the Kosovo partition would “open up a new round of

speculation and risk of Balkans border changes along ethnic fault lines”
(International Crisis Group)?!