Matter of Law, Question of Policy: Kosovo's Current and Future Status under International Law

Epaminontas E. Triantafilou
Matter of Law, Question of Policy: Kosovo’s Current and Future Status under International Law

Epaminontas E. Triantafilou*

I. INTRODUCTION

The collapse of communism signified the transition to a new world order and a new balance of power in areas formerly controlled by Moscow. In these areas, the transition opened a path towards national self-assertion and reversion to historical roots, the memory of which Soviet internationalism and cultural conformism had sought to eradicate. Nations that had previously coexisted under the guise of communist comradeship swiftly brought forth competing claims to land, cultural symbols, and historical lineage. In the “powder keg of Europe,” the Balkans, the sparks of nationalism triggered armed conflicts: four wars have ravaged the Balkan Peninsula since 1991.¹ The last of these wars, the one over Kosovo, ended in 1999. The ensuing peace nonetheless has not necessarily brought hope of a final resolution to the area’s underlying problems. In fact, the high potential for further conflict has forced organizations such as the UN to extend protection to certain populations that claim self-determination, without, however, creating independent states that could subsequently clash anew with neighboring hostile populations.² This approach

---

¹ The reference is to the armed conflicts in Slovenia (although some scholars would not include it as a Balkan state), Croatia, Bosnia-Herzegovina and, more recently, Kosovo. Admittedly, in 2001, Albanian separatists and government forces clashed in the Former Yugoslav Republic of Macedonia (“FYROM”); however, the conflict was not of a scale or character that would justify its elevation to the level of war.

² In the most recent equivalent action, the United Nations (“UN”) established, through Resolution 1272, the United Nations Transitional Administration in East Timor (“UNTAET”), although parties to the conflict partook in decisionmaking. Other less similar manifestations of the UN trusteeship power have appeared for relatively short periods in western New Guinea, Namibia, and Cambodia. See Michael J. Matheson, United Nations Governance of Postconflict Societies, 95 Am J Intl L 76, 77 (2001). See also Lt. Col. Michael J. Kelly, Restoring and Maintaining Order in Complex
found prominent application in the province of Kosovo, which is currently under UN interim administrative control.

II. THE UN IN KOSOVO: THE LEGAL PROBLEM

This Development initially explores the current status of the Kosovar province under international law and suggests that the legal justification for the UN Interim Administration in Kosovo rests on questionable grounds. Nonetheless, the weak legal justifications for the current UN presence may reflect a delicate political solution to a complex problem. As the second part of this Development demonstrates, unequivocal UN support for a final solution that would be more consistent with international law could introduce instability in an already volatile area.3

The open question as to the source of the UN’s authority to effectively govern Kosovo is of current significance, mainly for two reasons. First, it muddles the starting point of negotiation regarding the final status of the province. Serbs and Albanians have renewed their efforts to compromise, but exactly how much say each side will have in the final solution is unclear.4 Negotiations are currently taking place under pressure from the EU, which is eager to stabilize the area hoping to include it in the Union, and from the United States, which shares European security concerns and is in need of an exit strategy.5 Second, the degree of UN involvement in Kosovo suggests that the organization will have an active role in shaping the territory’s final status. The

---

3 The legal aspect of the UN’s intervention has received surprisingly little attention, when compared to its attendant practical problems. On the latter, see, for example, Hansjörg Strohmeyer, Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor, 25 Fletcher F World Aff 107 (Summer 2001) (offering possible solutions to problems that arise on the ground in the context of UN interim administrations). This Development, however, addresses an emerging tension between the legal nature of the UN system and its dedication to sustainable peace and security. Especially novel peace-keeping roles, such as the one the UN has undertaken in Kosovo, may require new approaches to interpreting the UN Charter. Although comprehensive treatment of this subject is beyond this Development’s scope, an amendment or new official interpretation of the relevant parts of the Charter (discussed below) would constitute significant steps in augmenting the legitimacy and effectiveness of similar UN missions in the future.

4 It is unlikely, for example, that Serbia will enter the negotiations with the same bargaining power as would be expected of a sovereign about to cede a portion of its land. For an interesting illustration of the UN Mission in Kosovo’s projected level of participation, which promises to be significant, see Janusz Bugajski, R. Bruce Hitchner, and Paul Williams, Achieving a Final Status Settlement for Kosovo, available online at <http://www.publicinternationallaw.org/programs/balkans/kosovo/KosovoReport.pdf> (visited Mar 28, 2004).

5 US disengagement is partially mandated by the need for personnel to be available for other missions. See Will Dunham, Eager to Free Troops, U.S. Reassesses Balkans Duty, Reuters (Sept 21, 2003).
absence of solid legal ground for the UN presence could undermine the legitimacy and sustainability of any UN recommendation regarding that status. This Development concludes that absent drastic changes in the Balkans that would alleviate security concerns, a final resolution is not forthcoming.\(^6\)

### III. HISTORICAL BACKGROUND

Beginning after World War II, Marshal Josip Broz Tito's regime provided Kosovo with a certain amount of autonomy, as part of measures aimed at preserving and strengthening the cohesion of the nascent Yugoslav state. Kosovo had a predominantly Albanian population, whose original aspiration was to join Albania or to achieve some form of independence.\(^5\) Granting Kosovo local self-government, therefore, was a way to abate Albanian separatism. This self-government, however, was effectively dismantled in 1990 by Slobodan Milosevic's Serbian nationalist regime.\(^8\) This policy change towards Kosovo occurred in part because Milosevic's government rallied popular support on a Serb nationalist platform. Serbs considered and still consider Kosovo "the cradle of the medieval kingdom, the Serbian 'Jerusalem,'" and abhor the prospect of full Albanian control of the territory.\(^9\) On the other hand, Albanians have been a majority in Kosovo for many years, and have an equally strong claim to the land and its history. The Yugoslav government's interventionism in the early 1990s translated into police abuses and repression against Albanians.\(^10\) In 1996, an


\(^7\) Although Tito's partisans had promised the Kosovars the option to choose which country they wanted to join after the end of World War II, the Yugoslav state never fulfilled that promise, annexing Kosovo instead. See W. van der Wolf, ed, *The Kosovo Crisis: Facts, Figures, and Documents* 28 (Global Law Assn/Wolf Legal 1999).

\(^8\) Peter Radan, *The Break-Up of Yugoslavia and International Law* 197 (Routledge 2002).

\(^9\) Sabrina P. Ramet, *The Kingdom of God or the Kingdom of Ends: Kosovo in Serbian Perception*, in Mary Buckley and Sally N. Cummings, eds, *Kosovo: Perceptions of War and Its Aftermath* 30, 31 (Continuum 2001). The tension in Serb-Albanian relations, as one may infer from their history, had persisted for many years, leading an observer as early as 1984 to suggest, prophetically, that post-Tito Yugoslav leaders' ability to continue Tito's "balancing act" would be the key to Yugoslavia's future stability. Patrick F.R. Artisien, *A Note on Kosovo and the Future of Yugoslav-Albanian Relations: A Balkan Perspective*, 36 Soviet Studies 267, 268–69 (Apr 1984). The political impetus Milosevic gained through his inflammatory nationalist rhetoric led some observers during the war in Kosovo to conclude that even NATO's relentless aerial bombardment of Yugoslavia was unlikely to subdue Serbian insurgencc. See Jon C. Pevehouse and Joshua S. Goldstein, *Serbian Compliance or Defiance in Kosovo? Statistical Analysis and Real-Time Predictions* 43 J Confl Res 538, 544–45 (Aug 1999).

\(^10\) Such attempts at independence were suppressed through imprisonments and persecutions. See *Statement by Republic of Kosovo Minister Bukoski, March 21, 1994*, in Philip E. Auerswald and David P. Auerswald, eds, *The Kosovo Conflict: A Diplomatic History through Documents* 68, 68–69 (Kluwer Law Intl 2000). For a synopsis of this period in recent Kosovar history, see OSCE, *Kosovo/Kosova: As
Albanian armed secessionist movement, the Kosovo Liberation Army ("KLA"), emerged in Kosovo. In 1998, the KLA engaged government security forces in clashes throughout the province.

The international community sought to avert further conflict, especially in light of reported humanitarian abuses. After failed attempts at reconciliation, NATO intervened by force. The Milosevic regime capitulated within eleven weeks. On June 10, 1999, the UN Security Council passed Resolution 1244, which aimed at granting Kosovo "substantial autonomy" through the following measures: the Yugoslav government was to withdraw all military, police, and paramilitary forces from Kosovo; the United Nations, assisted by NATO, would be responsible for both civil administration and military control; and, eventually, the UN would oversee "the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement." As Annex 1 to the Resolution notes, however, these measures would go into effect "taking full account of . . . the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia." In practical terms, the Resolution resulted in the formation of a civil branch, the UNMIK, and of a NATO military branch, the Kosovo Force ("KFOR").

IV. THE LEGALITY OF UNMIK UNDER INTERNATIONAL LAW

Against this background, several commentators have attempted to define the current status of Kosovo under international law. Although the term protectorate comes to mind, current literature avoids the term because of its association with colonialism. Thus, some scholars argue that the UNMIK is a "trusteeship" administration, an extended manifestation of the UN mandate to manage conflicts and preserve the peace worldwide. Aside from introducing a relatively novel UN role, this assertion raises the issue of whether the UN mandate is broad enough to encompass the Security Council's decision to de...
facto occupy Kosovo and what role the UN may assume in promoting a specific final status for the province.

There are several arguments in support of UNMIK's authority under the UN Charter and customary UN practice. Before presenting and addressing them, it is useful to note that Chapter XII of the UN Charter delineates an "International Trusteeship System." Article 77 in particular suggests that Chapter XII may be prima facie applicable in this case, since the trusteeship system applies to: “a. territories now held under [League of Nations] mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration.” Indeed, Serbia placed Kosovo voluntarily under the system (although one could argue that Serbia did so under military pressure from NATO, which now represents the UN's "security branch" in the area). However, the UN role with respect to such territories has been traditionally determined by agreement with the country that placed the territory under UN supervision, and has "typically amounted only to very general supervision, as actual governance was carried out by the state granted the trusteeship.” Therefore, it is not surprising that even UNMIK's mandate refers to Chapter VII, and not Chapter XII, to justify the UN governance of Kosovo.

According to supporters of UNMIK's legality, a "purposive interpretation" of Article VII of the UN Charter vests the requisite authority in the Security Council to establish and maintain a UN administration in Kosovo. That is, although Chapter VII does not explicitly confer the power to establish such an administration, this power can be inferred as necessary to uphold the principles enumerated in Articles 1 and 2 of the UN Charter. Besides, under Articles 24 and 39, it is the Security Council's responsibility to preserve international peace and security, and "trusteeship administrations" are another means to that end.

Further fortifying this view, other scholars note that although Resolution 1244 created an "international civil presence . . . unprecedented in scope and complexity," Article 41 brings such a presence well within the scope of the Security Council's powers. The Article allows the Security Council to use measures "not involving the use of armed force" in effectuating its decisions.

---

16 Id art 77 (cited in note 14).
19 Matheson, 95 Am J Intl L at 79 (cited in note 2).
The Article continues: "These [measures] may include complete or partial interruption of economic relations . . . and the severance of diplomatic relations." Since the list of possible actions is "clearly exemplary and not exhaustive," the argument goes, the establishment of the UNMIK falls within the scope of the Article.

Additional arguments in support of the UNMIK include the assertion that since the Security Council has the authority to create international crime tribunals and other administrative organs in furtherance of peace and security, nothing prevents it from establishing a complete civilian administration, which essentially encompasses all these organs at once. Besides, Chapter VII does not limit the measures the Council may adopt upon determining the existence of a threat to or breach of the peace. The establishment of a full administration can, therefore, be legitimately followed by border demarcation and vesting of sovereignty in newly independent territories. In other words, "there can in fact be situations in which the Security Council would be justified in directing a permanent change in some aspect of the status, boundaries, political structure, or legal system of territory within a state, if . . . doing so is necessary to restore and maintain international peace and security."21

The above arguments seem flawed, however, in terms of both international law and historical UN policies. Beginning with the so-called purposive approach to interpreting the UN Charter, the question that immediately arises is why the Security Council did not ground Resolution 1244 on the construction of specific Articles. The Council mentions "purposes and principles" of the Charter, but stops short of explicating which article(s) one would have to read purposively to infer the UNMIK's authority to occupy Kosovo. Perhaps articles under Chapter VII are the obvious answer; still, such a loose approach sweeps too far and ignores the restraints built into the Charter. For instance, it is not obvious that the establishment of an exclusively UN-run trusteeship is anticipated by Article 1(1) of the Charter. According to Article 1(1), one of the purposes of the United Nations is "to take effective collective measures for the . . . removal of threats to the peace . . . and to bring about . . . in conformity with the principles of justice and international law, adjustment or settlement of international disputes and situations."22 It seems peculiar to think that the Security Council would be acting "in conformity with principles of . . . international law" when it effectively creates new international law doctrine through the establishment of an omnipotent trusteeship administration in the present case. The Charter appears to limit the discretion of the Security Council to established principles of international law. For the sake of flexibility, one may also argue that careful

21 Matheson, 95 Am J Intl L at 85 (cited in note 2).
deviations are permissible, because of the generality of the language. However, it seems imprudent to argue that any UN action is lawful under the Charter on the assumption that it will eventually become embodied in international law as a customary international practice.\textsuperscript{23}

In fact, a less purposive and more originalist reading of the UN Charter supports the notion that the Charter’s drafters did not provide the Security Council with carte blanche, especially in the realm of peacekeeping. The phrase “may include” in Article 41 can be read more reasonably as restrictive, rather than as merely illustrative.\textsuperscript{24} There is no indication that the drafters wished to expand the scope of the article to include \textit{any} non-military activity as legitimately promoting the decisions of the Security Council. After all, there are arguably several restrictions to the Security Council’s authority under Articles 39, 41, and 42. Article 42, for instance, could be read to support a principle of proportionality in Chapter VII Resolutions in providing: “Should the Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take \textit{such action} . . . as may be \textit{necessary} to maintain . . . peace and security.”\textsuperscript{25} Limiting permissible action to the level of bare necessity appears to support the incremental escalation of measures to counter threats to the peace and suggests restraint in the actions of the Security Council. Following this rationale in the past, the Council has cautioned participating nations to act “commensurate[ly] with the specific circumstances”\textsuperscript{26} in Chapter VII operations. The restraint built into the Charter, therefore, is inconsistent with overbroad readings of the Articles regarding the Security Council’s discretion in preserving peace and security, and demonstrates that “strong medicine” such as a trusteeship administration should be firmly grounded on legal as well as policy grounds.

Indeed, the UNMIK transcends customary UN peacekeeping not only theoretically, but also in practice. The relevant Article 2(7) of the Charter

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Looking to the plain language of the Charter before resorting to purposive generalizations is necessary under Article 31 of the Vienna Convention on the Law of Treaties (1961), 23 UST 3227 (1972), TIAS No 7502, 500 UN Treaty Ser 95. For an argument that, in fact, “with only mild overstatement, the [UN] Charter is what the principal organs do” see Thomas M. Franck, \textit{The Use of Force in International Law}, 11 Tulane J Int’l & Comp L 7, 8 (2003).
\item \textsuperscript{24} Arguably, in the absence of independent review of the Council’s actions, the approach to interpreting Title VII of the Charter needs to be stricter and more judicial in nature without, however, compromising effectiveness when contemplating intervention in an internal conflict on humanitarian grounds. See Matthias J. Herdegen, \textit{The “Constitutionalization” of the UN Security System}, 27 Vand J Transnat L 135, 141 (1994) (arguing for the establishment of a “judicial counterweight” to the Security Council).
\item \textsuperscript{25} United Nations Charter art 42 (cited in note 14) (emphasis added).
\end{itemize}
\end{footnotesize}
provides: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”27 The same Article creates an exception for cases where the UN acts to preserve the peace under Article 39. However, this exception arguably applies insofar as the peace-threatening conflict is ongoing. As the Charter suggests, subsequent measures should be focused on promoting “settlement” between the opposing parties. Traditionally, “[p]eacekeeping operations facilitate the creation or implementation of a negotiated settlement.”28 After Kosovo, it is not obvious that a trusteeship administration can properly be considered as a settlement-promoting mechanism. In past peacekeeping operations, the UN acted as an arbiter that intended to bring clashing sides to the negotiating table and to broker viable solutions. For example, the first trusteeship administration with significant UN involvement in governance was instituted in Cambodia in 1991 and possessed some, but not comprehensive administrative powers. The UN administration’s powers were subject to the authority of a Supreme National Council, which was comprised of representatives of all interested parties.29 UNMIK, on the other hand, is not only brokering but also unilaterally shaping the final solution without necessarily considering input from all the parties concerned. In this sense, the Kosovo mission has broadened the scope of UN powers, while discounting the importance of state sovereignty.

Conceivably, the line-drawing problem with overbroad, purposive readings of the UN Charter also lurks in this discussion. To illustrate the underlying policy concerns behind playing “fast and loose” with the Charter’s provisions in the Kosovar context, consider the Albanian claim to minority self-determination. Until recently, the right to self-determination of minorities had existed in international law only as an abstract concept applicable to de-colonized territories, not sovereign states.30 Yet, the same concept became a

29 Matheson, 95 Am J Intl L at 77 (cited in note 2), citing Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, art 6 & Annex 1, 31 ILM 183, 184 (1992). Similarly, the short-lived UN administration of Eastern Slavonia (a Croatian region with a sizeable Serbian community) was established under a treaty between the East Slavonian Serbian leadership and Croatia, which reflected a consensus as to the future of the contested area. Thus, in sharp contrast with Kosovo, the role of the UN administration consisted not in unilaterally occupying the area, but in supervising and securing the implementation of a treaty between the opposing sides. Chesterman, Kosovo in Limbo at 5 (cited in note 6).
30 Malcolm N. Shaw, International Law 161–62 (Cambridge 2d ed 1986). Others have argued that the Serbs were colonial rulers of the Kosovars, thereby vesting the latter with the right to self-determination. See, for example, Enver Hasani, Uti Possidentis Juris: From Rome to Kosovo, 27 Fletcher F World Aff 85, 91 (Fall 2003).
widespread defense of separatist tendencies in the Balkans. After the precedent set by American and Western European policies of support towards such tendencies, it will not be surprising if, in the future, minority self-determination arises as a principle of customary international law. Consequently, states with separatist minorities (modern-day Russia, for example) will become warier of granting these minorities increased autonomy, if doing so could open the door for claims of territorial independence. The Security Council was apparently mindful of these implications and was careful to note in the Annex of Resolution 1244 that principles of state sovereignty need to be balanced against the Council's actions. Similarly, the international community is not impervious to these underlying dangers; after all, it "has so far refused to discuss possible independence [in Kosovo] for fear of setting precedents for other separatist minorities." Overall, it seems inapposite to defend the legality of the UNMIK on mere purposive readings, since loose interpretations may ultimately backfire with unforeseeable consequences.

The Security Council introduced additional legal complications by actively involving NATO in peacekeeping operations in Kosovo. Although the Security Council can employ means other than the use of force in implementing its decisions, the intimate cooperation of the UNMIK and KFOR made the latter appear to be functioning under color of UN authority. KFOR, however, is a military contingent that belongs to a coalition of countries that attacked Yugoslavia, potentially in violation of the UN Charter. Thus, KFOR can be

---

31 This concern was precisely the starting point of Serbian repression against Kosovar Albanians in the 1980s. See Artisien, 36 Soviet Studies at 268 (cited in note 9). However, the Albanian claim of independence currently carries less force than before: while in the 1980s Albanians in Kosovo could assert their independence under a constitutional provision, modern day Albanians throughout the Balkans (Kosovo, Macedonia, Serbia) could seek to assert independence under a principle of international law which is potentially inapplicable. Such a development would affect strategic interests of local as well as international actors. The overarching concern is, therefore, that UN support towards minority self-determination expands the scope of this principle and increases the volatility of the Balkan area. See, for example, Misha Glenny, Balkans Challenges for the West, BBC News (July 1, 2001), available online at <http://news.bbc.co.uk/1/hi/world/europe/1416145.stm> (visited Mar 28, 2004) (arguing that Albanian nationalism and visions of a Greater Albania, among other factors, increase the likelihood of protracted hostilities in the Balkans).

32 Indeed, under international law and the UN Charter in particular, state sovereignty is not a simple rule, but a fundamental principle. See Nico Krisch, Selbstverteidigung und kollektive Sicherheit 331 (Springer 2001). See also United Nations Charter art 2(4) (cited in note 14).


34 There is an extensive debate as to the merits of the "Clinton doctrine" of humanitarian interventions or preemptive strikes on the part of NATO. Less disagreement arises, however, as to whether NATO outright violated the UN Charter by attacking Yugoslavia without a UN mandate. For a forceful assertion of this argument, see Richard A. Falk, Kosovo, World Order, and the Future of International Law, 93 Am J Intl L 847, 852 (1999). There was an attempt by the US and NATO to contend that the use of force against Yugoslavia was authorized implicitly under
viewed separately as an occupying force that launched a campaign against a sovereign state (however legitimate the reasons). By furnishing KFOR with a mandate to provide UNMIK with security, the Security Council de facto ratified NATO’s presence in Kosovo, and by extension justified the Alliance’s prior actions as consistent with the current UN mission in Kosovo. This is supported by an additional and perhaps ironic observation. Since KFOR troops are currently acting under a UN mandate, they are “coercive peace-keepers,” that is, soldiers that the UN has deployed and authorized to use all necessary means in self-defense and in support of their mission.\(^5\) Under Article 105 of the Charter, international law prohibits attacks against these NATO troops.\(^6\) However, the same troops did not possess similar protection when attacking Yugoslavia in 1999. The protection extended to NATO troops through the UN reinforces the view that the UN sanctioned ex post NATO’s military action against Yugoslavia, although the Security Council never authorized NATO’s initial aggression. Whatever the reasons (lack of resources,\(^7\) political pressures) the presence of an official NATO contingent in Kosovo deprives UNMIK of some legitimacy under international law.\(^8\)

Finally, there is limited merit to the contention that the UN’s ability to establish administrative bodies and judicial organs implies that the UN possesses a mandate to establish self-sufficient interim administrations with the authority to vest sovereignty in new geopolitical entities. It seems counterintuitive to interpret statutes by induction, assuming that authorization to assume or establish certain administrative institutions amounts to the much broader power to instate complete administrations. If the drafters of the Charter had envisioned

---

\(^{35}\) Sharp, *Jus Paciarii* at 123 (cited in note 34).


\(^{37}\) This is a very real concern: during the war in Bosnia, the UN peacekeeping force in the region was ill-equipped to provide adequate protection to civilian populations in designated “safe areas,” such as Srebrenica. See Jane Boulden, *Peace Enforcement: The United Nations Experience in Congo, Somalia, and Bosnia* 92–93 (Praeger 2001).

\(^{38}\) The administrative separation between UNMIK and KFOR does not obscure the overlap in their mandate from the Security Council. See, for example, Marc Guillaume, *Le Cadre Juridique de l’Action de la KFOR au Kosovo* in Tomuschat, ed, *Kosovo and the International Community* 249–50 (cited in note 14).
the possession of such power by the Council, surely they would have said so in a relevant provision.

V. THE FUTURE OF KOSOVO

The legal issues surrounding the UN administration of Kosovo are certainly serious, yet it seems that political considerations actually control the fate of the province. In connection with a potential future status for Kosovo, four proposals have received systematic treatment: 1) indefinite protectorate status; 2) partition of Kosovo, with the Albanians receiving the majority of the land as well as independence; 3) full independence for the entire province; and 4) conditional independence in the form of a loose confederation with Serbia.39 The Independent International Commission on Kosovo considered each of the potential solutions and sided with conditional independence because it seems to be the best manner for Kosovars to become self-governing, free from UN administrative oversight.40

Before examining any proposed solution, however, it is helpful to note that predictions or suggestions regarding the future status of Kosovo involve a balance between the interests of the Kosovars and the stability of the Balkan region. As the analysis shows, the persisting instability casts doubt on international organizations’ ability to disengage from the area in the short run. Consequently, Kosovo will remain a protectorate for the foreseeable future, although the UN may delegate an increasing number of administrative functions to the nascent Kosovar authorities.41

First, it seems unlikely that Serbia would unconditionally accept UNMIK’s authority to vest sovereignty in a new Kosovar state. After all, the need for Serbia to cede sovereignty is part of the reason it will be an important participant in any negotiations regarding the future of the province. The reasons Serbia


41 See, for example, Christian Bourge, Report Ties Balkan Stability to Kosovo Status, Wash Times 2–3 (June 1, 2003), available online at <http://www.publicinternationallaw.org/docs/News/REPORT%20TIES%20BALKAN%20STABILITY%20TO%20KOSOVO%20STATUS.doc> (visited Mar 28, 2004). This assertion is not meant to downplay the urgency or importance of finding a solution to the problem. Laura Silber, a senior policy advisor for the Open Society Institute put it aptly: “The status of Kosovo . . . is the time bomb ticking under the Balkan body politic.” Laura Silber, Bush Has Neglected the Balkans for Too Long: A Ticking Time Bomb, Intl Herald Trib 7 (Jan 13, 2004).
might resist such a development are primarily political. The existence of a Serbian minority in Kosovo combined with the enduring Serb belief that Kosovo is a shrine of Serbian history means that any concession to the Kosovars will come at a large political cost. This cost is likely to be much higher for any government in which the newly elected nationalist Serbian Radical Party participates. Furthermore, despite many analysts’ emphasis on Serbs’ historical/psychological bond with Kosovo, the Serbian side is also called upon to concede a mineral-rich and strategic area. Openly signaling that only significant reciprocation from the Albanians and the international community could convince the Serbs to give in, the Serbian Parliament in August 2003 proclaimed Kosovo an indisputable part of Serbia. At the antipode, Albanians perceive the Serbian unwillingness to compromise and observe warily as international mediators voice concerns about the human rights of minorities and about Balkan stability, should Kosovo become independent. The high stakes suggest that the resulting negotiations and exchanges are likely to be protracted. Recent developments confirm this expectation.

Kosovar independence is currently unattainable for a host of domestic reasons as well. Admittedly, geopolitical independence may be the only realistic chance Kosovars will have at absolute self-rule and at regulating their relations with other nations. Given the importance that the Kosovars have traditionally attached to determining their own destiny, such a solution should abate the sense of grievance that repeated repression has created among the population. Even ignoring the obstacles posed by Serbian and western interests, however, the UNMIK cannot transfer sovereignty to Kosovars before ensuring that

42 The results of the recent Serbian election make the prospect of a UN-brokered, commonly accepted solution seem even more remote. Serbian voters provided Vojislav Seselj’s Serbian Radical Party (“SRS”) with a substantial majority in the new parliament. The SRS’s views on Kosovo mirror those of Milosevic. Such internal political turmoil will probably render Serbia an unpredictable negotiation partner in the near future. See Radio Free Europe/Radio Liberty, Serbia’s Uncertain Future, 8 Balkan Rep No 1 (Jan 9, 2004), available online at <http://www.rferl.org/reports/balkan-report/2004/01/1-090104.asp> (visited Mar 28, 2004).

43 Indeed, “the fact that many of [Serbia’s] most valuable non-ferrous metal mineral deposits are in Kosovo makes the area of great economic importance.” Europe Review World of Information, Serbia and Montenegro-Country Profile, 2003 WL 66786800 (Oct 20, 2003). The Trepça mining complex in particular includes “Europe’s largest lead and zinc mine as well as rich deposits of strategic metals such as nickel and cadmium.” A. Greg Kopetas, Deep Conflict: Serbs, KLA Fought over Trepça Mine in a 42-Day Battle—Bloody Clash Shows War Had Economic Element along with Ethnic One—Fighting for Our Jobs’, Wall St J Eur 1 (July 23, 1999).


certain conditions are met. Such conditions include the abatement of irredentism and latent nationalism that can destabilize the area once again; the establishment and proper implementation of a justice system; the adequate disarmament of paramilitary forces that threaten the area’s security; and the Kosovars’ “commitment to regional cooperation, regional governance, and enduring regional institutions.”

Albanian preoccupation with the principle of self-determination suggests that Kosovar independence could still constitute a spark that could bring about a nationalist conflagration, since it would provide a legal (as well as political) basis for sustained irredentism by Albanian populations throughout the region. Indeed, visions of a Greater Albania still exist among Albanians in Kosovo, Albania, and Macedonia. By the same token, a “Greater Serbia” has become once again a common term in Serbian politics, thereby promoting unrest among the Serbian minority in Kosovo as well as among the Bosnian Serbs. It seems, therefore, currently imprudent for the UN to sanction self-determination by recognizing Kosovar independence. Besides, Kosovo apparently has not achieved the requisite degree of internal order to become self-governing. The justice system, for example, suffers from the inadequate training of judges, from corruption, and from limited enforcement; crime is rampant; and certain groups that represent dubious interests still possess enough arms to cast a shadow over

46 Indeed, weapons totals estimates in Albania, Macedonia, and Kosovo (with a combined population of about 7.5 million) are as follows: 280,000 Kalashnikovs, 1 million anti-tank missiles, 3.1 million hand-grenades, 1 billion rounds of ammunition, and 2.4 million machine guns. See International Crisis Group, The Macedonian Question: Reform or Rebellion iv (Apr 5, 2001), available online at <http://www.crisisweb.org/home/index.cfm?id=1704&lid=1> (visited Mar 28, 2004).


48 See Kosovo Endgame, Fin Times at 20 (cited in note 33). On March 17, 2004, shortly before this Development went to press, clashes erupted in Kosovo. Although the agitators remain unnamed, ethnic Albanians committed acts of violence against Serbs, aiming to force Serbian communities out of Kosovo. These clashes, which prompted retaliations in both Kosovo and Serbia, raised concerns that the international community would be forced by the circumstances to resolve the Kosovar status, so as to avert intensification and arguably expansion of the conflict to neighboring states, such as Serbia and FYROM. However, events so far support the prediction that western governments are unlikely to yield to such pressure, since both the UNMIK and KFOR have made it clear to Albanian leaders that any further violent attempt at creating an ethnically homogeneous Kosovo would only undermine the Albanians’ standing in any negotiation regarding the future of the province. See, for example, Radio Free Europe/Radio Liberty, Which Way for Kosova?, 8 Balkan Report No 12 (Mar 26, 2004), available online at <www.rferl.org/reports/balkan-report/2004/03/12-260304.asp> (visited Mar 28, 2004).

49 For a vivid account of the difficulties UNMIK faced in establishing “law and order” upon arrival in Kosovo, see Hansjörg Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, 95 Am J Intl L 46, 48-50 (2001).
any attempt at stability. Finally, Albanians themselves are sharply divided across tribal lines and allegiance to more pacifist or more militant political forces, which are likely to clash once given a free reign.

In all, it seems appropriate to surmise that the Balkan region is too sensitive for novel experiments in statehood. The UN may have to devote significantly more resources towards infrastructural changes in Kosovo and towards stabilization in the Balkans as a whole before an independent Kosovar territory can safely and legitimately become yet another ingredient in the diverse ethnic mix of Southeastern Europe.

VI. CONCLUSION

In conclusion, although the case for the presence of the UNMIK in Kosovo is strong, it does not derive sufficient legitimacy from international law, since the actions of the Security Council with respect to Kosovo deviate in significant respects from officially (or traditionally) established Charter interpretations and peacekeeping procedures. This “legitimacy deficit” could adversely affect negotiations regarding the future of the area as well as popular perception of an already ailing collective security system. The United Nations, therefore, needs to reshape the legal underpinnings of trusteeship administrations to accommodate cases such as Kosovo, perhaps through a deliberative process that will invite the input of all participating nations.

On the other hand, an unequivocal UN stance on the status of Kosovo could have unforeseen consequences: more deference towards state sovereignty could provide Serbs with a better bargaining card; the converse would favor Albanians. Aware that settling the new international law of trusteeship administrations could have rapid political consequences in Kosovo, the international community retains its anticipatory stance, pending improvement of interethnic relations and security in the Balkans. The current uncertain political climate and the potential for further destabilization of the area suggest that Kosovo is likely to remain under UN control, at least for the foreseeable future.

50 See Fog-Ends or Freedom Fighters?—Violence in Kosovo and Macedonia Is Threatening the Area’s Fragile Peace, Economist 49 (Sept 13, 2003) (describing the efforts of an Albanian insurgent group, the Albanian National Army, to stir Albanian nationalism throughout the Balkan region).