

Kosovo's Precedents

The Politics of Sovereign Emergence and its Alternatives

PONARS Eurasia Policy Memo No. 7

Alexander Cooley

Barnard College, Columbia University

March 2008

On Sunday, February 17, 2008, the territory of Kosovo declared independence from Serbia. Shortly thereafter, and over the objections of Serbia and Russia, it was recognized by most Western states as the newest sovereign member of the international system. Concerns over Kosovo's "precedent" for the status of other separatist territories have been expressed throughout the international community, while, over the last year, Kosovar independence has been increasingly linked to the legal status of the Abkhazian and South Ossetian "frozen conflicts" within Georgia.

Drawing upon international relations scholarship on sovereignty and its evolution, this memo examines the issue of precedent and sovereign emergence. In the first section, I identify the distinguishing features of the two previous periods of sovereign change, European decolonization and post-communist dissolution. Next, I critically review the major arguments for why Kosovo does not constitute an international precedent and find them wanting. Finally, I suggest that rather than deny the international precedent set by the recognition of Kosovo, the transatlantic community instead should try to shape the precedent's scope and meaning. It should point to alternate ways of unbundling sovereignty already established during the recent international administration of Kosovo and consider the totality of the province's political evolution.

Who or What Determines Precedent? Great Powers and Modular Change

International relations history strongly suggests that the question of what constitutes precedent when new states emerge cannot be specified beforehand. In retrospect, two aspects seem critical for how states emerge. First, a group of international agents – states and/or international organizations – define a new category of non-sovereign polities and allow them the legitimate right of sovereign statehood. Second, periods of change in sovereign redefinition operate in a “modular” fashion, as new sovereign units encourage other political territories with the same characteristics to emulate them.

The cases of European decolonization and post-communist integration illustrate these principles of active redefinition and modularity. In the decolonization case, a trickle of colonial disengagements soon turned into a tide as new post-colonial states were granted membership in the United Nations and, in turn, used the General Assembly to advocate statehood for additional colonial territories. For the colonial powers, forestalling decolonization selectively became increasingly difficult from a legal perspective, once they accepted the principle that overseas territories capable of self-determination were entitled to independence. European colonial disengagement was actively supported and promoted (with a few exceptions) by the United States and the USSR, both of which tried to extend their global influence by recognizing new members of the rapidly growing developing world.

In the post-communist cases, Germany’s critical recognition of Slovenian and Croatian independence in December 1991 prompted the European Union (January 1992) and the United States (April 1992) to do so soon after. As with decolonization, the dissolution of the Soviet and Yugoslav federations was also modular. As Mark Beissinger has argued, the secession of one republic prompted others to pursue similar claims. Indeed, it is noteworthy that the Baltic States and Ukraine recognized Croatian and Slovenian sovereignty well before the EU did. Finally, a year after the dissolution of the USSR, the Velvet Divorce split the constituent Czech and Slovak republics of Czechoslovakia into independent states. In both the European decolonization cases and post-communist dissolution, like units emulated the actions of other like units. Over a period of roughly two years, the international community recognized the independent statehood of 20 former communist republics.

What lessons do these periods suggest for the issue of a Kosovo precedent? Legally, we once again see the granting of sovereignty to a new type of polity. Kosovo is not an overseas colonial territory and, unlike the initial post-communist states, it was an autonomous territory, not an actual constituent republic of a federation. So, Kosovo’s independence does signify the possible wider emergence of a new type of sovereign polity – the autonomous or

separatist territory.

Unlike decolonization or the post-communist period, however, Western states now wish to delimit the Kosovo precedent. Some members of the international community – especially EU members Spain, Slovakia, Romania, Cyprus, and Belgium – are alarmed that the Kosovo precedent will usher in a renewed period of modular change and fuel separatist demands by ethnic minorities within their borders. From a historical perspective, such concerns are not unreasonable. Already, we have heard the Kosovo precedent invoked by territorial separatists not only in Abkhazia and South Ossetia, but in Nagorno Karabakh, Northern Cyprus, the Basque country, and even Flanders.

This time, Russia has been the most active agent disseminating the idea of a Kosovo precedent, even as it formally states its opposition to it. Over the last few years, Moscow has repeatedly cautioned against the danger of a Kosovo precedent, while at the same time implying that such a precedent could prompt it to reconsider its policies toward the sovereign status of Abkhazia and South Ossetia. The legal position of Russia on the Kosovo precedent, by itself, certainly has grounding in international law, especially UN Resolution 1244 which mandated that Kosovo remain within Yugoslavia (later Serbia), but with “substantial autonomy.” Moscow has not just rendered a passive legal judgment on the matter. By selectively linking Kosovo with the Georgian breakaway territories, Russia in 2008 may well be playing the role of international legal catalyst, much like Germany did in 1991.

***Sui Generis?* The Arguments Against Precedent**

The fear that Kosovo may constitute some type of precedent is now palpable. In response, the transatlantic community could make three types of arguments for why the Kosovo case is not precedent setting.

First, the transatlantic community could simply maintain its present position that the case is unique. However, the political problem with the *sui generis* position, especially absent the backing of the UN Security Council, is that it effectively reduces precedent to one of international power – precedent is what the powerful decide. This not only raises international legal problems regarding the matter but also invites challenges against the authority and standing of the great powers that have decided this. As such, Russia’s challenge to the international community on Kosovo is as much about who gets the right to decide precedent as it is about the actual merits of the *sui generis* claim.

Second, the transatlantic community could specifically focus on the unique nature of the North Atlantic Treaty Organization’s intervention in Kosovo. By establishing the United Nations Mission in Kosovo (UNMIK) after its military campaign, the international community could claim that the *status quo ante* of Serbian sovereignty no longer applied, regardless of the compromised language

of UN resolution 1244. Post-NATO, UNMIK acted as a sovereign administrator with almost total powers for policy formulation and implementation throughout the region. This stands in stark contrast to the international post-conflict role in Georgia. Not only did the international community not intervene within the South Caucasus, but the international missions sent to Abkhazia (the United Nations Observer Mission in Georgia, or UNOMIG) and South Ossetia (the Organization for Security and Cooperation in Europe) were observer and monitoring bodies, not actual governing administrators. Although this line of reasoning is more promising than the first, it still rests on acknowledging the international legal authority of NATO and its ability to abrogate a UN-mandated status.

A third alternative would be to offer a universal rationale based on human rights criteria. One year after NATO's intervention in conflict, the International Commission on Intervention and State Sovereignty (ICISS) advanced the claim of "state sovereignty as responsibility," the idea that states that could not protect the most basic rights of their populations could involuntarily abdicate their sovereign rights to the international community. In the wake of concerns over "failed states," the doctrine seems to embody a concerted attempt to create a new legal norm that allows for the direct intervention of the international community in cases where governments repeatedly engage in gross human rights violations.

Again, however, the "human rights" violation justification runs into significant problems in the Georgian case. Both the Abkhaz and the South Ossetians have justified their territorial authority as the only credible solution to upholding the human rights of the citizens now residing on their territory. As recently as his February visit to Moscow, Georgian President Mikheil Saakashvili has countered this argument by claiming that previous patterns of "ethnic cleansing" and refugee displacement have prevented all of the citizens from the territories from asserting their fundamental citizenship and human rights. Moreover, the human rights-based claim to the Kosovo non-precedent finds only lukewarm support in a number of EU countries currently fending off internal separatist pressures from ethnic groups that have justified their claims in terms of human rights. Thus, human rights justifications for Kosovo's uniqueness also seem difficult to assert.

The Neglected Precedents: Alternate Sovereign Possibilities

The above analysis suggests that the main arguments for why Kosovo does not constitute a precedent are easily rebutted. Further, the international community's manifest concern about Kosovo's precedent shows that the issue already has spiraled further than Western policymakers initially anticipated. Precedent clearly is a concern.

To regain traction on the issue, transatlantic policymakers would do well not to reject the actual notion of Kosovo's precedent, but rather to assert a positive

argument that recasts just what *type* of precedent has been set. Rather than allow Moscow to draw its selective links between the Balkans and South Caucasus, Western policymakers should more aggressively delineate what they consider to be the generalizable lessons of the totality of Kosovo's political evolution, not just its final declaration of independence.

To do so effectively, both Washington and Brussels need to expand the scope of the types of sovereign organization they would find permissible within the contemporary international system. Rather than simply think in terms of independent and non-sovereign polities, a more careful attention to alternative or hybrid forms of sovereignty should be carefully considered. Indeed, by unbundling various aspects of state sovereignty, the West could allow itself much greater leeway and a real "menu of options" from which to craft possible "hybrid sovereign" solutions in the "frozen conflicts" and elsewhere.

First of all, the West should stress that international transitional administration, such as UNMIK in Kosovo or the UN Transitional Administration in East Timor (UNTAET), constitutes, in and of itself, a new sovereign form that could be emulated. International administration has been increasingly used in post-conflict states to impose a political settlement and allow parties the chance to negotiate a further sovereign transfer. In Eastern Slavonia, for example, the UN Transitional Administration for Eastern Slavonia (UNTAES) relatively successfully facilitated the transfer of the region from Serbian control to Croatia, while facilitating the return of displaced refugees. Much akin to Stephen Krasner's notion that the international community should once again consider "sharing sovereignty" in post-conflict territories, the international community could constitute the actual sovereign administrator over disputed territories.

Second, the international community should be more open to accepting the splitting of juridical sovereignty from domestic sovereignty. Juridical sovereignty refers to a polity's recognition by its international peers as a legitimate legal entity in the international system. Domestic sovereignty refers to the actual monopolization of coercion and governance by state authorities. Although we assume that these sovereign elements are mutually constitutive, the international system offers several examples of polities that exercise one element of sovereignty but lack the other. For example, Taiwan and Northern Cyprus exercise domestic sovereignty but lack juridical status. A number of weaker states in Africa, many of them war-torn, enjoy juridical sovereignty without enjoying anything approaching control within their borders. Splitting elements of juridical sovereignty from domestic sovereignty, then, also allows for additional sovereign possibilities.

A third source of sovereign alternatives comes from adopting procedures to administer special sites, of either strategic or symbolic importance, that may be

located on a disputed territory. Territorial disengagement, dating from European decolonization, frequently has been accompanied by agreements that created hybrid arrangements to govern such “site-specific assets” through mechanisms such as leasing or joint administration. States have used leases to continue using strategic military installations in a former periphery well after their territorial disengagement. Most recently, Russia has leased a number of Soviet-era assets located across post-Soviet states, such as the Sevastopol Black Sea fleet harbor facilities (Ukraine), the Gabala radar station (Azerbaijan), and the Baikonur Cosmodrome (Kazakhstan). Alternately, states can jointly administer or share specific sites, much like a private firm might form a joint-stock company. Certain variants of this have been proposed in the Israeli-Palestinian conflict as a final solution to the sovereign status of Jerusalem. Finally, states could agree to place certain special sites under international supervision to guarantee their preservation and the right of access to all.

On their own, none of these options – international administration, separating juridical sovereignty from domestic sovereignty, and adopting special governance for sensitive sites – seems to offer an obvious or feasible alternative plan for resolving the frozen conflicts. Yet, considered selectively and creatively, they offer some additional options to help redefine the “Kosovo precedent” on terms more consistent with Western interests, and they assist in creating alternate blueprints for solutions to the frozen conflicts other than outright declarations of independence. After all, Kosovo was effectively administered as a UN protectorate for nine years before it declared independence. During this time, Kosovo was offered substantial international reconstruction aid as a juridical entity, despite its unresolved sovereign status. The Ahtisaari Plan called for supervised independence under which the Kosovo government would have to demonstrate that it could uphold certain standards in its treatment of the Serbian community and its stewardship of Serbian cultural sites.

Thus, the totality of Kosovo’s recent history provides a number of examples of how sovereignty can be split or shared. These prior intermediary steps could also be referred to as part of the entire redefined Kosovo precedent. Applied to the South Caucasus or other frozen conflicts, the transatlantic community could call on the breakaway territories to accept elements of international transitional administration as the *sine qua non* to considering any formal changes to their legal status. Although in the case of Georgia’s conflicts, Tbilisi would initially object to such a proposal, it would also completely recast the issue and throw Moscow on the defensive. The transatlantic community would find itself on surer legal footing regarding the “Kosovo effect” and offer a much needed increased level of international engagement with the territories.

Conclusions

Absent a more aggressive stance from the West on what the Kosovo precedent

actually means, Moscow will continue to link the Balkans with the South Caucasus in its selective manner. Rather than deny the precedent, Washington and Brussels need to reset its terms. In this sense, a renewed engagement with the frozen conflicts is critical. Without proposing a new set of creative solutions for sovereign sharing in the region, the current intertwining of developments in Georgia and the Balkans could prove disastrous for both Tbilisi and the West. If Georgia is to be offered a NATO Membership Action Plan, either at the Bucharest summit in April or later, then the transatlantic community needs to think creatively as to how not to inherit another set of intractable territorial disputes.

PONARS Eurasia publications are funded through the International Program of Carnegie Corporation of New York and the Program on Global Security and Sustainability of the John D. and Catherine T. MacArthur Foundation. The views expressed in these publications are those of the author alone; publication does not imply endorsement by PONARS Eurasia, Georgetown University, the Carnegie Corporation, or the MacArthur Foundation.

© PONARS Eurasia 2008