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The Fog of Nation Building: Lessons from Kosovo?

*Edwin Villmoare**

In 2000, I volunteered to go to Kosovo with the American Bar Association's ("ABA") Central European and Eurasian Law Initiative. My position in Kosovo was entitled "rule of law liaison."

The nature and purpose of my work appeared clear enough on paper. But when my wife, Paula Huntley, and I arrived in Prishtina, the capital, where we would live for the next eight months, the situation "on the ground" verged on chaos. Kosovo had only recently been a war zone—and was now a place Louise Arbor, the Chief Prosecutor for the International Criminal Court for the Former Yugoslavia ("ICTY"), called "one vast crime scene." The Kosovar Albanians and the international community were running on adrenaline and hope. All problems had to be immediately addressed; all problems, it was believed, had immediate solutions. The ABA office and our home were both located on Dragodon Hill where a mass grave had recently been discovered. This grave and its exhumation served as a cruel reminder of what had happened and why we had come.

But before I turn to the specific question of Kosovo, I want to make some observations about the rule of law, and the success that the United States and Western Europe have had in planting it in foreign soil.

I. THE RULE OF LAW

The rule of law generally develops in three stages. The first is the drafting and enacting of new codes that are consistent with human rights and modern commercial practices. The second is the establishment of a functioning judicial system with judges who apply the new codes and enjoy a marked degree of

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This commentary is an elaboration of my remarks at the 2004 International Law Symposium. The information contained in this commentary comes from my personal experiences in Kosovo and elsewhere in the Balkans; official web sites of the United Nations, the Organization for Security and Cooperation in Europe, the European Union, the United States Agency for International Development and the World Bank; web sites of international human rights groups such as Amnesty International, Human Rights Watch, and the International Crisis Group; articles from American, British, Serbian, Macedonian, and Kosovar newspapers; generally respected histories of the Balkans and individual Balkan states; various reports from the Institute for War and Peace Reporting, including the "Balkan Crisis Report," the "Afghan Recovery Report," the "Tribunal Report" (for the International Criminal Court for the Former Yugoslavia), and the "Iraq Crisis Report." My remarks on the rule of law reflect, in part, Thomas Carothers' "The Rule of Law Revival," published by *Foreign Affairs*, March-April 1998, Vol. 77, No. 2. My views on South Korea owe a great deal to David Ekbladh's "How to Build a Nation," which appeared in the Winter 2004 issue of the *Wilson Quarterly*. This commentary represents my observations, opinions, and research and does not necessarily reflect the views or positions of any organization or other individual.

judicial independence. The third, and the one least often achieved, occurs when the government acknowledges its limitations by submitting itself to its constitution and laws.

Over the last thirty years, the United States and Western Europe have engaged in massive and extended efforts to establish the rule of law in Eastern Europe, South America, and Africa. Most of these efforts have failed at either the second or third stage. There are remarkable exceptions, such as Poland, but most recipients of rule of law largesse have not proceeded much beyond the stage of adopting new codes, sometimes accompanied by dubious efforts to reform the judiciary. Even the codes are suspect. Most are drafted by what I call “Codes R Us.” These are entities, most for profit, which draft codes for these countries, usually without much knowledge of prior codes or local culture. Among the drafters, you will occasionally find retired American law professors. This is about all the rule of law efforts have achieved to date.

If you doubt what I say, take a globe or map of the world and search for countries outside the West that have established a more or less complete rule of law. You will not find much to celebrate. You might hesitate over countries like Singapore where the laws are clear and the courts generally reliable. However, the semi-authoritarian administration of Singapore has chosen to *govern by* law while exempting itself from adherence to constitutional requirements. It does not govern *under* the rule of law.

The countries that have failed to establish the rule of law have, by and large, failed to achieve much in the way of real democracy or noticeable economic development. Slowly, the rule of law crowd, among whom I count myself, have come to recognize that rule of law, democracy, economic development, and where applicable, nation building all must occur together for any one of them to be successful. There can be no genuine progress in any one of these initiatives if there is not progress in all. The rule of law requires a proto-democratic environment to succeed, democracy requires economic development, economic development requires rule of law, and so forth. To think about one of these fields in isolation from the others is to make a grave mistake. Nevertheless, almost everyone does exactly this. In fact, few people have the background to approach these initiatives in an integrated manner. We need to find ways to address this complex challenge.

II. NOW TO KOSOVO

What does the story of little Kosovo, one-third the size of Belgium with a population of 2,000,000, technically still a province of Serbia, contribute to our understanding of nation building?

Kosovo is a study of what might be termed nation building in a “post-conflict, pre-conflict” situation. The term “pre-conflict” is meant to indicate that ethnic hostilities in Kosovo, and the Balkans as a whole, are not necessarily over. Certainly, the peoples of the Balkans do not think they are over and many are just

biding their time, dreaming of reconquest and revenge. My own view is that this sort of situation develops following military intervention when the enemy has not been completely defeated—militarily, economically, and psychologically. Twice the North Atlantic Treaty Organization (“NATO”) fought Serbia, in Bosnia and then in Kosovo, and both times Serbia came away not just angry, but unrepentant and much aggrieved. Serbia is in a constant state of defiance, even though this stance hinders recovery and economic development. The Serbs are still fighting the Balkan Wars of the 1990s.

III. SOME RECENT HISTORY

Slobodan Milosevic, formerly a communist apparatchik, came to power ten years after Marshall Tito’s death by stoking Serb nationalism, and in 1989, by revoking Kosovo’s autonomy within Serbia granted by Tito in 1974. Milosevic’s rise to power was fueled by his denunciations of Kosovo Albanians and his endorsement of the dearly held Serbian belief that Kosovo is an ancestral holy land the Serbs are entitled to as matters of history and religion. In the eyes of the Serbian Orthodox Church and most Serbian nationalists, Kosovo is the Serbs’ Jerusalem, a place where the predominantly Muslim Albanians, who constitute ninety percent of the population, are destined to be replaced by Serbian Orthodox Christians and fully integrated into Serbia.

With revocation of Kosovo’s autonomy, the Kosovo Serbs, a minority of some ten percent in the province, had turned the tables. Serbs insisted that all classes in primary and secondary education be taught in Serbo-Croatian. They divided higher education into ethnic groups. Segregation and discrimination were rampant. The Albanians adopted a policy of non-violent civil resistance, something they have never been given proper credit for. They created their own parallel structures, such as schools and medical clinics. The schools were often no more than rooms in people’s homes. The students suffered harassment and worse. A number of young people I met told of Serb police bursting into their classes, beating the teachers if they were male, and sending terrified kids home. Sometimes the police threw canisters of tear gas into the classrooms. Meanwhile, the social and political situation deteriorated, as did the economy of Kosovo, which was confined to mining, smelting, a bit of light manufacturing, remittances from sons abroad, and marginal family farming. Kosovo’s Gross Domestic Product (“GDP”) contracted by fifty percent during this period, to some \$400 per capita.

In 1996, the Kosovo Liberation Army (“KLA”) appeared as an alternative to civil resistance. This small insurgent force was incapable of confronting the Serb military, but could attack police stations, kidnap, and in some cases, execute civilians (including Albanians viewed as collaborators), and otherwise harass the Serb population. Let’s face it, the KLA, like most insurgent and rebels groups, committed acts of terrorism and war crimes, a point that Milosevic keeps raising from the dock at the ICTY.

The rejection of non-violent civil resistance by KLA leaders reflected the growing sentiments of Kosovars Albanians: this form of resistance, along with the parallel structures, had played into the hands of the Serbs and had accomplished nothing. Life for the Albanian population got worse as Serb soldiers and police responded to KLA actions with increasing violence: burning homes, raping women, and executing men of all ages. As usual in such struggles, the vast majority of the victims were civilians. That, I am afraid, is what the KLA wanted to happen in order to trap Serbs into documented atrocities. The Serbs cooperated.

In 1998 and early 1999, as the KLA became larger and more daring, Milosevic began an ethnic cleansing program to change the ethnic composition of Kosovo's population. At the same time, Serb response to the KLA escalated into stark massacres of villagers by Serb militias and paramilitary groups. These massacres caught the attention of the world. As usual, the Europeans, with the exception of Prime Minister Tony Blair, were prepared to do nothing. President Bill Clinton found himself on the hot seat. Finally, in the spring of 1999, NATO bombed Serbian military forces in Kosovo—with little effect, except that Serb actions to destroy villages and drive out Albanians reached a frantic pace.

Finally, NATO began to bomb targets in Serbia, where the power grid, the bridges, and Milosevic's home were fair game. Milosevic initially thought the NATO bombing campaign was a bluff, and was called by some wags "bombing lite." Meanwhile, 1.4 million Albanian Kosovars were either internally displaced or driven from Kosovo. The pictures were heart-rending. The use of trains to remove Albanians from the cities reminded the world of the Holocaust. President Clinton, who had ill advisedly announced that he would not use ground troops, began to reconsider. NATO would have to invade by late summer to avoid a Balkan winter and the deaths of many Albanians hiding in the mountains of Kosovo. Finally, as Belgrade took a fierce pounding, Milosevic realized that he had miscalculated and agreed to remove his forces from Kosovo. With the retreating Serb units fled half of the 200,000-300,000 Serb and Roma population of Kosovo.

In what condition did the Serbs leave Kosovo? The NATO ground forces, approximately 50,000, found the countryside in ruin. Fifty percent of all Albanian homes had been destroyed or severely damaged. Almost all the machinery in the factories had been removed to Serbia. The hospitals had been stripped of all equipment and supplies. The electricity from the two dilapidated coal-fired power plants was on about half the day, as was the water. The schools were in ruin; the roads all but impassible except in four-wheel drive vehicles. The courts were deserted. All telephone service had been lost. All land records had been taken by the departing Serbs. Nothing worked. Mass graves were identified and exhumation began to take place.

The United Nations (“UN”) assumed responsibility for governing Kosovo. The Security Council adopted Resolution 1244 authorizing the Secretary General to:

... establish an international civil presence in Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

The Resolution instructs the Secretary General to support “the reconstruction of key infrastructure and other economic reconstruction,” and to hold elections. These activities are to proceed pending a final settlement of Kosovo’s political status.

Pursuant to Resolution 1244, the UN installed an interim civil administration for Kosovo, “the United Nations Interim Administration Mission in Kosovo” (“UNMIK”). The Organization for Security and Cooperation in Europe (“OSCE”) began providing a wide range of services. The European Union (“EU”) promised to look after economic development. The military force of NATO plus Russia (“KFOR”), joined by thousands of English speaking police from all over the world, sought to impose order. Bernard Kouchner, the charismatic founder of Doctors without Borders, took over as the head of UNMIK. He was a great publicist for Kosovo, if not much of an administrator.

Food and housing materials were trucked in. European, American, and international relief agencies, so-called non-governmental agencies (“NGOs”), flooded in to assist. Few starved. Houses went up quickly, some built by international agencies, and many by Albanian Kosovars, who, given the supplies, can throw up a house in short order. UNMIK, OSCE, the EU, and the NGOs began a storm of initiatives to improve the electricity, refurbish the schools, repave the roads, improve health care, draft new laws, revive the legal system, prepare for the return of the Serbian and Roma refugees, and plan for municipal governments and municipal elections. A constitution of some sort was envisioned.

IV. IN KOSOVO

My “portfolio” under the ABA’s agreement with United States Agency for International Development (“USAID”), included membership on the committee to nominate judicial candidates for approval by the UN, membership on the committee to draft new codes of crimes and criminal procedure, participation in the initial training for the new judges, the design and delivery of human rights training for defense attorneys, membership on the committee to give the law school a new curriculum, and a general obligation to attend relentless, usually useless, meetings with rule of law lawyers from the various law-related components of OSCE and UNMIK. Other than that, my calendar was open.

My first hint that something was amiss occurred when I attended a meeting to address the question of what to do with juvenile offenders. I arrived a bit late and found thirty people assembled to discuss the issue. I could not see why it was necessary to have thirty people present, notwithstanding the fact that youth are a high priority and a large number of NGOs are able to obtain funding in this area. The French magistrate who was in charge of UNMIK's department of judicial affairs and apparently in charge of the meeting was at that moment loudly and *avec hauteur* demanding from a major in the British army instantaneous information on youth held in military facilities. The major politely explained the logistical impossibility of meeting this demand. One does not become a major in the British military by taking orders from an autocratic French magistrate. Without quite saying this, the major cast a steely eye upon the magistrate and told her that she would receive the documentation the day following arrest, and that was that. The room was in something of an uproar. Standing near the door for a quick escape, I turned to my assistant, a Kosovar Albanian law student, and asked whether there were any Kosovars in the room. "Yes," she replied, "Me."

Apparently the organizers of the meeting felt no need for ideas and information from the locals. This scenario was to repeat itself all too often. I inquired about the matter once and was told that we were all too busy to be bogged down by Kosovars. Well, of course. Why hadn't that occurred to me? The internationals found many reasons to exclude Albanians (the Serbs refused all participation under orders from Belgrade), and to inform them of decisions after the fact. The truth is that most of the Europeans had a marked prejudice against Albanians and disliked working with them. Excluding Albanians from key discussions and denying them opportunities to participate in decisions was to haunt the whole enterprise.

As I lifted the lid to peek at the problems I was supposed to work on, I found the big one. Were we working to create a free Kosovo, or a Kosovo to be restored eventually to Serbia? UN Resolution 1244 contains some lofty but vague language signaling that the UN and, therefore the prime actors in the liberation of Kosovo, the United States, Great Britain, France, Germany, Italy, and Russia, did not want to address the issue of status any time soon. This postponement of the core question threw a cloud of ambiguity over the whole enterprise. The UN hoped to make rapid improvements in Kosovo, while ethnic feelings subsided before it had to face up to the question of status. Postponing this question sowed the seeds of enormous distrust among the Albanians and encouraged mischief by Serbia.

The various administrations in Belgrade, emboldened by the delay, made it very clear (and continue to make it clear) that they expected Kosovo back. To keep the waters roiled, they regularly make new demands regarding Kosovo's status. They insist that Kosovo is non-negotiable but then advance ideas like "cantonizing" Kosovo or annexing the northern section of Kosovo, home to many of the remaining Serbs in Kosovo and the giant Trepka mining complex. The Kosovar Albanians continue to make it clear that they will never submit to

any form of Serbian control or yield any territory. Their answer is always an unequivocal no. They will not bargain over their homeland. However, they are not at all sure that the UN will not do so.

In effect, the Kosovar Albanians are being asked to participate vigorously in nation building without any clear prospect of becoming a nation.

The issue of status has consumed the Albanians and Serbs, almost to the exclusion of everything else. Neither has developed a plan for a sustainable Kosovo. The Albanians have become sullen and passive. Their hope for independence is fading. Most of the money committed by the international community has been spent with very little to show in the form of economic development. The international community now finds itself in a Catch 22. Kosovo does not have the resources to survive as an independent nation. On the other hand, the first Serb official who arrives in Kosovo to assert even the most marginal authority on behalf of Serbia is a dead man walking. He would have to arrive as a passenger in a column of tanks. The war would begin anew.

Deferring a decision like this is not a mere delay. It is a decision—with consequences. The UN decided to let developments in Kosovo play themselves out in hopes that a solution to the status of Kosovo might emerge. This decision is the cause of the UN's current dilemma: grant independence to Kosovo, precipitating a political and economic collapse, or return control of Kosovo to Serbia, precipitating another bout of war and ethnic cleansing. Neither option is acceptable. The UN has put itself in a position where it must stay and as it stays, it is seen increasingly less as a liberator, and more as an occupier. Occupiers quickly become impatient and dictatorial; the occupied become angry and subversive.

Many of the problems now surrounding the issue of status might have been avoided had the UN followed the strong recommendations contained in the "Kosovo Report," published in 2000 by the Independent International Commission on Kosovo. The commission's members included Justice Richard Goldstone, Hanan Ashrawi, Richard Falk, Michael Ignatieff, and Martha Minnow. Their report called for conditional independence for Kosovo. There were a number of advantages to granting conditional independence soon after cessation of formal hostilities. These included a clear direction for the international community, a status the Albanians might have been inspired to protect and expand, a goal for international funding sources, and the elimination of Serbia from the debate at a time that it more or less expected "punishment." ("You engaged in ethnic cleansing and other atrocities; you lost the war; you lose Kosovo.") I am quite sure that such a status would have galvanized both the Albanian and international communities. I cannot say that this approach would have eventually produced a modern country able to stand on its own two feet. It was, however, the only approach that might have avoided the current muddle. It seems that decisions made early in nation building, such as the fatal decision to disband the Iraqi army and put 400,000 unemployed young men on the streets, some still armed, are often the most critical.

As I went about my work, I discovered countless smaller problems everywhere. With little or no evidence, Albanian prosecutors were obtaining convictions of Serbs for various atrocities. Trial panels consisting of all Albanian judges were all too willing to convict, most often because the judges were easily convinced, but sometimes because they were too terrified of radicals to vote to acquit a Serb. No matter what an Albanian judge experienced during the war at the hands of Serbs, even possibly from the defendant, he never recused himself. UNMIK pressured the new Supreme Court to overturn these convictions, which it immediately did. The Supreme Court, consisting of members who at that time served from year to year at the pleasure of UNMIK, could be cooperative. Finally, Kosovar and international prosecutors, afraid of Albanian response if they abandoned weak or frivolous cases against Serb defendants, tried the cases to *disprove* guilt and show the Albanians that the wrong people were in the dock. While laudable in some absolute moral sense, this approach did nothing to help establish the integrity of the legal system—or to persuade the Albanians.

UNMIK then tried salting the five-member trial panels with an international judge on each panel on the theory that one international judge could prevent a miscarriage of justice. International judges had absolutely no effect on the outcome of cases. Only three votes were necessary to convict, and the Albanian judges voted as a block. Then, UNMIK went to panels consisting of three internationals and two Albanians. (The Kosovar Serbs continued their boycott of UNMIK activities.) Even these panels proved unpredictable. Now, international prosecutors (several from district attorneys' offices in the United States) try cases of inter-ethnic crime before panels consisting entirely of international judges. This development occurred just as the prosecutions of former KLA members began. The timing did not escape the Albanians nor did the fact that defendants have no access to international defense attorneys, only local attorneys who are rarely able to compete with the international prosecutors. Clearly, the judicial system belongs to the UN and not to Kosovo.

I should add that during my tenure in Kosovo, it was necessary to bring attorneys from Serbia to defend Serbs. No Albanian attorney would do it, nor would a Serb defendant accept the services of an Albanian attorney. To protect the Serb attorneys, it sometimes became necessary to secrete them into Kosovo in armed personnel carriers. Once they arrived, they were assigned armed guards and the location of their quarters was kept secret. UNMIK and OSCE were legitimately fearful that they would be killed. Participating in this "underground railway" is one of the ways I became acquainted with Serb attorneys. They displayed courage in coming to Kosovo. I admired them for it.

The UN has great powers of denial and equally great powers to create alternative realities. One of the first acts of UNMIK was to declare the European Convention on Human Rights applicable in Kosovo. This appears a grand gesture until you realize that human rights, like constitutional rights in the United States, are rights that run against the government. In Kosovo, UNMIK is the government. The UN takes the position that, as a super-national entity, such conventions do not apply to it and

points out that it has special immunity under the UN Charter, as do its employees when acting in their official capacity. OSCE, KFOR, and the EU adopted similar positions. The international community was above such mundane concerns as human rights. It had come with benevolence and wisdom and should not be bogged down by challenges from the locals. So much for human rights in Kosovo.

In my efforts to teach the Convention to defense attorneys in case they might be able to use it some day, I encountered a number of logistical problems. I was required to have interpreters fluent in both Albanian and Serbo-Croatian as well as materials prepared in both Albanian and Serbo-Croatian in case Serb lawyers showed up. During my tenure none did. On the other hand, no one told me that Bosniacs and Turks would attend the training in Prizren. I discovered this half an hour before the training began. I immediately sent staff to find suitable interpreters. They were available in Prizren but had left for the weekend to hike in the mountains. The Bosniacs and Turks stayed, however. They clearly understood a great deal of Albanian but would not acknowledge it. Refusing to speak any language other than that of your ethnic group is a common way of asserting the rights of your ethnic group. After the war, almost everyone who had been fluent in several languages common to Kosovo suddenly became monolingual.

Another problem arose. I could distribute the Convention in Albanian and Serbian but that was of little use. The Convention contains general principles that acquire specific meaning only through decisions of the European Court of Human Rights. Those decisions are available in English and French, and only in English and French. None of the attorneys I worked with, some ninety, could read either language. The decisions are typically twenty pages, single-spaced, and follow a standard but awkward formula. I tried summaries and translations of key passages. However, nothing I could do would enable them to do their own research. After I left, someone translated what were described as the forty most significant decisions. The body of case law from the Court is enormous. Forty decisions would not even scrape the surface, but this is the sort of duct-tape approach that is often necessary in Kosovo.

In an effort to jump-start the law school, the acting German Chancellor of the University of Prishtina proposed the adoption of the law curriculum from the University of Bologna. The law faculty, older men who had last engaged in serious teaching ten years earlier under a socialist curriculum and who had little inclination or incentive to change their ways, rejected the proposal. The Chancellor, encouraged by those of us in the international community who care about such things as curricula, assembled leaders of the faculty. He informed them that they would approve the curriculum or those voting against it would never teach again. So far so good. I could see the faculty faces; they were buckling. Then, quite unexpectedly, the Chancellor added the fatal sweetener: "But if you do vote for it, I will grant you life-time tenure." The result of this deal is a tenured faculty whose members resist the new curriculum. The old guard is still in control. Nothing has changed at the law school, except that a few more open-minded professors, a small minority, now understand what is

necessary to have a real European law school. Most serious law students wish passionately that they could attend law school elsewhere.

A similar problem arose with the appointment of Kosovar judges. Where could we find even remotely qualified candidates? Only from among the judges who presided in the courts ten years earlier under the socialist regime. Too many of them have a “forget nothing/learn nothing” mind set. In the absence of an alternative, UNMIK appointed them to the bench. A rule for nation builders: you cannot advance your endeavor beyond the capacities and values of those local people you need to use.

A smaller, technical problem bedeviled the courts. The lights and heat went off without notice on a daily basis. The courthouses were given generators but these supported only the administrative offices. I have spent winter days in cold, dark courtrooms monitoring trials. It turns out that justice can proceed under such circumstances if the court is not relying on technology and you are wearing long underwear, a sweater, a woolen suit, a heavy topcoat, a ski cap, and gloves.

At the ABA office we had a large generator that went on when the power went off. Actually, it went on just after you lost the text open on your computer. Battery devices eventually solved this problem. But, there were others. The Albanian staff had to be reminded to buy fuel and not to push certain mystery buttons on the generator.

In many ways the most poignant development in Kosovo was the boom economy. You could see from the beginning that a bust would follow. The economy brought Albanians home from the diaspora, mostly young men who hoped that they could at last find work near their families. This economy grew out of the money spent by UNMIK, OSCE, NATO, NGOs, and all their employees. The boom was a “tourist” economy. Shops, restaurants, and internet cafes opened all over the place. Within a year, as the international community began to withdraw, these fragile enterprises began to close and have been closing ever since. There is absolutely nothing in Kosovo to interest real tourists. I returned to Kosovo in the summers of 2002 and 2003 to teach at the law school and visit with friends and colleagues. The commercial districts of Prishtina are increasingly pocked by empty storefronts. The hope and energy are vanishing.

V. SUBSEQUENT DEVELOPMENTS

After Paula and I returned home in 2001, banks began to appear in Kosovo, relieving the NGOs of the need to bring great wads of cash from Macedonian banks to run their offices and fund their projects. I found that there is nothing quite like crossing the grim, chaotic, diesel-polluted border between Kosovo and Macedonia with \$50,000 in twenty dollar bills on your person. UNMIK adopted a full complement of commercial laws, established a commercial court and proposed to privatize public property. Statistics were gathered. Excise, import, and income taxes were successfully imposed. As of 2003, 50,000 businesses had registered. Fifty-seven percent of these businesses are wholesale and retail trade,

auto repair shops, and small businesses that repair and construct buildings. Another eight percent are in restaurants. Manufacturing accounts for only eight to eleven percent of the businesses. Approximately eighty-seven percent of the work force is employed by businesses with one to four employees. Only one percent of all employees work for businesses that employ more than fifty workers. Eighty percent of all businesses are sole proprietorships. One percent of all businesses are foreign owned. Sixty percent of the population lives in rural villages working the land. Fifteen percent of the population receives welfare of about fifty-two euros a month per family. Remittances from sons working abroad account for thirty percent of the GDP.

UNMIK adopted a provisional constitutional framework and a European-style governmental structure. The Kosovo assembly has been elected and now sits. Kosovo has a president and a prime minister. UNMIK has created a full battery of ministries.

Taxes collected are close to meeting expenditures for the Kosovo General Budget of 516 million Euros. However, this budget is a bit illusory since it omits the value of the goods and services provided by the international community and the protection provided by KFOR and the international police. Someday Kosovo will have to find the money to cover these items.

Foreign aid so necessary to continue to upgrade Kosovo's ragged infrastructure is rapidly declining. For example, the EU, Kosovo's largest donor, contributed 362,000,000 euros in 2000, but only 51,000,000 euros in 2004.

Despite the substantial investments in economic development by the international community, the unemployment rate is fifty to sixty percent. Once again, bright, ambitious young people are leaving. The road and communication systems are wholly inadequate. The departure of the international community reduces the number of customers for small business and costs precious jobs.

The privatization initiative has hit snags involving disputed ownership and the very limited number of businesses that attract foreign investment. The huge Trepka mining complex that was the backbone of Kosovo's economy stands almost empty. It has valuable deposits of coal and zinc. Like most socialist mines, it is an environmental disaster requiring hundreds of millions to clean up.

VI. THE ISSUE OF STATUS

UNMIK has adopted standards that it insists the Kosovo government must meet before the question of status can be addressed.

UNMIK's mantra has become "standards before status." These are the eight standards:

1. Functioning democratic institutions,
2. The rule of law, including functioning and ethical police and judiciary,
3. Freedom of movement, that is, safety of movement for all minorities,

4. The right of return for all refugees and their integration into society,
5. Market economic development, including appropriate legislation, balanced budgets, and privatization,
6. Respect for property rights, including the resolution of ownership disputes and restitution of land,
7. "Normalized" dialogue with Belgrade, and
8. Reduction and transformation of the Kosovo Protection Corp (an incipient defense force) and increased minority participation in the Corp.

UNMIK is looking to Kosovo's "Provisional Institutions of Self-Government" to achieve these standards. Under the provisional constitution, that government is entrusted with authority over domestic affairs, including the economy, education, transport, local administration, judiciary, prisons, and the media. At least it looks that way on paper.

The constitution reserves to UNMIK the power to dissolve the assembly and call new elections, veto legislation, set the financial and budgetary parameters for the budget, appoint and remove prosecutors and judges, control the Kosovo Protection Corp, address all "international" matters, and serve as the sole point of contact for KFOR. In addition, UNMIK's "Independent" Media Commission has the power to shut down newspapers and television stations. In other words, almost all the standards are actually controlled by UNMIK. The self-government created in the constitution is largely an illusion. The Kosovar Albanians are acutely aware of this. UNMIK's attitude is one of imperial condescension to a struggling colony. They do not understand why the Albanians seem so little engaged with their government. The Albanians are increasingly distrustful and their distrust has led to passivity. They no longer want to play what they see as UNMIK's games.

Let us look at a couple of the standards that UNMIK has imposed. Freedom of movement and the right of refugees to return safely are impossible to achieve. If 50,000 NATO troops and 1,000 English-speaking policeman could not provide safety for minorities, what chance is there for the Kosovo interim government to do so? The Serbs remaining in Kosovo live in enclaves guarded by NATO. Every so often, Serb refugees dare to return to their Kosovo homes. And every so often a Serb is shot. This deters other refugees. The gunmen do not appear numerous, but they are almost impossible to catch.

Privatization is under the control of UNMIK and has been beset with difficulties, such as the claim raised by Serbia for pensions owed by these companies. No one knows the extent of these and other obligations. No one is going to buy a business with unknown liabilities. In fact, no one is going to buy a business in Kosovo, not even wealthy Kosovar businessmen living abroad. They are not fools. There are other privatization problems. The larger businesses involving electricity and telephones are not for sale because they are technologically entangled with Serbia. If you call your neighbor on a landline, the call goes through the central exchange in Serbia.

How can land disputes be resolved? The Serbs took the land records and have not returned them. In any case, UNMIK retains control over the Housing and Property Directorate, the entity in charge of resolving land disputes. The Directorate's work has been delayed while UNMIK creates a land registry from scratch. I might add that we never knew who actually owned the ABA building. There was no way to know. We were lucky, but other NGOs paid rent only to have the "true owner" show up and demand that he receive rent. In villages, where most of the slaughter and brutality occurred, restitution of houses and fields is a bad idea. Albanian villagers will extract revenge. They will not necessarily distinguish "good" Serbs from "bad." In one instance, a young Albanian returned to his village to find his close Serbian friend waiting to greet him. The Albanian apparently thought matters over. He knew that his Serbian friend had done nothing to him, but the friend was now using vacant fields the Albanian's family had traditionally farmed. Several days after coming home, he visited his friend and shot him in the face, killing him. The Albanian explained that having a Serbian friend had become an intolerable contradiction and made him crazy. Besides, the Serb should never have "claimed" his family's land. So much for land disputes. Actually, what often occurs is that Serb refugees sell their properties to Albanian Kosovars by quitclaim deed. These Serbs are glad to have the money for property they have no prospect of using.

What should the "normalized dialogue" with Belgrade include? Privatization, trade, telephones, and electricity maybe, *but* not status. Only UNMIK can talk to Belgrade about that topic (and only when there is a government in Belgrade—Serbia has problems forming governments).

The consequences of all of this are appalling. Commercial banks will not loan to the Kosovar government because there is no debtor nation to look to. Kosovo businesses are similarly hamstrung. Lenders will not loan to them because the lenders do not know what country the businesses are in or will be in and therefore, do not know what laws will apply in the future. International investment will not arrive until status is determined, creating a Catch 22 situation for economic development. Economic development cannot occur *until* status is decided, if then. Kosovo's trade balance is awful. Only a few nations trade with Kosovo, and Kosovo has little to offer. Cigarettes and gasoline are actively smuggled. Organized crime has moved to drugs and human trafficking, although in my view Kosovo remains less corrupt than the surrounding countries. (You can get an argument on this.) The Serbian population in the city of Mitrovica (near the Trepka mine) runs parallel institutions with the open support of Serbia. At least temporarily, UNMIK has acquiesced to this *de facto* partition. The judiciary is subject to corruption. A Kosovo judge earns approximately \$400 per month (\$250 when I was there). The principal judge with whom I worked to established the Kosovo Judges' Association has since been removed from the bench for taking a \$400 bribe.

For all the diversity and talent within the UN staff, the UN can miss the obvious. It appears oblivious of the overwhelming resentment caused by a

Kosovar judge earning \$5,000 a year sitting with an international judge earning \$140,000, who may know less than the Kosovo judge. Such salary disparities exist between locals and internationals in all fields. The Kosovars have begun to think that the internationals are stringing out their work to retain their salaries.

The decision-making processes of the UN are ponderous and opaque. The UN is a rigid, hierarchical organization full of talented bureaucrats who, unfortunately, are either powerless or too fearful to make decisions. Moreover, it remains a mystery what decisions are made at headquarters in New York. UNMIK's committee to draft new codes of crimes and criminal procedure for Kosovo was making progress, but slow progress because Kosovar law professors had been charged with most of the actual drafting. Everything they drafted had to be translated into English. Suddenly and inexplicably the project was taken over by New York. Many months later completed codes returned. They were well done (unless you favor rights for defendants), but they had been prepared without input from Kosovar Albanians—or, for that matter, Kosovo Serbs. The tendency of New York to withdraw or retain most significant authority (or worse, second guess) may explain why Kosovo has had four UNMIK administrators in five years. Of course, it takes each new administrator several months to get up to speed administratively and to begin to fathom the ethnic situation. A great deal of time has been lost by these frequent changes.

VII. COMPASSION FATIGUE

Perhaps the most disturbing development for Kosovo is that the international community has grown weary of hearing about war atrocities, weary of human suffering. Its attitude is: the war occurred five years ago; get over it. The community has trouble remembering that they are dealing with people many of whom had their houses burned, watched their fathers and sons being executed, and saw their mothers, sisters and daughters raped. The international community cannot wrap its mind around the rage these experiences have engendered, rage that carries people to the edge of suicide or mental collapse—or that explodes into fierce, often indiscriminate, violence. I recounted to my assistant, a sweet generous young woman, a remarkable story that I had heard. A young Kosovar Serb had planted himself in front of an advancing column of Serbian tanks. Unlike Tienneman square, no reporters or cameras were present; the world was not watching. The lead tank simply ground him under. "Why do you tell me about one good Serb?" My assistant shouted, "I don't want to hear about one good Serb!" She had lost five members of her family to Serb violence. A young Albanian lawyer in our office lost eleven members of her family. This group of elders lived together in one house. Those able to walk would not abandon those too crippled to do so. The Serbs, some of whom were neighbors, torched the house. All the old people died in the fire.

I will not tell you stories of barbarity that would stun you. I will tell you that the Serb paramilitaries, many of them career criminals and sociopaths released by

Milosevic from the prisons and jails of Serbia to join in the carnage, were frequently high on amphetamines and cocaine. In some instances, they drew red streaks across their faces and bodies with the blood of their victims. War paint! The paramilitaries preferred to kill with knives. No cruelty conceivable by the human mind was off-limits. In fact, the more grotesque the crime the greater their pleasure. So, for many Kosovar Albanians, the only good Serb is a dead Serb. Trying to force the Albanians prematurely into a cooperative relationship with Serbia is a fool's game.

As the international community grows weary of hearing about war trauma, the ICTY has become a victim of unintended consequences. The Court was not established to revive the political careers of defendants, yet, this year, two years after the start of his trial, Milosevic was elected *in absentia* to the Serbian Assembly. Vojislav Seselj, leader of the Serbian Radical Party and an admitted paramilitary leader in custody at the ICTY awaiting trial, was also elected *in absentia* to the Assembly. His extremist party won twenty-seven percent of the vote. The villains have now become heroic Davids before the Goliath of the ICTY. The Court itself has not persuaded the Kosovar Albanians that it will accomplish anything good or useful for them. What the Kosovars know is that Milosevic's trial is interminable and that victims who go to testify are badgered by Milosevic with obscure facts about their families (provided to Milosevic by the Serbian secret police) and made to fear that Serb hit men can reach them.

The bureaucrats of UNMIK and OSCE are impatient. They arrived with a very sophisticated checklist and a series of templates, which they imposed without regard to the facts on the ground. It was all they knew to do. The bureaucrats want to strike items off the to-do list to show New York that rapid progress is occurring. I am reminded of my days at the Office of Economic Opportunity during the "War on Poverty." We had to show that any grant to develop new approaches had either solved problems or developed workable solutions. No grant for such a project could last longer than three years. Congress wanted instant gratification and churning of the funds. Worse, the White House under President Johnson wanted to march from success to success. The White House would accept no other outcome. It had the same attitude toward the war in Vietnam. The White House believed what it insisted on being told. It lost the war in Vietnam and the War on Poverty. The UN, OSCE, NATO, and the EU could easily lose everything they are trying to achieve—if they do not reevaluate what they have undertaken and what has yet to be done.

First, not last, the UN must resolve the question of status. The UN and the nations supporting the enterprise in Kosovo must face the fact that they cannot return Kosovo to Serbia, not in any manner. It cannot partition Kosovo without destroying any chance that it might have of becoming a functioning state. It cannot grant unconditional independence and more or less walk away; Kosovo would suffer immediate political and economic implosion. No one wants an indefinite UN protectorate; the Kosovo Albanians would surely conclude that liberators had now become occupiers, if they have not already reached this

conclusion. So we come full circle to the conditional independence recommended in 2000 by the Independent International Commission on Kosovo. But what would that accomplish and how soon would it accomplish it? Certainly, conditional independence would require the continuation of technical support and an increase in financial commitment. However, if realistic criteria for independence were established along with time lines for reaching *full* independence, Kosovo Albanians and the international community would at least have a clear direction to go in. The Kosovar Albanians might yet be reenergized and international donors might yet have their interest renewed. This approach is a long shot, a real long shot, and would come five years late! But, the other options offer even less promise.

In 2003, the international community attempted to open a dialogue between Kosovo and Serbia on ‘technical matters,’ such as transport and telecommunications, refugee return, and missing persons. Working groups on such matters involving Kosovar Albanians and representatives of the Serbian government were established, but Kosovo’s Prime Minister Bajram Rexhepi withdrew, leaving the President and Chairman of the Assembly to represent Kosovo. In every issue lurked the question of status. Although the parties talked (which is progress), almost nothing of consequence was decided. Now the UN indicates that in 2005 it will review the progress toward the eight standards and open negotiations on the status of Kosovo. This cautious approach does not excite enthusiasm among Kosovar Albanians.

VIII. NATION BUILDING

The UN finds itself in the role it seeks to avoid, the custodian of a place that no one has a solution for. Without receiving a clear mandate from the Security Council in Resolution 1244 and without deciding the issue of status, the UN has drifted into nation building. The introduction of democracy, the creation of the Kosovo provisional government, and the establishment of the eight standards constitute *de facto* nation building. Since the UN does not possess the expertise for nation building, it can reasonably be said that the UN is engaged in on-the-job training.

If the UN does not have a handle on nation building, no one else does either. People cite this country or that country as examples of nation building. (East Timor is too shaky to count.) Setting aside post-war Germany and Japan where “rebuilding” of established, sophisticated nations occurred, the only successful example of nation building that we have in recent history is South Korea—and it took over fifty years. The United States was fully dedicated to the project as part of its effort to stem the tide of communism. At one point, the United States was spending the equivalent of 1/70th of its GNP on South Korea.

The path of South Korea to independent nationhood with the rule of law, democracy, and a self-sustaining economy was anything but straight and predictable. The first elected president, Syngman Rhee, though pro-American, proved ineffectual and corrupt. Eventually, he was forced to step down. General Park Chung Hee almost immediately took over the government in a *coup d’etat*.

Park instituted a program of reform designed to stimulate the economy—and satisfy the U.S. However, the economy remained weak until the Vietnam War came along. The United States desperately needed steel, chemicals, and other industrial products from South Korea. Purchases for the Vietnam War enabled South Korea to build up its industrial capacity and become a regional economic power. In 1979 after eighteen years in power, Park was assassinated. A military junta effectively ruled the government (sometimes through surrogates) until, in 1997, Kim Doe Jun, the leader of the opposition, became the first president elected by the political opposition. Finally, South Korea achieved what appears to be a stable democracy. But, as you see, success required an enormous investment, fifty years, and luck. It was a long rocky road and the outcome was by no means assured, regardless of United States intentions or efforts.

The South Koreans continue to play bare-knuckle politics, however. In 2004, the current president, Roh Moo Hyan, was impeached by the conservative assembly for alleged violations of a minor election law. As often happens in South Korea, the people, seventy percent of whom supported Roh, took to the streets, as South Koreans traditionally do when deeply dissatisfied. Subsequently, the assembly changed hands, the Constitutional Court set aside the impeachment, and Roh returned to the presidency. No one was assassinated, the military stayed in the barracks, the people spoke, and the politicians followed the rules—more or less. Democracy can be a messy business and tends to follow cultural patterns, something we need to keep in mind as we consider nation building in Kosovo and elsewhere.

Is the international community committed to Kosovo for anything resembling the effort in South Korea? Of course not. But if it were, it would need to face the fact that Kosovo has no bureaucratic class, no technocrats, no statesmen or national leaders. Such people are a generation away, maybe two. The Albanians are skilled traders and canny businessmen. However, they do not yet have a good feel for collaboration or coalitions. The clan structure is very strong. The man of the house rules absolutely. In the rural areas women are often little more than beasts of burden. Vendettas and blood feuds are on the decline but not unknown. While we were in Kosovo, members of feuding clans shot at each other from separate moving cars. During the exchange of fire, one of the cars crashed head on into a third car, killing most of the innocent occupants.

The current generation of younger Kosovars is in many ways a lost generation. They were denied higher education for most of the apartheid years and are desperate to catch up. They are struggling to throw off the most oppressive elements of their culture. Few leaders, young or old, have much experience outside of Kosovo. The Kosovars have little feel for modern democratic government or capitalist economics. Why should they? They have no experience with these “panaceas.” Contrary to the beliefs of the neo-cons around President Bush, democracy and capitalism are not the natural order of things; they are not instincts that automatically guide people once released from the chains of socialism or dictatorship. They are acquired tastes, and these tastes can vary.

2004 / The Fog of Nation Building: Lessons from Kosovo?

If all of this were not daunting enough, the international community must face that fact that dealing with Kosovo requires dealing with the other states of the Balkan Peninsula. Serbia, Montenegro, Croatia, Bosnia-Herzegovina, and Macedonia are among Kosovo's natural business and trading partners. They are interdependent whether they like it or not. We must realize that the countries of the Balkan peninsula, except for Greece, are a group of post-war states collectively destined for failure and the consequences of failure—a diaspora of unwanted workers flooding Western Europe, growing organized crime with tentacles throughout Europe, the prospects of future wars, and, now, a possible safe haven for terrorists. The real project here is the building of a viable structure for the broken countries and provinces of the former Yugoslavia, under whatever name and under whatever political and economic framework that will advance the region towards membership in the EU. The situation is reminiscent of the Paris Peace Conference of 1919 when the United States, Great Britain, France, and Italy created the first version of Yugoslavia out of disparate claims and territories.

No one bargained for all of this. However, some people in the current administration want to undertake the reformation of the Middle East. Such an undertaking, if it goes forward, will make the problems of Kosovo and the Balkans appear trivial.

A. Lessons?

Can we extract useful lessons from Kosovo? One is that we know almost nothing about nation building—least of all the political and cultural alchemy that produces a commitment to the democratic process. A second is that amateurs, and we are all amateurs, cannot do nation building quickly and on the cheap. Billions of dollars, decades of effort, and of course, good luck are necessary. A third lesson is perhaps that it cannot be done at all, at least not by imposition from the outside by the international community.

Despite the rhetoric, the current U.S. administration has no intention of making more than a token effort in Afghanistan. The rubric of nation building was merely one more moral justification for invasion. No one in his right mind, not even the current administration, believes that nation building in Afghanistan is possible, unless the Afghanis happen to stumble upon it themselves.

Iraq will be the next big test. Iraq makes Kosovo look like the garden of Eden.

B. Postscripts

The nation building that was supposed to follow the invasion and conquest of Iraq is not happening, and is not going to happen. One may decry the lack of planning, the insufficiency of troops, the innocence and ignorance of Paul Bremer, and the appalling belief that Ahmed Chalabi was going to be the man to pull Iraq together. No doubt these have contributed to the present confusion.

Behind the confusion, however, move Iraqi politicians of all sorts—the interim prime minister, Mr. Allawi, other members of the interim government, tribal leaders, religious leaders of the Sunni and Shiite sects, Baathists, Kurds, and Turkomen. Iraqi politicians are a rough crowd. They are also skilled in their way. They are gradually shoving the United States to the sidelines. The toppling of Saddam and the determination of Iraqis to run Iraq their way rather than follow some plan conceived by the United States may yet lead the Iraqis to form a semblance of a representative government. The government will have to be a coalition offering sufficient incentives to keep most of players at the table and procedures that allow for periodic changes or modifications in leadership. Whatever government the Iraqis form will be the product of hard negotiations that may, at times, involve violence. That government may not meet our criteria for a true democracy and may ignore all U.S. plans and wishes, if only to establish its independence and legitimacy. It may become obstreperous. It may disappoint and infuriate the United States. It will, however, be an improvement on Saddam's rule and, while Islamic in many ways, will probably have a secular core that limits the influence of clerics and extreme fundamentalists.

The Iraqis will not go the way of Iran, although Iran is clearly pushing for such a result. Enough Iraqis understand the disaster of a theocracy. Iraq is blessed with oil. Money will not be a stumbling block. If a functional government does develop in Iraq, it will add weight to the notion that nation building cannot be imposed from the outside but must arise from within, taking a form that reflects the people and their culture. Iraq may yet become a modern nation, if we stand back, but not too far back. The U.S. forces should hover around, if permitted to do so, to ensure that external powers (especially Iran, which has armed Muqtada al-Sadr's Medhi Army) stay out of Iraq and that no one seizes power by force during the inevitable pushing and shoving for political power that will almost certainly offend our sensibilities.

The alternative appears to be civil war and chaos. Iraq may yet explode into terrible wars that destroy not only its prospects for the future but ignite much of the Middle East from Turkey to Syria to Iran. The United States would then find itself somewhere between quagmire and Armageddon. Let us hope that the Iraqi people of whatever ethnicity or sect of Islam see that they have much to lose and little to gain in war.

Let us also hope that the present and future administrations learn that people and countries are too proud, too stubborn, and too complicated to fit our present, limited notions of nation building.

In Kosovo the volcano of ethnic hatred, which the UN had tried to persuade itself was cooling, instead erupted in March 2004. Three events provided the catalyst. Kosovar Albanians were infuriated when Serbs closed the main road from Prishtina to Skopje where it passes through a Serbian enclave. The Serbs were protesting the shooting of a Serb teenager by unknown assailants. Next, Albanian veterans and other supporters of the KLA organized a demonstration to protest the prosecution of former KLA leaders for war crimes and crimes against

humanity. The following day newspapers and television stations reported that Serbs with dogs had chased four young Albanian boys into the Ibar River where three drowned. Immediately, over thirty-three riots broke out across Kosovo. The number of rioters is estimated at 50,000. At least 730 homes of minorities along with thirty-six orthodox churches and monasteries, some of them architectural masterpieces from the fourteenth century, were burned. Approximately 4,000 minority Kosovars—Serbs, Roma, and Ashkali (Albanian speaking Roma) were left homeless. Albanians who live in Serb majority areas were forced to flee. It is reported that Albanian crowds in some communities systematically destroyed every single minority home. KFOR troops were completely unprepared. Some simply watched houses burn. When KFOR troops finally intervened, an Albanian threw a grenade. Approximately 1,000 people were injured during the riots, including some 180 soldiers and police. Eleven Albanians and eight Serbs were killed during the rioting.

When the dust cleared, the international community concluded that while three of the four boys had drowned in the Ibar, Serbs played no role in the event. Kosovo television stations began to reconsider their decision to broadcast such inflammatory information without bothering to check the facts. Most Albanians I know were mortified by the riots, although not all were convinced that Serbs had not, in fact, chased the boys into the river. (The surviving boy was so beleaguered by leading questions and suggestions that he was unsure what had happened, but, ultimately, he absolved Serbs of any responsibility for the events surrounding the drownings).

UNMIK denounced the Albanian community for ethnic cleansing. International human rights groups denounced UNMIK, KFOR, and the police for incompetence and complacency. Most of the 2,000,000 Kosovar Albanians took no part in the riots. However, the suddenness of rioting in so many communities and the efficient destruction of minority houses in many of these communities suggests some organization behind the rioting. Some believe that local radicals directed events. Others believe that some central entity played a part.

Certainly, UNMIK, KFOR, and the police will take greater care in the future. However, while the international community wrings its hands over what they see as a setback in the development of a multicultural society, Albanian radicals are continuing the reverse ethnic cleansing that began with the return of the Albanians from the refugee camps and mountains. More minorities are leaving in terror and almost none of the earlier minority refugees want to return. Kosovo will not be a multicultural society, despite the UN's strong commitment to preserving the multicultural nature of Kosovo and to multiculturalism generally. The logic of the situation is that the Albanians are ridding themselves of Serbs and their cultural heritage, along with collaborators, to ensure that Serb claims to Kosovo become meaningless. The determination to cleanse arises out of the international community's failure to resolve the status of Kosovo. The Kosovar Albanian community, not just the radicals within it, is going to subvert all efforts to achieve any form of multicultural society until the UN makes it absolutely

clear that Kosovo and its people will never again be subject to control from Belgrade. The eight standards UNMIK imposed as a condition of resolving status are increasingly out of reach. Bill Clinton cites Kosovo as one of his great international successes. The sad truth is that Kosovo is rapidly becoming one more complete failure in nation building, not because the international community lacks good intentions or adequate resources, but because nation building remains an infinitely complex process beyond our current cultural sophistication, capacity, patience, and commitment.

A recent Rand Corporation study concluded that Kosovo is “the best-managed of the U.S. [led] post-cold-war ventures in nation building.” This conclusion underscores just how far we have to go.

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