

CHARLES UNIVERSITY IN PRAGUE
FACULTY OF SOCIAL SCIENCES
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DEPARTMENT OF POLITICAL SCIENCE



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**Institution Building in Post-Conflict Areas:
The Quest for Legitimate Institutions in Kosovo**

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Declaration of Authorship

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Abstract

The pivotal argument of this thesis is that, due to specific circumstances, Kosovo operates as an EU protectorate. Firstly, the political status of Kosovo deeply divides the UN members, including the major powers, which makes unilateral decisions ineffective. This implies that neither side can achieve maximalist demands, and thus further negotiations are required. Secondly, both representatives of Kosovo and Serbia expressed hope that their future is in the EU. Both sides are ready to compromise their legal and/or political status and welcome a solution under the formula: Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; and, Serbia not to recognise Kosovo, even if it means that Serbia loses authority over the region. Thirdly, the great powers, led by the USA and Russia, decided that the conflict and the political status of Kosovo should be facilitated by the EU. This decision, accompanied by the ICJ decision that Kosovo's solution should be sought through the EU political channels, gives the EU role of a moral agent. Finally, while the EU protects Kosovo in international affairs, it also requires from Serbia to recognise Kosovo's institutions and local autonomy.

Abstrakt

Klíčovým argumentem této práce je, že kvůli konkrétním okolnostem Kosovo vystupuje jako protektorát EU. Zaprvé, politický status Kosova hluboko rozděluje členy OSN, včetně hlavních mocností, což způsobuje, že jednostranná rozhodnutí jsou neúčinné. To znamená, že ani jedna ze stran nemůže dosáhnout maximalistické požadavky, a proto jsou zapotřebí další jednání. Zadruhé, zástupci Kosova a Srbska vyjádřili naději, že jejich budoucnost je v EU. Obě strany jsou připraveny urovnat své právní a / nebo politické postavení a vítají řešení podle vzorce: "Kosovo musí být nezávislé od Srbska, i když to bude znamenat, že Kosovo nebude svrchovaným státem; a Srbsko uzná jeho suverenitu, i když to bude znamenat, že Srbsko ztratí pravomoc nad tímto regionem ". Zatřetí, velmoci v čele s USA a Ruskem rozhodli, že konflikt a politický stav Kosova by měla zprostředkovat EU. Toto rozhodnutí, spolu s rozhodnutím Mezinárodního soudního dvora, že problém Kosova by měl řešit přes politické kanály EU, nabízí EU roli morálního zástupce. Nakonec, i když EU chrání Kosovo v mezinárodních záležitostech, vyžaduje také, aby Srbsko uznalo kosovské instituce a místní autonomii.

I dedicate this thesis to Rostislav N. Semenov
(1930-1992)

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INTRODUCTION

Aim

The goal of this thesis is to make a proposal regarding the future political status of Kosovo, taking into consideration the internal tensions between the two ethnic communities inhabiting the same small region and the lack of consensus among the main actors in the international community.

The proposal has two variants. The soft variant suggests that a final settlement can be only established and sustained through the EU. The hard variant claims that Kosovo being recognized as an EU protectorate is the only plausible solution.

Problem

Kosovo Albanians and Serbs have diametrically opposing views, while Kosovo Albanians believe that Kosovo is an independent state, Serbs see it as an autonomous province within Serbia. These black-and-white views divide the primary global superpowers and the world as a whole. One group of nations, most notably the United States and most Western powers, support Kosovo's independence, while other nations, led by China and Russia, defend Serbia's territorial integrity. Surprisingly (or not), many academics also reach seemingly irreconcilable conclusions that manifest the same fundamental cleavages as the two ethnic groups they analyse.

The analysis begins with the discussion of the historical issue of the two ethnic groups. Ethnic tensions in Kosovo can be traced back to at least 1878. This is the year in which Serbia officially gained independence, and Kosovo Albanians formed the League of Prizren with the goal of establishing all-Albanian administration under Ottoman rule. After World War I, the Great Powers rewarded Serbia for heroic deeds

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during the war, deciding that Kosovo was to be part of the newly formed Kingdom of Serbs, Croats, and Slovenes. This decision left a significant number of Albanians outside their paternal state. Many argued that this was not a fair or just decision, and one which victimized Kosovo Albanians.

However, victimisation is a relative category; the global community and the Serbs also found strong evidence to argue that the Serbs were the real victims. In 1668, with the help of the Habsburg Empire, the Serbs revolted against Ottoman rule. After the Ottomans defeated the Austrians at Kacanik gorge, the Serbs endured brutal vengeance. Hundreds of thousands of Serbs left Kosovo to find new homes on the banks of the Danube and the Sava. In 1737, the Serbs once again sided with the Habsburg Empire, only to be defeated again and to suffer another act of revenge. During that period, the Ottomans populated Kosovo with Islamised Albanians. Therefore, the Serbs may argue that, while they suffered, Albanians not only collaborated with occupying forces but also accepted another religion and culture in order to rise to the highest positions in the Ottoman Empire.

Both ethnic groups have strong claims to victimhood, even without mentioning the Kosovo Battle, World War II, the communist dictatorship, and Milosevic's rule. It takes us nowhere to discuss victimhood through a black-and-white lens, without a reconciliation process. However, briefly discuss this vicious historical cycle, which alternates between 'a Serbian aggressor and Albanian victims' and 'an Albanian aggressor and Serbian victims', will be briefly discussed in Chapter 2. For now, it is only important to bear in mind that the question of victimhood generates diametrically opposed feelings. The task is to observe, understand, and take these feelings into consideration when proposing a solution regarding Kosovo's political status. These feelings are constructed through a narrative that encompasses a common understanding of past, present, and future, which may be referred to as collective memory. When two collective memories clash, the result is devastating: it produces accusations, mistrust, distortion, and, finally, falsification of history. The textbooks used to shape the young generations who did not experience or do not remember the war are filled with hate speech, nationalist rhetoric, and distorted facts. Therefore, the two ethnic groups seem to live in two different worlds with different histories, values,

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and hopes. This division nurtured by collective memory and cemented by parallel education will be the subject of Chapter 1.

When it comes to the global debate, the situation is equally grievous. The question of whether Kosovo is an independent state splits the world roughly in half. According to officials in Pristina, that number is 113 states, while the Serbian Government claims that the number is 94.¹ The discrepancy in numbers can be explained by two factors. Firstly, Pristina tends to include non-recognised states. Secondly, Pristina's officials dispute Belgrade's claim that 15 states revoke the recognition of Kosovo. Even numbers, something that can be empirically proven by our senses (we assume that our senses accurately replicate the external world), are a subject of dispute in the Balkans. Pristina and Belgrade might not have their numbers straight, but they do highlight the arguments in their favour: Pristina emphasizes that almost all the Western powers support Kosovo's sovereignty, while Belgrade proclaims that almost five billion people do not. These facts, just like the question of which group is a victim, do not lead to a resolution progress. This is not because the exact answers cannot be determined, but because Ghana and Togo, with all due respect to those states, will not have the final say regarding the political status of Kosovo.

Therefore, it is more relevant to analyse what the Western powers have to say. While they agree on the question of what should be done (Kosovo should be an independent state), the Kosovo supporters have different views on the question of why it should be done. There are over 10 different arguments, which will be briefly discussed when analysing the International Court of Justice (ICJ) decision on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law. The diverse arguments can be briefly summarized as follows: American representatives believe that Kosovo has enjoyed constitutional rights identical to those of republics since 1974 and that, as republics enjoy the right to secede, Kosovo does as well. London believes that Kosovo's independence is logically the last step in the violent break-up

¹ For Pristina's numbers see: Kosovo Thanks You: Thank you from the Kosovar People. Available at: <https://www.kosovothanksyou.com/>; for Serbia's see: 'Dačić: U ovom trenutku manje od 100 država priznaje Kosovo', RTS, 16 August, 2019. Available at: <http://www.rts.rs/page/stories/sr/story/9/politika/3626685/dacic-u-ovom-trenutku-manje-od-100-drzava-priznaje-kosovo.html>.

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of Yugoslavia.² The French government points out that the durability of the international mission implies that sovereignty should be transferred to Kosovo. The Germans, however, put forward the claim that independence is the *ultima ratio* because all other options have been exhausted. Serbia's supporters are also divided on this question. However, there is consensus among them that Kosovo's recognition would constitute a precedent and that, even if the international community decides to treat Kosovo as *sui generis*, there is no guarantee that other entities with a similar background will not use the same argument.

It is clear that the leaderships of two ethnic groups are engaged in political and legal quarrels and that foreign states are pursuing their own various interests. What about scholars? The complexity of the case invites the participation of experts from various fields including political theory, international relations, international law, ethics, and philosophy. This intersection of neighbouring academic fields has produced much superb literature and provoked many innovative and courageous approaches. However, although the conflict in Kosovo has received extensive coverage in academic circles and the media, there are not many scholarly publications that analyse the two main aspects of Kosovo's problem; these are (a) What is the status of Kosovo?; and (b) What kind of institutions are most appropriate for a multicultural society based on a consensual agreement?³ While a minority of authors focus on finding a solution to the status question, most of the academic literature on Kosovo is devoted to the analysis of the present provisional political arrangement and institutional design. Both operate on unrealistic assumptions. The proposed recommendations for an improved institutional design, however innovative, are likely to fail without the tacit consent (at least) of Serbia's government and the participation of Kosovo Serbs.

² While the UK remains one of the strongest Kosovo allies, its efforts to lobby for recognition decline. There are two reasons: the failure to attract new recognition is perceived as damaging to the UK international influence to damage, and 'British officials have expressed frustration at what they see as Kosovo's persistent inability to produce a comprehensive and viable plan to secure more recognitions'.

J. Ker-Lindsay, 'The United Kingdom: Kosovo's Strongest Supporter in Europe', in J. Ker-Lindsay and I. Armolakos (eds), *The Politics of Recognition and Engagement EU Member State Relations with Kosovo*, Cham, Palgrave MacMillan, 2020.

³ This will be discussed in the section on the contribution of the thesis.

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The Unilateral Declaration of Independence (UDI) did not solve either problem, but rather exposed the second layer without reaching a consensus on status, excluding everyone who does not view Kosovo as a sovereign state from the debate on institutional design. In other words, the proponents of this approach simply assume that Kosovo's statehood is a given and concentrate on state-building and the process of reconciliation itself, rather than addressing the debate regarding its status. For them, the international missions are present in Kosovo to help the region achieve the capacity to govern its territory. In this line of thinking, once Kosovo acquires this capacity, it will gain the legal power and legitimacy needed to govern, its citizens will live in a fully-recognised state, one that will further foster patriotism and participation in governance, and the narrative will be created alongside the building of the state. This solves half the problem, or perhaps it is better to say one side of it, as it excludes Serbia and the Serbian minority in Kosovo.

Turning a blind eye might be a solution in the short run; however, in the absence of a consensus among Kosovo Albanians, Kosovo Serbs, and Serbia, the Kosovo question is likely to boomerang. It is not realistic to force the Serbs to participate without dreaming of regaining sovereignty over Kosovo. Faced with a mathematical problem, we can say, 'we will negate one variable because doing so makes it easier to solve the equation', but the result will not be correct. Similarly, the other side could negate a different variable and obtain its own incorrect result. To avoid this conundrum, we must remind ourselves that any plausible solution regarding Kosovo's status must involve Kosovo Albanians, Kosovo Serbs, and Serbia.

While the scholars rightly recognise that question of status is a *condicio sine qua non* for the future development of the political system in Kosovo, they fail to provide plausible justifications for their proposals. The proposals belonging to this approach can be divided into two groups. The first belongs to the category of unrealistic solutions, such as the division of Kosovo and treating Kosovo as a part of Serbia. The second holds that only when Kosovo is ready for full EU membership will its status be of principal importance; thus, the dialogue over statehood should be postponed, and we should focus on the various economic issues in the region that can be solved through technical agreements. Taking into consideration the fact that Kosovo is years away from fulfilling the formal requirements for joining the EU, this solution sounds

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logical and plausible. However, this reasoning is problematic given that it fails to recognise that only a mutually accepted status can bring the political stability necessary for economic development.

Structure of the Thesis

The thesis contains nine chapters, in addition to the introduction and conclusion. Chapter One provides the theoretical and methodological framework. It explains the thesis in the context of current literature and links the literature on nationalism to that of consociationalism. Chapter Two assesses the nature of the conflict in light of the Constructivism *versus* Primordialism debate. It discusses the nature of the conflict and the role of the international community. The discussion on this question is significant because whether the conflict is understood as fluid or fixed largely defines the arguments for certain political institutions.

Chapter Three analyses the history of the province through selected events to show the shifting nature of the narrative ‘aggressor-victim’ in Kosovo. Since it seems that the deeper Serbs and Albanians dig into the past, the farther they are from the solution, historical references will limit when discussing the solution. However, the narrative, based on facts or not, plays an important role and cannot be neglected. The primary concern of Chapter Four is to examine conditions under which the USA and Russia deferred to the EU. This chapter follows the process of negotiations before the Unilateral Declaration of Independence (UDI) and explains how American-Russian political machinations pushed the EU into the role of reluctant hero of Kosovo’s citizens.

Chapter Five maps out the political and legal implications the EU faced in Kosovo and analyses how Brussels created a unitary voice within the union regarding the polarising issue of the political status of Kosovo. Chapter Six explores the International Court of Justice’s (ICJ) decision to legitimise the EU approach based on dialogue and consensus over the blatant American and Russian support of the maximalist demands of their proteges. Chapter Seven reveals that Kosovo’s current arrangement is consociational only as long as the EU remains the facilitator of the

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arrangement. Also, building on the negotiation process, the ICJ decision, and the current state of affairs, it is clear that the final settlement requires consensus among Belgrade, Pristina, and Brussels.

Chapter Eight proposes a formula for consensus: (a) Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; (b) Serbia not to recognise Kosovo even if it means that Serbia will lose *de facto* and *de jure* authority over the region. In this chapter, I conclude that there is already a ‘silent’ consensus based on this formula— Kosovo as a European protectorate. Chapter Nine discusses various accumulated disputes between Belgrade and Pristina, which, accompanied by recent European inertia towards the Balkans, pose serious challenges to the final settlement. The final chapter summarizes and synthesises previous discussions and considers implications for future work in the area.

Chapter 1

THEORETICAL AND METHODOLOGICAL BACKGROUND

Abstract

This chapter is divided into three sections: the first explains that the thesis' contribution to the elitist approach by suggesting how 'spoilers' should be addressed, while also providing a platform to accommodate opposing views. The second justifies the normative approach to the study of Kosovo and of application of three methods: initial judgement, thought experiment and relevant judgement. The final section presents a theoretical framework by linking the literature on nationalism to the consociational model of democracy.

The thesis contribution and its place in the current literature

The majority of recent literature related to Kosovo can be roughly divided into two approaches: top-down and bottom-up. The first, top-down or elitist approach, emerged from the idea that EU leverage *vis-a-vis* the conflicted parties combined with the EU membership conditionality could enforce domestic compliance.⁴ However,

⁴ J. Bergmann, *The European Union as International Mediator: Brokering Stability and Peace in the Neighbourhood*, London, Palgrave Macmillan, 2020; J. Bergman and A. Niemann, 'Mediating International Conflict: The European Union as Effective Peacemaker,' *Journal of Common Market Studies*, vol.53, no.5, 2015, pp.957-975; F. Bieber, 'The Serbia-Kosovo agreements: An EU success story?', *Review of Central and East European Law*, vol. 40, no. 3/4, 2015, pp. 285-319; G. Visoka and J. Doyle, 'Neo-functional peace: The European Union way of resolving conflicts', *Journal of Common Market Studies*, vol. 54, no. 4, 2016, pp. 862–877; S. Economides and J. Ker-Lindsay, 'Pre-accession Europeanization': The case of Serbia and Kosovo', *Journal of Common Market Studies*, vol. 53, no. 5, 2015, pp. 1027-1044.

proponents of this perspective recognise the limits of EU influence on domestic reforms. Bergmann and Niemann suggest that lack of coherence within the EU and the spoiler potential of Kosovo Serbs have ‘a constraining influence on the EU’s effectiveness as a mediator’.⁵ The Kosovo Serbs’ spoiler has been expected since the European transformation of Serbia came from purely utilitarian reasons.⁶ In other words, Serbia to a certain extent, uses Kosovo Serbs to gain economic and political benefits from the EU. On the other hand, lack of coherence, while it considerably reduces EU capacity to enforce solution(s), also requires that a consensus as five member states do not recognise Kosovo’s statehood. Despite this division, the EU manages to establish itself as a regional leader and successfully employs ‘a vast array of foreign policy tools to promote the state-building process’.⁷ Therefore, EU’s internal division is not necessarily negative; true, it curbs performance, but it also gives the EU credibility and leverage to act as a neutral mediator.⁸ It is hard to imagine that Serbia would stay committed to the European path if a condition for membership were to recognise Kosovo. Following this line of thought, it is argued that impartiality outweighs efficiency: a fair and just outcome is more desirable than a short-lasting unilateral decision.

The bottom-up approach focuses on the resistance of local actors. Contrary to the elitist approach, which discusses how ‘spoilers’ are manipulated, advocates of this approach attempt to explain the source of resistance. According to Troncotă, the EU purposefully accepts ‘constructive ambiguity’ which, despite its initial success, did little to address the cleavage between and within the ethnic groups ‘leaving little space for reaching shared views that would lead to successful implementation’.⁹ The EU strategy to widen margins of interpretation allowed both groups to subscribe to ‘opposing and competing projects of consolidating statehood’.¹⁰ Although, it may be true that the EU bears a share of responsibility for a missed opportunity to provide a

⁵ Bergmann and Niemann, 2015, p. 970.

⁶ Economides and Ker-Lindsay, 2015, p. 1027–1044.

⁷ E. Baracani, 'Evaluating EU Actorness as a State-BUILDER in 'Contested' Kosovo', *Geopolitics*, vol. 25, no. 2, 2020, p. 382.

⁸ Bergmann, 2020, p. 73-78.

⁹ M. Troncotă, 'The association that dissociates – Narratives of local political resistance in Kosovo and the delayed implementation of the Brussels Agreement', *Southeast European and Black Sea Studies*, vol. 18, no.2, 2018, p. 234.

¹⁰ M. Vulović, 'Performing statehood in Northern Kosovo: Discursive struggle over contested space', *Cooperation and Conflict*, vol. 55, no.3, 2020, p. 341.

more precise guide for Belgrade and Pristina, there is a general consensus that at least part of the problem is rooted in the local resistance and their different reading of Kosovo's statehood, demonstrating that Kosovo's political status remains the all-consuming issue.

Some authors within this approach, however, take the EU critique a step further: for them, not only does emancipatory peace come from local institutions, not from external actors, but European interventionism is considered 'purely an instrument for grabbing and disguising power as well as reducing local resistance and prolonging interventionism through reconfiguration'.¹¹ Thus, the EU emulates old colonisers whose role was to emancipate and Christianize local population.¹² This construction is incorrect and dangerous. It is incorrect because the UN administration was established by SC UN Resolution 1244. Prior to Resolution 1244, Serbia signed the Kumanovo agreement authorizing an international civilian and military presence. Although one can certainly question the validity of the consent at the time (there was explicit threat of force), Serbia legitimised the agreement and resolution through political actions in the following years (for example, cooperation with NATO). Similarly, the Kosovo Albanian leadership, while it did not have an opportunity to participate in processes in 1999, welcomed the EULEX mission which came under the framework of the UN, and thus accepted UN supervision. Even Kosovo's declaration of independence states that Kosovo 'shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999)'.¹³ Furthermore, what distinguishes Kosovo and other modern international administration and protectorates from old practices 'is the multiplicity of actors involved'.¹⁴ The multiplicity prevents single states from exploiting protected land, and ensures that no single state bears the cost of administration.

The comparison between the EU role in Kosovo and old colonisers is not only in error, it is dangerous. Although the discussion of the relationship between Kosovo

¹¹ G. Visoka, *Shaping Peace in Kosovo: The Politics of Peacebuilding and Statehood*, London, Palgrave Macmillan, 2017, p. 13.

¹² V. Musliu and J. Orbie, 'The international missions in Kosovo: what is in a name?', *European Foreign Affairs Review*, vol. 19, no. 3, 2014, pp. 424-426.

¹³ *The Constitution of Kosovo*, 2008, par.12

¹⁴R. Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction*, Oxford, Oxford University Press, 2005, p.33.

and EU administration remains relevant, if conducted only within its own framework, it excludes Serbia and roughly 50% of recognised states which make up 70% world's population. At the very heart of this Kosovo - EU framework lies the question of whether Kosovo is already an independent state or only a small step away from becoming one (once the EULEX mandate is over). For example, in an interesting study, Zupančič explores psychological implications for Kosovo Serbs after the Brussels Agreement, while simultaneously omitting not only majority of world's population but also Kosovo Serbs and North Kosovo experts, since it seems that the only options for them is to integrate 'into the state of Kosovo'.¹⁵ This research asks a loaded question - 'are you, Kosovo Serbs, aware that Kosovo is an independent state? And if so, how do you feel about?' For the sake of argument, let us reverse the roles: Imagine an author asserting that Kosovo is part of Serbia and then asking about economic or psychological implications for Kosovo Albanians after Serbia signed a trade agreement with Eurasian Union.

While there is nothing wrong with localising knowledge, it is pernicious when localising knowledge becomes tantamount to decolonisation.¹⁶ First and foremost, Kosovo is not an EU colony, its mission is employed through the UN mechanism and confirmed by leaders of both ethnic groups. However, if we accept that the EU is an oppressor and agree that the EU should leave Kosovo, the question of Kosovo's political status still remains. Once EULEX is out, nothing changes: the UN still has mandate, and Kosovo would return to its pre-2008 state. EULEX was not employed to colonise a sovereign state but to establish peace since the UN mission and the Provisional Institutions of Self-Government (PISG) failed to protect Serbs. If we jettison EULEX, what is the reason to preserve UNMIK and KFOR? The combination UNMIK-KFOR proved to be as efficient in keeping peace as Milosevic's administration. Perhaps, then, Kosovo could go another step back to the pre-1999 state. After all, Milosevic is long dead and now many leaders tout Vucic as a reliable

¹⁵ R. Zupančič, 'EU peace-building in the north of Kosovo and psychosocial implications for the locals: A bottom up perspective on normative power Europe', *Journal of Balkan and Near Eastern Studies*, vol. 21, no. 5, 2019, p. 578. No doubts that the author views Kosovo's statehood as completed as in another study he states that 'Kosovo is one of the youngest countries in the world'. R. Zupančič and N. Pejič, *Limits to the European Union's Normative Power in a Post-conflict Society*, Springer Briefs, 2018, p.1.

¹⁶ Visoka, 2017; G. Visoka and F. Musliu, *Unravelling Liberal Interventionism Local Critiques of Statebuilding in Kosovo*, New York, Routledge, 2019.

partner and anchor of stability in the Balkans.¹⁷ Surely, once Pandora's box is opened, mythmakers can delve into history (to, for example, pre-1974 Kosovo, pre-1941 Kosovo, or pre-1918 Kosovo) to provide legitimacy for any current discriminatory policies¹⁸

Exclusion of certain groups can go horribly wrong on a large scale. Therefore, it is contended that any non-status related discussion regarding Kosovo ought to be placed within consensual borders. The nearest such framework is 'Kosovo as an EU protectorate'. This framework allows Kosovo Albanians, Kosovo Serbs, Serbia and the EU to participate in questions surrounding Kosovo on equal terms. Since the dominant research in the field is produced by scholars and institutions located in the states that recognised Kosovo, it often appears that any research on Kosovo is bound to *a priori* accept Kosovo as a sovereign state or a state-in-becoming. Does that mean that if Chinese specialists overwhelm the field in the future, we have to then adopt the view that Kosovo is an integral part of Serbia? To prevent such scenarios, we need consensus, if not on Kosovo's political status, minimally on an academic framework which will be independent of future contingencies.

Therefore, the thesis makes a contribution in two ways. Firstly, within the elitist approach, the thesis suggests how 'spoilers' should be approached, arguing that the EU membership conditionally remains an essential and the most effective and tool at the EU's disposal. Secondly, and more importantly, the thesis offers a platform on which to reconcile different views regarding Kosovo's political status. The platform is designed to accommodate the disputes within both the elitist and bottom-up approaches.

¹⁷ See for example: 'Serbia is a close partner and will remain one', Federal Government of Germany, 27 February, 2018; 'French President expresses support for dialogue with Pristina in letter to Vucic', N1 Info, 5 January, 2019.

¹⁸ Note that the possibility of return to pre-1999 state is excluded by the international community during the negotiation talks; therefore, the previous only illustrates the sinister nature of the proposal that the EU should leave Kosovo.

Approach and Methods

The previous section is not intended to rebut a positive approach, but to tell a cautionary tale about potential abuses when it comes to the study of Kosovo. Whether the question of ‘spoilers’ is discussed within the context of negotiations is qualitatively different from discussion within Kosovo’s constitutional framework. In the former, the question keeps the door open for different views on Kosovo’s political status. On the other hand, if the question is examined in the context of Kosovo’s legal system, the solution is *a priori* imposed, and the only option is to ‘build’ within the given setting (or to ignore the study). A similar and more refined logic is to be found in the discussion on the EU-Kosovo relationship. No matter whether Kosovo is perceived as a sovereign state or a colonised entity, the discussion overlooks the role of Serbia; thus necessarily leads to the conclusion that Kosovo ‘earned’ its sovereignty. The Kosovar and Serbian arguments are so equally distributed in quality and quantity, that to refuse to acknowledge this pluralism might be considered academic heresy.

In a society dominated by a single goal there could in principle only be arguments about the best means to attain this end— and arguments about means are technical, that is, scientific and empirical in character: they can be settled by experience and observation or whatever other methods are used to discover causes and correlations; they can, at least in principle, be reduced to positive science.¹⁹

Therefore, once there is a designated solution or goal, a positive approach to the study of Kosovo becomes no more than a ‘servant’ to the goal. It is worth mentioning a fairly obvious point that both sides are guilty of this crime. Also, this is not to say that a positive approach does not have its place in the field; quite the contrary, its studies remain a source of inspiration and means of background checking. However, reconciliation of the two diametrically opposing views cannot come from a positive study; a normative approach is required. Given that the aim of the research is to

¹⁹ I. Berlin, ‘Does Political Theory still exist’, in P. Laslett and W. G. Runciman (ed.), *Politics, Philosophy, and Society*, Oxford, Blackwell, 1961, p.8.

propose a solution and that its place in literature is to offer a platform for the conflicting views, the thesis belongs to political theory.

Political theory focuses on normative, conceptual and evaluative questions, often broadly constructed. It is placed between (positive) political science and moral philosophy. While political science aims to answer ‘What is it?’, moral philosophy ‘What ought to be done?’, political theory answers ‘What ought to be done when we do not agree about what we ought to do?’.²⁰ By addressing this question political theorists pursue ‘the second agenda in the company of philosophers [who] made the existence of disagreement among individuals’.²¹

This is the exact subject of the thesis: to propose a solution for Kosovo’s political status in times when neither the so-called West or East, nor NATO, Europe, the Catholic Church, the Orthodox societies, or the Muslim community, can find a consensus within their own spheres. And certainly, there is no precise mechanism to determine whether the USA, the UK, and Italy are more ‘significant’ than China, Russia, and Spain, or whether particular Muslim, Catholic, or Orthodox societies have a higher sense of justice. Similarly, Kosovo’s history is one of excruciating pain without answers; highest courts delegate its obligations to politics, yet, what is political in the case of Kosovo oftentimes comes down to personal moral beliefs: Do we believe that murdering thousands (or tens of thousands) of civilians and displacing over 200,000 people is just if the result is simply that 850.000 other people can return to their homes?²²

This long-standing utilitarian versus Kantian debate is thought-provoking and inspiring; however, it might be inimical once normative ethical theories leave the domain of moral philosophy prior to being widely accepted. To illustrate: in 2001,

²⁰ C. List and L. Valentini, ‘The Methodology of Political Theory’, in H. Cappelen, T. S. Gendler and J. Hawthorne (eds), *The Oxford Handbook of Methodological Philosophy*, Oxford, Oxford University Press, 2016.

²¹ Instead of asking ‘[w]hat are the implications of (for example) John Rawls’s theory of justice so far as democratic and constitutional procedures are concerned?’, we should ask ‘what are we to think about democratic and constitutional procedures, given that such procedures have to accommodate a politics for those who differ fundamentally about whether theories like Rawls’s are correct’.
J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, p.3.

²² For numbers see: Human Rights Watch, ‘The Crisis in Kosovo’, 2000.
Available at: <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>

Philip Morris commissioned a report titled 'The Public Finance Balance of Smoking in the Czech Republic', which claimed that early mortality of smokers outweighed other health costs.²³ In other words, it is desirable for people to smoke and die younger because the Czech government would save money. A commentary in Czech media noted that it is 'as if the auto industry had claimed that the faster people drove, the more they would be killed and the more the state would save'.²⁴ The study elicited outrage not because people disagreed with high/low price tag, but because they found the idea of putting a price tag on a human life preposterous.²⁵ Similar to Philip Morris, NATO made a calculation: how many refugees return per one death civilian.²⁶ No doubt, however, that minimizing civilian casualties was a top priority for NATO generals: as Lt. Gen. Michael Short put it 'collateral damage drove us to an extraordinary degree. General Clark committed hours of his day dealing with the allies on issues of collateral damage'.²⁷ The Philip Morris study and NATO intervention both raise the questions 'who has the authority to make such calculation (if anyone)?' and 'why should we accept that particular way of thinking?' The Philip Morris study blatantly counterpointed money versus people; thus was easily ridiculed and dismissed. However, when intervention creates a dilemma of people *versus* people, there is no a straightforward answer: Not containing Milošević would have been equally devastating. It seems NATO find itself between Scylla and Charybdis, having to choose the lesser of two evils.

Certainly, in crisis we are oftentimes compelled to make such decisions on individual, national, and global levels. King Agamemnon sacrificed his daughter for good of his troops, national governments send young men to battles in order to defend the nation, and the UN engages in combat activities to prevent larger atrocities. Thus, the people *versus* people calculation is sometimes necessary. However, regional

²³ Philip Morris Report on Public Finance Balance of Smoking in the Czech Republic, Available at: <https://edition.cnn.com/2001/BUSINESS/07/16/czech.morris/>

²⁴ D. Holley, 'Philip Morris Angers Czechs With Tobacco Toll Report', LA Times, 5 August, 2001.

²⁵ Even though the study does not explicitly state, based on Philip Morris' estimation that the Government saves in total 196 millions per year(1999) and that there were roughly 22.000 smoking related deaths in that year - the Czech Government saves 150.000 crowns per death smoker (adjusted to inflation).

²⁶ The number is somewhere between 120 to several hundreds.

²⁷ Or, in the words of Lt. Gen. Marvin R. Esmond, 'NATO success with precision engagement and minimal collateral damage was a key factor in holding the Alliance firmly together during the bombing'. Human Rights Watch, 'The Crisis in Kosovo', 2000. Available at: <https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>

military alliances do not have capacity to make such decisions. This is not to say, as in case of positive political science, that moral arguments should be dismissed, but that their proponents should remain Argus-eyed.

Normative disagreements force political theory to rely on normative self-examination, and '[o]ccasionally the self-examination takes a morbid turn', as one in 1956 Laslett declared that 'the tradition of political theory was broken, and the practice dead'.²⁸ Berlin himself titled a paper 'Does political theory still exist?'; however, he was more optimistic:

[As] long as rational curiosity exists - a desire for justification and explanation in terms of motives and reasons, and not only of causes or functional correlations or statistical probabilities - political theory will not wholly perish from the earth, however many of its rivals [...] may claim to have dispelled its imaginary realm.²⁹

In addition to Berlin and Laslett, other great minds in political theory such as Macintyre, Dahrendorf, Rawls, Hart, Pocock, have addressed its morbidity.³⁰ And, in the 1960s, they were only able to detect a faint pulse. Ten years later, however, Rawls became a saviour of the field. In his *locus classicus* 'A Theory of Justice' and later works, Rawls methodologically saved political theory. His methodology begins with a theory 'inspired by our initial intuitive judgements or given by some *prima facie* principles' (in Rawls' case these are principles of justice), then tests implications of the given theory (original-position as a thought experiment), and finally comes to an overlapping consensus based on comparisons with rival ideas which includes a 'fair amount of commentary on the theory's interpretation and its applications'.³¹ Rawls' methodology consists of four methods: 1. intuitive judgement (as strict evidence), 2. reflective equilibrium, 3. thought experiment and intuition pumps, and relevant

²⁸ Taken from: J.S. Dryzek, B. Honig and A. Phillips, 'Introduction', in J.S. Dryzek, B. Honig and A. Phillips (ed.), *The Oxford Handbook of Political Theory*, Oxford, Oxford University Press, 2006, p. 13.

²⁹ I. Berlin, 1961, p. 33.

³⁰ See their essays on the role of political theory in P. Laslett and W. G. Runciman (ed.), *Politics, Philosophy, and Society*, Oxford, Blackwell, 1961.

³¹ List and Valentini, 2016, p.538.

judgement.³² The Rawlsian approach quickly transitioned from a specific community to the global society. Following the Maastricht Treaty, the approach entered the fields of international relations and area studies, and European integrations have become an arena for confronting the underlying empirical assumptions of normative political theory.³³

This thesis adopts the Rawlsian line of thought. Besides the three aforementioned methods, it also rests on three internal criteria of assessment: consistency, axiomatizability, and deductive closure.³⁴ Political theory is built upon the assumption that order of preferences are consistent. Thus, under condition *a*, *x* is preferred to *y*, there is a possibility that under condition *b*, *y* might be preferred to *x*. In other words, the argument is that under the given circumstances the best solution for Kosovo's political status is an EU protectorate; however, if circumstances change, the preferred solutions might change as well. For example, if Serbia recognises Kosovo, then Kosovo as a sovereign state is preferred to the status of protectorate. Further, axiomatizability requires that there be a finite number of requirements. There are six: 1. the political status of the disputed territory divides the UN member states, including the great powers, scholars, and policy-makers; 2. the great powers believe that the conflict and Kosovo's political status should be facilitated by the EU; 3. both ethnic groups and paternal state envision their future within the EU; 4. all legal means are exhausted and the highest courts have decided that the solution should be found by means of political channels within the EU; 5. the EU has expressed its readiness to facilitate and manage the conflict in a status-neutral manner; 6. such an arrangement is politically feasible. Finally, deductive closure ensures that all requirement belongs to the theory: if case *x* (*a* to *f*) is *P*, then also case *y* that (*a* to *f*) is *P*. Therefore, if Kosovo meets all six requirements then it is a protectorate, moreover if any other case meets those requirements it also becomes protectorate.

Regarding external criteria, the point of departure is intuitive judgement based on *prima facie* principles which are further tested by thought experiment and intuition

³² Ibid., pp. 525-545.

³³ For Europe and other regions see: J.S. Dryzek, B. Honig and A. Phillips (ed.), *The Oxford Handbook of Political Theory*, Oxford, Oxford University Press, 2006, Chapters 13-16.

³⁴ List and Valentini, pp. 539-540; cf. A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', *International Organization*, vol.51, no.4, 1997, pp. 515-516.

pumps. The requirements are given based on initial judgements and then applied to a real-world case (intuition pump) which prompts normative judgements. Those two methods, however, do not fully protect against biases. The third external method, the relevant judgment(s) (in this case, taken from other authors, not society) is used against biases and anecdotal arguments. Therefore, the initial judgement is that resolution of conflict is possible and the preferred outcome to a settlement:³⁵ The analysis begins with the question of the nature of Kosovo's conflict. If the conflict is fixed once constructed, then the best outcome is a good settlement (and the initial judgement must be changed). On the other hand, if the conflict is fluid not only can the conflict be facilitated but there is room for consensus.

Subsequently, the research attempts to find a refugee in history and in the thesis 'Kosovo as a unique case'. However, based on the work of specialists, the finding is that myth and reality are often inseparable in Kosovo and slight change in time-frame leads to opposing conclusions. Similarly, the thesis 'Kosovo as a unique case' is more of an impediment than a building block or a solution. It is also important to note that the thesis is not intended to test a hypothesis which allows the changing of views and 'casting them off ungrudgingly under the pressure of evidence'.³⁶ Remaining flexible proves to be fruitful in first three chapters of the thesis and expressly in the chapter on negotiations. Faced with publicly available, but insufficiently explored scholarly evidence, such as the view of some EU members officials that the whole process was a farcical set up and Russia's offer to trade Kosovo's recognition for American support in the post-Soviet area, a different light is shed on the EU role in legal troubles after the UDI and a different reading of the ICJ decision emerges. Thus, Chapter 4 to 6 serve as an inspiration for a hard variant of the proposal: 'Kosovo as European Protectorate'.

The hard variant of the proposal is a new judgement, which is consistent with and even complementary to the initial judgement that corresponds to the soft variant of the

³⁵ Majority of lawyers believe that 'if both sides are unhappy, you probably have a good settlement'. However, no doubts that if possible, 'resolution is much better than settling'.
S. Lewin, *Getting to Resolution: Turning Conflict Into Collaboration*, Berrett-Koehler Publishers, Oakland, 2009, p.3.

³⁶ B.Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea*, London, Routledge, 1984, p. 7; A. Bryman, 'The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology', *The British Journal of Sociology*, Vol. 35, No. 1, 1984, p78.

proposal. This new judgement is tested against the current arrangement and against consensus among the interested sides: Brussels, Belgrade, and Pristina. First of all, it is important that the proposal does not require tectonic legal changes and does not cause disturbance of ordinary people's life. Then, the proposal should be based on consensus; in other words, it cannot be a bilateral agreement between the EU and Serbia or the EU and Pristina. Finally, Kosovo as EU protectorate is compared to other relevant and widespread proposals such as division of Kosovo and Serbia's recognition of Kosovo's external sovereignty, but also compared to certain more 'exotic' proposals such as two-Germany and Hong Kong models.

In short, the aim of this thesis is to suggest what we ought to do regarding Kosovo's political status considering the disagreement about what ought to be done. Therefore, the approach taken in this work is normative. The starting point is an initial judgement that the negotiations between Kosovo and Serbia should be facilitated by the EU. This judgement is examined in the light of the nature of the conflict, history, unilateral decisions, and the ICJ decision, all of which prompt a new judgement: Kosovo as EU protectorate. The new judgement is then discussed into context of the current arrangement, trilateral relationship among the interested sides, and then tested against the other relevant normative judgements taken from policy makers and experts.

Theoretical Framework

Many studies on deeply-divided societies rest on a three-layer analysis. These layers are internal analysis, analysis of borders, and external analysis. First, internal analysis assesses nations or ethnic groups with opposing views. Second, studies examine how these ethnic groups operate within certain borders in proximity to their parent state(s). Third, in addition to ethnic groups and paternal states, the study considers external actors.

Deeply-divided societies originate from disparate groups of people, in our particular case ethnic groups. These groups are self-aware and self-defined based on religion, language, or historical ties. There are three major strands in the existing literature on nationalism. Modernists once viewed ethnicity as a contemporary issue

that would eventually vanish as societies adopted new technologies;³⁷ however, they now see it as a tool used by group leaders to promote their interests.³⁸ Proponents of primordialism advance the claim that ethnic groups are not only bound by personal attachments but also by primordial affinities based on blood relationships.³⁹ Finally, constructivists stress the multiplicity and variability of ethnic identities based on specific circumstances.⁴⁰ The multiplicity and variability of salience is precisely what primordialism cannot explain. On the other hand, certain identities seem to be so persistent that it is hard to imagine how they could be deconstructed. The reason is that ethnicity 'has become more salient because it can combine an interest with an effective tie. Ethnicity provides a tangible set of common identification—in language, food, music, names—when other social roles become more abstract and impersonal'.⁴¹

This argument explains the revival of nationalism in Yugoslavia as a consequence of social disorientation. In other words, the collapse of communism left behind a void that has been filled with a tangible national identity. Therefore, we need to consider not only the fact that ethnicity is socially imagined but also its complex nature, its primordial characteristics and the interests of group leaders. McKay proposes a matrix framework that captures the dual nature of ethnicity. This framework is based on two axes, ethnic manifestations based on primordial characteristics and ethnic manifestations based on material factors.⁴² Primordial characteristics and material factors can be categorised as 'high' or 'low'. This approach helps us to simultaneously track different kinds of ethnic affiliations (for example, marital, ethnic, and cultural). As McKay puts it, 'instead of asking which approach—primordial or mobilizationist—has more explanatory power, it is now

³⁷ R. H. Thompson, *Theory of Ethnicity: A Critical Appraisal*, New York, Greenwood Press, 1989; A. Cohen, *Urban Ethnicity*, London, Routledge, 1974.

³⁸ B. Anderson, *Imagined Communities*, London, Verso, 1991.

³⁹ E. Shils, 'Primordial, personal, sacred and civil ties: some particular observations on the relationships of sociological research and theory', *The British Journal of Sociology*, vol. 8, no. 2, 1957, pp. 130-45; M. Benks, *Ethnicity: Anthropological Construction*, London and New York, Routledge, 1996.

⁴⁰ I. Lustick, 'Agent-based modelling and constructivist identity theory', *APSACP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, 2001, pp. 22-25; K. Chandra, 'Introduction', *APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, 2001, pp. 7-11.

⁴¹ D. Bell, 'Ethnicity and Social Change', in N. Glazer and D. Moynihan (eds), *Ethnicity: Theory and Experience*, Cambridge, Harvard University Press, 1975, p.169.

⁴² J. McKay, 'An exploratory synthesis of primordial and mobilizationalist approaches to ethnic phenomena', *Ethnic and Racial Studies*, vol. 5, no. 4, 1982, pp. 401-413.

possible to inquire about the extent to which both are operative in varying degrees'.⁴³ The second advantage of this matrix approach is that it follows the evolution of ethnic groups throughout different historical periods. It does not only track the level of nationalism within a certain group but also variation in the definition of the group itself. For example, being a Yugoslav in 1930 is entirely different from being a Yugoslav in 1950.

Similarly, Brubaker develops a notion of 'groupness' that suggests that the group by its very nature cannot be viewed as an inalterable phenomenon. In other words, boundaries of ethnicity are at certain times blurred, while at other times they become pronounced.⁴⁴ Although Brubaker admits that 'groupness' is strengthened by its codification in public policy, the 'parochial scholarly tradition', and the 'group-making, group-strengthening endeavours of ethno-political entrepreneurs',⁴⁵ groupness flourishes only under a certain set of circumstances.⁴⁶

Taking into consideration the discussion above, the approach taken here honours both the durability and the time-varying salience of ethnic identities. The study of consociational arrangement will also be examined within the socio-economic context of the province, as well as the historical context of conflict regulations. The literature on nationalism and consociationalism provides a link between the nation and the paternal state. It is important to note that this thesis does not view the paternal state as an external actor in the implementation of power-sharing.

Modern societies are organised in accordance with a pluralist notion of the state. Pluralism is a 'defence of multiplicity in beliefs, institutions and societies' that recognises the 'existence of diversity in social, institutional and ideological practices, and values that diversity'.⁴⁷ Lijphart views plural society as a concept characterised

⁴³ Ibid, p.403.

⁴⁴ R. Brubaker, 'Myths and Misconceptions in the Study of Nationalism', in M. Moore (ed), *National Self Determination and Secession*, Oxford, Clarendon Press, 1998, pp. 233-265.

⁴⁵ Ibid, pp.295-296.

⁴⁶ For example, in the Yugoslav case, there was widespread intercommunal violence during World War II, the narrative of that violence was pervasive in private settings, and the state engaged in recurring violence. Ibid, p.291.

⁴⁷ P. Dunleavy and B. O'Leary, *Theories of the State: The Politics of Liberal Democracy*, Basingstoke, Macmillan, 1987, p. 13.

by ‘religious, ideological, linguistic, regional, cultural, racial, or ethnic’ divisions.⁴⁸ Though these views might appear similar, there is a significant difference between them. Liberal pluralism rests on the idea that heterogeneity can be accommodated by means of citizenship, institutional checks and a cross-group societal culture. However, the effects of assimilation undercut this concept. These ‘common’ cross-cutting principles oftentimes conflate minority and majority identities, as in the case of Soviet-Russian and Yugoslav-Serb identities. In other words, though citizenship is legally granted on an equal basis, minority groups are treated as an underclass.

This assimilation issue has motivated proponents of liberal pluralism to alter their conventional views. At first, they believed that ‘whatever pluralism exists within states can be accommodated within states’; however, faced with challenge of inevitable assimilation, liberal pluralists have softened their views and proposed a ‘regime of internal political differentiation in which minority rights—and not necessarily the same minority rights for all groups—have a prominent place’.⁴⁹ Within this new literature, liberal pluralists delivered an important notion, cross-cutting cleavages. They argue that ‘positive’ fragmentation occurs if there is more than one rift. In order for fragmentation to have positive outcome, Lipset argues that institutions should ‘sustain the expectation of the major group’ while meeting other requirements such as (a) the integration of all groups within the system, (b) the ‘moderation of tensions among its contending political forces’, and (c) the existence of ‘cleavages within ... groups not between them’.⁵⁰

Therefore, citizens’ multiple and overlapping memberships push the majority group to seek consensus with the minority group on certain issues. However, if cleavages coincide and create cumulative cleavages, a ‘deep’ pluralism occurs in the society. In Kosovo, there are not only ethnic cleavages but also religious and linguistic ones. It is often understood that these cumulative cleavages along two or more axes result in state crisis.

⁴⁸ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven, Yale University Press, 1977, p. 3-4.

⁴⁹ A. Buchanan, ‘The making and unmaking of boundaries: What Liberals Say’, in *States, Nations, and Borders: The Ethics of Making Boundaries*, in A. Buchanan and M. Moore (eds), Cambridge, Cambridge University, 2003, p. 231.

⁵⁰ S. Lipset, *Political Man: The Social Bases of Politics*, London, Heinemann Educational Books, 1983, pp.78-81.

Using Almond's typology of Western democracies based on political culture, Lijphart identifies two types of democracies, Anglo-American/Scandinavian and European. The characteristic of European democracies is cumulative cleavages; therefore, according to Almond, they must be unstable. However, that is not the case. European democracies include both stable (Netherlands) and unstable (the Weimar Republic) examples. This leads Lijphart to suggest that an elite accommodation variable explains the differences. In other words, with elite accommodation, it is possible to have fragmented but stable democracy.

Consociational Democracy

Classical consociational theory can be divided into three streams. The first one pays close attention to a segmented social structure, evaluating the level of cooperation between the divided groups.⁵¹ The second stream, which is advanced by Lijphart, examines elite behaviour within fragmented societies. The third thread in the literature on consociational theory focuses on political traditions by suggesting that a culture of mutual understanding between divided groups is essential to accommodative practices.⁵² All three approaches are related in that their central focus is the stability of institutions in fragmented societies in Western Europe. However, Lorwin focuses on institutions, Daalder examines political traditions, and Lijphart's work pays attention to elites. Certainly, all three approaches make a significant contribution to the literature. Nevertheless, this thesis draws on Lijphart because of two additional approaches he developed in his later work.⁵³

Lijphart's model of consociational democracy was intended as an explanatory framework for the Netherlands, which belongs to the category of European democracy but exhibits stable government. Though it is widely accepted that Lijphart's model has become prescriptive only in recent years, it seems that Lijphart himself was sympathetic to this from the very beginning. In *Democracies in Plural Societies*, he writes, 'This book's message to the political leaders of plural societies is

⁵¹ V. Lorwin, 'Belgium: Conflict and Compromise', in K.D. MacRae (ed), *Consociational Democracy*, Toronto, McLelland and Stewart, 1975.

⁵² J. Steiner, 'The Principles of Majority and Proportionality', in K.D. MacRae (ed), *Consociational Democracy*, Toronto, McLelland and Stewart, 1975.

⁵³A. Lijphart, 'Consensus and Consensus Democracy: Cultural, Structural, Functional, and Rational-Choice Explanations', *Scandinavian Political Studies*, vol. 21, no. 2, 1998.

to encourage them to engage in a form of political engineering: if they wish to establish or strengthen democratic institutions in their countries, they must become consociational engineers'.⁵⁴

Subsequently, Lijphart expanded his model to post-apartheid South Africa, proposing three types of consociational democracy.⁵⁵ His prescription for future consociational democracies is taken from historical examples; he evaluates the advantages and disadvantages of those systems. For example, he examines Canada in 1840, the Netherlands in 1917, Lebanon and Switzerland in 1943, Malaysia in 1955, Colombia in 1958, and Cyprus 1960.⁵⁶

Initially, Lijphart identified four attributes of consociational democracy.⁵⁷ First, leaders of divided groups jointly govern the territory. Secondly, there is a mutual veto mechanism in the decision-making process that prevents the larger group from exercising dominion over a minority group. Thirdly, the electoral system is designed based on the principle of proportionality. Proportionality applies not only to political representation but also to the allocation of resources. Fourthly, there is a principle of autonomy that is not necessarily territorial but may also be cultural or religious. These four traits were later transformed into a more complex system of consociational democracy, characterised by grand coalitions, proportionality, segmental autonomy, and veto rights.⁵⁸

A grand coalition implies the co-operation of two ethnic groups in governing the state. Here, we distinguish between two scenarios. In the first, there can be a coalition between all major parties representing the major group, which co-operate with the representatives of a minority group. This is termed a 'complete' consociation or a 'proper grand' coalition. For example, in Northern Ireland, all relevant political parties are part of the government and there is practically no opposition. On the other hand, it is also possible for representatives of a minority group to form a coalition with some of the majority parties, leaving others in opposition. For example, in

⁵⁴ A. Lijphart, *Democracies in Plural Societies: A Comparative Exploration*, 1977 p. 223.

⁵⁵ A. Lijphart, *Power-Sharing in South Africa*, Berkeley, University of California, Institute of International Studies, 1985.

⁵⁶ A. Lijphart, 'Consensus and Consensus Democracy', 1998.

⁵⁷ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, 1977, 99-103.

⁵⁸ See for example A. Lijphart, *Constitutional Design for Divided Societies*. *Journal of Democracy*, vol. 15, no.2, 2004, pp. 96-109.

Bosnia, the largest ethnic groups comprise the government, while smaller parties make up the opposition. In Kosovo, however, the largest minority party does not have a guaranteed place in government. Instead, the tradition is to give this party one ministry, usually reserved for minorities. While the largest minority party in Kosovo cannot influence the final decisions made by the government, in Macedonia, the largest minority party remains a king-maker due to cross-cleavages within the majority parties. In Macedonia and Kosovo, voters are not legally obliged to declare their identity and vote for 'their' representatives but instead have the freedom to choose from all political parties, which makes these political systems a 'liberal' consociation.

Segmental autonomy implies cultural protection and power-sharing dispersion. In other words, the decision-making process for highly sensitive issues should involve both minority and majority groups, while leaving decision-making on all other issues to the discretion of each group. It can be manifested in two forms, territorial and non-territorial. In the case of non-territorial segmental autonomy, group members can enjoy their rights anywhere in the polity. Serbs in Kosovo, at least on a paper, enjoy both forms of segmental autonomy. There is an Association of Serb Communities, and Church property is protected. Furthermore, Kosovo Serbs have the right to use their language and attend their own schools outside Serb Communities (in enclaves or Pristina, for example).

Proportionality refers to the transfer of power from the majority to the minority group. First, the proportionality principle implies the overrepresentation of the minority group, which ensures their participation in political institutions. Secondly, this principle entails the allocation of public goods, including a fair allocation of public expenditure and public-sector jobs.

'Veto rights' refers to a legislative protection for the minority group, which will be outvoted on vital issues. It can be absolute, as in the case of Bosnia, where a minority group can veto virtually any decision. However, it is more common for it to be suspensive, giving the minority group the right to veto only specific decisions. In Kosovo, Kosovo Serbs can veto only decisions related to minority rights.

Critiques of Consociational Democracy

While it gained popularity and fame, Lijphart's theory also attracted criticism.⁵⁹ In this text, only the four most relevant critiques are explored. The first criticism of consociational democracy is based on the notion that the theory employs circular reasoning. It is rooted in Lijphart's argument that the tradition of elite accommodation is conducive to consociation. As Daalder puts it, 'ancient pluralism facilitated the development of a stable, legitimate and consistently pluralist for modern societies'.⁶⁰ However, this reasoning does not imply that the existence of elite accommodation is pre-condition for consociational arrangement; it merely suggests that it offers a favourable environment. Quite the contrary, Lijphart argues in *Politics of Accommodation* that, despite the previous example of elite accommodation, which lasted until 1848, the Netherlands achieved stable democracy. The second set of critiques stems from this argument.

Boynton and Kwon identify two problems with Lijphart's theory.⁶¹ Firstly, it does not address 'how the views of the groups would be most likely to change over time given this structure of politics'.⁶² In other words, there is a missing link between the phase in which 'there is no communication between elites' and that in which 'elites engage in decision making'. Secondly, we cannot be sure about the causal direction of the phenomena. It is impossible to know which event comes first, elite accommodation or institutions that are amenable to elite accommodation.

While the first critique is simply a misunderstanding, the second one must be addressed at length. However, in the case of Kosovo, we can confidently claim that

⁵⁹ A. Pappalardo, 'The Conditions for Consociational Democracy: A Logical and Empirical Critique', *European Journal of Political Research*, vol. 9, no. 4, 1981, pp. 365-390; M.C.P.M. van Schendelen, 'The Views of Arend Lijphart and Collected Criticisms', *Acta Politica*, vol. 19, no. 1, 2014, pp.19-49; B. Barry, 'The Consociational Model and Its Dangers', *European Journal of Political Research*, vol. 3, no. 3, 1975, pp. 393-412; I. Lustick, 'Lijphart, Lakatos, and Consociationalism', *World Politics*, vol. 50, October 1997, 88-117; M. Bogaards, 'The Uneasy Relationship Between Empirical and Normative Types in Consociational Theory', *Journal of Theoretical Politics*, vol. 12, no. 4, 2000, pp. 395-423

⁶⁰ H. Daalder, 'On Building Consociational Nations: Cases of the Netherlands and Switzerland', in K. D. MacRae (ed), *Consociational Democracy*, 1975, p.114.

⁶¹ For later critiques based on Boynton and Kwon, see: M.C.P.M. van Schendelen, 'The Views of Arend Lijphart and Collected Criticisms', 2014; I. Lustick, 'Lijphart, Lakatos, and Consociationalism', 1997; R. Andeweg, 'Consociational Democracy', *Annual Review of Political Science*, vol. 3, June 2000, pp. 520-21.

⁶² G.R. Boynton and W.H. Kwon, 'An Analysis of Consociational Democracy', *Legislative Studies Quarterly*, vol. 3, no. 1, February 1978, p.23.

there was no tradition of consociational arrangements prior to the Brussels Agreements in 2013.⁶³ The missing link between the two phases will be later explained in terms of the circumstances imposed by the EU: because both Serbia and Kosovo expressed a desire for a European future, it would be economically and politically costly to avoid accommodation.

The third critique comes from Horowitz's programme of 'integrative' solutions for deeply-divided societies.⁶⁴ Like the previous critics, Horowitz believes that there is no mechanism to push elites towards accommodation. Elites can even manipulate prolonged conflict if it is beneficial for them. He puts forward the claim that, in deeply-divided societies, the institutions that encourage moderation are of the utmost importance because they bring about the creation of a common state identity. This thesis does not contradict the argument that there are situations in which elites indeed prolong conflict to pursue private gains. However, this explanation is similar to the reasoning offered above: in the case of Kosovo, elites do not opt for cooperation because they suddenly become more co-operative, but rather because exclusion becomes economically and politically costly.

Finally, Barry argues that division 'based on ethnic identity is more likely to be resistant to consociational management'.⁶⁵ This occurs because religious conflict is a conflict between organisations, and, while religious groups have leaders, they are not defined by their leadership but by their religious views. Therefore, he questions to what extent those leaders exercise the necessary control to 'take part in consociational arrangements with confidence that they can "deliver" their supporters'.⁶⁶ Even Lijphart's examination of Northern Ireland reveals the same challenge.⁶⁷ Kosovo's division is certainly not based on religious animosity.⁶⁸ Nevertheless, Kosovo

⁶³ One can claim that the Kosovo 2008 Constitution is such an arrangement. However, I will demonstrate in this thesis that it became consociational only after the Brussels Agreement.

⁶⁴ D. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society*, Berkeley, University of California Press, 1991, pp. 137-144.

⁶⁵ B. Barry, 'Political Accommodation and Consociational Democracy', *British Journal of Political Science*, vol. 5, no. 4, October 1975, p. 502.

⁶⁶ *Ibid*, p. 502.

⁶⁷ A. Lijphart, *Democracy in Plural Societies*, 1997, p.134-141.

However, in his study of Switzerland, Belgium, and Malaysia, he claims that stability can be achieved through control of the majority; for example, it might be achieved by means of over-representation. A. Lijphart, *Power-Sharing in South Africa*, 1985, p.97-98.

⁶⁸ For example, majority of European states recognise Kosovo as an independent state, while, more than a half of member states of the Organisation of Islamic Cooperation (OIC) refuse to do so. The

confronts an underlying issue that is characteristic of societies divided along religious lines, namely, a lack of overarching loyalty. This lack of common identity gives rise to a danger that moderate politicians might be labelled as 'pro-other ethnic group'. For instance, if a Kosovar politician who is ethnically Albanian advocated for a more comprehensive set of minority rights to benefit Kosovo as a society, he would be seen as pro-Serbian. It goes both ways; an ethnically Serbian Kosovar politician would be perceived as a traitor if he argued that Kosovo should not be blocked from membership in the International Organisation of Vine and Wine, which would be beneficial for the whole society, as wine is associated with longstanding cultural traditions.

Under this specific condition, consociational systems require three additional supports:

First, the rival ethnic segments must not be unreservedly committed to immediate or medium-term integration or assimilation of others into 'their' nation or to the creation of their own nation state...Second, successive generations of political leaders must be motivated to engage in conflict regulation and sustain the consociational system. The leaders of the rival ethnic communities must fear the consequences of protracted ethnic war...Third, the political leaders of the relevant ethnic communities must enjoy some political autonomy themselves, so they can make compromises without being accused of treachery.⁶⁹

These criteria are far more difficult to achieve than those described for classical Western democracies. However, apart from the fact that elites are willing to maintain a consociational arrangement, Kosovo has another advantage: divided opinions among EU member states regarding Kosovo's statehood might be perceived as a challenge for European foreign policy, but it is a blessing in disguise for the citizens

reasons are, however, different: there are states with similar issues (Azerbaijan, Indonesia, Morocco), states that view Kosovo as an American project (Syria, Iran, Iraq), and traditional Serbia's allies from a communist era (Algeria, Tunisia).

⁶⁹ J. McGarry and B. O'Leary, 'The Political Regulation of National and Ethnic Conflict', *A Journal of Comparative Politics*, vol. 47, no. 1., January 1994, p. 113.

See also: J. McGarry and B. O'Leary, *The Politics of Ethnic Conflict Regulation*, J. McGarry and B. O'Leary (eds), London, Routledge, 1993, pp.36-37.

of Kosovo. This division implies that the final solution will not be the result of a unilateral decision, but instead will be based on consensus. On the other hand, excessive involvement on the part of the EU creates special circumstances that reach beyond complex power-sharing.

Complex power-sharing is a mechanism for the accommodation of ethnic conflicts that combines consociationalism, integration, and power-dividing. It is 'the result of the implementation of a self-governance regime whose success as an approach to conflict settlement requires a relatively complex institutional structure that cannot be reduced to autonomy/(ethno-)federalism, (traditional) models of power-sharing or power-dividing'.⁷⁰ In other words, in complex power-sharing, the concept of autonomy is combined with other conflict regulation strategies. These strategies can involve international actors or aim to exclude them. In Northern Ireland, the principle of consent allowed residents of the island of Ireland to exercise the right to self-determination 'without external impediment'.⁷¹ On the other hand, in Bosnia, there is a mechanism for the international arbitration of disputes that involves international actors. Though the mechanism remains underdeveloped and burdened with various problems,⁷² its presence hints at the necessity of international involvement in certain cases of complex power-sharing. Therefore, the more appropriate definition of complex power-sharing states that it is as an arrangement that 'concurrently deploy[s] autonomy, governmental, and executive power-sharing, veto and voting mechanisms, human and minority rights regimes, dispute settlement mechanisms, and the involvement of a layer of international involvement or even international governance'.⁷³

Though comprehensive, this definition fails to differentiate between various external actors. For example, there is a significant qualitative difference between the involvement of the Republic Ireland in Northern Ireland and NATO's role in Bosnia.

⁷⁰ S. Wolff, 'Complex Power-sharing and the Centrality of Territorial Self governance in Contemporary Conflict Settlements', , *Ethnopolitics: Formerly Global Review of Ethnopolitics*, vol. 8, no. 1, 2009, p. 29.

⁷¹ The Northern Ireland Peace Agreement, 'The Agreement reached in the multi-party negotiations', 10 April 1998, *Constitutional Issues*, p.3.

⁷² It still remains a valuable asset, see: H. Radončić, N. Janković, P. Mladenović, 'Arbitration as means to resolving disputes in Bosnia and Herzegovina', *Vojno Delo*, vol.4, 2017, pp.212-223.

⁷³ M. Weller, and B. Metzger, *Settling Self-determination Disputes: Complex Power-Sharing in Theory and Practice*, Leiden/Boston, Martinus Nijhoff Publishers, 2008, p.IX-X.

Therefore, it would be useful to differentiate between a fully external actor and a neighbouring reference or paternal state. In Kosovo's case, Serbia, to a large extent, plays the role of a reference state; this is similar to Serbia's role in the Dayton Agreement. However, it also takes the role of an internal actor, much like the role of the Albanians in the Ohrid Agreement. The EU, the situation is more complex still, as the EU remains a fully external actor while, due to specific circumstances, it is must adopt the role of patron state.

Kosovo: from UN Protectorate to International Consociation

In a political sense, a protectorate is a territory that is protected in matters of international affairs while retaining its local autonomy. However, the mere functioning of the given territory does not reveal whether the relationship between the protected and the protector is based on coercion or consensus. Thus, legal practitioners and policy-makers emphasise the importance of the process for the creation of the protectorate.

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognised by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.⁷⁴

Therefore, in consideration of the above, a protectorate is a territory established by an agreement, and widely recognised as such, in which the protectorate is autonomous in internal affairs while it is represented and protected by another state or group of states in its international relations.

⁷⁴ J.R. Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 1979, p.284.

This definition fits well not only for a protectorate but also for International Territorial Administration (ITA) and, to some extent, certain older practices. Although many authors do not shy away from using the word protectorate when it comes to Kosovo,⁷⁵ J. Crawford warns that the political status of a given territory should not be determined by ‘inference from the label attached to it (‘protectorate’, ‘suzerain’, ‘vassal’...) but from an examination of the constituent documents and the circumstances of the case’.⁷⁶ Wilde provocatively states, ‘ITA is protection and colonialism in a new guise, ostensibly serving objectives set by the member states of international organizations collectively, rather than by European states Individually’.⁷⁷ ITA and modern protectorates might indeed resemble colonial practices; however, it is true that the evolution of legal and political norms has brought about unique circumstances limiting the functions and governance of protecting states.⁷⁸ Therefore, instead of focusing on the label, the terms ‘protectorate’ and ‘ITA’ will be used interchangeably, paying attention to the relationship between the protected state and the protecting state or union of states. This relationship includes agreements, international recognition of the territory as a protectorate, local autonomy, and international representation by the protecting state or union of states.

During the period 1999–2008, Kosovo was a UN protectorate established by UN SC Resolution 1244 following an agreement between Slobodan Milošević and Marti Ahtisaari (Annex 2). Resolution 1244 was adopted by a measure of 14 votes with one abstention (China). Therefore, the international status of Kosovo as a UN protectorate was widely accepted. Internally, the UNMIK mission worked to transfer ‘its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions’.⁷⁹ By 1999, UNMIK had formed the Kosovo police force, in which 90% of placements were reserved for Kosovo Albanians and

⁷⁵ A. Heinemann-Grüder and I. Grebenshikov, 'Security governance by internationals: The case of Kosovo', *International Peacekeeping*, vol. 13, no. 1, 2006, pp. 43-59; M. Grasten and L. Uberti, 'The politics of law in a post-conflict UN protectorate: privatisation and property rights in Kosovo (1999–2008)', *Journal International Relations and Development*, vol. 20, 2017, 162–189; J. Rupnik, 'Kosovo: Dilemmas of the Protectorate', *E. Eur. Const. Rev.* 48, 2000; A. Yannis, 'The UN as Government in Kosovo', *Global Governance*, Vol. 10, No. 1, 2004, pp. 67-81.

⁷⁶ J.R. Crawford, *The Creation of States in International Law*, 1979, p.284.

⁷⁷ R. Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial', *The American Journal of International Law*, Vol. 95, No. 3, 2001, p. 601.

⁷⁸ R. Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction*, Oxford, Oxford University Press, 2005, pp.16-42.

⁷⁹ UN SC Resolution 1244, 10 June 1999, par. 11.

the rest for Kosovo Serbs and other minorities. In 2001, there were elections for Provisional Institutions for Self-Government (PISG), conducted under the UNMIK Institutional Framework. Therefore, Kosovo's protectorate was established and regulated by an agreement (Resolution 1244) and globally recognised as such. While internationally protected by the UN, Kosovo enjoyed substantial local autonomy.

In February 2008, Kosovo's Assembly adopted the Unilateral Declaration of Independence and the EU deployed the EULEX mission. EULEX is a status-neutral mission that operates within the framework of Resolution 1244.⁸⁰ However, Resolution 1244 guarantees the integrity and sovereignty of Serbia⁸¹ and as such is not recognised within Kosovo's constitutional framework.⁸² On the other hand, Kosovo's Constitution was imagined as a consociational arrangement. While it has all of the characteristics of a consociational arrangement, it lacks the essential precondition, namely, an elite agreement.⁸³ In other words, because it was rejected by Belgrade and by Kosovo Serbs, it was instead a unilaterally enforced solution.

It was only after the Brussels Agreement that these issues were resolved.⁸⁴ Firstly, Kosovo agreed to use an asterisk beside its name. The asterisk refers to the following: 'This designation is without prejudice to positions on status and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence'. Secondly, Serbia agreed to integrate judicial authorities and police into Kosovo's legal system in North Kosovo and agreed that four northern Serb-majority municipalities would be formed in keeping with 'Kosovo law and international standards'.⁸⁵ This demonstrates that Kosovo renounces its international presence by accepting that its political designation is consistent with Resolution 1244, while Serbia recognises Kosovo's institutions and its local autonomy. Belgrade and Pristina also agreed not to block one another's path to the EU.

⁸⁰ See for example: Council Joint Action, on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo 2008/124/CFSP, February 2008, par.2.

⁸¹ UN SC, Resolution 1244 S/RES/1244, June 1999, Introduction, p.2.

⁸² Kosovo's Constitutions mentions the UN only as historical fact that precedes Kosovo's sovereignty. The Constitution of Kosovo, art.153.

⁸³ See Chapter 7.

⁸⁴ For legal issues from the period 2008-2013 see Chapter 5.

⁸⁵ Brussels Agreement, 'First Agreement of Principles Governing the Normalization of Relations', par. 12.

Without doubt, the Brussels Agreement is an elite accommodation that also retroactively absorbed the consociational elements of Kosovo's Constitution, as Serbia recognised Kosovo's local authority and laws. It, however, remains a rather peculiar consociational arrangement. The Brussels Agreement is an internationally binding agreement for only one side: Kosovo. While Kosovo's assembly ratified the agreement, Serbia treats it as an internal agreement consisting of political commitments to its southernmost province. This lack of Serbia's commitment is compounded by the fact that, after the Brussels Agreement, Serbia increased its presence and leverage in North Kosovo in ways not seen since 1999,⁸⁶ which allows Belgrade to play a double role. On the one hand, Belgrade is a guarantor of the agreement, as it was in the Dayton Agreement; on the other, Belgrade plays the role of 'elite' and directly participates in the consociational arrangement. This is similar to the role the Albanians play in the Ohrid Agreement.

However, though the Brussels Agreement is not internationally binding for Serbia, it contains elements of an international treaty. Paragraph 14 states, 'It is agreed that neither side will block, or encourage others to block, the other side's progress in their respective EU path'.⁸⁷ This bilateral clause applies only to external policy; however, it includes only the EU, not any other international organisation. In other words, the Brussels Agreement can be viewed as an international treaty only as regards EU internal affairs. It is important to note that international law does not recognise Kosovo, and a document either is an international treaty, or it is not.

In the agreement, the EU not only plays the role of a mediator but also guarantor of the agreement. The success of this odd arrangement can be explained by '(a) great leverage vis-à-vis the conflict parties due to their EU membership aspirations and (b) its mix of a strategy of formulation and manipulation that draws on this leverage to move parties toward agreement through the use of positive incentives'.⁸⁸ In other words, while the EU officially only mediates the negotiations, its de facto leverage places it in the position of guarantor of the Brussels Agreement because Kosovo's and Serbia's EU aspirations are an impediment to a new conflict. Therefore, while Kosovo's arrangement can be defined as complex power-sharing in the period

⁸⁶ See Chapter 8.

⁸⁷ The Brussels Agreement, par.14.

⁸⁸ Begmann and Niemann, 2015, p.1.

between 2008 and 2013, after the Brussels Agreement, it becomes a sort of transnational consociation.⁸⁹

I argue that this relationship between Belgrade, Brussels, and Pristina, due to specific circumstances, establishes Kosovo as a European protectorate. However, significant changes in global politics or even a whimsical statesman could stop the process. Therefore, there are two caveats: first, the EU cannot withdraw from the region; and, second, Serbia must not recognise Kosovo. In the first scenario, the most probable outcome would be a new conflict, as the conflict would no longer be costly for elites from Belgrade and Pristina. The second, more likely scenario, is one in which Serbia recognises Kosovo as an independent state. This implies not recognition in sense that ‘Serbia accept this reality... through Chapter 35 [a legally binding agreement with Kosovo is one of the EU’s conditions for Serbia]’,⁹⁰ but instead explicit recognition.⁹¹

Kosovo as European Protectorate

The central argument of this thesis is that, under the following circumstances, Kosovo would almost organically become a protectorate of the EU: (a) the political status of the disputed territory divides the UN member states, including the great powers, pundits, scholars, and policy-makers; (b) the great powers believe that the conflict and Kosovo’s political status should be facilitated by the EU; (c) both ethnic groups and paternal state envision their future within the EU; (d) all legal means are exhausted and the highest courts have decided that the solution should be found by means of political channels within the EU; (e) the EU has expressed its readiness to facilitate and manage the conflict in a status-neutral manner; (f) such arrangement is politically and technologically feasible.

⁸⁹ Transnational consociation, besides internal consociation, includes links to paternal state, intergovernmental, and bipartisanship.

I. Sircar, *Transnational Consociation in Northern Ireland and in Bosnia-Herzegovina: The Role of Reference States in Post-Settlement Power-Sharing*, LSE, PhD Thesis, 2006, pp. 65-89.

⁹⁰D. Doli, *The International Element, Statehood and Democratic Nation-building: Exploring the Role of the EU and International Community in Kosovo’s State-formation and State-building*, Springer, 2019, p.180.

⁹¹ I discuss this issue in Chapter 8. In short, without Serbia's explicit recognition, Spain and other EU member state that object Kosovo's statehood has no incentives to change the decision. It is similar to Russia and China in the UN. Those three states clearly assert that they will not change the decision regarding Kosovo's political status unless Serbia does otherwise.

The political status of the disputed territory divides UN members, including the great powers. Under the current constellation of powers, unilateral decisions remain ineffective, if unlikely to occur. In other words, there is almost no chance that either side will achieve its maximalist demands, namely, that the disputed territory become a member of the UN and many other regional and international organisations, or that it return to the status *quo ante*. The inability of the disputed territory to join the UN or to return to its pre-conflict state could give way to a bumpy stalemate, as in the case of Palestine, or a wave of recognition withdrawals, as in the case of the Sahrawi Arab Democratic Republic.

Both ethnic groups and the paternal state have expressed that their future is in the EU. This is a unique situation in and of itself. Representatives and residents of the disputed territory hope to join a union or federation including the state from which they declared independence. The union implies open borders and free movement of goods and people, and thus equal or even greater levels of cooperation between the disputed territory and the paternal state than would be required by the autonomy of the disputed territory within the paternal state. There is no doubt that a common European future can bring peace and consequently stability. As George Vassiliou, the former president of Cyprus, remarked, 'if Cyprus had been a member of the European Union ... neither union with Greece (enosis) nor partition (taksim) along ethnic lines would have been a realistic slogan'.⁹² While Cyprus is not a candidate to become a European protectorate because its political status does not divide the great powers, it certainly provides a grain of hope for the case of Kosovo. In the case of Cyprus, the Annan Plan did not 'permit either of the two sides to maximize its demands' but encouraged them to 'make mutual compromises in order to secure their fundamental needs'.⁹³

The third condition is that the great powers believe that the conflict and the political status of the disputed territory should be facilitated by the EU. On its own, this condition suggests a colonial relationship in which the great powers carve out

⁹² G. Vassiliou, 'EU Entry: Catalyst for Cyprus Solution', *Global Dialogue*, Vol. 5, no. 3/4, 2003, p.1

⁹³ A. Sozen and K. Ozersay, 'The Annan Plan: State Succession or Continuity', *Middle Eastern Studies*, vol. 43, No. 1, 2007, p. 138.

What is interesting for Kosovo is that the Plan required referendums in both the paternal state and the disputed territory. Further, the question of EU membership was tied to a 'special' relationship with Turkey.

zones of absolute power. However, when accompanied by the condition that the highest courts must decide that international law cannot resolve the dispute and therefore advise the divided parties to seek a solution through the EU, this hint of colonialism disappears.

Furthermore, it is not enough for the great powers and legal experts to ‘impose’ the EU's responsibility for the final status of the disputed territory; it is also important that the EU assume certain duties and rights. The EU must express readiness and demonstrate a capacity to manage the conflict and accommodate the solution.

Finally, for Kosovo to become a protectorate of the EU, such an arrangement must be politically and technically feasible. Technical feasibility refers to an arrangement that does not contravene physical, social, or psychological laws. For example, a proposal that requires all citizens to acquire advanced mathematical skills or to be able to jump two meters would be infeasible. It is, however, feasible to ask citizens of the disputed territory to refrain from violence and respect other ethnic groups if there are proper incentives for this behaviour. On the other hand, political feasibility also implies that there must be enough political support for the proposal. This need not be explicitly stated; it can come in the form of accepting the current state or in the form of a silent consensus.

Chapter 2

ETHNIC IDENTITIES IN KOSOVO: NARRATIVES, EDUCATION, AND POSSIBILITIES FOR RECONCILIATION

Abstract

This chapter argues that the conflict in Kosovo is socially constructed; however, the possibility to change narratives was lost after the international community failed to establish common narratives through a unified educational system. Parallel education and collective memory are the main pillars of consistency of ethnic identities in Kosovo. While the international community has set its task to maintain peace, Belgrade and Pristina remain occupied with questions of sovereignty and international recognition. Therefore, the quest for reconciliation rests on youth activism; nevertheless, past experience shows that passions can be harnessed by interests and the question, yet to be answered, is how to protect fervour from political manipulation.

Introduction

Current scholarship concurs that the concept of ethnic identity includes one or more of the following: religion, language, dialect, tribe, clan, race, nationality, region, and caste.⁹⁴ The vivid discussion of ethnicity precipitates the dilemma of how ethnic identities are to be understood—as fluid or fixed. Scholars converge on the idea that identities are socially imagined; however, there is considerable disagreement whether they can be altered once constructed. Kosovo, and the former Yugoslavia in general, are the arena for testing of these claims. The crucial question is ‘are identities in Kosovo fluid or fixed once constructed’? Since Kosovo's history is oftentimes

⁹⁴ D. Horowitz, *Ethnic Groups in Conflict*, Berkeley, University of California Press, 1985.

inseparable from myths and as such subject to political abuses, this chapter avoids going far into history and focuses on the post-conflict state and the role of the international community. Another looming question of the is ‘why are ethnic identities in Kosovo so persistent’?⁹⁵ To answer this, the chapter discusses collective memory and parallel educational systems. Understanding of past events, often mired in controversy, are reflected in the present and shape the future: they are further transmitted to state institutions and serve to build identity. The chapter also raises the question of possibilities for reconciliation considering lack of interest on the part of political leaders and the international community.

Constructivism versus Primordialism

The point of departure of this chapter is the question ‘are identities, including Kosovo, fluid or fixed once constructed?’ The answer creates a fundamental difference for addressing ethnic cooperation in deeply divided societies.⁹⁶ The question has persisted since the 1950s: Proponents of the primordial approach believe that ethnic identity is fixed once constructed; thus ethnic tensions are an alterable feature of human nature, while constructivism suggests that ethnic identity is socially constructed, therefore mutable, and ethnic boundaries can be redefined. The discrepancy between the two approaches is best summarised by Benks:

the primordiality position would hold that ethnicity is an innate aspect of human identity. It is a given, requiring description rather than explanation. At the other end of the scale, the instrumentalist position (known sometimes as the ‘circumstantialist’ approach) would hold that ethnicity is an artefact, created by individuals or groups to bring together a group of people for some common purpose.⁹⁷

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⁹⁶ A. Lijphart, ‘Constructivism and consociational theory’, APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association, vol. 12, no. 1, 2001, pp. 11-13.

⁹⁷ M. Benks, *Ethnicity: Anthropological Construction*, London and New York, Routledge, 1996, p. 39.

The term primordialism was popularised by Shils: he contends that modern society is ‘held together by an infinity of personal attachments, moral obligations in concrete context, professional and creative ambition’ but also by ‘primordial affinities’.⁹⁸ He argues that these attachments ‘are not just a function of interaction... [but] attributed to the tie of blood’.⁹⁹ By the same token, Geertz asserts that primordial ties are not merely the result of ‘personal affection, practical necessity, common interest, or incurred obligation... [but] of some unaccountable absolute importance attributed to the very tie itself’.¹⁰⁰ Until the 1980s, modernists viewed ethnicity as belonging to the under-developed world,¹⁰¹ a phenomenon that would perish with modernity.¹⁰² However, it became clear that ethnicity could not be explained as a side-effect of modernisation. Ethnicity began to be seen in terms of conflicts and interests as ethnic affiliation did not become obsolete in colonies, quite the contrary – it became a phenomenon that haunts metropolitan areas.¹⁰³ Marx’s famous quotation ‘a spectre is haunting Europe – the spectre of communism’ became ‘a spectre is haunting Europe – the spectre of nationalism’.¹⁰⁴ The last stage of decolonization coincided with the fall of Soviet Bloc showing that workers adopted Marxist ideology for purely practical reasons such as equal rights and better working conditions.¹⁰⁵ Hobsbawm argues that ‘socialist movements were not, ever, anywhere, movements essentially confined to the proletariat in the strict Marxist sense’.¹⁰⁶ Indeed, in the former Yugoslavia, ideology successfully obfuscated national identities; however, the bankruptcy of Communism created an ideological void that was then filled by nationalism.¹⁰⁷ This is not a coincidence; in its essence, communism was a modernist ideology and as such it planted seeds for nation-building if not nationalism.¹⁰⁸

⁹⁸ E. Shils, ‘Primordial, personal, sacred and civil ties: some particular observations on the relationships of sociological research and theory’, *The British Journal of Sociology*, vol. 8, no. 2, 1957, p.131

⁹⁹ *Ibid.*, p.142

¹⁰⁰ C. Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, p.259.

¹⁰¹ A. Cohen, *Urban Ethnicity*, London, Routledge, 1974, p. xi.

¹⁰² R. H. Thompson, *Theory of Ethnicity: A Critical Appraisal*, New York, Greenwood Press, 1989, p.2.

¹⁰³ *Ibid.*, p.379.

¹⁰⁴ N. Ephraim, *Marxism and Nationalism*. London and Concord, Pluto Press, 1991, p.1.

¹⁰⁵ E. Hobsbawm, *Identity Politics and the Left*. Paper read at Barry Amiel and Norman Melburn Trust Lecture, at Institute of Education, London, 1996.

¹⁰⁶ *Ibid.*

¹⁰⁷ R. Hayden, ‘American Proposals for the Constitutional and Political Status of Kosovo: The State as Legal Fiction’ in *East European Constitutional Review*, vol. 7, no. 4, 1998. pp. 83-92.

¹⁰⁸ C. King, ‘Post-postcommunism: tradition, comparison, and the end of “Eastern Europe”’, *World Politics* vol. 53, no.1, 2000, p. 164.

Brubaker's analysis of nationalism in the Soviet Union reveals a contradiction where the political apparatus repressed nationalism while encouraging institutionalism of nationhood as an elemental social category.¹⁰⁹ A similar trend can be observed in communist Yugoslavia after the Constitution in 1974.¹¹⁰ Indeed, political institutions and processes are often the creators of ethnonational groups.¹¹¹ Therefore, the shift from communist ideology to nationalism is a consequence of social disorientation: 'When society fails, the nation appears as the ultimate guarantee'.¹¹²

The persistence of ethnic identities in under-developed countries and the birth of nationalism in Europe effectively pushed primordialist scholars to make a compromise: 'After all our ethnic identities are not stamped on our genes, so they must be socially constructed'.¹¹³ Yet we should not jettison the idea of fixed ethnic identity since, once constructed, they are difficult to reconstruct.¹¹⁴ In other words, individuals do not merely inherit language, religion or culture, rather they adopt these through their families. Families are, however, primordially determined. This implies that even religion, a stable component of ethnicity, can be changed; nevertheless, it is highly unlikely to occur in modern times. Therefore, primordialism in 21st century holds that ethnicity:

- (a) is constructed around sociologically known similarities, especially around kinship, (b) can be assumed as fixed once it is constructed, (c) is solidified by violent out-group conflict and/or mass literacy and (d) has an overpowering impact on behaviour,

¹⁰⁹ R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe*, Cambridge, Cambridge University Press, 1996.

¹¹⁰ I. Vejvoda, 'Yugoslavia 1945–91 – from decentralisation without democracy to dissolution', in D.A. Dyker and I. Vejvoda (eds) *Yugoslavia and After: A Study in Fragmentation, Despair and Rebirth*, London and New York: Longman, 1996, pp. 9–27.

¹¹¹ J. Rothschild, *Ethnopolitics*, New York, Columbia University Press, 1981, p. 95.

¹¹² M. Hroch, quoted from E. Hobsbawn, 'Nations and Nationalism since 1780: Programme, myth, reality', Cambridge, Cambridge University Press, 1990, p. 173.

¹¹³ S. Van Evera, 'Primordialism lives!', *APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, 2001, p.20.

¹¹⁴ W. Connor, *Ethnonationalism: The Quest for Understanding*, Princeton NJ, Princeton University Press, 1994.

because humans attribute an ineffable significance to their assumed kinship ties.¹¹⁵

Parallel to the primordialist adjustment, constructivists actively joined the debate. As a rebuttal to the primordial arguments, they take sub-Saharan Africa and the immigrants in the New World as examples to demonstrate the fluidity of ethnic identities.¹¹⁶ Based on studies of three countries, Backer concludes that there is a shift ‘from an overwhelming focus on persisting difference... to a broader focus that encompasses emerging commonalities.’¹¹⁷ Advocates of this approach also argue that the primordial assumptions of fixed nature make ethnicity unsociological and unanalysable.¹¹⁸ Primordialism, for all its faults, allowed scientists to sort people into groups and make confident predictions without examining or observing them; on the other hand, constructivism forces scholars to ‘probe the multiplicity of identities available to individuals’¹¹⁹ In short,

Those who subscribe to the constructivist approach agree on two basic propositions: First, individuals have multiple, not single, ethnic identities; and second, the identity with which they identify varies depending upon some specified causal variable.¹²⁰

Hence, both approaches agree that identities are not stamped on our genes; however, the question remains whether ethnic identities can be reconstructed? Reconstruction can indeed happen; nevertheless, conditions required for reconstructing identities in modern society are rare. Van Evera advances three arguments to back this claim:

¹¹⁵ M. Bayar, ‘Reconsidering primordialism: an alternative approach to the study of ethnicity, *Ethnic and Racial Studies*, vol.39, no. 9, 2009, p. 1643.

¹¹⁶ R. Brubaker, ‘The return of assimilation? Changing perspectives on immigration and its sequels in France, Germany, and the United States’. *Ethnic and Racial Studies*, vol. 24, no. 4, 2001, pp. 531-548;

¹¹⁷ *Ibid.*, p.542.

¹¹⁸ J. Eller and R. Coughlan, ‘The poverty of primordialism: the demystification of ethnic attachments’. *Ethnic and Racial Studies*, vol. 16, no. 2, 1993, pp. 183-202.

¹¹⁹ I. Lustick, ‘Agent-based modeling and constructivist identity theory’, *APSACP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, 2001, p.23.

¹²⁰ K. Chandra, ‘Introduction’, *APSA-CP: Newsletter of the Organized Section in Comparative Politics of the American Political Science Association*, vol. 12, no. 1, 2001, p.7.

- (1) Ethnic identities harden when mass literacy is achieved.
- (2) Ethnic identities are hardened by violent conflict with others.
- (3) The identities of non-immigrant ethnic groups are far more firmly fixed than immigrant identities.¹²¹

Identities are difficult to reconstruct; however, specific institutional design ‘under certain circumstances, will provide rational political actors with incentives towards cooperation, moderation and accommodation between themselves and their rivals’.¹²² In other words, the ethnic identities can be moderated.

Therefore, the premises of the chapter is that: (a) the ethnic hatred is socially constructed, therefore (b), within certain political environments and under certain electoral systems, ethnic conflict can be managed; however, (c) though the ethnic hatred is social construct, primordial narrative is a powerful tool that fuels hatred between the ethnic groups. These premises raise the pivotal question of this section: ‘why is ethnicity a persistent and all-consuming issue in Kosovo?’

Failure of the International Community to Create Shared Narratives

After the conflict in 1999, there was no peace arrangement between Kosovo Albanians and Kosovo Serbs: the UN and NATO imposed peace and squandered an opportunity to change Kosovo’s political climate. King and Mason prophetically predicted that ‘if Kosovo gains independence without having embraced ethnic diversity or the rule of law, it will be a thundering confirmation of the axiom that might makes right’.¹²³ Indeed, the road from armed conflict to peace requires from the society acknowledgement of violence from the recent past.¹²⁴ However, the international community expected that the International Criminal Tribunal for the former Yugoslavia (ICTY) would ‘put international justice norms ‘to work’ and

¹²¹ Van Evera, p. 20.

¹²² B. Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management*, Cambridge, Cambridge University Press, 2001, p.6.

¹²³ I. King and W. Mason, *Peace at any Price: How the World Failed Kosovo*, London, Hurst & Co., 2006, p.21.

¹²⁴ ‘Transitional Justice in Kosovo’, KIPRED: Kosovo Institute for Policy Research and Development, ‘prepared by I. Dugolli and I. Agimi, Pristina, 2008, p.4.

produce just outcomes for victims as well as perpetrators, were considerable from the outset'.¹²⁵ Even though it is still empirically unclear whether this approach has a positive or negative impact,¹²⁶ there is strong evidence that the prosecution of perpetrators would lead to further atrocities if political realities are neglected.¹²⁷ This top-bottom approach, without truly involving the communities, has as a consequence that 'compliance with international norms becomes a political strategy that allows states to go through the motion of fulfilling international demands while in fact rejecting the profound social transformation these norms require'.¹²⁸ Another consequence is that victims were disappointed, feeling it was unjust that ICTY would bargain with perpetrators and reduce sentences in exchange for confessions.¹²⁹ This explains why justice, for Kosovo Albanians and Kosovo Serbs, is still understood as justice for crimes committed against their own ethnic group but not for crimes committed against the other ethnic group. Indeed, local prosecutions face several obstacles including a 'climate of intimidation' – 'a chronic failure to provide adequate witness protection in Kosovo'.¹³⁰ Nonetheless, in 2012, according to the UNDP, Kosovars became more hesitant to view war perpetrators as criminals, with a drop of 10 per cent within Kosovo Albanian and Kosovo Serb communities and a drop of 22 per cent within other non-majority communities.¹³¹ Not surprisingly, 94.2 per cent of all respondents support finding the truth.¹³²

Truth is another mechanism within the framework of transnational justice. Disclosing truth means going 'beyond a mere recital of objective facts',¹³³ providing consolation to victims by individualising guilt and creating common narratives; nonetheless, in the Balkans – 'the truth or a shared narrative of the past is nowhere to

¹²⁵ J. Subotić, 'Truth, justice and reconciliation', *Journal of international relations and development*, vol. 18, no.3, 2015, p.367.

¹²⁶ O. Thoms, R. James, and P. Roland, 'State-level Effects of Transitional Justice: What Do We Know?' *International Journal of Transitional Justice*, vol.4, no.3, 2010, pp.329–354.

¹²⁷ A. M. Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, Princeton N.J., Princeton University Press, 2001.

¹²⁸ J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*, Ithaca NY, Cornell University Press, 2009, p.167.

¹²⁹ J. Rowen, 'Mobilizing Truth: Agenda Setting in a Transnational Social Movement', *Law & Social Inquiry*, vol.37, no.3, 2012, pp.686–718.

¹³⁰ 'Kosovo: report on investigations into KLA must lead to prosecutions for crimes against humanity', Amnesty International, public statement, 30 July 2014.

¹³¹ UNDP (UN Development Programme), *Perceptions on Transitional Justice: Kosovo 2012*, p.12.

¹³² *Ibid.*, p.19.

¹³³ P. Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly*, vol.20, no.4, 1998, pp.737–816.

be found'.¹³⁴ While the ICTY was responsible for the retributive justice mechanism, UNMIK focused on the domestic field, addressing the questions of missing persons, and promoting human rights.¹³⁵ However, UNMIK experienced 'systematic failures to adjudicate war crime cases' due to lack of judicial personnel and insufficient protection of witnesses and judges.¹³⁶ War crime suspects are seen as heroes and their trials are seen as a trial to national history, evidence also shows that individuals who fought for the KLA (Kosovo Liberation Army) benefitted more compared to victims or minority communities.¹³⁷ Indeed, for Serbs, the truth is only truth about atrocities committed against their own group. For Kosovo Albanians, the truth is 'the struggle for freedom equated with [Serbian] crimes, and the struggle of the KLA and the people of Kosovo was a war of liberation for democratic, independent, and free Kosovo'.¹³⁸ Asked about causalities in the Kosovo conflict, children often replied with exaggerated numbers such as 250.000 (estimations are that the figure is around 10.000), they simply are not taught about the conflict in schools. Pupils in certain regions did not know that there were victims among Kosovo Serbs and found it difficult to accept this new information.¹³⁹ Considering the extensive falsification and distortion of facts in Albanian and Serbian textbooks,¹⁴⁰ , it may be still too early to learn the truth about the conflict. This is the subject of the next section.

Education

Education is a potent tool for positively shaping young minds. In Kosovo, however, for younger generations who did not experience the war, education plays a different role. Instead of serving as a mechanism for reconciliation, it is a stumbling block to inter-ethnic dialogue.

¹³⁴ Subotic, 2015, p.371.

¹³⁵ I. King, and W. Mason, p.21.

¹³⁶ OSCE (Organization for Security and Co-operation in Europe), Kosovo's War Crimes Trials: An Assessment Ten Years On, 1999-2009.

¹³⁷ Visoka, 2016, p.8.

¹³⁸ Voice of America. 2005. Kosovo Welcomes the Release from The Hague of Two Former KLA Members. Quoted from Visoka, 2016, p. 7.

¹³⁹ F. Aliu, 'Kosovo Kids Taught False History, Study Shows', Balkan Insight, 24 September, 2012.

¹⁴⁰ Ibid.

The Constitution in 1963 upgraded Kosovo to the status of a province, where sovereignty was still guaranteed by Serbia. This was significant because Amendment VIII envisaged constitutional equality among nations that encouraged the Albanians to seek additional rights:¹⁴¹ The University of Pristina offered classes in Albanian, and the university became an arena for testing the ideological concept of brotherhood and unity.¹⁴² Radoslav Gaćinović notes that

in the early 1990's, Kosovo and Metohija had 22 scientific organisations and units, with more than 1,200 employees, including 213 professionals with PhD degrees and 160 people with Masters degrees, mostly Shqiptars; before World War II, no Albanian from Kosovo had received an academic degree. At that time, Kosovo had 16,500 teachers in the Albanian language, a number which exceeded the number of students coming from the ranks of that nationality in 1941 (my translation).¹⁴³

A downside was the creation of the new Kosovo Albanian elite and 'once flagged as a showcase of inter-ethnic coexistence' the University of Pristina developed into a 'fortress of nationalism'.¹⁴⁴ The pinnacle of this nationalistic enthusiasm was the Albanian demonstration in 1981 which 'shattered any semblance of brotherhood and unity at the university and in the province as whole'.¹⁴⁵ This provoked Serbia's answer: empowered by the constitutional amendment in 1989, Serbia abolished dual education and the University of Pristina lost its autonomy. Serbia's measures had a counter-productive result: Belgrade had good ideological arguments to impose Communism on Kosovo Albanians but had no possibility to lure them to accept Serbian nationalism. Kostovičova vividly describes the situation:

The application of new education and labour laws by Serbia after its forceful abolition of Kosovo's autonomy in 1989 rendered most Albanian pupils 'schoolless' and their teachers and administrators jobless. Starting the new school year belatedly in January 1992,

¹⁴¹ SFRY Constitution, 1963, art.111-112, and Amendment VIII

¹⁴² D. Kostovičova, *Kosovo: The Politics of Identity and Space*, New York NY, Routledge, 2005. p.44.

¹⁴³ R. Gaćinović, *Otimanje Kosova i Metohije*, NIC Vojska, Beograd 2004, pp.58-59.

¹⁴⁴ Kostovičova, p.45.

¹⁴⁵ *Ibid.*, p.45.

Albanian pupils greeted their teachers in living rooms, garages, shops and cellars throughout Kosovo. The creation of what came to be known as parallel education for and by Albanians in Kosovo was a powerful demonstration of their resistance to the Serbian state and its policies.¹⁴⁶

The Albanian-language parallel education system became the main pillar of the Albanian political struggle for independence. Therefore, by abolishing education in the Albanian language, Serbia lost control over Kosovo Albanians.

In post-conflict Kosovo, the educational system is still deeply divided. An epitome of this division is Mitrovica (Serb. *Kosovska Mitrovica*, Alb. *Mitrovice*), once a prosperous town and synonymous with inter-ethnic cooperation, today it is a symbol of segregation. The town is divided by the Ibar River which has become the *de facto* border since the conflict. Young generations attend parallel educational systems and have no contact with members of the other community. In other cases, when children have the opportunity to attend school together, politics, rather than fostering multi-language education, is the major impediment. A good example is a school in Gjilan (Serb. *Gnjilane*, Alb. *Gjilani*) which

constructed with financial support from the British Embassy for the two communities to be taught in their own language and curricula, but to share classes such as physical education. However, the setup of a sign naming the school after a Kosovo Liberation Army member and a 'Republic of Kosovo' sign proved too divisive and ran counter to the spirit of the project, which endeavoured to bring communities together under a shared roof with common values.¹⁴⁷

There are examples of co-habitation; however, sharing the same school does not assure integration. In Lipjan (Lipljan/Lipjani), pupils attend the same school but with two curriculums (in Serbian for Kosovo Serbs, Kosovo Croats, Kosovo Bosniaks and

¹⁴⁶ *Ibid.*, p.45

¹⁴⁷ OSCE, Mission in Kosovo, Department of Human Rights and Communities, 2009, p. 16.

Roma - in Albanian for Kosovo Albanians, Ashkali and Kosovo Turks) and three different directors and names.¹⁴⁸

Young generations study from textbooks filled with hate speech, accounts of state genocide, terrorist activities, and chauvinism. A good example of this is the Battle of Kosovo: for Serbian pupils, the battle was between Serbs and Turks, while the participation of other nations is omitted; for Albanians, however, the part of other nations is overstated. Also, there is an attempt to show that the much-revered Serbian hero Milos is, in fact, Albanian, only because he was born in Drenica, a place today populated by Albanians.¹⁴⁹ Political leaders especially reach back into time, as early as possible and take advantage of blurred historical events to justify their politics. We read history books to discover what happened in the past, just to realise that what we seek to know is often unknowable. Blanchot, writing on Holocaust, noted ‘the wish all in the camps – the last wish: know what has happened, do not forget, and at the same time never will you know’.¹⁵⁰ If history books, which are the key for reclaiming memory, cannot perform this task then ‘mythmakers, epic poets, and chroniclers of the royal court are kept busy trying to provide legitimacy for regimes whose entitlement to govern is anchored in events of the past’.¹⁵¹ In addition to biased education, young Kosovo Albanians and Kosovo Serbs, unlike their parents, lack a common language and thus opportunities for inter-ethnic communication and interaction are rare (English, to some extent, serves as a lingua franca). Parents and the communities in general have an equally negative impact on the perception of these young people.

¹⁴⁸ *Ibid.*, p.17

¹⁴⁹ S. Gashi, *Kosova 1912–2000: in the history textbooks of Kosova, Albania and Serbia*, Pristina, KAHCR and KEC Printing Press 2012, pp. 44–55.

¹⁵⁰ M. Blanchot, *The writing of the disaster* (A. Smock, trans.), Lincoln, University of Nebraska Press, 1995, p.82

¹⁵¹ A. Margalit, *The ethics of memory*, Cambridge Mass., Harvard University Press, 2002, p.11.

Collective Memory

Collective memory is constructed through narratives which encompass a common understanding of past, present and future, and serve the process of identity building. Stories told about the past establish social cohesion and the sense of belonging,¹⁵² through two seemingly counterpoised factors – the unique self and sameness.¹⁵³ Uniqueness in relation to other ethnic groups, and sameness within one's own group. Sameness constitutes the essence of 'common mental construction that occurs when we are co-members of a social category'.¹⁵⁴ As a Serbian refugee recalls: 'He was one of my best friends [an Albanian], I even gave his daughter blood, but one day when I had a [non-ethnic] argument with another Albanian, he supported him even though they barely spoke and simply told me 'I am sorry, he is mine'.¹⁵⁵ Rousseau argues that the first man who said 'this is mine' was a founder of a civil society. In Kosovo, the opposite happened; those who were saying 'they are mine' are founders of the uncivilised society: people who remained silent while members of their ethnic group were burning temples, vandalising graves, and expelling their neighbours paved the way to parallel education and to the current distorted collective memories.

For Kosovo Albanians, the current version of collective memory 'emphasizes independence as an aim... [and] is used to create a homogenized discourse that glorifies the symbolic collective trauma of the Jashari family and pledges faithfulness and great sacrifice for independence and freedom, which has been reformulated into the legend.¹⁵⁶ There is total silence regarding their crimes against Serbs, members of the KLA are heroes and any accusation against its members is seen as an assault on all Kosovo Albanians. The most common line of reasoning among Kosovo Albanians is that 'individual crimes committed for revenge should be carefully separated from those organised crimes against a community'.¹⁵⁷ Many are in complete denial: 'no Albanian could have done something like that... Serbs killed and tortured us, and now

¹⁵² J. Chaitin, 'Co-creating peace', in B. Charbonneau and G. Parent (eds), *Peacebuilding, Memory and Reconciliation, Bridging Top-Down and Bottom-Up Approaches*, Conflict, Development and Peacebuilding Series, London, Routledge 2012, p. 151.

¹⁵³ M. Strapacova, 'The reconciliation process in Kosovo: under the shadow of ethnic primordialist manipulation', *Journal of Balkan and Near Eastern Studies* vol.18, no.1, 2016, p.58

¹⁵⁴ *Ibid.*

¹⁵⁵ Interview with a Serbia refugee, in July 2016.

¹⁵⁶ Strapacova, pp.61-62.

¹⁵⁷ 'Uncomfortable truths: war crimes in the Balkans', *Balkan Insight*, 16 November 2011.

we are accused'.¹⁵⁸ On the other hand, Kosovo Serbs are more aware of crimes committed by their group; however, they still believe that KLA and NATO are behind most of the crimes: 'Albanians leaving Kosovo [in 1999] was orchestrated by the West with the aim to accuse us of violation of human rights and bomb us'.¹⁵⁹

What are chances for reconciliation under these circumstances? Political impediments and international reluctance to deal with education and common memory paint a rather dismal picture of future reconciliation; however, young activists are cause for hope.

Reconciliation

The term reconciliation should be used with caution: it can mean anything from shared institutions to accepting responsibility and creating a framework for common history.¹⁶⁰ It is seen here not merely as the absence of violence but as the recognition of past wrongdoings. It seems, however, that political leaders have different priorities:

the dominance of more urgent questions about Kosovo's independence and sovereignty, as well forward-looking attempts for state-building, international recognition, and EU integration, have profoundly overshadowed efforts to deal with the past in Kosovo.¹⁶¹

Nonetheless, in absence of political agreement on narratives about the past, civil society has taken the prominent role in recognising victims of the conflict. Certain NGOs, such as the Council for the Defence of Human Rights and Freedom (CDHRF) 'lost its relevance over time due to weak archival practices and verification of human rights abuses, allegation of misuse of evidence, and one-sided, unrepresentative and incomplete documentation of war crime'.¹⁶² Others, however, have achieved solid results, for example, the Humanitarian Law Center (HLC), which created the database 'Kosovo Memory Book' (KMB), a valuable resource on victimisation in Kosovo. The

¹⁵⁸ Ibid.,

¹⁵⁹ Interview with a Serbian student, in July 2016.

¹⁶⁰ Subotić, 2015, p.374.

¹⁶¹ Visoka, p.8

¹⁶² Ibid., p.12.

Human Rights Data Analysis Group (HRDAG) concluded that the KMB ‘documents all or nearly all human losses during the conflict in Kosovo during the period 1998-2000.’¹⁶³ The role of the KMB is ‘not only to document facts about the suffering of their loved ones in order for them to find peace but also to prevent recurrence of crimes or manipulation of the number of victims’.¹⁶⁴ However, the KMB database faces obstacles on the both fronts. The impact of the database remains minor with respect to everyday life in vulnerable communities.¹⁶⁵ Also, the KMB database has not changed the narrative in Pristina or Belgrade. Kosovo’s government and Serbia’s government do not accept the KMB: ‘the precision and accuracy of the KMB does not suit ethno-nationalist discourses in either country’.¹⁶⁶ Similarly, EULEX refuses to use the database and rather focuses on selective cases.¹⁶⁷ But the lack of governmental support is just tip of the iceberg; there is a question of whether these NGOs are democratic in their essence. The UNESCO guide for introducing democracy says that: NGOs derive their democratic virtue from a mass membership and when funded from abroad should meet a ‘strict requirement of transparency in funding and policy formulation’ and it is non-democratic (or less democratic) if ‘wealth of power [is] in hands of a few’.¹⁶⁸ Malagurski shows that the most represented (in media) NGOs in Serbia are reluctant to reveal their sources of funding and have small membership: Center for Cultural Decontamination – 14 members, Helsinki Board for Human Rights – 9 members, Humanitarian Law Center – 8 members, Center for Euro-Atlantic Studies – 4 members.¹⁶⁹ Directly contacting sponsors, he discovered that these NGOs (plus Youth Initiative for Human Rights) have received at least 10.243.133 dollars (including only sources which revealed their aids). As Malagurski cynically concludes, ‘for the group of organisations promoting democracy at every corner - they are not democratic at all’.¹⁷⁰ Therefore, it is little wonder that ordinary people discard the civil sector in the Balkans.

¹⁶³ J. Kruger and P. Ball, *Evaluation of the Database of Kosovo Memory Book*, December 10, 2014, p.59.

¹⁶⁴ HLC (Humanitarian Law Center), *Belgrade Presentation of the Interim Results of the List of Killed, Dead and Missing Serbs, Roma, Bosniaks, Montenegrins and Other Non-Albanians in Kosovo*, 2009.

¹⁶⁵ Visoka, p.16.

¹⁶⁶ *Ibid.*, p.17.

¹⁶⁷ HLC (Humanitarian Law Center), *Trials for Ethnically and Politically Motivated Crimes and War Crimes in Kosovo in 2010*. HLC Kosovo Annual Report, 2010.

¹⁶⁸ D. Beetham and K. Boyle, *Introducing Democracy: 80 Questions and Answers*, UNESCO Publishing, (2nd edition) 2009, p.107

¹⁶⁹ B. Malagurski, *The Weight of Chains 2*, a documentary movie directed by B. Malagurski, 2014.

¹⁷⁰ *Ibid.*

The initiatives for reconciliation of unimpeachable probity (at least at initial stage) come from young people who did not experience war or who share everyday life with the other ethnic group. Most of the younger generations show no interest in political activism preferring to join sports associations – bastions of nationalist ideology.¹⁷¹ However, a number of young people are dissatisfied with the limited opportunities to explore war crimes offered by national(ist) frameworks. Accumulation of this dissatisfaction opened the space for the regional organisations such as Youth Initiative for Human Rights (YIHR) and RECOM. Their methods differ from conventional human rights advocacies: instead of pursuing justice and truth on the state level, they focus directly on communities. These activities are also, primarily, engaged in changing ‘structural transformation to deal with past human rights violation at a more systemic and societal level’¹⁷² - online and on-site. The Internet and real world intersect when youth organises online street actions to underscore that there are victims on all sides.¹⁷³ The goal of new activists also differs from the past generations of activists. The new generation operates in a post-authoritarian time and does not aspire to regime changes, rather it seeks truth and reconciliation among ethnic groups in the former Yugoslavia. Unlike, for example, the *Otpor* (Resistance) student movement which had only one goal: to overthrow Slobodan Milošević’s regime. The idea of resistance says it is negative in its essence: ‘not I am fighting for, but I am fighting against’.¹⁷⁴ Once the regime was defeated, the movement became moribund: 17 years later, many of the activists are involved into the politics. In contrast, the new generation of activists has a goal that transcends geographical borders and deals with eternal issues such as truth and justice. However, these actions were often overshadowed by the negative reputation of civil society in general. Indeed, Donald Horowitz notices that ‘while passion and interest sometimes operate separately, there are also reasons why they are so often found together (those with interest seek to

¹⁷¹ T. Nikolic, ‘Reviews on Youth Policies and Youth Work in the Countries of South East Europe, Eastern Europe and Caucasus – Serbia,’ Council of Europe, April 2011, available at < http://pjp-eu.coe.int/documents/1017981/3087112/Reviews_on_youth_policies_SEE_EECA_Serbia_2011.pdf/2978f717-0adb-4170-b79e-d1765251dcd8> (accessed 10 May 2017).

¹⁷² A. Kurze, ‘#War Crimes #PostConflictJustice #Balkans: Youth, Performance Activism and the Politics of Memory’, *International Journal of Transnational Justice*, vol.10, no. 3, p. 456.

¹⁷³ For Zagreb see: <https://www.facebook.com/media/set/?set¼a.457672924271768.98191.145459252159805&type¼3> (accessed 18 May 2016); For Pristina: https://www.facebook.com/nisma.ime/photos_stream (accessed 18 May 2016).

¹⁷⁴ Ž. Bojović, ‘Ideja Otpora više nije potrebna’, *Radio Free Europe/ Radio Liberty*, 12 November 2008.

harness passions)¹⁷⁵. Therefore, this activism sparked by a youth fervour is a glimmer of hope; nevertheless, it remains to be answered how it will withstand politicisations.

Conclusions

The analysis of conflict in Kosovo in light of ethnic identities and institution-building, yields the following conclusions:

First, the conflict is socially imagined, and as such, it is changeable. Therefore, with a certain institutional framework, the conflict can be not only facilitated but the international community can lead opposing sides to a consensus. However, one has to be cautious about top-bottom solutions as the period under the communist regime shows that the division can be masked through repression, without tackling the nature of the conflict.

Second, this division has been perpetuated through collective memory and inculcated by education. While the Serbs could not have tamed Albanian narratives and myths, they exacerbated the situation by abolishing education in Albanian. Amendments from 1989 returned the province to Serbia, however, that was also the moment Serbia's government unequivocally lost the Kosovo Albanians.

Third, the international community, paradoxically, has been as successful in building shared narratives and a unified educational system as Milošević's regime. Almost two decades after the conflict, Albanian and Serbian pupils read largely different curriculums and it seems that narratives have never been so disparate.

Fourth, while the international community remains primarily occupied with facilitating the peace, the question of status continues to be the all-consuming issue for Belgrade and Pristina; thus reconciliation is off the table for the moment. Nevertheless, a grain of hope comes from youth activism.

¹⁷⁵ D. Horowitz, 'Structure and Strategy in Ethnic Conflict', Paper prepared for the Annual World Bank Conference on Development Economics, Washington, April 20-21, 1998, p.33.

Chapter 3

HISTORY: A VICIOUS CIRCLE OF VICTIMS AND AGGRESSORS

‘When Milošević came to power...everything remained the same, only power was transferred into the hands of Serbs’¹⁷⁶

Abstract

This chapter argues that demographic changes in Kosovo occurred during two periods: the ‘Great Migrations’ and World War II. These two events, deeply ingrained in the Serbian collective memory, explain the anxiety and hysteria in Serbian academic and political circles in the 1980s. The chapter also, by analysing select historical events, discusses the cyclic nature of Kosovo’s history where the pendulum swings every two decades from ‘Serb aggressors and Albanian victims to ‘Serb victims and Albanian separatists’. It finally warns about abuse of the thesis ‘Kosovo as a unique case’.

Introduction

There are various explanations for the Yugoslav conflicts such as ancient hatreds, clash of civilizations, unbearable history, the role of intellectual and political elite, and the impact of external factors. The task of this chapter, however, is not to provide comprehensive insight into Kosovo’s history or to test validity of explanations, rather it is to explain Serbia’s great turn in the 1990s. Therefore, the central question of this section is ‘what triggered Serbia’s reforms and mass violation of human rights in the 1990’s?’ Prior to answering this question, the chapter focuses on specific historical causes of the conflict between Albanians and Serbs. This historical analysis is a

¹⁷⁶ T. Judah, ‘Branislav Krstic Profile, Kosovo’, Portraits – Return to Europe, August 2007, available at <http://www.esiweb.org/index.php?lang=en&id=280&portrait_ID=1> (accessed 31 May 2017).

perilous task because as Albanians and Serbs ‘reach further back into time it becomes easier to argue whatever they want in order to find support for their view of the present’.¹⁷⁷ The dispute over the province commenced during Ottoman rule; thus, a point of departure is the question: ‘why and how do Albanians and Serbs both claim authority over Kosovo?’

Pre-Socialist Era

In 1688, encouraged by the Habsburg Empire, the Serbs rose against the Ottoman Empire; however, the Austrians were defeated at Kacanik gorge and brutal Ottoman vengeance ensued. The majority of Serbs were forced to migrate to the North.

Kosovo’s demography began to change, as this and further migrations, into which were included Albanian Catholics, led to parts of Kosovo becoming depopulated. The Ottomans were to encourage resettlement here with loyal Albanian Muslims, many of whom were now to come down from the mountains of Albania to the fertile plains of Kosovo or to western Macedonia.¹⁷⁸

This event, known as the ‘Great Migration’, when 185.000 Serbs left Kosovo fundamentally changed the demography.¹⁷⁹ The 18th century saw aggressive Islamisation of the population, mostly among Albanians.¹⁸⁰ Having accepted Islam, ‘Albanians could and did rise to the highest positions in the Ottoman Empire. They came to have ambivalent feelings toward it, especially as the empire went into decline’.¹⁸¹ While Albanians desired reforms and wanted more power, the decline of the Ottoman Empire also meant they were ‘forced to confront their future, which now came face to face with the re-emergence of the Balkan Christian states’.¹⁸²

¹⁷⁷ Judah, 2008, p.30.

¹⁷⁸ Ibid., p.33; For challenging this widely accepted view see: Malcolm, 1998, chapter 8.

¹⁷⁹ D., Bogdanović, Beograd, Knjiga o Kosovu, Srpska Akademija Nauka i Umetnosti, 1984, p.59.

¹⁸⁰ Ibid.

¹⁸¹ Judah, 2008, p.34.

¹⁸² Ibid., p.35.

The question of Kosovo escalated in 1878, the year Serbia officially gained independence from the Ottoman Empire.¹⁸³ In the same year, not coincidentally, the League of Prizren was founded with the intent to create an autonomous all-Albanian administration within the Empire.¹⁸⁴ Two different ideologies and nationalism were about to clash, and Kosovo was at stake. Indeed, the London Peace Treaty settled the creation of an Albanian state; nevertheless many Albanians stayed within the borders of Serbia¹⁸⁵ since Serbs were ‘the little David standing up to the Austro-Hungarian Goliath’.¹⁸⁶ Serbia had won three wars in the early 20th century: the first and second Balkan wars, and World War I; thus had earned high credibility in the eyes of their allies. Moreover, Serbia had doubled its territory which included Kosovo.¹⁸⁷ Despite the fact that Albanian frustration was growing,¹⁸⁸ no major changes occurred until World War II. During the WW II, the situation dramatically changed, when Germany and its allies occupied Serbia, the Albanians took Serbian population in Kosovo under its control.¹⁸⁹

How is it that both Serbs and Albanians both claim authority over Kosovo? Once predominately Serbian, Kosovo became the home of Albanians after the Great Migrations and the ruthless Islamisation of the population. Sparked by this demographic change, Albanians saw Kosovo as a part of Greater Albania. However, when the world powers were drawing the map of the Balkans, Serbia had greater credibility and an irreproachable reputation; thus Kosovo was given to Serbia. The second demographic change, to a lesser extent occurred during the WW II when most of Kosovo was controlled by Albania. The history of these conflicting claims of authority makes, helps explain the hysterical language of Serbian academics used in the 1980s.

¹⁸³ For comprehensive history of Serbia: V. Ćorović, *Istorija srpskog naroda*, Beograd, Janus, 2001; K. Jiriček, K., *Istorija Srba*, Beograd, Naučna knjiga, 1952.

¹⁸⁴ P. Kola, *The Search for Greater Albania*, Hurst & Company, London, 2003; P. Milo, *Greater Albania: Between Myth and Reality*, Tirane, 2003.

¹⁸⁵ Malcom, 1998. p.257

¹⁸⁶ Judah, 2008, p.41.

¹⁸⁷ Note that in short period part of Kosovo was under the Montenegrin Kingdom.

¹⁸⁸ Formation of the Kacak movement which aspired to unify all Albanians.

¹⁸⁹ Except the North Kosovo (Germany), and the Eastern Kosovo (Bulgaria).

From the Golden Era to ‘Genocide’

Though Albanians committed monstrous crimes during WW II,¹⁹⁰ the new communist elite and Josip Broz did not prosecute the Albanians in exchange for political support.¹⁹¹ This cooperation was, partially, rewarded by an autonomous status.¹⁹² However, that Kosovo remained within the sovereignty of the Socialist Republic of Serbia was far below Albanian expectation and hopes.¹⁹³ The Constitution from 1963 upgraded the region to the status of the province, but once again Kosovo’s autonomy was guaranteed by Serbia.¹⁹⁴ Nonetheless, this Constitution was significant because Amendment VIII envisaged a constitutional equality among nations that encouraged the Albanians to seek additional rights (e.g., the University of Pristina, offered classes in Albanian which led to the creation of the Albanian elite).¹⁹⁵

The fact that constitutional rights did not match Albanian expectations, accompanied by the fear of Serbian nationalism, led to a mass demonstration in the 1960s. However, Broz, in his visit to Kosovo in the same year, stated that Aleksandar Ranković is ‘politically death’.¹⁹⁶ While he condemned every kind of chauvinism, Broz also stated the province was ‘neglected’ and called for further affirmation and emancipation of the Albanian population.¹⁹⁷

Indeed, the 1970s and 1980s were a golden age for Kosovo Albanians: ‘they were freer than they had ever been in Yugoslavia and better educated and in better health than they had ever been in the whole of their history’.¹⁹⁸ The price for Kosovo Albanian well-being was rather high: according to the Constitution in 1974, SFRY

¹⁹⁰ S., Avramov, *Genocid u Jugoslaviji 1941-1945, 1991...*, Akademija za Diplomaciju i Bezbednost, Beograd, 2008.

¹⁹¹ Kola, 2000. p. 83

¹⁹² SFRY Constitution (1946).

¹⁹³ Malcolm, 1998, p.316; Cohen, 2000, pp.61-62

¹⁹⁴ SFRY Constitution (1963), art.111-112

¹⁹⁵ Kostovičova, 2005. p.44

¹⁹⁶ Ranković was practically chief of all civil secret services from 1945 to 1966. He is nowadays often regarded as a Serb hegemonist.

For different account see: S. Cvetković, 'Fall of Aleksandar Ranković and Condemnation of "Rankovićism"', *Tokovi Istorije*, vol.3, 2016.

¹⁹⁷ M. Živković, 'Poseta Josipa Broza Tita Kosovu i Metohiji (25-28 Marta 1967. godine) u svetlu postbrionskih dešavanja', *Baština*, vol. 30, 2011, p. 149.

¹⁹⁸ Judah, p.55.

‘was hardly a state... with the communist party being the only supposedly unifying power’.¹⁹⁹ The constitution caused

‘positive discrimination’ in favour of the Albanians in Kosovo: bilingualism became a condition for employment in public services, four-fifths of available posts were reserved for the Albanians on a parity basis and national quotas were strictly applied when nomination were made for public functions. Thus began the virtual Albanisation of public life in Kosovo.²⁰⁰

At least 50.000 Serbs left the province during the 1970s, which, accompanied with the high Albanian birth rate, significantly changed the demographic picture.²⁰¹ On the death of Broz, the situation deteriorated further. In 1981, Kosovo Albanians held a mass demonstration and demanded unification with Albania.

This event marked a new wave of Serbian migration from Kosovo: ‘Serbs felt they were harassed to leave their farms and houses’, often stimulated by a large amount of money for their properties.²⁰² This mass demonstration changed the momentum:

In contrast to the period prior to 1981 when Albanian national identity in Kosovo was nourished thanks to opportunities to learn and explore national history, culture and tradition, in the post-1981 period it flourished precisely because this symbolic nourishment was denied to it.²⁰³

The demonstration led 10.000 Serbs to leave Kosovo, and migration persisted throughout the 1980s.²⁰⁴ Even Ibrahim Rugova, reflecting that period, confessed that ‘there were many crimes committed against Serbs’.²⁰⁵

¹⁹⁹J., Elster, C. Offe, and U. K. Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*, Cambridge, Cambridge University Press, 1998, p.8.

²⁰⁰ Miranda Vickers, 1998, p.180

²⁰¹ J. R. Lampe, *Yugoslavia as History: Twice there was a Country*, Cambridge University Press, Cambridge, 2000, pp. 303-304.

²⁰² Judah, 2008, pp.59-60

²⁰³ Kostovičova, 2005, p.52

²⁰⁴ L. Cohen, *Serpent in the Bosom: The Rise and Fall of Slobodan Milosevic*, 2000, p.31.

²⁰⁵ W. Zimmerman, *Origins of a Catastrophe: Yugoslavia and Its Destroyers*, Three Rivers Press, New York, 1996, p. 80

Therefore, just as the actions of Kosovo Albanians against the Serbian government might be perceived as a response to 1989 amendments and 1990 constitutional arrangement, these changes might be seen as a reaction to violent Albanisation of Kosovo. For Serbs, education in Albanian was a hotbed of Albanian nationalism fuelled by ‘pseudo-scholarship’ and ‘irredentism’.²⁰⁶ However, the initiative for changes did not come either from Kosovo Serbs or Serbia’s leaders, but from Serbian intellectuals. The Serbian Academy of Science and Arts addressed various issues concerning the future of Serbs and Yugoslavia in the Memorandum in 1986. The Memorandum is often seen as marking the beginning of Yugoslavia’s destruction. This is true only in part; the Memorandum is largely a tedious academic document discussing legitimate concerns regarding economy and demography, such as low growth rate, low labour productivity, the fact that 24 per cent of all Serbs live outside Serbia (40 per cent if Vojvodina and Kosovo included).²⁰⁷

However, the Memorandum prophesied that:

if genuine security and unambiguous equality for all peoples living in Kosovo and Metohija are not established; if objective and permanent conditions for the return of the expelled nation are not created, then this part of the Republic of Serbia and Yugoslavia will become a European issue, with the gravest possible unforeseeable consequences.²⁰⁸

Ultimately, the language becomes sharper; in its most infamous paragraph the Memorandum states that

the physical, political, legal, and cultural genocide of the Serbian population of Kosovo and Metohija is a worse historical defeat than any experienced in the liberation wars waged by Serbia from the First Serbian Uprising in 1804 to the uprising of 1941.²⁰⁹

²⁰⁶ Jevtić, Đ., *Bitka za Kosovo: šest vekova posle*, Beograd, Novi Svet, 1998.

²⁰⁷ Serbian Academy of Arts and Science, *Memorandum*, Belgrade, 24 September 1986, par.1 and 8.

²⁰⁸ *Ibid.*, par.8.

²⁰⁹ *Ibid.*

Vasilije Krestić, one of the authors of the Memorandum, claims that the Memorandum was intended to save Yugoslavia, not to destroy it.²¹⁰ In a similar tone, Matija Bećković asks to whom the Memorandum belongs, to those who wrote it or those who stole, implying the text was brutally abused.²¹¹ He reminds us that Serbian Academy of Science and Arts never envisaged nor signed it.²¹² It seems that authors did not intend to publish the Memorandum, and how the text appeared in public remains under the veil of secrecy. The most popular version is that authors sent the manuscript to Jovan Đorđević who took it to a home where his brother-in-law, a journalist, found and disclosed it.²¹³

Regardless of intentions of authors and the role of media, once the genie was out of the bottle, among their leadership, Croats became the vanguard of European values, Bosniaks felt chosen to fight jihad, Albanians started drawing new maps, while Serbs were left torn between preserving the communist doctrine and nationalistic awareness. This ambiguity was embodied in Slobodan Milošević. In 1987, he was sent to console Kosovo Serbs; when the mass started yelling “they beat us” (the police, mostly formed by Albanians), Milošević replied with words that still echoing in ears of the Serbs ‘no one shall beat you’. These words, for Serbs, meant that Kosovo Serbs will be no longer discriminated against on their own land. Despite conventional wisdom, Milošević’s language was mild and composed of communist cliches. He clearly stated that the government should not classify people as Albanians versus Serbs but as decent people committed to brotherhood and unity versus those who back counter-revolution and nationalism.²¹⁴ However, he finished the speech with a promise that ‘Yugoslavia and Serbia will never give up Kosovo’.²¹⁵ A year later in Belgrade, in what is considered his most patriotic speech, Milošević announced reforms and proclaimed that ‘the most important thing that we must solve is to establish peace and order in Kosovo’.²¹⁶ Then suddenly his language becomes shrill, Milošević’s words had a whiff of the infamous paragraph from the Memorandum:

²¹⁰ N. Čaluković, *Nedeljnik*, Memorandum SANU: odgovor 30 godina kasnije, interview with Vasilije Krestić, September 2016.

²¹¹ Čaluković, N., *Nedeljnik*, Memorandum SANU: odgovor 30 godina kasnije, interview with Matija Bećković, September 2016.

²¹² *Ibid.*

²¹³ Čaluković, interview with Vasilije Krestić.

²¹⁴ Speech of Slobodan Milošević in Kosovo Polje, 25 April 1987.

²¹⁵ *Ibid.*

²¹⁶ Speech of Slobodan Milošević in Belgrade, 21 November 1988.

People will even consent to live in poverty, but they will not consent to live without freedom, at least not the people gathered here and the people in Serbia, to whom I myself belong, and therefore I know that they only can live in freedom and in no other way. Both the Turkish and the German invaders know that these people win their fight for freedom.²¹⁷

Two years later, on the 600 year anniversary of the Kosovo Battle, Milošević returned to Kosovo to deliver what is now known as his most famous speech. Despite the widely accepted opinion that the speech preached ethnic hate, Milošević actually called for the prosperity of all of Serbia's citizens 'irrespective of his national or religious affiliation'.²¹⁸ He also warned that Serbia is ready to wage armed conflicts: 'we are being again engaged in battles and are facing battles. They are not armed battles, although such things cannot be excluded yet'.²¹⁹ However, this time he chose a more mollifying approach to the communist values while stressing importance of unity among Serbs and Serbia's place in Europe:

today it appears not only unjust but even unhistorical and completely absurd to talk about Serbia's belonging to Europe. Serbia has been a part of Europe incessantly... in this spirit we now endeavour to build a society... [which will] contribute to the efforts of all the progressive people of our age that they make for a better and happier world .²²⁰

It is not a coincidence that Milošević's nationalist rhetoric was followed by communist sentiments. It was clear that there was no united vision of common future for Serbs; the sharp division on pro-Yugoslavia and pro-Serbia population was bridged by introducing the thesis that without Kosovo there is no either Yugoslavia or Serbia. There seems to be no compelling reason to argue that Milošević targeted other nations and minority in Yugoslavia besides Serbs since only Serbs see both Turks and Germans as invaders: Croats collaborated with Germans in WW II, most of Bosniaks see Turkey as a motherland, while Kosovo Albanians received religion from Turks

²¹⁷ Ibid.

²¹⁸ Speech of Slobodan Milošević in Gazimestan, 28 June 1989.

²¹⁹ Ibid.

²²⁰ Ibid.

and closely collaborated with Germans during the occupation. Therefore, Milošević was a man who consolidated Serbs' wishes to remain in Yugoslavia, and Kosovo Serbs' request to stop Albanisation of public life in Kosovo. In other words, he was chosen to save Yugoslavia and protect Kosovo Serbs. Sadly, he did the opposite.

Two things have come to epitomize Milošević's politics: abolishing the autonomy of Kosovo and human rights violations. The amendments to the Serbian Constitution from 28 March 1989 significantly reduced Kosovo's competencies. Kosovo Albanians responded by establishing the Republic of Kosovo in 1991. Indeed, 'Kosovo had never been less Serbian than at the point when it became a part of Serbia again'.²²¹ However, despite the popular belief that Milošević 'stripped off' Kosovo autonomy and eliminated it as a practical matter,²²² the amendments from 1989 and the Constitution from 1990 did not totally quash the autonomy of Kosovo. What the constitutional amendments did was 'change what in comparative constitutional law and practice (even of socialist states) seemed to be unprecedented competences of an autonomous regime within a larger political unit'.²²³ These amendments were followed by the consent of all republics and autonomous provinces.²²⁴ The amendments abolished inequality between autonomous provinces and the Republic since according to the Constitution from 1974, 'the institutions of the Republic, which included provincial representatives as well, were responsible only for the affairs in Serbia proper, while the provinces were ruled almost exclusively by local institutions'.²²⁵ Subsequently, the constitutional arrangements from 1990 preserved the territorial autonomy of provinces and envisaged the official use of minority language, and a variety of competencies including social protection, budget planning, environment and urbanism.²²⁶ This issue is often linked to arbitrary exclusion. According to James Crawford:

when the inhabitants (of the territories forming distinct political-geographical areas) are arbitrarily excluded from any share

²²¹ Cerović, 'Čas istine', *Vreme*, 26 November 1990; Available at:

<https://www.vreme.com/cms/view.php?id=1724103>.

²²² Written Statements of the USA, p. 8; Written Statement of the UK, p.29.

²²³ M. Jovanović, 'Is Kosovo and Metohija Indeed a 'Unique Case'?', in J. Summers (ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights*, Martinus Nijhoff, 2011, p.13.

²²⁴ Written Statement of the Government of Republic of Serbia, International Court of Justice, 15 April 2009, p.76.

²²⁵ *Ibid.*

²²⁶ Republic of Serbia, *The Constitution*, Belgrade, 28 September 1990, art.8 and 109.

in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing.²²⁷

Based on this claim, Kosovo Albanians ‘exercise a right of self-determination that is different from that of the population of Serbia’.²²⁸ However, it would be correct to state that representatives of Kosovo Albanians voluntarily withdrew since they left the Provincial Assembly as

a reaction to the previous decision (terminated on 18 April) of the Presidency of the SFRY, presided by the Slovenian representative Dr Drnovsek, to introduce the state of emergency and to use the armed forces in Kosovo. It was only after this move of Kosovo Albanians that the Serbian Assembly introduced the Decision about the Existence of Special Circumstances on the Territory of Kosovo (26 June 1990).²²⁹

Indeed, absenteeism of Kosovo Albanian representatives can be viewed as a misuse of constitutional rights according to the legal maxim *nullus commodum capere de sua iniuria* rather than arbitrary exclusion.²³⁰ Another argument in favour of voluntary absenteeism is that Kosovo Albanians refused to participate in Milošević’s defenestration in 1992 when

the million Albanian votes could undoubtedly have ousted Milosevic, but as the Kosovar leadership admitted at the time, they did not want him to go. Unless Serbia continued to be labelled as profoundly evil - and they themselves, by virtue of being anti-Serb, as the good guys – they were unlikely to achieve their goals. It would have been a disaster for them if a peacemonger like Panic had

²²⁷ James Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 2006, p.127.

²²⁸ Written Statement by the Swiss Confederation, International Court of Justice, 17 October 2009, p.20.

²²⁹ Jovanović, 2011, p.14.

²³⁰ M. Kreća, *The Badinter Arbitration Commission: A Critical Commentary*, Jugoslovenski pregled, Belgrade, 1993, p. 13.

restored human rights, since this would have left them with nothing but a bare political agenda to change borders.²³¹

It appears that Kosovo Albanians and Serbs underwent suffering for opposing reasons: Serbs because they voted for Milošević, and Kosovo Albanians because they refused to vote against him.

The second pillar of Milošević's politics was a brutal violation of human rights which was the most alarming in Kosovo through practices of discrimination, police brutality, discriminatory removal from police and judiciary, arbitrary imprisonment of journalists, and general oppression of the Serbian police and military.²³² However, the Serbian regime overtly relied on means of coercion throughout the whole territory in order to fight its 'enemies':

It should be noted that cases of police abuse are not a problem exclusively associated with the volatile situation in Kosovo. Serious cases of ill-treatment by the police were recorded, e.g. during winter demonstrations in Belgrade and elsewhere in 1996-1997, and later in connection with street protests in Belgrade on 30 September and 1 October 1997, in reaction to the ousting of the city's mayor, Mr. Zoran Djindjic, and other controversial acts. A large number of people were injured and some arbitrarily detained when police violently dispersed demonstrators.²³³

While 1989 amendments and 1990 constitutional arrangements were legal and legitimate acts, brutal violation of human rights cannot and should not be justified.²³⁴

²³¹ M. Vickers, *Between Serb and Albanian: A History of Kosovo*, New York, Columbia University Press, 1998, p.263.

²³² The UN General Assembly, 'Situation of human rights in the territory of the former Yugoslavia: violation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)', A/RES/48/153, 20 December 1993, par.18; The UN General Assembly, 'Situation of human rights in Kosovo', A/RES/49/204, 23 December 1994.

²³³ The UN Economic and Social Council, 'Situation of human rights in the territory of the former Yugoslavia', E/CN.4/1998/63, 14 January 1998, pp.19-20.

²³⁴ Aftermath: Milošević was extradited to the ICTY but he died in a prison cell waiting for the final decision. In 2016, Niel Clark sensationally declares that Milošević was exonerated during the case of Radovan Karadžić. Clark, N., 'Milosevic exonerated, as the NATO war machine moves on', *Russia Today*, 2 August 2016, available at: <<https://www.rt.com/op-edge/354362-slobodan-milosevic-exonerated-us-nato>> (accessed 14 May 2017); Knežević, G., 'Milosevic "Exonerated"? War-Crime Deniers Feed Receptive Audience', *Radio Free Europe/ Radio Liberty*, 9 August 2016, available at: <

However, 1989 amendments and 1990 constitutional changes continue to be the subject of investigation and various abuses. The most significant thesis is ‘Kosovo as unique case’. The argument is based on the facts that Milošević abolished Kosovo’s autonomy and violated human rights of Albanians. However, there are several issues at this junction. First, nothing prevents similar entities from claiming to be unique cases. Second, the constitutional arrangements were legal and legitimate acts. Third, human rights violation was one of Milošević’s strategies that targeted not only the Albanian minority but also Serbs in Kosovo and Serbia proper. .

The thesis implies that Belgrade should face previous wrongdoings since ‘[e]very nation in the world has a burden it has to pay for’.²³⁵ While, it might be true that historical heritage cannot be entirely ignored, it is unfair to reduce Kosovo’s history to Milošević’s regime as it is unfair to start the study with WW II crimes. This vicious cycle spirals to an eternal and almost metaphysical query of the first cause: ‘who started the conflict?’ This question, though unlikely to be answered, has been used by political leaders, policy makers, and to a much lesser extend scholars to justify certain positions, politics, and policies.

Conclusions

This chapter discussed select historical events in order to make two interrelated points:

First, Kosovo, once predominately populated by Serbs, has demographically changed in two periods. During the “Great Migrations”, 185.000 Serbs left Kosovo and Albanians massively accepted Islam which put them into superior position to Serbs in the Ottoman Empire. Secondly, during the WW II, Albanians once again collaborated with occupation forces which expelled a large number of Serbs from Kosovo. These two events explain today’s claims, from both ethnic groups, over the region, which are best summarised as a clash of Serbian historical rights and Albanian ethnic rights. The events also explain, but do not justify, the hysterical language of the Serbian elite in the 1980s when public life in Kosovo was openly Albanised.

<https://www.rferl.org/a/milosevic-war-crime-deniers-feed-receptive-audience/27910664.html> (accessed 14 May 2017).

²³⁵ ‘Ahtisaari: Serbs have a burden to pay for’, B92, 26 August 2006.

HISTORY: A VICIOUS CIRCLE OF VICTIMS AND AGGRESSORS

Second, Kosovo's history is a vicious cycle where pendulum swings from 'Serb aggressors and Albanian victims' to 'Serb victims and Albanian separatists' every couple of decades. Examining 1990, though 1989 amendments and 1990 Constitution were legal and legitimate acts, the conclusion is that Serbia's regime was overtly brutal, although not only to Kosovo Albanians. However, given the analysis of the 1970s and the 1980s, it appears that Serbia's reforms, followed by violation of human rights, were a response to Albanian discrimination over Serbian population during the period 1974-1989. Once again, this separatism and violence might be read as a response to previous constitutions which neglected Albanian needs and aspirations.

Chapter 4

NEGOTIATIONS: LOSERS AND WINNERS

Abstract

This chapter discusses losers and winners in negotiations over Kosovo's future status.

Less than five years after the war ended, it became apparent that international missions had failed to maintain peace and bring prosperity to the province; 2004 March mass riots pushed the agenda towards status talks where only one outcome was possible: Kosovo's unilateral declaration of independence (UDI). The winners of this ignominious process were the USA, Russia, and political leaders of Kosovo Albanians.

The Americans achieved their primary goal, justification of the intervention in Kosovo's independence; the Russians proved that Russia is still to be asked in global affairs, while leaders of Kosovo Albanians gained another opportunity to enhance their wealth through privatisation of state enterprises. On the other hand, the losers were Serbia, the EU, and citizens of Kosovo. Serbia's offer of substantial autonomy for Kosovo did little to convince the international community that Belgrade was ready to make concessions. Quite the contrary, it signalled that the Serbs want only sovereignty over the province with no responsibility. For citizens of Kosovo, UDI is a noose around their necks since under UNMIK administration, Kosovo was universally accepted, while now every step towards a prosperous society must overcome the obstacle of contested statehood. Finally, the EU was compromised by being unscrupulously forced to maintain a status neutral mission in Kosovo whilst its members were everything but neutral to Kosovo's status.

Introduction

The first chapter of the dissertation investigated the crux of Kosovo's conflict, concluding that it is socially constructed but not easily or rapidly changed given the obstacles of shared narratives, parallel education and collective memory. Subsequently, the second chapter argued that parallel education and collective memory translate into irreconcilable views on the history and the future of the province. However, it has also shown that by using a certain time-framework or by going further back into time, both ethnic groups can find justifications for their present views. In other words, both ethnic groups are equally right (or wrong) since narrative swings from 'Serb aggressors and Albanian victims' to 'Serb victims and Albanian separatists'. The third chapter has taken this division even further and has demonstrated that academics and policy-wonks manifest the same propensities as the ethnic group they analyse. They often are unwilling to take into consideration all available data and arbitrarily select facts that best fit their narrative. The fundamental result is the thesis Kosovo as a *sui generis* case which still plays an important role though the majority of scholars vigorously reject its arguments.

However, the international community led by the USA and backed by Russia, neglected these factors. The repercussion is that people of Kosovo were left out of the process of negotiation. Various imposed solutions have brought a peace to the region; however, it will be a fragile peace as long as citizens are not given 'ownership' over the process. The international community, fearful after failing to prevent massacres in Bosnia and Herzegovina, only aimed to bring the province under control as quickly as possible at any cost. In March 1999, NATO launched a campaign against Yugoslavia. On 10 June, exactly 78 days later, the UN Security Council passed Resolution 1244. The Resolution heralded different hopes and aspirations: Serbia's government viewed the resolution as a warranty of its sovereignty and territorial integrity. For Kosovo Albanians, it was 'the process of independence [which] cannot be initiated without the presence of NATO, the United Nations, and the OSCE'.²³⁶ On the other hand, for the

²³⁶ B. Shala, 'Because Kosovars are Western, there can be no homeland without a state,' in William Joseph Buckley (ed.), *Kosovo: Contending Voices on Balkan Interventions*, Cambridge, Eerdmans, 2000, p. 187.

West, led by the USA, this meant legitimisation of the unilateral airstrike, while Russia, after a decade of playing a trivial role in the world chess game, used this opportunity to re-establish its position in the Balkans. Therefore, the central query of this chapter is: ‘taking into account the seemingly conflicting positions of the four actors, who are the losers and the winners in the negotiation process which culminated in Kosovo’s declaration of independence?’ The two next chapters will explore the consequences of this process.

Background

The dissolution of Yugoslavia galvanized the southern province. Following the example of Republics, Kosovo Albanians demanded formal statehood in the early 1990’s. Ibrahim Rugova, a face of non-violent resistance to Serbian rule, and his followers organised unofficial elections for president and parliament in May 1992 which ‘while illegal in the eyes of the Serbs and held in private houses instead of public building, the Serbs did little or nothing to impede them’.²³⁷ There are two reasons for Serbia’s inertia. Firstly, the Serbs, because of his philosophy of non-violence, found Rugova a lesser “evil” than other potential leaders of Kosovo Albanians. Secondly, simultaneously to Kosovo’s “elections”, the blockade of Sarajevo started, and the US president, George Bush, had warned Milošević that ‘the United States will be prepared to employ military force against the Serbs in Kosovo and Serbia proper’.²³⁸ However, Milošević and his entourage soon discovered that the administration of the USA was, if not crooked, inconsistent. Robert Gelbard, the American envoy, declared that the Kosovo Liberation Army (KLA) is ‘without any questions a terrorist group and that the United States condemns very strongly terrorist activities in Kosovo’.²³⁹ The Serbs were additionally encouraged by the Dayton Agreement and strong assurance that the USA would back Serbia’s sovereignty over the province: ‘We have made it clear to Milošević and Kosovars that we do not support independence for Kosovo, that we want Serbia out of Kosovo, not Kosovo out

²³⁷ T. Judah, 2008, p.70.

²³⁸ Guardian, 29 December 1992 quoted from: R. Caplan ‘International diplomacy and the crisis in Kosovo’, *International Affairs*, vol. 74, no. 4, 1998, pp.745-761, p.753.

²³⁹ *Ibid.*, p.753.

of Serbia'.²⁴⁰ However, the situation on the ground did not match Serbia's optimism. The KLA intensified its attacks and became 'increasingly bold in its attacks and now appeared to be in control of parts of the province'.²⁴¹ Encouraged by warming words from the West and motivated by new attacks from the KLA, Serbia's security forces launched several operations and raids where almost 100 people were killed, including women and children.²⁴² These attacks marked a shift in how the international community viewed the conflict. The Contact Group, composed of the World's powers (Britain, France, Germany, Italy, Russian, and the USA), convened in order to 'condemn the large-scale police actions of the last 10 days that further inflamed an already volatile situation. The violent repression of non-violent expression of political views is completely indefensible'.²⁴³ Further, the Contact Group insisted that an 'urgent start be made in the process of unconditional dialogue with the leadership of the Kosovar Albanian community'.²⁴⁴ Shortly afterwards, the UN Security Council passed Resolution 1160, condemning 'the use of excessive force by Serbian police forces against civilians' but also 'all acts of terrorism by the Kosovo Liberation Army'.²⁴⁵

Following Resolution 1160 and concerns of the Contact Group, 'Washington initiated a peace process between the two sides. It was short lived. Although a meeting was held between Milošević and Rugova in mid-May, the process collapsed when Serbian security forces launched another major offensive against the KLA'.²⁴⁶ In July 1998, only two months after the negotiations failed, Milošević launched an offensive campaign against the KLA which 'impacted severely on the civilian population and has displaced around 250 000 refugees'.²⁴⁷ The NATO 'issued an ultimatum to Milošević warning that air strikes would follow if he failed to stop the violence'.²⁴⁸

²⁴⁰ 'In Balkans Again, Promises, Promises', New York Times, 14 October 1998 quoted from: J. Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans*, London, I.B. Tauris, 2008, p.13.

²⁴¹ J. Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans*, London, I.B. Tauris, 2008, p.11

²⁴² 'The KLA – terrorist or freedom fighter', BBC, 28 June, 1998.

²⁴³ 'Statement on Kosovo adopted by the members of the Contact Group' meeting in London on 9 March 1998.

²⁴⁴ 'Statement on Kosovo issued by members of the Contact Group' meeting in Bonn on 25 March 1998.

²⁴⁵ UN Security Council Document, UN Security Council Resolution 1160, S/1998/272, 28 March 1998.

²⁴⁶ Ker-Lindsay, 2008, p.12.

²⁴⁷ T. Youngs, 'Kosovo: The Diplomatic and Military Options', International Affairs and Defence Section, Research Paper 98/93, 27 October, 1998, Summary of main Points.

²⁴⁸ *Ibid.*, p.12.

Russia responded that the conflict in Kosovo might escalate into a large scale war with unpredictable and long-lasting consequences, and warned that Russia possesses the right to develop full-scale military cooperation with Serbia.²⁴⁹ The Serbs, witnessing the Western malaise in Bosnia, found no reason to take these warning seriously. Likewise, NATO had already faced merely rhetorical threats from Russia in 1995 during the campaign against Serbs in Bosnia. It turned out that Russia's warning was a part of a diplomatic game; however, unfortunately for Milošević, NATO was determined to show its teeth.

The Contact Group summoned both sides to Rambouillet to resolve the conflict. The Serbs faced an ultimatum – to accept the deal enforced by the NATO or deal with military consequences, while the Albanians 'were repeatedly told that their refusal to sign the accords would render the NATO threat against Serbia mute'.²⁵⁰ This persuaded the Albanians; however, Milošević discarded the deal on the grounds that the annexe would undermine Serbia's sovereignty since it gave NATO troops the right to travel throughout the whole territory of Serbia. There is no doubt that 'NATO was guilty of a serious blunder in allowing a Status of Forces Agreement into the package which would never been acceptable to the Yugoslav side, since it was a significant infringement of its sovereignty'.²⁵¹ Indeed, the Military Annex was a red herring and 'part of the agenda that was never reached because it broke down on something fundamental before that'.²⁵² It seems that 'the purpose of Rambouillet was not so much to broker a deal' as it was to build a 'consensus in Washington and among the NATO allies that force would have to be used'.²⁵³ The negotiations failed to deliver an agreement between the Serbs and the Albanians; however, the USA succeeded in convincing its allies that brute force was the only solution for the conflict in Kosovo.

After securing the consensus among the members, the USA and the NATO unleashed air strikes against Serbia and Montenegro assuming that this was not going to be a real military conflict but merely a way to quickly convince Slobodan Milosevic to capitulate and accept the Rambouillet framework. It soon became apparent,

²⁴⁹ Ibid., p.14.

²⁵⁰ I. Daadler and M. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo*, Brookings Institution Press, Washington, D.C., 2000, p.85.

²⁵¹ House of Commons, 'Kosovo', Foreign Affairs Committee – Fourth Report, 1999-2000, par.65.

²⁵² Ibid.

²⁵³ Daadler and O'Hanlon, p. 85.

however, that the alliance was not simply engaged in a form of coercive diplomacy. It was at war.²⁵⁴

Before the war, NATO officials ‘worried not about causing too little damage to Serb force in Kosovo but about causing too much’²⁵⁵ which would encourage the KLA to demand independence of Kosovo and further unification with Albania. Accordingly, the size of the air forces resembled that used for the four-day bombing of Iraq in December 1998, thus Milošević seems to believe that ‘we [the USA] would bomb as we had just done in Iraq – hit them for three days and then stop, whether we accomplished the mission or not’.²⁵⁶ However, even in the digital era, the most powerful military pack organisation cannot know and predict everything. Firstly, Serbs were “enthusiastic” beyond expectations about the war which was not seen as an intervention against the regime, as a Serbian veteran recalls: ‘we did not go the war to defend Milošević but to protect our children in Belgrade’.²⁵⁷ The 1999 war, unlike the wars in Bosnia and Croatia, was perceived as a defensive one. Therefore, even 18 years after the campaign, Serbs have a strong feeling about the NATO: 84% of citizens do not want Serbia in the alliance, while 64% do not accept NATO’s apologies.²⁵⁸ Secondly, the West underestimated Milošević’s brutality: 800.000 Kosovo Albanians were expelled from Serbia, most went to neighbouring Albania and Formal Yugoslav Republic of Macedonia (FYROM).²⁵⁹ Yet, the West put all its eggs one the basket: the air strikes and had no ‘plan B’:

The allies viewed force simply as a tool of diplomacy, intended to push negotiations one way or another. They were unprepared for the possibility that they might need to directly achieve a battlefield result. That was deeply regrettable. In the end, far from repudiating perhaps the key element of the so-called Powell doctrine—the notion of decisive force—NATO’s war against Serbia was a vivid

²⁵⁴ Ibid., p.101.

²⁵⁵ Ibid., p.104.

²⁵⁶ B. Gellman, ‘The Path to Crisis: How the United States and Its Allies Went to War’, The Washington Post, 18 April, 1999.

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²⁵⁸ ‘Građani Srbije o bombardovanju: Ne prihvatamo izvinjenje, nećemo u NATO, za sve je kriv JEDAN ČOVEK’, Blic, 24 March, 2017.

²⁵⁹ UN High Commissioner for Refugees, ‘UNHCR Kosovo Crisis Update: 23 July 1999’, 23 July, 1999.

reminder that when using military power, one must be prepared for things to go wrong and be ready to escalate.²⁶⁰

The initial air strikes did not have the desired outcome, leading to an intensification of strikes and wider targets. The alliance ‘launched 2300 missiles at 990 targets and dropped 14.000 bombs, including depleted uranium bombs and cluster munitions’ which killed over 2000 civilians (88 children) and ‘destroyed more than 300 school, libraries, and over 20 hospitals’.²⁶¹

While the war was blazing, the G8 met in Germany on 9 May to set seven principles for the settlement of the conflict.²⁶² This portended that Russia ‘accepted that the Kosovo conflict could end only on what amounted to NATO’s terms and that this view of the essentials was to be presented as a non-negotiable package to Mr Milošević’.²⁶³ As a USA policymaker noted the two sides ‘are singing from a single sheet of music’.²⁶⁴ This effectively pushed Milošević to accept the withdrawal of Serbia’s forces and employment of the Kosovo Protection Force (KFOR) under NATO patronage.²⁶⁵ Indeed, the USA won the war in both military and diplomatic senses; however, defeating Serbs in Kosovo came with high cost – losing Russians:

only 39 percent of respondents felt positive about the United States in March, compared with 67 percent just three months earlier. The share of

²⁶⁰ Daadler and O’Hanlon, p.105.

²⁶¹ ‘15 years on: Looking back at NATO’s “humanitarian” bombing of Yugoslavia’, *Russia Today*, 24 March, 2014.

²⁶² The plan required: (a) an immediate and verifiable end of violence and repression in Kosovo; (b) withdrawal from Kosovo of military, police and paramilitary forces; (c) deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives; (d) establishment of an interim administration for Kosovo to be decided by the Security Council of the UN to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo; (e) the safe and free return of all refugees and displaced persons and an unimpeded access to Kosovo by humanitarian aid organisations; (f) a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarisation of the UCK (Kosovo Liberation Army); (h) comprehensive approach to the economic development and stabilisation of the crisis region. ‘G8 nations draw up peace plan’, *Guardian*, 6 May, 1999.

²⁶³ J. Fitchett, ‘Moscow Set to Back UN Resolution on Kosovo’, *The New York Times*, 3 June 1999.

²⁶⁴ *Ibid.*

²⁶⁵ UN Security Council Resolution 1244 (1999), 10 June, 1999, Annexes 1 and 2.

Russians who said their view of America was 'mainly bad' or 'very bad' more than doubled, from 23 percent to 49 percent.²⁶⁶

In short, the campaign in Serbia destroyed the illusion that Russia can cooperate with Americans on equal terms. This fear was the best summarised in 'now Yugoslavia, next us'.²⁶⁷

International Missions and Democratic Changes in Serbia

On the 10 June, almost three months from the beginning of NATO's intervention, the UN Security Council passed Resolution 1244. The resolution reaffirmed the commitment to the sovereignty and territorial integrity of Yugoslavia but also envisaged Kosovo's 'substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.²⁶⁸ Additionally, this interim administration would pave the way to a 'final settlement'.²⁶⁹ However, UNMIK and the NATO-led Kosovo Force (KFOR) missions responsible for ensuring peace catastrophically failed: 230,000 Serbs and Roma immediately fled from Kosovo.²⁷⁰ Ironically, UNMIK and KFOR proved to be as successful in protecting Serbs as were the Serbian police in protecting Albanians.

Coincidentally with the pogrom of Kosovo Serbs, Serbia experienced dramatic political changes. In October 2000, the citizens of Serbia overthrew the regime of Slobodan Milošević and elected a new Democratic elite led by Zoran Đinđić, the president of Democratic Party (srb. *Demokratska Stranka - DS*), and Vojislav Koštunica, the leader of Democratic Party of Serbia (srb. *Demokratska Stranka Srbije*

²⁶⁶ M. Wines, 'Crisis in the Balkans: The Russians; Hostility to U.S. Is Now Popular with Russians', *The New York Times*, 12 April 1999.

²⁶⁷ *Ibid.*

²⁶⁸ UN Security Council Resolution 1244 (1999), Annex 1, 10 June 1999; and UN Security Council Resolution 1244, par. 10.

²⁶⁹ *Ibid.*, par.11.

²⁷⁰ 'Kosovo: one last chance; the race against winter; yet another exodus,' *Refugees*, 3(116), 1999, p. 11; L. Burema, 'Reconciliation in Kosovo? A few steps taken, a long road ahead,' *Journal on Ethnopolitics and Minority Issues in Europe*, vol. 11, no. 4, 2012, p. 7.

- DSS).²⁷¹ The new political elite discovered very soon that governing Serbia is a significantly more demanding task than winning elections against Milošević. The international community immediately responded by lifting economic sanctions and providing generous aid.²⁷² However, cooperation with the Hague tribunal (ICTY) sharply divided the new democratic leaders: while Koštunica believed that Milošević should face only a domestic trial for abuse of power, Đinđić insisted that there is no time and despite the fact that the Yugoslav Constitutional Court banned any extradition of Serbs to the ICTY, he arrested and extradited Milošević to the tribunal in Hague.²⁷³ The international community interpreted this as Đinđić attaching little or no significance to Kosovo, which eventually became the mantra that Đinđić viewed Kosovo as *de facto* independent.²⁷⁴ The truth is that Đinđić emphasised the importance of dealing with Kosovo at the time, being aware that the future solution could not be to make Kosovo a Serbian province under the same circumstances as before 1999, but he also excluded the option of independence.²⁷⁵ This approach served as a forerunner of Koštunica's 'red line' expressed in the phrase 'more than autonomy and less than independence'. Đinđić proposed that the optimal solution might be a federation, where the Serbs would be constitutive people with their own institutions within the framework of common institutions.²⁷⁶ This resembles Koštunica's proposal for cantonisation of Kosovo,²⁷⁷ which implied that Kosovo's democratic process would proceed unimpeded while the Serbs would gain political control in places where they have a majority. Furthermore, both politicians conceived a grandiose geopolitical idea to link the status of Kosovo and the secession of Republika Srpska (RS) in Bosnia and

²⁷¹ Note that the Democratic Party of Serbia, despite its name, is a national-conservative party.

²⁷² \$2 billion in reconstruction aid and \$300 million a year in aid over the next seven years.

J. Subotic, 'Explaining Difficult States: The Problem of Europeanization in Serbia,' *East European Politics and Society*, vol. 24, no. 4, 2010, pp.595-616.

²⁷³ This is the epitome of Đinđić- Koštunica issue, the former insisted that reforms have to be based on the rule of law while the latter wanted reforms by any means.

O. Kesic, 'An airplane with eighteen pilots: Serbia after Milosevic,' in Sabrina P. Ramet and Vjeran Pavlakovic' (eds), *Serbia since 1989: Politics and Society under Milosevic and After*, Seattle, WA: University of Washington Press, 2005, pp. 95–121.

²⁷⁴ B. Radeljic, 'The Politics of (No) Alternatives in Post-Milosevic Serbia,' *Journal of Balkan and Near Eastern Studies*, vol.16, no.3, 2014, p.245.

²⁷⁵ Z. Đinđić, The last interview given on BN Television, 21 March 2001.

²⁷⁶ Ibid.

²⁷⁷ 'Kostunica Seeks EU Support for Kosovo "Cantonization" Plan,' Radio Free Europe/Radio Liberty, 23 March, 2004, <<http://www.rferl.org/content/article/1052005.html>> (accessed 15 February 2016).

Herzegovina:²⁷⁸ ‘Koštunica is attempting to link the final status of Kosovo to the RS secession from Bosnia, which will result in continued western frustration with the implementation of the Dayton Accords in Republika Srpska’.²⁷⁹ Đinđić also warned that:

if it cannot be applied to Serbia what was signed in Dayton, that all the national communities got their collective status and that borders are unchangeable... if this does not apply to Serbia, I think it cannot be applied to anyone in future.²⁸⁰

The two, indeed, had different approaches: while Đinđić wrongly assumed that Serbia earned international ‘credit’ and therefore it was the right time to raise agonising questions, Koštunica completely lacked a sense of political reality, insisting that Serbia’s territory cannot be the subject of a political trade. Despite the obvious discrepancy in their characters reflected in certain issues (such as cooperation with ICTY), the two leaders ‘shared the same overall goals’:²⁸¹ (a) Serbia will never recognise Kosovo as an independent state, (b) Serbia should seek full integration into the EU if the EU acknowledges Serbia’s national interests. This is exactly opposite of what the West expected, i.e., that ‘Serbia is no longer willing to sacrifice the interest of its seven million to maintain the lifestyle of 60 000 north Kosovo Serbs’;²⁸² to the contrary, Kosovo was and has remained the all-consuming issue for Serbs.

However, the existing conflict expanded outside of Kosovo in early 2000 when the Liberation Army of Preševo, Medveđa, i Bujanovac conducted several attacks in southern Serbia, stating that their ‘objective was to protect the local ethnic Albanian population of some 70 000 people from the repressive action of the Serb security

²⁷⁸ According to the Badinter Commission Albanians in Kosovo were considered in the same way as Serbians in Bosnia. European Community Conference on Yugoslavia, Arbitration Commission, Opinion No.2.11 January 1992.

²⁷⁹ J. Lyon, ‘Serbia after Milosevic: a progress report briefing by ICG analyst James Lyon to the US Congress Commission on Security and Cooperation in Europe,’ International Crisis Group, 6 March 2001, <<https://www.crisisgroup.org/en/publication-type/speeches/2001/lyon-serbia-after-milosevic-a-progress-report-briefing-by-icg-analyst-james-lyon-to-the-us-congress.aspx>> (accessed 10 March 2016).

²⁸⁰ Đinđić, 2011.

²⁸¹ Kesic, 2005, p.107.

²⁸² E. Pond, ‘Serbia Reinvents Itself’, The International Institute for Strategic Studies, vol.55, no.4, 2013, p.8.

forces'.²⁸³ Expulsion of Kosovo Serbs and the new conflict in southern Serbia effectively pushed the international community, leaders of Kosovo Albanians, and Serbia's government to amend the current deal. For Albanians, there was only one outcome— independence. Serbs, on the other hand, clearly announced that there would be no compromise regarding the statehood of the province. These two positions deeply divided the international community: the USA backed Kosovo's independence in a name of 'new military humanism' and human rights. The USA succeeded in achieving a consensus regarding the intervention in 1999 by 'inventing' Rambouillet, but this time common ground was nowhere to be found. Additionally, Russia cemented its position to rigid interpretations of international law. Consequently, a scapegoat of this saga was a newly established union, the EU. The first external challenge acutely split the Union; several of the member states took a vigorous stand that they would not support unilateral decisions, while others viewed only one viable solution— independence.

It was under these circumstances that the UN introduced a Constitutional Framework establishing the Provisional Institutions of Self-Government (PIGS). This document envisaged the institutions of Self-Government such as Assembly, President, Government, Courts, and other bodies,²⁸⁴ with a wide range of competencies.²⁸⁵ At this junction, two questions may come to mind: did the interim mission have the right to make permanent changes in fundamental institutions? What is the source of UNMIK legitimacy? To answer the first question, the law of belligerent occupation is the main boundary setter for the international mission since the initial situation emerged from an armed conflict between NATO and Serbia:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change

²⁸³ G. Partos, 'Presevo valley tension', BBC, 2 February 2001, <<http://news.bbc.co.uk/2/hi/europe/1043583.stm>>, (accessed 20 March 2016).

²⁸⁴ Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001, par.1.5.

²⁸⁵ (a) Economic and financial policy; (b) Fiscal and budgetary issues; (c) Administrative and operational customs activities; (d) Domestic and foreign trade, industry and investments; (e) Education, science and technology; (f) Youth and sport; (g) Culture; (h) Health; (i) Environmental protection; (j) Labour and social welfare; (k) Family, gender and minors; (l) Transport, post, telecommunications and information technologies; (m) Public administration services; (n) Agriculture, forestry and rural development; (o) Statistics; (p) Spatial planning; (q) Tourism; (r) Good governance, human rights and equal opportunity; and (s) Non-resident affairs.
Ibid.

introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.²⁸⁶

Riegner rightly observes that the international presence may look like an occupation; however, the international presence is founded on the multilateral document, Resolution 1244,²⁸⁷ therefore the UN administration had the right to pass the Constitutional Framework for Provisional Self-Government; however, the right to alienate the land was not included. Regarding the question of the legitimacy of UNMIK rule in the eyes of the population, there are no definite answers; nevertheless, it seems to be a multifaceted process involving:

- (a) Co-option of local elites;
- (b) Economic co-option of the local population resulting from the immense economic power of the ruling organization;
- (c) A generally favourable view of international intervention by the local population;
- (d) Strategically limited use of coercion.²⁸⁸

Therefore, there seem to be no compelling reasons to object to the legitimacy and legality of the document: the source of legitimacy is Resolution 1244, while above-listed processes supplied legality. It seemed, at first, that the document would satisfy all interested actors. Albanians considered it as another step toward independence; Serbs read it as a confirmation of sovereignty, and the USA as a legitimizing the military intervention. On the other hand, for the EU this meant that the challenge is postponed if not entirely conquered, while Russia gained precious time to prepare itself after a decade of Boris Yeltsin's rule. The idyllic atmosphere was interrupted when it was confirmed that UNMIK had no interest in the settlement of Kosovo's final status:²⁸⁹ Kosovo Albanians responded with a series of attacks,²⁹⁰

²⁸⁶ The Fourth Geneva Convention relative to the protection of civilian persons in time of war, (12 August, 1949), art. 47

²⁸⁷ M. Riegner, *The Two Faces of the Internationalized pouvoir constituent: Independence and Constitution Making Under External Influence in Kosovo*, *Goettingen Journal of International Law*, vol.2, no.3, 2010, p.1056

²⁸⁸ B. Pula, 'The UN in Kosovo: Administering Democratization', in F. Bieber and Ž. Daskalovski, *Understanding the War in Kosovo*, London, Frank Cass, 2003, pp.195-212, p.200.

²⁸⁹ 'Kosovo's unconventional new chief', *BBC News*, 14 February 2002.

which was in effect a push forward to further negotiations. Subsequently, the international community unveiled another solution which came down as the ‘Standards before Status’ policy. The idea was that the province would make progress in eight areas prior to final settlement of its status:

- (a) The existence of effective representative and functioning democratic institutions;
- (b) Enforcement of the rule of law;
- (c) Freedom of movement;
- (d) Sustainable returns of refugees and displaced persons, and respect for the right of communities;
- (e) Creation of a sound basis for a market economy;
- (f) Fair enforcement of property rights;
- (g) Normalized dialogue with Belgrade;
- (h) Transformation of the Kosovo Protection Corps (KPC) in line with its mandate.²⁹¹

However, the new document did nothing to ease the rift between the UNMIK and Kosovo Albanians. In March 2004, Serbs again became the focus of Albanian anger when a wave of violence ‘spurred by sensational and ultimately inaccurate reports that Serbs had been responsible for drowning of three young Albanian children’.²⁹² The outcome was disastrous:

Large ethnic Albanian crowds targeted Serb and other non-Albanian communities, burning at least 550 homes and twenty-seven Serbian Orthodox churches and monasteries, and leaving approximately 4,100 Serbs, Roma, Ashkali (Albanian-speaking Roma), and other non-Albanian minorities displaced. Nineteen people—eight Kosovo Serbs and eleven Kosovo Albanians—were killed, and over a thousand wounded—including more than 120 KFOR soldiers and UNMIK police officers, and fifty-eight Kosovo Police Service (KPS) officers.²⁹³

²⁹⁰ J. Janssens, *State-building in Kosovo. A plural policing perspective*, 2015, p.115.

²⁹¹ ‘Standards for Kosovo’, Presented Pristina, 10 December 2003.

²⁹² ‘Failure to protect: Anti-minority violence in Kosovo, March 2004,’ Human Rights Watch, 16(6(D)), July, p.1.

²⁹³ *Ibid.*, p.7.

The international community was in ‘absolute denial about its own failures in Kosovo’ and seemed ‘happy to continue with ‘business as usual’ rather than putting in place reforms’.²⁹⁴ As a result of this inertial approach, ‘Albanian extremist now know that they can effectively challenge the international security structures’.²⁹⁵ Instead of producing incentives for further development of mechanisms for protection of minorities, ‘violence had once again advanced the independence agenda as nothing else in the previous five years had’.²⁹⁶ Kofi Annan, the UN Secretary-General at the time, appointed Kai Eide to deliver a report on the situation in Kosovo. Eide concluded that the UN ‘leverage in Kosovo is diminishing’ and that the EU ‘will have to pay the most prominent role in Kosovo’.²⁹⁷ He further stressed the importance of integration of Kosovo and Serbia into European-Atlantic institutions and the necessity of status talks.²⁹⁸

The problem, however, was that while the European Union was willing to take a greater role in Kosovo, without a clear status any EU presence ran the risk of being seen as little more than a replacement for UNMIK, with all the dangers that this would entail.²⁹⁹

Not surprisingly, both Serbs and Albanians were against the proposal, though for diametrically opposite reasons. Ibrahim Rugova, the leader of Kosovo Albanians, said that ‘the only platform for the status talks is the independence’.³⁰⁰ Vojislav Koštunica, then Prime Minister of Serbia, reiterated that required standards were not reached and that there is no progress on issues of decentralisation and refugee returns.³⁰¹ The 2004 riots indicated that UNMIK should ‘hand increasing responsibilities to the European Union’ which would ‘bring Kosovo closer to European norms, even after the conclusion of future-status negotiations’.³⁰² The agenda was shifted from the ‘standards before status’ approach to a ‘priority based standards policy’: ‘Determining

²⁹⁴ *Ibid.*, p.3.

²⁹⁵ *Ibid.*

²⁹⁶ I. King and W. Mason, *Peace at any Price: How the World Failed Kosovo*, London, Hurst & Co., 2006, p. 191.

²⁹⁷ ‘Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council’, UN Security Council Document, S/2005/635, 7 October 2006, p.21.

²⁹⁸ *Ibid.*, pp.21-22.

²⁹⁹ J. Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans*, London/New York, I.B. Taurus, 2009, p.23.

³⁰⁰ ‘Kosovo set for “breakaway” talks’, BBC, 7 October 2005.

³⁰¹ ‘Srbi s Barozom i Renom’, B92, 17 February 2006.

³⁰² ‘Kosovo: the way forward’, NATO, 01 October 2004.

the future status of Kosovo will in itself be a demanding challenge...[however] entering the future status process does not mean entering the last stage, but the next state of international presence.³⁰³

Only five years after employment of the international mission, it became apparent that UNMIK had disastrously failed to sustain peace and protect minorities in the province, which meant that a new deal was imminent. Paradoxically, it is not diplomacy or global players but an avalanche of riots that pushed agenda towards status negotiations. All interested sides had their own proposal and desires: American sought to create another Rambouillet to achieve broader consensus among members of NATO; Albanians viewed the new round of negotiations as a step toward independence, while Serbs insisted on refugee return prior to discussion on a future status. Russia meanwhile experienced dramatic changes and this time it was evident that it would support the maximalist demand of its protégée. Similarly, the EU had failed to impose itself as the ultimate power on its own turf during the conflict in 1999, and this was an opportunity for redemption.

Preparations

On 24 October 2005, the UN Security Council summoned a meeting to discuss the report. Eide opened the session by repeating that there would ‘never be a good moment for addressing Kosovo’s future status’; he however admitted that ‘the time has come to start the future status process’.³⁰⁴ Soren Jessen-Petersen, then the UN Secretary-General’s Special Representative, continued in a similar tone: ‘And though the ultimate outcome cannot be known, I am confident that the resolution of Kosovo’s status can have only positive effect on the wider region’.³⁰⁵ Finally, Koštunica took the floor and raised the crucial question for Serbs and Serbia: ‘whether future status talks can succeed if the crucial standards for human rights and fundamental freedoms in Kosovo and Metohija are neither fulfilled nor near fulfilment in the foreseeable

³⁰³ S/2005/635, 7 October 2006, p.5.

³⁰⁴ 5289th Meeting of the Security Council, UN Security Council Document, S/PV5289, 24 October 2005; 5290th Meeting of the Security Council, UN Security Council Document, S/PV5290, 24 October 2005, pp.2-3.

³⁰⁵ *Ibid.*, p.4.

future'.³⁰⁶ Subsequently, he reiterated that any solution must respect the sovereignty and territorial integrity of Serbia as an internationally recognised state and reminded the international community that Serbia's political efforts will be 'directed to defining a specific and viable form of substantial autonomy for Kosovo and Metohija'.³⁰⁷

Once Annan secured the support of the SC for further status negotiations, he nominated Martti Ahtisaari, the former president of Finland and a peacemaker with excellent knowledge of Yugoslavia, for the post of UN Envoy for Kosovo.³⁰⁸ Though Ahtisaari appeared to be a perfect candidate, he was the Chairman of the International Crisis Group, a lobby group that passionately supports the independence of Kosovo.³⁰⁹ Nevertheless, Serbia did not attempt to block his post. Ahtisaari's appointment was followed by the Contact Group meeting in Washington. At one point during the negotiations, Lavrov insisted that the USA must give more respect to Russia as a global power, on which Ahtisaari replied: 'So, Russia is a great power, entitled to help shape the Security Council's decision about Kosovo. I agree. So why is your foreign policy on this subject being made in Belgrade?'³¹⁰ At the end of the meeting, the Contact Group informed the all involved parties that the future process would be based on ten principles, among others that 'the settlement of Kosovo issue should be fully compatible with international standards of human rights, democracy and international law and contribute to regional security' but also that it 'will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is unilateral or results from the use of force would be unacceptable'.³¹¹ This seemed to satisfied Russia and the USA and their proxies, as well as the EU, which had no unified position at the time. Immediately after the meeting, Ahtisaari established the Office for the UN Special Envoy for Kosovo (UNOSEK) in Vienna where relationships among team members

³⁰⁶ Ibid., p.8.

³⁰⁷ Ibid., p.9.

³⁰⁸ 'Letter dated 31 October from the Secretary-General addressed to the President of the Security Council', United Nations Security Council Document, S/2005/708, 31 October 2005.

³⁰⁹ 'Secretary-General Appoints Former President Martti Ahtisaari of Finland as Special Envoy for Future Status Process for Kosovo', United Nations Secretary-General Document, BIO/3714 (or SG/A/955), 15 November 2005.

³¹⁰ March 2007 Interview with Martti Ahtisaari, New York, quoted from Henry Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan*, Cambridge, Cambridge University Press, 2010, p.114.

Similar accusation was repeated a year later when Karen Pierce complained that 'the Russians have outsourced their foreign policy to Belgrade'. W. Hoge, 'Kosovo Independence Measure Withdrawn From U.N. Council', *The New York Times*, 21 July 2007.

³¹¹ Contact Group Document, Guiding Principles, 2 November 2005.

were described as a family since members ‘were detailed from other institutions, thereby removing completion and rivalry’.³¹² UNOSEK ensured a direct and coherent approach by establishing liaison arrangements with the USA, the EU, and NATO while Russia declined the offer. However, ‘Ahtisaari was careful to recruit Ivanov [a senior Russian diplomat] to the UNOSEK staff to tie Moscow into the process’.³¹³ Ahtisaari, did not hide that the status talks were pathway to Kosovo’s independence. In November 2006 in Belgrade, he told Koštunica ‘you have lost Kosovo. The challenge now is how to clean up Milosevic’s mess’.³¹⁴

A month later, on 5 and 6 December at a meeting of the Organisation for Cooperation and Security in Europe (OSCE) in Ljubljana, officials from Washington and Moscow re-confirmed their division. There are serious indications that the Russians, ‘while promising Serbian leaders that they would oppose anything Belgrade does not agree with, say in private talks with their western counterparts that they will not oppose conditional independence for Kosovo’.³¹⁵ Whether this was a result of Ahtisaari’s negotiation skills or another Russian trick to be treated as a global power remained the secret. Similar to the Russians, French policymakers assured the Serbs that ‘France would support Serbian interest but that those interests had to be realistic’.³¹⁶ On the other hand, the US representative had no sympathy for the Serbian efforts to hold on to Kosovo.³¹⁷

Prior to the direct talks, the Contact Group met twice: on 16 January when it was announced that the direct negotiations would take place in Vienna on 25 January, However, the death of Ibrahim Rugova postponed the talks and forced the Contact Group to meet once again in London on 31 January. This gathering invited not only six foreign ministers but also Ahtisaari, Javier Solana (then the European Union High Representative for Common Foreign and Security Policy), Olli Rehn (the EU Commissioner for Enlargement), and Jaap de Hoop Scheffer (the NATO Secretary-General). Participants firmly dismissed Putin’s call for ‘universal principles’ and Kosovo as a precedent:

³¹² Henry Perritt, p.116.

³¹³ Ibid.

³¹⁴ Ibid., p.120.

³¹⁵ Judah, T., ‘Kosovo Conditional Independence: Behind the scene hard talk begins’, ISN Security Watch, 24 December, 2005.

³¹⁶ Ibid.

³¹⁷ Ibid.

We need common principles to find a fair solution to these problems for the benefit of all people living in conflict-stricken territories... If people believe that Kosovo can be granted full independence, why then should we deny it to Abkhazia and South Ossetia.³¹⁸

This was the cornerstone of the USA – Russia dispute: while American policy wonks insisted that Kosovo would be a precedent, the Russians emphasised a legalistic approach that any formula for Kosovo must have an effect on other cases. Along similar lines, the Chinese representative opted for legalistic views. On the other hand, the EU had no consolidated reaction; nevertheless, British and French policymakers argued that a final decision must reflect the will of people.

Negotiations

The direct talks started on 20 February 2006 in Vienna. The talks were deemed to be positive and parties ‘found ‘common ground’ in discussing how basic services would be administered at the local level to reflect the ethnic makeup of local populations’.³¹⁹ The delegation addressed the questions that are important to any resolution of Kosovo’s future status such as ‘health care, education, culture, social welfare and police and justice’.³²⁰ Despite the fact that general atmosphere was considered excellent, there was no major progress. In summary, the first round was merely an attempt to ‘ensure Serb involvement in the governance of Kosovo’ through decentralisation while acknowledging that ‘too much decentralization would make Kosovo ungovernable’.³²¹

A month later, on 17 March, the second round of negotiations took place again in Vienna. Once again, the primary topic was decentralisation, but this time extended to local finance, inter-municipal cooperation, and cross-boundary cooperation. Not surprisingly, this aroused certain tensions: the Kosovo Albanians believe the draft was

³¹⁸ ‘Putin Says Kosovo can become precedent’, Radio Free Europe/Radio Liberty, 01 February, 2006.

³¹⁹ V. Crawley, ‘Kosovo Parties Report Positive Results from First Round of Talks’, Washington File, 23 February, 2006.

³²⁰ Ibid.

³²¹ Perritt, p.146.

a ‘Trojan horse that would lead to the partition of Kosovo along ethnic line’.³²² After being reassured that Kosovo’s partition was off the table, this round of negotiations concluded two important points: financial support to Serbian municipalities in Kosovo from Belgrade were acceptable and Kosovo municipalities gained the power to make inter-municipal cooperation.³²³ Optimism faded in the third session of talks, beginning on 3 April. The parties failed to show any mettle over the issue, stubbornly retaining their positions: the Serbs wanted decentralisation along ethnic lines, while the Kosovo Albanians called for equality of all municipalities. The fourth round, beginning on 4 May, delivered nothing new, except that the Serbs linked the question of decentralisation to the subject of refugee returns which was characterised as “extreme request” in Pristina.³²⁴ The fifth session, starting on 23 May, raised another subject: protection of religious and culture heritage in the province. Only two days before this round of talks, Montenegro voted for independence with 55.5 percent passing the 55 percent threshold.³²⁵ Despite gloomy expectations, this session proved to be successful and brought agreement on protection of religious heritage.

However, the sixth round, beginning on 31 May, appeared to be more challenging. The focus was on economic and financial disputes and, not surprisingly, the stumbling block was control over enterprises, privatisation, and repaying the foreign debt of Kosovo. This session was sobering for Serbia’s representatives who realised that the final and single aim of the talks was independence. This sharp policy change infuriated Jessen-Petersen, who replied that ‘high unemployment, rather than security fears, was the reason why so few Kosovo Serbs exiles had returned’ adding that ‘Kosovo Serbs formed less than 10% of the province’s population, but he spent more than that amount of his time reassuring them that they had a future in Kosovo’ and finally accusing Belgrade of ‘dissuading Kosovo Serbs from taking part in running the

³²² Ibid., p.148.

³²³ The reality was that Kosovo already worked this way. The three municipalities north of the Ibar River that divided Mitrovica – Leposaviq, Zvečan, and Zubin Potok – had Serb majorities and were really governed from Belgrade. Civil servants in these municipalities (as in other Serb-predominant communities in Kosovo), which included local teachers, health care workers, and police officers, drew salaries and pensions from Belgrade; they disdained any connection with UNMIK or the central government in Pristina. Mitrovica itself was divided: UNMIK and the PISG ran the predominantly Albanian part south of the river; Belgrade ran the predominantly Serb part north of the river.
Ibid., p.148.

³²⁴ Ibid., p.149-50.

³²⁵ ‘Crna Gora nezavisna’, *Novosti*, 21 May, 2006.

province'.³²⁶ This forced Serbia to make an about face from 'Kosovo is part of Serbia' to 'any solution for Kosovo must be universal'³²⁷ in order to forge its position with Russia. Similarly, Russia stopped requesting a universal solution without Serbia's approval, insisting that there are 'no legal, political or moral grounds to force Serbia into a solution'.³²⁸ Therefore, in July 2006, for the first time, Serbia and Russia had unified views, and the reason was, paradoxically, the West. The West refused to "trade" with Russia and implement Kosovo's solution to the Soviet zone, while simultaneously ignoring Serbia's requests.

Another round of talks on 18 July was business as usual:

the Kosovo delegation blamed Belgrade for its unconstructiveness with its positions and demands, claiming that the issues were not between Belgrade and Pristina but rather between Belgrade and everyone else involved. Belgrade, for its part, accused Ahtisaari of bias, saying that his aim was independence for Kosovo but that he refused to say so openly.³²⁹

Trapped in a vicious cycle of decentralisation, refugee returns, protection of religious heritage, and minority rights, Ahtisaari saw the only hope was in elevating the talks: this opened a high-level discussion and a future status of the province. On 24 July, Boris Tadić and Vojislav Koštunica met with Fatmir Sejdiu and Agim Ceku in Vienna. The negotiation parties are entrenched where they started, the Kosovo Albanians insisting on independence, while the Serbs reiterated that they would not lose 15 per cent of their territory.³³⁰ Nevertheless, the Kosovo Albanians showed 'flexibility in the decentralisation talks'; on the other hand, the Serbs needed to come to 'reasonable compromises for many of the issues'.³³¹ On 7 and 8 August, the second round of high-negotiations continued with a technical discussion on centralisation and communities, again with little progress. The situation significantly deteriorated when a newly appointed SRSG, Joachim Rucker, indicated the end of UN's administration in

³²⁶ 'UN boss in Kosovo chides Serbia', *Balkan Update*, 30 June, 2006.

³²⁷ V. Koštunica, *Obrana Kosova*, Beograd, Filip Višnjić, 2008, (speech from 13 July 2006), pp.50-59.

³²⁸ 'Russia challenges UN power to impose Kosovo ruling', *Reuters*, 13 July, 2006.

³²⁹ Perritt, p.154.

³³⁰ 'Tadić i Koštunica u Beču naspram Sejdiua i Čekua', *Danas*, 24 July, 2006.

³³¹ 'High-Level Meeting on the Future Status of Kosovo', *Contact Group Statement*, Vienna, 24 July, 2006.

Kosovo and independence as a final outcome.³³² At the same time, Ahtisaari sent a rather blunt message to the Serbs that ‘every nation carries a burden for which it has to pay... the leaders in Belgrade have to face the heritage and responsibility’.³³³

A month later, on 7 and 8 September, the parties met to discuss decentralisation and protection of religious sites. This time the UN overtly criticised the Serbs for non-cooperation, while they praised the Kosovo Albanians for having ‘really moved’ on issues.³³⁴

Seven months of negotiations were marked by another UN SC meeting on 13 September. This served as another opportunity for accusation between the UN and Serbia. Rucker expressed his regret that Belgrade retains a powerful influence over the attitudes of the Kosovo Serbs. I would wish to get a clear signal from the Belgrade authorities to the Kosovo Serbs that their future is in Kosovo if they wish it, that they have no reason to leave and that they should find ways to cooperate with the elected Kosovo authorities.³³⁵

Sanda Rašković-Ivić, a Serbian representative, reiterated that

terrorist attack against the Serbs occurred subsequent to a statement to the effect that the Serbs as a nation were guilty — a statement that was expressly made in front of the Serbian negotiating team in Vienna and several other witnesses by a person one would never expect to do so, especially considering the high office he holds.³³⁶

The relationship between the UN and Serbia reached a low ebb following the UN representatives claim that the Serbs are not cooperative and tenaciously held unsustainable positions. On the other hand, the Serbs believed that representatives of the UN are simply status biased and the whole negotiation process is a mere façade to force Serbia to recognise Kosovo as an independent state.

³³² E. Jansson and N. MacDonald, ‘Understated envoy offers hope for future of Kosovo’, *Financial Times*, 28 August, 2006.

³³³ ‘Ahtisaari: Serbs have a burden to pay for’, B92, 26 August, 2006.

³³⁴ ‘Press Briefing by UN Deputy Special Envoy Albert Rohan after the 7– 8 September round of direct talks held in Vienna’, UNOSEK, 8 September, 2006.

³³⁵ UN Security Council, 5522nd Meeting of the Security Council, UN Security Council Document, S/PV.5222, 13 September, 2006.

³³⁶ *Ibid.*, p.3.

Eight months of long and ignominious talks took a toll on internal affairs both in Belgrade and Pristina. Serbia's Constitution was drawn up and adopted in haste. No doubt, 'Serbia had never had a more illiterate constitution in terms of law and language';³³⁷ however, the UN decisions, adverse for Serbia, significantly (if not entirely) influenced its adoption. Therefore, the main characteristic of the new Constitution was that it served its mainly political purpose.³³⁸ The Constitution states that 'the Province of Kosovo and Metohija is an integral part of the territory of Serbia' but it also envisaged a 'substantial autonomy'.³³⁹ As Ratko Marković, a prominent Serbian legal expert, noted:

What is the purpose of mentioning Kosovo and Metohia three times in a brief preamble, when it is 'within sovereign Serbia'? Since everything 'within sovereign Serbia is an integral part of the territory of Serbia', and thus inseparable from Serbia. That is why this message, bearing in mind the current status of Kosovo and Metohia, is primarily intended for the international public, that Serbia has a constitutional obligation to preserve its territorial integrity and sovereignty in its entire territory, that Serbia has a right to Kosovo and Metohia. That message to the 'international community' may be understood on a national and patriotic basis, but it cannot have any legal effects.³⁴⁰

If Serbia's government indeed intended to communicate to the international community by reiterating its already well-known position of 'Kosovo is Serbia' and 'substantial autonomy for Kosovo', it showed the infirmity and anxiety of the Serbs. On the other hand, if the original idea was to produce an all-patriotic consensus, then Koštunica's government succeeded since 97 percent of citizens voted for the new constitutional arrangement.³⁴¹ After adopting the Constitution, political leaders in Serbia schedule new elections for 21 January 2007, at which people of Serbia confirmed loyalty to Koštunica's view of the future of Kosovo.³⁴² Approximately 450

³³⁷ R. Marković, 'Republic of Serbia Constitution of 2006 – A Critical Review', UDK 342.4(497.11), 2006, p. 48.

³³⁸ The other purpose was to change the old –Milošević's constitution. See: Ibid.

³³⁹ Constitution of Republic Serbia 2006, Preamble.

³⁴⁰ Marković, p.7.

³⁴¹ 'Constitution gives government clear mandate', B92, 6 November 2006.

³⁴² Koštunica's DSS formed the Government despite the fact that it came second after SRS (note that SRS backed the constitutional change and was strictly against negotiations with representatives of Kosovo Albanians).

'Izbori 2007', Vreme, Web Specijal 01, January 2007.

km south of Belgrade, in Pristina, leaders of the Kosovo Albanians faced challenges of their own: the rise of the Self Determination movement (alb. Vetëvendosje), a party that oppose foreign involvement in Kosovo's internal affairs and demand full independence; the second issue was more frequent terrorist attacks by the group name the Albanian National Army (ANA).³⁴³ In short, awaiting Ahtisaari's final proposal, Serbia reached a broader consensus on the Kosovo issue, while Kosovo Albanians started to fear that long process would not bring the desired outcome.

The Ahtisaari Plan

On 26 January 2007 Ahtisaari delivered his Comprehensive Proposal For the Kosovo Status Settlement, which goes down as the Ahtisaari Plan, to the Contact Group. Two major rifts occurred immediately: first, between the West and Russia which was concerned about the timing of further steps. Second, within the West: while the USA and the UK rushed for implementation of the proposal, France 'although reiterating EU support for the UN Envoy, argued that there should be a chance for further negotiations'.³⁴⁴ A week later, the proposal was presented to the Serb and the Kosovo Albanians. Anticipating troubles with Russia, however, Ahtisaari did not use the word independence in his proposal. Vaguely formulated that 'Kosovo shall be a multi-ethnic society...govern itself democratically... [with] an open market economy...',³⁴⁵ the body of the plan concerned even Kosovo Albanians. However, after being repeatedly asked for his position on independence in Pristina, Ahtisaari 'winked and said "wait for my report to the Security Council"'.³⁴⁶ However, even without this disheartening moment, it was evident that the proposed 'provisional independence' for Kosovo would be: The Ahtisaari Plan envisaged for Kosovo all elements of the state such as the Constitution, national symbols (flag, seal, and anthem), and right to negotiate and conclude international agreements.³⁴⁷ On the other hand, this 'independence' remained limited by the establishment of the International

³⁴³ 'Armed group surfaces in Kosovo', Reuters, 8 December 2006.

³⁴⁴ Ker-Lindsay, 2009, p.54.

³⁴⁵ 'Comprehensive Proposal for the Kosovo Status Settlement' (Ahtisaari Plan), 2 February, 2007, art.1, par.1 and par.4.

³⁴⁶ Perritt, 164.

³⁴⁷ Ahtisaari Plan, art.1, par. 3,5, and 7.

Civilian Representative (ICR) who, among other things, would facilitate full implementation of agreements related to religious and culture heritage, monitors budget preparations, and would be consulted about constitutional arrangements.³⁴⁸ This document portends that ‘Serbs will lose Kosovo and Albanians the right to govern it’ and that ‘Kosovo is only independent of Serbia’.³⁴⁹

In the report, he stated: ‘both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of independence’,³⁵⁰ concluding:

Independence is the only option for a politically stable and economically viable Kosovo. Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia.³⁵¹

Lavrov was curt and blunt: ‘there is nothing to veto’.³⁵² Vladimir Titov, then deputy foreign minister of Russia, repeated that ‘a decision based on Marti Ahtisaari’s draft will not get through the UN Security Council’ and reminded the West that ‘the threat of using the veto should stimulate the sides to find a mutually acceptable mechanism.’³⁵³ Therefore, the inexorably long and almost local game of ‘independence versus autonomy’ between the Serbs and the Kosovo Albanians became ‘Ahtisaari Plan versus universal solution’. On one side, Washington and London now backed by France, on the other – Russia. And what of Europe? While several member states of the EU immediately rejected Ahtisaari’s plans, ‘Italy had been waffling all over the place’ and in Germany, ruling Social Democrats were reluctant since they played on

³⁴⁸ Ibid., art.7, par.4.; art.8, par.1; art.10, par.1;

³⁴⁹ R. Qosja, ‘Moraćemo opet da se sukobimo sa Srbima’, Glas Javnosti, 29 September, 2008.

³⁵⁰ ‘Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council’

UN Security Council Document, S/2007/168, 26 March 2007, p.2.

³⁵¹ Ibid., p.4.

³⁵² ‘Russia, Kosovo clash over independence plan’, Reuters, 24 April, 2007.

³⁵³ Ibid.

‘popular German antagonism towards U.S. unilateralism’.³⁵⁴ In short, the rules and the price were the same, only the chessboard had become larger. Meeting in Moscow, in May 2007, Condoleeza Rice and Lavrov agreed to ‘to down increasingly strident rhetoric’,³⁵⁵ but reached no breakthroughs on the major challenges (Kosovo and the USA planned to install a missile system in Eastern Europe). However, Lavrov said that two sides ‘agreed to seek a solution that will satisfy all parties’, while Rice repeated that ‘Kosovo will never again be part of Serbia’.³⁵⁶ At the same time, between the two giants, Europe was playing its own game. It was clear that several members of the EU (led by Spain) would not support any imposed or unique solutions as on 23 July; therefore, EU foreign ministers failed to reach consensus on the Ahtisaari plan. However, they agreed that future negotiations between the Serbs and the Albanians should be mediated by Troika, diplomats from the USA, the EU, and Russia. The further talks were viewed as a Russia’s victory; nevertheless, EU diplomats stated that ‘they have no intention of being thwarted by Russia’.³⁵⁷

Meanwhile, the USA crystallised the politics towards Kosovo:

- (a) Run out the clock on getting a Security Council resolution embodying Plan A, with a specific authorization of the Ahtisaari Plan.
- (b) If unsuccessful with Plan A, move to a minimalist Plan B: a Security Council resolution authorizing international presences.
- (c) If unsuccessful with Plan B, persuade the Europeans to accept Plan C – coordinated recognition of a Kosovar declaration of independence.
- (d) If unable to secure Plan C, recognize Kosovo and persuade as many European states to recognize as possible.
- (e) Dan Fried would travel to Pristina and Belgrade and invite the Unity Team to come to the United States.
- (f) The Albanians would arrive on July 23 and Jeremić, representing Serbia, on July 27th.

³⁵⁴ Perritt, p.187.

³⁵⁵ P. Finn, ‘Putin, Rice Resolve to Tone Down Harsh Rhetoric’, Washington Post, 16 May, 2007.

³⁵⁶ Y. Zarakhovich, ‘Why Russia Block Kosovo Independence’, Time, 23 May, 2007.

³⁵⁷ ‘Out with the UN, in with the EU’, The Economist, 26 July, 2007.

- (g) Ask the Secretary General to superintend a replacement negotiation strategy and eventual UNMIK confirmation of a UDI.³⁵⁸

The Contact Group met in Vienna on 25 July to confirm that the USA – EU – Russia troika would conduct further talks. Ahtisaari asked to be excused from this process, explaining that he ‘didn’t want any further role for UNOSEK. My folks and I did not want to put the Plan into play for cherry picking by Serbia and Russia’.³⁵⁹ The Troika, comprised of the USA special envoy Frank Wisner, a Russia’s diplomat Aleksandr Botsan-Khachenko, and Wolfgang Ischinger, a German ambassador to London and participant of the Dayton Accords, set 120 days as a deadline. Despite the fact that the relationship between the diplomats was ‘warm and constructive’, little progress was made.³⁶⁰ The first round of negotiations, on 10 August, was rife with well-known arguments; however, it revealed two things: the Serbs practically had two different groups representing people of Serbia and Kosovo Serbs and the Kosovo Albanians were not nearly as equipped as the Serbs.³⁶¹ If the first round exposed the Kosovo Albanians as incompetent, the second round, held on 30 August, disclosed that the Serbs could not answer what “substantial autonomy” entailed for Albanian representation in Belgrade. Their proposal sounded specious: ‘They never had good answers. It was like proposing that Arkansas would get no funding from the U.S. government and would have to fly the American flag but have no representation in Congress’.³⁶² The Troika, despite the initial idea to not make any proposal, was effectively pushed to do so. In 14 points, the Troika confirmed that ‘there will be no return to the pre-1999 status and that Belgrade will not govern Kosovo. It also concluded that ‘Serbia will not interfere in Kosovo’s relation with international monetary institutions’.³⁶³ This provided Kosovo with space for building institutions, while it did not interfere with Serbia’s position to keep formal sovereignty without governing the province. The blunt criticism and the 14 points proposal galvanised the Serbs, who in the next couple of rounds, presented two ideas. The first idea was to

³⁵⁸ Confidential 2008 Interview with Wisner, taken from Perritt, p.183.

³⁵⁹ *Ibid.*, p.191.

³⁶⁰ *Ibid.*, 195.

³⁶¹ *Ibid.*, 196-7.

³⁶² Other international participant simply said: ‘the Serbian autonomy proposal was bullshit’. Perritt, p.198.

³⁶³ E. Vucheva, ‘International troika ups efforts to break Kosovo deadlock’, *EU Observer*, 22 October, 2007.

arrange Kosovo like Hong Kong, under this model ‘international borders would not be changed and neither of the two sides would be allowed to make a unilateral decision on constitutional or sovereignty issues’.³⁶⁴ Representatives of Kosovo Albanians dismissed this model on the ground that Kosovo and Hong Kong differ historically.³⁶⁵ The second idea resembled the case of Aland Islands within Finland, which was again discarded by the Kosovo Albanians.³⁶⁶

Finally, the last round of negotiations ended on 28 November, with no success and no progress. The Russians expressed hope that the conclusions would be made by the UN SC and emphasised that Kosovo is one of the key issues to Moscow; similarly, the Serbs believed that not ‘all compromise possibilities [are] exhausted’; for the Kosovo Albanian representatives independence remains ‘the beginning and the end of the vision regarding the Kosovo status’, adding that the next move is consultation with Washington and Brussels; the USA envoy concluded that the status quo was not a sustainable option and that the problem ‘would soon be solved’; the Europeans stated that the EU demonstrated ‘total unity’ during the negotiations process.³⁶⁷

However, behind the scene talks were considered a charade: ‘We must give the appearance of taking these negotiations with seriousness without running the risk of actually taking them seriously; they can produce nothing’ complained an EU senior diplomat, while another reconfirmed his position: ‘Their only value is to show doubters in the European Union that a negotiated solution is impossible. Afterwards, we can say, ‘[l]ook, we tried again; this time you can’t blame failure on Martti Ahtisaari, whom you said was biased’.³⁶⁸ This process was best summarised by Misha Glenny:

For several months, both Russia and the US have in effect supported the maximalist demands of their chosen proxies in the Balkans: Serbia and Kosovo. This neutered the most recent negotiations of the US-EU-Russia troika, which were a last-ditch attempt to hammer out a compromise between Belgrade and Pristina... Neither side had any incentive to compromise, and the EU was exposed

³⁶⁴ V. Oleksyn, ‘Serbs Suggest Hong Kong Model for Kosovo’, The Associated Press, 5 November, 2007.

³⁶⁵ Ibid.

³⁶⁶ ‘Serbia Proposes Finish Province Model for Kosovo’, Deutsche Welle, 21 November, 2007.

³⁶⁷ ‘Troika-mediated Kosovo talks fall through’, B92, 28 November, 2007.

³⁶⁸ Ibid.

again as incapable of managing a political crisis in its own backyard, while its taxpayers will be compelled to clear up the resulting mess.³⁶⁹

The final act of this charade was 17 February 2008: Kosovo's Declaration of Independence. Put differently, the USA settled for the Plan D, i.e., to recognise Kosovo and persuade as many European states as possible to do likewise. Subsequently, the EU presidency announced that member states were free to decide whether to recognise Kosovo's independence. Most of members of the EU decided to follow the USA, while Cyprus, Greece, Romania, Bulgaria (eventually recognised Kosovo), Slovakia and Spain 'expressed anxiety about the signal that recognition might send to separatists'.³⁷⁰ Alberto Navarro, then Spanish Minister for Europe, was frustrated that 'the future of Kosovo has been decided in Washington and to some extent in Moscow, and not in Europe'.³⁷¹ Despite the deep split among members, the EU, however, endorsed the EULEX mission deployed as European Security and Defense Policy (ESDP) mission on 16 February 2008, only one day before Kosovo's declaration, which 'fulfil its mandate through monitoring, mentoring, and advising, while retaining certain executive responsibilities'.³⁷² While the mission was status neutral, the first ICR, who arrived two days after the declaration, had the role to supervise Kosovo's independence. Paradoxically, the EU's Special Representative (EUSR) and ICR were embodied into one person – Pieter Feith, a well-known Dutch diplomat with experience in Indonesia, Iraq, and the former Yugoslavia.³⁷³ This and other schizophrenias cause by the declaration, the Ahtisaari Plan, and EULEX will be the topic of the next chapter.

³⁶⁹ M. Glenny, 'The Status of Kosovo was supposed to be the last obstacle to solving the problems of the Balkans', *New Statesman*, 6 December, 2007.

³⁷⁰ 'EU splits on Kosovo recognition', *BBC*, 18 February, 2008.

³⁷¹ *Ibid.*

³⁷² 'The Joint Action Plan of the Council of European Union, 2008/124/CFSP, 4 February, 2008, art.2.

³⁷³ The Council of the European Union, 'Javier Solana, EU High Representative for the CFSP, welcomes the appointment of Pieter Feith as EU Special Representative in Kosovo and Yves de Kermabon as Head of Mission of EULEX Kosovo', S060/08, Brussels, 16 February, 2008.

Conclusions

The chapter has aimed to answer the question: Taking into account the seemingly conflicting positions of the four actors, who are losers and winners in the negotiation process which was culminated in Kosovo's declaration of independence? In negotiations, like in wars, to discern the winners and the losers, historical distance is needed. However, in short run, the winners of Kosovo's talks were the USA, Russia, and the leaders of Kosovo Albanians. Kosovo's independence was a primary goal of the USA, one it achieved; thus, it can be considered a victor. However, the price was high since the issue divided Europe. Yet, a greater cost to the American politics was loss of Russian support. For the Russians, this was a significant re-emergence on the global scene, showing that Russia was still to be asked when global changes are made. This was a sobering reality as the West was not ready to treat Russia as an equal. Finally, leaders of the Kosovo Albanians achieved a great victory: Kosovo was independent of Serbia and there were plenty of enterprises to be privatised.

On the other hand, the most obvious loser was Serbia. Serbia should be praised for traversing a long path from political brinkmanship to the guarding of international law; however, all its proposals seemed to be specious: 'autonomy for Kosovo' meant merely 'sovereignty without responsibilities'. This legal inertia and lack of innovative solutions did nothing to convince a majority of states that Kosovo belongs to Serbia. The less obvious losers were the citizens of Kosovo. Under UN administration, Kosovo was universally accepted; however, after UDI that was no longer the case: Kosovo operates under a supervised independence which is neither compatible with EU norm nor appealing to foreign investments. In other words, it seems that the declaration is the noose around the neck of Kosovo's citizens. Finally, the biggest, and simultaneously the most subtly defeated side was the EU. After the EU failed to take responsibility for its own turf in 1999, the conflict in Kosovo, a forgotten European issue, returned with a vengeance as an immanent impediment to the EU's common policy. The EU ended up a victim of American and Russian machinations. The result was that the EU was unscrupulously forced to take on the onerous challenge of maintaining a status neutral mission in Kosovo whilst its members were not neutral to Kosovo's status.

Chapter 5

LEGAL SCHIZOPHRENIAS

Abstract

This chapter analyses two legal schizophrenias. First one was a dual position of the ICR and the EUSR; while the ICR was appointed as an advocate of Kosovo's independence, EUSR is required to be status-neutral reflecting the official position of the EU. The second legal issue is concerned with the tripartite 'Ahtisaari Plan – EULEX – Kosovo legal framework' where the Ahtisaari Plan serves as a grundnorm for Kosovo's Constitution and takes precedence over all other legal provisions in Kosovo, while being legalised only within Kosovo's constitutional framework. Furthermore, the EULEX mission is envisaged by Ahtisaari Plan. However, the mission is employed under the UNMIK umbrella which exists only as a historical fact not as an authority in Kosovo's Constitution; therefore, EULEX has no legal basis to exercise its mandate under Kosovo's constitutional arrangement.

Introduction

Once the UN decided that Resolution 1244 would remain in force, the EU neither want to send mission without UN approval nor to refrain from deploying it. The compromise was that EULEX undertook the mandate of the ESDP Rule of Law Mission as envisaged by the Ahtisaari Plan but kept a status-neutral framework under Resolution 1244. Put differently, the UN SC authorised the EULEX mission under the framework of Resolution 1244, which guarantees Serbia's sovereignty over the province, while EULEX is, practically speaking, the ESDP mission envisaged by the Ahtisaari Plan. Therefore, the principal aim of the chapter is to probe the legal schizophrenia of the tripartite 'Ahtisaari Plan-EULEX- Kosovo legal framework' and to investigate its political reasoning and consequences.

However, EULEX mission, the most ambitious and largest of the EU, was accompanied by a smaller one, the International Civilian Office (ICO) headed by ICR. Strangely, this position was coupled with a position of the EU's Special Representative (EUSR). While the EUSR was required to be status-neutral reflecting the EU's official position on Kosovo's status, ICR was appointed as an advocate of its independence. Thus, Pieter Feith (ICR 2008-2012, EUSR 2008-2011) had 'to clarify in what capacity he was speaking about Kosovo, often having to switch between the two roles'.³⁷⁴ This "paradox" will be the point of the departure for analysing the role of the ICR.

International Civilian Representatives

The Ahtisaari Plan envisaged that the ICR and EUSR, a position appointed by the Council of the EU, 'shall be one person'.³⁷⁵ One can reasonably argue that

This created all sorts of strange paradoxes inasmuch as the EUSR was required to take a status-neutral position, in line with the EU's formal position of Kosovo's statehood, whereas the ICR was specifically appointed to oversee Kosovo's institutions and is an advocate of independence.³⁷⁶

However, this is an odd decision only if taken out of the context: 'in shorthand favored by European media, it was a bossy Washington that dictated the EU's support for Kosovar independence from Serbia', yet most of member states 'favor conditional Kosovar independence as the least worst course'.³⁷⁷ And five member states of the EU remain firmly opposed to independence. These diametrically opposing views on Kosovo's statehood produced a split within the EU. Therefore, the EU faced two overlapping challenges: how to forge its position with the Americans and how to reach

³⁷⁴ J. Ker-Lindsay and S. Economides, 'Standards before Status before Accession: Kosovo's EU Perspective', *Journal of Balkan and Near Eastern Studies*, vol. 14, no.1, 2012, p.87.

³⁷⁵ 'Comprehensive Proposal for the Kosovo Status Settlement, art.10, par.5.

³⁷⁶ J. Ker-Lindsay and S. Economides, 2012, p.86-7.

³⁷⁷ E. Pond, 'The EU's Test in Kosovo', *The Washington Quarterly*, vol.31, no.4, 2008, p.98.

consensus among its members in order ‘not to repeat the nightmare of transatlantic split and the rift within the EU’s own ranks over the U.S. invasion of Iraq in 2003’.³⁷⁸

The Janus-faced role of the ICR/EUSR ‘provided fodder for local and international officials to manipulate the sometimes diverging EU/US position on strategic issues’.³⁷⁹ The first face looked to Washington-Brussels harmony regarding supervised independence and lead institutional building agenda, while the second face focused on the common ground of all the EU state members regarding– Kosovo’s European future. Though it was an interim solution, the arrangement softened the harsh rhetoric between Belgrade and Pristina and signalled that the EU had the highest leverage in the province inasmuch the both sides had opted for the European path: as Feith put it: ‘During the institution-building stage the two-hat arrangement was very useful. In the upcoming phase of dialogue between Kosovo and Belgrade, I imagine it will be less so. The EU should be in the lead during that process’.³⁸⁰ Therefore, this ‘strange paradox’ is actually a diplomatic victory for Europe; despite being pushed by America-Russian machinations into a tedious challenge to remain status-neutral and to supervise Kosovo’s independence, the EU successfully balanced this by finding a fine line between the two.

The second often emphasised issue is how the EUSR, a person who holds a status-neutral position, can acquire executive power. The status-neutral position denies Kosovo’s statehood, yet the EUSR remains “governor” of Kosovo. Here, Europe pulled another trick:

During the course of his tenure, the ICR/EUSR did not exercise his powers, other than the powers to make or consent to certain appointments, in a single instance. He was given legal advice in instances where he came close to exercising his powers but then it was decided that local authorities should be involved rather than the ICR issuing an executive order.³⁸¹

³⁷⁸ *Ibid.*

³⁷⁹ P. Feith, *State Building and Exit: The International Civilian Office and Kosovo’s Supervised Independence 2008-2012*, Pristina, International Civilian Office, 2012, p.61.

³⁸⁰ *Ibid.*, p. 64.

³⁸¹ *Ibid.*, p.65.

No doubt that the ICR is virtually Kosovo's governor; however, the EU tactic to address issues through persuasion and dialogue successfully cajoled all parties. Nevertheless, 'as the friction within the EU structures became more apparent and the push for a more magnified EU role became stronger in 2010, the utility of the double-hatted arrangement became less apparent';³⁸² therefore, the EU in May 2006 appointed Fernando Gentilini as the EUSR in Kosovo.³⁸³ Furthermore, Europe linked the office of EUSR with the European Commission Liaison Office, which had a separate status.³⁸⁴ The point where law meets politics often blurs what is considered normal and exceptional. Thus, the complexity of the case invited the ICR/EUSR and Europe to act as moral agents, which is to say as reluctant and benevolent governors of Kosovo: reluctant because the burden was assigned to them and benevolent because the ICR/EUSR did not abuse this power. Put differently, Brussels, while seeking consensus among its member states, successfully balanced aspirations of Serbia's government and representatives of Kosovo Albanians, and all of these without imposing its solutions on the citizens of Kosovo.

It is worth remembering that Brussels inherited the legal chaos and rage of the both ethnic groups. To show support to the Americans and the Albanians, the EU sent the ICO which would start the process of state-building; 'they [Kosovo Albanians] would get recognition from the bulk of EU states and support, including money, as long as they the main provisions of the [Ahtisaari] plan into their law'.³⁸⁵ On the other hand, to appease the Serbian side and the UN (it confirmed Resolution 1244), Brussels employed the EULEX mission under the UNMIK umbrella. This relationship: Ahtisaari Plan- EULEX- Kosovo's legal framework remains the *bête noire* of Europe.

The Triangle: Ahtisaari Plan – EULEX – Kosovo's Legal Framework

If the previous legal puzzle was solved by technically deconstructing legal issues, the relationship Ahtisaari Plan – EULEX – Kosovo's Constitution (the triangle)

³⁸² *Ibid.*, 62.

³⁸³ 'Statement by the High Representative, Catherine Ashton, on the appointment of Fernando Gentilini as EU Special Representative in Kosovo', A 176/11, European Union, Brussels, 6 May, 2011.

³⁸⁴ 'EU upgrades presence in Kosovo, appoints new representative', *Southeast European Times*, 23 December 2011.

³⁸⁵ Judah, 2008, p. 115.

proved to be more challenging. The reason is rather obvious, the Janus-faced role of the ICR/EUSR involved only one party (the EU), left alone reluctantly to exercise its powers. This time, however, all parties had their own aspirations. Therefore, the decision-making process, i.e. framing legal documents with political decisions, became rather complex. In order to understand this legal schizophrenia, we first need to analysis the bilateral relationship of the Ahtisaari Plan and Kosovo’s legal framework.

Kosovo’s constitution states that the Constitution is ‘the highest legal act of the Republic of Kosovo’,³⁸⁶ but it also states that all authorities in Kosovo shall abide by the Ahtisaari Plan which takes precedence over all other legal provisions in Kosovo. If there are inconsistencies between the Constitution and the Settlement, the latter prevails.³⁸⁷ It is not completely unusual that international law serves as the *grundnorm*; however, since the UN SC failed to adopt the Ahtisaari Plan, it is legal only in the eyes of Kosovo’s constitutional framework. Indeed, the Ahtisaari plan envisaged Kosovo’s Constitution and prescribed its standards;³⁸⁸ nevertheless its legal source remains a mystery. In other words, ‘the Ahtisaari Plan does not legally validate Kosovo’s Constitution – the reverse occurs. Although the Ahtisaari Plan authorises the adoption of Kosovo’s Constitution, it had no legal power to do so’.³⁸⁹ This is a peculiar situation in itself; however, the EULEX mission produced further complications.

The Ahtisaari Plan invited an ESDP mission which:

shall assist Kosovo authorities in their progress towards sustainability and accountability and in further developing and strengthening an independent judiciary, police and customs service, ensuring that these institutions are free from political interference and in accordance with internationally recognized standards and European best practices.³⁹⁰

Following the settlement, Kosovo also welcomed ‘an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European-led

³⁸⁶ Constitution of Kosovo 2008, art.16, par.1.

³⁸⁷ *Ibid.*, art.143.

³⁸⁸ Comprehensive Proposal for the Kosovo Status Settlement, General Principles, art.1, par.3.

³⁸⁹ D. Doli and F.Korenica, ‘What about Kosovo’s Constitution’, *The Vienna Journal on International Constitutional Law*, vol.5, no.1, 2011, p. 57.

³⁹⁰ Comprehensive Proposal, General Principles, art.12, par.2.

rule of law mission'.³⁹¹ Subsequently, EULEX confirmed that it 'shall fulfil its mandate through monitoring, mentoring, and advising, while retaining certain executive responsibilities'.³⁹² However, following Kosovo's Declaration of Independence, the UN reaffirmed that Resolution 1244 continued to be in force and the position of the UN on Kosovo's status remained status.³⁹³ Subsequently, the EU employed the mission which: 'The Kosovo organs, institutions and authorities referred to [in] this Joint Action are institutions created on the basis of Resolution 1244'.³⁹⁴ Therefore,

the UNMIK SRSG retained the exclusive executive and legislative authority in Kosovo under Resolution 1244 and changing circumstances on the ground due to Kosovo's declaration of independence merely limited UNMIK's operational but not legal capacity the EU did not want to send a mission without an official approval of the UN.³⁹⁵

Indeed, the UDI not only invites an EUSP but also welcomes 'the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244' (1999).³⁹⁶ This reference includes UNMIK and NATO, since both missions came under the Resolution, they are a historical fact which precede the UDI and cannot be eliminated. This, however, does not indicate that Kosovo accepted the presence of those missions. The UDI would further

invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999)

³⁹¹ Declaration of Independence, art.20.

³⁹² 'The Joint Action Plan of the Council of European Union', 2008/124/CFSP, Mission Statement, 4 February, art.2.

³⁹³ 'Report of Secretary-General on the United Nations Interim Administration Mission in Kosovo', 12 June, 2008, par.4 and annex 1.

³⁹⁴ 'The Joint Action Plan of the Council of European Union', Introduction, art.2.

³⁹⁵ R. Muharemi, 'The EULEX from Perspective of Kosovo Constitutional Law', ZaoRV 70, 2010, p.368.

³⁹⁶ Declaration of Independence, par.5.

and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.³⁹⁷

Here, it is clear that the UDI envisage only NATO presence, while UNMIK ‘does not exist as an authority but merely as a historical fact, which needs to be wound up through succession of arrangements under constitutional law’.³⁹⁸ The Constitution, indeed, guarantees that it will continue to respect international agreements and other acts relating to international cooperation.³⁹⁹ In other words, Kosovo’s constitutional arrangements continue to respect agreements sign by UNMIK, thereby acknowledging its historical importance for Kosovo’s independence, nevertheless eliminating UNMIK’s authority. Bearing in mind that EULEX comes under the UNMIK umbrella, there are two plausible options: either EULEX cannot exercise its authority in Kosovo or the UDI is *ad absurdum*.

The EU employed the mission in February 2008, but it became legalised only in November when the UN confirmed that EULEX assumes ‘responsibility in areas of policing, justice and customs, under the overall authority of the United Nations... and in accordance with resolution 1244 (1999)’.⁴⁰⁰ Therefore, the EULEX that arrived in February was the exact ESDP mission envisaged by the Ahtisaari Plan and as such was welcomed by Kosovo’s institutions. However, with legalisation, different responsibilities came: ‘EULEX will fully respect Security Council resolution 1244 (1999) and operate under the overall authority and within the status-neutral framework of the United Nations’.⁴⁰¹ Kosovo’s representatives emphasised that Kosovo was in favour of EULEX deployment only,

‘in accordance with the mandate foreseen in Declaration of Independence, the Comprehensive Proposal for a Kosovo Status Settlement, the Constitution of the Republic of Kosovo, Kosovo’s legislation, the European Union Joint Action of 4 February 2008 and Kosovo’s institutions’ invitation to EULEX’.⁴⁰²

³⁹⁷ Ibid.

³⁹⁸ Muharemi, p.369.

³⁹⁹ The Constitution 2008, art.145, par.1.

⁴⁰⁰ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008, S/2008/692, art.23.

⁴⁰¹ Ibid., par.50.

⁴⁰² Ibid., Annex I, par.1.

They further asserted that Kosovo would cooperate with EULEX if the mission respects the sovereignty and territorial integrity of Kosovo.⁴⁰³ However, whatever was the role of the mission, it is clear that EULEX had become the status-neutral mission operating under the UNMIK authority on 12 November 2008. This is no trifling matter as ‘of the moment that EULEX was placed under the status neutral framework work of Resolution 1244 it had no legal basis to exercise its mandate’⁴⁰⁴ under Kosovo’s constitutional arrangements.

Therefore, this legal schizophrenia is as follows: the Ahtisaari Plan serves as *grundnorm* of Kosovo’s Constitution though the Ahtisaari Plan does not produce any consequence in international law since it is validated only by Kosovo’s Constitution but not UN SC: Furthermore, the Ahtisaari Plan takes precedence over all Kosovo’s legal provisions. Following the Ahtisaari Plan, Kosovo’s representatives invited the European mission; however, that mission was legalised in the UN and comes under the umbrella of UNMIK and Resolution 1244. The crux of this puzzle is the fact that Kosovo’s Constitution recognises UNMIK only as a historical fact that precedes institutional arrangement. Put differently, UNMIK does not -exist in Kosovo’s legal documents despite the fact that it maintains the position of the exclusive executive and legislative authority in Kosovo.

There are, however, two solutions to this puzzle, one legal and other political. The first option states Kosovo’s constitutional arrangement can be viewed as *ad absurdum* since its *grundnorm* is an internationally non-binding document; thus the EULEX mission should not abide by the Constitution. This legalistic argument seems inane if one takes into consideration that 23 EU member states already recognise Kosovo. The second option is more practical; it does not deny the schizophrenic nature of the issue: either the Constitution is absurd or EULEX has no legal basis upon which to exercise its authority. Nevertheless, this line of thought projects that the mission’s status-neutrality is ultimately meaningless and interprets it as a ‘sign of strong political support for Kosovo from the EU as well as the United States’.⁴⁰⁵ This idea further implies that the mission will, under a veil of neutrality, enable Kosovo’s institutions to function. However, this will do little to convince five state members to recognise

⁴⁰³ Ibid., Annex I, par.3.

⁴⁰⁴ Muharemi, p.372-3.

⁴⁰⁵ T. Loza, ‘How neutral is status-neutrality’, Politico, 28 November, 2008.

Kosovo's statehood inasmuch as they are not concerned with Pristina's ability to govern the territory rather than the case might open a Pandora box. Put bluntly, even if Kosovo achieves full functionality under EULEX, the European rift remains. A necessary but unpleasant choice was made to appease the main ally – the USA, to buy peace on its own turf, and to fillip the Serbs.

The result is an unhappy attempt to accommodate American and Russian demands in which EULEX had to function simultaneously as a state-building mission according to the Ahtisaari Plan and a mission that respects Serbia's sovereignty since it comes under the UN auspices. It is predicament left to the Europeans to resolve.

Conclusions

Negotiations concerning Kosovo's status place Europe in an odd position; while maintaining the status-neutral mission, member states of the EU had already fixed their positions on Kosovo's statehood. The first challenge imposed by American-Russian machinations was the double-hatted arrangement of the ICR and the EUSR. On one hand, the ICR was appointed to monitor Kosovo's independence while the EUSR was to be status-neutral reflecting the official position of the EU. This presented two related challenges for Europe: how to forge its position with the Americans and how to build consensus among its member states. In other words, to establish harmony between Brussels and Washington, while finding common ground among members. Simultaneously, the arrangement appeased the Serbs and the Kosovo Albanians and sent a clear message that Europe has the will and power to be a leader on its own turf.

If the first challenge was a great diplomatic victory, the second is an enduring problem for Europe: maintaining a status-neutral mission while helping Kosovo to build institutions. European officials rightly decided to overlook legal issues which helped the EU to focus on relieving the hardships of ordinary people in the province and facilitating future political negotiations. Resolving the future status of Kosovo seems to be a precondition for its welfare and security. This precondition and Europe's response to it will be explored in the chapter 8.

Chapter 6

ICJ: WHAT DOES THE DECISION REALLY MEAN?

Abstract

This chapter argues that the ICJ's narrow interpretation of the question 'is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law' promoted stability and facilitated further negotiations of Kosovo's political status under auspices of the EU. Though the Court missed the historic opportunity to address highly important questions such as self-determination or remedial secession, it indicated that Kosovo and Serbia should seek a solution through political channels rather than legal puzzles. The decision showcased the advantages of a European approach based on dialogue and diplomacy over the American and Russian crude support of their allies and elevated the European position in the region.

Introduction

After the unilateral declaration of independence in 2008, the question of Kosovo's statehood moved from diplomacy to a legal battleground. On 8 October 2008, the General Assembly of the UN adopted resolution 63/3 in which it requested the International Court of Justice (ICJ) to render an advisory opinion on the question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law'?⁴⁰⁶ Serbia, the sponsor of this resolution, stated that 'the Court would prevent the Kosovo crisis from serving a deeply problematic precedent', and explained that the resolution 'would also

⁴⁰⁶ International Court of Justice, Request for Advisory Opinion: transmitted to the Court of pursuant to General Assembly resolution A/RES/63/3 of 8 October 2008, 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo', 2008.

serve to reaffirm a fundamental principle: the right of any Member State of the United Nation to pose a simple, basic question on a matter it considers vitally important to the Court'.⁴⁰⁷

In retrospect, we can ask whether Serbia posed the right question: 'the real issue was not so much whether Kosovo has broken international law by declaring independence but whether other countries have violated international law by recognizing it'.⁴⁰⁸ Answering why Serbia did not ask the 'essential question', Vuk Jeremić, then a minister of affairs, replied that such a question 'carried the danger of eliciting a reply that would have been highly adverse for Serbia'.⁴⁰⁹ Serbia's main representative at The Hague, Saša Obradović had a similar explanation: 'considering all circumstances I think we should not be naive and believe that the outcome would have been different'.⁴¹⁰ It seems that Belgrade either doubted the competence of Serbian legal practitioners or the impartially and conscientiousness of the ICJ judges. This was viewed as a small win for Serbia— if nothing else, a hearing would buy two years for the Serbs and the decision was non-binding.

The resolution won approval by a wide margin, even Britain abstained from the vote in order to show respect to the ICJ.⁴¹¹ The Americans, however, called the request 'unnecessary and unhelpful since independence for Serbia's former autonomous province was irreversible'.⁴¹² However, the ICJ decision was declared as moment of truth: 'If the ICJ sides with Serbia, Kosovo could be pushed into negotiating a settlement. The opposite could see more countries recognising its independence'.⁴¹³ Though non-binding, it was clear that the decision would 'provide a framework for diplomats to try to establish a working relationship between Serbia and Kosovo'⁴¹⁴ and that any outcome would be historic since it was the first time the ICJ had ruled on a case of territorial secession. Both Belgrade and Pristina discarded the option that the decision might alter their positions; however, Ker-Lindsay noted that

⁴⁰⁷ '22nd plenary meeting of the sixty-third session of the General Assembly', A/63/PV.22, 8 October, 2008, p. 1.

⁴⁰⁸ J. Ker-Lindsay, 'Was Kosovo's Declaration of Independence legal? Is it a State?', James Ker-Lindsay Youtube Channel, Jul 17, 2020.

⁴⁰⁹ V. Gligorov, 'Questions and answers', Peščanik, 30 July, 2010.

⁴¹⁰ Ibid.

⁴¹¹ N. MacDonald, 'Serbia wins right to challenge Kosovo at ICJ', Financial Times, 8 October, 2008.

⁴¹² Ibid.

⁴¹³ 'ICJ to rule on legality of Kosovo's independence', BBC, 22 July, 2010.

⁴¹⁴ Ibid.

the ruling in favour of Serbia would put European states that had recognised Kosovo's independence in a challenging situation:

Although everyone says it is an advisory opinion, you can't just say that it doesn't matter. It has tremendous significance. This is a principle organ of the United Nations. Countries such as Britain, France, Germany, and the members of the European Union have based the European Union's whole ethos on respect for international law.⁴¹⁵

On 22 July 2010, the long-awaited ruling stated that Kosovo's declaration did not violate international law; however, the ICJ Court did not clarify whether Kosovo had the right to independence. Besides the prediction that the decision would bolster recognition, it was also expected that the ruling would 'have profound ramifications on the wider international stage'.⁴¹⁶ Ten years after there are no indications that the ruling increased demand for recognition by other conflicted entities similar to Kosovo. Therefore, the principal inquiry of this chapter is 'what diplomatic consequences did the ICJ decision have on Kosovo?' To answer this question, arguments of all interested parties will be analysed and the decision of the Court explained.

Arguments

The debate had three strands. The first revolved around the question of whether Kosovo is a *sui generis* case. States arguing in favour of Serbia expressed worries that even if Kosovo were labelled as a unique case, other entities would see their situation as analogous and act accordingly. On the other hand, states in favour of the Kosovo case listed 10 distinct arguments why Kosovo is a unique case; these will be analysed in detail. The subject of the second dispute was whether the UDI could be justified under the principle of self-determination or the doctrine of remedial secession. Supporters of Kosovo's case viewed self-determination as realised internally without secession. Detractors argued that self-determination is reserved for a 'people'.

⁴¹⁵ 'International Court of Justice Rules on Kosovo Independence', Radio Free Europe/Radio Liberty, 22 July, 2010.

⁴¹⁶ 'Kosovo's independence is legal, UN court rules', The Guardian, 22 July, 2010.

The debate I: Sui generis?

I - The USA, Ireland, Japan, and Poland argued that Kosovo's status in the SFRY 1974 Constitution makes Kosovo a unique case. According to the US written statement (WS):

while still a part of Serbia, after 1974 Kosovo was acknowledged to possess sovereign rights and to have joined Serbia and Yugoslavia of its own volition. Kosovo enjoyed constitutional rights and legal powers and exercised governing authority at all levels of government that were largely (and in important ways entirely) identical to those of the six republics.⁴¹⁷

The Japanese WS reiterated the same argument that Kosovo enjoyed 'considerable degree of autonomy, almost equivalent to that of the six republics'.⁴¹⁸ Ireland also concluded that Kosovo was indeed a *sui generis* case since its 'autonomy was not limited to autonomy within Serbia'.⁴¹⁹ This argument is also used in the UDI: 'Our independence brings to an end the process of Yugoslavia's violent dissolution'.⁴²⁰ It is clear, however, that the Constitution guaranteed the right to self-determination only to peoples (*narod*) and not to nationalities (*narodnost*), the term reserved for minorities in the Federation.⁴²¹ 'Kosovo Albanians apparently wanted, through acquiring the status of Republic for 'their' territorial unit, to also gain the status of a constituent people'⁴²², and therefore acquire the right to self-determination.

II - Estonia, Luxembourg, and the UK advanced the claim that Kosovo manifests *sui generis* in the context of violent break-up of Yugoslavia.⁴²³ It remains a mystery why this argument applies only to Serbia and Kosovo and not to other entities composing successor states of the SFRY.

⁴¹⁷ Written Statement (WS) of the USA, p.7.

⁴¹⁸ WS Japan, p.6.

⁴¹⁹ WS Ireland, p.10.

⁴²⁰ Kosovo Declaration of Independence, Pristina, 17 February 2008, par.10.

⁴²¹ The Constitution of the Socialist Federative Republic of Yugoslavia, Belgrade, 1974, Basic Principles, art.1.

⁴²² Jovanović, 2011, p.9; See also: WS Serbia, p.73-74.

⁴²³ WS Estonia, p.12; WS Luxembourg, p.1; WS UK, pp.11-12.

III – ‘Massive violence and repression that took place in Kosovo in the period up to and including 1999, which would have justified the secession on the basis of self-determination’.⁴²⁴ In other words, Kosovo is *sui generis* because of unprecedented violation of human rights and humanitarian law. As a rebuttal to this point, it was said that serious and persistent human rights violation occurred across the world but this ‘has not lead the States favouring Kosovo’s secession... to adopt the same policy in relation to these other parts of the world’.⁴²⁵

IV – The fourth reason is the durability of the international administration in Kosovo;⁴²⁶ however, none of the states explained how Kosovo differs from other entities under international administrations which remain as part of sovereign states.

V – France argued that Serbia had not governed the province since 1999 which resulted in ‘Serbia’s sway over Kosovar territory and its population was irreversibly transferred to the Kosovar authorities’.⁴²⁷ Serbia’s reply, here, seems to be repetitive and weak: ‘Of course, this is only France’s perception of things. If this is indeed the case, then there would have been no need to negotiate the future status of the territory’.⁴²⁸ It is clear; however, that “irreversibility” does not exclude status talks since it does not imply independence but merely that Kosovo’s status cannot be what it was prior to 1999. On the other hand, Argentina, while admitting ‘irreversibility’, emphasised that it has never been decided that the ultimate goal would be independence.⁴²⁹ Judging from France’s explanation (or lack thereof), it appeared that France’s legal team viewed status talks only as a path to Kosovo’s independence.⁴³⁰

VI – The sixth argument, also developed by France’s legal experts, is tied to the previous one: it states that Resolution 1244 did not prohibit the option of Kosovo’s independence, nor did it require Serbia’s consent on the statehood; therefore ‘Kosovo’s independence is not really a classical example of secession’.⁴³¹ Surely, Kosovo’s independence might be plausible option; however, this does not justify this

⁴²⁴ WS Estonia, p.12; See also WS Poland, p.23.

⁴²⁵ Written Comment (WC) Serbia, p.73.

⁴²⁶ WS France, p.30; WS Japan, p.7; WS Ireland, p.11.

⁴²⁷ WS France, p.31.

⁴²⁸ WC Serbia, p.72.

⁴²⁹ WS Argentina, p. 17.

⁴³⁰ They completely failed to provide an explanation: ‘the existence of the State of Kosovo has not been put before the Court’. WC France, p.3.

⁴³¹ WS France, p.35; See also WS Estonia, p.12.

solution nor indicate that independence is ultimate objective. In principle, it is true that the future status does not require Serbia's consent; however, bearing in mind that any solution requires the approval of the UN SC and that Russia discards any solution without Serbia's blessing, in reality, Kosovo's independence requires Serbia's consent.

VII – Following the failure of negotiations, independence emerged as the only viable political option:

after more than a year of negotiations, including 17 sessions of direct discussion and visits by 26 expert missions to Belgrade and Pristina, it became clear that a mutually acceptable solution was not possible, while the status quo was becoming still less sustainable.⁴³²

Or as Germany put it 'no other avenue left open, unilateral action is *ultima ratio*'.⁴³³ While Romania stressed that unilateral right of secession is not recognised by international law,⁴³⁴ the UK argued that there is neither 'general law rule requiring negotiations to continue'.⁴³⁵ On the other hand, Serbia once again referred to other cases such as Cyprus, arguing that 'to accept such an argument would be tantamount to accepting that if a mediator's proposal is not accepted by one side, the other can simply impose it on the other'.⁴³⁶

VIII – Kosovo is *sui generis* because the majority of population desired independence.⁴³⁷ Here, the rebuttal is twofold: only a population that constitutes a 'people' is entitled to external self-determination, and Serbia showed that this is not the case for Kosovo's population.⁴³⁸ Second, 'a people determining its external political status must be read as the expression of external political status for the whole population of a State through the government of the existing State'.⁴³⁹ In other words, even if Kosovo's population constitutes a people, the approval of parental state is needed in order to secede.

⁴³² WS France, p.37;

⁴³³ WS Germany, p.27.

⁴³⁴ WS Romania, p.29.

⁴³⁵ WS UK, p.113.

⁴³⁶ WC Serbia, p.74.

⁴³⁷ WS Ireland, p.33; WS Japan, p.7.

⁴³⁸ WS Serbia, p. 192.

⁴³⁹ WS Cyprus, p.34.

IX – France put forward the claim that the purported absence of solution leads to Kosovo’s independence.⁴⁴⁰ Serbia responded that this was a ‘hollow’ claim: ‘in any events, the fact that some States consider that independence is the best solution for the province of Kosovo does not transform this political opinion into a legal ground, no matter how powerful and rich these State are’.⁴⁴¹

X – France’s legal team made another questionable and possibly inaccurate assertion:

bearing the above factors in mind, the United Nations, like the European Union, entirely legitimately continued fully to support and to assist Kosovo’s authorities, thereby demonstrating, among other things, that they never considered the declaration of independence a threat to international peace and security in the region.⁴⁴²

As already established, the UN re-confirmed Resolution 1244 and that EULEX had been employed under the umbrella of the UN; therefore, the UN was and remains status-neutral. On the other, ‘even if the European Union support were true, which is not the case, this would not constitute a legal basis whatsoever. Regional organisations cannot dispose the territory of their member States, all the more of non-member states’.⁴⁴³

In short, states in favour of Serbia successfully jettisoned all the arguments for Kosovo as a unique case: this is the best summarised in Argentina’s statement that that only a declaration that ‘is in conformity with international law, it would constitute a precedent’.⁴⁴⁴ Moreover, Cyprus warned that ‘where the Kosovo-recognising States see the only difference, other States might see other situations as identical and act accordingly. The weakening of the protection of the principles of territorial integrity and non-intervention could hardly be avoided’.⁴⁴⁵ Put differently, even if the international community (including Serbia) agreed that Kosovo is *sui generis*, there is

⁴⁴⁰ This argument overlaps with the Argument VII. See: WS France, p.37-44.

⁴⁴¹ WC Serbia, p.75.

⁴⁴² WS France, p.29.

⁴⁴³ WC Serbia, p.75.

⁴⁴⁴ WS Argentina, p.26; Similar point produced Bolivia’s legal team: ‘if there is an acceptance of a unilateral declaration of Kosovo’s independence without having a clear foundation of international law to analyse and judge in every case, we would be establishing a bad precedent’. WS Bolivia, p.1.

⁴⁴⁵ WC Cyprus, p.19.

no guarantee that entities in similar circumstances would abstain from seeking status as a unique case.

Debate II: Self-determination and Remedial Secession?

During the process, a common assumption was that self-determination should be enforced without the creation of a new state. Internal self-determination was defined representation,⁴⁴⁶ respect for human rights,⁴⁴⁷ participation,⁴⁴⁸ and territorial integrity.⁴⁴⁹ On the other hand, external self-determination was viewed as a right of a people to their constitution status on the international stage. States agreed on definitions; however, the matter of dispute remained the scope of the internal right to self-determination and whether Kosovo Albanians or the entire population of the province, are a ‘people’. It seems few Kosovo-backer states were sceptical that self-determination could ever imply independence, therefore, the Court was requested to ignore the concept of self-determination when ruling on the final decision.⁴⁵⁰ However, in the final decision, the Court did not clarify this concept which triggered an avalanche of criticism.

The first dispute was whether territorial integrity should prevail over self-determination. All states accepted the prevalence of territorial integrity with the exception of Slovenia, which argued that ‘self-determination is the essence of democracy’ while the principle of territorial integrity ‘has no direct link to democracy’.⁴⁵¹ However, states arguing in favour of Kosovo’s case introduced the concept of “remedial secession” as an *ultima ratio* exception. In other words, Kosovo is an abnormal situation in which the population had no right to internal self-determination (due to mass human right violation); thus Kosovo Albanians “earned” right to exercise external self-determination. As Finland argued, citing the Commission of Jurists on the Aaland Islands, ‘the right of self-determination may not

⁴⁴⁶Netherlands stated that ‘the existence of a government that does not represent the whole people belonging to the territory’ is a reason to promote the right to self-determination. WS Netherlands, p.9.

⁴⁴⁷ ‘Respect for human rights and the assurance of effective participation in the internal affairs of a State could represent, on the other hand, an authentic solution for maintaining the integrity of the principle of self-determination’, WS Romania, p.23.

⁴⁴⁸ See: Albanian made the case for self-determination based on ‘the cultural, economic and political apartheid which Kosovar Albanians were subjected’. WS Albania, p.20.

⁴⁴⁹ Germany linked territorial autonomy and self-determination by citing the Final Act of the Conference on Security and Co-operation. See: WS Germany, p.33.

⁴⁵⁰ Albania, Austria, Denmark, Kosovo, and the UK.

⁴⁵¹ WS Slovenia, p.2.

normally be invoked against existing States, the Commission held that where the boundaries of existing States have become contested [...] self-determination may emerge as a criterion for future territorial settlement'.⁴⁵² It is worth emphasising that Kosovo-backer states requested external self-determination because internal self-determination would prevent Kosovo from achieving independence. Serbia, on the other hand, insisted that remedial secession is untenable under international law:

Those States advancing 'remedial secession' doctrine have been unable to justify their position in legal terms, and have simply taken the doctrine for granted and have failed to explain how this doctrine forms part of positive international law. The simple reason for this is that it does not.⁴⁵³

Cyprus also argued that the principle 'has not emerged as a rule of customary law'.⁴⁵⁴ Though the principle does not constitute international law, it is a significant tool in international relations to be dismissed by mere rhetoric. However, states arguing in favour of Serbia seemed to be right and remedial secession is not applicable to Kosovo. It is worth observing that representatives of the Kosovo Albanian voluntarily withdrew from Serbia's institutions which was a misuse of constitutional rights;⁴⁵⁵ thus conditions for remedial secession were not present. Nevertheless, even if such conditions existed 'allegations of ill-treatment several years ago cannot be a justification for allowing the dismemberment of a State now'.⁴⁵⁶ Therefore, the question is whether conditions were present on 17 February 2008 (the date of the UDI). Undoubtedly, under Resolution 1244, Kosovo Albanians enjoy widest possible autonomy, and 'there is no reason to believe that Kosovo, at the moment of the DOI [declaration of independence], have been under Serbia's control'.⁴⁵⁷

Germany claimed that:

The reality is that the very legacy of the conflict, in particular the atrocities of the late 1990s, make a return of Serb rule in Kosovo unthinkable. Certainly, in the eyes of the Kosovars, if not in the eyes

⁴⁵² WS Finland, p.4; See also: WS Germany, p.34.

⁴⁵³ WC Serbia, p.132.

⁴⁵⁴ WS Cyprus, p.37.

⁴⁵⁵ See: Chapter 2.

⁴⁵⁶ WS Cyprus, p.38.

⁴⁵⁷ WS Romania, p.44.

of the international community, the viability of a solution that would maintain Serb sovereignty over Kosovo could not be established, by acknowledging that ‘the Serbia of today is not the Serbia of the past’.⁴⁵⁸

In other words, even if the remedy were not a viable solution, the right to secede remains. The assertion is not completely bizarre, but there are questions such as can a ‘tag price’ be put on the right to secede, e.g. how long and intense must discrimination be, and how is it measured, etc.

The second dispute raised the question whether there is a Kosovar people: put differently, whether Kosovo Albanians constitute a people entitled to self-determination. The Netherlands’ legal team linked the UDI with Resolution 1244 and the Rambouillet accords, while the Resolution envisaged that the final settlement for Kosovo must be based on the ‘will of the people’, the declaration reflects this by referring to people in the Preamble; therefore, Kosovars are ‘people’.⁴⁵⁹ France developed a similar claim based on the Rambouillet accords that independence was declared only after ‘negotiations came to a complete halt’ and it is the ‘genuine expression of the will of the people of Kosovo’.⁴⁶⁰ Albania went a step further asserting that the UN recognised Kosovo as a specific entity with specific people since it proclaimed that ‘Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes’.⁴⁶¹ Argentina had a rather different interpretation of the reference to the ‘will of the people’, it stated that the reference ‘by no means amounts to a recognition of a ‘people’ in the legal sense’, based on the fact that the Rambouillet accords refer to the Helsinki Final Act ‘which strongly stressed respect of the territorial integrity’.⁴⁶² Indeed, respect for the “will of people” is included; however, it is the only one of the requirements for the final settlement:

an international meeting shall be convened to determine a mechanism for a final settlement, on the basis of the will of people,

⁴⁵⁸ WS Germany, p.36.

⁴⁵⁹ WS Netherlands, p.7.

⁴⁶⁰ WS France, p.29.

⁴⁶¹ WS Albania, p.44.

⁴⁶² WS Argentina, p.39.

opinion of relevant authorities, each Party's effort regarding of this Agreement, and Helsinki Final Act...⁴⁶³

Switzerland also argued that Kosovars are a people because Kosovo is a non-self-governing territory as defined by James Crawford.⁴⁶⁴ Though well-developed, the argument is ultimately incorrect as Kosovo has never been inscribed as such entity by the UN.⁴⁶⁵ Interestingly, while France, Netherlands, and Switzerland argued that the entire population of Kosovo constitute a 'people', Albania and authors of the UDI viewed only Kosovo Albanians as a 'people':⁴⁶⁶ 'the people of Kosovo are distinct, being a group of which 90 percent are Kosovo Albanians, who speak the Albanian language, and who mostly share a Muslim religious identity'.⁴⁶⁷ Leaving aside the fact that the UN has never qualified peoples in this manner, this stance might be characterised as discriminatory, or as Serbia put it: 'an attempt to transform an ethnic/linguistic/religious minority within a State into majority within its own new State'.⁴⁶⁸

To summarise, the population of Kosovo neither can be considered as a people nor is the principle of remedial secession applicable to Kosovo. Firstly, 'people' from the Rambouillet accords is misleading if taken out of the context; however, it is clear that the accords do not refer to the population of Kosovo as the people since the accord expresses respect to territorial integrity. Furthermore, even if Kosovo's population is the people, this does little to justify secession since the 'will of people' is only one of requirements for the final settlement. Secondly, conditions for remedial secession were not met; nevertheless, even if we assume that Kosovo is a remedial case, past ill-treatment provides no justification for a remedy in 2008 when Kosovo had already enjoyed substantial autonomy under the interim administration.

⁴⁶³ Security Council, 'Letter dated 4 June 1999 from the permanent representative of France to the United Nations addressed to the Secretary-General', S/1999/648, 7 June, 1999, chapter 8, par.3; quoted from WS Argentina, p.39.

⁴⁶⁴ 'when the inhabitants [of the territories forming distinct political-geographical areas] are arbitrarily excluded from any share in the government either of the region or of the State to which they belong, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing', J. Crawford, *The Creation of States in International Law*, Oxford, Oxford University Press, 2006, p.127, quoted from WS Switzerland, p.20.

⁴⁶⁵ See Serbia's arguments: WS Serbia, p. 128-9.

⁴⁶⁶ WS Albania, p.41-2.

⁴⁶⁷ WS Authors of the UDI, p.157-8.

⁴⁶⁸ WC Serbia, p.138.

Debate III: The UDI is in Accordance with International Law?

Serbia and its supporters chalked up two victories in the previous debates; however, the third debate overshadowed these since it was the only one directly related to the question.⁴⁶⁹ The Court's decision not to address the two previous debates elicited outrage from academics and legal practitioners (the decision and this matter will be discussed in the next part of the chapter).

First, the USA successfully nullified the two debates by proving that 'territorial integrity is a principle of international law that governs conduct between and among states, not actions of non-state actors within states'.⁴⁷⁰ Serbia indeed attempted to persuade the Court that respect for territorial integrity applies not only to states: Resolution 1514 'called for an end to armed action against dependent peoples and emphasized that the 'integrity of their national territory shall be respected'.⁴⁷¹ However, Resolution 1514 is directed to the decolonisation process not to duty of non-state actors. In other words, the Court neither needed to decide whether Kosovo had the right to self-determination nor whether Kosovo was a *sui generis* case, but only whether the declaration was in accordance with international law. The pressure was on supporters of Serbia, or as Denmark put it: 'It is for those maintain that the declaration is unlawful to show the existence of such a prohibitive rule'.⁴⁷²

Serbia developed the argument that Resolution 1244, which guarantees Serbia's territorial integrity, imposes obligations on all relevant actors, including Provisional Institution of Self-Government (PISG).⁴⁷³ However, it remained contested whether the UDI was an act of the PISG⁴⁷⁴ since authors of the UDI claimed that these institutions did not issue the declaration: it was 'an act of the democratically-elected representatives of the people of Kosovo meeting as a constituent body to establish a new State'.⁴⁷⁵ Serbia was wrong to conclude that the UDI 'challenged and contravened

⁴⁶⁹ "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

⁴⁷⁰ WC USA, p.15; See also authors who support the claim, *ibid.*, p.15-6.

⁴⁷¹ WS Serbia, p.155.

⁴⁷² WS Denmark, p.3.

⁴⁷³ WC Serbia, p.152-3.

⁴⁷⁴ The PISG are the Assembly, the President, the Government, the Courts, and other bodies and institution as set in the Constitutional Framework.

⁴⁷⁵ WS Authors, p. 109.

the supreme administration of UNMIK⁴⁷⁶ - the UNMIK interim administration has remained the exclusive executive and legislative authority in Kosovo (see the previous chapter on Legal Schizophrenias): it is also significant that the Secretary-General refused to annul the declaration.

China, on the other hand, argued that the UN position with respect to secession is 'unequivocal' since Secretary-General U Thant said: 'the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State'.⁴⁷⁷ Put differently, China asserted that this is an argument for which the UN allows no partition of its members. Britain dismissed the claim on the grounds that the UN engagement in Kosovo was of a different nature, i.e., to protect population: 'international law contains no rule (outside the colonial context) giving secession precedence over preservation of the existing boundaries of States. But territorial integrity is not a guarantee against internal division, and separation'.⁴⁷⁸

By the same token, Egypt and Iran stated that international law regulates non-states within a state and prohibits them from seeking to break existing borders of a state. Iran gave an example of Comorian Island of Mayotte where:

although there was a non-international armed conflict going on within Comoros aiming at separation of the island of Mayotte, and a referendum was held in Mayotte the result of which was the will of the majority of inhabitants of the island not to join the newly independent state of Comoros, the General Assembly of the United Nations in many resolutions for nearly two decades affirmed the unity and territorial integrity of the Comoros, and the sovereignty of the Islamic Federal Republic of Comoros over the Mayotte island.⁴⁷⁹

Egypt recalled the similar situation in Sudan and the Democratic Republic of Congo where the UN addressed numerous resolutions confirming the respect for territorial integrity.⁴⁸⁰ Britain admitted that international law favours the territorial

⁴⁷⁶ WS Serbia, p.312.

⁴⁷⁷ WS China, p.7.

⁴⁷⁸ WC UK, p.20.

⁴⁷⁹ WS Iran, p.5.

⁴⁸⁰ WS Egypt, p.12.

integrity; however, that is ‘not the same as saying that international law contains a rule prohibiting secession’.⁴⁸¹

Finally, Serbia’s team explained that the interim administration ‘could only be altered by a new Security Council resolution’.⁴⁸² This is only partially true, the resolution authorised UNMIK to maintain peace and lead the process of the final settlement as the USA rightly observed: ‘the central legal purpose of a new resolution would have been to end the mandate of the international civil presence established in 1999 and to have UNMIK complete its operations in Kosovo’.⁴⁸³

This debate was clouded by misunderstandings: while Kosovo supporters asked Serbia-backer states to furnish evidence of international law prohibition of a declaration, the latter explained at length that the PISG issued the declaration, and named various cases where the UN regulated non-state actors within states. Serbia, and to a lesser extent its supporters, paid a high price for playing ‘Chinese whispers’ – the Court decided that the declaration had not violated international law.

The Decision

The ICJ issued the long-awaited decision on 22 July 2010, as we have already seen, that Kosovo’s declaration of independence had not violated international law. There were three options: (a) a narrow reading which meant that the Court would examine ‘the legality of purely verbal act’; (b) a moderate reading which would require examination of ‘the lawfulness of the secession as such’; (c) an expansive reading which besides the lawfulness of secession would consider ‘the consequences of its findings of (il)legality’.⁴⁸⁴ The Court opted for the narrow reading:

In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask

⁴⁸¹ WS UK, p.21.

⁴⁸² WS Serbia, p.287.

⁴⁸³ WC USA, p.42.

⁴⁸⁴ M. Milanović, ‘Kosovo Advisory Opinion Preview’, EJIL: Talk, July 22, 2010.

about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.⁴⁸⁵

However, the Court made a distinction between a ‘declaring’ and ‘effective’ independence by stating that sometimes a ‘declaration resulted in the creation of a new State, as other it did not.’⁴⁸⁶ Muharremi called this distinction ‘artificial’ and not convincing since it ‘does not reflect the process of creating a new state, and it especially does not reflect the process of state-building in Kosovo’.⁴⁸⁷ Christakis went a step further by arguing that the Court eschewed the question whether Kosovo has the ability to effectively control its territory and had no courage to even mention the criteria of statehood.⁴⁸⁸

This narrow reading, not surprisingly, prompted a fair measure of outrage among legal experts. They were tempted to ‘blame the Court for having taken the easy route by focusing on the narrow question of whether international law prohibits unilateral declaration of independence’.⁴⁸⁹ Besides omitting statehood of Kosovo, the Court said nothing on secession itself: ‘The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence’.⁴⁹⁰ The Court, also, failed to address the questions of determination outside colonial context and the concept of remedial secession. This suggests that international law has little to say on relations between states and non-state actors, and ‘the continuous tension in the international

⁴⁸⁵ International Court of Justice (Kosovo Opinion), ‘Accordance with international law of the unilateral declaration of independence in respect of Kosovo’, 22 July, 2010, par.51.

⁴⁸⁶ *Ibid.*, par.79.

⁴⁸⁷ R. Muharremi, ‘A Note on the ICJ Advisory Opinion on Kosovo’, *German Law Journal*, vol.11, no.8, 2010, p.874.

⁴⁸⁸ T. Christakis, ‘The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?’, *Leiden Journal of International Law*, vol.24, no.1, 2011, p.75.

⁴⁸⁹ D. Richemond-Barak, ‘The International Court of Justice on Kosovo: Missed Opportunity or Dispute “Settlement”’, *Hague Yearbook of International Law*, vol. 23, 2011, p.2.

⁴⁹⁰ Kosovo Opinion, par.56.

legal system's ability to provide rules on claims to external self-determination' persists.⁴⁹¹

What, then, did the Court say? The UDI did not violate international law: as Judge Simma put it, this

underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the 'Lotus' Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order.⁴⁹²

He admitted that by upholding the principle, 'The Court fails to seize a chance to move beyond this anachronism, extremely consensualist vision of international law'.⁴⁹³ Legal experts express different worries; the first issue is whether the Court extended the idea that one consecrates a freedom to act unless explicitly prohibited by international law to be 'applicable as a general principle of law, which is not confined to relations between states, but which also applies to entities which could be considered states in *statu nascendi*'.⁴⁹⁴ The other worry is that separatist movements can misread the decision as 'Lotus eaters' because 'the disillusion could be great'.⁴⁹⁵

The Court also implicitly refused the idea of Kosovo is a unique case:

Nowhere in the advisory opinion did the Court treat Kosovo as a 'unique' case. The Court accepted to examine the lawfulness of the declaration of independence of Kosovo both under general international law and under the *lex specialis* created by Security Council Resolution 1244. This is very important because it demonstrates that international law cannot be waived as a matter of political discretion and convenience.⁴⁹⁶

⁴⁹¹ E. Ćirković, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence', *German Law Journal*, vol.11, no.7/8, p.912.

⁴⁹² Declaration of Judge Simma, p.478.

⁴⁹³ *Ibid.*, p.479.

⁴⁹⁴ Muharremi, p. 876.

⁴⁹⁵ 'In *Odyssey IX*, Homer speaks about the lotophagi, who were a race of people from an island near North Africa. The lotus fruits and flowers, primary food of the island, were delicious, but were narcotic and addictive, causing the people who eat them to sleep in apathy'. Christakis, p.80.

⁴⁹⁶ *Ibid.*, p.81.

But what does indeed the decision mean? Why did the Court decide to take the narrow reading of the question? Widespread interpretation is that the opinion is a clear win for the Kosovo Albanians and their supporters: Hajredin Kuci, then the deputy prime minister of Kosovo, opened a bottle of champagne and toasted for ‘justice, a victory for Kosovo and the region as a whole’ while in Belgrade there ‘was bitter disappointment’.⁴⁹⁷ While perceived as a grandiose victory for the Kosovo Albanians, Serbia’s loss, and a missed opportunity for academics and legal practitioners, in reality, the Court wanted to reward Serbia too:

The Court engaged in a delicate exercise, designed to avoid further fuelling the tension between Kosovo and Serbia: on one hand, it held that nothing in international law prevented the declaration of independence; on the other hand, it said absolutely nothing regarding the status of Kosovo. With time, however, Kosovo’s win appeared more perceived than real, and each of the interested parties were able to claim a small victory.⁴⁹⁸

Put differently, the ICJ opted for the least antagonizing solution, whereas the declaration does not violate international law and it will be up to individual states whether they want to recognise or not: ‘the court appears to subtly indicate that it would be preferable for Serbia to pursue its future course of action in relation to Kosovo through political channels’.⁴⁹⁹ Indeed, the Court failed to deliver answers on highly important questions such as secession outside colonial context, and the statehood of Kosovo; however, by adopting a win-win solution, it has promoted cooperation and left politics to decide on this specific case.

What are consequences of the decision? Prior to the advisory opinion, Serbia’s supporters warned that the decision in Kosovo’s case would have a significant impact on separatist movements across the globe. This was not the case, probably due to the carefully designed decision which aims to promote future negotiations and stability in the region. The second expectation was that if the ICJ sided with Kosovo, it would spur many states to recognise its independence. Indeed, 42 states have recognised

⁴⁹⁷ ‘Serbia and Kosovo react to ICJ ruling’, BBC, 22 July, 2010.

⁴⁹⁸ Richmond-Barak, p.12.

⁴⁹⁹ R. Tricot and B. Sander, ‘Recent Development: The Broader Consequences of the International Court of Justice’s Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo’, *Columbia Journal of Transnational Law*, vol.49, p. 362.

Kosovo since the decision (7 July 2010), bringing the number to 111 (plus four entities); however, it will not change the firm position of China, Russia (announced it would veto any solution without Serbia's consent), Cyprus, Greece, Romania, Slovakia, and Spain (which would continue to challenge and evaluate European politics in Kosovo). Despite the prediction that the trial might slow down the process of recognition, 19 states recognised Kosovo within years (excluding Portugal, Montenegro, and Croatia which did so immediately after Serbia submitted the case). Therefore, we can conclude that the trial and decision had little to no impact on recognition. The third expectation was that the advisory opinion might give a direction of future status negotiations: Skender Hyseni, then a foreign minister of Kosovo, sent a message to the Serbs to 'come and talk to us'.⁵⁰⁰ It would be an overstatement to say the decision single-handedly 'forced' Belgrade and Pristina to continue talks; however, there is no doubt that the decision has established the framework that only a solution involving all interested parties and promote regional stability is workable. In a diplomatic sense, 'eventually both Serbia and Kosovo emerged with the sense that they "got something".⁵⁰¹ However, the 'hidden' winner is the EU as the Court confirmed its position of a 'political' consensus over American and Russian support for unilateral decisions. This is the moment when Europe restored its full credibility in the region, and moreover, showed its will to clear up its own backyard: 'good neighbourly relations, regional cooperation and dialogue are the foundations on which the EU is built [and] the EU is therefore ready to facilitate a process of dialogue between Pristina and Belgrade'.⁵⁰²

Conclusions

When Serbia requested that the ICJ decide whether the UDI violated international law, it had two hopes: to slow down the process of recognition and to gain legal support for future talks. Neither of Serbia's wishes were realized. During two years of hearings, 19 states recognised Kosovo, while the Court opted for the narrow reading of the question and ruled in favour of Kosovo. This narrow interpretation prompted

⁵⁰⁰ 'Kosovo wins victory as UN court calls independence declaration legal, rejects Serbia's claim', Fox News, 22 July, 2010.

⁵⁰¹ Richemond-Barak, p.19

⁵⁰² 'Kosovo wins victory as...', Fox News, 22 July, 2010.

resentment among academics and legal practitioners since the Court had missed an opportunity to address the questions of self-determination outside colonial context, the concept of remedial secession, and whether Kosovo is *sui generis*. However, the narrow interpretation is the least antagonising for both Belgrade and Pristina and invited them to pursue a future solution through political dialogue. The decision certainly favours a European approach focused on improving the life of Kosovo's citizens rather than relying on rigid law or imposed solutions. Therefore, this was a great victory for the EU; nevertheless, unilateral decisions encouraged by the USA produced the legal chaos yet to be solved; thus the next chapter will analyse the current institutional framework of Kosovo and its challenges for Europe.

Chapter 7

CONSOCIATIONAL CHARACTER OF KOSOVO'S CURRENT CONSTITUTIONAL ARRANGEMENT: THE NECESSITY OF CONSENSUS

Abstract

The Constitution of Kosovo guarantees over-representation of ethnic minorities in the Assembly, judiciary system and state-owned enterprises, provides them with a minority veto and cultural autonomy, and requires a 'grand coalition'. Therefore, from a legal standpoint, the Constitution of Kosovo resembles a consociational arrangement. However, it was only after the EU facilitated a dialogue between Belgrade and Pristina that Kosovo became a consociational polity since the Constitution is a result of the unilateral decision while the Brussels Agreements involve representatives of both ethnic groups and can be view as a 'grand bargain'. Kosovo's Constitution is indeed a unilateral arrangement that excluded the Serb minority; however, the fact that its authors envisaged Kosovo as a consociational polity and their willingness to negotiate with Belgrade implies that a final settlement of Kosovo's status requires consensus. Further, the Constitution contains serious flaws which indicate that the current arrangement is bound to be interim and in need of an improved and consensual replacement. In other words, the Kosovo Albanians face the stark choice to either rule the democratically deficient polity or seek dialogue with Kosovo Serbs and Belgrade.

Introduction

Kosovo's conflict is socially constructed thus mutable. However, it has been cemented in the short run by collective memory and parallel education. The international community did little to build shared narratives and a unified educational system. Moreover, academics and policy-makers manifest similar propensities to split along ethnic lines and define their position by the opposition. Neither the international

community nor policy experts successfully address the cyclical nature of Kosovo's conflict. The epitome of this division are ignominious and threatening status negotiation talks in which the Americans and the Russians, engaged in a global chess game, scored significant political and diplomatic victories and pushed onto Europe onerous challenges. The EU appeared as a guardian of ordinary people in Kosovo. But the EU is not a Good Samaritan merely concerned for the well-being of Kosovo's people; it is a reluctant hero and in that this role only due to its internal split. American unilateral decisions bent on moral rectitude accompanied with Russia's purist approach of reading international law painted a rather gloomy picture of any European chance to succeed in Kosovo. However, Europe found a way to maintain harmonious relations with Washington and appease the Serbs and the Kosovo Albanians. The International Court of Justice (ICJ) advisory opinion confirmed Europe's approach that the future status should be based on consensus and sought through diplomatic rather than legal channels. Nevertheless, a looming obstacle is Kosovo's Constitution. When it failed to ensure authorization of Ahtisaari Plan, the USA decided to recognise Kosovo and persuade as many states as possible to follow its example. A newly established 'state' needed a new constitution; thus, on 15 June 2008, Kosovo's Assembly adopted one. The constitutional development process had three requirements. Firstly, it should be 'acceptable and impressive to the rest of the world'; secondly, it aimed to 'ensure broad international acceptance...and quick recognition'; and thirdly, it aims to eventually prepare Kosovo for 'membership into the European Union'.⁵⁰³ At the heart of this 'modern European constitution with the addition of some more American-style checks and balances'⁵⁰⁴ lies the idea of the consociational democracy.⁵⁰⁵ Therefore, the point of departure of this chapter is whether the Constitution fulfils all requirement of the theory of consociationalism. However, this legal inquiry gives only an understanding of a procedure but not of a result. Thus the pivotal question is - does political reality match the Constitution based on the theory of consociationalism? This question is followed by an analysis of constitutional

⁵⁰³J. Tunheim, 'Rule of Law and the Kosovo Constitution', *Minnesota Journal of International Law*, vol.18, no.2, 2009, p.375.

⁵⁰⁴ *Ibid.*, p.378.

⁵⁰⁵ See: F. Korenica and D. Doli, 'The Politics of Constitutional Design in Divided Societies: The Case of Kosovo', *The Croatian Yearbook of European Law and Policy*, vol.6, 2010. The authors conclude that Kosovo's Constitution is a consociational arrangement from a legal perspective; however, it seems that they are more concerned with procedure than the final result which should be the main goal of a consociational constitutional order. Furthermore, the authors failed to recognise the 'deal of elite' as a precondition.

weaknesses in order to test the durability of the institutional framework. However, prior to probing the legal and political perspectives of Kosovo's institutional framework, we first need to discuss the consociational model of democracy and its principles.

Consociational Democracy

Consociationalism is a highly influential model for institutional design in divided societies; it has been championed by Lijphart. He has been developing his argument through a vivid debate with Horowitz for more than two decades. The debate continues to shape the field. Both authors, however, believe that ethnic conflicts are durable and constructed their theories accordingly. In contrast are authors who believe that ethnic differences do not necessarily reflect political differences.⁵⁰⁶ Thus the Lijphart-Horowitz debate translates into a broader dispute: 'accommodation versus integration'.⁵⁰⁷ Lijphart discards arguments of integration approach as naïve:

Although the replacement of segmental loyalties by a common national allegiance appears to be a logical answer to the problems posed by a plural society, it is extremely dangerous to attempt it. Because of the tenacity of primordial loyalties, any effort to eradicate them not only is quite unlikely to succeed, especially in the short run, but may well be counterproductive and may stimulate segmental cohesion and intersegmental violence rather than national cohesion.⁵⁰⁸

⁵⁰⁶ See for example: J. McGarry, B. O'Leary and R Simeon, *The Integration-Accommodation Debate: An Outline* in S Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford, Oxford University Press, 2008.

⁵⁰⁷ The Constitution of Kosovo is indeed based on consociational democracy, however, as we will see later in this work – it also contains element of integration. I will discuss in detail integrationist ideas in Chapter "...". In the same chapter, I will propose alterations for Kosovo's institutional framework.

⁵⁰⁸ A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven, Yale University Press, 1977, p.24.

Building on Lipset's findings,⁵⁰⁹ Lijphart developed the theory of cross-cutting cleavages where individuals possess a different 'number of different interests and outlooks'.⁵¹⁰ Thus, this multiplicity of perspectives promotes moderate political views and provides 'the absence of sharp partisan division among individuals, political elites will likewise be subject to the pressure to moderate their political positions'.⁵¹¹ This idea is closely related to the competitive model of democracy: 'the ruling elite and factions within it, choose to tolerate or suppress the political opposition; the political opposition, and individuals within it, respond by acting within the political system or by challenging the political system'.⁵¹² In other words, 'parties will cycle in and out of government, as they assemble shifting coalition of voters in their competition for the political center'.⁵¹³ However, Lijphart argued that this will do little in deeply divided societies where divisions occur in 'line of objective social differentiation' such as ethnicity.⁵¹⁴ The reason is simple, cross-cutting cleavages do not contribute to moderation; quite the contrary, the widening of existing ethnic (or religious, culture, etc.) only fuels further conflicts.

There is no political competition across ethnic divides. The political consequences of the institutions of majoritarian democracy in divided societies will depend on precise demography of the policy in question. If there is a clear ethnic majority, the result is not temporary minority which eventually cycles into power, but a persistent minority which will permanently be in opposition and excluded from political office.⁵¹⁵

Therefore, Lijphart proposed the consociational model of democracy which is not just a 'preferable alternative to majoritarian democracy but that is the only real

⁵⁰⁹ He defined legitimacy as 'the capacity of the system to engender and maintain the belief that existing political institutions are the most appropriate ones for the society': these institutions must contain expectations of major group, integration of all groups, moderate tensions, and create 'cleaves within the groups [and] not between them'. S. Lipset, *Political Man: The Social Bases of Politics* (2nd ed.), London, Heinemann Educational Books, 1983, pp. 64-65, and 78-81.

⁵¹⁰ A. Lijphart, *Democracy in Plural Societies*, p.10.

⁵¹¹ S. Choudhry, 'Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies', in S. Choudhry (ed.), *Constitutional Design for Divide Societies: Integration or Accomodation*, Oxford, Oxford University Press, 2008, p.16.

⁵¹² G. Marks, 'Rational Sources of Chaos in Democratic Transition', *American Behavioral Scientist*, vol.35, no.4/5, 1992, p. 417.

⁵¹³ Choudhry, p.17.

⁵¹⁴ A. Lijphart, *Democracy in Plural Societies*, p.3.

⁵¹⁵ Choudhry, p.17.

possibility'⁵¹⁶ that can be applied to deeply divided societies. He defines the model in terms of four characteristics: grand coalition, cultural autonomy, proportionality, and minority veto.⁵¹⁷ Grand coalition implies that 'the political leaders of all significant segments of plural society co-operate in governing the country'.⁵¹⁸ Its 'grand deal' among political leaders is often understood as a 'cartel of elites'.⁵¹⁹ In its purest form, it is a consensual multiparty coalition; nevertheless, it 'may also take various other forms, like informal advisory arrangement and alternating presidencies'.⁵²⁰ Indeed, this type of democracy is about any 'particular institutional arrangement as the deliberate joint effort by the elite to stabilise the system'.⁵²¹ The second characteristic is minority veto which serves as the 'guarantee that it [the minority] will not be outvoted by the majority when its vital interests are at stake'.⁵²² The rule can be absolute and applied to all decision, or as a suspensive and applied to certain specific decisions.⁵²³ Lijphart himself seems to be sympathetic to the latter since the former might result in a 'tyranny of the minority' and threatens to paralyse institutions. Another principle of consociational democracy is proportionality in political representation, allocation of funds, and judiciary, army, police and other public positions. The principle is to transfer power to minority groups and this is 'attained when the minority or minorities are over-represented to such an extent that they reach equality with the majority or the largest group'.⁵²⁴ The fourth element is segmental autonomy based on the idea of cultural protection and dispersion of power-sharing. This principle complements the grand coalition element: 'the decision should be made jointly by the segments with approximately proportional degrees of influence; on all other issues, decision-making should be left to each segment'.⁵²⁵ Segmental autonomy

⁵¹⁶ A. Lijphart, 'Majority rule versus democracy in deeply divided societies', *Politikon: South African Journal of Political Studies*, vol.4, no.2, p. 114.

⁵¹⁷ Lijphart recently simplified the model: See. A. Lijphart, *Constitutional Design for Divided Societies*. A. Lijphart, *The Wave of Power-Sharing Democracy*.

⁵¹⁸ A. Lijphart, 'Majority rule versus democracy...', p. 118.

⁵¹⁹ R. Dahrendorf, *Society and Democracy in Germany*, Garden City, 1967, p. 276.

⁵²⁰ A. Lijphart, 'Introduction: developments in power sharing theory', in A. Lijphart, *Thinking about Democracy: Power Sharing and majority rule in theory and practice*, London/New York, Routledge, 2008, p. 8.

⁵²¹ A. Lijphart, 'Consociational Democracy', *World Politics*, vol.21, no.2, 1969, p. 213.

⁵²² A. Lijphart, 'Majority rule versus democracy...', p. 118.

⁵²³ A. Lijphart, 'Self-determination versus pre-determination of ethnic minorities in power sharing systems', p.67

⁵²⁴ A. Lijphart, 'Majority rule versus democracy...', p. 119.

⁵²⁵ *Ibid.*

is not necessarily tied to territorial autonomy, but also counts ‘segments that are not defined in geographical terms’.⁵²⁶

Constitution of Kosovo and Four Elements of Consociational Democracy

Kosovo’s Constitution envisages that

There shall be at least one (1) Minister from the Kosovo Serb Community and one (1) Minister from another Kosovo non-majority Community. If there are more than twelve (12) Ministers, the Government shall have a third Minister representing a Kosovo non-majority Community. There shall be at least two (2) Deputy Ministers from the Kosovo Serb Community and two (2) Deputy Ministers from other Kosovo non-majority Communities. If there are more than twelve (12) Ministers, the Government shall have a third Deputy Minister representing the Kosovo Serb Community and a third Deputy Minister representing another Kosovo non-majority Community.⁵²⁷

This article from the Constitution led Korenica and Doli to conclude that Kosovo’s constitutional arrangement is a ‘consociational one, since it requires a grand coalition’.⁵²⁸ However, ministers representing minorities do not possess the right to veto, an element closely tied to the grand coalition principle. In reality, these ministers are elected by the Assembly consisting of 85-90 percent of Kosovo Albanian deputies; therefore, they have little power to influence policies. In other words, minority ministers have to be ‘suitable’ candidates in the eyes of Kosovo Albanian deputies and remain under the strong influence of a prime minister since he ‘may change members of the Government without the consent of the Assembly’.⁵²⁹ The authors admit the integrationist nature of the article 96, but also advance the claim that ‘the idea that

⁵²⁶ A. Lijpart, ‘Self-determination versus pre-determination of ethnic minorities in power sharing systems’, p.67

⁵²⁷ Constitution of Kosovo, 2008, art.96, par.2-3.

⁵²⁸ Korenica and Doli, 2010, p.276.

⁵²⁹ *Ibid.*, art.96, par.4.

formation of a grand coalition government can go beyond ethnic interests and no ethnicity can block the process'.⁵³⁰ It is worth recalling that the grand coalition principle is based upon the idea of elites' joint efforts to find a plausible solution for divisions. Therefore, a place for one Kosovo Serb minister, who is accountable to a Kosovo Albanian Prime Minister and Kosovo's Assembly, can hardly be called consociational arrangement. The second acute issue, the direct consequence of the fact that Kosovo's constitutional framework had no basis in co-operation of political elites, is that the Serbian minority did not take advantage this arrangement. Kosovo Serbs, backed by local politicians and Belgrade, entirely boycotted elections until recently. The change occurred only after Brussels' Conclusions and pressure from the EU (this will be explored in the next chapter). Thus, a glimmer of hope for consociationalism in Kosovo is a result of EU's efforts but not unilateral decisions favoured such as the UDI. Here, we come to the third issue, perhaps the most significant one, the ownership of the Constitution. Ahtisaari's plan envisaged that 21 Kosovar experts shall compose the Constitutional Commission;⁵³¹ however, in reality, the US Administration, represented by USAID, led the constitutional process. The result was that 'Kosovo Albanian elites were never given the feeling of ownership'.⁵³² Therefore, a soft argument states that the grand coalition principle was not met since the constitutional arrangement was a result of a unilateral decision produced without Kosovo Serbs participation. A hard argument goes that even Kosovo Albanian elite was left without real ownership over the Constitution. As a rebuttal to the hard line arguments, one can reasonably argue that the Kosovo Albanians traded ownership for independence since it is hardly imaginable that the USA would let them create an institutional framework on their own. This mistrust is exhibited in the fact that Ahtisaari's plan precedes the Constitution. Furthermore, even the soft line might be a matter of dispute; for example, Belgrade agreed to allow its judges to practice law under Kosovo' legal system (from 17 October 2017) which can be viewed as Belgrade's approval of Kosovo's institutions and its constitutional arrangement. To recap, the unilateral decision to produce the Constitution based on the consociational model of democracy by merely including ministers from the Kosovo Serb minority is a mere façade if there are no direct negotiations including the Kosovo Albanians, Belgrade, and leaders of Kosovo

⁵³⁰ Korenica and Doli, 2010, p.277.

⁵³¹ Comprehensive Proposal for the Kosovo Status Settlement, art.10, par.2.

⁵³² J. Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective', Review of Central and East European Law, vol.33, 2008, p.449.

Serbs. Authors of UDI and the Constitution designed a beautiful house but left the Europeans to build it.

The proportionality principle, the second characteristics of the model, is tested against the composition of the Assembly, the judiciary system and state-owned enterprises.

The Assembly has one hundred twenty (120) deputies elected by secret ballot on the basis of open lists. The seats in the Assembly are distributed amongst all parties, coalitions, citizens' initiatives and independent candidates in proportion to the number of valid votes received by them in the election to the Assembly. In the framework of this distribution, twenty (20) of the one hundred twenty (120) seats are guaranteed for representation of communities that are not in the majority in Kosovo as follows: Parties, coalitions, citizens' initiatives and independent candidates having declared themselves representing the Kosovo Serb Community shall have the total number of seats won through the open election, with a minimum ten (10) seats guaranteed if the number of seats won is less than ten (10).⁵³³

For years, Kosovo Serbs boycotted Kosovo's elections which left their constitutional rights a dead letter. Though the Constitution guarantees 10 seats for Kosovo Serbs, the question was whether MPs were legitimate representatives of the Serb minority since the majority of Serbs chose not to exercise their rights. However, the situation dramatically changed in the 2017 elections when Kosovo Serbs massively voted thanks to a push from Belgrade. Belgrade effectively persuaded Kosovo Serbs to vote through a combination of crude blackmail and nationalistic rhetoric. On the one hand, Kosovo Serbs were threatened that non-participation could lead to losing jobs; while, on the other hand, Belgrade emphasised that only through participation and exercising their right could Kosovo Serbs defend 'what is sacred and inalienable'. Serbia openly invited Kosovo Serbs to support the Serb List (srb. Srpska Lista), arguing that other Serbian lists are mere 'puppets of Albanian politicians'.⁵³⁴ Serbia's target was twofold: firstly, to 'satisfy' the EU and show readiness to implement

⁵³³ Kosovo's Constitution, art.64, par.2-3.

⁵³⁴ 'Vučić pozvao Srbe da glasaju za Srpsku listu', B92, 9 June, 2017.

Brussels Conclusion; secondly, to halt formation of Kosovo's army. However, while Belgrade encouraged Kosovo Serbs to vote, it also emphasised 'unbreakable' ties between Serbia and Kosovo Serbs' institutions in Kosovo.⁵³⁵ Though this new moment in the Belgrade-Pristina relationship had promise, we should keep in mind the primary reason for such decision.

Next, the Constitution envisaged over-representation of minorities in the Constitutional Court where two out of nine places are guaranteed to minorities and require a double majority (a majority of the entire Assembly plus a majority of representatives of ethnic minorities) for their election.⁵³⁶ By the same token, the principle of over-representation is present in the Supreme Court and other courts:

At least fifteen percent (15%) of the judges of the Supreme Court, but not fewer than three (3) judges, shall be from Communities that are not in the majority in Kosovo. At least fifteen percent (15%) of the judges from any other court established with appeal jurisdiction, but not fewer than two (2) judges, shall be from Communities that are not in the majority in Kosovo.⁵³⁷

In the original position, the issue was the quality of Serbian judges since North Kosovo maintained its own judicial system; however, on 31 August 2017, leaders of Kosovo Albanians and Serbia 'agreed [on] the final steps for the implementation of the Justice agreement reached within the EU facilitated Dialogue'⁵³⁸ which meant the integration of Serbian judicial personnel on 17 October. It is a noteworthy step which indeed elevates Kosovo's judicial system to a consociational arrangement.

Finally, the constitution guarantees 'equitable representation [to ethnic communities] in employment in public bodies and state owned enterprises at all levels, including in particular in the police service in areas inhabited by the respective Community'.⁵³⁹ Additionally, it guarantees minority seats in the Kosovo Judicial

⁵³⁵ L. Gedošević, 'Đurić: Samo Srpska Lista može da spreči formiranje Vojske Kosova', Blic, 21 May, 2017.

⁵³⁶ Kosovo's Constitution, art.114, par.3.

⁵³⁷ Ibid., art. 103, par. 3 and 5.

⁵³⁸ European Union – External Action, 'Federica Mogherini meets with President Thaci of Kosovo and Vučić of Serbia', 31 August, 2017.

⁵³⁹ Kosovo's Constitution, art.61.

Council,⁵⁴⁰ the Kosovo Security Force,⁵⁴¹ and the Central Election Commission.⁵⁴² Proportionality in state owned enterprises resembles the purest form of consociationalism; nevertheless, the question of property remains a highly contested issue, while the Ahtisaari plan states that immovable and movable property of Serbia located in the province shall pass to Kosovo,⁵⁴³ Serbia vigorously opposes this proposal, and it is yet to be seen whether Belgrade can push the negotiation agenda in this direction. The property issue remains the point of dispute.

In short, from a legal standpoint, the principle of proportionality is satisfied since Kosovo's Constitution envisages over-representation of minorities in Assembly, the judiciary system and public-own enterprises. However, this legal perspective provides insight only into an idealistic result. For the political realisation of the principle, Belgrade's consent was required. By giving the consent, Serbia not only agreed to the result but also confirmed the very procedure of the arrangement.

The third characteristic of consociational democracy is a veto right. The idea is that minorities will not be outvoted by a majority in affairs of vital interest for them. Kosovo's Constitution provides the right to veto on adoption of following laws:

- (1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in intermunicipal and cross-border relations;
- (2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution;
- (3) Laws on the use of language;
- (4) Laws on local elections;
- (5) Laws on protection of cultural heritage;
- (6) Laws on religious freedom or on agreements with religious communities;
- (7) Laws on education;
- (8) Laws on the use of symbols, including Community symbols and on public holidays.⁵⁴⁴

⁵⁴⁰ Ibid., art. 108, par.6.

⁵⁴¹ Ibid., art. 126, par. 4.

⁵⁴² Ibid., art. 139, par.4.

⁵⁴³ Comprehensive Proposal for the Kosovo Status Settlement, art.8, par. 3.

⁵⁴⁴ Kosovo's Constitution, art.81.

Article 81 also excludes the possibility that these vital laws may be submitted to a referendum. Subsequently, the Constitution envisaged the minority veto right on constitutional amendments:

Any amendment shall require for its adoption the approval of two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo.⁵⁴⁵

These rights are absolute and cannot be revoked by any means, which shows that this is essentially a consociational arrangement (if a veto right understood as suspensive) despite the fact that the ‘impossibility of ethnic communities to vetoing the adoption of the Constitution nevertheless suggests that the Constitution was adopted under an integrationist umbrella’.⁵⁴⁶ This integrationist adoption of the Constitution should be put into context: the USA and leaders of Kosovo Albanians, after the UDI, wanted a constitutional framework which would seal Kosovo’s independence. However, the authors of the Constitution were obviously aware it was an interim solution and that any durable arrangement must be based on consensus; thus they established that any amendments would require a double majority. The idea behind this is to avoid Serbia’s government and to negotiate Kosovo’s legal framework directly with leaders of Kosovo Serbs. Nevertheless, the dialogue facilitated by the EU shows that there would be no long-lasting solution without Belgrade.

The last principle of consociational democracy is segmental autonomy. This principle has two elements – protection of cultural heritage and dispersion of power-sharing. The Constitution envisaged a wide range of cultural autonomy: ethnic minorities have right to

express, maintain and develop their culture and preserve the essential elements of their identity, namely their religion, language, traditions and culture. [To] receive pre-school, primary, and

⁵⁴⁵ Ibid., art.144, par. 2.

⁵⁴⁶ F. Korenica and D. Doli, 2010, p. 285.

secondary education, in their own language... to use their language and alphabet freely in private and public...⁵⁴⁷

The Constitution also granted the Serbian language the status of official language within the whole territory of Kosovo.⁵⁴⁸ Subsequently, it states that ‘Kosovo ensures and protects religious autonomy and religious monuments within its territory’.⁵⁴⁹ In reality, Kosovo’s security forces have not reached maturity for such a task; thus the international peace forces still have to protect Serbian religious sites. This is the main reason Kosovo failed in its bid to join UNESCO and unlock significant funds for culture and education.⁵⁵⁰ However, the success of segmental autonomy largely depends on the second element – dispersion of power-sharing. The idea of dispersion of power-sharing holds that decision-making should be left to minorities whenever possible. Kosovo’s Constitution entirely omitted this element; however, Belgrade and Pristina agreed to establish the Association/Community of Serb majority municipalities which contain following organs: Assembly, President, Council, Board, Administration, and Complaints Office.⁵⁵¹ Besides said organs, the Serbian Community will have its own budget, is entitled to have its own symbols, and ‘can be dissolved by decision of its Assembly adopted by a 2/3 majority of its members’.⁵⁵² Indeed, Kosovo ‘has not yet commenced any implementation steps regard to the Agreement on Association’,⁵⁵³ however the agreement shows two things. Firstly, Kosovo’s policies require a consensus of Pristina, Belgrade, and Kosovo Serbs. Originally, leaders of Kosovo Albanians calculated that the UDI and the Constitution would force a direct dialogue with representatives of Kosovo Serbs and exclude Serbia’s government from negotiation talks; however, the path to Kosovo Serbs’ hearts still goes through Serbia. Serbs have accepted Kosovo’s institutions only after instructions from Belgrade. Secondly, the Kosovo Albanians are ready to give Kosovo Serbs what Serbia’s government refused to guarantee to Kosovo Albanians, that is, substantial autonomy accompanied with participation in governmental institutions. It

⁵⁴⁷ Kosovo’s Constitution, art. 59, par. 1, 3 and 5.

⁵⁴⁸ *Ibid.*, art.5, par.1.

⁵⁴⁹ *Ibid.*, art.39, par.1.

⁵⁵⁰ ‘Kosovo fails in UNESCO membership bid’, *The Guardian*, 9 November, 2015.

⁵⁵¹ European Union – External Action, ‘Association/Community of Serb majority municipalities in Kosovo – general principles/main elements’, art. 6.

⁵⁵² *Ibid.*, art. 16, 18, and 19.

⁵⁵³ Republic of Kosovo – Ministry for Dialogue, ‘Brussels Agreements – Implementation State of Play’, 1 January – 15 June, 2016, p.2.

is worth recalling that Serbia offered the substantial autonomy for Kosovo Albanians but hesitated to guarantee seats in the Serbian Parliament or state-owned enterprises. In other words, Serbia wished to keep formal sovereignty over the province without responsibility. Therefore, the Kosovo Albanians have the courage to do what Serbia never did. If fully implemented, this will be a consociational arrangement in its purest form and could lay a strong foundation for future settlements.

To summarize, from the legal perspective Kosovo's Constitution satisfies four principles of consociational democracy. Nevertheless, a stumbling block remains in the unilateral nature of the document. Therefore, the Constitution envisaged proportionality, grand coalitions, and a veto right, but it was only after the EU facilitated dialogue that Kosovo Serbs have started integration in Kosovo's institutions. In the same vein, segmental autonomy is provided by a bilateral agreement between Belgrade and Pristina.

Kosovo' Constitution as Interim Solution

We have seen that the authors of the Kosovo's Constitution aim to replicate the consociational model of democracy; however, though the Constitution envisages all four characteristics, as already said, it was only after the EU's efforts that the Constitution now resembles a consociational arrangement. This part of the chapter discusses the durability of Kosovo's Constitution; in other words, whether the authors of the Constitution and their supporters intended to create a lasting framework or if the Constitution was intended as an interim solution prior to a consensus.

The Constitution contains the Preamble and fourteen chapters. The Preamble opens with the famous statement 'We, the people of Kosovo' which agrees with the ICJ advisory opinion that the 'people' are authors of the Constitution. Oddly, citizens of Kosovo never had the opportunity to vote for this arrangement. Similarly, leaders of Kosovo Albanians did not feel the need for a referendum when declaring Kosovo's independence.⁵⁵⁴ The short Preamble does not contain any remnants of multicultural society:

⁵⁵⁴ Indeed, Kosovo Albanians voted for independence in 1993 Referendum, however, not a single state recognise their decision.

Its contents had triggered a long drawn-out battle with international community representatives. Kosovars were keen to reflect their struggle for statehood, including their sacrifices, in the Preamble. However, this was deemed unacceptable, as such reference might have suggested that Kosovo considered itself the home of a titular, ethnic Albanian nation to the exclusion of other communities.⁵⁵⁵

Since the Preamble does not refer to any particular historical event, one can convincingly consider ‘the preamble a step towards making the state of Kosovo a nationalist-free country’.⁵⁵⁶ However, Article 3 states that ‘Kosovo is a multi-ethnic society consisting of Albanian and other Communities’:⁵⁵⁷ this differentiating between ‘the Albanian and ‘other’ communities which are not enumerated conveys, however, on the symbolic level the ‘identity fiction’ of the majority population and the state, which is a characteristic element of the ethno-national ideology’.⁵⁵⁸

The Basic Provisions state that Kosovo is ‘democratic, unique and indivisible state’ which sovereignty ‘stems from the people [and] belong to the people’,⁵⁵⁹ and confirm that the Constitution is the highest legal act of the republic.⁵⁶⁰ Contrary to this, the Constitution later states that the Ahtisaari Plan takes precedence over all legal provisions in Kosovo:

The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter shall prevail.⁵⁶¹

The Ahtisaari Plan can, however, be amended by a double majority, which implies that Kosovo supporters had in mind that the Kosovo Albanians must seek a consensus

⁵⁵⁵ M. Weller, ‘The Kosovo Constitution and Provision for the Protection of Minorities in Europe’, *European Yearbook of Minority Issues*, vol.6, 2006-7, p. 494.

⁵⁵⁶ D. Koli and F. Korenica, ‘Calling Kosovo’s Constitution: A Legal Review’, *The Denning Law Journal*, vol.22, no.1, 2010, p.58.

⁵⁵⁷ Kosovo’s Constitution, art.3, par.2

⁵⁵⁸ J. Marko, p. 443.

⁵⁵⁹ Kosovo’s Constitution, art.1, par.1, and art.2, par.1.

⁵⁶⁰ *Ibid.*, art.16, par.1.

⁵⁶¹ *Ibid.*, art.143, par.3.

with the Kosovo Serbs and Belgrade. Interestingly, the consensus between the two sides requires the approval of the ICR since he is ‘the final authority in Kosovo regarding the interpretation of the civilian aspects of this Settlement’.⁵⁶² Therefore, any future legal framework of the polity demands the consensus of Kosovo Albanians, Kosovo Serbs and Belgrade, and the European Union. However, proposed amendments cannot diminish ‘any of the rights and freedoms set forth in Chapter II’.⁵⁶³ However, this does not apply to Chapter III on rights of communities. The authors of the document set the protection of communities/minorities as the main precondition for their support of Kosovo’s independence which was well warranted considering the 2004 riots.

Chapters IV, V, and VI regulate roles of the Assembly, Government and President. Kosovo’s Assembly is the legislative institution directly elected by the people,⁵⁶⁴ and as such, it is the most legitimate institution in Kosovo’s legal framework. In addition to the role of the highest law-making body of the polity, the Assembly also announces referenda, ratifies international treaties, approves the budget, elects and dismisses the President of the Assembly and the President of Kosovo, elects the Government and expresses no confidence in it, oversees the work of the Government and other public institutions, elects members of the Judicial Council, proposes judges, and others.⁵⁶⁵ Members of the Assembly hold a mandate of four years,⁵⁶⁶ and have a duty to elect, besides the President of the Assembly, five deputy Presidents: two proposed by the largest parliamentary group and two from non-majority communities.⁵⁶⁷ Members of the Assembly enjoy a limited immunity which resembles immunity granted to USA senators.⁵⁶⁸ Additionally, the Constitution assigns members of the Assembly the capacity to ‘determine the internal organization and method of work for the Assembly’ and constitute ‘permanent committees, operational committees and ad hoc committees reflecting the political composition of the Assembly’.⁵⁶⁹ The main element of the Assembly’s power is, however, the initiative ‘to propose laws may be taken by the President of the Republic of Kosovo from his/her scope of authority, the Government,

⁵⁶² Ibid., art.2, par.1 (a).

⁵⁶³ Ibid., art.144, par.3.

⁵⁶⁴ Ibid., art. 63.

⁵⁶⁵ Ibid., art. 65.

⁵⁶⁶ Ibid., art. 66, par.1.

⁵⁶⁷ Ibid., art. 67, par.1-4.

⁵⁶⁸ Ibid., art. 74.

⁵⁶⁹ Ibid., art. 76 and art. 77, par.1.

deputies of the Assembly or at least ten thousand citizens as provided by law'.⁵⁷⁰ The fact that ten thousand citizens can initiate laws shows that 'the Assembly [is] open in terms of law initiates'.⁵⁷¹ Finally, the Assembly might be dissolved if the government cannot be established within 60 days, if two-thirds of all MPs vote in favour of dissolution, or if the President is not elected within 60 days.⁵⁷²

The President of Kosovo is 'the head of state and represents the unity of the people of the Republic of Kosovo'.⁵⁷³ The paradox is that the President cannot 'exercise any other public function [or] any political function'⁵⁷⁴ while it is a partisan president elected by a coalition of parties. The second question closely tied to the paradox is whether the President is indeed a representative of the people since he is appointed by the Assembly:

The President of the Republic of Kosovo shall be elected by a two-thirds (2/3) majority of all deputies of the Assembly. If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of all deputies of the Assembly shall be elected as President of the Republic of Kosovo.⁵⁷⁵

However, history hitherto shows that usually a third round of voting is needed since Kosovo's political parties are highly scattered.⁵⁷⁶ Besides representing a unity of Kosovo's citizens, the President represents Kosovo, guarantees the constitutional functioning of institutions, announces election for the Assembly, issues decrees, promulgates laws approved by the Assembly, has right to return adopted law for re-consideration, signs international agreements, proposes amendments, refers question to the Constitutional Court, leads foreign policy, and so forth.⁵⁷⁷ Finally, the procedure for dismissal of the President is rather complex:

⁵⁷⁰ Ibid., art. 76.

⁵⁷¹ D. Koli and F. Korenica, 'Calling Kosovo's Constitution: A Legal Review', p. 69.

⁵⁷² Kosovo's Constitution, art. 82, par. 1.

⁵⁷³ Ibid., art. 83.

⁵⁷⁴ Ibid., art. 88, par.1-2.

⁵⁷⁵ Ibid., art.86.

⁵⁷⁶ The best example is new Kosovo's government appointment with 61 votes in 120- seat parliament.

⁵⁷⁷ For the complete list see: Ibid., art. 84, par. 1-30.

If the President of the Republic of Kosovo has been convicted of a serious crime or if the Assembly in compliance with this article determines that the President is unable to exercise her/his responsibilities due to serious illness, or if the Constitutional Court has determined that he/she has seriously violated the Constitution, the Assembly may dismiss the President by two thirds (2/3) vote of all its deputies.⁵⁷⁸

The complicated procedure protects the President's mandate and secures continuity of power since the majority is often fragile and governments do not end their mandates.

The second branch of executive power is the Government which consists of the Prime Minister, deputy ministers and ministers. Its primary role is to make decisions, proposes draft laws and amendments.⁵⁷⁹ The Constitution, further, specifies that the Government proposes and implements internal and foreign policies, promotes the economic development, proposes the budget, guides and oversees the work of administrative bodies and the development of public service, and so forth.⁵⁸⁰ The head of the Government is the Prime Minister. The Constitution lists particular competencies tied to this position (as opposed to competencies of the whole Government) and provides him/her with power to 'change members of the Government without the consent of the Assembly'.⁵⁸¹ Next, the articles 95 and 96 specify that the Government is elected by a simple majority and envisages seats for minority communities (this has been discussed in the previous part of this chapter). The Constitution, however, states that 'the number of members of Government is determined by an internal act of the Government'.⁵⁸² There is no justification for such an arrangement, and this represents a serious omission. Finally, the Government is accountable to the Assembly, its members enjoy immunity similar to members of the Assembly, and the motion of no confidence requires the majority of votes of the Assembly.⁵⁸³

⁵⁷⁸ Ibid., art.91, par.2.

⁵⁷⁹ Ibid., art. 92, par.1 and 4.

⁵⁸⁰ Ibid., art.93.

⁵⁸¹ Ibid., art.94, par.4.

⁵⁸² Ibid., art.96, par.2.

⁵⁸³ Ibid., art. 97-100.

THE NECESSITY OF CONSENSUS

In short, the Government, Assembly, and President paint a picture of a modern society with minor issues such as whether (a) the President indeed represents the unity of Kosovo's citizens, bearing in mind the electoral procedure; (b) determination of the number of members of the Government by an internal act might be read as democratic deficiency. The substantial problem of Kosovo's Constitution, however, lies in the judiciary system since it does not 'refer to any legal remedies against administration decisions'.⁵⁸⁴ The Constitution indeed envisaged that:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.⁵⁸⁵

Therefore, it seems that this constitutional provision 'lead[s] to the conclusion that any administrative decision either on the local or central level can immediately be contested before a court without the necessity of exhausting all possible remedies in the administrative procedure'.⁵⁸⁶ Rather strangely, the Constitution states that

Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.⁵⁸⁷

This is an unhappy marriage of the American system and the monopolised European arrangement, where constitutional cases are diffused and no court has ultimate authority over constitutional issues. Following the American diffuse judicial review, the Constitution opens an ability to establish specialised courts,⁵⁸⁸ while

⁵⁸⁴ Marko, p.445.

⁵⁸⁵ Kosovo's Constitution, art.54.

⁵⁸⁶ Marko, p.445.

⁵⁸⁷ Kosovo's Constitution, art. 113, par.7-8.

⁵⁸⁸ *Ibid.*, art. 103, par.7.

guarantees that the Constitution ‘shall be interpreted consistent with the European Court of Human Rights’.⁵⁸⁹ The logic behind this is that Kosovo cannot sign or ratify the European Convention on Human Rights (ECHR); thus ‘in order to bind Kosovan domestic standards of human rights protection to international standards and instruments, these instruments have been directly constitutionalized within the framework of the Constitution itself’.⁵⁹⁰ This legal riddle, as we have already seen, can be amended by the double majority which implies the Kosovo Albanians will need to seek a consensus with the Kosovo Serbs and Belgrade.

The next chapter of the Constitution regulates economic relations. The aim of the Constitution was to create a vibrant environment that promotes freedom of economic activities and security for private and public property which would lure foreign investments.⁵⁹¹ However, ‘corruption, political interference and instability have stifled Kosovo’s efforts to attract foreign investors’ since the diplomatic community and non-governmental organisation have accused Kosovo Trust Agency (KTA) of ‘selling state property on the cheap to buyers with political connections’.⁵⁹²

Another blemish in the Constitution is the chapter X – Local Government and Territorial Organisation. Kosovo is a unitary polity with two territorial levels: central and local. The Constitution states that the municipality is the basic unit of local government and that municipalities ‘enjoy a high degree of local self-government’,⁵⁹³ which produces ‘confusion between possibility and functional necessity of decentralization of the state administration on the one hand, and the constitutionally guaranteed right of municipalities to self-government on the other’.⁵⁹⁴ Further, the Constitution fails to list bodies of municipalities which have been, however, supplemented by the Brussels Agreement on the Association/Community of Serb majority municipalities. Currently, it remains a secret whether Serb communities will have real power, or they will be reduced to the level of NGOs as happened in Croatia with the Joint Council of Municipalities.

⁵⁸⁹ *Ibid.*, art.53.

⁵⁹⁰ P. de Hert and F. Korenica, ‘The New Kosovo Constitution and Its Relationship with the European Convention on Human Rights: Constitutionalization “Without” Ratification in Post-Conflict Societies’, *ZaoRV*, vol.76, 2016, p. 164-5.

⁵⁹¹ Kosovo’s Constitution, art. 119.

⁵⁹² F. Bytyci, ‘Kosovo privatization boss quits over transparency concerns’, *Reuters*, 16 May, 2013.

⁵⁹³ Kosovo’s Constitution, art. 124, par.1-2.

⁵⁹⁴ Marko, p.444.

The Constitution, further, maps out security institutions of the polity which reflect the ethnic diversity of the polity. Thus, the Kosovo Security Force protects ‘the people and Communities’,⁵⁹⁵ the Police are responsible for the preservation of public order and border control,⁵⁹⁶ while the Intelligence Agency has a role in identifying, investigating, and monitoring threats to security to the polity.⁵⁹⁷ Finally, the Civilian Aviation Authority regulates civilian aviation activities.⁵⁹⁸ However, Kosovo’s security institutions are supervised by the ICR⁵⁹⁹, whereas NATO ‘shall have overall responsibility for the development and establishment of a civilian-led organization of the Government to exercise civilian control over this Force [Kosovo Security Force]’.⁶⁰⁰

Chapter XII establishes independent institutions such as ombudsperson, auditor-general, central election commission, independent media commission, and other independent agencies. The Ombudsperson protects the rights and freedoms of citizens, the Auditor-General is the highest institution of financial control, the Central Election Commission supervises, directs and verifies activities related to elections and referenda, and the Independent Media Commission regulates broadcasting frequencies in the polity.⁶⁰¹ The last two chapters of Kosovo’s Constitution regulate amendments, the relationship with Ahtisaari’s Plan and transitional provisions.

To summarise, leaving aside the schizophrenic triangle Kosovo’s Constitution–Ahtisaari Plan– Eulex (see chapter 5) and various minor issues, Kosovo’s constitution contains several serious flaws. The Preamble contains no remnants of a multicultural society and that, followed by the fact that the Constitution refers to the Albanian and other communities, is an apparent sign of the ethno-national ideology. Next, the Constitution does not envisage legal remedies against administrative decisions which is a serious democratic deficiency. Another legal conundrum to be solved is the relation between the Constitution and the European Convention on Human Rights: while Kosovo has no possibility to sign or ratify the ECHR, the Constitution is interpreted in accordance with the document. These weaknesses, together with a

⁵⁹⁵ Kosovo’s Constitution, art. 126, par. 2 and 4.

⁵⁹⁶ *Ibid.*, art.128, par.1 and 5.

⁵⁹⁷ *Ibid.*, art.129, par.1.

⁵⁹⁸ *Ibid.*, art.130.

⁵⁹⁹ Ahtisaari Plan, ‘Annex IX International Civilian Representative’, art.2, par.4.

⁶⁰⁰ *Ibid.*, ‘General Principles’, art. 13, par.5.

⁶⁰¹ Kosovo’s Constitution, art. 131-142.

double-majority requirement for its amendment and Pristina's willingness to maintain negotiations with Belgrade even after the UDI, suggest that the Constitution is only an interim solution and that the final settlement requires consensus.

Conclusions

A new Kosovo arrangement inevitably requires a consensus among Belgrade, Pristina, the EU, and Kosovo Serbs. The analysis of the current constitutional framework of Kosovo, indicates that the Constitution satisfies four characteristics of consociational democracy: grand coalition, proportionality, veto rights, and cultural autonomy. The Constitution guarantees a ministry place in the Government for the Serb minority, over-representation in the Assembly, courts, and state-owned enterprises; it also contains right to veto decision on minority rights and envisages protection of cultural heritage. However, in reality, the Constitution was a result of the unilateral decision made by the Kosovo Albanians and their supporters; therefore, the very nature of this arrangement lacks the preconditions of a consociational agreement –a deal of elites. This deal of elites implies an arrangement involving all relevant parties, but the foundation of the Constitution remains a unilateral decision. Therefore, it was, after the Brussels Agreement, that Kosovo's institutional framework has the appearance of a consociational agreement; nevertheless, this consociational agreement defines the framework for future negotiations between Belgrade and Pristina.

Further probing of Kosovo's Constitution shows that the Kosovo Albanians face a stark choice whether to rule the democratically deficient polity or seek a dialogue with Belgrade and the Kosovo Serbs through the EU. The acute issues such as the power triangle Kosovo's Constitution –Ahtisaari's Plan –EULEX, Kosovo's relationship with the ECHR, and others, can be solved only by amending the Constitution. The amendment, however, requires a double majority. Therefore, it is apparent that the USA and other states supporting Kosovo's independence viewed this Constitution as an interim solution. In other words, Kosovo's 'supervised independence' can come to an end only if Belgrade and Pristina find a consensus over the status and other issues.

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Hence, two lessons can be drawn: (a) the final settlement of Kosovo requires consensus, (b) the point of departure for the future settlement will be accommodation of the conflict. However, I will argue in next chapters, that not only does Kosovo have both the capacity and incentives to fully integrate all its citizens, but Kosovo will be better off if opts for integration.

Chapter 8

SILENT CONSENSUS

Abstract

This chapter argues that there are two conditions for all sides (the EU, Kosovo, and Serbia) that should be met to arrive at a final arrangement of Kosovo's status. For Belgrade: (a) it must be a face-saving solution; (b) it must guarantee prosperity to central and northern Serbia. For Pristina: (a) Kosovo must be independent of Serbia; (b) there must be ample and continuous EU' support to Kosovo's democratic institutions and the clear possibility to become an EU member state. For Brussels: (a) there must be relationship normalisation between Pristina and Belgrade because a new Cyprus is no option for Germany and its followers; (b) there must be consensus on Kosovo's status between Kosovo and Serbia since non-recognisers wish to eliminate any unilateral/forceful solutions which their own minorities may take as an example and abuse in future. Therefore, a solution which meets all six conditions should be based on the formula: (a) Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; (b) Serbia not to recognise Kosovo even if it means that Serbia will lose de facto and de jure authority over the region. Analysing the current state, the chapter concludes that there is already a silent consensus involving the formula: Kosovo as a European Protectorate.

Introduction

Kosovo Albanian leadership has only one path to end various legal impediments to a democratic society, that is, to amend the Constitution. Since the amendment of the Constitution requires a double majority, Pristina must seek a consensus with the Serbs. The argument has another angle: while Belgrade claims Kosovo's territory, the President, Prime Ministers, or members of the Government cannot set foot on Kosovo's soil without approval from Pristina. Serbia's strategy 'more than autonomy – less than sovereignty' (read sovereignty over the province but no responsibility to govern it) failed politically (during status talks) and legally (the ICJ

decision); therefore defined state borders and a fast track to the EU membership require a new ‘deal’ with the Kosovo Albanians.

Kosovo is, however, in the throes of maximalist demands from the two sides, Kosovo Albanians’ independence and Serbs’ sovereignty, and it would be naïve to assume that either Belgrade or Pristina will make a concession that would fully appease the other side. Put bluntly, it is unlikely that Belgrade will ever recognise Kosovo as an independent state or Pristina will ever obey the authority of Serbia., Consequently, Kosovo will indefinitely remain a land of legal wrangling and political braggadocio. Therefore, desires of both ethnic groups and aspiration must be redressed. Kosovo Albanians are uncompromising about Kosovo’s independence from Serbia, opposing Belgrade’s authority over the polity. Nevertheless, Pristina welcomes the EU authority even at the cost of the EULEX mission making Kosovo’s Constitution *ad absurdum*. While Serbia denies Kosovo’s sovereignty, it has no illusion that its jurisdiction over the region has been lost and fully accepts European supervision in Kosovo. In other words, the initial disparity ‘independent Kosovo versus Kosovo as a part of Serbia’ becomes less glaring as ‘Kosovo independent of Serbia versus Kosovo is a non-state entity’. Hence, the formula for a consensus runs as follows: (a) Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; (b) Serbia not to recognise Kosovo even if it means that Serbia will lose de facto and de jure authority over the region. There is already a ‘silent’ consensus regarding the status of Kosovo, that it be an EU protectorate. Though ‘patrimony’ might be a better word than ‘protectorate’ as the latter implies merely supervision, while the former emphasizes the sense of belonging to Europe as both ethnic groups share European heritage and future. At this junction, important questions come to mind: How would Kosovo as a European patrimony differ from the existing supervised independence, and why does this matter?

Kosovo is synonymous with legal chaos and corruption on all levels. The *grundnorm* of Kosovo’s Constitution is the Ahtisaari Plan, a document that produces no consequences in international law but is the document that invites the EULEX mission. The mission, however, comes under the umbrella of the UN which does not exist in the Constitution (It exists only as historical matter). Furthermore, the UN re-confirmed Resolution 1244 and Serbia’s sovereignty over the province. Everyone’s house is no one’s home. This is best illustrated by wide-spread corruption that remains

Kosovo's largest obstacle to attracting investment.⁶⁰² Even EULEX officials are not immune to scandals.⁶⁰³ Dire economic conditions and lack of ownership is leading Kosovo Albanians, who once were laying down their lives to stay in Kosovo, to emigrate.⁶⁰⁴ Kosovo's prosperity is a hostage of its status: the patrimony solution solves the issue of ownership that consequently curbs corruption and attracts foreign investments. It is important to emphasise that any consensual deal including the partition of Kosovo or Serbia's recognition of its independence would have similar effects on corruption and foreign investments. Therefore, prior to defending the existence of the silent consensus, two other options for settlement of Kosovo's status will be discussed in this chapter: partition and Serbia's recognition of existing Kosovo's borders. The final part of the chapter aims to answer questions 'Why would the Kosovo Albanians agree on the patrimony status and squander a chance to achieve full independence?'; 'Why would the Serbs accept this arrangement and irreversibly lose *de facto* and *de jure* authority over the province?' and 'Why does the final deal matter to Brussels?'

Partition of Kosovo

The idea of Kosovo's partition has been evolving over the last decade. In the midst of status talks, it invoked the sense of fairness:

The West is fond of the mantra that the status quo is not sustainable. What they really mean is that Kosovar Albanian expectations of imminent independence have been raised to such an extreme that any frustration of independence will lead to violence against the NATO forces. So we must give Kosovo its independence quickly. The status quo is very unstable, but we must change it in ways

⁶⁰² Kosovo Country Commercial Guide, 'Kosovo -9-Corruption', 22 July, 2017.

⁶⁰³ N. Tabak and J Xharra, 'Scandals and Suspicious at the EU's Kosovo Mission', Balkan Insight, 7 November, 2014.

⁶⁰⁴ A. Smale, 'Kosovars Who Fought for Land Are Now Eager to Leave', The New York Times, 7 March, 2015.

which make it better, not worse. So Kosovo should become independent, but not within its present borders.⁶⁰⁵

Therefore, 'partition of Kosovo will please neither side, but the equality of pain is more likely to lead to stability than present Western plans which will undoubtedly destabilise Serbia, and through Serbia the whole region'.⁶⁰⁶ Put differently, partition meant a face-saving solution for Serbia. Ahtisaari, however, discarded this arrangement on the grounds that 'the Serbs did not deserve a face-saving way out, since they were all guilty of what had happened in Kosovo'.⁶⁰⁷ Commenting on this decision, Ker-Lindsay concludes that 'by sticking to narrowly defined principles, Kosovo seems destined to be kept in limbo. There is an opportunity to reach a historic compromise that is, in fact, more in line with established international norms than the current imposed 'solution', and yet the former UN envoy refuses to countenance such a settlement'.⁶⁰⁸ Indeed, any solution based on compromise is better than the imposed solution; however, the partition gives scant details about how it will be done. Hence, though it would bring stability to Kosovo, it raises various issues such as segmental autonomy for Serbs south of the river Ibar (Serbs living in enclaves surrounded by Albanians), cultural heritage of Serbian Orthodox Church, and the Albanian minority in Serbia. Firstly, would Belgrade and Pristina need a new deal for Serbs from enclaves? If so, that would compromise Pristina's authority over North Kosovo Serbs and would require new talks on Serbian enclaves in Kosovo which is likely unacceptable for Pristina. Secondly, the arrangement does little to solve the issue of the cultural heritage of the polity and the membership of Kosovo in UNESCO. Thirdly, is Belgrade ready to 'trade' North Kosovo for Bujanovac, Preševo, and Medvedja (three municipalities with the Albanian minority in Serbia) and to allow further partition of Serbia. Fourthly, does the arrangement mean that Kosovo can seek union with Albania? Finally, would the model of Republika Srpska in Bosnia set an example?

⁶⁰⁵ I. Roberts, 'Partition is the best answer to the Kosovo question', *The Independent*, 5 December, 2007.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ J. Ker-Lindsay, 'Principles and the Partition of Kosovo', *Peace Review: A Journal of Social Justice*, vol.32, no.2, 2011, p. 232.

⁶⁰⁸ *Ibid.*, p.233.

In 2017, Ivica Dačić, Serbia's minister of foreign affairs, proposed partition for the final settlement of Kosovo's status, which well illustrates the disparity between Belgrade's views and reality. Under this proposal, Serbian enclaves would gain autonomy, protection would be granted for Orthodox churches and monasteries, and financial compensation for private and state property.⁶⁰⁹ It seems that this proposal from a former minister of Milošević is late by a decade or two since Belgrade had already signed an agreement on Serb municipalities (including both enclaves and North Kosovo). Moreover, and the proposal omitted two issues of utmost importance: union with Albania and the Albanian minority in Serbia. Therefore, the reaction of the Kosovo Albanians was not surprising: 'Kosovo is a multi-ethnic democracy with internationally recognised borders. Serbia's renewed ideas for border change are dangerous and unacceptable'.⁶¹⁰ Yet as unpalatable as Dačić's 'solution' was, its appearance indicates a significant shift in Serbia's thinking: it implies that Serbia is ready, under certain circumstances, to relax its rigid principle of territorial sovereignty. Does this imply that Serbia will trade Kosovo for the membership in the EU and the prosperity of its territory? There is no evidence that Serbia will ever recognise Kosovo's sovereignty, however, this shift hints that there are two conditions under which Serbia is ready to 'give away' Kosovo: (a) it must be a face-saving solution; (b) it must guarantee prosperity to central and northern Serbia.

Serbia's Recognition

There is a widespread belief that 'Serbia is no longer willing to sacrifice the interest of its seven million to maintain the lifestyle of 60.000 north Kosovo Serbs'.⁶¹¹ In other words, the only reason Serbia has not recognised Kosovo is that the Serbs believe they can have their cake and eat it too. Serbia is faced with the choice "membership in the EU versus Kosovo", and to recognise Kosovo's sovereignty is to force a solution in Belgrade. The last such proposal comes from David Philips, a foreign affairs expert to the USA State Department:

⁶⁰⁹ 'I. Dačić Razgraničenje s Albancima je trajno rešenje', *Večernje Novosti*, 13 August, 2017.

⁶¹⁰ 'Kosovo Rejects Serbian Partition Plan for Ending Territorial Dispute', *Radio Free Europe/Radio Liberty*, 15 August, 2017.

⁶¹¹ E. Pond, 'Serbia Reinvents Itself', *The International Institute for Strategic Studies*, 2013, p.8.

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Serbia must recognize Kosovo's independence in order for sustainable peace to be achieved. Recognition is the cornerstone of a grand bargain. Normalization would include Kosovo's membership in the United Nations (UN). In parallel, Kosovo and Serbia would work on European Union (EU) membership criteria, entering the EU at the same time. Serbia is impatient to join the EU. To assuage its concerns, EU member states can send a message to Belgrade that the EU will move expeditiously once Serbia completes all the chapters of the 'acquis communautaires' and recognizes Kosovo. This report proposes more effective mediation by the international community, including a more robust role for the United States. It also offers a roadmap to address bilateral issues between Kosovo and Serbia.⁶¹²

To say that Kosovo's independence helps peace is a bold statement and ultimately wrong-headed. Quite the contrary, Kosovo's recognition would further destabilise the region: Pristina does not need more 'independence' but more supervision. The Council of Europe accused, based on confidential reports from FBI and other intelligence agencies, 'Hashim Thaqi [current president of Kosovo] and other members of 'Drenica Group' [of]... having exerted violent control over the trade in heroin and other narcotics'.⁶¹³ The Group is also said to be involved in other activities such as human and organ trafficking, monopolisation of Kosovo's largest economic sectors, and money laundering. The report continues:

Everything leads us to believe that all of these men would have been convicted of serious crimes and would by now be serving lengthy prison sentences, but for two shocking dynamics that have consolidated their impunity: first, they appear to have succeeded in eliminating, or intimidating into silence, the majority of the potential and actual witnesses against them (both enemies and erstwhile allies), using violence, threats, blackmail, and protection rackets; and second, faltering political will on the part of the international community to effectively prosecute the former leaders of the KLA.

⁶¹² D. Philips, 'Implementation Review of the Kosovo-Serbia Dialogue', Institute for the Study of Human Rights, Columbia University, 5 September, 2017, p.1.

⁶¹³ D. Marty, 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Council of Europe, 12 December, 2010, p.15.

This also seems to have allowed Thaqi – and by extension the other members of the ‘Drenica Group’ to exploit their position in order to accrue personal wealth totally out of proportion with their declared activities.⁶¹⁴

Pristina, on the other hand, called the report ‘despicable’ and ‘bizarre’, written by ‘people with no moral credibility’.⁶¹⁵ However, it seems that ‘the signs of collusion between the criminal class and high political and institutional office bearers are too numerous and too serious to be ignored’.⁶¹⁶ Every state has its own mafia; nevertheless, Kosovo would be the first case where mafia has its own state.⁶¹⁷ Therefore, Pristina does not need more freedom and larger funds but a proper oversight.

Furthermore, Philips’ report argues that ‘dialogue cannot be open-ended’ and recommends an ambitious ‘deadline of 18 months, with the possibility of a 6-months extension’⁶¹⁸. As a reward, Kosovo and Serbia would enter the EU at the same time. By any standard, this is a grotesque proposal: First, Serbia would give up territory for which it claims sovereignty, and as a ‘reward’ it would wait for that economically backward territory to meet the requirements of the EU in order for both to join simultaneously. Serbs would recognise Kosovo only if the package includes face-saving interpretation and guarantees prosperity for the rest of Serbia. Neither of those requirements is met in Philips’ proposal. The author, as many before him, claims that ‘Serbia’s leaders need a reality-based approach. They must face the fact that Kosovo is lost’.⁶¹⁹ Matija Bećković, a member of Serbian Academy of Sciences and Arts, logically asks ‘If Kosovo is not ours, why are they asking us to give it to them? If it is theirs, why are they taking it from us? Moreover, if they can already take it away, why are they hesitating?’⁶²⁰

⁶¹⁴ Ibid., p.15.

⁶¹⁵ M. Montgomery and A. Raxhimi, ‘Report Links Top Kosovo Officials to Organ Harvesting’, *Balkan Insight*, 14 December, 2010.

⁶¹⁶ Marty, p.10.

⁶¹⁷ Note that most notable figures of Kosovo's politics are under the charges for war crimes: Hashim Thaci (a president of Kosovo), Kadri Veseli (a leader of the second strongest party in opposition), and Ramush Haradinaj (a former Prime Minister, and a leader of the second strongest party in power).

⁶¹⁸ Philips, p.3.

⁶¹⁹ Ibid., Foreword; This opinion is present within Serbia as well, for example Vuk Drašković, the leader of the opposition in the 1990s, believes that ‘Serbia should accept and recognize the Kosovo reality’. ‘SPO leaders wants Serbia to recognize “Kosovo reality”’, B92, 7 August, 2017.

⁶²⁰ J. Vučićević, ‘Zašto nam otimaju Kosovo ako odavno nije naše’, *Sputnik*, 20 October, 2015.

Finally, Philips welcomes ‘a robust role for the United States’ as the USA ‘has always been strong and bipartisan’.⁶²¹ There are two issues here: firstly, we have seen that the USA has been the loudest advocate of Kosovo’s independence which directly opposes Serbia’s interest in the region. Thus the USA cannot be seen as a neutral arbiter in Kosovo’s case. Secondly, Belgrade would very likely demand Russia’s help, which would again invites Moscow and Washington to play another global chess game, at the cost of Kosovo’s citizens. While Russia and the USA are drawn into petty geopolitical games, accusations, and scandals, they lose sight of what matters for Kosovo (this can be said for their own citizens as well but that’s another topic) and end in a stalemate. The EU, on the other hand, has already sketched out the contours of a new deal based on consensus.

The previous section showed Serbia’s shift from the inflexible ‘Kosovo is a part of Serbia’ assertion toward more consensual proposals. It asked whether this implies that Serbia might recognise that Kosovo has been lost. Serbia, it seems, is ready to give away Kosovo under two conditions: (a) the solution must be face-saving; (b) it must guarantee prosperity to the rest of Serbia (for example, fast track to the EU membership). The solution ‘Serbia should recognise Kosovo’ does not satisfy the two conditions; moreover, it poses another issue: Pristina is far from ready to maintain the peace in the polity and left without supervision Kosovo will not become a sustainable democracy. Even if Belgrade were to recognise Kosovo’s sovereignty, it would change next to nothing for Pristina. Kosovo seems to need supervision with or without Belgrade’s recognition.

The Brussels Agreements and Silent Consensus

The EU, torn by its internal split on Kosovo’s statehood, has become a reluctant hero of Kosovo’s citizens. In 2011, a new dialogue started between Serbia and Kosovo, this time, however, under auspices of the EU and with the primary goal to improve quality of life for the people of Kosovo. The process is best described by Sir Robert Cooper, then a Special Advisor at the European Commission:

⁶²¹ Philips, p.15.

This mandate was a straightforward and truthful way of explaining what we were doing and why. ‘Cooperation ... to improve the lives of ordinary people’ reflects what people sometimes call ‘the European method’ – seeking peace through practical cooperation rather than through grand rhetoric about the brotherhood of mankind – though sometimes we cannot resist that temptation too. This is the method invented with the Coal and Steel Community. The last objective, ‘bringing Serbia and Kosovo closer to the EU’ is essentially about enlargement: the Thessaloniki promise which the EU will one day make good.⁶²²

The dialogue was conducted ‘without prejudice to the question of recognition’ which placated both sides. The negotiations though technical, ‘had far-reaching political implications, such as the extension of Kosovo’s authority in the North of Kosovo, the removal of Serb barricades across the northern border with Serbia and recognition of Kosovo’s travel documents by Serbia’.⁶²³ The dialogue fostered consolidation and planted the seed of consensus: all sides agreed to improve the lives of Kosovo’s citizens. The agreements on civil registry and freedom of movement were the first step: while the former document created a ‘joint committee’ which would identify gaps in missing documents,⁶²⁴ the latter allowed each party to ‘travel freely within or through the territory of the other’.⁶²⁵ The following agreement was on cadastral records which, for Pristina, was a chance to establish a reliable civil registry and property record. On the other hand, for Belgrade, the agreement opened the possibility for restitution of Serbs’ property.⁶²⁶ The two sides also ensured ‘free movement of goods in accordance with CEFTA’ and agreed on mutual acceptance of university diplomas.⁶²⁷

These agreements were followed by political questions such as the demarcation of the border between Kosovo and Serbia, and regional representation of Kosovo. The

⁶²² R. Cooper, ‘The Philosophy of the Belgrade-Pristina Dialogue’, *European Western Balkans*, 16 July, 2015.

⁶²³ Visoka, p.8.

⁶²⁴ Agreed Conclusions, ‘Civil Registry Books’, 2 July, 2011.

⁶²⁵ Agreed Conclusions, Freedom of Movement, 2 July, 2011.

⁶²⁶ Agreed Conclusions, ‘Cadastral Records’, 2 September 2011.

⁶²⁷ Agreed Conclusions, ‘Customs Stamp’, 2 September 2011; Agreed Conclusions, ‘Acceptance of university diplomas’, 2 July and 21 November, 2011.

agreement on integrated boundary/border management (IBM) aimed to harmonise legislation with the EU acquis.⁶²⁸ Interesting enough, Pristina viewed the line as a border, while Belgrade recognised the line as an administrative boundary. However, the line was drawn, Belgrade recognised the territorial integrity of Kosovo. Acceptance of the border, accompanied with the fact that Serbia's government continued dialogue even after the Constitutional Court of Serbia proclaimed the agreement on cadastre unconstitutional,⁶²⁹ shows that Serbia recognises that "others" (in this case the EU) have jurisdiction over the region. However, it would be incorrect to view Serbia's position as recognition of Kosovo's sovereignty. Serbia recognises Kosovo's territorial integrity precisely because the EU's authority is assumed, not the authority of Kosovo Albanians.⁶³⁰

Another very political agreement, also formally technical, was on regional representation and cooperation. This agreement enabled Kosovo to independently participate in regional organisations, however, Kosovo added an asterisk (Kosovo*) to indicate that Kosovo's statehood is 'in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence'.⁶³¹ The conclusion allows Kosovo to become a member of regional organisations, however, not as a sovereign state since it operates under Resolution 1244. Therefore, Kosovo's representatives are free to, independently from Serbia, take part in regional organisations; nevertheless, when it comes to modification of existing agreements, representatives of UNMIK 'will be invited to meetings organised within the framework of arrangements for which it is a signatory'.⁶³² In other words, Kosovo is independent from Serbia but not sovereign to modify decisions made by UNMIK administration.

On 19 April 2013, 'after ten rounds of often gruelling talks in the EU-facilitated Dialogue', the EU announced that Serbia and Kosovo 'had reached a landmark agreement':⁶³³ The First Agreement Governing the Principles for Normalisation of Relations, signed by the Prime Ministers of Serbia and agreement over Kosovo. This

⁶²⁸ Agreed Conclusions, 'IBM', 2 December 2011.

⁶²⁹ 'Ustavni sud: Neustavna Uredba o katastru za Kosovo', Blic, 26 February 2014.

⁶³⁰ The decision of the Constitutional Court had a consequence that the Brussels agreements cannot be ratified in the Serbia parliament and are not binding under international law, thus there is no guarantee that the agreement will be obeyed by a Serbia's government in the future.

⁶³¹ Agreed Conclusion, 'Arrangement Regarding Regional Representation and Cooperation', 24 February, 2012.

⁶³² Ibid., par.6.

⁶³³ 'Serbia and Kosovo reach landmark deal', European Union – External Action, 19 April, 2013.

agreement envisaged the creation of the Association/Community of Serb majority municipalities with their own President, Vice President, Assembly and Council.⁶³⁴ The result was that ‘local elections were held Kosovo wide’ and that Serbia made progress in the dismantling parallel institutions’.⁶³⁵ Some authors hurriedly proclaimed that there are two certain things about the agreement: ‘The first is that the Serbian government has given up on keeping northern Kosovo in its system and has ceded its authority to Pristina. The second is that Belgrade has implicitly recognised that Kosovo is a state’.⁶³⁶ Both statements are partially true, however, they fail to take into account Serbia’s calculations.

The nature of the double name for the border between Kosovo and Serbia signals trouble: while for Serbia it is a community of municipalities which reflects newly established entity, for the Kosovo Albanians it is nothing but another inter-municipal association within the existing system. If Pristina expands territorial and ethnic rights too far for Kosovo Serbs, it runs the risk of having an equally dysfunctional polity as Yugoslavia had under the 1974 Constitution. On the other hand, it is unlikely that the community will be lowered to the status of an NGO (as it has been the case in Slavonia) since municipalities ‘cannot be dissolved by a court decision, which suggests it is to have some kind of constitutional status’.⁶³⁷ The text is rather short and often vague; therefore, its implementation would be as challenging as the negotiations itself. The Community ‘will be created by statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable law and constitutional law (including the 2/3 majority rule).⁶³⁸ However, the agreement neither specified which organ would legislate the statute (Kosovo’s Assembly, existing municipal bodies under Serbian law, or newly elected municipalities under Kosovo’s law) nor what ‘constitutional law’ was indicated since it does not exist within Kosovo’s system (nevertheless, it does exist in Serbia’s). What is clear, on the other hand, is that Serbia will hold indirect influence in Kosovo through the representation of Kosovo Serbs. It is a paradox that the dismantling of Serbia’s institutions in Kosovo means that ‘Serbia’s engagement in Kosovo needs to

⁶³⁴ ‘First agreement of principles governing the normalisation of relations’, par.3. 19 April, 2013.

⁶³⁵ European Commission, ‘Serbia 2014 Progress Report’, 8 October, 2014, p.5.

⁶³⁶ Ibid.

⁶³⁷ ‘The Kosovo-Serbia Agreement: Why Less is More’.

⁶³⁸ Ibid., par. 2.

increase'.⁶³⁹ The first Kosovo wide elections, highly praised by the EU, rested on Belgrade's activities to promote voter turnout:

Belgrade assembled a Serb candidate list for Serb municipalities in the north and south, mostly from members of Serb parallel institutions in Kosovo. Its promotion as a joint, single list for Serbs in Kosovo prompted widespread resistance – from other Serb parties and lists in Kosovo, from leading EU member states including Germany, and from the Kosovo government.⁶⁴⁰

This reveals two things. Firstly, Kosovo Serbs remain closely tied to Belgrade since 'ninety percent of Serbs will always listen to Belgrade though they are not fooled by the story of the return of Serbia'.⁶⁴¹ It is important to stress that the agreement was signed by Serbia despite the disapproval of the majority of Kosovo Serbs. Therefore, they took a part in Kosovo's institutions not because of the agreement but despite it. Secondly, the agreement 'did not necessarily dismantle the Serbian parallel institutions in the northern Kosovo but rather found the way to legitimise them by, somehow, integrating them in the Kosovo legal framework'.⁶⁴² In short, Serbia indeed gave up on keeping parallel institutions; however, Belgrade remains present in Kosovo.

Regarding Serbia's recognition of Kosovo's statehood, it is true that Serbia implicitly recognised Pristina's statehood. However, what does this 'implicit' recognition mean? By signing the agreement, Serbia recognises Pristina's authority over the province; however, it remains excessively engaged in thwarting international recognition of Kosovo. The best example is the decision of Suriname to revoke its recognition of Kosovo.⁶⁴³ While Ivica Dačić, Serbia's minister of foreign affairs, marked this as a victory of Serbia's diplomacy and uttered that 'such a decision shows that one must be persistent, talk to everyone [and] this also show[s] that it's not all over', the revocation came after the meeting of Suriname's representatives and Sergey

⁶³⁹ K. Bassuener and B. Weber, 'Not Yet a Done Deal: Kosovo and the Pristina-Belgrade Agreement', A DPC Policy Paper, November 2013, p.2.

⁶⁴⁰ Ibid., p.3.

⁶⁴¹ Ibid., p.4; this was the initial name of Serbs list supported by Belgrade.

⁶⁴² L. I. Mehmeti, 'Kosovo – Serbia: normalisation of relations or just diplomatic theatre? An analysis of the April 2013 EU brokered agreement between Kosovo and Serbia', University of South Australia, 2013, p.15.

⁶⁴³ See the note: L. Gedošević, 'Diplomatska Ofanziva: Da li će posle Surinama, još neka zemlja povući priznanje Kosova', Blic, 1 November, 2017.

Lavrov.⁶⁴⁴ On the other hand, the Kosovo Albanians reiterated that ‘in the international law there is no concept of withdrawing a recognition [and] there is no state called ‘Kosovo and Metohija’’.⁶⁴⁵ Only a month after Suriname’s decision, Guinea Bissau also ‘sent a note to Pristina informing them of revocation’.⁶⁴⁶ Suriname and Guinea Bissau are surely not global players, and it is hard to imagine that many of Serbia’s citizens can point them on the map; however, their revocations show that the Brussels Agreement is by no means implies recognition in the eyes of Belgrade. In the Balkans, oftentimes it is a long and thorny path from implicit to explicit.

So, what is the significance of the Agreement? Besides being the first documents sign by highest representatives of the Kosovo Albanians and the Serbs (which is value in itself), it indicates Serbia’s willingness to surrender its *de facto* authority in Kosovo if it the EU guarantees its presence. On the other hand, Pristina gained long-awaited authority over the entire polity; however, the price for establishing control over the whole province is Belgrade’s increased influence in Kosovo, which is controlled, in its volume, by Brussels. This Agreement is surely not a cure for Kosovo’s troubles; however, it is a necessary step towards improving people’s lives. This historical agreement has been followed by several technical agreements such as agreements regarding Energy and Telecommunications. The latter agreement allowed Kosovo to acquire a three-digit dial code (international number), while the former established ‘direct channels of communication to discuss subjects of mutual interest’, whereas the new company will supply electricity to the four Serb majority communities.⁶⁴⁷ Also important were Liaison arrangements wherein Pristina and Belgrade exchange Liaison Officers.⁶⁴⁸ However, in all three agreements, there are no explicit references to Kosovo or Serbia, instead “parties” is used, also the office ‘used by the Liaison Officer and his staff [falls] within the EU Delegation/ EU Office’.⁶⁴⁹

The major objection to the agreement is that it ‘challenges the principles of multi-ethnic Kosovo that have been promoted and fostered by the International

⁶⁴⁴ D. Morina, ‘Kosovo Says Suriname Can’t Revoke Independence Recognition’, *Balkan Insight*, 31 October, 2017.

⁶⁴⁵ *Ibid.*, The government of Suriname indeed declared its revocation of the recognition of Kosovo and Metohija (the name used in Serbia’s Constitution).

⁶⁴⁶ ‘Guinea-Bissau officially revokes recognition of Kosovo – FM’, B92, 22 November 2017.

⁶⁴⁷ Arrangements regarding Telecommunications, 8 September, 2013; Arrangements regarding energy, 8 September, 2013.

⁶⁴⁸ Liaison arrangement, 30 May, 2013.

⁶⁴⁹ *Ibid.*, par 1.

Community despite the fact that this concept did not make any sense in the Kosovo environment (above 90% of population is Albanian)^{.650} Instead of clutching our pearls, we can focus on multicultural elements of the agreements; thus the Agreement on Justice that followed the Agreement on Normalisation proved that the idea of multicultural society is still present: for example, the Basic Court in Mitrovica ‘will be composed of 5 Kosovo Serb and 2 Kosovo Albanian Judges’, while the department for serious crimes ‘of 4 Kosovo Serb and 4 Kosovo Albanian Judges’ (The multicultural prospect of Kosovo’s society will be discussed in the next chapter).⁶⁵¹ The second imminent objection was that the implementation of the agreements would be impossible. Today, however, there is no significant progress except on the agreement on the Association/Community of Serb municipalities and the Cadaster.

Freedom of Movement – each side ‘enable residents of the other party to travel freely... The parties also agreed to interim solutions for purchasing temporary insurance’.⁶⁵²

Civil Registry – is entirely completed since Serbia passed copies of the original registers to EULEX which, after check-ups, will be given to Kosovo.

Cadastre – Serbia’s Supreme Court rejected this agreement as unconstitutional.

Diplomas Recognition – entirely completed including all education levels diplomas.⁶⁵³

Integrated Border Management (IBM) – ‘implementation of the IBM agreement is remarkable, given the very constructive cooperation between border authorities of both states’.⁶⁵⁴ It is worth mentioning, however, that different personnel do show the symbols of their respective states.

⁶⁵⁰ Mehmeti, p. 14.

⁶⁵¹ Agreement on Justice, par. 11, 9 February, 2015.

⁶⁵² BIRN, ‘Big Deal: Lost in Stagnation’, Report no.2, April 2015, p. 18.

However, there were certain incidents such arrestment of two Kosovo Albanians in September and October 2016. For details see: Republic of Kosovo, ‘Brussels Agreements: Implementation State of Play’, Pristina, 16 June – 25 November 2016, p. 21-22.

⁶⁵³ See: Republic of Kosovo, ‘Brussels Agreements: Implementation State of Play’, p.5., and BIRODI (authors Z. Gavrilović and P. Dimitrijević), ‘Izveštaj o primeni Briselskog sporazuma (od strane Republike Srbije), June – December 2014, Bureau for Social Research and Open Society Foundation, Belgrade, January 2015, p. 13.

⁶⁵⁴ Republic of Kosovo, ‘Brussels Agreements: Implementation State of Play’, p. 22.

Regional Representation and Cooperation – another agreement that has been on the right path (it is difficult to mark it as completed as Kosovo constantly joins new regional organisations) with regard to Kosovo’s representation in regional organisations. Thus, Kosovo became a member of the Permanent Court of Arbitration, the International Association of Prosecutors, the Parliamentary Assembly of the Council of Europe, the European Association of Chambers of Commerce, and acceded in The Hague Apostille Convention.⁶⁵⁵

Telecom – Kosovo received a dialling code while Serbia’s mobile operators are terminated.

Energy – it is agreed that KOSTT operates independently; however, the final implementation has been stalled by Serbia.

Justice and Police – Serbia’s dismantled its institutions and Kosovo Serbs judges and police now operated within Kosovo’s legal system.

Association/ Community of Serb municipalities – certainly the most important agreement for Belgrade and Kosovo Serb, has been delayed by Kosovo. Pristina claims that ‘the establishment of Association should go in synchrony with dismantlement of the remaining Serbia’s parallel structures in Kosovo’,⁶⁵⁶ and since Serbia’s judges and police personnel joined Kosovo’s system in December 2017, it likely that visible progress on Serb Communities will follow.

Implementation more than the agreement has shown that Kosovo’s wish to be independent from Serbia is higher than its desire to be nominally sovereign. Pristina discarded plain talks of its sovereignty for improvement of quality of life for Kosovo’s citizens: for example, using an asterisk, avoiding state symbols on the borders, and allowing EULEX to have a civil registry. Similarly, Serbia handed *de facto* and *de jure* authority over the province to EULEX. Bearing in mind that EULEX mission requires the support of Kosovo’s Assembly, practically, Belgrade handed Kosovo to Pristina. However, this is a fragile deal since the agreements have not been ratified in Serbia’s parliament and are treated as “conclusions” but not international agreements. Therefore, in order to convince Serbs to respect the agreements, EULEX presence is needed. The lesson to be drawn from the Brussels Agreements is that Serbia

⁶⁵⁵ Ibid., p.23.

⁶⁵⁶ Republic of Kosovo, ‘Brussels Agreements Pending Implementation’, Pristina, 6 July 2017, p. 5.

recognised that Kosovo is not its territory any longer, and that Kosovo Albanians accept independent from Serbia, though it means not being a sovereign state. Both sides, however, agree that this is merely a point of departure but believe that the ‘final’ settlement of Kosovo’s settlement will come on the heels of this success. Therefore, Vučić invited citizens of Serbia to an internal dialogue and a realistic approach on Kosovo:

It's time for us to as a nation stop burying our heads in the sand and try to be realistic, not to allow ourselves to lose or give to someone what we have, but also not to wait for what we have long lost to arrive in our hands.⁶⁵⁷

Similarly, Thaci expressed his hopes that Pristina would ‘strike an historical agreement with Serbia in 2018’ stressing that ‘dialogue is the only way forward for Kosovo and Serbia’.⁶⁵⁸ Worse than local atrocities and international blunders, for Kosovo, were Pristina’s and Belgrade’s mantras ‘Kosovo is a sovereign state’ and ‘Kosovo is part of Serbia’ respectively. It was the first time that both sides simultaneously felt a final settlement was imminent. The gap, while significant, was smaller.

In this section, I argue that dialogue and its implementation prove Serbia’s willingness to hand Kosovo to the EU and Kosovo’s readiness to accept supervision if it implies sovereignty from Serbia. In the next section, why the current arrangement is the best for all three sides and why it should be “sealed” is explained.

The Brussels Agreements and their implementation are clear sign that there is a ‘silent’ consensus regarding the status of Kosovo. Serbia traded its *de facto* power in Kosovo for EULEX’s guarantees that the mission’s status is neutral and will supervise authorities in Pristina. The Kosovo Albanians, on the other hand, made concessions related to their sovereignty only to gain independence from Serbia. The silent consensus is that Kosovo is a European protectorate. It is argued that not only is this the current state, but it is also the best solution for the final settlement. Instead of referring to Kosovo as a supervised sovereign state (or protectorate), Kosovo might be called a European Patrimony which reflects European cultural heritage and European

⁶⁵⁷ ‘Vucic for ‘internal dialogue, realistic approach to Kosovo’, B92, 24 July, 2017.

⁶⁵⁸ ‘Kosovo president seeks final deal with Serbia in 2018’, France 24, 2 February, 2018.

future. Formalisation of the current state brings several advantages. Firstly, there are no clear losers, and everyone gains something: It is a face-saving solution for Serbia, while for Kosovo Albanians it is the final secession from their “oppressor” – Serbia. Secondly, it does not further destabilise the region since Kosovo would practically continue to function as from 2008. Thirdly, the ownership settlement attracts foreign investments. Finally, it signals the maturity of Belgrade and Pristina to Brussels and the international community. The best way to illustrate the benefits of this arrangement is to answer following questions: ‘Why would Pristina agree to patrimony status and squander a chance to achieve full independence?’; ‘Why would Belgrade accept this arrangement and irreversibly lose *de facto* and *de jure* authority over the province?’, and ‘Why does the final deal matter to Brussels and Europeans?’

Why would the Kosovo Albanians agree to patrimony status and squander a chance to achieve full independence?

First of all, a Kosovo – European Patrimony (KEP) solution does not imply that Kosovo will never become a fully independent state. The ultimate authorities of KEP would become 27 member states of the EU which means that if there is a consensus, Kosovo might become independent. In other words, Kosovo would become a member of the EU without facing five states which do not recognise its sovereignty today, and furthermore leaves space to be recognised by them along that path. Frankly stated, there is no evidence that Kosovo could join the European family without being recognised by all members. Prior to publication of New Enlargement Strategy for the Western Balkans, ‘Spain has insisted that Kosovo should be excluded from the plans’; as Spanish foreign ministry said ‘Kosovo is not part of the enlargement process and has its own differentiated framework’.⁶⁵⁹ There is a constant worry that one of those five states will block Kosovo’s path to the European family. Therefore, membership in the EU might become a pipe dream for Pristina. The European Commission indeed reported that Kosovo ‘has an opportunity for sustainable progress through the implementation of the Stabilisation and Association Agreement and to advance on its European path once objective circumstances allow’.⁶⁶⁰ However, these “objective circumstances” mainly refer to the “normalisation” agreement with Serbia.

⁶⁵⁹ M. Zivanovic, ‘EU to Showcase New Enlargement Strategy for Balkans’, Balkan Insight, 6 February, 2018.

⁶⁶⁰ European Commission, ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’, Strasbourg, 6 February, 2018, p.7-8.

Perhaps a better demonstration of the previous point is the Stabilisation and Association Agreement (SAA) sign between the EU and Kosovo. Whereas some other states of the Western Balkans are recognised as potential candidates, ‘the abundant use of the caveat “should objective circumstances so permit” in the preamble, and in several provisions of the SAA further reveals the uncertainties regarding the development of EU-Kosovo relations’.⁶⁶¹ Article 2 of the agreement says:

None of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step.⁶⁶²

Furthermore, the relationship with Serbia and cooperation with the CSDP ‘constitute essential principles of this Agreement [and] in case of the non-compliance by Kosovo with these commitments, the EU may take measure it deems appropriate, including suspending all or part of this Agreement’.⁶⁶³ Therefore, not only has Kosovo not been treated like others in the Western Balkans but relationship normalisation with Serbia is a top priority in order to stay on the European path (again, however, there are no guarantees that Kosovo will eventually join the EU without recognition of all EU member states). Further, the SAA with Kosovo excludes portfolio investments⁶⁶⁴ which ‘reflects the limits to the scope of the EU’s competences in the field investments as confirmed in Opinion 2/15 regarding the EU’s Free Trade Agreements with Singapore’.⁶⁶⁵ Finally, the mobility of individuals is restricted to ‘areas of working conditions, remuneration and dismissal, family reunification, long-term residence, students, researchers and highly qualified employees, seasonal workers, intra-corporate transferees and pensions’⁶⁶⁶ since the mobility provision resides within the competence of the member states.

⁶⁶¹ P. Van Elsuwege, ‘Legal Creativity in EU External Relations: The Stabilization and Association Agreement between the EU and Kosovo’, *European Foreign Affairs Review* no.22, vol. 3., p. 405.

⁶⁶² Council of the European Union, ‘Stabilisation and Association agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part’, Brussels, 10728/1/15 REV 1, 2 October, 2015, art.2.

⁶⁶³ *Ibid.*, art.5.

⁶⁶⁴ *Ibid.*, art. 65.

⁶⁶⁵ Elsuwege, p.406.

⁶⁶⁶ SSA with Kosovo, art. 86.

In short, due to an internal EU split among states which do or do not recognise Kosovo, Kosovo is not perceived as a potential candidate. However, this uncertain path to the EU is conditioned by Kosovo's relationship with Serbia. This vacuum of uncertainty directly affects investments and mobility, i.e. the life of Kosovo's citizens.

However, by accepting the idea of European Patrimony, Kosovo would overcome those obstacles and could focus on other, less acute issues, such as building democratic institutions, the rule of law, minority rights, and market economy. It should be emphasized that Kosovo cannot succeed without European support. Therefore, there are two conditions under which Pristina might relinquish the idea of full sovereignty: (a) Kosovo to be independent of Serbia; (b) extensive and continuous support for Kosovo's democratic institutions by Brussels and an unhindered path to the EU. With the KEP proposal on the table, the Kosovo Albanians would face a sincere test. The UDI recalls 'the years of strife and violence in Kosovo' and claims that Kosovo's future 'lies with the European family'.⁶⁶⁷ This implies that the declaration was a result of Serbia's terror and that Kosovo is committed to the European path. The KEP settlement takes Serbia out of the equation and paves the way (from this perspective, the only way) to the EU. Thus by rejecting this generous proposal Pristina would spark doubts that Kosovo's independence is indeed only a first step towards the creation of the Greater Albania.⁶⁶⁸ The international community, however, has already shown how it deals with inconsistencies in Kosovo's politics. Former members of KLA, now MPs, tried to suspend a law regulating the Special Chambers (the Court for war crimes) by reasoning that it 'is a political court and wants to punish only Kosovo Liberation Army soldiers for alleged war crimes'.⁶⁶⁹ The Quint member states warned that:

Such a move calls into question Kosovo's commitment to the rule of law and risks all that Kosovo has achieved. It puts the interests of certain individuals above the interests of Kosovo society. We condemn such a move, and anyone who supports it will be rejecting Kosovo's partnership with our countries. We urge all Kosovo's leaders and members of the Kosovo Assembly to speak out against this initiative and honestly inform Kosovo's citizens of the severe

⁶⁶⁷ Kosovo's Declaration of Independence, 2008.

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⁶⁶⁹ V. Hopkins, 'Kosovo politicians in 'panic attack' over war crimes court', Politico, 5 January, 2018.

negative consequences, including for Kosovo's international and Euro-Atlantic integration.⁶⁷⁰

The result was the Assembly presidency meeting did not reach a quorum twice. The international community sent a clear sign that it would tolerate deviation in Kosovo's politics from the Ahtisaari's plan. Therefore, Pristina has the choice to either comply or suffer severe consequences. While the KEP solution presents the test of commitment for Pristina, Belgrade faces a different conundrum.

Why would the Serbs accept this arrangement and irreversibly lose de facto and de jure authority over the province?

We have seen that Belgrade, through the Brussels Agreement, passed its jurisdiction to Pristina and most notably EULEX; thus it may seem as Serbs are reconciled to the fact that Kosovo is lost. That is far from the truth. The Agreements have not been ratified in Serbia's parliament, and therefore do not hold under international law (on the contrary, Kosovo's Assembly did ratify them); they are treated as conclusions made among the EU, representatives of Kosovo Albanians, and current Serbia's government. In other words, there are no guarantees that the next government will obey the Agreements. Hence, the final settlement with Kosovo (or ratification of the signed Agreements) requires constitutional changes. In the New Enlargement Strategy for the Western Balkans, the European Commission insisted that 'in Serbia's case the interim benchmarks related to the normalisation of relations with Kosovo (chapter 35) must be met and a comprehensive, legally-binding normalisation agreement concluded urgently'.⁶⁷¹ Reacting to this report, Vučić said that these conditions are 'like the Himalayas, but we would not be the first to have climbed Mount Everest' and invited citizens of Serbia to decide:

Do we see a future in Europe, for which we have to pay a certain price, which is not small - or do we leave it at this now? Citizens will decide and we will respect that decision. But I will not hide,

⁶⁷⁰ Quint Member States Statement, 4 January, 2018.

⁶⁷¹ European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', p.7.

instead I will say what I think is best for the country, and citizens will say whether that's fair or not.⁶⁷²

What he thinks is apparent from the following statement:

The EU strategy opens up a window of hope and chances, and it is up to us to be accountable and to work harder. The economic situation is no longer as difficult, but it will be in 10 or 15 years if we do not solve political problems. And if we solve them, we will grow economically like a rocket.⁶⁷³

While it is evident that the president of Serbia wishes to make a deal with Pristina, he rejects a solution where Serbia will 'lose everything, while someone else gets everything'.⁶⁷⁴ On the other hand, it is hard to predict how citizens would react, especially since there is no concrete proposal. Approximately every second citizen of Serbia supports Serbia's membership in the EU while 59% of them 'believe that the issues between Belgrade and Pristina should be resolved regardless of whether the EU requires [it]'.⁶⁷⁵ This signals that citizens of Serbia expect a European future and the final settlement regarding Kosovo's status regardless of the path. A legally binding agreement is, however, a precondition for membership in the EU: the KEP solution would remove that stumbling block while offering a face-saving way out. As the member states are the ultimate authority, Serbia has a chance, once it joins the EU, to gain shared authority over Kosovo if Kosovo does not prove to be sufficiently mature to become a sovereign state before Serbia joins the EU. The idea is that 27 member states decide whether Kosovo should continue its path as a fully independent state or as a European Patrimony prior to Serbia's entry in the EU since it is doubtful that once inside Serbia would dramatically change its policy and support Kosovo's independence.

If for Pristina, the KEP solution represents a commitment test, for Serbs it is a reality check of whether they want the European future or another period of isolation. Jean Claude Juncker, then the President of the European Commission, suggested 2025

⁶⁷² 'Huge obstacles on EU path –citizens to decide what to do', B92, 7 February, 2018.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Government of the Republic of Serbia – Ministry of European Integration, '49% of citizens strongly support Serbia's membership to EU', 24 July, 2017.

as a year when Serbia might join the EU which should be taken in a broader geopolitical context.⁶⁷⁶ Böhmelt and Freyburg forecast that, when the benchmark is the 2004 average compliance with *acquis*, Serbia passes the threshold in 2035.⁶⁷⁷ However, ‘the migration crisis and Russia’s increasingly threatening behaviour in the eastern neighbourhood provide strong reasons for the EU to keep Serbia on the accession path, which works against applying consistent conditionality in other areas’.⁶⁷⁸ In other words, a legally-binding agreement (a final settlement) with Kosovo launches Serbia onto the fast-track to the EU: Brussels is ready to turn a blind eye to issues such as human rights and press freedom since Serbia is not only an important ally in the migration crisis but membership is a means to avoiding Serbia’s lurch towards Russia. (After Montenegro joined NATO in April 2017, Serbia is the last bastion of Russia’s influence in the West Balkans. This is the topic of the last chapter).

Why is the KEP significant to Brussels and Europeans?

The significance of Kosovo’s final settlement to Brussels is closely related to the project of European enlargement. Ker-Lindsay *et al.* correctly identify the issue that many scholars perceive ‘the EU, acting as a unified body, has pursued expansion as part of its fundamental reason for being’.⁶⁷⁹ This idea of an ever-expanding union as a tool for itself is, however, an affront to the idea of European society, in which peace is a product of conflict-solution management of which enlargement of the union is a side effect. While for the EU, enlargement is part of the peace project, many members have their own objectives and this includes denying expansion. Here I will list only states with a direct interest in the region.⁶⁸⁰

⁶⁷⁶ European Commission, ‘State of the Union 2017: Letter of Intent to President Antonio Tajani and to Prime Minister Juri Ratas’, Strasbourg, 13 September 2017, see: Priority 9.

⁶⁷⁷ T. Böhmelt and T. Freyburg, ‘Forecasting candidate states’ compliance with EU accession rules, 2017-2050’, *Journal of European Public Policy*, vol.25, no.11. 2017, p.15.

⁶⁷⁸ B. Huszka, ‘Human Rights on the Losing end of EU Enlargement: The Case of Serbia’, *Journal of Common Market Studies*, Early View 2017, p. 13.

⁶⁷⁹ J. Ker-Lindsay *et al.*, ‘The national politics of EU enlargement in the Western Balkans’, *Southeast European and Black Sea Studies*, vol.17, no. 4., 2017, p. 512.

⁶⁸⁰ Even though the UK is leaving the union, it is still worth mentioning its position towards European extension. The UK was one of the loudest supporters of European extension, however, mostly because it was seen as the ‘best defence against efforts the other members to pursue greater political integration’. In other words, the UK saw acceptance of new members as guarantee to a looser union.

Germany⁶⁸¹ has developed the ‘yes, but’ approach often used in foreign policy. Berlin supports ‘the association process into a sequence of small units... [however] remains opposed to any ‘automatism’ that would reward a (potential) candidate country that has not fulfilled required reforms’.⁶⁸² In other words, Berlin is a demanding supporter of European extension: while it supports new members on their path to the union as in the case of the Berlin Process (the initiation of the intergovernmental conference held in 2014), Germany makes high demands (it was the main advocate of the ‘normalisation’ requirement for Serbia). Germany’s policy demands ‘could also backfire on the commitments of candidate countries if not coupled with strong incentives’⁶⁸³ since Serbia’s officials are oftentimes irritated by what they view as Berlin’s, condescending, comments and advice. For example, in response to Sigmar Gabriel’s remark that Serbia should accept reality and the existence of Kosovo’s state: Ivica Dačić replied ‘[g]ive him my regards. Farewell, Gabriel, and accept the reality that the current German government is outgoing’.⁶⁸⁴ I will explore potential consequences of rigid German conditionality in the last chapter.

Another pillar of the EU is France. The French view of the union as a set of values and a tool for strengthening its international role combined with a general aversion towards limited of sovereignty and transferring of competencies to Brussels make France dispassionate and disengaged when it comes to enlargement. Paris seems to be bent on following Germany’s lead, ‘stepping only in rare cases of divergences, such as on the question of opening accession talks with Serbia’.⁶⁸⁵ Due to France’s traditional pro-Serbian policy, the international community, believing it would be easier for Kosovo Serbs to accept a traditional ally, appointed French officials for two important roles such as the NATO regional command for North Kosovo UN Special Representative. It is also not surprising that the ethnic line (excluding the enclaves)

See: J. Ker-Lindsay, ‘The United Kingdom and EU enlargement in the Western Balkans: from ardent champion of expansion to Post-Brexit irrelevance’, *Southeast European and Black Sea Studies*, vol. 17, no. 4, 2017, p. 566.

⁶⁸¹ Germany is a country with a significant number of Albanians and Serbs and a top destination of Serbia’s export.

⁶⁸² T. Toegholfer and C. Adebahr, ‘Firm supporter and severe critic – Germany’s two-pronged approach to EU enlargement in the Western Balkans’, *Southeast European and Black Sea Studies*, vol.17, no. 4, 2017, p.538.

⁶⁸³ *Ibid.*, p. 546.

⁶⁸⁴ ‘Serbian FM tells German counterpart to “accept reality”’, B92, 16 February, 2018.

⁶⁸⁵ N. Wunsch, ‘Between indifference and hesitation: France and EU enlargement towards the Balkans’, *Southeast European and Black Sea Studies*, vol. 17, no.4, 2017, p. 552

between Kosovo Serbs and Kosovo Albanians is in Kosovska Mitrovica, the town protected by French soldiers. However, despite open, though largely rhetorical, support for Serbia's European, France has no national interest in the Balkans, and therefore remains largely absent.⁶⁸⁶

The states with an economic and cultural interest in the Balkans are Italy, Hungary, and Austria. For Italy, the main economic pillars in the region are Albania and Serbia: while it acknowledges that recognition of Kosovo is an unfair condition for Serbia,⁶⁸⁷ Italy maintains good relationships with Kosovo and Albania,⁶⁸⁸ but Italy's influence in the region has been hindered by lack of resources and narrow approach of focusing exclusively on trade and security.⁶⁸⁹ Hungary remains engaged in the Balkan affairs due to a common history and a significant minority in Serbia; however, just as Italy, it lacks the capacity to make an impact. Hungary's position is especially peculiar: while it is a committed Euro-sceptic, its government supports European extension. Huszka does not see this as a contradiction since enlargement endorsement serves national interests.⁶⁹⁰ Besides historical and cultural ties, the recent migration crisis seems to have further strengthened the bond between Budapest and Belgrade. When Hungary's government built fences on the border with Serbia, Serbia refused to impose any countermeasures, most probably in order not to lose Hungary's support for EU integrations. This policy paid off when Victor Orbán rejected the idea that normalisation with Kosovo should be one of the requirements for Serbia's accession:

I would like to make clear that Hungary does not accept anyone trying to block Serbia's accession to the European Union for any reason. It is only fair that the same rules should apply to the Serbs as did to the Hungarians, or to those who joined earlier.⁶⁹¹

⁶⁸⁶ For detailed France's approach to enlargement to Serbia and the Balkans see: *Ibid.*

⁶⁸⁷ See for example: 'Italijanski minister: Srbija što pre u EU, priznanje Kosova je nepravedan uslov', *Blic*, 16 January, 2012.

⁶⁸⁸ For example, Italy is very vocal backer of visa-free regime for Kosovo and Albania is the top trade partner.

⁶⁸⁹ A. Frontini and D. Denti, 'Italy and EU enlargement to the Western Balkans: the Europeanization of national interest?', *Southeast European and Black Sea Studies*, vol. 17, no. 4, 2017.

⁶⁹⁰ B. Huszka, 'Euro-sceptic yet pro-enlargement: the paradoxes of Hungary's EU policy', *Southeast European and Black Sea Studies*, vol.17, no. 4, 2017.

⁶⁹¹ Cabinet Office of The Prime Minister of Hungary, 'Viktor Orbán's press statement after his talks with Aleksandar Vučić, Prime Minister of the Republic of Serbia', Belgrade, 5 September, 2016.

In short, Hungary has historical interest in the Balkans; Italy has trade interests; what the two have in common is that both support further extension of the EU. While Italy's stance toward enlargement and Serbia's conditions for accession tends to align with Germany's position, Hungary, a leading Euro-sceptic, oftentimes defies Berlin's conditions. Finally, Austria is, due to geographical proximity and historical ties, another interested party with inadequate capabilities to influence the region. After forming a new government, led by Austria's People Party (OVP) and the right-wing Freedom Party (FPO), Austria has joined the family of reluctant European states of the EU. Heinz-Christian Strache, a Vice-Chancellor of Austria and the leader of FPO, said that 'Kosovo is without a doubt a part of Serbia' and only a matter of Serbia's internal question.⁶⁹² Eventually, he explained that it is 'a reality that Austria has recognized Kosovo' but again stressed that 'it is also a reality that Serbia sees Kosovo within its composition'.⁶⁹³ However understood, this statement should not be ignored,⁶⁹⁴ especially since it is not an isolated response. Miloš Zeman, a president of Czech Republic, stated that he personally did not recognise Kosovo and that a solution must be sought between Belgrade and Pristina without foreign involvement.⁶⁹⁵

So far, we have seen two factions of European states. This faction is united around the idea that Serbia should solve all disputes with Kosovo prior to accession, and can be divided into two subgroups: states which follow Germany's policy but have no or little interest in the region (for example, France), and states following Berlin with trade and/or security concerns but scarce leverage (Italy). The second fraction encompasses the reluctant European states such as Austria, Hungary, and the Czech Republic.⁶⁹⁶ These states defend the position that Brussels should require no special

⁶⁹² 'Austrian vice-chancellor: Kosovo undoubtedly part of Serbia', B92, 12 February, 2018.

⁶⁹³ "'Serbs love those who love them' –FM meets with Austrian VC', b92, 12 February, 2018.

⁶⁹⁴ It might inspire 'courage in those in Europe opposing Kosovo's independence' and swing narrative. For example, Behgej Pacolli, a Kosovo's minister of foreign affairs, told that 'Serbia does not necessarily have to recognize Kosovo's independence'.

E. Robelli, 'The anti-Kosovo provocateur from Vienna', Pristina Insight, 14 February, 2018.

⁶⁹⁵ D. Milinković interview with Miloš Zeman, 'Miloš Zeman: Hašim Tači je ratni zločinac', Večernje Novosti, 30 April, 2015. Zeman reiterated this opinion when he said that 'double standards are being applied to the cases of Crime and Kosovo'. 'Czech president sees Kosovo-Crimea double standards', B92, 6 October, 2017; However, the Czech political scene has been divided on Kosovo. See:

T. Dopita 'The Czech Republic: Kosovo's Reluctant and Disengaged Recogniser', in J. Ker-Lindsay and I. Armolakos (eds), *The Politics of Recognition and Engagement EU Member State Relations with Kosovo*, Cham, Palgrave MacMillan, 2020, pp. 83-102.

⁶⁹⁶ Note that not all the European reluctant states belong to this fraction: for example, Poland belongs to a dispassionate-and-disengaged group (France) and Slovakia is in the third group consisting of the states which do not recognise Kosovo.

conditions for Serbia. In other words, Serbia should be able to join the EU without the final agreement with Pristina. Both groups, however, believe that Serbia will eventually gain a place within the union and that Kosovo independence is an irreversible reality.⁶⁹⁷ Where they differ, nevertheless, is whether Serbia should accept this reality prior to accession.

Finally, the third fraction consists of five member states which refuse to recognise Kosovo – Cyprus, Greece, Romania, Slovakia, and Spain, all of which have significant minorities of their own who, they are afraid, might follow Kosovo's example. It is important to stress that all five states view expansion to the Western Balkans as one of EU's priorities. Cyprus' interest in the region is almost entirely related to Serbia which can be primarily explained in terms of trade and tourism.⁶⁹⁸ However, the two nations are also bound by religion⁶⁹⁹ and shared perception they are victims of foreign intervention.⁷⁰⁰ Though, Nicosia is never an initiator of EU enlargement, it supports Serbia on the EU path and more importantly on the issue of Kosovo. However, while Cyprus claimed that it 'would not recognize Kosovo even if Serbia does', today, after the Brussels Agreement, it is more likely that if Serbia recognises Kosovo's sovereignty, Nicosia will follow since 'Cyprus cannot be more Serbia than Serbia'.⁷⁰¹ In other words, the Cypriots hold no rigid position on Kosovo's status, but would respect any decision coming from the dialogue between Belgrade and Pristina. Greece is another traditionally pro-Serbian state;⁷⁰² however, it 'is possibly the most engaged non-recognizer with Pristina – diplomatically and politically'.⁷⁰³ Thus, Athens, on

⁶⁹⁷ Even in the case of Czech Republic revocation of recognition is highly improbable.

⁶⁹⁸ Even though Cyprus export to Serbia is only 0.15% and it accommodates only 8000 Serbian tourists, it is by far the most important state in the region therefore Belgrade remains only place in the region where Cyprus has an open Embassy.

See: I. Ioannides, 'Cyprus and EU enlargement to the Western Balkans: a balancing act', *Southeast European and Black Sea Studies*, vol.17, no.4, 2017.

⁶⁹⁹ See: G. Kentas, 'Cyprus: Position paper on Kosovo. In Kosovo calling: International conference to launch position papers on Kosovo's relation with EU and regional non-recognising countries', Kosovo Foundation for Open Society and British Council, Pristina, April, 2012.

⁷⁰⁰ Ioannides, 2017, p. 636.

⁷⁰¹ *Ibid.*, p.642.

⁷⁰² For example, Athens openly took pro-Serbian stance during the war in Croatia.

See: M. Takis, *Unholy alliance: Greece and Milošević's Serbia*. College Station, Texas A&M University Press, 2002.

Also, 97% of Greeks opposed Greece (within NATO) military intervention against Serbia.

Taken from: I. Armakolas and G. Triantafyllou, 'Greece and EU enlargement to the Western Balkans: understanding an ambivalent relationship', *Southeast European and Black Sea Studies*, vol.17, no.4, 2017, p. 615.

⁷⁰³ I. Armakolas and G. Triantafyllou, 2017, p. 622.

Kosovo's request, established an Economic and Commercial Affairs Office because Greece 'has significant investment in Kosovo'.⁷⁰⁴ It also maintains a Liaison Office in Pristina (at an ambassadorial level) and recognises Kosovo's travel documents (visa regime).⁷⁰⁵ This should be understood in the context of the Brussels Agreements, whereas Serbia also has a Liaison Office in Pristina, recognises Kosovo's travel documents, and maintains trade with Kosovo. Put differently, Athens simply follows Serbia: 'Greece clearly views Kosovo as a future part of the EU. However, this position is qualified by stressing that a solution to the status question should be reached together with Serbia in a mutually accepted fashion'.⁷⁰⁶ Romania, like Greece, follows Serbia. Bucharest has opened a Representative Office⁷⁰⁷ in Pristina but firmly rejects Kosovo's sovereignty: after the EU signed as SAA with Pristina, Romania's government made it clear that it would not influence its position on Kosovo's status and that 'the agreement was signed only between Kosovo and the European Union, in its own name, without the participation of member states. So, Romania will not sign and will not ratify the agreement'.⁷⁰⁸ In the eyes of Serbia, Romania is a solid ally who may help with the Kosovo compromise.⁷⁰⁹ In the same vein, Slovakia is a firm and traditional Serbia's ally. Interestingly, Slovaks are the second favourite nation among Serbs.⁷¹⁰ Ivan Korčok, Slovakia's minister of foreign affairs, reiterated that Bratislava 'will not recognize Kosovo, not because of Serbia, although we understand your situation, but because for us this is a matter of principles, and we will remain consistent'.⁷¹¹ At first glance, it looks like Slovakia would stick to its position towards Kosovo's sovereignty despite Serbia's recognition; however, in reality it is hard to imagine that Slovakia would oppose any solution acceptable to Serbia's government. Finally, Spain is the most vocal opponent of Kosovo's independence; it is the only state that requested that Kosovo should be excluded from EU's strategy for the West

⁷⁰⁴ Hellenic Republic - Ministry of Foreign Affairs, Political Relations: Kosovo*, available at: <https://www.mfa.gr/en/blog/greece-bilateral-relations/pristina/>, (accessed on 8 March, 2018).

⁷⁰⁵ Ibid.

⁷⁰⁶ I. Armakolas and G. Triantafyllou, 2017, p. 622.

⁷⁰⁷ However, Kosovo has no representative in Bucharest.

⁷⁰⁸ M. Chiriac, 'Romania Sticks to its Tough Line on Kosovo', *Balkan Insight*, 28 October, 2015.

⁷⁰⁹ 'Romania asked to help with "Kosovo compromise"', B92, 8 March, 2018.

⁷¹⁰ I cannot find a source but I will – I am quite sure they were the second favourite (after Russians and before Chinese).

⁷¹¹ "'Nothing has changed – Slovakia won't recognize Kosovo'", B92, 6 March, 2018.

Balkans.⁷¹² There is even an opinion that Spain would not recognise Kosovo's statehood even if Serbia were to given its issues with Gibraltar and Catalonia.⁷¹³ This is, however, a bold prediction and, like in case of Slovakia, it is hardly possible that Madrid would ignore Serbia's will.⁷¹⁴

The common denominator of all three factions is support for European extension to the West Balkans with emphasis on normalisation between Belgrade and Pristina. While the first group (led by Germany and followed by most member state) holds the opinion that Serbia has to make a final arrangement with Pristina prior to accession, the second (Austria, Hungary, and the Czech Republic) and the third (states which do not recognise Kosovo) groups consider this condition unjust. The latter two groups, however, differ when it comes to Kosovo's accession: the second faction sees no issues for Kosovo's accession; the third fraction requires Kosovo's status to be solved prior to its accession. Paradoxically, the first and the third factions both stress the importance of the 'final' settlement but view the issue from different standpoints. The former group believes that Kosovo is an independent state and pressures Serbia to normalise relations with its neighbour, while the latter views the status issue as an internal question of Serbia.

Therefore, a solution that satisfies member states of the EU should be based on: (a) relationship normalisation between Pristina and Belgrade because another Cyprus is no option for Germany and its followers; (b) consensus on Kosovo's status between Kosovo and Serbia since non-recognisers wish to eliminate any unilateral/forceful solutions which their own minorities may take as an example and abuse in future. The KEP solution meets both requirements. For Brussels, the KEP solution which is based on the EU enlargement, as well as consensus among member states, also shows that even after Brexit, the union remains a primary goal for many other states and promotes the EU as the ultimate power in the region succeeding where two of the world's most

⁷¹² In the final document Kosovo has been included, however, 18 months limit for Serbia to reach an agreement with Kosovo has been omitted.

Zivanovic, 2018.

⁷¹³ T. Trkić, interview with Vladimir Stanković, 'Da li je Gibraltar špansko Kosovo i može li Britanija da ga izgubi zbog „bregzita“', SputnikNews, 14 April, 2017.

⁷¹⁴ Note, however, that Spain opposed Kosovo membership even in cultural and sporting organisations, and that its diplomats are banned to talking to Kosovo representatives even in informal settings.

R.Ferrero-Turrión, 'Spain: Kosovo's Strongest Opponent' in Europe, in J. Ker-Lindsay and I. Armolakos (eds), 2020, pp. 226 and 230.

militarily powerful states failed. Equally important, the solution is already in play, and thus would not lead to diplomatic turmoil.

Conclusions

Kosovo's chaotic legal system can be amended only through a new Constitution which requires votes of Kosovo Serb representatives. Similarly, Belgrade needs to normalise relationship with Pristina in order to continue its European journey. This mutual need softens their maximalist demands embodied in 'Kosovo is a sovereign state' and 'Kosovo is part of Serbia' to 'Kosovo is independent of Serbia' and 'Kosovo is not a sovereign state'. New narratives open space for a firm solution under the formula: (a) Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; (b) Serbia not to recognise Kosovo even if it means that Serbia will lose *de facto* and *de jure* authority over the region. There is, however, already the silent consensus following this formula: Kosovo as a European Protectorate since both sides welcomed the EULEX mission and signed the Brussels Agreement which are inconsistent with their domestic laws, recognising the EU as the primary authority. In the eyes of Belgrade, this is a face-saving solution which paves the way to the EU. Similarly, for Pristina, it is a solution that eliminates Belgrade's *de jure* claim over Kosovo and secures European support to Kosovo's democratic institutions. Due to its internal split on Kosovo's status, the EU is also forced to seek consensus. The KEP solution satisfies member states requirements that prior to accession Kosovo and Serbia should reach the final status arrangement and that this arrangement is not unilateral or forced. Moreover, the consensual solution would put Brussels on a pedestal as a dominant deal-maker in the region, while accession of new members would prove that enlargement remains fundamental European idea even after Brexit.

Chapter 9

FROM THE SILENT CONSENSUS TO THE FINAL AGREEMENT: CHALLENGES AND OPPORTUNITIES

Abstract

This chapter argues disputes between Belgrade and Pristina such as tariffs, the Specialist Chamber, ownership of natural resources, the Serb Community, membership in international organisations, and Kosovo's army could be solved under the KEP proposal. The Proposal is a panacea for Kosovo, but it is in the long-run, fruitless without building shared narratives. An assassination of a Serbian politician shows that any event can encourage political braggadocio and spark distrust between the two sides. Nevertheless, the road to shared narratives goes through four stages: refugee return, inter-groups contact, promotion of common interest, and loyalty to the province and its institutions. Surprisingly, a grain of hope and inspiration comes from the police officers, judges, and prosecutors.

Introduction

In early 2018, the European Commission victoriously proclaimed that the Western Balkans were part of Europe and that their peoples 'have a common heritage and history and a future defined by shared opportunities and challenges'.⁷¹⁵ That was a message for the Kremlin. The message to the region was less encouraging: 'there will be no further arrangement during the mandate of this Commission and this Parliament'.⁷¹⁶ Yet, the same report forecast that Serbia might be ready in 2025 and that Kosovo's citizens will enjoy the visa liberations if it solves border issues with Montenegro and strengthens its track record in fighting organised crime. While Serbia opened 16 chapters (two closed), leadership in Pristina were doing everything to meet

⁷¹⁵ European Commission, 'A credible enlargement perspective for and enhanced EU engagement with the Western Balkans', Strasbourg, 6 February, 2018, p.1.

⁷¹⁶ Ibid.

both benchmarks, and it seemed that there was life in the EU after Brexit. At that moment, everything was idyllic, there were even rumours that Vučić, Thaci, and Mogherini would be nominated for a Nobel Peace Prize.⁷¹⁷ However, this picture shows us the forest, not the trees. The situation on the local level, seemingly, had reached its lowest point: Belgrade – Pristina dialogue had stalled and both sides again engaged in mutual accusation over the delay. The European ‘carrot and stick’ strategy accompanied by the idea of deconstructing political disputes into technical challenges appeared to be fruitless. Perhaps the EU gave a carrot to the wrong side. The Kosovo Albanians adopted a resolution on border demarcation with Montenegro and did everything to fight organised crime. However, the EU refused to give a date for the visa liberalisation to Kosovo due to the fear that its citizens might misuse this right.

On the other hand, the EU has been ready to turn a blind eye to when it comes to political violence in Serbia, and it seems to tolerate Vučić’s soft autocracy. Brussels further allows Vučić’s regime to adopt a dirigiste policy of economic and political planning through media censorships and often local intimidation. This allows Vučić and his coteries to use ‘fractured discursivity’: They are ready to give ‘lip-service to the EU’ and simultaneously ‘either engage in nationalist discourse, or allow xenophobic discourse to thrive on the margins’.⁷¹⁸ In other words, while they present themselves as reformist in Brussels and populist at home, the local elite seizes power and wealth.⁷¹⁹

Therefore, Brussels put stability in the region as the primary goal even when it comes at the expense of democracy. Additionally, Serbia tries to play both sides, the EU and Russia, justifying that its agreements with Russia are merely related to economics. That is partly true, however, as long as the Kremlin does not share European values, values Serbia has chosen, it is a legitimate fear that Russia’s investments might hinder Serbia’s European perspective. However, it is not all roses for Vučić’s administration. Massive protests all over the country and frequent reports

⁷¹⁷ ‘Vucic and Thaci to be nominated for Nobel Peace Prize?’, B92, 16 August, 2018.

⁷¹⁸ S.M. Jovanović, ‘Fractured discursivity: discursive governance in Serbia in relation to nationalism and xenophobia (2012–2016)’, *Journal of Contemporary Central and Eastern Europe*, vol. 27, no. 2/3, 2019, p. 164.

⁷¹⁹ B. Radeljić and V. Đorđević, ‘Clientelism and the Abuse of Power in the Western Balkans’, *Journal of Balkan and Near Eastern Studies*, vol. 22, no. 5, 2020, pp. 597-612.

on political violence put significant pressure on the Government, and it is just a matter of time until the EU reacts.

Meanwhile, Kosovo not only has not received the date for the visa liberalisation, but also has failed to join INTERPOL and has lost several recognitions due to Serbia's aggressive foreign policy over recognition of Kosovo. As a result, the leadership in Pristina has become anxious and turned once again to unilateral decisions such as refusal to form the Court for War Crimes, introduction of 100 per cent tariffs on Serbian goods, and appropriation of Trepca mining. Interestingly, this time unilateral decisions come in spite of American wishes and recommendations. And in just matter of months, dialogue between Belgrade and Pristina regressed and negotiations stymied. The negotiations between Belgrade and Pristina are like paddling upstream, if one stops, the canoe goes quickly downstream. On a positive note, the two sides are now engaged in everyday issues that are of concern for citizens of Kosovo rather than being mired in old debates. . However, since the immediate focus of the chapter is challenges and opportunities on the road from the Silent Consensus to the Final Agreement, I will briefly discuss an event that served as a trigger to stalled negotiations.

Stalemate

On 16 January 2018, Kosovo Albanian and Serbia's representatives gathered in Brussels to discuss technical matters of the Agreement when they received the news that Oliver Ivanović had been shot down from a moving vehicle. Within minutes, the Serbian delegation withdrew, and years of slow progress between Belgrade and Pristina seemed lost. The murder itself is at issue, the political environment leading to this brutal event and its consequences are.

A western diplomat described Ivanović as 'pragmatic moderate, eager to reach out to find a compromise that would improve the lives of all people in Mitrovica'.⁷²⁰ A moderate politician in times when moderation brought only enemies. While Serbs were drawing a target on his back, Pristina identified him as a war criminal. In order to

⁷²⁰ A. MacDowall, 'Kosovo Serb politician Oliver Ivanovic shot down dead outside party headquarters', *The Guardian*, 16 January, 2018.

understand this peculiar situation, we need to briefly review the local 2013 elections in Kosovo, the first elections after the Brussels Agreement. As discussed earlier, Serbia invited Kosovo Serbs to vote which resulted in an extraordinary turnover in Serb communities except Kosovska Mitrovica. Despite Belgrade's strong message that a high turnover is the best way for Serbs to ensure payments to public institutions or 'if you don't believe your own country, then don't believe your own pocket' as a member of the 'Srpska' list (supported by Belgrade) said.⁷²¹ The boycott campaign secured a victory (turnover was around 17 per cent) by fuelling patriotism but also through organised violence since a couple of hours before closing polling stations 'several dozens of men in mask [started] smashing ballot boxes, assaulting staff members, firing tear gas and eventually forcing election official to flee'.⁷²² In other words, Serbs were forced to choose between losing jobs or to being marked, and possibly beaten, as traitors.. The latter choice had two nuances – to vote Ivanović and opt to balance between Belgrade and Pristina, or vote for his opponent, Pantić from the "Srpska" list and surrender power to Belgrade. However, January of 2014 brought a series of bizarre events. Pantić, Belgrade's candidate and winner of the election refused to take office, stating that his signature on a text with Kosovo's symbols would violate the constitution of Serbia and called the OSCE status neutral role a 'major scam by the international community'.⁷²³ When it became clear that repeated elections were to be organised under Kosovo's laws, Pantić resigned. Repeated elections brought a new wave of violence. Dimitrije Janicijevic, a candidate for mayor whose party collaborated with Kosovo Albanians, was gunned down on the street.⁷²⁴ During those months planted bombs and shooting became part of everyday life. There are many assumptions about what was happening in Mitrovica in early 2014; however, the most plausible is that Serbia was not ready to sacrifice its European path and prosperity of all Serbs for the sake of 20.000 Kosovo Serbs and that unity was a primary goal. Therefore, no opposition should be allowed. No matter how we understand these two events: as Belgrade's purge or an attempt to increase tensions, the third event helped Belgrade in this endeavour. In the midst of the repeated elections, the EULEX arrested Ivanović on suspicion of war crimes. He was originally sentenced to a nine-year prison

⁷²¹ G. Delauney, 'Kosovo violence leaves elections in tatters', BBC, 4 November 2013.

⁷²² D. Bilefsky, 'Violence Mars Elections in Kosovo', The New York Times, 4 November, 2013.

⁷²³ 'Serb Turns Down North Kosovo Mayor's Post', Balkan Insight, 13 January, 2014.

⁷²⁴ 'Hardline Kosovo Serbs Elected North Mitrovica Mayor', Radio Free Europe/Radio Liberty, 24 February, 2014.

term, the Court of Appeals overturned the first verdict and ordered a retrial only two months after the repeated elections.⁷²⁵ From prison, he stood no chance; thus Goran Rakić (the ‘Srpska’ list) won the post with 52.6 per cent of the ballots.⁷²⁶ These events: bombs, shooting, Pantić’s refusal to take office, the assassination of the pro-Albanian candidate, the EULEX timing to arrest Ivanović during the campaign, paints a rather murky picture of political life in the divided town. No doubt, all three sides had motives: Belgrade to force compliance on Serbs from Mitrovica, Pristina to increase tensions between Belgrade and Kosovo Serbs, and the EULEX to eliminate all obstacles for the implementation of the Agreement.

However, what is important, and suspect is the timing of the murder. In January 2018, the two teams met to continue negotiations after months of delay when news of Ivanović’s murder came out. At that time, Belgrade had secured its power in North Kosovo mostly through directors of state-owned enterprises who successfully cowed workers into backing them. Ivanović, though he was a mainstay of the idea that Kosovo Serbs should directly communicate with Pristina to achieve compromise and this troubled Belgrade, he was an irrelevant political agent in Kosovo’s political life with few voters supporting him. Whatever lay behind the murder, it effectively stopped the dialogue and more than a year of political wrangling. Rather than investigating the crime, both Belgrade and Pristina rushed to accuse one another. Milovan Drecun, a Head of the Parliamentary Committee on Kosovo, marked it as a message that ‘Serbs aren’t welcome in Kosovo... When they see such a brutal murder of prominent Serbian politician, they can only decide not to return to Kosovo any more’.⁷²⁷ Albin Kurti, Kosovo’s opposition leader, was blunter: ‘North of Mitrovica is controlled by Serbia more than Belgrade itself ... And the assassination was done so professionally. It was not done by an angry individual. I think it was organised in a cold-blooded manner by the Serbian state’.⁷²⁸ It is true that North Mitrovica is in many ways *de facto* controlled by Belgrade, however, not a single poster can be put up without Kosovo Police knowing. In other words, whichever side organised the murder, the other side could have prevented it. This crime deflected attention from

⁷²⁵ ‘Oliver Ivanovic released from house arrest’, B92, 21 April

⁷²⁶ ‘Hard-line Kosovo Serb Elected North Mitrovica Mayor’,

⁷²⁷ G. Ellis, ‘Kosovo: The mysterious murder of Oliver Ivanovic’, Al Jazeera, 18 January, 2018.

⁷²⁸ *Ibid.*

accumulated internal issues bothering both administrations and diminished already shaken trust between the two ethnic groups.

However, the Kosovo Police listed several suspects (all of them Kosovo Serbs) among them were a former administrator at the office of Ivanović and a police officer. To this day, two Kosovo Serbs remain in detention while M.R., who is listed as wanted, is currently in Serbia. President of Serbia, Aleksandar Vučić, claims that he is not Ivanović's murderer and that 'such accusation would weaken the negotiating position of Serbia'. He also indicated that the Kosovo Police special units planned to kill him in an arrest.⁷²⁹ Ivanović, in an interview published after his death, had said that 'the centre of power [in North Kosovo] is not in the municipality building because the municipality building belongs to this other, informal centre of power [criminal]' and marked M.R as one of the main people who are this informal centre of power.⁷³⁰ The President of Serbia earlier took M.R and four others as an example of how people should fight for the preservation of Kosovo Serbs in Kosovo. No doubt, the President had in mind economic preservation since these five people were an extended arm of Belgrade's dirigiste economic politics in Kosovo.⁷³¹

In short, this brutal event 'helped' Belgrade to accuse Pristina that Kosovo's Force cannot adequately protect ethnic minorities (Kosovo Serbs are integrated in the Kosovo Police), while the Kosovo Albanian leadership used it to point out that Belgrade not only protects the criminal circle but entirely controls it. This rhetoric echoes the early 1990's; however, with switched roles: This time, Serbs used informal centres of power to undermine the official institutions, and Kosovo Albanians were left to prove their legitimacy in a non-cooperative and usually hostile environment. It seems that both sides aimed to 'buy' time in order to solve burning internal and external issues and strengthen their positions prior to the next and probably final round of negotiations. And just like 25 years ago, citizens of Kosovo would pay the price.

⁷²⁹ 'Oliver Ivanovic's Murder: The Arrests So Far', BIRN, 27 November, 2018.

⁷³⁰ 'BIRN: Ivanovic imenovao Radojcica kao centar moci na KiM', N1 Info, 27 February, 2018.

⁷³¹ Several private companies won practically all tenders in North Kosovo. See: M. Radonjić, 'Da se zna ko je gazda', NIN, 7 March, 2019, p.20.

Challenges

In the last year, Kosovo has suffered a series of failures in the international arena. The EU pressured Pristina to adopt the law concerning the Kosovo Specialist Chamber and the Specialist Prosecutors (the Specialist Court), it also failed to join INTERPOL, and the date for the visa liberalisation is not set. As a result, the Kosovo Albanian leadership has turned once again to unilateral decisions such as expropriation of Trepca mining, the introduction of 100 per cent tariffs to Serbia, and adoption of an aggressive platform for future dialogue with Belgrade. Kosovo's unilateral actions are affected by three factors: (a) under the Trump administration the USA prioritises internal affairs and when it comes to Kosovo oftentimes goes along with European recommendations; thus Pristina now has no reliable partner in a global game; (b) the May 2019 elections in Europe suggest that Mogherini and her administration will be replaced. Since it was the last year of her mandate, Mogherini rushed Kosovo to normalise their relationship with Belgrade in order to complete her job; with a new official, Pristina hopes that pressure will drop; (c) Kosovo's Government consists of pro-European and rather nationalistic coalition partners who have to balance between the two opposing ideologies. It appears that Kosovo has seen many 'sticks' and a 'carrot' is yet to come. The above-mentioned failures will be briefly discussed.

The Specialist Chamber was established in 2015 based on a report of '[i]nhuman treatment of people and illicit trafficking in human organs in Kosovo'.⁷³² The report claims that Serbs and Albanians were hidden as prisoners and subject to inhuman treatment under the control of KLA. Though the Specialist Court was established in 2015, there was not a single case until Kosovo tried to scrap it in 2018. The EU warned Pristina that 'bilateral relations will suffer' in that case,⁷³³ and made it a condition for the visa liberalisation. It is no surprise that Pristina defied the Court since the main figures of political life in Kosovo were members of KLA. It is peculiar, however, that the Court was established under Kosovo law, but it is entirely run by international experts. While this diminishes political influence inside Kosovo, 'the main challenge facing the KSC [the Court] is convincing witness to testify' since even

⁷³² D. Marty, 'Inhuman treatment of people and illicit trafficking in human organs in Kosovo', Doc.12462, 7 January, 2011.

⁷³³ 'EU Warns Kosovo on Scrapping War Crime Court', Radio Free Europe/Radio Liberty, 12 January, 2018

in the Hague a current Prime Minister Haradinaj ‘was twice acquitted on charges amid allegations that two critical witnesses were intimidated’.⁷³⁴ Also, there is a perception of ‘selective justice’ as the Court is only to ‘investigate and adjudicate the alleged crimes mentioned in the Report, but also to shield foreign states and their officials from possible legal implications’.⁷³⁵ Eventually, there were several cases and the EU reported that Kosovo fulfilled this requirement. Simultaneously, Kosovo’s Assembly adopted a demarcation zone with Montenegro which was the second and the last condition for the visa liberalisation. The EU commission confirmed that Kosovo ‘met the 2 outstanding visa liberalisation requirements on the ratification of the border demarcation agreement with Montenegro and a strengthened track record in the fight against crime and corruption, thus fulfilling all benchmarks set out in the Visa Liberalisation Roadmap’.⁷³⁶ It was expected that the EU would apply the same standards for Kosovo as previously in the cases of Ukraine and Georgia. However, the fear of massive emigration and ‘distrust and disbelief among a number of member states about its seriousness and achievements in the fight against corruption and organised crime’ left Kosovo without the visa liberalisation.⁷³⁷ By refusing to put Kosovo on the Visa Liberalisation Roadmap, the EU seems inert concerning any agenda in Kosovo at the moment. Consequently, Kosovo returns to politics of unilateral decisions. First of all, Kosovo introduced 100 percent tariffs on goods from Serbia. The introduction of the customs tariffs is Pristina’s attempt ‘defend Kosovo’s vital interest’, or in other words, ‘revenge’ for Kosovo’s failed bid to join INTERPOL: ‘Serbia is continuing its aggressive campaign against Kosovo in int’l stage. It is also undermining the normalisation process’.⁷³⁸ After being warned by the EU that Pristina ‘has to immediately revoke these decisions’,⁷³⁹ the Kosovo Albanian leadership responded by imposing a second layer of tariffs on products from Serbia.⁷⁴⁰ While this question divided Kosovo Albanians, the biggest opposition parties are against dialogue,

⁷³⁴ A. Crosby and A. Zejneli, ‘Explainer: New Hague Tribunal Looks To Avoid Mistake of Past Kosovar Prosecutors’, Radio Free Europe/Radio Liberty, 18 January, 2019.

⁷³⁵ R. Muharremi, ‘The Kosovo Specialist Chamber from a Political Realism Perspective’, International Journal of Transitional Justice, vol. 13, no.2, 2019, p.20.

⁷³⁶ European Commission, ‘Visa Liberalisation: Commission confirms Kosovo fulfils all required benchmarks’, Brussels, 18 July, 2018.

⁷³⁷ D. Emini and Z. Nechev, ‘Visa liberalisation for Kosovo: The only tangible result for the foreseeable future’, EURACTIV, 12 October, 2018.

⁷³⁸ ‘Kosovo raises import tariffs on goods from Serbia to 100 pct’, N1 Info, 21 November, 2018.

⁷³⁹ BBC, ‘Kosovo hits Serbia with 100% trade tariffs amid Interpol row’, 21 November, 2018.

⁷⁴⁰ F. Bytyci, ‘Amid recognition row, Kosovo hits Serbia with more customs tariffs’, Reuters, 28 December, 2018.

Thaci and Haradinaj originally had slightly different demands. Haradinaj said that tariffs will remain in force until ‘the mutual recognition of Kosovo and Serbia’.⁷⁴¹ It seems that Haradinaj has forgotten that Serbia is internationally recognised. On the other hand, Thaci chooses his words more carefully, asking for a comprehensive peace agreement for which he ‘will be ready and willing to make compromises necessary to reach [it]’.⁷⁴² On the other contentious issue, appropriation of the ‘Trepca’ mine and the ‘Gazivode’ hydro-power complex (located in North Mitrovica and continuously operating since the end of the conflict), the two leaders are united against Brussels. In spite of the clear EU message that any open issues between Belgrade and Pristina should be resolved through the EU-mediated negotiations,⁷⁴³ Thaci and Haradinaj stressed that Kosovo refuses to discuss any natural resources within its territory and that European pressure is ‘unprecedented, unacceptable and as such breaches Kosovo’s sovereignty’.⁷⁴⁴

The two leaders opted for a different path to solutions – the Platform for Dialogue. It was adopted by 61 in favour in the 120-seat Assembly with LDK, Vetevendosje (Self-Determination), and the ‘Srpska’ list boycotting the session.⁷⁴⁵ To remedy American absenteeism in Kosovo Policy, the Platform envisages American mediation, accompanied by the EU, which ‘would be a guarantee of its implementation’. To remedy the failure to join INTERPOL, Kosovo now expects Serbia to ‘stop not only with all activities in connection with recognition... [but] also with the activities in connection with interfering on its road to international organisations’. The Platform also envisages a Tribunal for Serbian crimes in Kosovo as an answer to the Specialist Court. And finally, natural resources of Kosovo belong to the Republic of Kosovo and will not be a subject of future dialogue.⁷⁴⁶ In response, Brussels reiterated that prior to

⁷⁴¹ ‘Kosovo to keep tariffs until Serbia grants recognition, insists PM’, EURACTIV, 24 January, 2019.

⁷⁴² ‘Kosovo tariffs: Thaci and Vucic support a compromise, Haradinaj does not back off’, European Western Balkan, 2 February, 2019.

⁷⁴³ ‘EU on Trepca, Pristina’s trade barrier, dialogue’, B92, 5 February, 2019.

⁷⁴⁴ ‘Kosovo politicians and EU clash over the future of Trepca’, Pristina Insight, 5 February, 2019.

⁷⁴⁵ Note that neither LDK nor Vetevendosje are ready to cooperate with the ‘Srpska’ list to overthrow the Government. See: ‘Kosovo’s opposition not willing to cooperate with Serbs in overthrowing Government’, Gazeta Express, 11 March, 2019.

⁷⁴⁶ ‘Kosovo Assembly endorsed platform for dialogue with Serbia’, European Western Balkans, 8 March, 2019.

a new round of negotiations, tariffs should be abolished.⁷⁴⁷ Needless to say, Serbia's officials were quick to accuse Kosovo of hammering the last nail in the talks' coffin.⁷⁴⁸

On the other hand, Belgrade not only stopped Kosovo from joining INTERPOL, but it also successfully coaxed several states to withdraw their recognition. Furthermore, since Serbia's only condition for continuation of negotiations is that Pristina revoke tariffs which is also the EU demand, the blame for this failure falls on Kosovo's leadership. The best illustration was the Munich Security Conference panel on Kosovo-Serbia dialogue.⁷⁴⁹ Vučić opened the panel with a statement that Serbia delivered all items on the Brussels Agreement, while Kosovo has not fulfilled one. He further warned that Kosovo's Platform is anti-dialogue, causing Wolfgang Ischinger, a former mediator in the negotiations between Kosovo and Serbia, to ask a naïve but very important question: 'what keeps you from taking this small step?' Thaci's response sounded more like a member of Milošević's 1990's diplomatic staff or Koštunica's 2000 legal team than a former KLA fighter: 'the reached agreements must be in accordance with constitutions and law of the two countries'. On a positive note, the leaders of two ethnic groups promised to do the best to reach the compromise. The most important remark came from Johannes Hahn, a European Commissioner, who reminded the panel that citizens of Macedonia and Greece had not been in favour of their solution (approximately 20 per cent in both countries) but that the support has risen since then, which should encourage Kosovo and Serbia. In other words, a solution does not need to be immediately accepted by all but to have the potential to convince a majority in both communities. It is a valuable lesson considering that above mentioned external challenges Kosovo has yet to confront, as well as the fact that 49 MPs in Kosovo's Assembly oppose any negotiations with the Serbs (61 of them support the Government, 10 are representatives of Kosovo Serbs) and internal issues which Vučić's administration face.⁷⁵⁰

Serbia's Government has a different challenge than Pristina. In the international arena, Belgrade successfully stopped Kosovo from joining UNESCO and INTERPOL,

⁷⁴⁷ 'Kocijancic: Nastavak dijaloga jedini put napred', Radio Free Europe/ Radio Liberty, 8 March, 2019.

⁷⁴⁸ 'Serbia's official: Kosovo platform commits premeditated murder of dialogue', N1 Info, 14 March, 2019.

⁷⁴⁹ The Munich Security Council, Panel on the Security in South East Europe, 16 February, 2019. Available on: <https://www.youtube.com/watch?v=1-wvfwjoMUG>; (accessed on 15 March, 2019).

⁷⁵⁰ It is true that his party has majority in the Parliament, however, a future consensual agreement (read the one stating that Kosovo is not any longer Serbia's territory) would require absolute majority.

and persuaded several states to withdraw recognition of Kosovo, and opened 16 chapters in its negotiations with the European Union. However, a spate of political violence sparked protests led by university professors and students. Protesters recognised elements of dictatorship and systemic destruction of democratic institutions as well as a violation of the Constitution by President Vučić and the government. That this is not a collective paranoia, is confirmed by Freedom House which degraded Serbia to “partly free” due to ‘deterioration in the conduct of elections, continued attempts by the government and allied media outlets to undermine the independent journalism through legal harassment and smear campaigns’.⁷⁵¹ A Similar conclusion was issued by Reporters Without Borders which states that under the current regime Serbia is ‘a country where it is unsafe to be a journalist’ which together with a ‘high level of ownership concentration’ puts Serbia on 76th place in World Press Freedom Index (just behind Albania).⁷⁵² Finally, on the annual Corruption Perception Index of Transparency International, Serbia dropped two points to 39 with a warning that this trend may persist.⁷⁵³ However, unlike Haradinaj and Thaci, Vučić decided to avoid direct conflict with the opposition and the EU. Instead, he started a campaign ‘Future of Serbia’ that will help to the most vulnerable groups through increasing employment opportunities,⁷⁵⁴ a project that entirely overshadows protests in Serbia’s media. However, Hahn claims that the EU needs more evidence and that such reports should be further checked.⁷⁵⁵ Leaders of the EU member states also see Serbia as a reliable partner, and Merkel is ‘impressed by how successfully Serbia is progressing along the path of reform’,⁷⁵⁶ Kurz views it as ‘an anchor of stability’,⁷⁵⁷ and Macron touts Serbia as a ‘guarantor for stability’ in the region.⁷⁵⁸ Therefore, it is apparent that ‘the EU’s approach to the region had prioritised stability over democratic values’.⁷⁵⁹ While

⁷⁵¹ Freedom House, ‘Freedom in the World 2019: Democracy in Retreat’, 2019.

⁷⁵² Reporters Without Borders, ‘Serbia: European still distant’, 2018.

⁷⁵³ ‘Transparency International’s new Corruption Perception Index: Western Balkans in decline’, European Western Balkans, 29 January, 2019.

⁷⁵⁴ ‘Vucic starts his ‘Future of Serbia’ campaign’, B92, 7 February, 2019.

⁷⁵⁵ ‘Hahn Demands Proof of Serbia Media Censorship’, BIRN, 17 February, 2015.

⁷⁵⁶ ‘Serbia is a close partner and will remain one’, Federal Government of Germany, 27 February, 2018.

⁷⁵⁷ ‘The changeling: Serbia’s prime minister’, The Economist, 15 September, 2016.

⁷⁵⁸ ‘French President expresses support for dialogue with Pristina in letter to Vucic’, N1 Info, 5 January, 2019.

⁷⁵⁹ House of Lords, Select Committee on International Relations, ‘The UK and the future of the Western Balkans, 1st Report of Session 2017-2019, 10 January, 2018.

Europe tolerates media censorship it is yet to be seen how it will respond to tighter relations between Serbia and Moscow.

In his first foreign trip in 2019, Putin visited Belgrade. The visit was a love fest. Vučić used Putin's visit to Serbia to show his friendship with the most admired leader in Serbia. Mobilising 100,000 people for the visit, Vučić solved two problems : while marginalising protests against him, he sent a message to the EU that there might be an alternative to the European path. As Vuk Jeremić, a leader of opposition People's Party and a former UN secretary observes, the cheering of 100,000 people for the Russian leader puts pressure on Brussels to 'become even more tolerant towards his autocratic behaviour, in the hope that he doesn't drop Serbia's formal commitment to the join the EU'.⁷⁶⁰ Both leaders stressed historical and religious ties, with Putin paraphrasing a popular Serbia slogan 'if we are together, then victory awaits'.⁷⁶¹ Vučić audaciously uttered that 'although Serbia is not a very large country geographically, you can rely on us'.⁷⁶² The friendship between Belgrade and Moscow is not news. However, in the last couple of years, the relationship has gone beyond mere rhetoric. Russia invested over 4 billion dollars in Serbia's economy and committed to spending extra 1.4 billion to deliver Russia's gas.⁷⁶³ Besides direct investments, Russia supplies Serbia's army with military equipment and the two sides signed a trade agreement in 2019. In other words, Serbia is partially dependent on Russia for energy supplies and military equipment maintenance.

In short, several failures in international affairs effectively pushed the Kosovo Albanians to unilateral politics. Furthermore, Serbia though labelled an anchor of stability, has an aggressive foreign policy (i.e. systematic blocking of Kosovo in international organisations and tight cooperation with Russia) and strong media censorship within its territory. However, despite this, there is an opportunity for the final settlement. First of all, the EU has a new administration, which now has enough time and remarkable foundations to cajole Belgrade and Pristina into a historic agreement. Secondly, though Vučić's concentration of power has a negative impact on democratic institutions, it implies that he possesses the power to seal the deal even if it

⁷⁶⁰ M. Santora and N. MacFarquhar, 'Putin Gets Red Carpet Treatment in Serbia, a Fulcrum Once More', *The New York Times*, 17 January, 2019.

⁷⁶¹ *Ibid.*

⁷⁶² S. Walker, 'Putin gets puppy and hero's welcome on Serbia trip', *The Guardian*, 17 January, 2019.

⁷⁶³ Interview with V. Putin, *Politika*, 16 January, 2019.

is perceived negatively among Serbs. Thirdly, the visa liberalisation would cement power of Kosovo Albanians representatives eager to negotiate with Belgrade.

Opportunities

In the previous chapter we have seen that in a broader sense Kosovo as a European Protectorate (KEP) proposal, operating under the formula ‘Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state’ – ‘Serbia not to recognise Kosovo even if it means that Serbia will lose de facto and de jure authority over the region’. The KEP proposal satisfies conditions for Belgrade and Pristina, as well as for the EU such as: it is a face-saving solution for Serbs, it guarantees prosperity to Serbia and Kosovo Serbs, Kosovo gains independence from Serbia, and Brussels continues its extensive support to democratic institutions and a market economy, while for Europe, it does not set a precedent of forceful solutions that might be abused by minorities within the member states in the future. In the next sections, the more concrete and profound disputes between Belgrade and Pristina in applying the KEP proposal will be analysed.

The first dispute between Serbs and Kosovo Albanians was Kosovo Assembly’s approval of legislation to form the army in December 2018. This prompted criticism from the EU, NATO, and Serbia. Serbia’s representative viewed it as a ‘direct threat to peace and stability in the region’, while Jens Stoltenberg warned that Kosovo will ‘face serious consequences’.⁷⁶⁴ A similar statement came from the EU that the army should be established only ‘through an inclusive and gradual process in accordance with Kosovo Constitution’.⁷⁶⁵ However, in reality, Kosovo had its own army from January 2009 under the name the Kosovo Security Forces, although under KFOR monitoring. Even the legislators were aware that the law did not mean that the army will immediately be ready to perform.⁷⁶⁶ Therefore, the act was symbolic. Under the KEP proposal, Kosovo’s army would be a part of the European army: Macron and Merkel confirmed that European army is not simply a political provocation or a

⁷⁶⁴ B. Surk, ‘Kosovo Parliament Votes to Create an Army, Defying Serbia and NATO’, *The New York Times*, 14 December, 2018.

⁷⁶⁵ ‘EU and NATO sj. hare position on Kosovo army’, B92, 14 December, 2018.

⁷⁶⁶ *Ibid.*

pipedream.⁷⁶⁷ What was an idea promoted by die-hard European federalists, appears to be a reality. There are a few things that make citizens' proud and one of them is military service.⁷⁶⁸

The Specialist Chamber for the KLA war crimes is the most contested. The Chamber was established to investigate alleged crimes of the KLA members, and it is led by international staff. The representatives of Kosovo Albanians demand a similar tribunal for Serbian crimes, and the demand seems to be fair. However, they envisage a tribunal which would not only operate under domestic law but would be run by local staff. This unilaterally-formed tribunal where Kosovo Albanians appointed to decide cases for Kosovo Serbs would create further distrust. Therefore, the only plausible solution is that the Chamber remains under international management, however, expanding its competence to Serbian crimes as well. In other words, the EULEX (or a similar mission) would continue to appoint judges, prosecutors, and administrative personnel for the Specialist Chamber, while closely monitoring the Supreme Court and local courts.

The natural resources dispute, although the most expensive, is perhaps the easiest to resolve. The proposal suggests that Serbia would lose *de facto* and *de jure* authority over the region; thus it is bound to withdraw the claims over natural resources in North Kosovo. The widespread views are that oftentimes previous revenues from privatisations did not match the potential; nonetheless, there are success stories when managed by the International Finance Corporation, a member of the World Bank Group.⁷⁶⁹ Put differently, 'a process as a whole cannot be considered successful... [and] their post-privatization success is highly dependent on external factors'.⁷⁷⁰ Therefore, while it is apparent that the process would be supervised by an international body, it is also Kosovo's last chance to create a stock market.⁷⁷¹

Regarding membership in international organisations such as UNESCO and INTERPOL, both sides might abuse these privileges. If the Serb Community gains

⁷⁶⁷ See comments: J. Dempsey, 'The Insincere Calls for European Army', Carnegie Europe, 6 September, 2016.

⁷⁶⁸ Note that Kosovars had the highest trust in army, judge, and police prior to conflict.

⁷⁶⁹ International Finance Corporation, 'Kosovo KEDS Privatisation', June, 2017.

⁷⁷⁰ D. Dobranja, 'Privatization of extractive enterprises in Kosovo: How can they succeed?', European Western Balkans, 26 May, 2019.

⁷⁷¹ F. Aliu, 'Privatization Process in Kosovo', *Iliria International Review*, vol.1, 2014, pp.165-6.

executive power, it would create a *de facto* independent entity within Kosovo's community and North Kosovo would remain under direct control of Belgrade. On the other hand, without executive power the Community appears to be nothing but an NGO. Although the latter option is more appealing, Kosovo Serbs cannot be left without protection – there must be the right to veto. Then, however, if the veto right is given to Kosovo Serbs, we run the risk that they might be able to paralyse the central government. Therefore, the most elegant solution would be that a High Representative for Kosovo holds the veto right. Similarly, the High Representative would monitor legislation and international arrest warrants since it would be wrong to deprive Kosovo of joining the global networks for cultural and police cooperation.

To summarise, the beauty of the KEP proposal is that while it solves disputes, it does not require tectonic changes in reality. There is little that Serbia and the EU can do to prevent Kosovo from forming the army, establishing control over natural resources in North Kosovo, and establishing the tribunal for Serbian crimes. However, in the long-run, it is hard to imagine that Kosovo's Government could keep control over resources in part of the region where Kosovo Serbs are the majority, while the army and tribunal are nothing but a dead letter without the European support. Under the KEP proposal, Kosovo acquires all requisites, however, under European supervision. Similarly, Serbia, although losing *de jure* claims over the territory, gains what it values the most – protection of its minority and cultural heritage of the Orthodox Church in Kosovo. However, the essence of the division is certainly not these disputes, but different narratives built through collective memory and parallel education. Though there is no single formula for creating shared narratives in post-conflict areas, past experience shows that the road goes from 'facilitation of refugee returns and the creation of security for minority members to the facilitation of inter-ethnic contacts to promote the development of common interest and loyalty to (even pride in) the same institutions'.⁷⁷² To recap, there are four stages: refugee return, inter-group contact, promotion of common interests, and loyalty to the province and its institutions. These will each be considered in turn.

Regarding refugee return, since the escalation of the conflict, a number of international organisations have documented a decrease in violence, unfortunately,

⁷⁷² S.G Simonsen, 'Addressing Ethnic Division in Post-Conflict Institution-Building: Lesson from Recent Cases', *Security Dialogue*, vol. 36, no.3, p. 305.

mostly caused by migration and further segregation. In the current state, Kosovo Serbs refuse to go back, explaining that they do not want to be under the authority of the institutions of the Republic of Kosovo, while Albanians are against the return of Kosovo Serbs as they regard them as a threat to Kosovar independence. At the first glance, this appears to be the least contested stage. No doubt, most Kosovo Serbs and Kosovo Albanians would agree that living together is a price worth paying for living in a prosperous territory under European mentorship. On the other hand, the international community also has strong incentives to support refugee returns in order to avoid “a moral defeat”. As Michael Steiner put it: ‘we came to Kosovo to protect human rights and we cannot allow this country to become monoethnic’.⁷⁷³ However, the recent UNHCR report on Serbian refugees paints a gloomy picture of Kosovo Serbs refugees in Serbia. Out of 200.000 refugees, 68.514 persons are in need with an average monthly income per household of 169 euro, while 50 per cent of them rent or live with relatives.⁷⁷⁴ There is an estimate that due to institutions’ limited budgets, Serbia will need 55 years to solve the problem.⁷⁷⁵ Further, there is a ‘significant drop of willingness of these persons to return’ to Kosovo, and the main reasons are insecurity and limited freedom of movement.⁷⁷⁶ Their houses and agricultural land has been usurped and illegally used and cultivated. This remains the most painful question for both sides, and it is yet to be discussed.⁷⁷⁷ However, refugee return is neither a goal in itself nor an insurmountable obstacle to inter-ethnic dialogue.

For inter-group contact, the best way to facilitate contact is through direct talks. Language is, however, another issue working against inter-group interaction. While in the pre-war period Albanians learned Serbian, young Albanians no longer have reason to learn the language. On the other hand, Serbs rarely spoke Albanian, and it seems they are yet to acknowledge the importance of this language. The third official language, English, could become the lingua franca because ‘among a people without fellow-feeling, especially if they read and speak different languages, the united public

⁷⁷³ Quoted from: R. Petersen, *Western Intervention in the Balkans: The Strategic Use of Emotions in Conflict*, Cambridge University Press, Cambridge, 2012, p.167.

⁷⁷⁴ The UNHCR, *Commissariat for Refugees and Migration of the Republic of Serbia, ‘Situation and Needs of Internally Displaced Persons’*, May, 2018, pp.11 and 15.

⁷⁷⁵ F. Rudic, ‘Refugees from Kosovo Living in Poverty in Serbia: Report’, BIRN, 1 October, 2018.

⁷⁷⁶ The UNHCR, ‘Situation and Needs of Internally Displaced Persons’, p.16.

⁷⁷⁷ Note that in last six years Belgrade has avoided to raise this question, only Kosovo Serbs with residence in Kosovo have been the matter of dialogue.

opinion necessary to the working of representative institutions cannot exist'.⁷⁷⁸ However, having English as a lingua franca might create generational and social divides with older Albanians and Serbs communicating in Serbian, and young Kosovars in English, if not the language of other ethnic groups. One of the requirements to work in state institutions might be extensive knowledge of at least two of the three official languages. In the future, this might create four groups in society: a class of young bureaucrats communicating in English, older bureaucrats using Serbian among themselves, and young Albanians and Serbs forced to communicate with peers and officials who speak their languages. Good examples are the police and courts in Mitrovica where older officials of different ethnicities communicate exclusively in Serbian among themselves while those educated after the conflict use English (On a positive note, they also try to learn each other's languages). Also, in areas of real estate and trade, many people recognise the benefit of having a common language since in post-conflict societies infrastructure has been destroyed, and there is an acute need to re-open profitable trade channels. Although this is a small sample, it suggests hope for the deeply divided society.

Promotion of common interest is both the easiest and the hardest stage in the development of common narratives: the easiest in the sense it already exists, and the hardest because it is limited to certain areas. Once inter-ethnic contacts have been achieved, the media has the potential to moderate citizens' impulses, and to build on shared experiences. In addition to uniform media exposure, a shared school curriculum is a necessity. However, it is one thing to prescribe, and another to take the medicine. Textbooks are filled with hate speech, accounts of state genocide, and nationalist rhetoric. In the current system, opportunities for interaction are rare, because of language restrictions. However, when it comes to education in Kosovo, market-oriented reforms should be avoided in its initial stage. Several studies show that market-oriented reforms, though they might increase the quality of schools, in deeply divided cases such as Kosovo, they encourage division and segregation.⁷⁷⁹ The French-German experience shows that a joint history book is possible, but it also

⁷⁷⁸ J.S. Mill, *Consideration on Representative Government in Utilitarianism*, in *Liberty, Representative Government* (ed. By H. Acton), J.M. Dent, London, 1972, p.220.

⁷⁷⁹ P. Lipman, *No Child left behind: globalization, privatization and politics inequality, Neoliberalism and Education Reform* (ed. E.W. Rose and R. Gibson), Hampton Press, Creskill NJ, 2006, p.50

shows it takes time and is contentious.⁷⁸⁰ Therefore, it is not reasonable to expect significant changes in the population that has witnessed war; however, it is possible to raise a new generation who will be proud of their native soil. Then, perhaps, the older citizens will learn to love the land of their children.

Pride in and loyalty to the institutions can be generated when refugees have returned, when people have security, can, speak the same language(s), and learn from the same textbooks. This is when common narratives and identity can be built. There are many things that might make citizens proud: celebrating the same holidays, cheering for national teams, even military service.

Conclusions

The highly politicised murder of Oliver Ivanović pushed Belgrade and Pristina into another round of recrimination and a stalemate; consequently, disputes accumulated over issues such as tariffs, the Specialist Chamber, ownership of natural resources, the Serb Community, membership in international organisations, and Kosovo's army. The fact that the EU has not set a date for Kosovo's visa liberalisation despite the positive report that Kosovo fulfilled all requirements, and that the EU does nothing to prevent Serbia from an aggressive foreign strategy to hinder Kosovo from joining international organisations, has only aggravated the situation. However, the representatives of both ethnic groups have expressed numerous times their willingness to find a solution and emphasised that they see their societies within the European family. I argue that the KEP proposal is not only the most suitable to resolve these disputes, but also requires no colossal adjustments from the current situation and paves the way to shared narratives. It is of utmost importance, however, that communication between the ethnic groups is established and common interests promoted, as success depends on loyalty to Kosovo institutions. Unfortunately, refugee return has lost momentum in the last several years, and it is hard to see any progress on this issue in near the future.

⁷⁸⁰ 'History lessons: A joint history book that crosses Rhine', *The Economist*, 6 July, 2006.

Conclusions

The thesis proposes a political status for Kosovo that takes into consideration polarising views within the disputed territory and the major actors in the international community.

There are two variants of the proposal: hard and soft. The soft reading of the proposal, based on the nature of the conflict and impotence of any side to unilaterally solve the problem, argues that the final settlement can be only established and sustained through the EU. Kosovo's conflict is socially constructed and as such mutable. Thus, under a specific institutional arrangement, it is possible to manage tension, to accommodate the ethnic groups, and to create a prosperous society. However, analysis of the conflict reveals that collective memory and parallel separate education have been and remain stumbling blocks to a multicultural society. In the web of collective narratives and myths, falsification and distortion of facts thrive and replace truth and reality. While the local population is the source and engine of the ethnic division, it seems that the international community had not done enough to address these issues in the period between 1999 and 2008. Certainly, one can make a compelling argument that the aim of the UN administration was to establish and maintain the peace, and therefore had neither an agenda nor mechanism to promote inter-ethnic communication. The prolonged conflict between two ethnic groups, most notably atrocities committed in 2004, forced the international community to reconsider its approach, which led to the status talks.

The status negotiations, unfortunately, proved to be a charade. Many European officials believed that the intent behind the negotiations was to show that all diplomatic means were exhausted and to expose Brussels as incapable of managing a political crisis in Europe. These long and often ignominious talks were followed by the UDI, the employment of EULEX, and the ICJ decision. Contrary to expectations, these did not cement Kosovo's independence but paved the way to further negotiation talks, this time, under the aegis of the EU.

CONCLUSIONS

With respect to the UDI, Washington and Pristina had a simple idea: Kosovo should declare independence, which, followed by the recognition from the EU member states, would pose a conundrum for Serbia; that is, to either recognise Kosovo or to be left out of the European project. However, due to disunity among the members of the EU, the UDI had different consequences. On one hand, Brussels decided that recognition of Kosovo would not be one of the conditions for Serbia's entry into the union. On the other, there was a real concern that Serbia, once it joined the EU, might abuse its right and block Kosovo. While this further produced a significant turn in Belgrade's and Pristina's relationship towards EULEX, it did little to curb the diplomatic and legal battles between the two sides.

The most significant legal contest came after Serbia requested an advisory opinion of the ICJ on the question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' For scholars and policy-makers this was the moment of truth. If the Court sided with Serbia, new rounds of negotiations would follow, the opposite implied a new wave of Kosovo's recognition. The Court ruled that the declaration did not violate international law. Opting for a narrow interpretation based on legal technicalities, the Court, according to most legal practitioners, missed a historical chance to address more general issues such as secession and self-determination outside of colonial context. However, though the decision sparked resentment among scholars and lawyers, it was a signal to politicians that the question of Kosovo's statehood belongs to the realm of politics.

Therefore, these two unrelated factors, the European internal split on Kosovo's political status and the ICJ decision, shaped the landscape of new narratives in Belgrade and Pristina. Since it became apparent, as the EU officials repeated numerous times, that Serbia would not be forced to recognise Kosovo, Pristina downsized its argument that Belgrade should accept reality (Kosovo's independence) before any negotiations. Similarly, the ICJ decision was a sobering moment for the Serbs, compelling them to shelve legal arguments. This narrative shift contributed to the Brussels Agreement. While the character of the Agreement reveals Kosovo and Serbia's commitment to the European path even if that commitment implies significant concessions, its implementation remains largely depended on EU involvement.

CONCLUSIONS

The hard reading of the proposal suggests that Kosovo be a European protectorate since, firstly, the political status of Kosovo divides the UN members, including the major powers, led by the USA and Russia. Washington and Moscow have, for the most part, a negative impact on the negotiation process; their uncompromising and opposing views guarantee that Pristina will not accept the return to the *status quo ante* and Belgrade will not accept Kosovo's independence. Secondly, the USA and Russia concluded that the EU is responsible for Kosovo's future; this combined with the fact that the EU has gained the trust of both ethnic groups and their representatives by carefully crafting political demands into technical requirements, points to the EU. Thirdly, the ICJ decision suggests that the interested sides should seek the solution through political channels under the EU framework. This does not entirely obfuscate legal arguments; however, it implies that they are not of utmost importance and provides larger space for political manoeuvres. Fourthly, both Kosovo's ethnic groups and paternal state envision their future within the EU. Belgrade and Pristina assumed obligations that are clearly against their constitutional frameworks. Thus, Serbia accepts the EULEX mission, recognises Kosovo's institutions, and fulfils the obligations from the Brussels Agreement. On the other hand, Kosovo, besides assuming obligations from the Brussels Agreement, also accepts the asterisk next to its name which implies that Kosovo's political status is in accordance to Resolution 1244 and the ICJ decision. In other words, both sides welcome a solution under the formula: (a) Kosovo to be independent of Serbia even if it means that Kosovo is not a sovereign state; (b) Serbia not to recognise Kosovo even if it means that Serbia will lose *de facto* and *de jure* authority over the region. Fifthly, the EU plays a rather unique role: while maintaining a status-neutral mission, Brussels secures Serbia's recognition of Kosovo's local autonomy and embraces the role of Kosovo's protector in international affairs.

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