

Discussion Paper

WHO'S THE BOSS?

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INTRODUCTION

The optimists among us, who hoped that independence would bring clear rules of governance, democratic accountability and certainty over Kosovo's future, have been holding their breath for months. The situation unfolding on the ground has created an even more muddled governance system than Kosovo has ever seen in the past. Nine months after the declaration of independence, Kosovo is governed by a myriad of competing authorities – UNMIK, ICO, EULEX, the Kosovo government and parallel Serbian institution. Not much has changed for the better since February 17.

Kosovo is de-facto divided, with neither Prishtina nor the international community exerting effective control over Northern Kosovo. The International Civilian Office, headed by a seasoned Balkan politician Peter Feith, mandated to oversee the implementation of the Ahtisaari Agreement has its hands tied as there is little 'implementation' to monitor. UNMIK, far from handing over the reins to a successor EU rule of law mission, has been reconfiguring itself - or in other words, rewriting its own job description for a continuing presence for an undefined period. EULEX, the new EU rule of law mission, is deeply unpopular even before being fully deployed. Several thousand demonstrators have turned out on Prishtina's streets chanting slogans including 'down with EULEX.' In fact, Kosovo finds itself in the most hazy and unclear situation since the end of the conflict in 1999.

With this paper, IKS asks two simple, yet difficult questions: who is really the boss in independent Kosovo? And given Kosovo's muddled governance structure, when is Kosovo likely to begin realising its aspirations to join the EU as a functional and independent state?

KOSOVO'S SPRING

On 17 February 2008, Kosovo wrote history. On this cold February day, the streets of Prishtina were buzzing with flag-waving youth and cheering crowds. CNN and BBC had live coverage during most of the day. At 3pm the long-awaited moment had come; Kosovo's Prime Minister was reading the Declaration of Independence in both Albanian and Serbian languages.

'Honouring all the men and women who made great sacrifices to build a better future for Kosovo, We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of

UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.’¹

A centuries-old dream had come true; for most Kosovars this was their happiest day. There were high hopes that Kosovo would no longer be run by UNMIK and that the international promise to help Kosovo become a ‘normal’ European country, undivided and multi-ethnic, would come true.

The first country to recognise Kosovo was Costa Rica, immediately followed by the United States, UK, France, Turkey and Albania.² Throughout spring, news of international recognitions trickled in, bringing the total number of countries recognising Kosovo’s independence to 52 as of today. On 15 June Kosovo’s new constitution came into force. The signing ceremony marked another historic step for the newborn state. Article 1 defines the Republic of Kosovo as an independent, sovereign, democratic, unique and indivisible state. Article 2 states that the sovereignty and territorial integrity of the Republic of Kosovo is intact, inalienable, indivisible and protected by all means provided in this Constitution and the law.

In hindsight, the months from February to summer 2008 will most likely be remembered as ‘Kosovo’s spring.’ Day by day, the new state started to act like a ‘normal’ European country. Border posts and signs reading ‘Welcome to the Republic of Kosovo’ were put in place. The new Ministry of Foreign Affairs opened ten diplomatic missions and appointed Kosovo’s first-ever ambassadors. Kosovo also applied for membership in the International Monetary Fund and the World Bank Group. The Kosovo Privatisation Agency took over from the internationally managed Kosovo Trust Agency. The Banking and Payments Authority was renamed Central Bank of Kosovo. In compliance with the Ahtisaari Agreement, laws were passed by which Kosovo authorities assumed responsibilities for the police force, security and domestic intelligence. In July, the Ministry of Interior started issuing the first Kosovo passports.

15 June was supposed to be the last day of the UN protectorate in Kosovo; for the first time after nine years, democratically elected Kosovar authorities were to assume full power over stately affairs. But so far this has not happened. The governance situation in Kosovo has never been as confused as today and Kosovo’s European future is hanging in the balance.

BELGRADE’S GRAND BARGAIN

Kosovo’s declaration of independence sent shock waves through Serbia’s political establishment. On the day of Kosovo’s declaration of independence, a grenade exploded

¹ Declaration of Independence of Kosovo, Republic of Kosovo; February 17, 2008

² www.kosovathanksyou.com

near the UN court in Northern Mitrovica. A second grenade failed to detonate outside the building of the future EU mission. The political message was clear: multi-ethnic institutions and all symbols of Kosovo's newborn state – including courts, police, customs and border crossings – were singled out as targets by extremist Serbs.

The next day in Belgrade, a peaceful “Kosovo is Serbia” rally gathering about 250,000 people escalated into violence resulting in one dead and up to 150 injured (35 of them police officers).³ Main target were the embassies of the countries that had led the way in recognizing Kosovo's independence. The Turkish embassy was the first one to be attacked by stones, followed by the Croatian and US embassies. Rioters climbed onto the balcony of the US embassy, took down the flag, set it on fire and replaced it with the Serbian flag; eventually the embassy was also set on fire. But violence was not confined to Belgrade alone.

As Kosovo's last-contested territory, Northern Kosovo also flared up in violence. On 19 February, a mob of several hundred Kosovo Serbs ransacked and burned down two border crossings – Gate 1 and Gate 31 – on the Kosovo-Serbia border.⁴ UN peacekeepers had to come to the rescue of Kosovo police officers manning the border. Pressured by hardliners and enticed by financial promises from Belgrade, Kosovo Serb officers serving in the Kosovo police force turned in their badges and stayed home. The Serbian Orthodox Church in Kosovo joined the boycott; on 3 March Bishop Artemije ordered his clergy to cease all contacts with Kosovo authorities.⁵ Belgrade also tried to assert control over the railway line connecting Lesak with Zvecan.⁶ The violence reached its zenith on 17 March.

A few days prior, the Court building in North Mitrovica had been stormed and occupied by a crowd of about 40 people, including Serbian Ministry of Interior officers. In the early hours of 17 March, UNMIK police with KFOR support tried to reassert control of the courthouse. UNMIK police and KFOR came under direct gunfire and were attacked with rocks, molotov cocktails and hand grenades. 22 KFOR soldiers, 42 international and Kosovo police officers were injured. The violence culminated in the tragic death of Kynol Igor, a 26 year old Ukrainian police officer⁷.

These were not isolated or spontaneous attacks by an angry crowd; Serbia's then-Minister responsible for Kosovo, Slobodan Samardzic publicly endorsed the violence by stating that ‘today's action is in accordance with general government policies.’ In his words, the

³ B92 NEWS; February 22, 2008

⁴ Agence France-Presse; ‘Serbs Attack Kosovo border points as tensions mount,’ Ismet Hajdari; February 19, 2008

⁵ Associated Press; ‘Serb Rail Company retakes control of rail line in northern Kosovo,’ Zvezdan Djukanovic; March 3, 2008

⁶ Agence France-Presse; ‘UN Reasserts Control Over Railway Line in north Kosovo’; March 5, 2008

⁷ UNMIK Press Briefing - Special briefing by Principal Deputy Special Representative of the UN Secretary-General Larry Rossin, COMKFOR Lt.-Gen. Xavier Bout de Marnack and Police Commissioner Larry Wilson; March 18, 2008

burning down of the border and custom posts on 19 February were ‘legitimate acts.’⁸ The then-Prime Minister Kostunica also promised that Serbia will not pause until ‘the illegal declaration of the fake state of Kosovo is annulled’ and he added ‘Serbia will prevail, step by step, and it will win in the end.’

Contrary to the situation of the riots of March 17, 2004, the reaction of the international community present in Kosovo, was lukewarm. Until now it seems that nobody has been brought to justice.

VOLTE-FACE

Kosovo’s declaration of independence on 17 February 2008 did not come as a surprise. On the contrary, it was the result of years of international diplomacy and high-level negotiations. Even the date and the text of the declaration itself were agreed with international offices in Prishtina.

Back in early 2006, Martti Ahtisaari had been personally tasked as the UN Secretary General’s Special Envoy to initiate a process of negotiations between Prishtina and Belgrade. Months and months of negotiations and shuttle diplomacy resulted in a carefully calibrated document official named the Comprehensive Proposal for the Kosovo Status Settlement, also known as the ‘Ahtisaari Agreement.’ In February 2007 Ahtisaari recommended in plain language to the Security Council to grant Kosovo independence. He reasoned that:

‘Independence is the only option for a politically stable and economically viable Kosovo.’⁹

In a letter to the Security Council on 26 March 2007, Ban Ki-moon openly endorsed Ahtisaari’s recommendation to grant Kosovo independence. The letter signed by Ban Ki-moon states unmistakably that:

‘Having taken into account the developments in the process designed to determine Kosovo’s future status, I fully support both the recommendations made by my Special Envoy in his report on Kosovo’s future status and the Comprehensive Proposal for the Kosovo Status Settlement.’

A year and a half later, this all seems history. With the diplomatic backing of veto-wielding Russia, Belgrade has succeeded in scoring several important diplomatic victories. Tadic’s promise to undo Kosovo’s independence through legal and political means translated into a two-fold strategy. On the one hand, Belgrade has been pushing

⁸ BBC News; ‘Serb ministers plan Kosovo visit’; February 25, 2008

⁹ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council, p.4, point 10

hard for an international advisory opinion at the International Court of Justice (ICJ). On October 8, 2008 the United Nations General Assembly endorsed Serbia's request; 77 members out of 192 voted in favour of asking the Hague-based ICJ for a non-binding advisory opinion on the legality of Kosovo's declaration of independence.¹⁰

Most importantly, though, Belgrade has been pushing hard to force all parties to return to the negotiation table. "We are ready to return to the negotiating table and we will insist on this in all international forums. This will be our strategy and our answer to the declaration of the illegal so-called state of Kosovo and Metohija," Tadic stated publicly on 15 June 2008.¹¹ In fact, as early as April 2008, the UN was holding talks with Serbia. Back then, however, it was believed 'that there is little chance that the talks would be fertile.'¹²

Weakened by the lack of a clear legal mandate of the UN Security Council, struggling to deploy its full force and facing stiff resistance from the Kosovo Serb community, the EU rule of law mission (EULEX) was all too ready to renegotiate the terms of its deployment. Serbian President Boris Tadic repeatedly stated that the EULEX mission is welcome in Kosovo under two conditions only: that it is preceded by a UN SC decision and that it does not implement the Ahtisaari plan, which includes Kosovo's supervised independence.

INFAMOUS SIX POINTS

By June 12th, the outlines of a new deal brokered between Belgrade and New York began to take shape. In two separate letters sent to President Sejdiu and President Tadic, Ban Ki-moon promised to 'reconfigure the structure and profile of the international civil presence' in light of the 'substantially changed situation in Kosovo.' UNMIK's reconfiguration was to 'enable the European Union to assume an enhanced operational role in Kosovo.' The key word, however was that the EU's new role was to be 'in accordance with resolution 1244.'¹³ This represented a dramatic shift from Ban Ki-moon's earlier policy endorsing Kosovo's independence and an equally dramatic change of EULEX's original deployment plans.

On 26 June, UNMIK formally announced the start of the reconfiguration process. As part of the process, UNMIK Pillar IV closed down and the newly established Kosovo Privatisation Agency took over from the Kosovo Trust Agency. UNMIK's Department of Civil Administration and the Office of Communities, Returns and Minority Affairs

¹⁰ Bill Varner, 'UN Members ask for Legal Ruling on Kosovo's Status,' Bloomberg; October 8, 2008.

¹¹ B92 NEWS; June 15, 2008

¹² Dusan Janjic, Director of the Forum for Ethnic Relations. April 23, 2008

¹³ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/354), chapter III, paragraph 13; June 12, 2008

ceased to exist.¹⁴ UNMIK's field offices were also drastically reduced in size, while retaining its strong presence in Mitrovica north and Kosovo's north. Ban Ki-moon acknowledged that the government of Kosovo has indicated that it would welcome a continued UN presence in Kosovo 'provided that it only carries out limited, residual tasks.'¹⁵

In Ban Ki-moon's latest report on 24 November, the UN Secretary General mentioned the 'new realities and challenges' facing UNMIK's authority on the ground and reported to the Security Council that "as a consequence for the deeply diverging paths taken by Belgrade and the Kosovo authorities following Kosovo's declaration of independence, the space in which UNMIK can operate has changed." He stressed that his 'Special Representative is facing increasing difficulties in exercising his mandate owing to the conflict between resolution 1244 (1999) and the Kosovo Constitution,' which "does not take UNMIK into account."

In this report, Ban Ki-moon expressed his hopes that EULEX would soon:

'Assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella headed by my Special Representative, and in accordance with resolution 1244.'¹⁶

In an interview in March this year, Yves de Kermabon promised that the role of EULEX would be different from that of UNMIK. Until the summer, he stressed repeatedly that EULEX would not be subordinate to UNSC Resolution 1244 and EULEX would not take orders from the UN HQ in New York. On the contrary, since its inception EULEX was designed to be **the** flagship project of Europe's nascent Common Security and Defence Policy.

Initially, EULEX was meant to assist Kosovo institutions to develop an independent multi-ethnic judiciary, police and customs service adhering to European best practices.¹⁷ As part of EULEX, EU member states committed themselves to deploy close to 2,200 international staff – including police monitors, specialized riot police units, prosecutors and judicial experts- at a monthly cost of more than EUR 13 million (not including the substantial cost of seconded personnel).¹⁸ In many respects, the credibility of the EU as a global player able to project its interests abroad hinges on the success of EULEX.

¹⁴ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/692), chapter X, paragraph 22; November 24, 2008

¹⁵ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/354); June 12, 2008

¹⁶ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/692), chapter X, paragraph 23; November 24, 2008

¹⁷ Press Release from the Council of the European Union titled 'Kosovo: Council establishes an EU Rule of Law Mission, appoints an EU Special Representative', Brussels, 16 February 2008

¹⁸ Total official Budget for the first 16 months is 208 million Euro.

It is worth remembering at this point that EULEX is an integral part of the Ahtisaari Agreement. Article 13.3, states that:

‘The ESDP Mission shall support implementation of this Settlement and shall provide mentoring, monitoring and advice in the area of the rule of law generally, while retaining certain powers, in particular, with respect to the judiciary, police, customs and correctional services’

Annex IX 2.3 lists the powers and privileges afforded to the ESDP Mission, including its authority to investigate war crimes, organised crime and corruption, power to call upon international prosecutors to deal with sensitive cases and responsibility to monitor and advise domestic law enforcement agencies on all areas related to the rule of law. Article 2.3 of Annex IX also prescribes in clear language those international prosecutors serving as part of EULEX as well as international judges shall serve within the Kosovo judicial system and in accordance with Kosovo law. Last but not least, the ESDP Mission is also vested with:

‘Authority to ensure the efficient implementation of this Settlement through the execution of tasks accorded to the ESDP Mission’ (Annex IX, 2.3.h)

As a result of diplomatic pressure by Belgrade and a deal brokered behind closed doors, these provisions that have been endorsed by the Kosovo authorities and by all 52 countries that have recognised Kosovo’s independence on the basis of the Ahtisaari Settlement, no longer hold true. Desperate to deploy, EULEX agreed to new terms proposed by Serbia and eventually agreed between Belgrade, New York and Brussels.

The ‘new deal’ known on Prishtina’s streets as ‘Ban Ki-moon’s six point plan’ covers key state responsibilities including the police, customs, justice, transportation and infrastructure, boundaries and Serbian patrimony. These are all areas that have been discussed at great length as part of the negotiations process brokered by the UN’s own Special Envoy Martti Ahtisaari.

Issues pertaining to police and borders are dealt with comprehensively in article 9 and Annex VIII of the Ahtisaari Agreement. Article 2 of Annex VIII confirms that Kosovo shall have one unified chain of command for police services throughout Kosovo. The Ahtisaari Agreement also contains provisions to ensure that the ethnic composition of the police force in a given municipality reflects the ethnic composition of the population. Special provisions have also been inserted to allow for Kosovo Serb majority municipalities to select their own local station commanders.

The entire Annex IV is dedicated to Kosovo’s justice system, including provisions on minority representations among judges, prosecutors and in Kosovo’s Judicial Council as

well as provisions to allow for new municipal courts being established. Special safeguards to protect Serbian patrimony in Kosovo are included under Annex V of the Agreement. The Serbian Orthodox Church is afforded a long list of privileges, immunities and protective measures, including protective zones and the establishment of an Implementation and Monitoring Council to monitor all provisions concerning religious and cultural heritage. The Ahtisaari Agreement has not only dealt with all ‘six point’ comprehensively; it actually contains a number of painful concessions.

This new ‘six point plan,’ however, goes beyond the concessions that Prishtina had initially agreed to as part of the overall settlement. In fact, the new ‘six point’ plan looks irritatingly similar to demands originally put forward by Belgrade during the negotiations process. One cannot fail to get the impression that what Belgrade failed to achieve during the UN-brokered negotiations process with Prishtina, it now tries to reinsert as part of a deal to deploy EULEX.

Ban Ki-moon’s plan provides for stations and sub-stations in minority areas to remain under the **existing** chain of command, monitored by international police. The plan also foresees that the **UNMIK** Police Commission appoints a senior Kosovo Serb police officer reporting to international police officers. Regarding customs, Ban Ki-moon’s plan foresees that **international** customs officers are reinstated at gates 1 and 31, applying procedures in accordance with resolution 1244 and rates consistent with **UNMIK** Regulation 2004/1. The plan states that Kosovo shall continue to function as a single customs area and states: ‘Those discussions will also address the disruption of the customs revenues collected at gates 1 and 31, which should also, as appropriate, benefit the development of local communities.’¹⁹

According to the plan, the courthouse in Mitrovica has been reopened, applying **UNMIK law only** and staffed by **UNMIK personnel**. In the future, judges and prosecutors in relevant Serb majority areas shall continue to be appointed in accordance with resolution 1244, and not in accordance with the Kosovo justice system and Kosovo laws. Notwithstanding the extensive provisions in the Ahtisaari Agreement, the six-point plans calls for **continued dialogue** between Belgrade and Prishtina regarding Serb patrimony and continued international protection of the Serbian Orthodox Church.

Most importantly, however, as Ban Ki-moon announced in his earlier letter dating back to 12 June, the six-point plan is specifically designed for ‘relevant Serb-majority areas.’²⁰ In other words, for Kosovo’s restive north, its purpose is to ensure that the ‘political and security situation in Kosovo and in the wider region remains stable’ and that minority communities are protected. This sounds very much like yet another ‘status quo holding

¹⁹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/692), chapter XI, paragraph 38; November 24, 2008

²⁰ Letter dated 12 June 2008 from the Secretary General addressed to President Boris Tadic, point 2

operation’ proposed by the same institution that has failed to improve the situation in Kosovo’s north for the past nine years. Especially in the last nine months since 17 February, UNMIK has lost total control of the North in the face of violence orchestrated by Serb extremists. It has allowed criminal groups to create a legal vacuum and smuggler’s paradise right in front of its nose. Why should UNMIK’s resolve – or EULEX’s ability – to assert control north of the Ibar change with the ‘six point’ plan? What safeguards are there to ensure that this ‘temporary arrangement’ will not cement the creation of an UNMIK-controlled and EULEX-policed state within a nominally independent Kosovo state?

Even though, UNMIK and EULEX repeatedly stressed that these arrangements are of a temporary nature only, the six-point plan remains open-ended. The only provisions concerning timing state that ‘each of the arrangements for the six points will apply until the relevant follow-up mechanisms have been put in place.’²¹ This formulation leaves ample room for UNMIK to continue its ‘reconfiguration process’ for an indefinite period in the future.

For the past months, the authorities in Prishtina have voiced reservations concerning the lack of clarity on the timing of the reconfiguration process and the competencies retained by UNMIK.²² Ban Ki-moon acknowledges this in his latest report.

‘They have clearly expressed that they do not accept the results of the arrangements contained in the present report’

In a statement released on 18 November, Prishtina confirms its opposition. Prishtina supports the quick deployment of EULEX in accordance with the Declaration of Independence, the constitution, the Ahtisaari Agreement, the EU Joint Action of 4 February and Kosovo’s invitation to EULEX. But, so the statement reads:

‘Kosovo’s institutions reject the whole six-point document.’

Prishtina authorities are right to oppose the six-point plan. How can EULEX remain status-neutral and simultaneously deliver on its mandate to support the implementation of the Ahtisaari Settlement? How can EULEX provide ‘mentoring, monitoring and advice in the area of the rule of law’ when it does not recognise Kosovo laws and Kosovo authorities as the only legitimate source of legislative power? How can EULEX effectively fight organised crime when it fails to deploy throughout Kosovo? And, how can an EU rule of law mission composed of 32 countries, including five EU member

²¹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/692), chapter XI, paragraph 28; November 24, 2008

²² Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (S/2008/692), chapter XII, paragraph 52; November 24, 2008

states that do not even recognise Kosovo's independence, gain the trust of the population it is meant to serve?

On 19 November and again on 2 December, a coalition of civil society organisations led by Vetevendosja, COHU and Rrjeti i Grave called for a peaceful protest in Prishtina. According to local newspapers about 30,000 turned out on the streets. These were the largest protests Prishtina had seen since the end of the war in 1999. Among the slogans chanted by the protestors were calls for 'down with EULEX,' 'down with UNMIK,' 'UCK,' 'no partition' and 'we want to be sovereign.'

But neither taking to the streets nor engaging in the cheap blame-game of the opposition is the right answer now. For Prishtina to assert its position, it needs to work in partnership with its friends abroad and act like a state. Taking a proactive approach to fulfil the provisions of the Ahtisaari Agreement that are in the remit of the Kosovo government is a first step. This must be accompanied by a coordinated public diplomacy effort and an international campaign to improve Kosovo's image abroad. Mulling over Ban Ki-moon's plan and Belgrade's tactics is not enough.

While IKS agrees that the six-point plan represents a violation of the terms originally agreed as part of the Ahtisaari Settlement, protesting on the streets now is taking a short-term view. If there is one lesson to be learned from nine years of UNMIK rule, it is that international missions need a clear exit strategy and mechanisms to ensure democratic accountability. Taking a longer-term view, IKS is not only concerned about Ban Ki-moon's six-point plan. We are equally concerned about the small print of the Ahtisaari Agreement providing the ICR and head of EULEX with unchecked executive powers.

LESSONS FROM UNMIK

The mandate of UNSC Resolution 1244 was groundbreaking in many ways. UNMIK was to be not only the largest peacekeeping mission in the history of the UN, UNMIK was to 'build' a new 'state' and directly govern Kosovo for an indeterminate number of years. For nearly a decade, UNMIK was the ultimate authority in Kosovo, exercising functions and tasks normally assumed by the *government*, both at central and local level. Regardless of what powers UNMIK transferred, Kosovo institution – from police to border control- always remained subject to the full and final authority of the SRSG.²³ Perhaps the best illustration of this balance of power is the fact that in order for any laws adopted by the Kosovo Assembly to come into force they had to be 'promulgated' by the SRSG.

²³ This much was in fact asserted by the Constitutional Framework for Provisional Self-Government, (UNMIK Regulation 2001/9), Chapter 12, On the Authority of the SRSG, which reads 'The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244(1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244(1999) or this Constitutional Framework.'

From day one, senior officials of the EU-led International Civilian Office were at pains to stress that the future mission in Kosovo would not be similar to UNMIK. Speaking in December 2006, Torbjorn Sohlstrom, head of the ICO preparation team held that:

‘The international community’s engagement [in Kosovo] will be very different from what it is today, and from what it has been over the past seven years. [...] It will no longer seek to *govern* Kosovo [...] and the] responsibility to administer the affairs of Kosovo will be the responsibility of the elected representatives [...]. The role of the international community will be: to *assist*, in a multitude of ways [...]; to *monitor* [...] that a status settlement is correctly implemented [...]; and to *condition*, through the process of integration with [...] the EU. [...]²⁴

As an illustration, Sohlstrom used a *metaphor* from the world of football and concluded, ‘if Kosovo is the team, the international community has so far been the owner of the team. In the future, we hope to move more in the direction of being the trainer.’ At a meeting with civil society representatives Peter Feith, in his capacity as EUSR and head of the International Civilian Office, stressed again that:

‘Our philosophy is that Kosovo Government is in the lead; we are not here to lead we are here to support and advice.’²⁵

This approach reflects the original intentions of those who drafted the Ahtisaari Proposal. When Ahtisaari recommended to the Security Council to grant Kosovo independence, he reasoned that:

‘Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions.’²⁶

Ahtisaari specifically called for the powers of the international civilian and military presences to be ‘strong – but focused – in critical areas such as community rights, decentralization, the protection of the Serbian Orthodox Church and the rule of law.’²⁷

The drafters may have had a genuine desire not to replace UNMIK by ‘EUMIK,’ but in a world of ever-changing political expediencies what matters in the end are not intentions

²⁴ Torbjorn Sohlstrom, Personal Representative of Javier Solana and Head of ICO PT, speaking at a roundtable discussion organized by Forum 2015, entitled ‘Post-Status Status’, held on 14 December 2006 (the quote is taken from the February 2007 publication, p.50, emphases added). See also Torbjorn Sohlstrom’s interview with Jeta Xharra, ‘Jeta ne Kosove’, BIRN/RTK, February 9, 2007.

²⁵ Peter Feith ICR/EUSR, March 17, 2008. ‘Kosovo’s Civil Society in the European Era’, ICR meeting Civil Society, organized by University of Prishtina.

²⁶ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council, p.4, point 10

²⁷ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council, p.4

but what is printed in black and white. A close look at the small print of the Ahtisaari document reveals that the text provides the ICR with extensive powers and privileges to ensure the full implementation of the Settlement.

These powers are not limited to ensuring that minority rights are protected; in his double-hatted role as the EU Special Representative (EUSR), the ICR has authority over other important areas of governance and rule of law, including the judiciary, the police, border control, customs and correctional services.²⁸ The ICR also has the authority to appoint directly (or provide his or her consent for the appointment of) officials in some very important institutions, such as the Auditor-General, international judges and prosecutors, the directors of the Customs Service, Tax Administration, the Treasury, the Central Banking Authority of Kosovo, as well as the international members of the Board of the privatisation agency and those of the Kosovo Property Agency.²⁹

As the ‘*final authority* in Kosovo’ regarding the interpretation of the civilian aspects of the Settlement, the ICR will have the right to:

‘take *corrective measures* to remedy, as necessary, any actions taken by the Kosovo authorities that the ICR deems to be a breach of this Settlement, or seriously undermine the rule of law, or to be otherwise *inconsistent with the terms or spirit* of this Settlement.’³⁰

No further formal guidance is provided on what constitutes the ‘*spirit*’ of the Settlement; it is subject to interpretation and can be invoked randomly by cunning lawyers. The list of ‘corrective measures’ includes the authority to annul laws or decisions adopted by Kosovo authorities or to sanction or remove from office public officials, as the ICR judges necessary.³¹

By giving the ICR an explicit right to remove public officials, the ‘Ahtisaari Settlement’ is charting into new territory: an unelected international official is given wholesale powers by the Parliament of Kosovo to remove Kosovar officials from office without the latter having the right to appeal this decision in front of an independent review mechanism.

In fact, when it comes to limitations of powers, oversight mechanisms and review processes, the Ahtisaari Settlement is vague and obscure in its wording. The ICR will have the authority – if he or she so decides – to establish a mechanism to review the use

²⁸ ‘Comprehensive Proposal for the Kosovo Status Settlement’, annexed to the ‘Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status’, UN Security Council, S/2007/168/Add.1 Annex IX, Article 2.3.

²⁹ *Ibid.*, Annex IX, Article 2.2 and Annex VII, Article 2 and Article 4.

³⁰ *Ibid.*, Annex IX, Article 2.1.c, emphases added.

³¹ *Ibid.*, Annex IX, Article 2.1.c and Article 2.1.d.

of his or her powers (and those of the EUSR), but *without prejudice to the privileges and immunities* granted to the post-status mission.³²

The ICR/EUSR, its professional members and its appointees will be accorded the same privileges and immunities enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations.³³ The Vienna Convention, however, is not designed to provide immunity to international officials with explicit powers to meddle in a state's affairs. On the contrary, article 41 states that:

‘Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to *respect the laws and regulations* of the receiving State. They also have a duty *not to interfere in the internal affairs* of that State.’³⁴

The only possible outside check on the powers and authority of the ICR is the ‘International Steering Group’ (ISG). As ICR, Peter Feith is expected to regularly report to the ISG and act upon its instructions.³⁵ In the original settlement presented in February 2007, the ISG was to be composed of representatives of France, Germany, Italy, Russia, the United Kingdom, United States, European Union, European Commission, and NATO.³⁶ In the face of Russian opposition to Kosovo's independence its composition had to be changed. The ISG today assembles a loose group of states that recognize Kosovo's independence and have a stake in its development. The Kosovo government is thus expected to subject itself to the scrutiny of a body whose final composition, rules and procedures remain uncertain.

On paper, EULEX is equally equipped with extensive – and unchecked – executive powers. Article 3 (b) of the Joint Action specifically states that EULEX personnel have the authority ‘as necessary, in consultation with the relevant international civilian authorities in Kosovo’ to ‘*reverse or annul* operational decisions taken by the competent Kosovo authorities.’³⁷ EULEX personnel will also enjoy immunities similar to ICO and UNMIK.

Accountability again is foremost to an international body, in this case the Council of the European Union, and not to the Kosovo authorities. There is also no clear unified chain of command between the International Civilian Representative and the head of the EULEX mission. In essence, there will be two power centres, each claiming to guide

³² *Ibid.*, Annex IX, Article 2.6.

³³ *Ibid.*, Annex IX, Article 4.6.

³⁴ Vienna Convention on Diplomatic Relations, 1961. Article 41, pg.13

³⁵ Comprehensive Proposal for the Kosovo Status Settlement’, annexed to the ‘Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status,’ Annex IX, Article 4.1 and Article 4.2.

³⁶ *Ibid.*, Annex IX, Article 4.2.

³⁷ Council Joint Action, 2008/124/CFSP, February 4, 2008; Official journal of the European Union; Article 3, (b)

Kosovo towards its European destiny, each equipped with extensive executive powers and each reporting to and taking instructions from an outside body representing a different group of states. Peter Feith as ICR will report to the International Steering Group, while Yves de Kermabon, as head of EULEX, will take his instructions from the PSC acting under the responsibility of the Council of the European Union. The only provision for institutional ‘cooperation’ foresees that:

‘The Civilian Operations Commander and the European Union Special Representative (EUSR) shall consult each other as required.’³⁸

In accordance with Ban Ki-moon’s six point plan, the head of EULEX also has to report to UN HQ in New York. There is no mentioning of any required consultations with elected Kosovo officials. Kosovo authorities are also not meant to be part of the discussions on an extension or review of EULEX’s mandate. This is entirely up to the Council and its member states, or in the words of the Joint Action:

‘The Council shall evaluate, not later than six months after the start of the operational phase, whether EULEX Kosovo should be extended.’³⁹

Evidently, the new international mission in Kosovo is not the ‘light handed’ ‘presence’ that the official rhetoric coming out of Brussels portrays it to be. Why should this trouble us?

EXIT STRATEGY

Ahtisaari envisaged that ‘the supervisory role of the international community would come to an end only when Kosovo has implemented the measures set forth in the Settlement proposal’⁴⁰ Ahtisaari also argued that ‘notwithstanding, this strong international involvement, Kosovo’s authorities are ultimately responsible and accountable for the implementation of the Settlement proposal.’⁴¹

The Kosovo Government has committed itself strongly to implement the Ahtisaari Status Settlement. Paragraph 3 of the Declaration of the Independence reads:

‘We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adaptation of the

³⁸ *Ibid.*, Article 7.6

³⁹ *Ibid.*, Article 19

⁴⁰ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council, p.4

⁴¹ Letter dated 26 March 2007 from the Secretary General addressed to the President of the Security Council, p.4

legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.’⁴²

The same goes for the new constitution; a whole chapter is dedicated to the Ahtisaari package. Chapter XIII (Final Provisions) states that:

‘All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo’s obligation under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary actions for their implementation.’⁴³

Furthermore, ‘the provisions of the Comprehensive Proposal for the Kosovo Status Settlements dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.’⁴⁴

Internationally, Kosovo has also bound itself tightly to implement the provisions of the settlement. In a letter sent to 192 Foreign Ministries of UN Member states, the government emphasized that:

‘With the declaration [of Independence] we have irrevocably committed Kosovo to the full implementation of all obligations contained in the Comprehensive Proposal of the UN Special Envoy, including of course a multi-ethnic, democratic future for Kosovo, protection of the rights of all communities and to all provisions concerning the international supervision of Kosovo.’⁴⁵

There are limitations, however, as to how much the government in Prishtina can do to unilaterally ‘implement’ the terms of the settlement. The Ahtisaari Plan was deliberately designed in such a way as to lock all parties into cooperation. In his letter addressed to the Security Council, Ahtisaari once again confirmed that Kosovo can succeed:

‘In this endeavour only with the commitment and active participation of all communities, including, in particular, the Kosovo Serbs.’⁴⁶

While the Ahtisaari Settlement grants ICO and EULEX extensive powers to force cooperation in Prishtina, it contains no provisions that oblige Serbia and Kosovo Serbs to support the implementation process. Key provisions of the Agreement, from decentralisation to cultural heritage protection, cannot be implemented without at least a token support of Belgrade.

⁴² Kosovo Declaration of Independence – 17 February 2008

⁴³ Constitution of the Republic of Kosovo – Chapter XIII, Article 143.1

⁴⁴ Constitution of the Republic of Kosovo – Chapter XIII, Article 143.2

⁴⁵ Letter sent to 192 UN Member States from Kosovo Government on February 17, 2008 asking for recognition.

⁴⁶ Comprehensive Proposal for the Kosovo Status Settlement – UN Security Council, 26 March 2007

As for Kosovo Serbs, experience during the last few years has taught us that they are very much bound by politics in Belgrade. There is no evidence to believe that this pattern will change in the near future. As there is likely to be no shift in Belgrade's policy, we do not expect much in terms of cooperation with political representatives of the Serb community in Kosovo. Unless the EU has the guts to condition Serbia's EU accession process on at least tacit support for the Ahtisaari Agreement and EULEX's deployment throughout the country, Kosovo could therefore be taken hostage again by political decisions taken in Belgrade.

EUROPEAN PERSPECTIVE

Back in summer 2005, Ban Ki-moon's predecessor had tasked the Norwegian diplomat Kai Eide to recommend a process to resolve Kosovo's final status. Eide demanded that 'once the process has started, it cannot be blocked and must be brought to a conclusion.' His report concluded that:

"The international community must do the utmost to ensure that, whatever the eventual status, it does not become a 'failed' status. Kosovo cannot remain indefinitely under international administration."⁴⁷

It also called on all actors to help Kosovo realize its European future.

'Kosovo is located in Europe, where strong regional organizations exist. In the future, they — and in particular the European Union (EU) — will have to play the most prominent role in Kosovo. They will have the leverage required and will be able to offer prospects in the framework of the European integration process.'

In its Guiding Principles, the Contact Group also called on all parties to ensure that a final settlement in Kosovo should 'contribute to realizing the European perspective of Kosovo.'⁴⁸ But it is foremost Kosovo's European destiny that is hanging in the balance today. With five EU member states not recognising Kosovo there is little chance that Kosovo can enter into any contractual relationship with the European. Signing a Stabilisation and Association Agreement, the first step on the long road to eventual EU membership, is impossible unless all 27-member states agree. Such agreement is unlikely to come from member states that do not even recognise Kosovo's authorities as legitimate.

⁴⁷ Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council (S/2005/635); October 7, 2005

⁴⁸ Guiding principles of the Contact Group for a settlement of the status of Kosovo; November 15, 2005.

It has become clear in recent months that Europe is reluctant to condition Serbia's European future on Kosovo. IKS believes this is a mistake; it would be better for Serbia, Kosovo and the entire region if the EU were to articulate clearly that Serbia's EU integration perspective hinges on its support for the successful implementation of the final status settlement in Kosovo. We recommend that progress on Serbia's EU accession process is conditioned on the establishment of "good neighbourly" relations with Kosovo, which is a common demand for all countries that plan to access the EU.

Outright obstruction by Belgrade, either directly or indirectly through exerting pressure on the Serbian community in Kosovo, should not be rewarded with faster integration. The EU's own merit-based accession process that has worked so well in leveraging reforms in countries as diverse as Estonia and Bulgaria risks being undermined by unwarranted concessions to Serbia. The EU accession process is the EU's main lever of pushing for reforms in the countries of the region. To maximize its political leverage, the different components making up the EU presence in Serbia and Kosovo must therefore speak in one, unified voice. This is not just about Kosovo; it is the EU's own credibility that is at stake.

But there is plenty of homework to do in Prishtina as well. With independence declared, now is a good time for the government in Prishtina to set new goals. It took Bulgaria 14 years from signing a Stabilisation and Association Agreement to becoming a full EU member. Kosovo has only 12 years left if it wants to join the European Union by 2020; it must speed up. To beat Bulgaria and to catch up with its neighbours, Kosovo must sign a Stabilization and Association Agreement by 2010, submit its application for candidacy by 2012 and open accession negotiation by 2015. This is an ambitious agenda; donors and EU member states will certainly discourage Kosovo from pursuing it. It is the Kosovar Government's turn to be visionary and persistent.

To achieve this goal, Kosovo politicians must develop a clear vision and an assertive action plan to implement those provisions in the final status settlement that are in the government's own remit. A speedy completion of the terms of a status settlement is a prerequisite to put Kosovo firmly on the path towards EU integration. The Ahtisaari Settlement is merely a stepping stone to this more important, more rewarding, but ultimately much more challenging aim. A leadership that proactively implements even the toughest parts of the Settlement and hereby limits the presence of an international supervisory power to its absolute minimum (2 years + review period + wrap-up) is Kosovo's only chance of joining the EU in the next 20 years.

To counteract the temptation to keep justifying an extensive EU presence with strong executive powers – the EU must commit itself to clearly define the terms of the review process with the aim of ending international supervision in due time. The Ahtisaari Proposal is deliberately vague on the term limits of international supervision and the

review process. The text of the Settlement speaks of a review of the powers of the ICR in two years time ‘[...] with a view to gradually *reducing* the scope of the powers of the ICR and the *frequency of intervention*.’⁴⁹ The final decision if and when to terminate the mandate of the ICR rests with the ISG.⁵⁰ This is incompatible with international principles of transparency and democratic accountability. It also bears the risk of ‘mission creep,’ as we have seen with UNMIK.

UNMIK has long ceased to be welcome, but it has failed to design an elegant exit strategy. To prevent ICO and EULEX from repeating the same mistake, the review process must be done transparently, in close consultation with the Kosovo government and should be externally validated. The Kosovo government should be able to appeal to an independent body – outside the existing ICO/EUSCR structure – for a second opinion.

Considering how much the Kosovo government has bound itself to implementing the terms of the Ahtisaari Agreement, IKS believes that the Kosovo Parliament should also be assigned a clear role in the review process. This would ensure at least a token of democratic accountability. IKS recommends that those provisions of the Ahtisaari Agreement that could not be implemented satisfactorily by the time of the review process should be incorporated into the EU accession process. The European Union hereby secures itself a much more effective and transparent way to exercise political leverage over Kosovo.

Furthermore, the international community should refrain from making progress in the implementation of the status settlement dependent on progress in other areas such as ‘eradicating corruption’ or ‘combating organised crime’ in Kosovo. Mixing goals and objectives in such a way only serves to prolong an expensive international presence in Kosovo indefinitely, and would rob local politicians of the incentives to take responsibility for these problems themselves.

The financial burden on the European community to sustain an expensive international police, military and political presence must also be in relation to funds being made available to help push Kosovo’s economy onto a sustainable development path. A narrow focus on implementing the provisions of the Ahtisaari Agreement and large-scale allocations of funds for status-related cost can have a dangerous crowding out effect. Donors and governments should not fund a prolonged international presence at the expense of investing in issues of strategic importance such as economic and human capital development. Ultimately, the key to regional stability does not lie in the number of EU policemen deployed, but in the number of jobs created over the coming years.

⁴⁹ ‘Comprehensive Proposal for the Kosovo Status Settlement’, annexed to the ‘Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status’, UN Security Council, S/2007/168/Add.1, Annex IX, Article 5.1.c, emphases added.

⁵⁰ *Ibid.*, Annex IX, Article 5.2.

While there is a need for an international presence to guarantee minority rights, the EU should not aim to deal with all of Kosovo's governance problems. After all, the EU's proposed solution to Serbia's or Albania's persistent democratic deficiencies, or to their troubles with corruption or organised crime, has not been to send an Executive International Representative and a 2,000-strong Police Mission. Rather, it has engaged with these countries through conventional mechanisms of international diplomacy, leveraging especially the prospect of their eventual integration into the EU.

There is no reason why the approach should be any different with regard to Kosovo. It must be up to the Kosovo people to elect politicians who have the vision and energy to push Kosovo's EU integration policy forward. But, it is up to Europe to give Kosovo a real chance.



About us

The Kosovar Stability Initiative (IKS) is an independent, not-for-profit think tank focusing on empirical research and analysis of socio-economic developments in Kosovo. Founded in 2004, IKS offers innovative and policy-relevant research with the aim of initiating debates on issues of importance for Kosovo's future.

We believe that evidence-based public debates stand at the core of democratic decision making.

Since summer 2004, IKS has expanded its team to four full-time analysts and researchers, with a growing network of part time researchers and associates. The work of IKS is also supported by an Advisory Board including Kosovar and international analysts and practitioners.

Since its inception IKS's work has focused on issues of governance, economic development, urban planning, corruption in post-war reconstruction, education and Kosovo's image problem. IKS is also part of an ESI-inspired network of think-tanks across South East Europe.

All reports are freely available on our website.

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