

ONE YEAR AFTER THE END OF SUPERVISED INDEPENDENCE: KOSOVO'S DEADLOCK

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INTRODUCTION

One year after the end of supervised independence, Kosovo finds itself in a deadlock. The premature end of the supervised independence, hailed with successes which were not achieved, demonstrated the substantial diminished commitment of the sponsors of Kosovo's independence to completing successfully the once joint Kosovo-Western mission - full international legitimacy of Republic of Kosovo. The road for achieving this aim was placed on Kosovo's dialogue with Serbia, "facilitated" by the EU.

More than five years after the declaration of independence, and a year after its supervised independence ended, Kosovo faces two distinct realities regarding its statehood and foreign relations: that of an independent entity and the one of a sovereign and independent state. It is treated as an independent entity in its relations with Euro-Atlantic institutions and majority of states which have not recognized Kosovo, while Serbia treats it as both a separate territory governed by UNSC Resolution 1244 a part of itself. On the other hand, Kosovo is treated as a sovereign state only at bilateral level by the states which have recognized its independence. But, there is a disbalance between the scope and intensity of bilateral and multilateral relations that reflect the weakness of the current international legitimacy of Kosovo and the Western accommodation to "status neutral" policy.

The Brussels First Agreement on Normalization of Relations in essence surrendered to the concept of mono-ethnic based solutions. It goes far beyond the now forgotten Ahtisaari's Comprehensive Status Proposal (CSP), and lays the foundation for a new – bi-national character of the young state.

The implementation of the Agreement will not lead to integration of the Kosovo Serbs in the new state. Rather, the new institutions and powers of the Community of Serb Municipalities (CSM) will deepen the inter-ethnic divide, this time strengthened through an institutional separation. With an overall acceptance of the legal jurisdiction of Serbia over the Kosovo Serb settlements and municipalities, as long as Serbia does not recognize Kosovo's independence, and as long as the latter remains outside the United Nations, it is more likely that the Brussels brokered agreement will be a new status quo and another attempt to a peaceful partition rather than an attempt to strengthen Kosovo's ability to function as a fully internationally uncontested independent state.

Kosovo upcoming municipal elections on 3 November are facing three diverging interests interlinked with these elections, in which: the EU and the US see these elections as a part of implementation of the Brussels Agreement, and are mainly focused on participation of the Serbs in northern Kosovo (2% of Kosovo's electorate); Serbia sees these elections as a tool to constitute the CSM and legally and institutionally legitimize its presence in Kosovo through the victory of its created, financed and sponsored Civic Initiative Srpska; Kosovo must demonstrate the capacity to organize free, fair, democratic and transparent elections, after the massive

fraudulent elections of December 2010 which have seriously harmed the legitimacy of national institutions.

The risk of these diverging interests is high for the overall state of democracy in Kosovo itself. There is no domestic political climate to allow or overlook possible electoral fraud again. This will result in deep political turbulences if fraud is committed and legitimized after 3 November. Also, the possible massive boycott of the Serbs in northern Kosovo of these elections will pose a serious blow to Brussels Agreement, making it practically non-implementable. In such turn of events, Kosovo will find itself in the most serious political and institutional crisis since the declaration of independence in 2008. Furthermore, in 2014 Kosovo will face a number of serious challenges that will shape its mid-term future – the successful conclusion of the electoral reform and the regularity upcoming national elections; the transformation of the current format of Prishtina-Belgrade dialogue which will be driven by the pace of accession talks of Serbia; and the findings of the Euro-American Special Investigative Task Force on organ trafficking and organized crime.

THE WEST AND KOSOVO'S INTERNATIONAL LEGITIMACY: THE CHANGE OF POLICY

Since the end of supervised independence in September 2012, Kosovo has received 13 new recognitions, bringing the total number of recognitions to 104. Also, Kosovo became a member of the European Bank for Reconstruction and Development (EBRD) in November 2012; and became a member the Council of Europe Development Bank (CEB) in June 2013. Nevertheless, the prospects for Kosovo's membership in the

most important international organizations, such as the United Nations (UN), the Organization of Security and Cooperation in Europe (OSCE), the North-Atlantic Treaty Organization (NATO) and the EU remain bleak. The premature end of the supervised independence showed the lack of commitment of the sponsors of Kosovo's independence to see the full international legitimacy of Kosovo's statehood successfully completed. Instead, the hopes for achieving this aim were placed on Kosovo's dialogue with Serbia.

The EU "facilitated" Prishtina-Belgrade Dialogue, regardless of the Brussels Agreement, has not changed the position of EU non-recognizers, although it was widely expected to achieve this. The five Member States most likely will not change their position towards Kosovo's independence in the near future.

Kosovo's full international legitimacy is locked to Serbia's EU accession process. In reality, the "normalization of relations" can last for over a decade, i.e. until Serbia becomes an EU Member State. In practice, this means that Kosovo's international legitimacy will largely and exclusively depend on Serbia's political will. The parameters of this process are set in a way that for each acceptance of Kosovo's legal subjectivity by Belgrade, Prishtina has to make compromises in its internal functioning and institutional architecture to meet Belgrade's demands. On top of this, a number of the Brussels provisional agreements from technical and political dialogue – freedom of movement, telecommunications and energy -are expected to be re-negotiated in 2015 and 2016, when they expire. Legally, the implementation of the Brussels agreements has no binding international guarantors and guarantees, but

is subject of the good will of the parties to implement them.

Following these parameters, it is irrelevant whether Kosovo will actually be recognized by Serbia at the end of Belgrade's EU accession path. The pace with which Kosovo is compromising on its internal functioning, on behalf of short term peace and stability, will doom Kosovo to be dysfunctional, and all the hopes that Kosovo will not become the next BeH in the Western Balkans will be shattered - threatening long term peace and stability. The current parameters of "normalization of relations" instead of accelerating Kosovo's path to EU and international legitimacy may instead lead to tensions and potential conflicts. This lack of clear endgame between Kosovo and Serbia is fully in line with Belgrade's strategic objective of partition of Kosovo; Prishtina's fundamental lack of overall vision and strategy to strengthen its statehood; and the EU and US rush to get out of Kosovo, by subordinating a need for a comprehensive agreement on normalization between the two states to a rather technical and internal process of accession of Serbia to the EU.

THE CHANGE OF POLICY

Five years after the declaration of independence, Kosovo is faces two distinct realities regarding its statehood and foreign relations: that of an independent entity and the one of a sovereign and independent state. Kosovo is treated as an independent entity in its relations with Euro-Atlantic institutions and majority of states which have not recognized Kosovo, while Serbia while Serbia treats it as both a separate territory governed by UNSC Resolution 1244 a part of itself. This is a result of a concrete accommodation of a "status neutral" position of these institutions, including the United Nations. Apart of international organizations where

Kosovo has membership as an independent state (the World Bank, the International Monetary Fund, the EBRD), all other multilateral organizations view Kosovo as an independent entity, most of them not allowing membership for Prishtina. Moreover, through “status neutrality” Kosovo has joined a number of limited South Eastern Europe regional organizations and networks. Kosovo is treated as a sovereign state only at bilateral level by the states which have recognized its independence.

Nevertheless, the bulk of relations of Prishtina with others is concentrated at a multilateral level, mainly with the EU while the bilateral relations are at a much lower level. Even the recognizing states tend to adapt to “status neutral policy” of the multilateral agenda – mainly reinforcing this policy in Kosovo’s dialogue with Serbia, hence resulting in an unspecified long-term hope that Kosovo will one day be recognized by Serbia, this way concluding its international legitimacy. This Western policy is fundamentally flawed. It locks Kosovo in a long-term unfinished statehood, and a process of continuous internal rearrangements to make the independence of Kosovo acceptable to Serbia, while smoothing Belgrade’s EU accession. This policy disbalance places Kosovo in a worse situation than Bosnia. Bosnia’s international legitimacy is not questioned. Rather, the state is dysfunctional mainly because of its internal institutional setup brought by the internal division of the Dayton Agreement. Kosovo is placed in a situation where on one hand its statehood is disputed internationally, while internally accepts gradual bosnianization, paying the price for Serbia’s acceptance as an independent entity – not a state – and contractual relations with the EU.

In 2008 the sponsors of Kosovo’s independence, and Prime Minister Hashim Thaci, have created a false hope that the new state within months would obtain more than 100 international recognitions, and within mostly 5 years Kosovo would become a full member of the United Nations. Until 2011, this was the direction of actions of both sponsors of the independence and Prishtina itself. It was with the beginning of Kosovo-Serbia dialogue that shifted the direction of the sponsors towards accommodation towards Kosovo as an “independent entity” as a result of incapability to obtain full international support for Kosovo’s recognition as an independent and sovereign state.

The shock of this change is still being kept out of domestic public and political discourse in Kosovo. This is best viewed in how the Government of Kosovo has carried itself in dialogue with Belgrade, producing false expectations and accepting co-governance with Serbia over Kosovo Serbs, without a clear resolution of bilateral relations with Belgrade. Further, the impunity and alarming corruption and crime at highest political levels of governance in Prishtina, and the economic desperation, has resulted in a dramatic decline of faith in statehood by the Kosovars themselves. These circumstances have created an environment that if there is no mid-term change in international status of Kosovo - UN membership, the demands for dissolution of the state and unification with Albania will become a general political discourse, not limited only to Self-Determination Movement (VV).

THE END OF MULTIETHNIC STATE: SEPARATION VS. INTEGRATION

On 19 April, 2013, after 10 rounds of political dialogue in Brussels under the

auspices of the European Union (EU) High Representative of Foreign and Security Policy Catherine Ashton, Kosovo's and Serbia's prime ministers Hashim Thaci and Ivica Dacic initialed the "First Agreement of Principles Governing the Normalization of Relations" between the two countries. The First Agreement is surrendered to the concept of mono-ethnic based solutions. It creates an institutional ethnic separation between the Kosovo Serbs and others, and poses a blow to fourteen years of attempts of the international community to build Kosovo as a multi-ethnic society and state. It goes far beyond the Ahtisaari's Comprehensive Status Proposal (CSP) – by creatively interpreting it, and lays the foundation for a new character of the young state. While the CSP provided the foundation for a multi-ethnic society and state, the Brussels First Agreement has transformed the character of Kosovo to a bi-national unfinished state.

The Agreement creates a de-facto Kosovo Serb government (the Association/Community of Serb municipalities) with conflicting legal guarantees by Kosovo applicable law and Serbia's constitutional law¹. In a situation where Serbia does not recognize Kosovo's independence, Serbia's legal guarantees will make the Association/Community an institutional and administrative body loyal to Belgrade and functional within Prishtina's authority. This new governing body will function in a hybrid status framework, deriving its legal legitimacy and functioning from two contradicting Constitutions. This means a shared sovereignty and co-governance of Kosovo and Serbia over the Kosovo Serbs.

¹ Point 2 of the "Principles Governing the Normalization of Relations"

This first Agreement has also showed the inability of the central Kosovo institutions to build a true partnership with the Kosovo Serbs south of the Ibar river, penalized them for the incomplete process of decentralization, and directly reflected on the inability and/or lack of will of both the Kosovo Albanian leadership and the international presence to initiate building true multi-ethnic institutions. Ultimately, it has surrendered to Belgrade's tutelage and Serbia's 14 year investment to maintain the separation of Kosovo Serbs from Prishtina.

The Chapter 10 of Constitution of Kosovo, article 124 incorporates two distinct and mutually separate forms of municipal cooperation deriving from Ahtisaari's Plan². The first is through an *association of municipalities*, and the second through *municipal partnerships*. The association of municipalities can be created by municipalities to offer training, capacity building, technical assistance, policy research and policy recommendations to municipalities.³ The association is a non-profit organization.⁴ Therefore, the association offers services, organizes and coordinates the activities of members of the association, while promoting inter-municipal cooperation. The second - municipal partnerships - can be formed between two or more municipalities to provide joint services.⁵ Through partnerships municipalities can cooperate in their *own* and *enhanced* competencies, but not on *delegated* ones.⁶

² Constitution of the Republic of Kosovo, Chapter X, article 124 (Local Government and territorial organization)

³ Law on Local Self-government, No. 03/L-040; Article 32.3

⁴ The Statute of Kosovo Association of Municipalities, Article 2.1

⁵ Law on Local Self-government, No. 03/L-040, Article 29

⁶ Law on Inter-Municipal Cooperation, No. 04/L-010, Chapter 1, Articles 2, 3.

Therefore, through partnerships municipalities can jointly execute their competencies and provide joint services, but not through an association of municipalities. The First Agreement merged the two forms of municipal cooperation – the association and partnerships, by explicitly allowing the Kosovo Serb municipalities to collectively exercise joint governance through the Community of Serb municipalities in own, enhanced and delegated competencies.

The First Agreement lists five distinct executive competencies of the Community of Serb Municipalities in economic development, education, health, urban and rural planning. It will have a decisive role in nomination of the regional commander for a new region of northern Kosovo - composed of four Kosovo Serb majority municipalities north of Ibar river – where the four mayors will provide a list in the name of the CSM. The CSM will be governed by the Statute of the CSM; will have a President, Vice-President, Assembly and a Council (representatives of these structures will be elected after municipal government elections in northern Kosovo); the CSM may dissolve only after the approval of the participating municipalities.⁷

In addition to these powers, the CSM will also have a representative role as a separate entity to Kosovo central institutions and in this purpose have a separate seat at the President's Consultative Council for Communities, including a monitoring function. Also, the CSM will operate with the "Fund for the North", jointly with the EU and the GoK; will receive separate funding from Serbia; will receive additional

competencies by Serbia after Belgrade enacts its constitutional law. Furthermore, in North of Kosovo there will be a new electricity company⁸ that will supply electricity, provide distribution services to customers in the four northern Serb majority municipalities, and will be able to buy and sell power in the open market - independently from the KEDS in Prishtina. In telecom, the entire territory of future CSM and other Kosovo Serb settlements will be covered by separate companies – subsidiaries of Serbia – in fixed and mobile telephony.⁹

In judiciary the Agreement requires the creation of a division of the Appellate court, with a permanent seat in Mitrovica North composed by judges and administrative staff. The Appellate Court in Prishtina will establish a panel composed of a majority of Kosovo Serb judges to deal exclusively and explicitly with all 10 Serb majority municipalities. The second instance judiciary separation creates a de-facto Kosovo Serb Appellate court.

In police the Agreement creates an ethnic Serb dominated northern police region composed of four municipalities: Mitrovica North, Zvecan, Zubin Potok and Leposavic; with a Kosovo Serb regional police commander in northern Kosovo. Unlike the other regional commanders, the Kosovo Serb regional commander will be proposed by the four mayors on behalf of the CSM and will be nominated by the Ministry of Internal Affairs, not in compliance with the current Law on Police that stipulates that the territorial jurisdictions to police regions are created by the Director General of the

⁷ Differently the Association of Kosovo Municipalities can be dissolved by 2/3 of the Associations Assembly or by the state institution that has registered the Association in case when the members of the Association are not active for a year or more.

⁸ See Arrangements regarding Energy, points 4,5

⁹ See Arrangements regarding Telecommunications, points 3, 4.

Kosovo Police (DG) who also selects regional commanders.¹⁰

Given the new institutional arrangements the first agreement provides, it is unlikely that its implementation will lead to integration of the Kosovo Serbs in the new state. Rather, the new institutions will deepen the inter-ethnic divide, this time strengthened through an institutional separation. With a legal jurisdiction of Serbia over the Kosovo Serb settlements and municipalities, as long as Serbia does not recognize Kosovo's independence, and as long as the latter remains outside the United Nations, it is more likely that the Brussels brokered agreement will be a new status quo and another attempt to a peaceful partition rather than an attempt to strengthen Kosovo's ability to function as an independent and multi-ethnic state. This is fully in line with Serbia's cohesive policy of partition of Kosovo, strengthening Belgrade's new attitude of changing means to achieve its long-term goal.

KOSOVO IN A SHATTERED MIRROR

Kosovo will hold its municipal elections on 3 November. There are three diverging interests interlinked with these elections, in which: i) the EU and the US see these elections as a part of implementation of the Brussels Agreement, and are mainly focused on participation of the Serbs in northern Kosovo (2% of Kosovo's electorate); ii) Serbia sees these elections as a tool to constitute the CSM and legally and institutionally legitimize its presence in Kosovo through the victory of its created, financed and sponsored Civic Initiative Srpska; and iii) Kosovo must demonstrate the capacity to organized free, fair, democratic and transparent elections, after

the massive fraudulent elections of December 2010 which have seriously harmed the legitimacy of national institutions.

The risk of these diverging interests is high for the overall state of democracy in Kosovo itself. There is no domestic political climate to allow or overlook possible electoral fraud again. This will result in deep political turbulences if fraud is committed and legitimized after 3 November. Also, the possible massive boycott of the Serbs in northern Kosovo of these elections will pose a serious blow to Brussels Agreement, making it practically non-implementable. In such turn of events, Kosovo will find itself in the most serious political and institutional crisis since the declaration of independence in 2008.

Kosovo is fundamentally governed by informal structures and decision-making. There is significant control of the Government over judiciary, prosecution, police and the economy. The dismal socio-economic environment is worsening, with the unemployment rate standing at 35,1% , poverty rate at 29,7%¹¹ and economic growth of 2,6%¹², mainly due to government's public works rather than declining private economic development. Meanwhile, the Assembly of Kosovo is dysfunctional, where on one side the GoK has lost the majority in the Assembly but is kept in power by the "invisible supervisors" – the Quint – because of dialogue with Belgrade, while on the other side the Assembly is unable to exercise its

¹⁰ Law on Police, Nr. 03/L-035, articles 32,33.

¹¹ See UNDP Kosovo <http://www.ks.undp.org/content/kosovo/en/home/countryinfo/>. The UNDP data is used to be more accurate, since there is a disagreement between Kosovo's Statistic Agency which claims that unemployment is 30%, while the Ministry of Labor and Social Welfare claims the figure is 43%.

¹² See IMF <http://www.imf.org/external/country/UVK/index.htm>

oversight role. The independent branches of the government are either controlled by the ruling Democratic Party of Kosovo (PDK) or dysfunctional. Even the Government itself is showing signs of internal chaos – the decisions are fully concentrated in the hands of Prime Minister Hashim Thaci and a very small circle around him, while most of ministries function without any direction and coordination.

Meanwhile, the opposition parties – the Democratic League of Kosovo (LDK), the Alliance for the Future of Kosovo (AAK) and the Self-Determination Movement (VV) – have shown inability to change the Government and provide a credible alternative for democratic and economic transformation of Kosovo. The LDK and AAK are inert parties, saving the PDK from falling from power at critical times, at the same time competing with one another which one will join the PDK in a future government. VV has entrenched itself in an ideological box and at times violent political actions, making itself an easy target to being portrayed as a non-viable alternative for change in Kosovo. In reality, instead of the opposition parties, independent media, a few civil society organizations and the EU Commission through its Progress Reports which have become the most credible oversight institutions regarding internal developments in Kosovo have taken the oversight role of the opposition.

While Kosovo's institutions have not shown any significant commitment to fight organized crime and corruption, EULEX under the new leadership of the German diplomat Bernd Borchard has taken a number of steps to tackle crime. Ironically, during this change the Government of Kosovo has demanded for the withdrawal of EULEX, at times when senior GoK officials

and almost a third of the Assembly MPs are under investigation for organized crime and corruption. In this demand, the ruling PDK recent policy on demanding withdrawal of EULEX goes hand in hand with what VV has been asking for years. As with most political acts, GoK has proved to be an amateur in politics. The potential withdrawal of EULEX without the change of UNSC Resolution 1244 would re-establish UNMIK's authority over rule of law in Kosovo.

Kosovo's political elite has not been able and willing to jointly produce a vision and strategy to deal with the significant current and future domestic and international challenges the new state faces next year. Stability of governance in Kosovo will primarily depend on the outcome and regularity of local elections of 3 November. Depending on these results, the PDK can repeat the institutional crisis of 2010, bring itself down from power and call for extraordinary national elections, without electoral reform. Also, there is no agreement between Prishtina and Belgrade on Serbia's conditions to support the Kosovo Serb participation in the national elections.

One of the important preconditions for Belgrade is the establishment and functioning of CSM, the statute of which will be discussed and endorsed in Brussels after Kosovo's municipal elections. Alongside CSM's statute, Serbia is obliged to enact a constitutional law by which it will guarantee the existence of CSM, will incorporate the CSM in its own legal framework and will "transfer powers" to CSM, a range of authority superseding the future statute of the CSM. This will provide a double hat in CSM's functioning, where it will drive authority from both Serbia's constitutional law and the statute agreed with Prishtina and Brussels.

Most of 2014 will be an electoral year in Kosovo, Serbia and EU. Both Kosovo and Serbia will hold fresh national elections, and there are regular elections for the EU Parliament, which will later on elect the new EU Commission. It is evident that there will be a vacuum in dialogue, but also a change of the “address” of the facilitator – from the High Representative to DG Enlargement. The shift of the current dialogue from a high political level to an “enlargement” technical level of normalization is untimely, given the lack of a comprehensive agreement on normalization between Kosovo and Serbia. Further, such a change is more likely to cause instability and tensions instead of improving of relations between Prishtina and Belgrade. Linking normalization of relations for Serbia’s accession negotiations in Chapter 35, Kosovo becomes a hostage of Belgrade’s political priorities rather than the need for an early normalization of relations. The priority of the EU, on the other side, is firstly to open Chapters 35, 23 and 24 and close them the last at the end of accession talks, which may last for a decade. This places Kosovo in a ten year process of normalization of relations with Serbia which does not depend directly on Prishtina, becoming practically a non-player in deciding its future.

The Euro-American Special Investigative Task-Force will conclude its investigation on organ trafficking and organized crime in Kosovo by the end of 2013. These findings and possible indictments will be presented in early 2014. It will shape and decide the political future of Kosovo’s Prime Minister Hashim Thaci. In one way or another, Kosovo will be affected at national and international level by the Task-Force’s findings. Domestically, possible indictments will change the political scene, while the absence of indictments will maintain the current political trends. Internationally,

possible indictments will significantly damage the credibility of Kosovo in its quest for full international legitimacy.

CONCLUSION

Kosovo needs to enter in a phase where it will begin seriously focusing on pressing internal challenges of democratization, rule of law and successful combat of organized crime and corruption, revitalization of economy, and the EU accession process. It must also find a way to build a meaningful partnership with EULEX to strengthen domestic judiciary and prosecution and jointly with Brussels plan clear benchmarks for the end of EULEX’s presence and departure from the country. With NATO, it should also develop a comprehensive roadmap for downsizing of KFOR and an effective participation in the instruments of the Partnership for Peace.

Kosovo does not have the luxury, time and capacity to lose another decade to ensure its full international legitimacy and state functionality. The current process of “normalization of relations” which is locked and dependant directly on Serbia’s EU accession is mostly a reflection of EU’s incapability for enlargement in the Western Balkans, rather than EU’s capacity to stabilize the region. Dialogue with Belgrade has shifted the domestic focus on the pressing necessary reforms in Kosovo. If the current process continues as envisioned at present, it will strengthen the growing doubt in the viability of independent Kosovo over the next decade; will keep the policy of partition of Kosovo and other states of the region; and will pose a direct threat to overall stability of the Western Balkans.

Therefore, the current process of dialogue with Belgrade must end and change

significantly in 2014. This process should produce an immediate result of a long-lasting comprehensive agreement on defining the relations between Kosovo and Serbia, and explicitly allow Kosovo's full membership in the UN. The question of Kosovo's independence would become obsolete for five EU non-recognizers, and would be a

bilateral open issue between Kosovo and Serbia. Such a comprehensive agreement will enable faster European accession for Serbia, clear road for Kosovo's EU membership, and the final stabilization of the Western Balkans. It would also enable the Western Balkans states to begin cooperating in mutual interest and benefit on equal grounds.

Published by:



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This project is supported by: Balkan Trust for Democracy (BTD)

B | T | D The Balkan Trust for Democracy
A PROJECT OF THE GERMAN MARSHALL FUND

Content and views expressed in this publication are those of KIPRED and should not be considered as the views of the BTD.