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Bernd Burwitz¹

Kosovo Case

This paper demonstrates the current situation of International Organisations operating in Kosovo. Kosovo is in a “unique” situation of facing two legal realities, and different ways of how to react to these realities. The word “unique” is applied to Kosovo also in the sense that parties that are working in favour of a status change of Kosovo towards independent “statehood” argue that Kosovo as a socio-democratic and geographic entity is in a special situation. This paper does not take a position on the right status for Kosovo, but is highlighting that the situation of two legal realities exists in Kosovo today. By doing so this paper will not focus on the conflict history or the aspect whether the NATO intervention in 1999 was justified, as there is much more comprehensive literature on the conflict history and the “Humanitarian Intervention” debate available elsewhere. Furthermore it will not address the ongoing legal dispute on status change at the International Court of Justice. This paper will present a very complex, multi-faceted case in a very simplistic demonstration of the international presence for the reader who is not familiar with Kosovo in order to facilitate debate on the topic.

Background

Kosovo is a small land-locked geographic entity surrounded by Montenegro, Serbia², Albania, and Macedonia³. It has an estimated population of two million people, out of which the majority is of Kosovo Albanian ethnicity, five per cent Kosovo Serb and five per cent constitute of the remaining communities that live in Kosovo. These are of course only estimates as no recent population census for Kosovo exists. The territory of Kosovo is in line with the territory of the autonomous Province of Kosovo, which was part of the Republic of Serbia within former Yugoslavia.

Serbian authorities were reported to exercise human rights violations in a massive scale against the majority Kosovo Albanian Population. Armed Kosovo Albanian groups ran operations against people and Serbian state institutions such as the Police. The scope of the reports coming from Kosovo in 1998 and 1999 lead to a NATO military intervention in 1999.

In June 1999 the United Nations Security Council adopted Resolution 1244, which is the basis for the international civil presence in Kosovo. This resolution is still valid today, and is part of one of the realities in Kosovo as explained below. The United Nations Mission in Kosovo (UNMIK) started to set up provisional institutions in

¹ Bernd Burwitz (MA Conflict Resolution University of Bradford, EMPP Katholike Universiteit Leuven) has for 10 years been working for different organisations in former Yugoslavia, he is currently based in Kosovo.

² Some readers might not like to see Serbia listed separately as they feel it would weaken the argument that Kosovo is an integral part of Serbia.

³ Some refer to this country as “Republic of Macedonia”, others as “Former Yugoslav Republic of Macedonia”. The use of Macedonia, similarly to using “Serbia”, is to only provide a geographic indication.

Kosovo by April 2001, to build local capacities to support the UNMIK Administration in Kosovo. In addition a provisional parliament was elected in the first elections under UNMIK auspices in November 2001. Since the beginning of the UNMIK administration local provisional institutions work side by side with the UN and gained more and more competencies. UNMIK shared the responsibility of the civil presence in a four pillar system which is headed by a Special Representative of the Secretary-General (SRSG). Pillar 1 was managed by the UN and dealt with police and justice. Pillar 2 under the direct leadership of the SRSG ran the civil administration. Pillar 3 includes the democratisation process and establishment of institutions, in addition to promoting human rights and good governance. It is managed by the Organisation for Security and Cooperation in Europe (OSCE). Pillar 4 was managed by the European Union (EU) and focused on reconstruction and economic development.

Without consideration to costs and finding lasting solutions, in theory the governance design established under UNSCR 1244 could have continued indefinitely as no time frame was indicated in the resolution. However, the post-conflict environment of Kosovo, with the prevalence of the majority population to gain independence some international representatives sought to find a solution to the situation in Kosovo. The experience of the violence of the March 2004 riots was a stark reminder of the determination of the people living under the uncertain reality of an international lead administration. In a report to the Secretary General in October 2005 the Norwegian Diplomat Kai Eide recommended that a change to the status of Kosovo was needed. In the same month the UN decided to start negotiations on the status of Kosovo. Former Finnish President Martti Ahtisaari started with a negotiation process with Serbian and Kosovar representatives in 2006. The result was presented by Mr. Ahtisaari in his proposal in March 2007. The proposal subscribes a “supervised independence”, an idea which is rejected by the Serbian Government. In August 2007 a new set of talks were lead by a EU, Russian and US troika, headed by the German diplomat Wolfgang Ischinger. The Troika report is submitted in December 2007. No changes or break-throughs were made in the work of the troika.

Changes in the Kosovo situation

In 2008 several major political developments occurred in Kosovo. At the end of 2007 it was clear that the International Community was divided over how to proceed. While countries such as Serbia and Russia rejected the idea of having a “supervised independence” as suggested in the Ahtisaari proposal, other countries such as the US and countries within the European Union thought it was good to support this proposal.

In February 2008 the European Union stated that it would take an important role in Kosovo if the Government there would implement the Ahtisaari proposal. There was common opinion to deploy a Rule of Law mission (EULEX) and send a EU Special Representative.

On the 17th February 2008 the Kosovar authorities declared independence. On the 15th June 2008 the new constitution entered into force. In both cases, declaration of

independence and enactment of the new Constitution of the “Republic of Kosovo” reference is made to the Athisarri proposal⁴.

From 27 EU countries most have recognised the Kosovo declaration of independence. However, Greece, Romania, Slovakia, Spain and Cyprus did not, thus demonstrating a lack of consensus on EU policy towards Kosovo. The situation in Kosovo is further made difficult as Russia and China as permanent members of the UN Security Council are expected to veto changes to UNSCR 1244. In effect that means that no new UN Security Council resolution can provide the legal basis for a new international civil presence in Kosovo.

From the decision by the EU on 4th February 2008 to send EULEX as a rule of law mission it took until 9 December 2008 for EULEX to start regular operations. The solution to find a way to provide a mandate for EULEX was done by the adoption of UN Secretary General report on 26th November 2008. Through this step EULEX is deployed under the authority of UNMIK and UNSCR 1244. Effectively EULEX is a technical mission, and neutral to any status change, e.g. declaration of independence and the new Kosovo constitution. The Report did not make any mentioning of the International Civilian Office (ICO) which according to the Athisarri proposal is to oversee its implementation.

International Organisations

There are several international organisations operating in Kosovo, but for simplicity the focus will be on the EU, UNMIK and OSCE missions.

It was mentioned that Kosovo currently is experiencing two legal realities. One has its basis with the UNMIK administration based on UNSCR 1244. The other reality lays with the self-proclaimed independent Government of Kosovo and its constitution. The self-proclaimed independence has implications due to the recognition by more than 50 countries, including all but five EU states.

The legal reality of the legislative framework which has been established during the administration of Kosovo by UNMIK is in theory still in place. However, the executive instructions and directives from a point of view of the Kosovo Government are renewed and/or replaced with new legislation adopted by the Kosovo Assembly. Since June 2008 there are areas in legislation which have two sets of “valid” law. While the UNMIK administration is undermined by the new legislation, the whole of the administration as such has experienced changes in the light of the new reality on the ground.

Pillar 1 Police and Judiciary. UN police is no longer engaged, and police tasking has been handed over to EULEX. This is a significant change as UN police officers were actively engaged in everyday police work, while EULEX police officer monitor, mentor and advise. Most countries who have deployed police officers to EULEX do not allow their officers to be armed, thus making a statement that there are very restricted to a passive, none-executive⁵, role of mentoring. The judiciary work is also challenged⁶ (see “operational implications”).

⁴ The constitution incorporates directly parts of the Athisaari proposal.

⁵ There are some exceptions reserved for executive decisions by EULEX.

⁶ The UNMIK Department of Justice was closed in February 2009.

Pillar 2 UN Administration. There is no longer UN Administration staff deployed in the field. The UN Administration on a municipal level no longer exists since the autumn of 2008. The UN still has a very restricted number of a few people deployed. However, this staff is only there for some monitoring activity, and is assigned to the political affairs office.

Pillar 3 OSCE Capacity Building. The OSCE is still in place in support of capacity building, Human Rights protection and Democratisation work.

Pillar 4 EU Economic Development. Most work has ceased and the Pillar office closed in 2008. The Kosovo Trust Agency has been transformed to become a Kosovo lead institution. The Kosovo Property Agency is facing challenges in the management as two agencies, UN and ICO, are trying to lead this agency.

While the overall UNMIK Administration with its 4 pillar system has undergone much change since the declaration of independence, it has been extended with the EULEX mission. It is doubtful that it was the intention of the EU to have a status neutral mission engage in Kosovo under an UN umbrella. It is likely that the gravity of the rift within the International Community in respect to the idea to change the status of Kosovo, and the strength of the positioning of the two opposing blocks on this question, has been underestimated. The result is that two EU based missions are operating in Kosovo today, with differing mandates.

The other Mission related to the EU is the office of the International Civilian Representative/EU Special Representative (ICO). This Mission is in charge of implementing the Ahtisaari Proposal, and is therefore in direct support of “Supervised Independence”, and is thus not status neutral but actively working the status change which to date has been recognised by more than 50 countries⁷. Since no mandate could be generated through the UN system, the alternative solution was found by integrating the Ahtisaari Proposal within the constitution of Kosovo. The ICO therefore is mandated by a self declared independent Kosovo government, which is supposed to be overseen by the ICO. That the standing of the ICO as a mission with countries that oppose status change, e.g. Serbia, Russia, etc., is not good appears logical.

Operational Implications

What does it mean for International Organisations with differing mandates to operate in a territory with a disputed legal status? Firstly, in an ethnic conflict where part of the international community has decided to support one side, while another part of the international community challenges the intention of support of one side as not a good policy, it has differing reactions among the people belonging to the conflicting parties.

It can be assumed that the Kosovo Albanian population generally speaking is supporting the ICO, as this is part of the agreement to gain independence. It is also fair to assume that Serbia in generally is in support of the UN as this presents a maintenance of the old status. The Kosovo Albanian population will less likely favour work with the UN due to the same reason. However, for practical reasons the Kosovo Government will keep a minimum of cooperation with the UN. While the OSCE stays under the same mandate both conflicting parties understand that the OSCE Mission to

⁷ Note that the process of recognitions is on going at the time of reviewing this text it reach 60 recognitions.

Kosovo is benefiting both sides, but the OSCE operations are kept under close scrutiny not to work in any one sides favour. EULEX is in a very different situation, as the expectation by the Kosovo Albanian population was that EULEX would engage in favour of independence, but remains now a status neutral technical mission. EULEX which needed to compromise in order to find an operational mandate is for the time being tolerated by both conflicting sides.

The biggest challenge for EULEX is not resolved. It has to face the legal realities which exist in Kosovo. As a Rule of Law mission it is not ideal to be uncertain in knowing which set of laws to apply. As a status neutral mission deployed under UNSCR 1244 there is theoretically a need to recognise the legislation of the UNMIK administration. However, as EU Mission, sponsored predominantly by countries which recognise the independence of Kosovo, there is pressure to work in line of the new political reality that is in place within Kosovo and its police and judiciary institutions. To illustrate this judicial situation clearly one just needs to question how an international judge will act once he or she is residing over a case in a Kosovo court.

The ICO is also in a particular situation. As the implementing agency of the Athisaari proposal one of the primary tasks is to secure protective mechanisms for Serbs in Kosovo, but the proposal is not accepted by Serbia and Kosovo Serbs therefore officially keep a distance from ICO representatives. Serbia that is pursuing a policy of keeping Kosovo as a part of Serbia is challenged by an international office that is working in the spirit of independence of Kosovo.

While the different organisations face different situations, the situation of an international staff member working in Kosovo is a little awkward. It depends which organisation the individual is working for in order to see different working relationships in the field. Different persons from the same country will generally experience different reactions by local interlocutors, depending which organisation the person is representing. For instance, a German, from a country that has recognised the independence of Kosovo, can expect good relationship with for instance a Kosovo Albanian mayor if s/he works for the ICO, and OSCE. The reception could also be good if the person works for EULEX. It will be less enthusiastic for a German that works for the UN. The same person will be well received by a Kosovo Serb if s/he works for the UN or OSCE, but would need to expect to be not received as an ICO representative or maybe be received as a EULEX representative.

But the scrutiny that people operating under is also a challenge due to the two different realities in Kosovo. For instance, in Kosovo minorities are not considered as minorities due to the different political perceptions. A Kosovo Serb belongs to the minority within Kosovo territory. However, a Kosovo Serb belongs to the majority population within Serbia. The same applies the other way round for a Kosovo Albanian. As some interlocutors respond in a not constructive way, all populations in Kosovo are generally referred to as “communities”. As status neutral organisations there is a further twist in the terminology and wording as some words carry a political connotation. For instance the use of words such as “citizen”, “country”, “nation”, etc. imply statehood. It is however also difficult in a technical context, e.g. is an internally displaced person from Kosovo to Serbia an internally displaced person, or a refugee? Again it is the political perception that determines the correct terminology.

The impact of the two legal realities is apparent in many detailed facets of life. What are valid identification documents? UNMIK has stopped issuing UNMIK travel documents and ID cards. These types of documents are now issued by Kosovo institutions. However, Kosovo passports can not be used in Serbia and some other countries. Special arrangements need to be made for countries which have not recognised the unilateral declaration of Kosovo independence. An international visitor to Kosovo can travel to Serbia from Kosovo with a valid entry stamp for Serbia. All entry stamps received in Kosovo are not considered valid. People arriving to Pristina airport can therefore not continue to Belgrade directly, but would need to travel for instance via Macedonia. Car registration plates issued in Kosovo are not valid in Serbia, but Serbian plates issued for Serbian towns or enclaves inside Kosovo territory are tolerated (for the time being by Kosovo Police as a sign of goodwill). What about a car from the EU union with green insurance card valid for "Serbia", most likely the driver of such a car will need to buy additional insurance to be allowed entry to Kosovo by border police. But more importantly is the entry of goods, and the way customs can operate. Serb areas in the North do not want to see customs to operate. Valid customs stamps until recently were only issued at the South of Mitrovica, opening a grey area of import/export activity. The question on how to use Kosovo government stamps, e.g. in court, in an area that is hostile towards the idea of an independent Kosovo state, for instance in the northern municipalities will be an operational challenge that needs to be addressed.

There is mounting pressure on Kosovo Serbs to participate in Kosovo institutions. However, the participation of a Kosovo Serb in such an institution would risk sanctioning of Serbian authorities. For the average Kosovo Serb the choice to participate in a Kosovo institution is thus a particular challenge. For instance, why should a civil servant, e.g. teacher or police officer, risk losing pension and health care benefits of the Serbian state in return for a Kosovo salary which is approximately only 50% of a Serbian salary? Besides the rational reasons, there is also peer group pressure which should not be underestimated. However, much of the independence idea for Kosovo is based on the idealistic construct of a "multi-ethnic" society. While internationals face different reactions by local populations, depending which organisation they present and whom they are trying to work with, the "reverse" does apply to local interlocutors. The interlocutors who are available often do not genuinely represent their community. For instance, due to the system of reserved community seats there are members of the Kosovo parliament who were elected as parliamentarians with less than 100 votes.

Conclusion

It can not be disputed that a political change in Kosovo has occurred in the past year. The change of presence by international organisations operating in Kosovo is also evident. It is also very clear that the different constraints on the work of the ICO, EULEX and OSCE will remain for some time to come, in the absence of consensus over the policy for Kosovo by main global players.

Effectively the status quo of the UNMIK administration has been challenged, changed and in most parts operations have been shut down without change to UNSCR 1244. The Pillar system that had been originally established appears to have vanished. EULEX is operating under UNSCR 1244. However, it has not replaced UNMIK, but

acts as a technical support mission to Kosovo institutions. With the closure of UNMIK-UN operations, e.g. Civil Administration and Department of Justice, important aspects of UN presence in Kosovo have given way to more independent Kosovo institutions and to a limited degree the new international missions.

With UNSCR 1244 active and Kosovo institutions operating independently two legal dimensions exist in Kosovo. For the majority of the population of Kosovo this is not an issue, it is however an aspect that will occupy international organisations. The average person in Kosovo is usually only affected by these two realities when dealing with issues related to the outside of Kosovo.

At this point in time it can not be assessed when the situation in Kosovo will change for international organisations working there. However, the assumption is that if change to the two legal realities will occur it will be a silent encroachment of change, e.g. slowly implementing on an ad-hoc basis new Kosovo regulations. Alternatively a big impact change would occur, if currently opposing countries allow recognition of Kosovo within the UN system. This option for the time being can be ruled out as it is not likely to happen. Another impact would happen if countries that oppose status change discontinue their stance and allow for the acceptance of applying Kosovo law within the UNSCR 1244 frame. Both such bold alternatives appear unlikely at this moment in time. International staff in Kosovo will continue to face the challenge of working in a not clearly legally defined environment, whilst trying to continue with improving the living conditions of all people in Kosovo.