

Kosovo after the Hague

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Summary

"...The agony of Kosovo could not be balanced by the joy that was to be derived from it. The transports of the women who built the church must dull themselves in continuance, and even if they generated the steady delight of founding a new nation that itself was dulled by the resistance offered to the will by material objects, and by the conflict between wills working to different ends. But the agony of Kosovo must have been purely itself, pain upon pain, newly born in acuteness for each generation, throughout five centuries. The night of evil had been supreme, it still was supreme on a quantitative basis »

(Rebecca West, *Black Lamb and Grey Falcon* p. 844. Penguin, 1940).

ELIAMEP's 'out of the box' proposals

After the end of 1994, much earlier than the Paris and Dayton Accords, while the situation was considered to be contained, containable or even frozen, ELIAMEP undertook a comprehensive study aiming at anticipating developments and providing guidance for Kosovo. In April-May 1995, a team led by Professors Veremis and Kofos paid a visit to the former Yugoslav Republic of Macedonia - while the borders between Greece and FYROM were closed - in Kosovo and then to Belgrade. The findings of this mission, enriched with truly original proposals and innovative thinking, were later presented in a prophetic book -a bestseller of its kind- called ***Kosovo: Avoiding a New Balkan War*** (Athens 1998, edited by Thanos Veremis and Evangelos Kofos). The book was also presented in Skopje in June 1998. Furthermore, in April 1999, ELIAMEP produced another comprehensive book entitled ***Kosovo and the Albanian Dimension in S.E.E*** (Edited by Thanos Veremis and Dimitrios Triantaphyllou).

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The debate on Kosovo's final status had been launched, at least behind the scenes, much earlier than it is generally perceived. The British FCO selectively circulated a non-Paper as early as 2004. The American position, advocating independence for Kosovo, was formally crystallized much later. Notwithstanding this sequence, the fact is that Washington led the chorus.

In January 2005, the Hellenic Foreign Ministry dispatched a team of experts in the region. The team that visited Belgrade, the Presevo Valley and Kosovo, conducting over two dozen meetings, included the then Ambassador to Serbia and Montenegro Michael Spinellis, then head of the Hellenic Liaison Office in Prishtina Ambassador Gadis, Professor Kofos and the author. We also had useful meetings with the ethnic Albanian leaders of the former Yugoslav Republic of Macedonia.

In fact, our mission was to test the waters and informally present a two-fold proposal drafted by Professor Kofos for ELIAMEP in view of the opening of the final status debate. We

Kosovo after the Hague

failed to persuade our friends in Belgrade. Yet, our forecast of the Kosovo related developments proved to be accurate. We had no illusions.

The proposal consisted of two main ideas:

- a) The European Union would have to play a key role. Kosovo would have become a kind of EU protectorate.
- b) Devise a special status for the protection of the Orthodox churches and religious sites and monuments. This proposal remains the more comprehensive and far reaching with regard to the Orthodox churches, monasteries and monuments in Kosovo.

During a recent visit there (April 2010), we were told by one of the most gifted and charismatic Serbian priests, father X, that the Serbian diplomats and officials regretted later that they had not endorsed the Kofos/ELIAMEP proposal.

It was indeed a very creative, 'out of the box' proposal. So, no surprise we received a rather reserved reception in Belgrade. The Greek proposal also faced resistance from Xavier Solana's team. No surprise either. Their main objection was that there was no precedent and that it would have constituted a heavy political burden for the EU. Apparently, Europe is ready to move to action only if some other power or powers are leading the chorus.

The reception in Kosovo had variations. Yet, the overall atmosphere was somehow more open. It was clear that the Kosovars did not want contiguous territory and sovereign extraterritoriality for the churches and religious sites to be protected. It was not surprising that later, during the Vienna talks, the Kosovar delegation had a strong preference for the relevant proposals included in the Ahtisaari Plan.

These are indicative examples of the consistent ELIAMEP's efforts and commitment to offer ideas and solutions 'out of the box'.

Developments and questions

On 8 July I said to a Serbian official that my reaction two years ago – while I was serving my country as Ambassador to Washington - when the Serbian Government introduced the General Assembly Resolution 63/3 (of 8 October, 2008) was the following: First, are there any particular implications for Greek interests at large, and second, what would be the consequences if it backfires for Belgrade. That means it could have an adverse impact on Serbia's interests and political goals. It is not so hard to understand that the Serbian initiative, despite its initial success in the General Assembly, proved to have a rather unhappy end in The Hague. Two years later, due exclusively to the EU's diplomatic engagement and commitment, Serbia was rescued, at the last moment, in New York - in Brussels, to be more accurate - and avoided an open confrontation with the EU as a whole and with the US as well..

Accordingly, here is a first rather rhetorical question: Has the overall "General Assembly - International Court of Justice Operation" promoted Serbia's political and legal position in Kosovo? A careful analysis of the International Court of Justice's Advisory Opinion, issued on 22 July, shows that:

- (a) The ICJ. in §55 draws a comparison with the language of a question submitted to Canada's Supreme Court related to Quebec. In fact, many participants in the proceedings in the Hague referred to the Supreme Court's Ruling as a precedent. The relevant question was 'Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?...'. We observe that there are important language differences in relation with the question proposed by Serbia as sole co-sponsor

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Kosovo after the Hague

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and included in UNGA Resolution 63/3(Oct.8 2008) which had as follows : 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law '?

- (b) The Court made also clear in the Advisory Opinion (§ 23-27) that 'it has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law.'
- (c) Furthermore, in §50-56 the Court states that the question asked by the Assembly 'does not ask about the legal consequences of that declaration. It does not ask whether or not Kosovo has achieved statehood. Nor it asks about the validity or legal effects of the recognition of Kosovo by those States which have recognised it as an independent State' (§51).
- (d) Moreover, the Court in §84 of the Advisory Opinion unequivocally states that 'it considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law'.

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UNGA's Resolution 63/3 had also another serious impact which, so far, was not adequately analysed. For the first time, the International Court of Justice proceeded to the most authoritative interpretation of UNSC Resolution 1244(1999). Since its adoption, 1244 has been the custodian of the general international law in Kosovo, the basis for Kosovo's interim administration and Kosovo's international relations. It has been the fundamental, albeit exclusive, reference

document for Kosovo, for Serbia, for the EU and for the international community at large. Serbia was absolutely entitled and had a legitimate interest in using 1244 as the most effective ammo of its legal and diplomatic arsenal. Yet, the UNGA and ICJ proceedings rendered 1244, as this is the case after the Hague, a less supportive element for Belgrade's position. The relevant paragraphs of the Court's Advisory Opinion have as follows:

- '[...] Under the terms of the resolution 1244(1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo. Resolution 1244 thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244, the declaration of independence is an attempt to determine finally the status of Kosovo' (§114).
- 'The Court accordingly finds that Security Council resolution 1244(1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999)' (§119).

The Cyprus issue

Additionally, a parenthesis has to be opened and a reference to Cyprus to be made. Specifically, the Republic of Cyprus is, somehow unexpectedly so, a collateral beneficiary of the Court's Advisory Opinion. The country is among the 123 or so UN members that have not recognised Kosovo's independence. It participated in the hearings before the Court and

Kosovo after the Hague

made, among others, a statement. Turkey, though among the first states to recognise Kosovo's independence, did not participate in the hearings. Neither did Greece. The Government of Cyprus is right in keeping a low profile with reference to paragraphs 81 and 114 of the Advisory Opinion. Nevertheless, this does not alter the fact that the International Court of Justice has taken a clear and unambiguous position on Cyprus related issues.

In §81 the Court states:

- 'Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: inter alia, Security Council resolutions 216(1965) and 217(1965), concerning Southern Rhodesia; Security Council resolution 541(1983), concerning Northern Cyprus; and Security Council Resolution 787(1992) concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the d.i. thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position [...]'.
- In §114 the Court states: '[...] In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those

conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of Resolution 1244 (1999), the Security Council in its Resolution 1251 (29 June 1999), reaffirmed its position that 'Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded'. The Security Council thus set out the specific conditions relating to the permanent status of Cyprus [...]'

The months ahead

Looking towards the future of Kosovo after Hague, I have almost completely avoided commenting on Kosovo's stance, since it was Serbia that initiated the UNGA-ICJ Operation. At first glance, Kosovo and its political leadership should also feel comfortable in the legal/diplomatic battlefield. Now, they can just sit back and wait for the Serbs to come to the dialogue. But things are not going to be so simple. Notwithstanding some differences - semantics rather than substance- used for domestic reasons or reflecting personal agendas, there is a consensus among Kosovo's political leaders along the following lines:

- Kosovo's declaration of independence is not negotiable, neither are Kosovo's territorial integrity and sovereignty;
- Kosovo's marathon for bilateral recognitions has to be intensified. I intentionally use the term bilateral recognitions instead of international recognition which implies membership to the UN, its specialised agencies and regional or sub-regional organisations. What mostly matters, in this context, is membership to the Council of Europe and eligibility to join NATO and the European Union;

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Kosovo after the Hague

- Kosovo is ready and open to enter to talks - as that was the case in the past before the U.D.I. - with the Serbs on practical or technical issues affecting cooperation or deriving from the lack of cooperation;

Let me also add that, in spite of public statements, Kosovo was ready to engage a dialogue with Belgrade in relation with the Serbian community in Kosovo.

To get full international recognition, including membership to the UN and eligibility to join NATO and the EU, Kosovo frankly needs a kind of agreement or understanding with Serbia. What appears today to be formally or informally the EU conditionality for Serbia's accession talks, tomorrow will also stand as the conditionality for Kosovo. Nevertheless, there should be no illusions in Prishtina or in Belgrade. In September 2010, the rationale used by Baroness Ashton during her crucial meeting with President Boris Tadic was explicit. The content of the marathon meeting between these officials should serve as a manual for EU's 'smart power' policies in/for the Balkans on the basis of convincing carrots and persuasive sticks.

Entering the talks. The orchestration, the agenda and tentative timetable:

No one expects or anticipates the talks to be easy or conclusive. Nor do I know how and when they will start. Most probably in mid January or early February 2011.

For the Serbs, the EU umbrella would be the ideal one; EU and UN not bad at all. The Republic of Kosovo might have a preference for the US and the EU. Openly, they may have some difficulties in publicly denying a key role for the UN. Anyway, there are many internationals in Prishtina, Brussels and New York over a dozen internationals competing, in a kind of 'beauty contest', who will fit better to act as moderators. Or, at least, to be present.

For his part, Veton Surroi was right arguing two months ago in London that before the

launching of the talks, Serbia and Kosovo might need to enter into 'talks about the talks'.

The orchestration is taking place right now. Secretary Clinton's successful visit in both capitals and her good chemistry with Baroness Ashton were instrumental in this context. Whatever the setting, the first statements in the opening session could be along the following lines:

- Serbia will reiterate its stance -that I do not anticipate to change: Kosovo's secession is illegal. Serbia does not recognise Kosovo.
- Entering into direct talks does not imply or can be perceived as a de jure recognition. Serbia will state that Kosovo's U.D.I. is 'null and void'. They want to discuss Kosovo's status. To reach a status oriented mutually acceptable solution.

For sure, Serbia's delegation will operate under pressure from important domestic factors in Belgrade and segments of the Serbian community north of the River Ibar. Belgrade has also to take into serious consideration the views and interests of the Serbian Orthodox leadership in Gracanica, in Decani and elsewhere south of the Mitrovica bridge.

- Kosovo's stance will be sophisticated: roses and all kinds of nice flowers towards the Serbs. Happy to meet etc., we know each other so well, etc. They consider these talks to be the normal continuation of the bilateral technical talks they had until 2007. Suspended by Belgrade, following the Declaration of Independence.
- They will underline that Kosovo is an independent state recognized so far by 22 out the 27 EU members, three Permanent Members of the Security Council, 70 or so UN Members etc.. If they want to be nice towards the Serbs they will not refer from the outset to the

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Kosovo after the Hague

I.C.J.'s Advisory Opinion. If challenged, they will certainly do.

- They are eager and ready to discuss anything but Kosovo's independence, its territorial integrity and its borders. Their aim is also to join the EU and NATO, as well as the UN.
- If I was supposed to be the coordinator-to use a term from the old and good CSCE process - I would have scheduled one public meeting per session and then a dozen of coffee breaks and retreats; a good lunch and an luculian dinner. The negotiators to be designated have a unique advantage. They know each other so well and they can communicate without interpreters. Language, as well religious affiliation, have never been barriers in past meetings between Kosovar Albanians and Serbs. I could also argue that some negotiators have a good deal of respect for each other. Leave them alone if need be. Anyway, there were some informal contacts in the recent past; some soundings but not a structured dialogue.

The Issues

I assume that the discussion will concentrate on the northern part of River Ibar. What is more generally called the Northern Kosovo or simply the North. It will be ultimately about the definition or the nature of sovereignty or better about residuals of sovereignty. Not about borders. It will be about 'status within the status'. Exchange of territories between Serbia and Kosovo, as proposed by some as a practical if not the only workable solution, is for me the nightmare scenario for the Balkans, for the Caucasus and for Africa. Though it is still premature to talk about the Agenda, there are signals that the Serbian negotiators will give priority to the so-called low intensity issues such as the missing persons and the right for (of) return.

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The question is: are we entering a phase of revision of Ahtisaari's Comprehensive Proposals which are annexed to the Constitution of the 'Republic of Kosovo' as an integral part? If so, there is no certainty that the revision process will refer just to the status or the nature of northern Kosovo and that will not affect the Serbs in the South. What then will impede Prishtina from trying to revise the status of the Orthodox Monasteries, Churches and religious sites south of the Mitrovica Bridge as defined in the Ahtisaari Proposals?

Once the talks are launched, no public statements implying coercion are needed. Neither President Tadic and the pro-European and reformist government in Belgrade, nor Prime Minister Thaci or the Prime Minister to be elected in Prishtina have any particular interest in playing over-time. Yet, prognostics related to the negotiations timetable are still uncertain and volatile. The December 12, early elections in Kosovo would delay the opening ceremony. A reconfiguration of the Kosovar political forces cannot be excluded at this stage. Thaci can already capitalize on the direct negotiations with Belgrade. Indeed, Hashim Thaci or any other Kosovar Prime Minister has a lot of political capital. They have more space for maneuver, strategy and tactics compared to President Boris Tadic, who has already taken many political risks. Yet, the political pragmatism he displayed, received an unusual amount of international praise.

Agenda 2014 or 2020

The Greek Government, and personally Prime Minister George Papandreou, have stated that by 2014 all Balkan countries should join the accession process. Greece and of course G. Papandreou have no illusions. The enlargement process, open to all Balkan countries in accordance with the Thessaloniki agenda, is the indispensable soft -power mechanism, the catalyst for changing attitudes and policies, the vehicle for solving problems in the Balkan theatre. The problems are European ones. The

Kosovo after the Hague

June 2003, Thessaloniki Agenda had no adequate follow-up. The Agenda 2014, which needs now concrete content, is the next step.

Veton Surroi, addressing a conference in London in September, referred to the 2020 perspective, with Kosovo and Serbia becoming members of the European Union.

While the anniversary of the beginning of the First World War has given birth to the Hellenic proposal for 2014, most probably Veton Surroi rightly calculated that during 20th century Europe, the revision of agreements and treaties imposed actually started the day after their signature. So, apparently, this timetable takes into consideration the end of the First World War.

Yet, the revision process of the Treaty of Versailles imposed by the winners following the 'Armistice' started the day after they were signed. And then we had the Second World War.

The 1945 Second World War realities - as ratified by the Peace Treaty - were revisited in Helsinki in 1975 to take into account the European - indeed the East European - architecture shaped during the Cold War. Furthermore, the Helsinki Final Act was signed a year after the Turkish invasion and occupation of Cyprus.

The Final Act itself was panegyrically updated, reiterated and enriched in Salle Kleber, in Paris, fifteen years later (November 1990), taking into account the Glasnost and Perestroika impact in eastern Europe and in Europe at large. Nevertheless, the revision and the selective interpretation of the Helsinki Final Act and of the Paris Charter for A New Europe started precisely a year later.

The fact is that in Europe only the Agreements, Conventions or Treaties that were signed without winners and losers, that were the outcome of a negotiated process, resisted in time. I always refer to the Treaty of Lausanne as an excellent example.

That is something that both leaderships in Prishtina and Belgrade should bear in mind. They might also wish to remember that there are not permanent friends and allies, but only permanent interests. Kosovo's independence is the outcome of an accumulation of monumental miscalculations of the Milosevic regime, of the ethnic cleansing and iron fist policies and practices in Kosovo, of the historical dimension of the Rambouillet Conference and Agreements and of NATO's intervention in 1999. Last but not least, of the decisive, bold action of the US followed by the Europeans. The whole process lasted, since Milosevic's Kosovo-Polije speech, less than twenty years.

A vision for the future

Notwithstanding these developments, Kosovo and Serbia, Kosovar Albanians and Serbs will live together. Whatever the outcome of the talks, Serbia will be Kosovo's neighbour and Kosovo will be Serbia's neighbour. From the few, limited options they have, the best is to create the conditions for the next generation; the generation of Serbs and Kosovars holders of the EU passport. So if I were asked to give a label to the talks process I would rather call them 'The Next Generation Initiative': A generation of hope of peace and conciliation.

To join the UN Kosovo needs a Security Council Recommendation and then a General Assembly Decision, as provided for in Article 4 of the Charter. That implies that the first step is the P-5 consent; that the Russian Federation and the People's Republic of China agree. The recent consensus UNGA Resolution co-sponsored by Serbia and the EU may have a greater impact beyond Europe's borders, in Asia and in Africa, and Prishtina should not underestimate this fact. Ultimately, a modus vivendi with Serbia will pave Kosovo's road towards UN membership.

As a working hypothesis, I could guess that the UN admission issue could become, along with the European membership process, a fundamental parameter and a catalyst for the

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Kosovo after the Hague

International Community to provide adequate political incentives towards a negotiated settlement. Membership to the UN, under concrete conditions and commitments, is based

on a well-known precedent. However, that requires fresh co-operation between the US and the Russian Federation.

Further Readings:

- Rebecca West, *Black Lamb and Grey Falcon* p. 844. Penguin, 1940
- *Kosovo: Avoiding a New Balkan War*, Athens: ELIAMEP, 1998
- *Kosovo and the Albanian Dimension in Southeastern Europe*, Athens: ELIAMEP, 1999
- Analysis of the International Court of Justice's Advisory Opinion, issued on 22 July

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