

## Kosovo merits “special status as part of the EU”

Michael Emerson

The Kosovo issue has reached a state of impasse in the UN Security Council, with Russia having made it clear that it would veto any resolution recognising Kosovo’s independence from Serbia, unless Serbia would agree to this, which it will not - and indeed this is now made much more difficult by its newly revised constitution. And as long as Russia takes the lead with this blocking position, China is with them too. Neither is interested in Kosovo per se, but rather in their own domestic, regional and geopolitical interests.

Yet Kosovo has a case for secession relying on normative criteria that go way beyond the narrow legal formalism of votes in the UNSC. Scholars of international relations have identified criteria for ‘just secession’, complementing the better known argument of ‘just war’.<sup>1</sup> The essence of this argument is that secession may be justified in the event that a well identified people and territory have suffered a grave injustice at the hands of the central power (such as mass deportation or genocide, or credible threats thereof); that this is a last resort solution; and that the seceding entity also has a reasonable chance of establishing proper governance for itself. On these grounds, Kosovo can make a serious case, and a categorically stronger one than that

advanced by many other would-be secessionist entities, such as the Spanish Basques.

The situation is now a very dangerous one, with several obviously unattractive scenarios threatening to unfold: unilateral declaration of independence by Kosovo, followed by US recognition and a split within the EU; destabilisation of the situation on the ground between Serbian and Kosovo Albanian communities; and knock-on effects in other parts of the Balkans such as Macedonia and Bosnia.

If Russia has put a credible roadblock in place for any classic international resolution of the issue, the EU has to find a way around this roadblock, since it has to bear the likely costs of the unattractive scenarios. Moreover, it alone – being committed to the full integration of the whole of the Balkans into the EU – has the conceivable means to invent a solution that is not blocked by far-away third parties.

The solution could be based on the Ahtisaari plan. But this was designed for getting UNSC endorsement, which we now know will not materialise. The plan needs therefore to be adapted to this new situation, as the Crisis Group has argued.<sup>2</sup> Here we go further in sketching the systemic relationship that Kosovo might have with the EU. This could be viewed as an

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<sup>1</sup> See Bruno Coppieters, “The Kosovo Trilemma”, due to be published in the second edition of Bruno Coppieters and Nick Fotion (eds), *Moral Constraints on War: Principles and Cases*, Lanham, MD: Lexington Books, forthcoming 2008.

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<sup>2</sup> This argument is made by the International Crisis Group, in “Breaking the Kosovo Stalemate: Europe’s Responsibility”, Policy Report, 21 August 2007. However the ICG’s main idea is for the EU to acquiesce in Kosovo’s independence through a combination of positive votes and constructive abstentions in the EU Council of Ministers.

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amendment to the Ahtisaari plan, but it could also be viewed as a more fundamental change of paradigm, namely to withdraw the matter from the UN's legal-procedural conventions regarding international recognition, and to place it instead into the framework of European integration, where it is no longer subject to Russian or Chinese control.

The EU would open negotiations with Kosovo over an agreement defining a new status. The Ahtisaari plan would be the basis for negotiations over Kosovo's own institutions and powers over internal matters, and for special arrangements over security and external policy, with the EU providing *inter alia* guarantees for the Serb minority. Kosovo would also be subject however to the jurisdiction of the European Union in areas of EU law identified in the agreement. Since the ultimate objective, as for all the Balkans, is full integration with the EU, the principle would be one of general application of EU law, subject only to exemptions and transitional arrangements. The EU would administer its policies and programmes in Kosovo in collaboration with the government of Kosovo. It would for example treat Kosovo as a special participant in the EU's structural funds and education programmes such as Erasmus. There would be a key task, starting immediately, to identify which blocks of EU law should be applied first in Kosovo, and subject to the jurisdiction of the European Court of Justice. EU directives would, as usual, have to be transposed into Kosovo laws, and short-cuts would have to be found to do this without excessive burdens, for which the solution could be a combination of 'Slovenia' and 'Liechtenstein'. By this we mean that Slovenia as fellow ex-Yugoslav polity is perfectly placed to help Kosovo through the process; and that Liechtenstein as a micro-state was able to devise abbreviated legal procedures for adopting the whole of the EU market *acquis*.

Kosovo would not have a flag at the UN but, of more immediate importance, it would issue passports to its citizens, which would be recognised by the EU, followed soon by most of the rest of the world.<sup>3</sup>

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<sup>3</sup> The citizens of the islands of Jersey and Guernsey have passports carrying the designation "European Union",

Kosovo would have a Permanent Representation accredited to the EU in Brussels, which would have special institutional links to all the institutions of the EU, thus confirming and defining its special status.

The question for European policy-makers is how to spell out this proposal as an imaginative element of a wider and longer European integration strategy for the whole region. The legal status of Kosovo in relation to the EU would be defined in a binding agreement. The key words in this agreement would be a delicate matter for negotiation, including such options as special EU region, or territory, or associated territory or state. Kosovo could be 'part of the EU', to employ language sometimes used in agreements dealing with entities with special relationships with the EU. Such words have different connotations in different contexts, and their precise legal meaning has to be found in the supporting legal texts. The EU and Kosovo would thus decide between themselves what words to use and what meaning to give them in the precise context of EU law. Kosovo would not be a Member State of the EU for the foreseeable future, but the EU has already shown remarkable political and legal agility in accommodating special integrative relationships, ranging from the status of Norway, Iceland and Liechtenstein in the European Economic Area, through to arrangements with various associated entities and territories. For example the Channel Islands are 'part' of the EU without being 'part' of the United Kingdom.

For the Kosovo leaders it is now time for a reality check. The writing is on the wall, and it reads: "Russia denies you classic independence, with UN-legitimised recognition". They would be advised to make the best, rather than worst of what the EU might offer, which cannot be vetoed by Russia, China or Serbia. Above all they should choose a route that minimises the chances of violent destabilisation. Kosovo may make political declarations soon about their independence; but this should be framed in a way that allowed the EU to avoid formal UN-level recognition. The offer of 'special status as part of the EU' would not be full legal

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and "British Isles" as well as Jersey or Guernsey. Taiwan issues passports entitled "Republic of China – Taiwan" on the cover and can be used worldwide without UN membership, which is blocked by Beijing.

recognition as a fully independent sovereign state, but it would amount to functional recognition since the EU would be entering into a complex agreement with the government and would be operating policies in Kosovo. It would also leave the door open for definitive legal settlement, to be targeted at the time when both Serbia and Kosovo would be acceding to the EU as full members<sup>4</sup>.

For its part, Serbia would not be asked to change its constitution, but invited instead to only cooperate with the plan and continue its European integration course. To help calm spirits, Serbia could be offered an upgrade in status from its present vague ‘membership perspective’ to ‘membership candidate’, thus joining Croatia and Macedonia in this category. Maybe later there could be mutually agreed territorial adjustments between Serbia and Kosovo, but this is unlikely to be agreed now by the EU out of concern for knock-on effects elsewhere<sup>5</sup>. Serbia seeks to keep a small degree of functional as well as legal sovereignty over Kosovo, for example for border management. The way to achieve the functional objective should be to negotiate a tripartite agreement between the EU, Serbia and Kosovo on such questions, in which the legal hierarchy would be the typical European one, for supremacy of EU law, subject to the jurisdiction of the European Court of Justice.

Would EU member states that are reluctant to recognise a declaration of independence by Kosovo as a fully independent state find this formula of a special status within the EU more acceptable? The argument to be put, for example to Spain worried about the Basques, would be that Kosovo gets a special status but one that falls short of a full member state; and it deserves this special treatment because it suffered a grave injustice at the existential level. No minority within the EU is anywhere near able to make such a claim.

Would the formula set a precedent for other states and entities that are presently outside the EU and seek accession or an enhanced status in relation to it? Up to a point, yes. The case exists more widely for devising systemic arrangements (no doubt with variants on a case-by-case basis) for functional integration with the EU of parts of Europe that cannot easily fit as conventional member states. For Kosovo, as for the rest of the Balkans, the ‘membership perspective’ remains, but it is going to take many years for the EU to adapt its institutions beyond what is in prospect with the current Treaty reform negotiations in order to absorb another major enlargement, and before the Balkan states fully satisfy the Copenhagen criteria.

For several years, the slogan for Kosovo has been “standards before status”, in which status was implicitly understood by Kosovars to mean classic independence, with a flag at the UN. This is impossible for the time being and for the foreseeable future. But at the same time the *status quo* is itself unsustainable. This presents a classic dilemma situation, which requires therefore a special solution, which would be a special status that the EU, and only the EU, could offer.

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<sup>4</sup> At a meeting of the European Parliament in January 2007, the former foreign minister of Greece, George Papandreou, proposed to Kosovo that “you can have your independence when you become a member of the EU”.

<sup>5</sup> As suggested by the International Crisis Group, *op. cit.*

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