

From Normalisation to Territorial Exchange: the Effect of the EU Mediation on the Belgrade- Pristina Dialogue

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Abstract

This paper examines the role of the EU as a mediator in the Belgrade-Pristina Dialogue. Established with a “technical” and “political” component, the Dialogue was derailed after a proposal for land swaps between Serbia and Kosovo was put on the table. Considering this, the paper argues that in order for the EU as a principal mediator in the Belgrade-Pristina Dialogue to maintain the possibility for finding a solution, it needs to reframe the negotiations process after the initial proposal for land swap has become part of the official discourse. It consists of three parts. The first one analyses the way the negotiations have been framed by the mediator and its approach to use constructive ambiguity in the process. The second one explores if and how the Dialogue undermined the original framework as established with the Ahtisaari plan, especially in the light of the proposal for territorial exchange between Serbia and Kosovo. Finally, the third part examines whether it is possible to use international law to create a new narrative for the negotiations and reframe the process. From theoretical aspect, this research relies on negotiation theory and international law. The research argues that the Belgrade–Pristina Dialogue was constructed on a base with an inherent framing deficiency. Therefore, that it needs to be “reframed” in accordance with international law, taking into consideration the international community’s approach towards Kosovo thus far.

Introduction

The First Agreement on Principles Governing the Normalization of Relations between Belgrade and Pristina (hereinafter: the First Brussels Agreement) was concluded on 19 April 2013. It was initially praised by the President of the European Commission as a “historic” because it “paves the way for a better future of all citizens in Serbia and Kosovo” and reflects the “European spirit” of building bridges and cooperation (Barroso 2013). Although, some progress has been made in the following period, more than seven years since this statement, the enthusiasm has almost expired: the process has been derailed by the proposal for exchange of territories between Serbia and Kosovo from August 2018, and the Dialogue has eventually been halted after Pristina adopted a measure to tax Serbian goods imported to Kosovo with tariffs in the amount of 100 percent. The idea for territorial exchange, also known as land swap or, using the euphemism by Kosovo President Thaçi - “a border correction” (Morina 2018), caused a rift within the EU itself as mediator of the process and created serious concerns among the neighbouring countries (Plusinfo 2019).

This chapter argues that in order for the EU as a principal mediator in the Belgrade-Pristina Dialogue to maintain the possibility for finding a solution, it needs to reframe the negotiations process after the initial proposal for land swap has become part of the official discourse. The structure of the paper is divided into three parts. The first one analyses the way the negotiations have been framed by the mediator and its approach to use constructive ambiguity in the process. The second one will argue if and how the Dialogue undermined the original framework as established with the Ahtisaari plan, especially in the light of the proposal for territorial exchange between Serbia and Kosovo. Finally, the third part examines whether it is possible to use international law to create a new narrative for the negotiations and reframe the process. From theoretical aspect, this research relies on negotiation theory and international law. In fact, the concepts of ‘framing’ and ‘reframing’ are used in negotiation theory. This study focuses particularly on the question of ‘construction’ and ‘reframing’ as described by Zartman (2007), and the process of negotiations framing outlined by Lewicky, Barry, Sounders and Minton (2003, 30-73). In that direction, in order for the negotiations to be concluded successfully, mediators have to ‘frame’ the process. This entails that the parties to the dispute must share the same understanding of the issues that are being negotiated. This is especially the case when it comes to complex negotiations which include multiple questions. Possible ‘misconceptions’ about the issues being negotiated can sometimes develop during the negotiation/mediation process itself, usually because of occurring subsequent events. In that case, the mediator has to ‘reframe’ the negotiations/mediation in order to ensure that the parties have not developed different understandings of the key concepts pertinent to the process.

The Belgrade–Pristina Dialogue was initiated in 2011 and was officially divided into two components – technical and political – although, as it will be further explained, this division should be understood only provisionally and within the context of the adopted mediation

technique. The technical part of the talks resulted in agreements on the integrated border/boundary management, regional representation, freedom of movement, customs stamps, civil registry books, cadastral records, mutual recognition of university diplomas, and official visits.

The second round of political dialogue started in 2012 and included the already mentioned First Agreement of Principles Governing the Normalization of Relations, concluded in April 2013, which also included a detailed Implementation Plan and a document of the Scope and the Mandate of the Management Team for the Establishment of Association/Community of Serbian Municipalities. In August 2015 the parties concluded the Agreement on Association/Community of Serb majority municipalities in Kosovo – general principles/main elements, as well as agreements on energy, telecommunications and justice. Other agreements focussed on insurance, civil protection, agreement between the chambers of commerce, and on the Mitrovica Bridge. The state of implementation of these agreements varies, ranging from full implementation with some contentious issues, through partial implementation, all the way to suspended and/or not implemented at all (Beysoylu 2018, 204). This research, however, mainly focuses on analysing the First Agreement and the way the Dialogue has been framed by the EU so as to expand from the Ahtisaari framework which was originally envisaged by the international community at the time of the recommendation for supervised independence of Kosovo.

There is proliferating literature on the Belgrade–Pristina Dialogue predominately in the field of international politics, but there is almost no analysis of the issue from the aspect of international law. For Bieber, who studied the process in 2015, the dialogue can be seen a success story only because of the constrained framework within which it had been established: it did not “sought to produce a comprehensive and conclusive settlement” nor tried “to transform Serb-Albanian relations in Kosovo”, but, instead, it was an attempt by the EU “to gradually build a number of agreements [...] that would result in a long-term process in which relations would normalise” and the two countries would eventually join the Union (Bieber 2015, 317). For Gashi, Musliu and Orbie (2017, 548), the EU kept facilitating the negotiations despite the questionable effectiveness when it came to resolving the main issues because the “overarching ideal” of EU membership served as an “end-purpose”, motivating the parties to simply talk to one another while, at the same time, legitimising the EU as mediator. The subsequent literature is critically analysing the lack of success of EU engagement. Troncotă (2018, 233) pinpoint the insufficient progress, if not the failure of the entire process, on the EU’s mediation strategy to rely solely on the incentive of prospect membership and the use of “constructive ambiguity” which resulted in alienating the local elites and a situation in which “dividers” outnumber the “connectors.” For Beysoylu (2018, 214-215), it is the EU hybrid approach of mediation and lack of local ownership which turned part of the local elite to act as “spoilers” and resort to “subversive strategies to undermine the implementation process.” Overall, as Demjaha (2018, 17) argues, the Brussels dialogue has undermined Kosovo’s external sovereignty from the start, while for Bergmann (2018, 254) it “demonstrates the limits of [the EU’s] manipulative strategy and the conflict parties’ willingness to compromise.”

All these writings point out to the use of constructive ambiguity by the EU. However, there is a gap in the literature on how the use of constructive ambiguity is related, not only regarding the different understandings of the provisions by the parties, but how the parties see the negotiation process and its outcomes *per se*. Or, according to negotiation theory, how the Dialogue has been framed and, even more importantly, how can it be re-framed after the idea for exchange of territory has been presented.

When it comes to the question of the role of the EU in framing the Belgrade–Pristina Dialogue three issues emerge. First, the Dialogue has been transformed into a negotiation between Albanians and Serbs in general. As Gashi, Musliu and Orbie (2017, 550) point out, since the negotiations focused on the “normalisation of relations” between Serbia and Kosovo while casting aside the Kosovo Serbs, one can ask the question for “whom is this dialogue intended for”. This was only confirmed with the proposal for land swaps. Suddenly, it is not only Serbia which represents Kosovo Serbs and intends to improve their rights in Kosovo, but Kosovo represents the Albanians in Southern Serbia as well. This, along with the increased involvement of the Albanian Prime Minister Rama, is changing the process into overall demarcation issue between Serbs and Albanians in the Balkans. Second, the use of constructive ambiguity and dual interpretation has been expanded to such a level that the two parties developed different understanding of the entire process. Finally, the negotiations went out of the Ahtisaari framework, thus, in a way, undermining the entire approach of the international community in relation to Kosovo. It should be noted here that one of the issues that the organised international community was adamant during the status talks in Vienna was that Kosovo will not have territorial claims towards other countries and that it will not seek union with another state, i.e. Albania (Weller 2009, 213). The fact that Albanian Prime Minister Rama has recently become more vocal on the issue of possible reunification of Albania and Kosovo, additionally supports the argument that the entire approach adopted since then has been put into question. Namely, referring to the trade war between Kosovo and Serbia he called the foreign ministers in Tirana and Pristina “to begin working on a common strategic draft that will unite Albanians by the year 2025”, additionally urging the EU to “stop employing a two-faced approach” (Gotev 2018).

Constructive ambiguity and dual interpretation in the Belgrade–Pristina Dialogue

Although the existing literature considers constructive ambiguity as one issue, it should be differentiated between constructive ambiguity and dual interpretation. While constructive ambiguity refers to the entire process, dual interpretation is used on the outcome. As such, dual interpretation is a sub-category of constructive ambiguity. Namely, constructive ambiguity is a technique in which vague language is used in order to allow the negotiating parties to resolve particular issue(s) at a later stage. However, these issues are not completely casted aside, but only the agreement over them is postponed. In other words, the parties can move along in the peace process achieving progress while subsequently re-negotiate the question over which constructive ambiguity was used. On the other hand,

dual interpretation in its narrow meaning refers to the end result of a peace process. In this case the provisions of the agreement allow both parties to save face and declare victory by developing their own understandings. The issues are usually not re-negotiated and the parties, at least the political elites among them, are aware and somewhat tolerant with the opposite interpretations of the other side. This applies as long as it does not interfere or create factions in the domestic political discourse or, in case of an international agreement, raise questions in their international affairs. There are several examples to illustrate the difference between constructive ambiguity and dual interpretation (Stankovski 2019). In case of the negotiations between Serbia and Kosovo, the dual interpretation is a consequence of the constructive ambiguity used by the EU throughout the process.

The EU established the Belgrade–Pristina Dialogue in a way that allowed it to use what in negotiation theory is called ‘sequencing technique’ (Weiss and Rosenberg 2003). This would imply negotiating issue by issue in a previously carefully established order. That is why the Dialogue was provisionally divided into technical and political, although in the words of the first mediator, Robert Cooper (2015), that is somewhat “nonsense” as “all issues have both political and technical aspects.” However, he continues, sometimes “it is useful to focus on the technical and to pretend that it is nothing to do with politics” (Cooper 2015). This approach has been described as an attempt to reach a ‘neo-functional peace’ and, as such, it aims to avoid dealing with issues of the past by deconstructing the larger political issues into smaller technical decisions in order to achieve spillover effects and shift the parties from the previously entrenched positions (Visoka and Doyle 2016, 873).

According to Mitchell (2009, 323), there are three reasons why constructive ambiguity can be used. First, it can prepare the ground to “return to the problematic issue in the future when improved relations may aid resolution.” Second, in case of violent conflict, it allows the mediators “to push for the earliest possible agreement and to defer time-consuming issues.” And third, it allows the parties “to claim that a concession has been obtained on an important issue” and, as such, ease the relations with their constituencies. But, at the core of use of constructive ambiguity is the fact that this “deliberate use of imprecise language” (Berridge and James 2003, 51) is Churchman’s (1995, 9) view that the technique should only be used when negotiating less controversial issues of particular peace process (see also Mitchell 2009, 17). Nonetheless, these issues still have the capacity to either put the process to a halt or completely derail it. None of these conditions have been adhered to in the case of EU-led mediation process between Kosovo and Serbia. What this study argues is that constructive ambiguity cannot be used as a tool when it comes to substantive parts of the Agreement, i.e. for issues which are at the core of the dispute between the parties.

In other words, constructive ambiguity cannot be applied for the major issue of the negotiations, especially if the parties have different understandings of the process itself and its outcomes. This is exactly what happened in the EU approach to the Belgrade–Pristina Dialogue. Namely, Kosovo entered the negotiations as a technical dialogue leading to the First Agreement from 2013 with the expectation that it will result in mutual recognition between the two states (i.e. Kosovo and Serbia), as well as a removal of the parallel Serb structures by reintegrating/employing former members of these structures to Kosovo

institutions.ⁱ In other words, re-gaining the control of the Serbian majority municipalities in the northern part of Kosovo.ⁱⁱ For Serbia, on the other hand, the process was seen as “institutionalisation of the ethnic Serb political units within Pristina’s state structures by creating a rather autonomous community” (Beysoylu 2018, 9). In that regard, following the dilemma about the interpretation of the Community/Association provision, representatives from the North have stated that they see South Tyrol as models closest to what Serb municipalities should look like (Trancota 2018, 10). Moreover, the Government in Belgrade has maintained the narrative towards the ethnic Serbs in the North that the integration of these majority Serb municipalities within Kosovo institutions is “only temporary” as they are working on ensuring “best possible outcome” from the negotiation process.ⁱⁱⁱ It is not far-fetched to argue that this “best possible outcome” can be interpreted as eventual separation of Northern Kosovo. In that context, the campaign slogan of the Serbian Government supported the ‘Srpska Lista’ (Serbian List) also implied that a vote for the list would translate into autonomy similar to that of Republika Srpska in Bosnia and Herzegovina (Bieber 2015, 309). Therefore, it is not a surprise that the opposition political parties in Pristina regarded the First Agreement as one leading to ‘Daytonisation’ of Kosovo, i.e. creating a new Republika Srpska within its borders (Trancota 2018, 9).

Generally, the EU used constructive ambiguity or allowed dual interpretation over issues which would directly touch upon Kosovo statehood in, at least, three instances. The first one is the Agreement of Regional Representation (2012), also known as ‘footnote’ or ‘asterisk’ agreement. Namely, the Agreement was concluded in order to allow Kosovo to participate in international organisations without objections from Serbia, as long as an asterisk is used after the name of Kosovo stating that the designation is “without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo declaration of independence.” However, although Kosovo negotiators expected that this will allow Kosovo to obtain membership to international organisations where Serbia is also a member,^{iv} this was not entirely the case in practice. Namely, Serbia, and the EU, differentiated between “participation”, as stipulated in the Agreement, and “membership.”^v As a result, Serbia continued blocking Kosovo accession into international organisations as an overall tactic to prevent possible collective recognition or restrict Kosovo access to particular international instruments, as illustrated by the examples of the failed applications to UNESCO and Interpol.

The second instance refers to the Agreement on Integrated Border/Boundary Management (IBM) from December 2011.^{vi} While establishing an IBM was important in order to stop smuggling and other illegal activities, the very use of the acronym ‘IBM’ was another example of dual interpretation: for Kosovo it stood for ‘integrated border management’, but for Serbia, on the other hand, it meant ‘integrated boundary management’ (Bieber 2015, 302). As Bieber concluded, although these different interpretations allowed the negotiation process to continue, they could not resolve opposing views that were not merely semantic. As a result, the implementation process was considerably more difficult than reaching an agreement in the first place (Bieber 2015). The final example regards the issue with the so-called ‘Association/Community’ of Serbian municipalities (First Agreement on Principles Governing Normalization of Relations 2013). As the latest one is most complex, it will be elaborated in more detail in the next section.

In addition to these issues, during the negotiations on the judiciary, a question was raised about the location and scope of the courts in the municipalities where the Serbian community is a majority, especially the ones in the northern part of Kosovo.^{vii} In that direction, some of Kosovo negotiators involved in the process feared that the initial proposals made during the negotiations process potentially created a pretext for parallel institutions in the North because the location of the ‘premises’ of the courts was not clearly established.^{viii} This concern was only amplified when discussions were opened about the law these institutions will apply.^{ix} Namely, Kosovo wanted to have ‘Kosovo Law’ directly mentioned, while Serbia insisted only on using the term ‘applicable law’.^x In that direction, Kosovo argued that, the Basic Court in Mitrovica should include seven municipalities as provided by Kosovo Law, while Serbia claimed that this basic court should only include four northern municipalities with Serb majority.^{xi} According to Edita Tahiri, with this, Serbia aimed “to create ethnic courts” in this part of Kosovo.^{xii} In its final version, the Agreement on Justice specifically mentions Kosovo Law and, through it, establishes the Basic Court in Mitrovica for seven municipalities.^{xiii} On the other hand, it also provides branches in the four majority Serb municipalities in the North. This allowed for removal of the parallel courts and prosecution structures of in the northern Kosovo. There was also a compromise in the sense that the number of ethnic Serb judges in the courts was increased as a confidence-building measure.^{xiv} Although Tahiri claims that location of the courts was not any serious matter of dispute as they operate in several buildings located in North and South Mitrovica, the Agreement, nonetheless, either precisely states the location or a provision was added that a particular court might be seated in “another building to be agreed by both sides” (Agreement on Justice 2011).

First Agreement and constructive ambiguity

Ambiguity in the First Brussels Agreement does not emanate only from the simultaneous use of the words ‘Community’ and ‘Association’ where the former is preferred by the Serbian Government as it implies territorially defined autonomous entity, while the latter is preferred by the Kosovo Government because it equates to an organisation of municipalities, a type of an NGO. The Articles 2 and 3 additionally provide ground for different interpretations. Namely, Article 2 stipulates that the Association can only be dissolved by a decision of the participating municipalities, giving it constitutive powers which are ought to be constitutionally protected and further reinforced with the 2/3 double majority rule (First Agreement on the Principles Governing Normalization of the Relations 2011). Article 3, on the other hand, states that the “structures of the Association/Community will be established on the same basis as the existing statue of the Association of Kosovo municipalities [...]” (ibid.), thus supporting the view of official Pristina that the First Agreement merely creates an Association of municipalities, but not a federal type of entity. Additionally, the Agreement also allows the municipalities to cooperate among themselves and collectively exercise their powers through the Association/Community in accordance with Kosovo law and the European Charter on Local Self-government, giving it ‘full overview’ in the areas of economic development, health, education, urban and rural planning (ibid.). However, even the phrase ‘full overview’ was

described as ambiguous by the Kosovo Constitutional Court as it was translated differently in the Serbian and Albanian texts which the Court interpreted to equate to a mere 'review' or an 'audit' (Judgement in Case No. KO 130/15 2015, para. 143).

The European Charter indeed states that the “[p]owers given to local authorities shall normally be full and exclusive” which can be interpreted as implying executive powers, but only for the separate units of the local self-government and not the Association/Community as a whole. When it comes to the issue of inter-municipal cooperation, it leaves it to be regulated entirely “within the framework of the [domestic] law” (European Charter of Local Self-government 1985, Articles 4(4) and 10(1), respectively). The status negotiations in Vienna discussed these issues. The idea for federal-type system for Kosovo was rejected, establishing municipalities as the basic units of self-government (Weller 2009, 214). While they were granted “full and exclusive powers” over a range of issues, these powers were “to be exercised within the framework of central legislation” (ibid.). Ahtisaari proposal reflects this approach. But, his final document ignored the objection made by Kosovo that the “decision-making body” comprised of the representatives of the Serbian municipal assemblies might effectively create “a third layer of Government between the central and the local” (ibid.).

Additionally, regarding the question of composition of the courts, the Agreement goes against the ruling of the European Court of Human Rights in *Sejdić and Finci v. Bosnia and Herzegovina Case* (2009), which states that institutions should not be ethnically based, thus repeating the mistake of the international community with the Dayton Agreement. On the other hand, the Kosovo Constitutional Court missed the opportunity to answer some of the key questions such as whether the proposal over the Association/Community incorporates separate level of governance with executive authority and whether the “linkage between ethnicity and territoriality violates the fundamental principles of non-discrimination” (Weber 2016, 5).

According to Edita Tahiri, Chief Negotiator for Kosovo in the Brussels Dialogue, she was aware about the different understandings by both Kosovo and Serbia and therefore, just a day before the Brussels Agreement was concluded, she sent a letter to the EU High Representative Mogherini asking her to interpret these provisions. Although Edita Tahiri for the purpose of this research did not agree to disclose this correspondence and make it available to the public, she claims that she received a reply on the same day (i.e. prior to reaching the Agreement) which read that, for the EU, the Association would not have executive powers and would never become a third layer of governance.^{xv}

Belgrade – Pristina Dialogue and the Ahtisaari framework

The independence of Kosovo came after almost ten years of UN administration followed by the implementation of the UNSC framework known as ‘Standards for Kosovo’. The final status negotiations were authorised by the UN Security Council and held in March 2007 in Vienna, mediated by the UN Special Envoy Martti Ahtisaari. After two unsuccessful rounds of talks, he recommended supervised independence as the best possible option for Kosovo.

What is particularly interesting to underline here is that the Ahtisaari Report, referring to the so-called March riots in 2004, an event that left a “profound legacy” for both Kosovo and the international community, stated that there is an obligation for the Kosovo authorities to “reach out to Kosovo Serbs”, but also for the Kosovo Serbs to “engage actively in [the] Kosovo institutions” (Report of the Special Envoy of the Secretary-General on Kosovo’s Future status 2007). When it comes to the decentralisation issues, the Proposal considered the specific needs and concerns of the Kosovo Serb community further indicating that:

[...the Serb community] shall have a high degree of control over its own affairs. The decentralization elements include, among other things: enhanced municipal competencies for Kosovo Serb majority municipalities (such as in the S/2007/168 07-27223 7 areas of secondary health care and higher education); extensive municipal autonomy in financial matters, including the ability to receive transparent funding from Serbia; provisions on inter-municipal partnerships and cross-border cooperation with Serbian institutions; and the establishment of six new or significantly expanded Kosovo Serb majority municipalities (Report of the Special Envoy of the Secretary-General on Kosovo’s Future status 2007, Annex, II, 4).

The Comprehensive Proposal for the Kosovo Status Settlement (2007) was drafted in a way as to carefully include both internal and external stabilisation challenges and objectives. The external dimension was influenced by Contact Group’s previous position that the final solution for Kosovo cannot envisage return to the pre-1999 status, partition or union of Kosovo with another country (BBC 2006). It can be concluded that the latter two preconditions were put in order to preclude possible ‘domino effect’ to the regional stability. In this regard, Ahtisaari has referred to the political situation in Kosovo and the security implications it might have in the Balkans (D’Aspermont 2007, 658).^{xvi} The approach made some authors to argue that he was looking for a solution outside international law, warning that a solution that is “designed to deal with a unique case is not part of the law” (Bing Jia 2009, 34). This view cannot be accepted, as the doctrine of constitutional self-determination offers an explication of Kosovo independence without setting a precedent (Stankovski 2011).

When, encouraged by the Ahtisaari recommendation, Kosovo declared independence, it unilaterally accepted, *inter alia*, the Ahtisaari Plan and, through UNSC Resolution 1244, the Rambouillet Accords as well (Kosovo Declaration of Independence 2008, paras. 5, 8). It can be argued that this created *erga omnes* obligations for the new self-declared state. It is also noteworthy to mention that the Kosovo’s Declaration of Independence promotes Kosovo as a multi-ethnic state of all peoples living within its borders, not only of Albanian ethnicity.

The Dialogue with Serbia was an outstanding obligation from the ‘Standards for Kosovo’ approach by the international community (Standards for Kosovo 2003), which the Ahtisaari Report was building upon as it concluded that Kosovo needs to become independent state with an EU perspective in order to be able to continue fulfilling these

internationally established criteria (Report of the Special Envoy of the Secretary-General on Kosovo's Future status 2007). Based on this, Kosovo continued to implement measures on decentralisation and minority protection while, at the same time, being engaged in a dialogue with Serbia.

To summarise, there are four aspects about how the Ahtisaari Report and the period of internationally supervised independence framed the Belgrade–Pristina Dialogue and shaped Kosovo understanding of the process. First, the Ahtisaari plan defines Kosovo borders further stating that the new state “shall have no territorial claims against, and shall seek no union with, any State or part of any State” (Comprehensive Proposal for the Kosovo Status Settlement 2007), something which was later enshrined in Kosovo's Declaration of Independence (2008, para 8).^{xvii} Second, it outlined the decentralisation process, especially when it comes to the issue of the municipalities with Serbian majority. Third, by relying on the Standards for Kosovo, it actually established what the “normalisation” processes with Serbia entails (standards for Kosovo 2003, 14). Finally, the Ahtisaari-outlined plan was the basis of the entire approach of the international community in post-independence Kosovo.

Considering all of this, it is not a surprise that the Kosovo Government at the time, as well as the members of the negotiating team, also adopted the view that the origin of the Brussels Dialogue was in the Ahtisaari Plan.^{xviii} In that direction, Edita Tahiri defined, right from the start of the negotiation process, what she called “three red lines.” They were: no status discussions, no discussions on constitutional order of Kosovo, and no competences to Serb community beyond what was established with the Ahtisaari Plan.^{xix} In other words, according to members of the negotiating team of Kosovo, the framework for the Dialogue, in the view of Pristina, was based on the Plan.^{xx} This also included the understanding that the concept of the Agreement regarding the creation of “Association/Community” of Serbian municipalities was “anchored in the Ahtiraari Proposal” as well.^{xxi}

Competing views on the Dialogue and the role of the EU in framing the process

Since the start of the Belgrade-Pristina Dialogue the expectations of the Kosovo negotiating team was that the process will be led depending on the principles of international law and result in mutual recognition between the two countries.^{xxii} Considering this, it is not a surprise that for Kosovo negotiators the most important agreement reached during the technical dialogue was on the IBM in 2011, something which was regarded as a necessary precondition for setting a border between two sovereign nations.^{xxiii} However, as it was already explained, the EU in this instance blurred the lines with the use of constructive ambiguity.

Serbia, on the other hand, agreed to start the dialogue after the ICJ decision which found that the unilaterally adopted independence of Kosovo, as such, did not violate international law (Advisory Opinion of 22 July 2010). The *Advisory Opinion* also gave the EU the necessary leverage to pressure Serbia to start negotiations. However, taking into consideration Serbia's conduct during the process, it can be argued that for official Belgrade, the Dialogue was seen as a type of continuation of the status talks. The fact that

even the name of the talks, i.e. 'Belgrade-Pristina dialogue' and not 'Serbia-Kosovo dialogue', was established in order not to imply statehood (Gashi et. al. 2017, 540) can be regarded as contributing towards the aforementioned interpretation by Serbia.

The EU presented the Dialogue as a necessary precondition for advancing the aspirations of Serbia to join the Union; and for Kosovo to obtain recognition from the five EU non-recognisers and eventually be placed on the path toward EU integration. With this, it can be argued that the Union attempted, at least publically, to value-frame the negotiation process. However, statements from Brussels towards Serbia were also contradictory. The President of the European Commission Barosso said that Belgrade's position towards Kosovo would be taken into consideration when assessing Serbia's application and progress towards the EU, while for the EU Commissioner on Enlargement Štefan Füle it was "normalisation" which was required, not "recognition" (Plänitz 2018, 81).

Nevertheless, the public in Kosovo did not regard it in that way. Instead, the process was seen as a continuation of the state-building activity as outlined by the country's strategic partners before independence was declared (i.e. with the 'Standards for Kosovo' approach and the Ahtisaari Plan) and, as such, as an initiative that will strengthen Kosovo's statehood and ultimately lead to obtaining recognition from Serbia.^{xxiv} For the negotiators, it also represented an "aftermath of the Ahtisaari Process" and an opportunity for Kosovo to "re-establish control of the North again."^{xxv}

As this paper points out, the Belgrade-Pristina Dialogue was constructed on a base with an inherent framing deficiency. However, if initially the process was somewhat able to be contained, it was completely derailed when in August 2018 the idea for 'land swap' or 'border correction' was proposed. Although, it has been sporadically mentioned in the discourse before, usually only to be immediately discarded, it was the first time that it was referred to by a high representative of the negotiating parties, i.e. the President of Kosovo, Thaçi (Morina 2018). However, the biggest surprise came after the White House National Security Adviser, John Bolton backed the idea stating that:

[o]ur policy, the U.S. policy, is that if the two parties can work it out between themselves and reach agreement, we don't exclude territorial adjustments. It's really not for us to say. [...] We would not stand in the way, and I don't think anybody in Europe would stand in the way if the two parties to the dispute reached a mutually satisfactory settlement (Radio Free Europe 2018).

This prompted Germany to step up and publicly denounce the idea. As German Chancellor Merkel put it, "[t]he territorial integrity of the states of the Western Balkans has been established and is inviolable [...]. This has to be said again and again because again and again there are attempts to perhaps talk about borders and we can't do that [...]" (Gray 2018).

However, the EU High Representative Mogherini, as the principal mediator of the process, did not discard Bolton's idea. Although she emphasised that "the EU would only accept a deal in line with international and EU law", she further continued that if a possible

agreement meets those conditions, the EU would recognise it (Barigazzi 2018). However, the High Representative underlined that the “European history is based on overcoming and preventing any idea of ethnically pure nation states” (Barigazzi 2018). Nonetheless, this was interpreted as giving support to Bolton’s position. Her statement created a rift among the EU member states, which prompted the German Foreign Minister, as well as the foreign ministers of Luxemburg and Austria to denounce the idea (Barigazzi 2018). But, the strongest opposition came from Kosovo Prime Minister Haradinaj whose statement, in fact, illustrates Kosovo’s concern about the framework of the negotiations as he protested that “[i]nstead of talking about an agreement with Serbia for recognition, [Mogherini] has deviated the discussion on territories and borders”, thus her “discussions have destroyed the EU’s opportunity to forge an agreement” (Emerging Europe 2019).

Interestingly, civil society in both Serbia and Kosovo played an important role in confronting the plans for a land swap. In a letter to HR Mogherini, more than two dozen civil society organisations from the two countries have warned her that the idea for land swap sends a dangerous message to the citizens of Serbia and Kosovo, and can furthermore destabilise the entire Balkans (Radio Free Europe 2018). Even more importantly, the NGO sector in Kosovo was instrumental in the aftermath of the land swap idea. Namely, it mobilised quickly and without international help, and was very vocal in publicly criticising the President. The majority of the civil society organisations in Kosovo also saw the proposal as dangerous and, if accepted as such, a reason for undermining the fragile peace both in Kosovo and the entire region.^{xxvi} This attempt for public pressure was done in order to shame the political elites with the purpose to ensure that no political party will consent to such an option in the future.^{xxvii} When it comes to the Kosovo Serbs, especially the ones living in the municipalities in the South, the land swap idea created a negative sentiment that they have been sacrificed by the international community and used as a bargaining chip by everyone involved, including Serbia.^{xxviii}

In the meantime, throughout this entire period, US President’s Trump administration exacerbated the pressure towards Kosovo political leaders that opposed the land swap idea. This was done despite the concerns from his European partners. For example, Albin Kurti’s government was toppled in March 2020 after losing the confidence vote in the Parliament. The official reason was disagreement within the ruling coalition over the handling of the Covid-19 crisis. However, Albin Kurti stated that the real motive behind the collapse of his government was the meddling of Richard Grenell, President Trump’s envoy, because of Kurti’s reluctance to accept the land swaps as well as President Trump’s determination to have a “rush agreement” between Belgrade and Pristina basically at any cost (The Guardian 2020). This “rush agreement” might have happened if President Thaçi was not indicted by the Kosovo Specialist Chambers (KSC), prompting him to cancel the trip to Washington DC where he was supposed to meet his Serbian counterpart. Finally, Kosovo’s Prime Minister Avdullah Hoti and Serbian President Vučić signed the Agreement on Normalization (the so-called Washington Agreement) which did not bring any breakthrough in the Dialogue.

The Agreement was signed in the White House and focused on the economic normalisation between the two countries. It was hailed by President Trump as a major breakthrough

to a protracted deadlock, and as his personal success in bringing “a lot of love” where once was “a lot of fighting” (Trump White House Archives 2020). However, the agreement attracted widespread criticism on both sides of the Atlantic. Notwithstanding some aspects such as the operationalisation of a peace highway and a rail link between Pristina and Merdare, as well as the shared exploration of the Gazivide/Ujmani Lake as a source for water and energy supplies, it was, indeed, a “rush agreement.” Its purpose was to be used by President Trump to impress his electorate and increase his chances for reelection, just a couple of months before the November 2020 vote. However, the agreement lacked any substantial commitment that would advance the reconciliation process between the two countries. While Serbia did agree to halt the de-recognition campaign against Kosovo, the question of possible recognition was not addressed in any manner.

With the Washington Agreement in limbo and the change in the White House, it can be argued that even though the land swap idea now does not have the support of President Biden, it managed to revive the “ghosts” of the Balkan’s troubled history of redrawing borders. This is particularly evident from the controversy over the recent non-paper allegedly issued by the Slovenian Prime Minister Janša (BalkanInsight 2021).

The legacy of the land swap proposal and the way forward

After the deadlock with the land swap idea, it is vital that the negotiations are re-framed. In other words, it is of particular importance that the EU, as mediator, defines what the negotiations are about. As this research argues, constructive ambiguity and dual interpretation proved to be counterproductive if used for issues substantial for the negotiations. As one of the negotiators interviewed for the purpose of this research points out:

[w]e urgently need a [new] framework of the negotiations. That framework should be designed as the international community did in Vienna during the final status negotiations [i.e. the conditions established by the Contact Group]. In that case it stated which options were not possible - no going to the pre-1999 status, no change of borders, no joining another country. The same should be done now. It has to say at least which solutions are nonviable. If the idea for land swaps is not an option, tell us that it is not an option. We need to know what we are negotiating about.^{xxix}

As Bergman stated, “[i]f there is no overlap of conflict parties’ preferences and, consequently, a zone of potential agreement does not exist, mediation strategy will not have an influence on the effectiveness of the mediation effort at all” (Bergmann 2018, 424). He further argues that in that case the mediators can try to expand the zone of possible agreement by offering new incentives (Bergmann 2018). This cannot be applied in the case of Kosovo, not since August 2018. Therefore, in answering the question of how to reframe the dialogue after the process has been derailed with the land swap idea, it is important to argue that the international community has to create a new narrative which will be in line

with the international law. Also, this new narrative needs to consider the international community's approach implemented in the case of Kosovo thus far, which can be provisionally called an attempt to securitise the process of secession.

Therefore, after the land swap idea halted the negotiations, going back to the Ahtisaari framework might be, in fact, a step forward for Kosovo. It seems that, at least part of the international community is aware of this. In the words of a representative of the international community interviewed for the purpose of this research, but who insisted on remaining anonymous: "when I want to look into the future, I go back and read Ahtisaari's Proposal." Generally, the possible solution would be either to preserve the existing territorial organisation of Kosovo and reinforcing it by putting a cap on the issue of federalisation and land swap, i.e. respecting the Ahtisaari Proposal, or re-negotiate everything, in which case, the provisions on minority guarantees or limitations of territorial re-composition, i.e. merging with Albania, does not apply.^{xxx}

From the aspect of civil society, the EU needs to 'reset' the principles upon which the negotiation process is established.^{xxxi} This includes three prerequisites. The first one is the clarification of the principles of the Dialogue, i.e. what is exactly being negotiated. The second one is clarification of the Union's enlargement policy and establishing guarantees about the EU integration perspective of both Serbia and Kosovo. The third one is dealing with issues of the past, particularly the question of missing persons, the war crimes committed by both side, and the repatriation of the displaced persons.^{xxxii} The question of reconciliation has been regarded as pertinent by Kosovo public and the non-opening of this issue is one of the reasons for the prevailing scepticism that exists among Kosovo citizens regarding the Dialogue.^{xxxiii} Moreover, if the land swap idea is supported, it will create a perception that the EU is ready to back up a plan that goes against its basic values and its investment in a multi-ethnic state in Kosovo over a decade, making the conversation about multi-ethnic states in the Balkans redundant.^{xxxiv}

It is entirely different question, however, if the EU still has credibility after the idea for land swap was presented as well as whether the Union can continue its role as a mediator without inference from other countries. On the one hand the EU has been, and will most likely remain as the least common denominator between Belgrade and Pristina. This is because of multiple of reasons, three of which are most important. First, the combination of recognisers and non-recognisers among the member states allows it to be acceptable to both sides. Second, both countries have clear EU aspirations. Third, it is highly unlikely that the two parties will agree over another mediator in the process. If the US joins, which will without a doubt be accepted by Kosovo, Serbia would insist that also Russia takes role as a mediator. This can only further derail the process. Therefore, no matter that many countries have vested interest in the Region in general, and this dispute in particular, it is probable that the EU will remain as a formal mediator regardless of additional interference by other countries. On the other hand, in addition to the way that EU approached the mediation process, the mistrust is also amplified because of the undelivered promises previously made to Pristina like, for example, the still not approved visa liberalisation for the Kosovo citizens.^{xxxv}

Conclusion

As this paper has argued, through its role as a mediator in the Belgrade–Pristina Dialogue, the EU has managed to undermine the Ahtisaari Plan and the approach adopted by the international community when it comes to Kosovo’s supervised independence. The Union used constructive ambiguity and dual interpretation extensively, over the core issues of the dispute. With that, it has contributed in creating an entirely different understanding of the negotiation process by the two parties. The result of this has only brought the two sides further apart. Moreover, when the idea for land swap was introduced, the process has been completely derailed. If, by any chance, Kosovo and Serbia do agree on territorial exchange, the consequences to Kosovo and the wider region will be devastating. It will undermine the entire progress made by the international community thus far. To begin with, it will allow drawing borders within ethnic lines by completely discarding the *uti possidetis* principle which was applied since the dissolution of former Yugoslavia. This is something that the international community has always tried to prevent, ever since the beginning of the conflict in Yugoslavia (Owen 1997, 34). Additionally, the implications for other secessionist conflicts including the ones in Ukraine, Georgia and Moldova cannot be clearly envisaged.

The EU and the international community involved in Kosovo have two possible solutions at hand. One is to fully adhere to the Ahtisaari framework and preserve the existing territorial organisation of Kosovo, discarding the ideas for federalisation and land swap. The other option would be to negotiate everything. In this case both the provisions on minority guarantees, as well as the limitation on possible merging with other countries (i.e. Albania) will not apply. Therefore, the EU needs to ‘reset’ the principles on which the Dialogue has been established. In addition to this, there is the question whether the EU has the credibility to continue its role as a mediator without the interference from other countries. There is a need, therefore, to re-frame the negotiations and to create a new narrative in the process. As this article argues, the mediator should rely on the approach of the international community to securitise Kosovo statehood and re-invoke the Ahtisaari Plan in order to achieve this. In other words, the only opportunity to create this new narrative is by strictly adhering to the norms of international law.

List of Interviews

Ilir Deda, former Member of Parliament of Kosovo; Vice-president of political party Alternativa, Pristina 17 September 2019.

Eraldin Fazliu, Editor-in-chief, Pristina Insight, Pristina, 15 September 2019.

Civil society activist, Pristina, 17 September 2019.

Miloš Milovanović, civil society activist from Southern Kosovo, Pristina, 19 September 2019.

Donike Qerimi, former Deputy Advisor to Deputy Prime Minister Kuçi and member of the technical negotiation team from 2012 to 2015, Pristina, 20 September 2019.

Representative of the international community in Kosovo, 17 September 2019.

NGO Representative from Mitrovica, Pristina, 18 September 2019.

Fisnik Rexhepi, former Chief Policy Advisor for the Ministry of Foreign Affairs, Pristina, 20 September 2019.

Edita Tahiri, Chief Negotiator for Kosovo in the Belgrade-Pristina Dialogue in the period March 2011–September 2017, Pristina, 26 September 2019.

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Endnotes

ⁱ Interview with Edita Tahiri, Pristina (via WhatsApp), 26 September 2019.

ⁱⁱ *ibid.* Also, interview with Donike Qerimi, Pristina, 20 September 2019.

ⁱⁱⁱ Interview with a NGO representative from Mitrovica, Pristina, 18 September 2019.

^{iv} Interview with a civil society activist, Pristina, 17 September 2019.

^v *ibid.*

^{vi} For Kosovo *see*, Integrated *Border* Management [emphasis added], at <<http://kryeministri-ks.net/en/documents/integrated-border-management-december-2-2011/>>. For Serbia *see*, Integrated *Boundary* Management [emphasis added], at <<http://www.kim.gov.rs/eng/p13.php>>.

^{vii} Interview with Donike Qerimi, Pristina, 20 September 2019.

^{viii} *ibid.*

^{ix} Interview with Edita Tahiri, Pristina (via Skype), 26 September 2019.

^x *ibid.*

^{xi} *ibid.*

^{xii} *ibid.*

^{xiii} *ibid.*

^{xiv} *ibid.*

^{xv} *ibid.*

^{xvi} In that respect, D’Aspermont argues that Kosovo’s independence is part of a pragmatic approach by the international community and not of the exercise of the right of (remedial) self-determination.

^{xvii} “Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbours [...].

^{xviii} Interview with Edita Tahiri, Pristina (via Skype), 26 September 2019.

^{xix} *ibid.*

^{xx} Interview with Fisnik Rexhepi, Pristina, 20 September 2019.

^{xxi} Interview with Donike Qerimi, Pristina, 20 September 2019.

^{xxii} Interview with Edita Tahiri, Pristina (via Skype), 26 September 2019.

^{xxiii} *ibid.*

^{xxiv} Interview with a civil society activist, Pristina, 17 September 2019.

^{xxv} Interview with Donike Qerimi, Pristina, 20 September 2019.

^{xxvi} Interview with a civil society activist, Pristina, 17 September 2019.

^{xxvii} Interview with Ilir Deda, Pristina, 17 September 2019.

^{xxviii} Interview with Miloš Milovanović, Pristina, 19 September 2019.

^{xxix} Interview with a civil society activist, Pristina, 17 September 2019.

^{xxx} Interview with Donike Qerimi, Pristina, 20 September 2019.

^{xxxi} Interview with a civil society activist, Pristina, 17 September 2019.

^{xxxii} *ibid.*

^{xxxiii} *ibid.*

^{xxxiv} Interview with Eraldin Fazliu, Prishtina, 15 September 2019.

^{xxxv} Interview with Ilir Deda, Pristina, 17 September 2019.