

COLLECTIVE ETHNIC PROTECTION AS A MEANS OF (DIS-)INTEGRATION: The Association/ Community of Serb-Majority Municipalities

BODO WEBER AND AGRON BAJRAMI

Berlin – Prishtina
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EXECUTIVE SUMMARY

The establishment of an Association/Community of Serb-majority municipalities in Kosovo constituted one of the key elements of the April 2013 Agreement signed within the EU-led political dialogue between Kosovo and Serbia. The subsequent stalemate over the agreement's implementation marked the failure of the original dialogue's format, which had been intended as an incremental process with the 2013 Agreement envisaged as only one of a number of (subsequent) agreements. This process ultimately aimed at full normalization of bilateral relations between Serbia and Kosovo, and full integration of Kosovo Serbs into the Kosovo society and state.

The failure of international negotiations on the Serbia-Kosovo status dispute led to the Western-backed declaration of independence by Kosovo, and the unilateral introduction of UN mediator Martti Ahtisaari's peace plan. The plan aimed to resolve the inter-ethnic dispute by combining a highly decentralized Kosovo state structure with collective ethnic protections for Kosovo Serbs. Due to its unplanned form of implementation, it failed to bring all of the Kosovo Serb-majority municipalities into the Kosovo state.

Initially, the EU-led dialogue achieved progress on Serbia's acceptance of the reality of an independent Kosovo and the integration of the Serb-majority municipalities in Kosovo, particularly the four north of the Ibar River ("the north"). Kosovan municipal governance structures were established and the police and judiciary were

transferred to the Kosovo state system. The establishment of the Association/Community of Serb-majority municipalities, however, continued to be a sticking point. The April Agreement outlined the character, institutions and competences of this new structure in rather vague terms, defining it as a form of inter-municipal cooperation to "collectively exercise powers". The definition mirrored Brussels' approach of "constructive ambiguity," i.e., deferring disagreements in order to facilitate continued process. In the absence of any long-term EU strategy for the dialogue, over time the constructive ambiguity developed into a destructive ambiguity, gradually undermining the dialogue process as a whole.

Differences between Prishtina and Belgrade became increasingly entrenched and negotiations focused almost entirely on the future competences of the Association. As progress on the dialogue stalled, the integration of Kosovo Serbs into the Kosovo state halted. The dual existence of municipal governments and administrations under Kosovo and Serbian law provided an opportunity for structural corruption. In the 10 Serb-majority municipalities, the establishment of a one-party dominance further facilitated extreme forms of patronage under the control of a nexus of criminal actors and political elites.

The announcement of a new phase in the dialogue in July 2017 raised hopes that the impasse might be overcome. It was clear that the issue of the Association/Community could only be meaningfully addressed within the framework of a final settle-

ment in which Serbia would accept Kosovo's sovereignty and which would assure full integration of Kosovo Serbs into the state of Kosovo. However, as negotiations took an entirely different direction, i.e. toward ideas of a land swap, originally politically spinned by Belgrade, and - from 2018 - encouraged by important Western political actors, any hopes for such meaningful progress have been dashed for the time being.

Agreement on the Association/Community issue will only be reached if the framework of the original dialogue can be re-established, with Kosovo's sovereignty prioritized as the primary objective. One path toward a possible solution could be the pooling of municipal functions that exists in several highly decentralized European states. This model could satisfy Kosovo Serb interests via a form of self-rule and would address both sides' collective fears by avoiding the creation of a third layer of (ethnically-based) governance on part of the territory of Kosovo. Any solution, however, will only be effective if it simultaneously addresses the organized crime-political nexus and the entrenched patronage system in a way that avoids socio-economic disruption.



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INTRODUCTION

Since the conclusion of the 78-day NATO air campaign over Kosovo in 1999, the position and status of Kosovo Serbs within Kosovo has constituted one of the most contentious issues in Western-led negotiations between Kosovo and Serbia, both before and after Kosovo's formal declaration of independence from Serbia in 2008. The EU-led political dialogue began in 2012 and focused on placing conditions on Belgrade to encourage its recognition of the reality of an independent Kosovo. Serbia's EU membership aspirations - based on Serbia's acceptance of Kosovo's independence - was the most crucial point of discussion, but there was an additional focus on the issue of Kosovo Serbs. The 'Brussels' or 'April Agreement' was the "first agreement on principles governing the normalization of relations,"¹ and was signed by Prishtina and Belgrade in April 2013.

The Agreement had two key objectives: first, initial integration of the four Serb-majority inhabited municipalities in the North of Kosovo into the Kosovo State structure, including Serbian state institutions located within those territories, namely the police, judiciary and institutions of municipal governance. Second, the establishment of a so-called Association/Community of Serb-Majority municipalities, grouping together the four Serb municipalities in the North and the six in the South under the umbrella of a single body. The latter, according to Belgrade, was intended as a

safeguard for Kosovo Serbs and a means of ensuring Serb self-rule.

While the initial integration of Serbian state institutions within Kosovo was largely successful, the establishment of the Association/Community has resulted in an intense dispute between Belgrade and Prishtina. The dispute is largely concentrated on the question of whether the Association/Community should be granted executive competences. Belgrade and Kosovo Serbs have been vocal in their demands for executive competences while Prishtina (all Albanian parliamentary parties and civil society) rejects them, cautious that the Association could develop into a tool of ethnic-based territorial autonomy and secession. With the EU proving incapable of bridging this divide, the failure to establish the Association/Community brought implementation of the April Agreement to a standstill. As a consequence, the political dialogue, intended in its original 2012-13 form as an incremental process, has hit a wall.

A new phase in the political dialogue was announced in July 2017, aimed at a final, comprehensive and legally-binding agreement on normalization of Serbia-Kosovo relations. The announcement renewed efforts to resolve the deadlock over the Association/Community issue, however there have been no significant developments to date. Added to this, Serbia has made attempts to steer the dialogue in a different direction than

was intended by the original framework² established in 2011-13. Furthermore, some of the Western actors continue to show signs of ignorance on the core aims and principles of the dialogue process. As a result the negotiations have stalled, with the only available alternatives provided as either a form of ethno-territorialization reminiscent of the 1990s Balkan wars, or further concessions made toward Belgrade in some form of "Association plus."

This paper analyzes the issue of the Association/Community of Serb-majority municipalities in the context of the ongoing negotiations over a final, comprehensive agreement between Kosovo and Serbia. The first section examines what role the status of Kosovo Serbs within Kosovo played in international negotiations prior to the start of the EU-led political dialogue. The second section analyzes the institutionalization of ethnic protection mechanisms in the Kosovo constitution, resulting from UN mediator Martti Ahtisaari's Comprehensive Settlement proposal. The third section examines additional institutional regulations related to the position of Kosovo Serbs introduced by the political dialogue, i.e., the April Agreement, in particular the Association/Community. It examines why the Association/Community issue constituted the main spoiler for full implementation of the April Agreement and led to a crisis of the political dialogue. Section four examines the role the unresolved issue of the Association/Community has played in the new phase of the dialogue

that started in 2017. The final section analyzes the main challenges the establishment of the Association/Community presents, specifically in relation to state functionality and sovereignty. The paper concludes by offering some initial ideas toward a possible solution to the current impasse.

¹ The "First Agreement on Principles Governing Normalization of Relations between Kosovo and Serbia" was reached on April 19, 2013: http://www.kryeministri-ks.net/repository/docs/FIRST_AGREEMENT_OF_PRINCIPLES_GOVERNING_THE_NORMALIZATION_OF_RELATIONS,_APRIL_19,_2013_BRUSSELS.en.pdf.

² Bodo Weber/ Agron Bajrami, The Original Framework of the Political Dialogue, DPC-KFOS Policy Note Paper, Berlin-Prishtina, May 2018, available at: <http://www.democratizationpolicy.org/summary/the-original-framework-of-the-political-dialogue/>.

THE ISSUE OF KOSOVO SERBS IN PREVIOUS NEGOTIATIONS

After the 1998-1999 war, when it became obvious that Kosovo would not be returned to Serbian rule, the position of Kosovo Serbs became central to a status solution. Kosovo's independence was considered inevitable, thus at the 2005-2006 Vienna status negotiations the discussions concentrated on how the Serb community might adjust to this outcome. The riots in March 2004 evidenced the necessity of including safeguards for Kosovo Serbs in any status proposal.³

The Comprehensive Proposal for Kosovo Status Settlement - commonly known as the Ahtisaari Plan - addressed this issue in several annexes.

One section, on decentralization, provided a framework for inter-municipal cooperation and the right to form an Association and develop ties with the Republic of Serbia.⁴

The issue of the Kosovo Serb community and its relationship with Serbia again dominated the 2007 Troika negotiations, which took place after the Ahtisaari proposal was rejected by Belgrade. The Troika proposed a German-German model⁵ of bilateral relations between Kosovo and Serbia, with Kosovo maintaining the conditions of the Ahtisaari Plan, and Serbia agreeing to its implementation without formally recognizing Kosovo's

independence.⁶ The negotiations ultimately failed as Serbia rejected all of the discussed proposals. Instead, Kosovo declared independence and unilaterally implemented the Ahtisaari Plan's provisions, forming an integral part of the independent state's constitution. Kosovo Serbs were left with the choice of whether or not to make use of the positive discrimination mechanisms provided by the Plan, which formed the blueprint for the Kosovo Constitution. Supported by Belgrade, Kosovo Serbs in the north - which remained largely under control of the state of Serbia - refused any communication with the Kosovo institutions, while Serbs south of the river Ibar gradually started to accept some of the benefits and guarantees that the Ahtisaari Plan provided as the basis for integration into the Kosovo state.



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³ Discussion with a retired European diplomat involved in the Vienna talks. August 2018

⁴ The "Comprehensive Proposal for the Kosovo Status Settlement" was drafted by the team led by former president of Finland, Martti Ahtisaari, who was appointed as Special Representative of UN Secretary General, to mediate Kosovo-Serbia talks, in Vienna. See: <https://www.kuvend-ikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>.

⁵ On the German-German model see: Weber/ Bajrami, How to recognize reality? The issue of Serbia's recognition of Kosovo, DPC-KFOS Policy Note Paper, Berlin-Prishtina, June 2018.

⁶ The so called Troika talks were a shuttle mediation effort, initiated by countries of the Contact Group (France, Germany, Italy, Russian Federation, the United Kingdom and United States). The Contact Group appointed a three man mediating team, comprising of Wolfgang Ischinger (EU), Frank Wisner (US) and Alexander Botsan-Kharchenko (Russian Federation). From August to December 2007 the Troika attempted to facilitate an agreement between Kosovo and Serbia, complementing the Ahtisaari process. The process was unsuccessful. See "Report of the European Union/United States/Russian Federation Troika on Kosovo," December 4, 2007: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20723.pdf>.

THE AHTISAARI PLAN: INSTITUTIONALIZATION OF ETHNIC PROTECTION MECHANISMS IN THE KOSOVO CONSTITUTION

The Ahtisaari Plan, enshrined in the Kosovo Constitution, guaranteed extensive rights and protection mechanisms for Kosovo Serbs. Ahtisaari favored the combination of a highly decentralized state structure of only two layers of governance - state and municipalities - with strong local self-governance and robust collective ethnic protection mechanisms as a means of managing the ongoing ethnic conflict. Thus, local self-governance was institutionalized with protection mechanisms primarily established for Kosovo Serbs.

The Plan provided a high level of minority representation in Kosovo's state institutions. In the

Parliament, 20 of the 120 seats are reserved for minority communities, and 10 of those for Serb representatives.⁷ In the Government, the Plan guaranteed at least one Serb minister in a cabinet of 12.⁸ The Constitution also enshrined that constitutional changes, new legislation and other legislative acts relevant for minority communities can only be passed in Parliament with a double majority: 2/3 of the 120 MPs and 2/3 of the minority MPs.⁹

The Ahtisaari Plan provided extended powers for the Kosovo municipalities, with additional competences granted to municipalities where Serbs

were in the majority. The plan arranged for new Serb-majority municipalities to be formed, which were then devolved authority in policy areas such as education and healthcare. The newly created municipality of Northern Mitrovica was granted further powers over higher education, allowing a Serb University to be established.¹⁰ The municipalities with Serb majorities were also given authority over cultural affairs, including the protection and promotion of Serbian and other religious and cultural heritage within the municipal territory.

The plan also allowed Serb-majority municipalities control over inter-municipal cooperation, specifically to form partnerships on the devolved competences they shared. Further provisions were included to guarantee these municipalities the right to cooperate with institutions in Serbia, and to receive technical and financial support from the Belgrade government¹¹

A separate annex of the Ahtisaari Plan addressed religious and cultural heritage, granting autonomy to the Serbian Orthodox Church in Kosovo and protections for its religious sites, including the creation of protected zones around monasteries, churches, and other cultural sites. The plan provided for 40 such zones, including around Decani monastery, Peć (Peja) Patriarchate, the Historic Center of Prizren, Dević monastery, and Gazimestan memorial monument. According to the Plan, the primary security for the sites was to



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be provided by the Kosovo Police.¹² However, due to Belgrade's rejection of the Plan in 2006?, the KFOR peacekeeping force was initially deployed to protect the sites. Over time, responsibility was transferred to the Kosovo Police, but not without bitter complaints from the Serbian community.¹³

7 See Comprehensive Proposal for the Kosovo Status Settlement, Annex I, Constitutional Provisions, Article 3, pages 12-13; <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>.

8 Currently, the Kosovo government has 22 ministers, including 3 Serb ministers. For the full cabinet, see the Government website: <http://kryeministri-ks.net/zyra-e-kryeministrit/kabineti-qeveritar/>.

9 See "Constitution of the Republic of Kosovo", Article 65, Competences of the Assembly", page 20: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>.

10 The municipalities of Mitrovica North, Gračanica and Štrpce were granted competences to provide secondary health care. See the Comprehensive Proposal for the Kosovo Status Settlement, Annex III, Decentralization, Article 4, pages 23-24; <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>.

11 See the Comprehensive Proposal for the Kosovo Status Settlement, Annex III, Decentralization, Article 9-10, pages 27-28; <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>. These provisions were referred to when the Association of Serb-majority municipalities was later discussed in Brussels after 2012.

12 See the Comprehensive Proposal for the Kosovo Status Settlement, Annex V, Religious and Cultural Heritage, Article 3 pages 37-38; <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>.

13 "Heritage Handover to Kosovo Police Embitters Serbs", *Balkan Insight*, 4 May, 2011. <http://www.balkaninsight.com/en/article/heritage-handover-to-kosovo-police-embitters-serbs>.

KOSOVO SERBS IN THE POLITICAL DIALOGUE: THE ASSOCIATION/ COMMUNITY OF SERB-MAJORITY MUNICIPALITIES

Led by the EU, the political dialogue in its original 2011-13 form¹⁴ took steps to resolve the Kosovo-Serbia status dispute and support Belgrade to move towards accepting the loss of Kosovo. Serbia was rewarded via advancements in EU integration. Negotiations subsequently turned to the position of Kosovo Serbs, in particular those in the four municipalities north of the Ibar River. The April 2013 Agreement had two cornerstones: first, the initial dismantling of Serbian state institutions on Kosovo soil; and second, formation of a so-called Association/Community of Serb-majority

municipalities. The establishment of the Association/Community of Serb-majority municipalities, was to include the ten Serb-majority municipalities in Kosovo. It was to be realized through a statute that further defined its detailed competences and institutions. The text of the April Agreement had defined the character of this new entity, its institutions and particularly its competences, in vague terms. This vagueness, i.e. the lack of initial agreement between Belgrade and Prishtina on the entity's concrete character was embodied its double-name - offering Serbs to call it a com-

munity, while Prishtina termed it an association. The Association/Community was merely defined as a form of inter-municipal cooperation, aimed at “collectively exercising [the municipalities’] powers” according to Kosovo law and the regulations set out in the European Charter of Local Self Government.¹⁵ The entity’s bodies were modeled on the existing, Kosovo-wide Association of Kosovo Municipalities. Regarding decision-making powers, the Association/Community was to have “full overview of the areas of economic development, education, health, urban and rural planning.”¹⁶

The ambiguity of the definition provoked suspicion and fear among Kosovo Albanians, particularly for some of the opposition (Vetevendosje) and civil society groups, who labelled the agreement “Ahtisaari plus.” Questions arose on whether the Association/Community violated the principles of non-discrimination, specifically for non-Serbs, as inclusion of the ten municipalities was defined by Serb-majority ethnicity only. Parallels between the Association/Community and the Republika Srpska entity in Bosnia-Herzegovina (RS) were also drawn, with political and civil society actors voicing concerns that the Association/Community could be used to undermine Kosovo’s state functionality and constitutional order, and ultimately sow the seeds for ethno-territorial secession.¹⁷

Contrary to such concerns, some participants

in the Brussels negotiations suggested that the Association/Community’s function was largely symbolic for the Serbian government delegation. Serbian state officials required the Association/Community to save face following Serbia’s shift in policy towards Kosovo. Belgrade was fully aware that the collective ethnic rights and protection mechanisms enshrined in the Kosovo Constitution (the Ahtisaari Plan) were more than satisfactory from a human rights point of view, and thus could not (and need not) be supplemented with additional, substantial protection mechanisms.¹⁸ Conversely, the Association/Community adopted an important symbolic role as a substitute for Belgrade: having reassured Kosovo Serbs for many years that they were part of Serbia, Belgrade faced the challenge of communicating to Serbs north of the Ibar that they might end up outside of Serbia after all.¹⁹

The unclear character of the Association/Community mirrored the EU negotiators’ approach of “constructive ambiguity.” The unresolved and opposing positions of Belgrade and Prishtina were papered over by vague language and their resolution deferred to an unspecified point later in the process. In the absence of any long-term EU strategy for the dialogue, over time the EU’s constructive ambiguity developed into a destructive ambiguity, gradually undermining the dialogue process as a whole. Rather than negotiating a compromise, Belgrade and Prishtina became more

14 The Original Framework of the Political Dialogue

15 The “First Agreement on Principles Governing Normalization of Relations between Kosovo and Serbia” was reached on April 19 2013: http://www.kryeministri-ks.net/repository/docs/FIRST_AGREEMENT_OF_PRINCIPLES_GOVERNING_THE_NORMALIZATION_OF_RELATIONS,_APRIL_19,_2013_BRUSSELS_en.pdf

16 Ibid.

17 Agron Bajrami, *Association of Serbian Municipalities: From a tool of integration, to a disaster in the making*, GLPD Policy Note, Prishtina, December 2013, available at: <http://www.legalpoliticalstudies.org/association-of-serbian-municipalities-from-a-tool-of-integration-to-a-disaster-in-the-making/>.

18 BecauseInterview with former Kosovo delegation member, Prishtina July 2018.

19 The April Agreement’s implementation plan provision on the ‘Management Team’ indicated that Belgrade would primarily target Serbs in the North with the Association/Community. The Management Team was to be tasked with establishing the Association/Community by drafting its statute; and was to be exclusively composed of “representatives of the four northern municipalities.” See: <http://www.kord-kim.gov.rs/eng/>

entrenched in their partisan positions, blocking the establishment of the Association/Community. The dispute focused on the question of the “competences” of the Association/Community. Belgrade insisted on “executive competences” for the Association/Community as a means of addressing Kosovo Serbs’ fears of the integration (of the north) into the Republic of Kosovo. Prishtina, concerned by the potential for institutional dysfunctionality and the territorial disintegration of Kosovo, insisted the Association/Community should not have executive competences but the role of an NGO. Over time, these differences developed into a purely symbolic conflict with neither side ever meaningfully addressing the collective fears of the other. In addition, there was poor engagement with the issue of the Association/Community in terms of the rationale behind Kosovo’s constitutional structure, i.e. the combining of local self-governance and collective ethnic protection mechanisms. The discourse regressed to the ethno-territorial logic of the 1990s, focusing on territorial control rather than how democratic governance would work within that territory.

An agreement in August 2015 on the “general principles/main elements” of the Association/Community²⁰ neither solved nor seriously addressed the conflict. An intermediate agreement on the establishment of the Association/Community had

not been foreseen in the April Agreement, only the drafting and approval of its future statute. With further implementation of the April Agreement blocked by the dispute over the Association/Community, and Serbia’s accession process directly dependent on progress in the dialogue, a stalemate threatened during summer 2015.²¹ The August Agreement allowed EU negotiators to bypass this looming deadlock, but without addressing the cause of the crisis. The August Agreement laid out the Association/Community’s bodies and functions in more detail than the 2013 Agreement. At the same time, it avoided addressing the contentious issue of the Association/Community’s competences, instead largely copying relevant formulations from the April Agreement.

Despite this maneuver, the 2015 Agreement resulted in further deadlock on the Association/Community in December 2015, when the Constitutional Court in Prishtina ruled the Agreement partly incompatible with Kosovo’s constitution. Previously, Brussels, Belgrade and Serbia had successfully circumvented potential constitutional issues raised by the April 2013 Agreement.²² A similar approach was adopted for the August 2015 Agreement. However, against the background of significant inter-party conflict in Kosovo, the court failed in its attempts to balance political interests and constitutional law. By evaluating

the constitutionality of the 2015 agreement while simultaneously adhering to its previous decision not to evaluate the constitutionality of the 2013 Agreement - upon which the August 2015 Agreement was built - the Court ended up with a mission impossible. This endeavor led the Court to interpret the vague definitions of the Association/Community’s “full overview” competences (over areas of municipal competences such as economic development, education, health, urban and rural planning) as “being informed” - an interpretation which was completely unacceptable to Belgrade. The Court further stipulated that the future statute should be submitted in order that its compliance with the constitution be checked, prior to its introduction. Instead of enabling progress in the implementation of the April Agreement, this ruling meant that the Court ultimately blocked the agreement on the establishment of the Association/Community.²³

While establishment of the Association/Community was blocked, other sections of the April Agreement on integration that related to Kosovo Serbs were successfully implemented, namely the transfer of police, judiciary, and municipal governance²⁴ in the north from the Serbian to Kosovo state structure. However these developments still failed to advance the issue of the Association/Community. Locating the police and judiciary in the institutional framework of the Kosovo state did not address structural issues of organized crime that allowed the north to function as a lawless territory controlled by a nexus of underground, criminal actors and local political elites.²⁵

As the full implementation of the April Agreement has remained blocked, the establishment of governance institutions in the four northern municipalities within the Kosovo legal framework did not mark the phasing out of existing municipal structures of the Serbian state as originally intended. Instead, a parallel existence of Serbian and Kosovan municipal governance structures emerged, which provided a platform for structural corruption. To provide an example, eight out of the ten mayors in the Serb-majority municipalities today occupy a double function as Serbian and Kosovan mayor. Backed by the West, Belgrade established the ‘Srpska lista’ as a tool to encourage Kosovo Serbs in the north to participate in local elections. Unintentionally, this resulted in a Belgrade-controlled one-party system in all of the 10 municipalities. The move devastated the Serbian Liberal Party (SLS), the main Kosovo Serb party loyal to the Kosovo state established in the south after 2008. Together, the developments have reversed the limited success of Western-promoted efforts to foster local democracy and self-governance in the Serb-majority municipalities south of the Ibar. Equally, there has been no progress towards democracy and local self-governance in the four municipalities in the north.²⁶

p02.php.

20 Association/Community of Serb-majority municipalities in Kosovo - general principles/main elements, August 25, 2015, available at: http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf.

21 Based on the April Agreement, in December 2013 the European Council approved the Union’s accession negotiating framework with Serbia and opened accession negotiation with the first intergovernmental conference held in Brussels in January 2014. Without progress in the dialogue before the end of summer 2015, initiating the first accession negotiation chapters, including Chapter 35 on the political dialogue with Kosovo, would have been impossible.

22 Both constitutional courts in Kosovo and Serbia were addressed by opposition parties and asked to rule on the constitutionality of the April Agreement, and both refused. The Kosovan court ruled that the agreement was an international agreement, and that it had no constitutional jurisdiction to rule on international agreements. The Serbian court ruled that it did have constitutional authority to rule on international agreements, but contended that the April agreement was not an international agreement. Both rulings have been described by legal experts as politically influenced and legally questionable. Interviews with constitutional judges and constitutional law experts, Prishtina-Belgrade 2015-17.

23 Bodo Weber, *Awkward juggling. Constitutional insecurity, political instability and the rule of law at risk in the Kosovo-Serbia dialogue*, Big Deal report, BIRN Kosovo-DPC, Berlin-Prishtina April 2016; available at: <https://prishtinainsight.com/wp-content/uploads/2016/04/BIRN-Report-2016-ENG.pdf>.

24 Following the organization of first municipal elections under Kosovo law end of 2013, beginning of 2014.

25 Interviews with Kosovo Serb interlocutors in the north, 2018.

26 Interviews with Kosovo Serb interlocutors, 2014-2018.

THE ASSOCIATION/ COMMUNITY IN THE “NEW PHASE” OF THE DIALOGUE

The ongoing deadlock on the Association/Community was a clear indication to the parties involved in the political dialogue that the original, “constructive ambivalence”-based approach had reached an impasse. The subsequent announcement in the summer of 2017 by EU High Representative Federica Mogherini of a “new phase” in the dialogue was perceived as the only potential way to progress, by means of fast-forwarding negotiations to an endpoint on a final agreement on full normalization.

Beginning negotiations on a comprehensive settlement that addressed all unresolved issues between Kosovo and Serbia - and Prishtina and Kosovo Serbs - was considered the approach most likely to resolve the Association/Community dispute. Among Western actors it had become increasingly clear that the collective fears associated with the

Association/Community could only be meaningfully addressed within the framework of a final settlement that would end Serbia’s questioning of Kosovo’s sovereignty, and also deal with the integration of Kosovo Serbs into the state of Kosovo in a comprehensive manner. However, over the last year an increasing number of actors involved in the dialogue (Mogherini, the US and French administration) have distanced themselves from the original framework, based on firm principles and strict red lines (such as refusing border changes or the reopening of negotiations on status issues). As a consequence, there was no progress on the Association/Community issue.

Instead, a dichotomy was presented to Prishtina by those Western actors that had succumbed to Belgrade’s spin and departed from the original framework of the political dialogue. Prishtina was

presented with the options of either giving in on “creative solutions” such as exchange of territory, the division of Kosovo, and border corrections, or submitting to additional concessions for Belgrade in the form of an “Association/Community plus.” Both options hark back to the 1990s logic of ethno-territorialization.

Belgrade’s political spin from the outset of the announcement of the new phase on a “compromise” on the status of Kosovo as an independent state within existing border, was founded on the false claim that Serbia had fulfilled all of its obligations in the dialogue while Prishtina had reneged on theirs and blocked progress on the establishment of the Association/Community. These claims remained uncontested by Brussels until very recently. Belgrade has since used this argument to lobby for the territorial division of Kosovo.

In a similar vein, prior to softening its stance on border changes and a land swap in June 2018, the US government briefly tackled the issue of the Association/Community. In May, US diplomats presented a proposal to Kosovo party representatives and Serbian president Aleksandar Vučić that included three brief points:

- 1 Additional security guarantees for Serbian Orthodox church sites in Kosovo;
- 2 The removal of Kosovo Serb veto mechanisms at the Kosovo state level; in return for
- 3 Additional competences for the Association/Community.

The proposal failed to gain traction because it did not address the critical issues that led to the blockage of the establishment of the Association/Community, particularly Prishtina’s fears that the Association/Community could turn into a tool for ethno-territorial secession. US policy focus quickly shifted toward territorial discussions.²⁷ This shift is no coincidence: the US initiative on the Association/Community and the US’s change of position on the non-violation of borders in the Balkans are motivated by the same policy rationale - a short-cut to a “solution” and a striving for a(ny) deal where the deal is increasingly considered an end in itself. This approach is also driven by an increasing renunciation of western liberal democratic principles. Consequently, little consideration is given to the medium- and long-term impact and sustainability of such deals. This policy approach groups the US together with other actors in the West such as inter alia the Mogherini dialogue team and France.²⁸

As the very public push for a land swap and territorial division stalled in late August this year, there is an increasing probability that the issue of the Association/Community of Serb-majority municipalities will soon return to the top of the agenda in the dialogue negotiations.

²⁷ Interviews with US diplomats and Kosovo party representatives, 2018.

²⁸ Interviews with EU officials and EU member state diplomats, 2018.

POTENTIAL WAYS OUT OF THE ASSOCIATION/ COMMUNITY DEADLOCK

In theory, the framework for negotiations on a final and comprehensive agreement between Belgrade and Prishtina is best-placed to resolve the Association/Community tension. However, this is dependent on the framework ensuring the EU's (and US's) compliance with the original aims, principles and red lines of the political dialogue. Resolving the issue of the Association/Community is dependent on an approach that takes account of local context, namely the collective fears of Albanians and Kosovo Serbs.

A model which mirrors Kosovo's constitutional multi-ethnic model and considers how best to combine collective protection mechanisms with strong local self-governance is most likely to succeed. A systematic comparison between the As-

sociation/Community and the Republika Srpska entity in Bosnia-Herzegovina, to which Kosovo Albanian actors regularly refer to when expressing their related collective fears, may provide some initial inspiration.

Bosnia-Herzegovina's Dayton constitution, originally intended as a transitional arrangement only, was a situational compromise aimed at ending the war, which assumed institutional dysfunctionality as a precondition for the Bosnian Serb and Croat political leadership to accept the agreement. It was built out of the wartime ethnic territories, that formed strong middle layers of governance (entities and cantons), with a weak central state based on strong ethnic power-sharing elements, and a weak local level of governance. By contrast,

Kosovo's state order was designed to guarantee institutional functionality. It includes only limited elements of Albanian-Serb power-sharing, which will be further reduced once a final agreement ensures full state sovereignty, territorial integrity, and the full integration of Kosovo Serbs into the Republic of Kosovo. Based on the region's recent history and political and legal culture the Association/Community adopting the role of a third, middle layer of governance on only part of Kosovo's territory, and including ten municipalities without territorial contiguity, should be avoided.

Such inter-municipal links exist in other European states that favor highly decentralized modes of governance - pooling of municipal functions. This model utilizes the collective management of some municipal competences, but avoids creating a middle layer of governance. Neighboring municipalities join forces on a voluntary basis to better exercise competences, which can include joint management and the establishment of some joint public companies.²⁹ By approaching the drafting of the Association/Community statute in this way, the interests and collective fears of both parties could be accommodated. The model would formally be based on the voluntary involvement of the Serb-majority municipalities in joint management of devolved powers and, to a certain degree, on flexible agreement regarding which municipal competences will be pooled and with which of the ten municipalities.³⁰ The pooling of functions would also prevent the domination of the northern municipalities over the southern, which is the current modus operandi of the Association/Community.

In Bosnia-Herzegovina, the constitutional order is undermined by the RS by means of the territorial and institutional fragmentation of the police and judiciary. This is reinforced by extra-constitutional activities of the RS regime, led by Milorad Dodik since 2006. In Kosovo, primarily in the Serb-majority areas of the north, police and judiciary pose less of an institutional threat because they are integrated into a consistent hierarchy. However, a threat to the established order remains from the organized criminal-political nexus that, that undermines the formal functioning of institutions of municipal governance, police and judiciary and thus maintains a rules-free environment. To adequately address the security concerns of Kosovo Serbs, the Association/Community must include mechanisms to tackle the issues around serious and organized crime.

Similar to Bosnia, where power-sharing is heavily based on an ethnic patronage system, an even more pronounced system of patronage is dominant in the Serb-majority municipalities in Kosovo, particularly north of the Ibar. These power structures are controlled from Belgrade and are based on the economic domination of a highly inefficient public sector characterized by party-affiliated municipal administrations and public companies. Therefore, the integration of municipal governance structures into the Kosovo state system as a requirement of the Association/Community (functioning based on the principle of pooling of municipalities to deliver services) poses not an ethno-political problem, but a social challenge. The transfer of Serbian state municipal administrations to the system of Kosovo local

²⁹ On the pooling of municipal functions and how it could be applied in a Western Balkan context, see: Coalition 143 (K-143), *Municipalization: A Popular Governance Model for Bosnia and Herzegovina*, p.31; available at: <https://de.scribd.com/document/231194321/K-143-Municipalization-Model-FULL-document-ENG>.

³⁰ i.e. whether all ten Serb-majority municipalities will engage on certain competences, or perhaps a smaller number due to the lack of territorial continuity.

self-governance cannot be implemented successfully without a substantial reform of public administration, which would entail a significant reduction in the current number of public sector jobs. Such a transformation would therefore require broad public sector reform and a plan to mitigate the resulting impact on public employment. The transition costs would be significant.

Finally, in order to successfully effect the establishment of an Association/Community, Prishtina and the Kosovo Albanian community also have to be made accountable. State institutions should engage with Kosovo Serb communities in a much more meaningful way than has been the case to date. The collective rights of the Serb minority, guaranteed by the Ahtisaari Plan and the Kosovo constitution, need to be upheld more effectively than they have since 2008. Chances of success will be increased once the potential threat that Kosovo Serbs and Belgrade currently pose to the Kosovo state is eradicated with the signing of a final agreement that confirms Kosovo's sovereignty and territorial integrity. If local self-governance in Serb-majority municipalities is to be strengthened by the provisions of an Association/Community (based on the principles of pooling of municipal functions), then local self-governance should be strengthened in majority Albanian municipalities of Kosovo as well. There, inter-municipal cooperation remains significantly underdeveloped, despite its potential benefits.



A model which mirrors Kosovo's constitutional multi-ethnic model and considers how best to combine collective protection mechanisms with strong local self-governance is most likely to succeed.

