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ABSTRACT

The ICJ's favorable Advisory Opinion on Kosovo's declaration of independence did not buttress Kosovo's aspirations for wider international recognition and entrance into the UN because the ICJ's Advisory Opinion could not shift the political priorities of influential states that do not recognize Kosovo. Considering the aftermath of the ICJ's Advisory Opinion, the consequences of the Dayton Peace Agreement (DPA) in Bosnia and Herzegovina (BiH), and the stalemate in the implementation of the 2013 Kosovo-Serbia Brussels Agreement, this analysis evaluates the current political crisis in Kosovo and BiH and advances the following arguments. Firstly, although the ICJ explicitly rejected any resemblance between Kosovo's independence and the potential independence of the *Republika Srpska* (RS) entity in BiH, the RS became a bargaining chip for Serbia. Secondly, implementing the Brussels Agreement and creating the Community of Serb Municipalities (CSM) will not improve Kosovo's full international recognition and inclusion in international organizations. Finally, given the experience of the constitutional recognition of the RS entity in the DPA, the potential establishment of CSM in Kosovo will further limit Kosovo's institutional functioning. In effect, the CSM would be an additional limitation of Kosovo's sovereignty because the CSM cannot improve Kosovo's recognition by other states, but it can limit its internal governance, ultimately protracting the conflict in Kosovo.

INTRODUCTION

This analysis examines the potential legal and political parallels between the proposed CSM in Kosovo to be established by the 2013 Brussels Agreement and the *Republika Srpska* (RS), an entity established in Bosnia and Herzegovina (BiH) with the signing of the DPA in 1995. In the 2010 Advisory Opinion, the ICJ rejected any legal similarity between Kosovo's 2008 independence and the potential secession of the RS entity from BiH.¹ Nevertheless, the 2013 Brussels Agreement has complicated matters for Kosovo and the international architects of the 2013 deal, as the similarities between CSM and RS have resurfaced.

As the RS entity has veered politically outside of the bounds of the DPA, and its leadership openly speaks of its intent to secede from BiH, Kosovo's leaders have sought to slow or even prevent the creation of the CSM, arguing that the CSM would be another RS entity, even if constitutionally it lacked such a status. Though EU and U.S. officials insist that the CSM is incomparable to the RS entity, they have to date provided no convincing counterargument to Kosovo's concerns with the political consequences of the creation of the CSM. Kosovo's leader's concerns have only grown as the RS leadership has ratcheted up tensions in BiH and as leaders in Belgrade and RS speak openly of their joint aim for the creation of a pan-Serbian state comprising territories carved out of Kosovo, BiH, and Montenegro (i.e., the so-called "Serbian World").

Resolving this impasse is now not merely a question of Kosovo's internal administrative arrangements and its relationship with Serbia. This is a question of significant regional geopolitical consequence and a significant concern for international law, as questions concerning the status of semi-recognized and unrecognized territories and states have hung heavily above international relations since the start of the war in Ukraine and growing fears of China's aggression against Taiwan.

THE ICJ'S ADVISORY OPINION AND ITS LIMITS

Two issues addressed in the 2010 Advisory Opinion hold significance for this discussion: first, Serbia's opposition to Kosovo's independence and the comparison of Kosovo's independence to the proposed independence of the RS entity and, secondly, the ICJ's response to Serbia's claims regarding the Kosovo-RS comparison.

At the ICJ Serbia's stance against Kosovo's independence revolved around protecting the principle of territorial integrity, a cornerstone of international law, and its concerns about the domino effect of recognition on international relations resulting from Kosovo's independence by the ICJ and international community. To support its claim that the UN Security Council (UNSC) should safeguard territorial integrity as a pillar of the international order, Serbia referred to

¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010* (International Court of Justice).

several UNSC resolutions condemning the then-Federal Republic of Yugoslavia (FRY), of which Serbia was the principal state and eventual successor, for violating the territorial integrity of BiH during the 1992-1995 Bosnian War. Consequently, Serbia argued that Kosovo, as a province within Serbia, should be treated similarly as the RS entity was/is within BiH, emphasizing that one of the DPA's fundamental concerns was securing BiH's territorial integrity and sovereignty.² Furthermore, Serbia contended that Kosovo's independence should not be treated as a *sui generis* case in international law but as a destabilizing precedent that could motivate the RS entity, for example, to also declare its independence from BiH. The rationale is that if the *sui generis* argument were accepted as valid, it would equally apply to entities in other successor states of the Socialist (and) Federal Republic(s) of Yugoslavia (S/FRY).³

Politically, it appears that Serbia approached the ICJ for two reasons: one, to mobilize its internal nationalist public and, two, to signal to external and internal actors that Serbia considers the RS entity in BiH as a bargaining chip in its relations with Kosovo and external powers. That is, if Kosovo could secede from Serbia, Serbia would *ipso facto* consider BiH's territorial arrangements a reopened question despite Belgrade having signed the DPA. Indeed, nationalist actors often resort to international courts as a cost-effective method to galvanize local nationalistic sentiments, creating, from their perspective, a win-win scenario. A favorable opinion from the international court, in this case the ICJ, can be utilized by nationalist regimes to demonstrate that their cause has won international backing or standing. In contrast, an unfavorable opinion by such a court successfully perpetuates narratives of victimhood and injustice, which lend themselves to nationalist mobilization.⁴ Both outcomes can contribute to the standing and political interests of governing nationalist elites. Furthermore, by incorporating the RS entity into its arguments before the ICJ, Serbia signaled to external and internal actors its intentions to seek "compensation" for the loss of Kosovo but also its willingness to revisit and contest the nature of the post-Yugoslav state system.

In response to Serbia's arguments the ICJ agreed that the inviolability of the territorial integrity of states constitutes a fundamental aspect of international law. However, the ICJ explicitly refused to draw a parallel between Kosovo's independence and the potential secession of the RS entity from BiH. Drawing upon UNSC resolutions condemning declarations of independence in cases such as Southern Rhodesia, Northern Cyprus, and the then self-declared RS in 1992,⁵ the ICJ reached the conclusion that the illegality of these declarations does not arise from their unilateral nature, "*but from the fact that they were, or would have been, connected with the unlawful*

2 Dragan Gajin and Asim Jusic, 'ICJ i Deklaracija o Nezavisnosti Kosova: Analiza, Pravne i Političke Implikacije' (2011) 2 Demokracija i sigurnost u Jugoistočnoj Evropi 116, 118-119.

3 Government of the Republic of Serbia, 'Written Statement of the Government of the Republic of Serbia' (2009) <<https://www.icj-cij.org/sites/default/files/case-related/141/15642.pdf>>.

4 Asim Jusic, 'Damned If It Doesn't and Damned If It Does: The European Court's Margin of Appreciation and the Mobilizations Around Religious Symbols' (2018) 39 University of Pennsylvania Journal of International Law 561, 596-598.

5 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010* (n 1), paras 80-81.

use of force or other egregious violations of norms of general international law, in particular those of a peremptory character."⁶ Given the absence of any UNSC resolution condemning Kosovo's declaration of independence, the ICJ determined that Kosovo's act of declaring independence did not violate international law.⁷

While the Advisory Opinion was initially deemed beneficial to Kosovo, it had a limited impact on Kosovo's pursuit of the recognition of its sovereignty from other states. This was for several reasons. To begin with, the ICJ, in practical terms, operates as an institution whose rulings have limited impact in and of themselves and depend largely on the goodwill and interest of member states to enforce. Like many international courts, ICJ functions as a "glorified arbitration panel."⁸ Recognizing its constraints, the ICJ confined its Advisory Opinion to the central question – i.e., whether Kosovo's declaration of independence complied with international law – and explicitly declined to delve into the matter of whether Kosovo possesses the right to secede unilaterally.⁹ Given the ICJ's institutional limitations and its rationale in the Advisory Opinion, even if the ICJ had issued a judgment rather than a formally non-binding Advisory Opinion, such a judgment would not obligate states to recognize Kosovo. At most, other states might consider ICJ judgment an additional argument for recognizing Kosovo, but the ICJ's stance would nevertheless remain a non-decisive factor.

Ultimately, far more significant for Kosovo's international recognition than the ICJ's ruling has been the domestic concerns of the five EU (and four NATO) states who have, to date, not recognized Kosovo's sovereignty. From Kosovo's Declaration of Independence in 2008 to the issuance of the Advisory Opinion in July 2010, 69 states recognized Kosovo. 14 years after the ICJ Advisory Opinion, around 100 UN member states recognized Kosovo as an independent state. The most influential states opposing Kosovo's independence since 2008, including two permanent members of the UNSC (Russia and China) and five EU member states (Slovakia, Romania, Spain, Greece, and Cyprus), have not significantly altered their stance after the Advisory Opinion. This fact severely impedes Kosovo's prospects for full integration into the international community and the EU, the latter of which is arguably far more damaging to the country's short and long-term strategic interests to secure its status and maintain its sovereignty from Serbia.¹⁰

Accordingly, the lesson from the 2010 Advisory Opinion is that declarations of independence, as a means toward full international recognition by other states, are unlikely to be widely

6 *ibid.* para 81.

7 *ibid.* paras 80-81.

8 Eric Posner, 'The Decline of the International Court of Justice' [2004] Law & Economics Working Papers 9 <https://chicagounbound.uchicago.edu/law_and_economics/500>.

9 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010* (n 1). para 56.

10 Bart M] Szewczyk, 'Lawfulness of Kosovo's Declaration of Independence' (*American Society of International Law Insights*, August 2010) <<https://www.asil.org/insights/volume/14/issue/27/lawfulness-kosovos-declaration-independence>> accessed 8 October 2023. Katharina Buchholz, 'Kosovo & Beyond: Where The UN Disagrees On Recognition' (*Forbes*, 2023) <<https://www.forbes.com/sites/katharinabuchholz/2023/02/17/kosovo--beyond-where-the-un-disagrees-on-recognition-infographic/>> accessed 8 October 2023.

embraced unless supported by at least the entirety of the UNSC. The UNSC's consensus is a (geo)political question that the ICJ's decisions do little to address or sway. The international legal and political order remains deeply conservative with respect to questions of secession and the emergence of new states. The successful recognition of new states occurs only when there is a broad consensus, particularly among the major powers, that such a development is in keeping with each of their individual interests or does not actively imperil the same.¹¹

THE POLITICS OF THE KOSOVO-RS COMPARISON

The ICJ's Advisory Opinion has also had a negligible impact on either the views of the Belgrade government, or its network of nationalist proxies, above all those in BiH's RS entity. It is not an exaggeration to say that the vast majority of ethnic Serb politicians in the Western Balkans believe (concurrently) that if Kosovo is to be recognized as a sovereign state by Serbia, then it must be "compensated" through the transfer of the RS entity to Serbia and/or that Kosovo must remain an insoluble part of Serbia *and* that the RS entity should also be incorporated into its territories. Such views harken back to the origins of the Yugoslav dissolution crisis when Serb nationalist intellectuals and leaders first proposed the re-organization of the SFRY along ethno-sectarian lines and the creation of what was then known as "Greater Serbia," i.e. a pan-Serbian state composed in part or in the whole of Serbia, Vojvodina, Kosovo, Montenegro, BiH, and Croatia.

With respect to Kosovo, in the 1980s, prominent Serbian nationalists such as Mihajlo Marković and other members of the Serbian Academy of Sciences and Arts (SANU) proposed the partition of Kosovo along ethnic lines, creating a northern, majority Serb part and a southern, majority Albanian part.¹² Such ideas, however, did not remain sequestered to the domain of Serbian nationalists. Between 2020 and 2021, for instance, various "non-papers" attributed to various European officials likewise suggested the partition of Kosovo into northern and southern parts, alongside the partition of BiH, and the establishment of "greater Albania, Croatia, and Serbia."¹³ During the tenure of the Trump administration, then U.S. National Security Advisor John Bolton explicitly stated that territorial swaps between Kosovo and Serbia, and/or the partition of Kosovo into northern and southern parts, would be acceptable to the U.S. if achieved with the consent of both Serbia and Kosovo.¹⁴

Views advocating for the partition and/or incorporation of neighboring territories and states, however, sit uncomfortably within the context of Serbia's formal diplomatic posture. In the

11 Andrew T Guzman, 'Against Consent' (2011) 52 Virginia Journal of International Law 747. James R Crawford, 'Statehood and Recognition' in James R Crawford (ed), *The Creation of States in International Law* (Oxford University Press 2007).

12 Institute for War and Peace Reporting, 'SANU Memorandum Author Testifies' (2004) <<https://iwpr.net/global-voices/sanu-memorandum-author-testifies>> accessed 8 February 2024.

13 Kurt Bassuener, 'US Focus on 'Open Balkan' Economic Project Risks Open Season Instead' (11 November 2021) <<https://www.justsecurity.org/79176/us-focus-on-open-balkan-economic-project-risks-open-season-instead/>> accessed 2 August 2023.

14 Filip Rudic, 'US Won't Oppose Serbia-Kosovo Border Changes - Bolton' (*Balkan Insight*, 24 August 2018) <<https://balkaninsight.com/2018/08/24/us-will-not-weigh-in-on-serbia-kosovo-partition-08-24-2018/>> accessed 24 July 2023.

leadup to the formal dissolution of Yugoslavia, Serbia's primary argument was that, in the event of the breakup of the SFRY, ethnic Serbs beyond the borders of Serbia would face discrimination and potential expulsion unless they remained under Serbia's (in)direct protection. The eventual defeat of the breakaway *Republika Srpska Krajina* (RSK) in Croatia, and the accompanying departure and/or expulsion of some 200,000 Croatian Serbs from the territory, because of the Croatian Army's "Operation Storm" was used as *post facto* evidence of this claim.¹⁵

At the same time, though, Serbia was not only attempting to carve out territories from the sovereign Croatian and Bosnian states but was also orchestrating the systematic expulsion and killing of non-Serbs on the territories it temporarily occupied between 1991 and 1995. While Serb nationalists initially considered the signing of the DPA as a categorical loss, the incorporation of the RS entity into BiH has since been recast as the "greatest Serbian victory of the 20th century," while the state boundary line between BiH and Serbia has been redubbed "provisional line between the two Serb states."¹⁶ The governments in RS and Belgrade also echo such claims during their frequent joint sessions, which they characterize as the meetings of "two Serb states".¹⁷ Concurrently, supporters also laud the creation of the RS entity and admit that the ethnic cleansing and genocidal violence perpetrated by the Army of the Republika Srpska (VRS) and Serbian forces have been indispensable to the establishment of the RS entity as a "second Serb state."¹⁸

While opposition to Kosovo's sovereignty and support for the RS entity as a "second Serb state," or RS secession from BiH and/or its annexation by Serbia, are entirely contradictory views from a legal standpoint, they are, however, entirely congruent political views. The fundamental position of the Serb nationalist camp throughout the Western Balkans is an ideological claim that Serbia's borders and influence extend to wherever there are significant Serb communities in the Western Balkans. This goal can be achieved by various means ranging from hard partitions and redrawing of international borders to soft partitions and exerting influence in neighboring states via proxy political parties. Serb nationalist ideological claim and methods for its achievement must be accounted for to understand why the prospective creation of the CSM in Kosovo has become so problematic despite its initial acceptance and signing of the Brussels Agreement by the then-Kosovo authorities in 2013.

15 David Kanin, 'Hamster on a Treadmill: Western Diplomacy and the Kosovo Status Dispute' (10 July 2023) <<https://saisreview.sais.jhu.edu/hamster-on-a-treadmill-western-diplomacy-and-the-kosovo-status-dispute/>> accessed 15 October 2023.

16 ATV, 'Republika Srpska je najveća srpska pobjeda u 20. vijeku' (2022) <<https://www.atvbl.rs/republika-srpska/republika-srpska-je-najveca-srpska-pobjeda-u-20-vijeku-9-9-2022>> accessed 2 August 2023.

17 Omer Karabeg, 'Most: Da li je u toku tiha aneksija Republike Srpske u sastav Srbije?' *Radio Slobodna Evropa* (2020) <<https://www.slobodnaevropa.org/a/da-li-je-u-toku-tiha-aneksija-republike-srpske-u-sastav-srbije/30859449.html>> accessed 2 August 2023.

18 N1 Sarajevo, 'Serbia gives scholarships to students who glorified war criminals in BiH' (N1, 15 July 2023) <<https://n1info.ba/english/news/serbia-gives-scholarships-to-students-who-glorified-war-criminals-in-bih/>> accessed 2 August 2023.

THE CSM AS ANOTHER RS

In its original formulation, the CSM was intended to be an administrative region comprising the four majority-Serb municipalities in north Kosovo. The Brussels Agreement included the CSM with the purported rationale that, in exchange, Belgrade would completely withdraw from north Kosovo and cease obstructing further recognition of Kosovo by other states and its inclusion in international organizations.¹⁹ This was envisioned as a step towards the normalization of relations between Kosovo and Serbia, drawing inspiration from the Cold War model of “two Germanies,” wherein West Germany and East Germany coexisted and refrained from obstructing each other’s participation in international fora but without formal mutual recognition.²⁰

But since 2013, Kosovo has not taken any concrete steps towards the CSM, nor, for that matter, has Serbia halted attempting to thwart Kosovo’s accession to the relevant organizations of the international community. The current Prime Minister of Kosovo, Albin Kurti, has ratcheted up opposition to the creation of the CSM, arguing that to do so would result in the “Bosnization” of Kosovo, e.g. the creation of a Serb-majority ‘entity’ (whether constitutionally defined as such or not) within Kosovo that would serve as the institutional projection of Belgrade’s influence in the country, undermining the domestic governance in Kosovo as the RS entity has in BiH.²¹ U.S. officials, including regional envoy Gabriel Escobar, have been adamant that the CSM’s constitutional powers would be limited and incomparable to that of the RS in BiH.²² This legalistic argument, however, has done little to address Kurti’s fundamentally political concerns, not least of all because it invites further criticism of the U.S. position towards BiH. That is, if CSM will not or should not be another RS entity, why should Bosnians, in turn, continue to tolerate such a constitutionality modality in their country, especially given how fundamentally the RS has stepped outside the bounds of the DPA?

In May 2023, following the boycott of municipal elections by most of the Serb population in the north of Kosovo (i.e., in the municipalities of Leposavić, Zubin Potok, Zvečan, and North Mitrovica) at the direction of Belgrade, ethnic Albanian mayors were elected to these posts on a voter turnout of less than 2% of the population. With the support of the Kosovo government, Albanian candidates nevertheless attempted to assume their mayoral positions. This ultimately resulted in clashes between segments of the local Serb population and NATO-KFOR peacekeeping forces who tried to keep the former from storming the municipal offices in Zvečan. U.S. and EU officials

19 Berta López Domènech, ‘The Association of Serb Majority Municipalities: The Crux of Tensions’ (*European Policy Center*, 14 June 2023) <<https://www.epc.eu/en/Publications/The-Association-of-Serb-Majority-Municipalities-The-crux-of-tensions~517b60>> accessed 25 July 2023.

20 Marina Vulović, ‘The Normalisation of Relations between Kosovo and Serbia’ (*Stiftung Wissenschaft und Politik (SWP)*, 2023) <<https://www.swp-berlin.org/publikation/the-normalisation-of-relations-between-kosovo-and-serbia>> accessed 12 August 2023.

21 Željko Trkanjec, ‘Kurti to US Ambassador: No Association Based on Ethnicity in Kosovo’ (*www.euractiv.com*, 18 June 2021) <https://www.euractiv.com/section/politics/short_news/kurti-to-us-ambassador-no-association-based-on-ethnicity-in-kosovo/> accessed 25 July 2023.

22 Euronews Albania, ‘The Association Can’t Be a State within the State of Kosovo, Says Escobar’ (*Euronews Albania*, 5 August 2022) <<https://euronews.al/en/the-association-cant-be-a-state-within-the-state-of-kosovo-says-escobar/>> accessed 25 July 2023.

strongly criticized the Kosovo government's actions in attempting to seat Albanian mayors as an on-the-ground obstacle to establishing the CSM,²³ and imposing sanctions on the Kosovo government as a result. The EU restricted high-level visits, contacts, and financial cooperation with Kosovo,²⁴ while the U.S. canceled a planned military exercise and halted further advocacy of Kosovo's recognition and the process of integration into international organizations.²⁵ In a stern rebuke, the U.S. ambassador in Pristina stated that actions like those taken by the Kosovo government in the country's north could turn Kosovo into "Palestine, at worst, or Cyprus, at best".²⁶

The pressure exerted by the U.S. on the Kosovo government to create the CSM is reminiscent of the RS' (re)incorporation into BiH as part of the DPA. Recall that during the Yugoslav dissolution crisis, the entirety of the former Yugoslavia was under a UN arms embargo. This embargo, however, heavily favored the already well-armed forces of Milosevic's Serbia and its proxy forces in Croatia and BiH and left the nascent Bosnian armed forces in particularly dire straits. After nearly four years of horror exacted by Serb nationalist forces in BiH, which saw them perpetrate the worst atrocities in Europe since the Holocaust, the U.S.-led Contact Group began to heavily pressure the BiH government in 1995 at the exact moment that it had achieved a modicum of balance of arms. As a part of the pressure on the BiH government, the U.S. threatened to cease all aid and support for BiH – none of which, in any case, consisted of military aid – unless the BiH government accepted the DPA and recognized the RS entity as an exclusively Serb entity, the US effectively saved the Army of the Republika Srpska from a total military defeat. Regardless of whether these U.S. threats were genuine or not, the result of the DPA was the formal internal partition of BiH into two entities, the RS and Federation of BiH (FBiH) entities. This, in turn, allowed Serbia and Croatia to gain informal veto powers BiH through the DPA's complex system of ethno-sectarian and ethno-territorial power-sharing. These powers have since then been chiefly exercised through Serb and Croat nationalist political parties, i.e. the HDZ BiH and SNSD, that act as institutional sock puppets of the Zagreb and Belgrade governments within BiH.²⁷

The similarity between U.S. pressure on BiH in the context of the DPA negotiations and the threats the U.S. has made against Kosovo in the context of the CSM are striking. In a sense, the current round of U.S. diplomatic measures against Kosovo situates Kosovo in a proverbial "pre-Dayton phase". If the Kurti government acquiesces to U.S. pressure, Kosovo will move towards a "post-Dayton phase" wherein any formal constitutional limitations imposed on the CSM would be shown as ineffective as they were with respect to the RS entity in BiH.

23 Domènech (n 19).

24 Marton Dunai, 'EU Hits Kosovo with Sanctions after Serb Tensions Flare up Again' *Financial Times* (14 June 2023) <<https://www.ft.com/content/99a65be0-6af6-41f5-8de2-71f6e078568a>> accessed 25 July 2023.

25 Jeta Xharra, 'US Embassy Confirms Sanctions Against Kosovo Follow the Tensions in the North' (*Prishtina Insight*, 30 May 2023) <<https://prishtinainsight.com/us-sanctions-against-kosovo-follow-after-the-tensions-kosovo-excluded-from-defender-23/>> accessed 25 July 2023.

26 Avaz, 'Američki ambasador na Kosovu: Kratkovidna politika u najgorem slučaju stvara Palestinu, a u najboljem Kipar' (*Avaz.ba*, 30 May 2023) <<https://avaz.ba/vijesti/region/833922/americki-ambasador-na-kosovu-kratkovidna-politika-u-najgorem-slucaju-stvara-palestinu-a-u-najboljem-kipar>> accessed 25 July 2023.

27 Julian Borger, 'Bosnia's Bitter, Flawed Peace Deal, 20 Years On' *The Guardian* (10 November 2015) <<https://www.theguardian.com/global/2015/nov/10/bosnia-bitter-flawed-peace-deal-dayton-agreement-20-years-on>> accessed 26 July 2023.

On September 24th, 2023, a heavily armed paramilitary group led by Milan Radoičić, a Kosovo Serb politician and close associate of Aleksandar Vučić, attacked Kosovo police on patrol in the north and caused the death of one police officer. In subsequent clashes, Kosovo police killed half a dozen of the assailants, while Vučić fled to Serbia, where he was apprehended but quickly released on bail pending formal charges. Kosovo's government and most foreign observers and analysts affirmed the Serbian government was behind the attack. Aleksandar Vučić rebuffed these claims while simultaneously rationalizing the incident as a reaction to a lack of progress on the creation of the CSM.²⁸ The Kosovo government concluded that the events in Banjska had definitively killed any prospects of the CSM's realization.²⁹

Presently, the U.S. and EU envoys in the Western Balkans continue to insist, albeit in somewhat more muted tones, that the CSM remains an integral part of the Brussels Agreement. But such a stance has become much less convincing, which is why the political weight of the CSM as a modality for securing Serb minority rights in Kosovo remains heavily contested.

THE CSM'S UNCERTAIN FUTURE

The future of the CSM and the broader Brussels Agreement is unclear. The U.S. and EU mediators are repeating that implementing the Brussels Agreement and creating the CSM will usher in an era of normalization between Serbia and Kosovo, even if Belgrade does not formally recognize the country's sovereignty. One, however, does not need to necessarily accept Kurti's government's contention that the CSM would inevitably become another RS entity to conclude that the U.S. and EU mediator's vision is, at best, optimism driven by short-term ambitions of diplomats or, at worse, willful blindness. Add to this the credible allegations of gross electoral fraud by Vučić's government in Serbia following the December 2023 elections,³⁰ and the conclusion is that despite Albin Kurti's unpopularity in Washington and Brussels, arguments against CSM outweigh arguments in favor of CSM. This is for the following reasons.

Firstly, the focus of the US and EU criticism of the Kosovo government was the non-implementation of the CSM. But CSM was only one aspect of the reciprocal Brussels Agreement, and Serbia also did little to signal a credible commitment to the Brussels Agreement. Given the nature of what is being asked of Kosovo – the wholesale rearrangement of its constitutional regime – it is not unreasonable for the Kurti government to expect a real change in Serbia's ideological positions towards Kosovo. Evidence of Serbia's credible commitment to implementing the Brussels Agreements and ideological change has been absent to date.

28 Andrew Rettman, 'EU Appetite Growing for Sanctions on Serbia' (*EUobserver*, 4 October 2023) <<https://euobserver.com/world/157500>> accessed 15 October 2023.

29 'Šefica diplomatije Kosova: Nakon napada na sjeveru za nas je "Zajednica srpskih opština" mrtva' <<https://www.klix.ba/vijesti/regija/sefica-diplomatije-kosova-nakon-napada-na-sjeveru-za-nas-je-zajednica-srpskih-opstina-mrtva/230929033>> accessed 15 October 2023.

30 'Serbia Did Not Fulfil Its Commitments to Free and Fair Elections, Say MEPs | News | European Parliament' (12:26:00.0) <<https://www.europarl.europa.eu/news/en/press-room/20240202IPR17327/serbia-did-not-fulfil-its-commitments-to-free-and-fair-elections-say-meps>> accessed 18 February 2024.

Secondly, even if Kosovo creates the CSM and/or Serbia and Kosovo fully implement the Brussels Agreement, these facts are not likely to shift the non-recognition postures of EU states. As the aftermath of the Advisory Opinion shows, recognizing a new state is an entirely discretionary sovereign choice of other states. As evidence, consider that despite their public overtures, neither the EU nor U.S. mediators can guarantee full recognition of Kosovo by the EU's five non-recognizers even if the Brussels Agreement is fully implemented.³¹

Thirdly, even Serbia's extremely unlikely full recognition of Kosovo as an independent state would not necessarily force the hand of other states, especially UNSC members Russia and China. Russia could still veto Kosovo's acceptance into the UN, arguing, for instance, that Serbia's recognition of Kosovo was coerced by the West. Alternatively, Russia could simply use its veto power to spite the US interests and advance its strategic aim of destabilizing the Euro-Atlantic community.³² In other words, not even wholly improbable Serbia's recognition of Kosovo – let alone implementation of the Brussels Agreement – would guarantee that Kosovo would become a member of the UN.

Finally, there is the claim that the creation of the CSM would result in Serbia's political and institutional retreat from Kosovo's north. Given the post-DPA developments in BiH, this argument is willfully unrealistic. Since 2006, Serbia's chief regional client, longtime RS entity leader Milorad Dodik has consistently challenged the DPA by threatening secession of the RS entity, glorifying convicted war criminals and genocidaires, systematically and institutionally undermining the civil rights and security of non-Serbs in the RS entity and undermining the authority of core institutions of DPA like the BiH Constitutional Court, all the while installing its cadre in the BiH state institutions so as to block their functioning by using ethnic and entity based veto granted to RS entity by the DPA.³³ Nearly three decades since the DPA have shown that Serbia has deepened its influence on BiH's domestic politics chiefly due to the tools of the DPA. This would not have been the case if the RS entity had been dissolved in 1995 when the DPA was signed (as was the case in Croatia with the then Republika Srpska Krajina); or had the RS entity been left outside of the BIH constitutional regime. It stands to reason to argue that contemporary BiH would be better off if the RS entity were an unrecognized statelet like Nagorno-Karabakh or Northern Cyprus.

The chief counterargument to this analysis and argument in favor of CMS is the U.S. and EU mediator's insistence that the CSM would not have the same constitutional authorities within Kosovo as the RS entity in BiH. This formalistic argument is unsupported by the post-DPA behavior of international mediators in the Western Balkans in the past three decades and the

31 Agon Maliqi, 'The Kosovo-Serbia Conundrum Reaches a Breaking Point: Kosovo's North Emerges as Europe's Most Vulnerable Spot Outside Ukraine' (19 September 2023) <<https://newlinesinstitute.org/wp-content/uploads/Pages-from-202309014-Essays-Balkans-NLISAP-6.pdf>> accessed 15 October 2023.

32 Marina Vulović, 'Western Balkan Foreign and Security Ties with External Actors: An Arena of Geostrategic Rivalry for the EU or a Local Power Struggle?' (2023) 8 SWP Comment 1, 7.

33 Majda Ruge, 'Hostage State: How to Free Bosnia from Dayton's Paralyzing Grip' (*ECFR*, 18 November 2020) <<https://ecfr.eu/publication/how-europe-and-the-us-can-take-bosnia-beyond-dayton-25-years-later/>> accessed 18 February 2024.

current actions of the RS entity in BiH. Leaders in Kosovo are fully aware that, as Holbrooke quipped after the DPA, diplomats often “sign now and cheat later,” and they can readily observe the experience of BiH after Dayton and the U.S.’ lack of effective commitment to the integrity of the DPA.³⁴ Accordingly, despite the purported limits on the CSM’s institutional authorities and the pledges of individual American and European diplomats, Kosovo’s government cannot but see the contours of the RS entity in the proposed CSM.³⁵

CONCLUSION

At its core, this analysis examined the chasm that exists between legal-institutional desires and practical political realities. Kosovo had hoped that the ICJ’s favorable Advisory Opinion would buttress its aspirations for the universal recognition of its sovereignty and entrance into the UN. That did not occur because the ICJ’s Advisory Opinion had no ability to influence the political priorities of the relevant non-recognizer states. Today, as the U.S. and EU seek to assure Kosovo that its potential implementation of the CSM would not result in the recreation of an RS entity-like extension of the Belgrade government within its constitutional regime, they, too, are relying on legalistic rather than political arguments to convince Pristina. This strategy will not prove fruitful, especially given Kosovo’s experience after the 2010 ICJ ruling.

If the CSM is to have a future – a claim this paper takes no position on per se – Kosovo should retain effective methods for preventing the CSM from evolving into another RS-like extension of Serbia, as it has happened in BiH. A significant re-alignment campaign in BiH and returning the RS entity within the boundaries of the DPA would demonstrate to Kosovo that good governance is still possible even in the event of significant constitutional ethnic-based devolution. At present, however, that is highly unlikely, as unlikely as the successful implementation of the CSM or resolving the Kosovo-Serbia dispute.

34 Edina Bećirević, ‘Izvan Dejtona’ (2011) 2 *Demokracija i sigurnost u Jugoistočnoj Evropi* 113.

35 Bassuener (n 13).

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