

TRAINING BLACKBIRDS: THE INTERNATIONAL ADMINISTRATION OF KOSOVO

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ABSTRACT

TRAINING BLACKBIRDS: The International Administration of Kosovo (Under the direction of Robert Jenkins)

This thesis will examine the efficacy of the international administration of Kosovo from 2008 to 2011. It focuses on two key issues: compliance with the International Criminal Tribunal for the Former Yugoslavia and current efforts at liberalizing visa usage with the European Union. In order to assess both issues I use two-level game theory as a tool to investigate the organizations associated with compliance and visa liberalization. In the end I find that the structure of organizations that have the greatest effect upon the administration in Kosovo. The ICTY has a unitary structure that allows it to better exercise its wishes in Kosovo; whereas the EU is more fractured and has greater difficulty exerting itself consistently in Kosovo.

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Introduction

In this thesis I will study the international administration of Kosovo focusing on the period after the country's declaration of independence in 2008. I will use the framework of two-level games to discuss the efficacy of the international administration in two separate areas: ICTY compliance and visa liberalization with the EU. The structure of the organizations has the greatest effect on whether their message is conveyed effectively to the Kosovo government and, in the end, whether they can successfully implement their respective mandates.

The term administration will be used in the context of an organization that effectively controls some power of sovereignty that is usually reserved for the state. In a typical way of functioning the administration, the internationals continues to exercise the power over a portion of the sovereignty until they deem the local institutions able to competently operate the powers before designated to the internationals.¹ It is only the international administration that decides that enough has been accomplished for the locals to regain their sovereignty. In Kosovo the local government has yet to fully realize sovereignty from the international administration.

The question of international administration and the efficiency of its application is especially important now. Everywhere from Africa and the Middle East to South Asia, the

¹ Jackson, Robert. "International Engagement in War-torn Countries." Global Governance 10 (2004), p. 33

incidence of international administration is on the rise. And the case of Kosovo, being one of the first and thus furthest toward normal statehood, is useful to study and extract lessons for future uses of such administrations.

It is the structure of these administrations that matter most. The EU has such a complex coalitional structure that issues can come between member states that will adversely affect the ability of the administration to accomplish its mandate. Such a structure should be avoided in the future and in its place should be a more streamlined organization with a structure like that of the unitary structure of the ICTY.

Two-Level Game Theory

Any action or decision undertaken by an individual has ramifications for both that individual, and, also, for other persons connected to that individual. The same is true for the actions of states and international organizations. There are both domestic and international effects. In order to have a comprehensive understanding of such action, on these two levels, Robert Putnam developed the theory of the two-level game.

The very notion of the two-level game is a metaphor for the actual process of negotiation and ratification at an international agreement. The largest actors in this negotiating process are the states or organizations that are trying to come to an agreement. But within those larger actors there are negotiators that deal directly with the opposite state and the ratifiers who deal with their own negotiator. In usual negotiations, the negotiators are in the international sphere or what Putnam calls Level I, and the ratifiers are in the domestic sphere or Level II.² It is useful to think of the ratifiers as the constituents of the negotiator. They both appoint the negotiator and are represented by the negotiator, quite similarly to any politician in an electoral system.

In order for an international agreement to be ratified it must be adopted by the negotiator and the constituents to whom the negotiator is responsible. Each level has its own set of circumstances that will allow for successful agreement. Putnam defines a *win-set* as all possible agreements to which both Level I and Level II would agree.³ Generally, larger win-

² Putnam, Robert D. "Diplomacy and domestic politics: the logic of two-level games." International Organization 42 (1988), p. 436

³ *Ibid.*, p. 437

sets make agreements more likely. Because any successful agreement must fall in the win-sets of both states, agreement is possible only where win-sets overlap, the union of the sets. So, a larger win-set will mean that there are more possible points of agreement between the Levels, the larger the overlap between the win-sets.

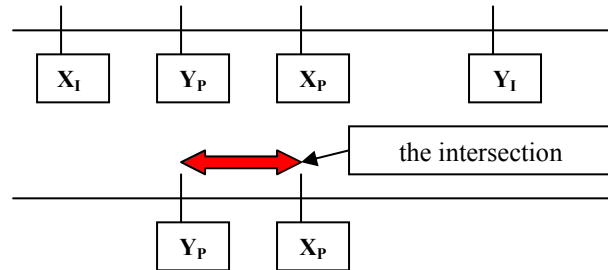


Figure 1

In Figure 1 we see an illustration of Level I win-sets and their union. In the figure, the win-set of country X is represented by the X characters, with X_I being the ideal outcome for the state and X_P representing the lowest possible outcome that the state can accept. The area on the line between X_P and X_I is the win-set for country X. It is likewise for country Y. Any possible agreement that will be made between the two negotiators will fall somewhere between their possible outcomes, or the area identified by the red arrow in the second line.

Due to the dual nature of the political considerations during international negotiations, conceiving of the process as a two-level game is convenient for analysis. On the domestic level groups pressure the government to fulfill their interests with respect to the international negotiations. While, on the international level, the government attempts to satisfy their domestic pressures and minimize the adverse consequences of this satisfaction on the international stage.

It is possible for an agreement to fail at ratification due to the possibility of defection by the actors involved in the bargaining process. In the realm of two-level games there are

two forms of defection: voluntary and involuntary. Voluntary defection occurs when an actor reneges on the ratification of an agreement “in the absence of enforceable contracts,”⁴ the oft cited Prisoner’s Dilemma. A more interesting defection is the involuntary case. It occurs when a negotiator is unable to deliver on a promised agreement due to the failure of ratification by the Level II constituents. It is often difficult to distinguish between the two forms of defection because the negotiator often has an incentive to portray voluntary defection as involuntary in order to enhance their bargaining position. Smaller win-sets make for a smaller intersection and thus involuntary defection by the negotiator more likely.

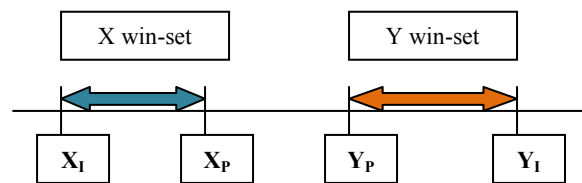


Figure 2

Figure 2 represents a case of involuntary defection. Even the worst acceptable agreement for each country will not be accepted by the other and thus the Level II constituents will refuse to ratify an agreement.

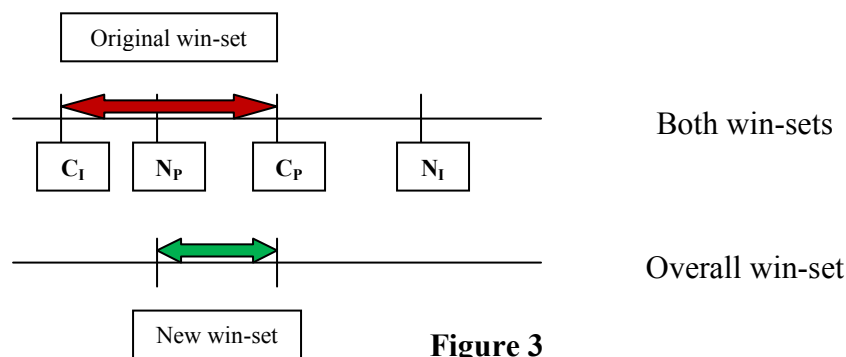
The negotiator in Level I has an ideal outcome that might differ from that of their constituents. It cannot be assumed that the negotiator is a perfect conduit for the wishes of the state. A negotiator has a vested interest in the outcome of negotiations, mostly in finding an amenable agreement for their constituents, but also including their personal interests.⁵ While taking their interests into account, they must at least be able to secure an agreement

⁴ *Ibid.*, p. 437

⁵ Mo, Jongryn. "The Logic of Two-Level Games with Endogenous Domestic Coalitions." *Journal of Conflict Resolution* 38 (1994), p. 415

that will not sacrifice their position as the negotiator. Thus negotiators must balance their personal interests with that of their domestic constituents.

The fact that the Level I negotiators have personal interests means that they have their own personal win-sets as well. An agreement that any state reaches must fall within the joint win-set of both the negotiator and his constituents. The same can be said for his opposite in the other state. Thus the overall effect of this added win-set is to create an even smaller possible area of intersection between the win-sets of the two states, as illustrated in Figure 3. Here, the win-set of the negotiator of country X is represented by the N_s and the constituents by the C_s .



In this instance, we cannot assign an ideal or a merely possible outcome for the state; it is only possible to see the overall win-set. This anomaly is due to the fact that there is uncertainty as to whether the ideal outcome will tend toward the constituents' ideal outcome or that of the negotiator. That would have to be sorted out by the negotiator and the constituents. What is most important is that the overall win-set for country X has shifted from the larger set of C_s , shown by the red arrow, to the smaller win-set between N_P and C_P , in green.

Win-set size has a further importance. The size of the Level II win-set will affect the gains made by the state in any agreement made during the bargaining process. A constricted

Level II win-set can be a bargaining advantage for the Level I negotiator. If a negotiator has too large an overlapping win-set with his constituents, then the opposite negotiator can use this knowledge to gain a relative advantage during negotiations and still be sure that the agreement will be within the intersection win-set and be sure of ratification. On the other hand, a small Level II win-set can be an advantage by constraining a state's overall win-set and allowing less room for the relative gains of the other negotiator in the final agreement. Thus a better outcome is achieved for the constrained state than might otherwise be achieved. This is a new version of the Schelling Conjecture.⁶

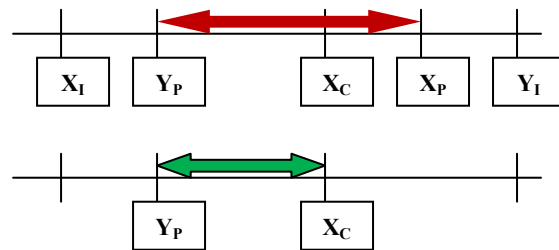


Figure 4

Figure 4 illustrates the effect of a constraint placed upon a negotiator of country X by his constituents. As in the first line, the initial and unconstrained win-set spans from Y_P to X_P and is closer to neither ideal outcome. Once a constraint is introduced, it moves the union win-set toward the X ideal and produces relative gains for the constrained country.

The coalitions and preferences among the Level II constituents have a great effect upon the win-set. A coalition, in this sense, is a group of Level II actors that share a common position. A winning coalition is the group of constituents that give their support to the agreement brokered by the negotiator. The preference for an agreement among a coalition of constituents is associated with the cost of agreement and non-agreement among that

⁶ Schelling, Thomas. *The Strategy of Conflict*. New Haven: Yale University Press. 1960.

coalition. A lower cost of non-agreement contracts the win-set due to the ability of the coalition to hold out for a better agreement without incurring much cost. However, different constituents have different costs for no-agreement. A Level I negotiator will have a better chance of securing support among a group of Level II actors and coalitions that have a high cost of non-agreement; they are his natural supporters.⁷ An agreement struck by a negotiator can meet opposition from those among his constituents who believe that the agreement goes too far in one direction, as well as those who believe that the agreement does not go far enough. Thus the negotiator cannot just take a simple “the more the better” approach. Among constituents, it is possible that those with the greatest interest in the agreement have the most extreme views; thus the negotiator may not find that this group is his natural supporter despite their keen interest in the passage of an agreement.

Level II institutions also play a keen role in the development of a ratifiable agreement. Ratification procedures affect the size of any win-set. There exists a great deal of difference between the win-sets and coalitions that form in a simple majority ratification system as opposed to a two-thirds majority system. Coalitions in a simple majority system might be smaller than those in a two-thirds system. Although the simple majority system will exert less significant domestic constraints and can lead to a less favorable, but quicker, agreement.

The relationship between the negotiator and the politics of Level II is often rocky. A Level I negotiator can be badly informed about his own Level II politics and even more so about the politics of the opposing negotiator’s constituents. This sort of misunderstanding is the situation that leads to involuntary defection; arising from a negotiator misinformed over

⁷ Putnam, *op.cit.*, p. 442

the constraints placed upon him by the constituents and forcing a failed ratification. At the same time, a negotiator must understate the win-set of his constituents in order to secure a better bargaining position, in effect, faking a constraint.⁸ Although each negotiator is likely to know more about their own Level II politics than those in the other state; this is not necessarily true. Each negotiator must carefully tread a path between its own lack of Level II knowledge and the need to portray to the other negotiator that his constituents have a narrow win-set. In order to maximize the utility of a negotiation, the negotiator must show that the overall win-set of the state is “kinky”, or that the proposed deal is likely to be ratified while a less favorable deal will be rejected.⁹ A kink is the point, corresponding to X_p or Y_p at which an agreement will no longer be ratified by a constituency. During negotiations it is unclear to both sides whether a kink actually exists or not, but a negotiator has an incentive to portray the situation as if one does.

The negotiator has the power to do this because he is often the sole link between the Level I and Level II in his state. This unique position leads to several interesting motivations of the negotiator. The extent of the role of the negotiator gives him an effective veto over any sort of agreement.¹⁰ Because the negotiator is the person that links the two levels, he is the one to table any agreement for Level II ratification, so it is unlikely that any deal could be struck that the negotiator does not support.

It is important to note that Putnam’s two-level game theory does not require that the actors at any of the levels be unitary. I refer to the actor, usually the negotiator, in Level I as a singular for convenience. If, for example, there are multiple actors on Level I, then the win-

⁸ *Ibid.* ,p. 452

⁹ *Ibid.* ,p. 453

¹⁰ *Ibid.* ,p. 456

set that would need to be analyzed would be the intersection of all of their win-sets. This new combined win-set would then be the overall win-set for Level I as a whole. This can be generalized for any N actors and levels.

The Schelling Conjecture relies on completely perfect information on the part of the negotiators concerning the constraints of Level II.¹¹ But, of course, there is never complete information. It is impossible for the negotiators to know exactly the level of constraint that exists on Level II. In one scenario, if he is not told the level of constraints, he may not be able to convey them to the other negotiator to prove his constraint and use it as a bargaining chip. Second, even if the negotiator is told the constraint of the ratifiers, the opposing negotiator may not believe that the constraints exist and ignore them. Last, even if the negotiator is told of the constraints he may not believe that they actually exist or he may choose to believe that they have a different quality than they, in fact, have, thus negating their bargaining advantage.

Although complete perfect information is impossible to achieve, the more perfect that the information about a constraint is, the better it will function as a bargaining advantage. The best constraint, thus, is a common knowledge domestic constraint. Furthermore, a constraint that is binding and permanent is the best form of constraint.¹² If one negotiator has binding constraints and the other takes a strong stance in the negotiations, then the risk of involuntary defection is high. But now the opposite negotiator knows that the constraints are binding, so, in a successive round of negotiations, the constraints are clear and are nearly perfectly conveyed, and thus function as a bargaining advantage.

¹¹ Iida, Keisuke. "When and How Do Domestic Constraints Matter?: Two-Level Games with Uncertainty." Journal of Conflict Resolution 37 (1993), p. 405

¹² *Ibid.*, p. 412

Previously, we have assumed, at least implicitly, that only one side of the negotiating process is constrained. Realistically, though, this is not true; in an actual negotiation, both sides will have domestic constraints that must be considered during the negotiations. Now we must compare the quantity of each side's constraint. There are three levels of constraint in this model: high, middle and low. But there is not an effect on the theory of the variety of constraint. When one of the parties' constraints are high and the other's are either low or middle level, then the negotiator with the high constraints will always be at a bargaining advantage and receive a better outcome in the agreement.¹³ This mechanism works by forcing the negotiator with the lower constraints to offer the other negotiator a better deal than they would have otherwise done. But this constraint does not have to be absolutely high in order for this mechanism to work, only high in comparison to the constraint of the other negotiator.¹⁴

As long as one negotiator has constraints higher than those of his opposite, he will then have a bargaining advantage. This, again, rests fundamentally upon the ideal of perfect complete information. Sometimes one might not be able to see clearly the constraints or desires of constituents and will thus lose that bargaining advantage. Realistically, there cannot be perfectly complete or incomplete information. Following the logic of Tarar's argument for a range of constraint intensity, we can construct a similar range for the completeness of information. A constraint will have the greatest positive effect upon the bargaining position of a negotiator when it is both high and the information relaying the constraint is complete. If both negotiators have high, or similarly intense constraints, then the

¹³ Tarar, Ahmer. "International Bargaining with Two-Sided Domestic Constraints." Journal of Conflict Resolution 45 (2001), p. 329

¹⁴ *Ibid.*, p. 330

negotiator with the more complete information will, necessarily, have the higher benefit from the constraints.

Application to Kosovo

The first reaction to the use of such an international relations framework to tease out insights into the domestic situation in Kosovo might be fairly negative. But the system in which Kosovo is governed and by which the political and legal institutions are created can be fairly described as international. As a state under international administration, Kosovo has unique institutions that allow for an international legal presence. In fact, the Kosovar constitution allows for the direct interference of the International Civilian Representative (ICR) in the law making process. Thus the international relations between countries of the European Union in the Council of the European Union and other international bodies have an effect upon the domestic situation in Kosovo through the ICR.

In this situation, the two-level nature of this system is clear. Level I, the international or negotiator level, in the previous discourse, is the “On the Ground” level. Here is where the negotiations happen between the representatives of the EU, the representatives of the Kosovar government and the other international actors. Their constituents, or Level II, are on the levels of the International and the Governmental. For the EU actors, they are the Council of the European Union and the European Commission, and occasionally actors beyond the EU such as the ICTY. These entities have differing responsibilities and competencies in Kosovo, but together they represent the full constituency of the international administration. The government, while being just as integral to the negotiations, has less strict divisions

between their constituents. It is impossible to separate the constituents of the government into sovereign entities like the states that compose the international constituents.

One might argue that this model is unable to comment upon the situation in Kosovo because it was designed for the international system. But this is far from correct. The main feature of the international system for which this model was designed is that of anarchy, with of no clear hierarchy between the actors. The same is true in Kosovo; while, in practice, some actors may have more political power than others at different times, the relative power that an actor has can change and thus there is a free hierarchy on Level I in Kosovo as well. This is to say that, in practice, neither a representative of the Kosovo government nor of the international administration has a fixed level of influence or negotiating leverage in every situation. There is movement among the actors depending upon the situation. Taking this fact together with the two clear levels of the system, I have shown that this model is perfectly suited for studying the current political and legal situation in Kosovo.

The use of two-level game theory is of course a simplification of the real-world situation of international administration. In both of my cases I will only identify Level I and Level II actors. But it may be that there are further levels of constituents above the Level II actor. It makes sense that as long as there are others that an actor on Level II is trying to satisfy that there would be another level above it. This could also be generalized to an N-level structure in trolley car-like fashion. But for the purposes of this paper two levels are adequate. Any constraints from a level above Level II can be assumed to be contained within the win-set of Level II. Thus, while sacrificing some robustness in the model, the simplification that I am using will not affect the overall logic of the mode

Kosovo: An Extremely Short History from 1980 – 2008

Before the International Administration, 1980 – 1999

Marshal Tito died on 4 May 1980 and laid the foundations for the dissolution of the country that he had built after World War II. Prior to his death, in order to fill his place at the top of the political food chain, a federal presidency was created. Each federal unit had a representative as did the autonomous provinces of Serbia, which included Kosovo. The autonomy ascribed in the 1974 constitution basically gave Kosovo and Vojvodina the status of republics within Serbia while retaining their provincial character. In this system, each province had representatives in the assembly of Serbia, but no representatives from Serbia were in the provincial assemblies.

The fact that decisions by the presidency had to be made by a majority of the representatives to pass forced the Milošević regime to revoke the autonomy of the provinces in what became known as the “Anti-Bureaucratic Revolution.” To gain control of the presidency Slobodan Milošević brought mobs to the streets throughout 1988 in Vojvodina and Kosovo to force out their current governments and, in their place, install Milošević-loyal governments.¹⁵ With the new governments installed, Milošević had both assemblies vote themselves out of existence effectively giving Belgrade control of three out of the eight seats on the federal presidency.¹⁶

¹⁵ Silber, Laura, and Allan Little. *Yugoslavia: Death of a Nation*. New York: Penguin, 1997., pp. 58 - 62

¹⁶ *Ibid.*, p. 69

During the long collapse of multi-ethnic Yugoslavia, Kosovo made several attempts to secede from the failing country as the other states successfully did. The first declaration of independence came on 19 October 1991. It was proclaimed by the Albanian members of the Kosovo Assembly, despite the fact that the provincial Assembly had been recently closed by Belgrade during the consolidation of central power. The declaration was pursuant to a referendum on independence that same year which had garnered 99.87 percent favorable votes.¹⁷ From then until 1999, Kosovo had a shadow government of the 'Republic of Kosova' that existed alongside the Yugoslav government.

Regular elections were held in this pseudo-republic without hindrance from the central government due to their engagement in conflicts elsewhere. In 1992, the intellectual Ibrahim Rugova was elected to the presidency of the republic. Rugova was an advocate of a passive and peaceful resistance to the Yugoslav regime. This policy was popular during the early part of the decade, but eventually patience began to wear thin. Especially after the exclusion of Kosovo from the 1995 Dayton Accords, which ended the fighting elsewhere in Yugoslavia, despite heavy lobbying by Rugova to the United States government.

The situation between the Kosovar and the Yugoslav governments began to deteriorate in 1996. In the month of February alone there were 580 cases of human rights abuses reported to international agencies.¹⁸ That year also saw an increasing militarization of the conflict. The Kosovo Liberation Army (KLA) carried out its first military action in August around the Drenica region. And, in Priština, a parade was held in honor of Željko 'Arkan' Ražnjatović, the notorious paramilitary leader and war criminal, and his armed group

¹⁷ Judah, Tim. Kosovo: War and Revenge. New Haven: Yale UP, 2000., p. 65

¹⁸ Pavlakovic, Vjeran, and Sabrina P. Ramet. "Albanian and Serb Rivalry in Kosovo." Ed. Tozun Bahcheli. Defacto States: the Quest for Sovereignty. New York: Routledge, 2004., p. 86

the Tigers. Further exacerbating the rising tensions was the total collapse of the Albanian government and economy in early 1997. The poverty and desperation of the local military leaders in that country gave them the incentive and opportunity to throw open the doors of the armories and sell their stockpiled weapons to the KLA.

At this point, tensions began to form within the Rugova government over their continued pacifistic stance. The KLA was gaining more popular support and momentum, and, during the period of January to February 1998, the KLA perpetrated as many attacks as during the whole of the previous year.¹⁹ In March, the Yugoslav Army set out to capture the key KLA leader Adem Jashari. Arriving at his family's compound in Prekaz and surrounding it, the Army then called for Adem to leave the house. When Adem did not appear, the army shelled the compound, leveling it and killing 58 members of the Jashari family.²⁰ This massacre triggered the first concerted offensive from the KLA and signaled the beginning of the war proper.

Before the entirety of the Serbian police and army apparatus could reach Kosovo in July, the KLA held the majority of the western portion of the region. Once the larger Serbian force reached Kosovo, the state began its counter-offensive. Pursuing a scorched-earth policy in the areas taken by the KLA, the army drove 200,000 people from their home all the while the KLA refused to fight a battle that they would lose and fled into the neighboring countries and the high mountains. The massive refugee problem created by the army garnered the first real attention of the world press.

Once some critical attention focused on the situation, the war found itself in a general lull, with only minor attacks from both sides from the end of 1998 to the beginning of 1999.

¹⁹ Judah, *op. cit.*, p. 137

²⁰ *Ibid.*, p. 140

But in January 1999, the local police in Račak, in Southern Kosovo, executed 45 Albanians, including children, suspected of helping the KLA.²¹ Footage of the massacre played on international television showed the bodies of those killed and forced the governments of the West to take action.

A peace conference was arranged by the Contact Group, a loose organization comprising the United States, Russia, The United Kingdom, France, Germany and Italy, between the Kosovo government and Serbia at the Château de Rambouillet near Paris. Despite some progress towards ratification by both sides during February and March, the Rambouillet Accords were signed by only Kosovo, the United States and Britain with Serbia and Russia refusing to ratify the agreement. Broadly, the agreement contained two parts. The first called for an interim United Nations administration of the province, but leaving it technically within Yugoslavia. And second for a NATO force to patrol and keep order in the province without the inclusion of the KLA or the Serbian security apparatus.

By refusing to sign the agreement, the Milošević regime had opted instead for more violence. On 24 March 1999, NATO began a bombing campaign that lasted for 78 days until capitulation by the Serbian regime on June 3rd. The aerial attack gave the Serbian security and allied paramilitary units the cover they needed to complete a plan of ethnic cleansing of the province. On a tally from June 9th, 862 979 refugees had fled the country for Macedonia and Albania.²² The United Nations Security Council (UNSC) met on June 10th and passed Resolution 1244. The resolution provides for a similar regime to that which the Rambouillet Accords envisaged, and, by the end of the day, the first NATO forces had begun to occupy Kosovo.

²¹ *Ibid.*, p. 194

²² Pavlakovic and Ramet, *op. cit.*, p. 88

From UNMIK to EULEX, 1999 – 2008

The passage of United Nations Security Council Resolution (UNSCR) 1244 provided the basis for the concentration of power under the United Nations Mission in Kosovo (UNMIK). UNMIK had full executive and legislative authority in Kosovo with the policing and border security being controlled by the NATO force in Kosovo (KFOR). The responsibility for UNMIK was vested in the Special Representative of the Secretary General (SRSG), who had complete executive authority within the territory.

The return of refugees from neighboring countries was swift and difficult in Kosovo. By November 1999, almost 800 000 of the refugees had returned to their homes.²³ With them had come a backlash against Serbs still in Kosovo and reprisal ethnic cleansing. Despite the reassurances of KFOR and the international community that their rights would be respected, many Serbs fled their homes for Serbia due to intimidation and fear of their new Kosovar neighbors and government. The only major area of current Serb settlement is north of the Ibar River in Mitrovica and in the south of the country around Štrpce.

The initial stance of the UNMIK administration was that the local Kosovar institutions, the government of the 'Republic of Kosova', were too weak to govern effectively. Thus UNMIK allowed little governance by the local population, only on a few minor local matters.²⁴ This arrangement led to dissatisfaction by the Kosovars who felt that they were merely an occupied nation and led increasingly to calls for a constitution to be made for Kosovo. The Kosovars wanted a full constitution, but UNMIK and the international

²³ Judah, *op. cit.*, p. 286

²⁴ Tansey, Oisin. "Kosovo: Independence and Tutelage." *Journal of Democracy* 20 (2009), p. 156

community decided that a full constitution would lead to a still greater desire for independence from the still nominally extant Yugoslavia.

Even the international community could not decide easily as to the course to take in Kosovo. The United States advocated for a full constitution based upon the Rambouillet Accords, while the European partners wanted a slower process that might lead to a constitution in the future.²⁵ In the end, a constitutional framework, as opposed to a full constitution, for provisional self-government was proclaimed by UNMIK on 15 May 2001. The framework created an Assembly of Kosovo, a Presidency of the Assembly and a President of Kosovo, all of which would be elected later in the year.

During the first election of 2001, Ibrahim Rugova was re-elected as the President of Kosovo. His Democratic League of Kosovo (LDK), and the other major Albanian parties, the Democratic Party of Kosovo (PDK) under Hasim Thaçi and the Alliance for the Future of Kosovo (AAK) under Ramush Haradinaj, formed an all Albanian coalition government in the Assembly. The election was the only one in which the Serb dominated North Mitrovica competed in the elections, with a Serb party garnering around 11.3 percent of the vote.²⁶ The following nation-wide election in 2004 saw a Serb boycott and AAK and LDK creating a government without the PDK. In 2006, Rugova died of lung cancer and plunged his LDK into a leadership vacuum and intraparty turmoil. Thus, in the elections of 2007, PDK and AAK formed a government without LDK and elevated Hasim Thaçi as prime minister.

The question of the future status of Kosovo was pursued slowly by UNMIK. The administration pursued a policy of standards before status. UNMIK would periodically assess

²⁵ Weller, M. Contested Statehood :Kosovo's Struggle for Independence. Oxford; New York: Oxford University Press, 2009., p. 181

²⁶ Tansey, *op. cit.*, p. 157

how various benchmarks toward democratization and accountability were being met within the territory and, based upon their assessment, status discussions would be either accelerated or pushed back.²⁷ By 2003, UNMIK announced that, at its present course, by mid-2005 enough benchmarks would have been met to begin final status negotiations. For many Kosovars, this timetable was too slow and aggravated anti-Serb sentiments. In March 2004 riots erupted in Mitrovica, which involved 50,000 Albanians and left 19 people dead, 954 injured, 550 houses and 27 Orthodox religious buildings destroyed.²⁸

The Norwegian Ambassador to NATO, Kai Eide, was tasked with investigating the incident and delivered a preliminary report in August, just five months later. The report found that some of the benchmarks were too difficult for the government to reach and had led to frustration with the standards before status process. The Eide Report advised that status talks be accelerated lest the lack of progress lead to further anti-Serb violence.²⁹

The status talks began in early 2006 despite the lack of completion of all benchmarks set by UNMIK. From the beginning the talks seemed pointless; Serbia would not accept an independent Kosovo, while Kosovo would accept nothing but independence. The discussions were to generally follow the recommendations put forward in the Eide Report and to be followed by a report on a final Comprehensive Proposal that would be voted on in the Security Council. The Comprehensive Proposal was written by former Finnish President Marri Ahtisaari and was presented by the Secretary General to the Security Council on 26 March 2007.³⁰

²⁷ Weller, *op. cit.*, p. 186

²⁸ *Ibid.*, p. 187

²⁹ *Ibid.*, p. 187

³⁰ U.N. Security Council. Report of the Special Envoy of the Secretary-General on Kosovo's future status (S/2007/168). 26 March 2007.

What became known as the Ahtisaari Plan, had three main aims. It meant to create an independent Kosovo with great amounts of Serb autonomy and comprehensive redistricting in order to secure homogenous Serb areas. Finally, the Plan called for UNMIK to be replaced by an EU led mission with a similar objective, but no overall executive capacity. The Plan, though, was never voted on in the Security Council because of an explicit Russian veto due to the independence provision in the document.

The failure of the Ahtisaari Plan led to further negotiations in late 2007. It was headed by a Contact Group troika of negotiators from the EU, Russia and the United States. Despite creative attempts to break the impasse, no agreement could be reached.³¹ After the election of the former KLA chief Thaçi as prime minister in 2007, a declaration of independence seemed inevitable. On 17 February 2008, a unilateral declaration of independence was promulgated by the Kosovo Assembly. Adoption of the Ahtisaari Plan was mentioned by name in the declaration. Thus the Kosovars unilaterally paved the way for the end of UNMIK and the beginning of the EU Rule of Law Mission in Kosovo (EULEX).

The mandate of EULEX is less comprehensive than that of UNMIK; it is invested with executive authority in any few areas of its competence. EULEX aims to, “develop and strengthen an independent and multi-ethnic justice system and a multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices.”³² Because the mandate for EULEX is based on the Ahtisaari Plan and was only adopted by the Kosovar government in its declaration of independence and its constitution, the Serbs north of the Ibar River refuse to recognize the legitimacy of the mission and continue to recognize only

³¹ Weller, *op. cit.*, p. 224

³² What is EULEX?, <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>

UNMIK authority. At stand-off like situation has been created with both UNMIK and EULEX having their own supporters and thus neither being fully capable to execute their missions in Kosovo.

ICTY Compliance: the Case of Ramush Haradinaj

ICTY Overview

The International Criminal Tribunal for the former Yugoslavia (ICTY) was created by the UNSC in 1993 as an *ad hoc* court whose jurisdiction includes the entirety of the wars accompanying the collapse of Yugoslavia that began in 1991. It was the first court of its kind since the Nuremburg and Tokyo courts following the end of World War II. Because the court is authorized in its practice by UNSCR 827 (1993) under Chapter VII of the UN charter, it has the force of binding international law, but without an institutional enforcement mechanism that would allow the court to issue subpoenas and evidence collection processes in a way that forces compliance.

While the first indictment by the court came in 1995, the court had spent the previous two years developing its procedures and conducting investigations in the warzones. The Dayton Peace Accords, which ended the war in Bosnia, prescribed cooperation with the ICTY as one of the pillars of the treaty.³³ Kosovo had seen little fighting during the wars, but because it was a province of the Federal Republic of Yugoslavia (FRY), the rump pseudo-successor to the socialist state that was comprised of Serbia and Montenegro, Kosovo was forced also to comply with the ICTY.

The unrest that began in Kosovo during 1996, however, was initially seen as internal matter of civil discontent by the court, and thus not specifically under the purview of the

³³ Kerr, Rachel. "Peace through Justice? The International Tribunal for the Former Yugoslavia." *Southeast European and Black Sea Studies* 7.3 (2007), p. 380

ICTY. However, once the unrest reached a boiling point in 1998, the ICTY Prosecutor became involved deeming it to have reached the point of “armed conflict”; she declared that both sides in Kosovo would hence forward be held accountable to the ICTY and that investigations into war crimes allegations would begin immediately.³⁴ Even after the autonomy that Kosovo gained during the international administration after 1999, the ICTY made it clear that Kosovo would still be considered under its jurisdiction as a continuation of the wars of succession that had begun in 1991.

The initial investigations of war crimes took place in March 1999, following the massacres in the Drenica region. The first indictment against any individuals for their conduct in Kosovo came in May of that year, but without any effective international presence on the ground, save a few unarmed OSCE observers, there was little ability for arrests to be made on the indictments.³⁵ This situation changed dramatically with the arrival of KFOR and the commencement of the work of UNMIK later in the year. After the arrival of international troops and police in Kosovo, investigations began with an amount of urgency heretofore unseen.

With a UN mandated international administration, from 1999 – 2008 the ICTY operated freely with the cooperation of UNMIK. The establishment of EULEX and independence in 2008 did nothing to damage the ability of the ICTY to continue to operate in Kosovo. In fact, due to the nature of EULEX as a capacity building mission overseeing the creation and maintenance of institutions concerned with the rule of law, the training and oversight applied to the Kosovo Police (KP) has reflected EU policy. And, while the KP plays the lead role in operations in Kosovo, it is closely intertwined with the EULEX police

³⁴ Prosecutor’s Statement, 7 July 1998, <http://www.icty.org/sid/7656>

³⁵ Weller, *op. cit.*, p. 170

officers.³⁶ The Council of the European Union has affirmed that it “support(s) the effective implementation of the mandate of the International Tribunal of the Former Yugoslavia.”³⁷

Furthermore, such supports for the ICTY are engrained in the mandate of EULEX.

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

d) ensure that ***cases of war crimes***, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, ***where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators***, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities³⁸

It is interesting to note that war crimes are first on the list of crimes that EULEX is mandated to assist in investigation and prosecution. Such a placement ensures that war crimes are firmly in the realm of EU policy concerns. This mandate also ensures that EULEX supports the ICTY in its proper functioning. Thus the current EULEX regime is committed to the burdens placed upon Kosovo by the ICTY.

Haradinaj et al.

Ramush Haradinaj was indicted by the ICTY in March 2005 and surrendered to KFOR within days of his indictment, but before the indictment had even been made public knowledge.³⁹ At the time of indictment, Haradinaj had been serving as Kosovar Prime Minister following the elections in 2004 and the formation of a coalition government with the

³⁶ EULEX Kosovo Police Component, <http://www.eulex-kosovo.eu/en/police/>

³⁷ COUNCIL COMMON POSITION 2004/293/CFSP of 30 March 2004 renewing measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY).

³⁸ COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO., p. 93, emphasis added

³⁹ Case Information Sheet: Haradinaj *et al.*, p. 1

AAK, his party, and the LDK. He quickly resigned his ministerial position. It is a curious occurrence that a man at the height of his power would quietly and quickly give up his power for a prison cell. This is ever the more curious because of other cases where a powerful suspect runs from the ICTY for decades with the help of their state's government.

Haradinaj was an early convert to the cause of Kosovo independence. By 1998 he had already risen to the rank of Commander of the KLA region Dukagjin, which encompassed the towns of Peć and Dečan, and bordered Montenegro and Albania. The indictment charges that while Commander of the region, he and his two co-defendants engaged in a joint criminal enterprise that was aimed at establishing complete control of the region by unlawful removal of Serb civilians and the mistreatment of Albanian civilians.⁴⁰ Furthermore, the indictment alleges that a “makeshift detention facility” was established near Jablanica, and that at the facility some detainees were subject to cruel treatment, murder, torture and rape.⁴¹ During the trial, Haradinaj was allowed to continue his political work in Kosovo, but he did not return to his post as Prime Minister.⁴²

The trial ended in April 2008 with Haradinaj and one defendant found not guilty on all charges and acquitted, with the other defendant facing only minor jail time. Upon release Haradinaj went back to Kosovo and continued his political career. Nearly immediately after his release the new Prosecutor, Serge Brammertz, stated to the BBC that “(my) office is not satisfied with the ruling. My office was unable to present all evidence to the court because some witnesses failed to appear.”⁴³ Accusations of threats against witnesses continued to

⁴⁰ *Ibid.*, p. 3

⁴¹ *Ibid.*, p. 4

⁴² “Hague Court Acquits Kosovo ex-PM.” <http://news.bbc.co.uk/2/hi/europe/7328148.stm>, 3 April 2008.

⁴³ “New war crimes chief in Belgrade.” <http://news.bbc.co.uk/2/hi/europe/7352813.stm>, 17 April 2008.

mount and a retrial was ordered for both of the acquitted defendants on six of their 37 charges.⁴⁴ The retrial charges maintain some of those most serious charges, including torture and murder. The retrial is based upon the assertion that, at the time, the ICTY “failed to appreciate the gravity of the intimidation” that witnesses faced.⁴⁵

The arrest warrant, in this instance, was signed on 19 July 2010 and once again Haradinaj quickly surrendered to KP forces and was transferred to The Hague. During his current imprisonment, Haradinaj has been refused release for political purposes and has only recently been allowed to leave the detention facility to visit his pregnant wife for their child’s birth.⁴⁶ It seems as though, this time, the ICTY is determined to make charges stick to the defendants and, with equal determination, to prevent the ability to directly intimidate witnesses into silence like the last trial.

What this story illustrates is that the ICTY, an organization with a highly constrained and highly visible Level II win-set can positively influence their Level I negotiator to follow a course that it desires. The win-set of the ICTY is very small and very simple. It consists solely of its ideal outcome, I_I , the arrest and trial of individuals accused of committing war crimes. There is no room for movement for the ICTY, they will accept only that their indictment be carried out; thus the ideal and possible outcomes are the same point. It cannot, for instance, change the charges brought against an individual in order to better facilitate an agreement with another party. The other party must move to the ICTY’s ideal outcome, not the ICTY move closer to the other party’s ideal.

⁴⁴ “Haradinaj arrested, transferred to Hague.” http://www.b92.net/eng/news/crimes-article.php?yyyy=2010&mm=07&dd=21&nav_id=68572 21, July 2010.

⁴⁵ “New war crimes trial for former Kosovo PM Haradinaj.” <http://www.bbc.co.uk/news/world-europe-10709093>, 21 July 2010.

⁴⁶ “Hague grants Haradinaj temporary release.” http://www.b92.net/eng/news/crimes-article.php?yyyy=2010&mm=12&dd=09&nav_id=71402, 9 December 2010.

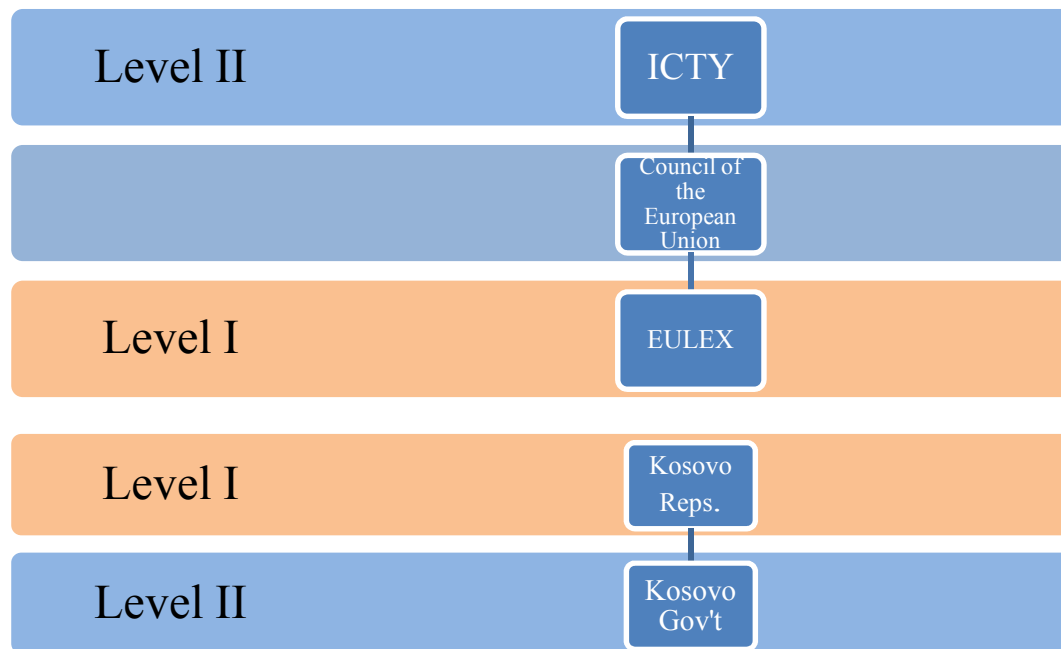


Figure 5

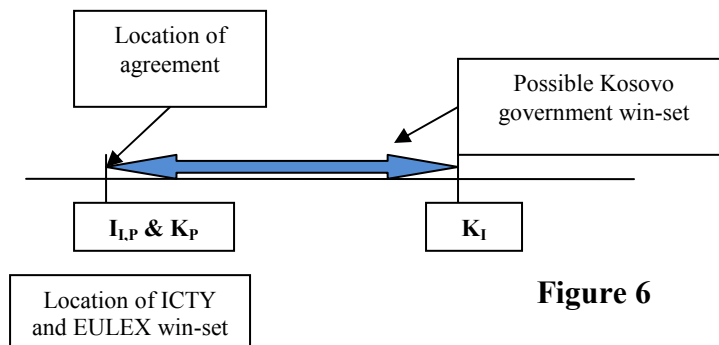


Figure 6

It is also true that due to the public nature of ICTY proceedings, the constraint that the ICTY places is as completely signaled as any constraint might be, which is illustrated in Figure 6 by the fact that $I_{I,P}$ is both the ideal and possible outcomes for the ICTY their win-set is a singularity. After an indictment is published, the entire world knows exactly what one point is contained within the ICTY win-set. In the case of Kosovo, because it is under an international administration, the policies enacted by the Council of the EU also have an effect upon the outcome. In Council Common Position 2004/293/CFSP, one of its clearer

statements, as well as in the EULEX mandate, the Council fully endorsed compliance with the ICTY. Thus, even though the Council controls the EULEX police officers, the win-set of the ICTY and the Council are exactly the same due to the provisions for ICTY compliance outlined above. And, due to the equally public nature of this pronouncement, it is known in a complete manner. The Council of the EU functions as a perfect conduit for the win-set of the ICTY to the EULEX police officers in Kosovo.

One area where an extra element might be added to the win-set of the ICTY is during the decision to issue an indictment. As we have seen, once an indictment has been brought by the ICTY there is no room for negotiation, but what about before the indictment is brought? The decision to investigate a war crime, and the actual investigation that follows, falls on the Chief Prosecutor. Indictments issued by the ICTY are made solely by the Chief Prosecutor, but have to be confirmed by a trial judge.⁴⁷ In the UNSC report that mandates the ICTY, the Prosecutor is setup as an entirely independent body.

The Prosecutor shall be responsible for the investigation and prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.⁴⁸

And further, it notes that

The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek to receive instructions from any Government or from any other source.⁴⁹

This independence seems to be true not only *de jure*, but also in practice. In her memoir, former Chief Prosecutor Carla Del Ponte is very clear that political decisions did not

⁴⁷ Del Ponte, Carla, and Chuck Sudetic. *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity : a Memoir*. New York: Other, 2009., p. 41

⁴⁸ UNSC. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (S/25704)*., p. 22

⁴⁹ *Ibid.*, p. 23

influence her decisions to indict. A bigger problem for the prosecution is governments where the investigations were taking place can be obstructionist during the process of evidence collection.⁵⁰ It does not seem that this obstructionism ever prevented an indictment from being brought in the sense that the prosecutor was told to halt an indictment in order to satisfy a political end by political leaders in the UN or the EU.

It may be that this is a slight idealization of the nature of the Prosecutor in the system of the ICTY. They are, of course, dependent upon someone, namely the UNSC, for their appointment and funding of the ICTY. These actions might make the considerations of the Prosecutor different than just solely the mandate of the ICTY. Thus perhaps there are political pressures upon the Prosecutor, but there does not seem to be blatant evidence of political pressure informing the decision to indict. The environment in which the Prosecutor works may not be perfectly insulated from pressure, but is as perfectly insulated as any appointed post might be.

Thus, by the time that the negotiations, as limited as they might be, even begin between the Kosovo and the EULEX representatives, the outcome has already been determined. The Kosovo representatives must comply with the ICTY ideal outcome, because there is no room for movement from that demand. The constraint of the Kosovo government that is placed upon its representatives does not matter, and so their possible win-set is equally insignificant. The Kosovo government faces the choice of conforming their own win-set to that of the ICTY or facing the costs of voluntary defection. Thus, no matter the constraint that the government might place upon their representatives to take a course of action that is different from that which the ICTY might like, the only possible agreement that might be

⁵⁰ Del Ponte, Carla., *op. cit.*, pp. 41- 42

made is at the ICTY's ideal outcome. The actual Level I negotiators are unimportant, because by the time they figure into the process, the agreement has already been decided upon solely by the ICTY.

The Level II actors in Kosovo do not have the means with which they might strike a different deal either. The Level II actor is the government and they owe their personal powers and sovereignty to the international community. And because of this dependence they cannot act against the will of the international actors when the win-set is thus particularly and clearly defined. There is no deal that the Level II actors in Kosovo might be able to strike that the international community would accept that is different from the win-set conveyed by the ICTY. And if the Kosovo Level IIs decide that they will not accept such an agreement, then they risk losing the sovereignty and powers that they have enjoyed to this point. Haradinaj exemplifies this. He had fought in the past for the sovereignty of Kosovo, and when it was guaranteed by the international community, he was unwilling to sacrifice the gains of the Kosovo government for those of himself.

Because of the special position as an internationally administered territory, the cost of voluntary defection for Kosovo would be great. The policy of standards before status, while, rushed on certain aspects, would never have allowed for a final status negotiation while the government of Kosovo was in non-compliance with the ICTY. Furthermore, the presence of international troops on the ground in Kosovo would have made any attempt at voluntary defection moot. Had the KP not taken any lead in arresting indictees and enforcing the will of the ICTY, KFOR surely would have.

The threat of the KFOR is not merely implied; the Kosovo government established the legal presence of the International Military Presence (IMP) in their constitution. While

the IMP has never been implemented, because only Kosovo has adopted the Ahtisaari Plan, it shows the commitment the Kosovo government has to gaining political independence. While, at the same time, possibly sacrifice some sovereignty in the future and the ability to voluntarily defect from the win-set of the ICTY.

1.2 Within means and capabilities, and until tasks can be relinquished to others under programmes to be agreed, the IMP will assist local authorities and the ICR in:

g. Providing support, on a case-by-case basis, to the international community and key civil implementation organizations, in the fulfilment of their respective mandates.⁵¹

This provision gives the IMP the basis under which it might operate in Kosovo. It is vague in scope and allows them to assist any and all international organizations with their respective mandates within Kosovo. In the next paragraph, the powers of the IMP are spelled out more clearly.

2.1 In fulfilling the IMP's responsibilities, the Head of the IMP shall have the authority, without interference or permission, to do all that he/she judges necessary and proper, including the use of military force, to protect the IMP and other designated personnel and to carry out its responsibilities. The Head of the IMP is the final authority in theatre regarding interpretation of those aspects of the Settlement that refer to the IMP.⁵²

The details of the scope of force that the IMP can use to enforce those aspects of the settlement that are breached on the ground are thus immense. Among those aspects is ICTY compliance.⁵³ Thus, even without the aid of the Kosovo government, other mechanisms are in place for the forced compliance with ICTY indictments. Currently these mechanisms are under the purview of KFOR on the basis of UNSCR 1244.

⁵¹ *Comprehensive Proposal for the Kosovo Status Settlement*, p. 58

⁵² *Ibid.*, p. 59

⁵³ *Ibid.*, p. 55

This point is illustrated by the cases of Isak Musliu and Haradin Bala, both of whom were arrested by KFOR in 2003.⁵⁴ While these two arrests occurred during the UNMIK era, the threat remains that fugitives will be arrested in Kosovo with or without the help of the Kosovo government. The threat is ongoing because of the nature of the Kosovo constitution and the place that is given to the IMP. Thus the Kosovo government would still incur the cost of voluntary defection, even if KFOR were to leave, while the perceived benefits of keeping suspects out of jail would not materialize.

The case of Ramush Haradinaj clearly illustrates this constraint in the face of a clear and narrow win-set. As a powerful and well liked politician, Prime Minister Haradinaj would have been a perfect candidate for the government to aid in hiding from the ICTY. It would probably have not hurt his credibility much had he defied the ICTY. When he left for The Hague for his initial trial, crowds gathered to send him off.⁵⁵ We can also see that, due to the rampant witness intimidation during the trial, it is not the great reach of the KP or EULEX police officers that forced Haradinaj to surrender to the police. It must be something special about the ICTY that has forced such strict compliance by the Kosovo government. It is because there is no room for movement within the win-set of the ICTY and that the costs of defection from the only possible agreement with the ICTY are too great for the Kosovo government to incur.

Contrast the case of Haradinaj with that of Ratko Mladić, the Bosnian Serb general still on the loose. The first indictment against Mladić was made in 1995 on the charges of genocide and crimes against humanity for his role as commanding officer at the massacre of Bosniak men and boys at Srebrenica. After the war it was an open secret that Mladić was

⁵⁴ Case Information Sheet: Limaj *et al.*, pp. 1-2

⁵⁵ "Hague court acquits Kosovo ex-PM." <http://news.bbc.co.uk/2/hi/europe/7328148.stm>, 3 April 2008.

living in Belgrade as a guest of the government of Slobodan Milošević.⁵⁶ Reports continued even after the fall of Milošević that Mladić was being supported by the government and that even he continued to draw a state pension until 2005.⁵⁷ He remains at large in Serbia with, it is assumed, with the help of friends in government. In this example we can see the consequence of voluntary defection in the absence of high costs. Without an international police presence, the Serbian government made the decision to incur the costs associated with not turning over war criminals and even supporting them financially. They did so without the fear that another entity might arrest the suspect without their approval. In a state like Serbia, where the sovereignty of the state is not in question, they can much more easily bear the weight of defection. They cannot ultimately lose their sovereignty by defecting; the costs cannot be their entire state barring some sort of international invasion. Kosovo, on the other hand, can lose their state more easily and will not choose defection quickly.

It is interesting to note that, without the support of the state, there has never been a fugitive of the ICTY who has been long on the lamb. The two remaining fugitives, Ratko Mladić and Goran Hadžić, received help from the Serbian government for years and now probably live in Serbia with the support of some people in government. Tuđman's Croatia supported Ante Gotovina in his initial bid to escape justice, but he was eventually caught in 2005. Kosovo, because of its unique position, has never had an indictee that has resisted arrest by the ICTY for any amount of time similar to the Serb or Croatian examples.

⁵⁶ Profile: Ratko Mladić, <http://news.bbc.co.uk/2/hi/europe/1423551.stm>

⁵⁷ Serbia confirms that Mladić received pension until November, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/newsbriefs/2006/01/04/nb-01, 4 January 2006

Visa Liberalization: Not for Kosovo

Why Liberalize?

The goal of visa liberalization, in the context of the European Union, is to allow the citizens of a country not part of the EU to travel freely within the Schengen zone (which includes 25 EU members, plus Norway and Switzerland, but excludes the UK and Ireland) without the need to apply for a visa. To do this the country must fulfill certain requirements that are set for it by the EU. These requirements include readmission of citizens found to be in the EU illegally, strict guidelines for the issuance and manufacture of biometric documentation, and secure border control.

Despite the legislative and technical difficulty associated with the task of meeting these requirements, most candidate countries are more than happy to fulfill them. For a candidate or potential candidate country, the essential laws and policies that liberalization requires are also parts of the Justice and Home Affairs pillar of the *acquis communautaire*, and so will have to be dealt with to become an EU member in the future. Additionally, without liberalization, citizens have to go through a lengthy process of visa application in order to travel to the EU and are thus less likely to do so. The difficulty attached to travelling to the EU can have a negative effect upon the European integration process within a country.

Furthermore, in most instances, trade between the two areas increases dramatically after visa-free travel is introduced.⁵⁸

General Framework for Liberalization

In the past, the journey toward visa liberalization has had several clear and straight forward steps. The first of which is the conclusion of a visa facilitation and readmission agreement with the Council of the EU. The second is the beginning of a visa dialogue. And last, before the liberalization process is complete, the roadmap of specific reforms that need to be implemented.

The initial step, that of conclusion of a visa facilitation and readmission agreement, is a way for the European Commission and the other country to streamline processes involved in migration between both entities. On the facilitation side of these agreements, the idea is to expedite and ease the process of obtaining short term visas for citizens of a country to the Schengen zone. The agreements offer to a set of people, usually businessmen and travelers, a greatly eased process of visa application.⁵⁹ A second portion of the agreement, that of readmissions, aims to ease the process of returning citizens who are found to be in the EU illegally to their home country. All countries of the Western Balkans, except Kosovo, that did not already have a facilitation and readmission agreement already (Serbia,⁶⁰ Montenegro, Macedonia, Bosnia and Herzegovina, and Albania) received their agreements in 2007.⁶¹

⁵⁸ "Trade booming with neighbors as visa requirements abolished." <http://www.todayszaman.com/news-233908-trade-booming-with-neighbors-as-visa-requirements-abolished.html>, 31 January 2011.

⁵⁹ Trauner, Florian, and Imke Kruse. "EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?" *European Journal of Migration and Law*, p. 423

⁶⁰ Kosovo was not covered under Serbia's deal and is deliberately excluded by name in the agreement.

⁶¹ *Ibid.*, p. 421

After the successful implementation of the facilitation and readmissions agreement, the visa dialogue is the next step toward full liberalization. The dialogue is much more informal than the other two steps. It is the process through which the European Commission in its capacity as the EU bureaucracy assesses the steps that need to be taken in the areas of document security and border security that will lead to eventual visa liberalization. The dialogue seems to be mostly an action of good faith that the country will one day gain visa-free access to the Schengen zone, but does not necessarily have to be so.

After the dialogue is finished and the EU has assessed the situation in each country, a roadmap is given by the Commission that outlines the specific reforms that a country must implement in order to achieve full visa liberalization. Most of the roadmaps for the Western Balkans are similar if not identical.⁶² Though each roadmap has specific blocks related to the situation in the individual country, the roadmap generally focuses on the areas of documents and border security. The Roadmap step is the most important and difficult part of the process because, after the completion of the reforms outlined in the roadmap, a proposal is then sent by the Commission to the Council of the EU for the final approval of visa-free travel.

The vote by the Council of the EU is the end of the visa liberalization process. The Council must vote because access to the Schengen zone is controlled by Regulation 574/1999 on the visa requirements for nationals of non-EU member states.⁶³ This law contains two annexes. The first is a 'black list' which enumerates all of the countries whose citizens require a visa to enter the Schengen zone. The second is the 'white list' that contains the

⁶² European Stability Initiative. "The Visa Roadmaps". <http://www.esiweb.org/index.php?lang=en&id=352>

⁶³ European Commission. "Visa requirements for nationals of non-EU member states." http://europa.eu/legislation_summaries/other/114007b_en.htm

countries whose citizens may travel visa-free to the zone.⁶⁴ It is the white list to which all Western Balkan countries aspire and onto which they eventually made it (Serbia, Montenegro, and Macedonia beginning in 2010; Albania, and Bosnia and Herzegovina in 2011).

A successful process: the Serbian example

Serbia, unlike Kosovo, has undergone a fairly normal path toward visa liberalization with the EU. The visa dialogue that began with Serbia in 2008 was the first in the region, and was always seen as a first step toward further and full visa liberalization. European Commission Vice President Franco Frattini said on the day of the launch, “I am happy to be here in Belgrade today, where we take this important step together towards our common European future. I welcome the launch of the dialogue on visa free travel which should open the doors of the EU to all citizens of Serbia.”⁶⁵

The roadmap was presented to the government of Serbia on 7 May 2008 and gave the exact reforms needed to establish the visa free regime. Delivered to Belgrade by another European Commission Vice President Jacques Barrot, the reforms fall into four categories, called blocks: document security, illegal immigration including readmission, public order and security, and external relations and fundamental rights.⁶⁶ The roadmap ends with further promises to Serbia.

⁶⁴ European Stability Initiative. “The EU decision-making process.” <http://www.esiweb.org/index.php?lang=en&id=354>

⁶⁵ “Commission launches dialogue with Serbia on visa free travel”. <http://www.europa.rs/en/mediji/arhiva-vesti/2008/756/European+Commission+launches+dialogue+with+Serbia+on+visa+free+travel.html>, 30 January 2008.

⁶⁶ European Commission. “Visa Liberalization with Serbia Roadmap.” 7 May 2008.

As already mentioned before, on this basis the Commission will consider the possibility to present a proposal to the Council for the lifting of the visa obligation, by amending the Council Regulation 539/2001[an amendment to 574/1999], and, following the procedure laid down in the EC Treaty for these matters, the Council will on the basis of the Commission's proposal, after consultation of the European Parliament, take a decision acting by qualified majority.⁶⁷

In July 2009, the Council voted for the proposal that allowed Serbian citizens with correct identification to travel to the EU without a visa beginning on 1 January 2010.⁶⁸ The ‘visa ghetto’ that existed on Europe’s doorstep in 2007 has been reduced to only Kosovo and its two million citizens.

Kosovo: Less than success

As with all other states in the region, eventual visa liberalization in Kosovo must start with a visa dialogue that would then lead to a visa roadmap and full liberalization. The process, though, is stalled. There is no dialogue, and as recently as October 2010, the EU has said that Kosovo is not ready for a dialogue.⁶⁹ Without this dialogue, Kosovo cannot implement a coherent strategy toward reforms that might lead toward eventual visa liberalization.

In late 2010 the European Commission Liaison Office in Kosovo released a *Factsheet* that described the ways in which Kosovo needed to reform in order to even begin a visa dialogue with the EU. The Factsheet is quite unlike the roadmap that Serbia received. The specific reforms are not clearly defined and is without guarantees of visa liberalization. Furthermore, unlike Serbia and the other Western Balkan countries, Kosovo must fulfill more

⁶⁷ *Ibid.*, p. 8

⁶⁸ “Serbs set for visa-free EU travel.” <http://news.bbc.co.uk/2/hi/8151518.stm>, 15 July 2009.

⁶⁹ European Stability Initiative. *Isolation Confirmed: How the EU Is Undermining Its Interests in Kosovo*. Berlin-Brussels-Pristina, 22 November 2010, p. 4

criteria in order to begin the dialogue. Pulled from a previous Commission statement, the *Factsheet* says,

Kosovo needs to adapt its legislation, strengthen its administrative capacity to process readmission requests and implement an effective reintegration strategy. It also needs to enhance the security of its borders and secure the management of civil registries and the issuance of documents.⁷⁰

Serbia, as we have seen, only needed to have readmission settled before a dialogue and roadmap were started. For Serbia, the further reforms were not a price of the dialogue, but instead were a price of admission to the Schengen zone. Thus it appears that the EU is treating Kosovo differently than the other countries of the Balkans. They have to complete reforms, that are usually implemented once a roadmap has been given, before the process can even begin.

Despite the backwardness of this process, the Kosovo government has gone ahead and unilaterally affected many of the reforms that the EU wants. Reforms have occurred despite the vague nature of the calls from the EU. Kosovo has made progress in every area given to it in the *Factsheet*. After the declaration of independence in 2008, Kosovo began dealing with the readmission of its citizens from foreign countries on its own (previously UNMIK had been in charge). Since then, Kosovo has established bilateral readmission agreements with nine European nations and is set to continue on this track.⁷¹ This sort of non-guided reform continued with a law passed in June that entered into force in August 2010. The law “defines the procedures for verification and return of Kosovo citizens and foreigners who crossed in transit from Kosovo to other countries.”⁷² If Kosovo were like all

⁷⁰ European Commission Liaison Offices to Kosovo. “Factsheet: Toward a visa liberalization dialogue with Kosovo.”, p. 1

⁷¹ European Security Initiative, *op. cit.*, p. 5

⁷² Government of Kosovo, *Visa liberalization Report*, October 2010., p. 6

the other countries of the Western Balkans, this reform alone would have been enough for a visa dialogue.

In the area of border security Kosovo has made strides as well. Due to the nature of EULEX as a rule of law mission focused on capacity building of the police and customs services, it seems strange that Kosovo has no clear way forward when it comes to border security. With an actual EU mission controlling some of the key institutions for visa liberalization, Kosovo should have a simpler time ascertaining the specifics of reform that the EU wants them to implement and not a harder one.

The Kosovo Border Police have the limited role of surveilling the border with Albania and controlling the crossing points not connected to the Mitrovica enclave.⁷³ The Kosovo government, though, hopes that soon the Border Police will control all of its international borders. The government has begun to undertake seven action plans toward integrated border management.⁷⁴ The content of these action plans are similar to those implemented under a roadmap. Yet in November 2010 the Commission stated that despite some progress being made in border security, “[integrated border management] implementation however needs to be speeded up.”⁷⁵ In previous cases such a requirement has only been made following the conclusion of a visa dialogue.

The last area mentioned in the *Factsheet*, the “secure management of civil registries and the issuance of documents” has also been tackled by the Kosovo government, although this is the area that needs the most work. The initial difficulties with civil documents date to the 1999 war with Serbia. When Serb troops withdrew they took many of the documents and

⁷³ European Security Initiative, *op. cit.*, p. 6

⁷⁴ Government of Kosovo, *op. cit.*, p. 7

⁷⁵ European Commission, *Kosovo 2010 Progress Report*, p. 50

registries with them.⁷⁶ A further blow to document security is the fact that old Yugoslav passports are still valid for Kosovar citizens. These older documents do not display any of the security features used in newer passports. But, according to the Commission new Kosovo “passports, identification cards and civil status documents have high technical security standards.”⁷⁷ However, the civil administration involved in implementing the new law on personal data protection, instituted on 29 September 2010,⁷⁸ is not yet in place. The EU believes that these deficiencies must be addressed before the visa dialogue might start. The problems with the security of documents is real in Kosovo and much needs to be done before visa liberalization can be completed, but document security is normally included in the roadmap process and has been a precondition for a dialogue only with Kosovo.

Kosovo has made progress toward meeting the preconditions for a visa dialogue, but in November 2010 the process was stalled further by a new qualification from the EU: reintegration of readmitted citizens. This is a further qualification after readmission; reintegration is a plan for helping readmitted citizens to find work and housing. According to Balkan Insight, a regional news source, the European Commission will not begin a visa dialogue until a reintegration plan is in place.⁷⁹ The National Refugee Commission’s new Strategy for Reintegration of Repatriated Persons that began in June 2010 has not been enough to satisfy the EU.⁸⁰ According to the Commission, the reintegration strategy fails on several accounts:

⁷⁶ European Stability Initiative, *op. cit.*, p. 7

⁷⁷ European Commission, *op. cit.*, p. 50

⁷⁸ Government of Kosovo, *op. cit.*, p. 8

⁷⁹ “Kosovo’s Visa Liberalization on Hold.” <http://www.balkaninsight.com/en/article/kosovo-s-visa-liberalisation-on-hold>, 9 November 2010.

⁸⁰ Government of Kosovo, *op. cit.*, p. 7

Reintegration remains a challenge and further efforts by Kosovo authorities are necessary. Capacity to handle reintegration of forced returnees needs to be strengthened. Communication between central and municipal levels on readmission is insufficient. The municipalities do not have adequate human and financial capacity for providing sufficient assistance to repatriated persons.⁸¹

Despite the need for a full realization of the Strategy, the problems that the EU has with the new Strategy are not insurmountable. The issue though is not that the tasks required to complete the reforms are difficult, but that they are being put in a more difficult order for completion in Kosovo. In the past reintegration has logically followed readmissions.

The levels of the game that describe the win-set structure for visa liberalization are different than those for ICTY compliance. Level II is occupied by the Council of the EU and the European Commission on the one hand and the Kosovo government on the other. The decision to add Kosovo to the white list is eventually the Council's decision; they are the highest level on the European side. But strangely the level of negotiation is the EC Liaison Office not a Council body. As the publishers of the *Factsheet* and the entity used to inspect the progress of Kosovo toward applying the *acquis communautaire*, they are the ones informing the Commission about reforms in Kosovo. The Council has no direct control of the Liaison Office since it reports to the Commission even though the Council is the body that would have to accept the changes to the white list.

In Kosovo, it is the Ministry of European Integration that is responsible for applying all of the *acquis communautaire* guidelines and bringing Kosovo closer to European standards of practice set forth by the Commission and is thus the Level I negotiator. Among the standards are those required for visa liberalization. The Ministry was created in April 2010 in preparation for the eventual filing of the Commission questionnaire, a first step toward EU

⁸¹ European Commission, *op. cit.*, p. 51

candidate status.⁸² The Ministry works closely with the Commission to fulfill the criteria necessary for further integration. The two-level structure for visa liberalization and EU integration in general is illustrated in Figure 7.

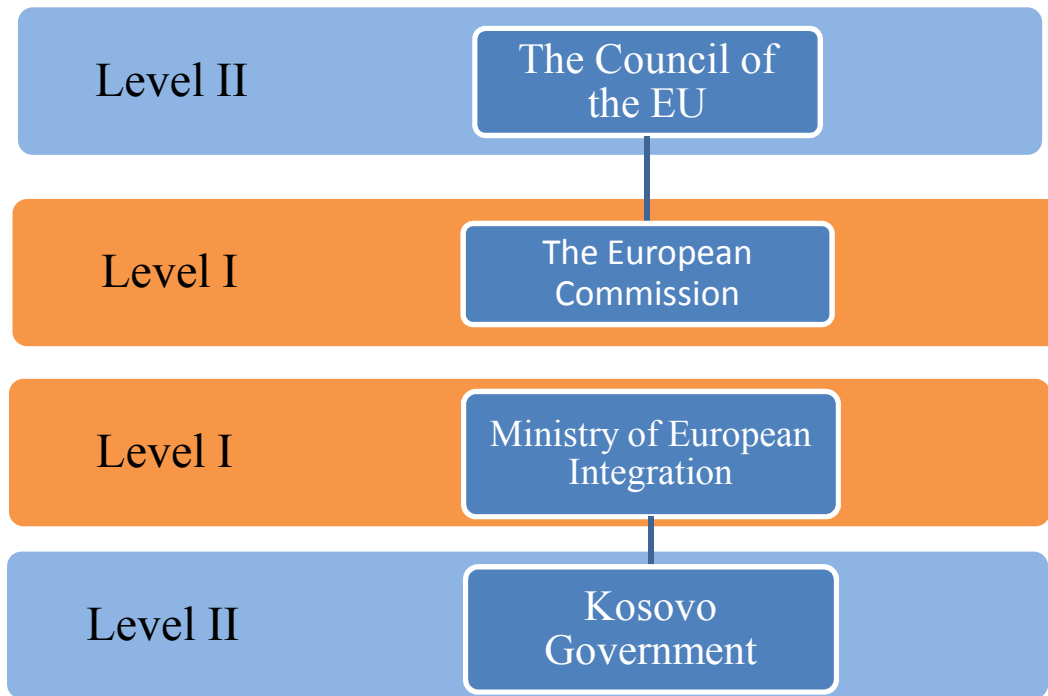


Figure 7

In this instance the sacrifice of only using two levels is most apparent. While it is the Commission that decides whether visa liberalization might be voted upon by the Council, so the Commission is Level I and the Council Level II, the Council has further clear constituents as well. The Council is composed of ministers of the member countries who are politicians in their own right and must be elected or appointed by their home country. Thus they have a further constituency in their respective capitals. To include a third level would give us a very robust view of the nature of the EU structures, but is not necessary for my argument. Any

⁸² Ministry of European Integration, *History of Kosovo EU Relations*, <http://mei-ks.net/?page=2,10>

sort of constraint placed upon the Council by their constituents can be reduced to an innate character of the Level II win-set.

The structure of the EU side of the diagram contains a peculiarity through which the Commission and the entire win-set of the EU when it comes to visa liberalization is constricted. Because the regulation that controls access to the Schengen zone has to be amended by the Council, and is overseen by the Commission, the win-set of the EU by the time that it is presented at Level I has been contracted from its original size. Since both the Commission and the Council have unique win-sets, the overall Level II win-set for the EU is the intersection of both individual sets and is contracted further than each individual win-set might be. Thus the overall win-set thus is smaller and more difficult to find an amenable agreement with the Kosovo negotiator.

To date the journey of Kosovo toward visa liberalization with the EU has had three distinct phases that are specific to Kosovo. The first was before anything concrete was said by the EU, and Kosovo operated under the assumption that it would be treated like the other West Balkan states and that it needed to conclude only basic readmission reforms before a dialogue would start. The second phase came after the Commission statement published in the Factsheet became public knowledge and Kosovo then had specific areas upon which to focus reforms. The third and final phase began after the movement toward a visa dialogue stalled due to the lack of an effective reintegration strategy.

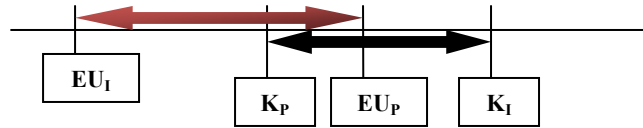


Figure 8

Figure 8 represents the first phase win-sets of both the EU and Kosovo before any official statements had been made on the subject of visa liberalization. Here Kosovo is operating under the assumption that having a readmissions agreement would be enough to start a visa dialogue. K_P is the greatest possible reform that Kosovo has the ability to enact and EU_P is the lowest possible amount of reform that the EU would accept to begin a visa dialogue. Thus the intersection, between K_P and EU_P , is the place where an agreement on readmissions would lead to a visa dialogue. While the Kosovar government does not know exactly where is EU_P , the threshold beyond which an agreement might be reached, it can at least infer the placement from the context of the Western Balkan countries. The possible point ought to be located at the conclusion of a basic facilitation and readmissions agreement with the EU.

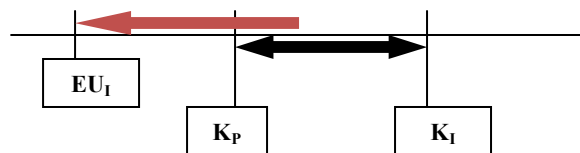


Figure 9

After it becomes clear that Kosovo has to meet other requirements in order to begin a visa dialogue, unless those other requirements are clearly articulated, as in a roadmap, the

possible EU point, EU_P , is unknown and the Kosovars do not know where an agreement might be reached, which is illustrated in Figure 9; this figure represents the beginning of phase two. In this instance, it can be assumed that the point EU_P has moved toward the EU ideal point, because further reforms would make it move closer to the *acquis communautaire* standards. The problem, though, is that without a clearly explained format and direction for reform, the EU has left the location up to guess work where the threshold for the beginning of a visa dialogue will start.

The Schelling Conjecture⁸³ would usually positively support a movement toward the ideal outcome for the EU. The movement would positively constrain the bargaining position of the EU and force Kosovo to come to an agreement that would be closer to the ideal of the EU. However, because the EU is not signaling to Kosovo where exactly their possible outcome is, Kosovo cannot make any sort of agreement for visa liberalization. So instead of positive constraint, the constraint is leading to involuntary defection on the part of Kosovo and to no agreement at all.

This trend toward the unknown has continued with the further shutdown of talks over reintegration strategy in phase three. After the Kosovo government at least attempted the reforms that are outlined in the Factsheet, the EU again decided that the reforms were not enough, as detailed above. We can again assume that the new EU_P has moved to the left, because there are new preconditions for a visa dialogue that would bring Kosovo closer into line with the *acquis communautaire*. But there is still no way to know how far it has gone toward the EU ideal. In this instance, Figure 9 represents this uncertainty equally well. It might be that the EU_P point has moved beyond K_P and possible union with the Kosovo win-

⁸³ The Conjecture states that a constraint placed upon a negotiator by a Level II actor can actually function as a bargaining advantage during the process of negotiating an agreement. It is discussed further in Chapter 1.

set into the realm of involuntary defection, because the Kosovars cannot deliver enough reform to satisfy the preconditions for a visa dialogue. If that has occurred, then the EU is in jeopardy of failing in its attempt to set Kosovo on the path to modern European statehood.

The EU is delivering its preconditions for Kosovo to begin its visa dialogue in a muddled fashion. Very unlike the ICTY, the EU is portraying its possible acceptance point of reforms in an imperfect manner. The Kosovo government has no idea how many and how great of reforms it needs to implement to begin a visa dialogue. The only thing known is the sector that needs reform. And when the EU does attempt to communicate its threshold of acceptance, it does so in such a vague manner that the reforms instituted by Kosovo might never be enough. For Kosovo it seems as if it is trying to hit a moving target, since every attempt at satisfactory reforms has failed. Such an involuntary defection scenario is a waste of time and money for Kosovo, because it is impossible for Kosovo to implement satisfactory reforms. Especially because this means that no matter the reforms, the EU will not offer visa-free travel to the Schengen zone.

The sovereignty of Kosovo is not fully accepted by all members of the EU and might account for the discrepancy in visa liberalization. If it were only those member states that did not recognize Kosovo as independent that are inhibiting the beginning of a visa dialogue, then Kosovo citizens ought to be allowed visa free travel to the EU as Serbian citizens. Since they accept that Kosovo is an integral part of Serbia then all peoples living in Kosovo are citizens of Serbia. The agreement that allows Serbian citizens to travel to the EU specifically forbids residents of Kosovo from doing so.⁸⁴ Kosovars can obtain Serbian passports, but

⁸⁴ "EU visa-free, but not for Kosovo residents." http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=07&dd=05&nav_id=60290, 5 July 2009.

through a special division of the Serbian Interior Ministry that gives different passports than those usually used by Serbian citizens.

The current situation speaks to reasons not completely tied to the non-recognizing states. The fact that Kosovo citizens are particularly excluded from using a potential Serbian passport to travel to the EU means that it is not merely those countries within the EU that do not accept Kosovo independence that are delaying the beginning of a visa dialogue. It would seem that they should support the use of Serb passports for Kosovars. Such an action would help to bolster Serbia's claim to the region. Thus the non-recognizing members of the EU should not, on principle, be averse to the idea of Kosovars traveling visa-free to the EU. They are not the sole reason for the current malaise of Kosovo's visa liberalization process.

The other side of the coin in the EU is those countries that do recognize the independence of Kosovo. They will not want visa liberalization at any cost, and would see the forced usage of Serbian passports to travel to the Schengen zone as contrary to their belief in the full independence of Kosovo. Thus within the Council there is a split among the members as to what policy they should pursue. The win-set that exists under such conditions cannot help but be unclear and imperfectly portrayed. An entity that cannot decide where its own ideal point is will also not be able to decide on a possible point either.

It is unclear why the EU does not give a straight indication for why the visa dialogue cannot start in Kosovo. It is not as if the dialogue is necessarily a promise of eventual visa liberalization, which usually comes with the roadmap. What the EU has decided to do instead is an almost informal dialogue that leaves both sides without a clear vision for moving forward. It might be that the EU, or certain member states, does not want to allow visa-free travel for the citizens of Kosovo. But such an intention would be myopic in the extreme and

threaten the success of the largest ESDP mission to date. EULEX has a vested interest in the success of the Kosovo project. It partially shares in the duties associated with sovereignty in Kosovo and has no clear reason for wishing Kosovo to have no path forward for visa liberalization.

Conclusion

The two examples discussed above, ICTY compliance and visa liberalization, offer glimpses into the way that international administrations can function effectively and the way that they might lead to a failure of complete transition to normal statehood. The failure of the EU to engage productively with Kosovo and the success of the ICTY in implementing its mandate is due to a disparity in institutional structure. The conclusion will also discuss some potential reasons that there is no movement one way or the other on visa liberalization and what the potential consequences of non-liberalization might be. First, I will look into what this new information might mean for this sort of application of two-level game theory in general.

The structure of the international administration in Kosovo and that of the international organizations themselves have lent themselves particularly well to the use of two-level game theory to understand their functioning. The basic idea of the win-set to describe the set of agreements that a given level of an organization will accept in a negotiation. The varied amount of levels upon which the concept of the win-set functions only compounds its theoretical power. It can give us a framework with which we can discuss large organizations while not losing the particularities of the organization. The EU is extremely complex with different parts of the organization operating in separate competencies that can make it difficult to assess the organization as a whole. Two-level game theory allows us to look at an organization as a sum of win-sets with the intersection of all of the win-sets as the overall organizational win-set. Without such a tool it is nearly impossible

to encompass an entire organization succinctly and in a fashion that is useful for simple study.

The win-set structure of the ICTY in the context of Kosovo is very determined; it is determined in the sense that there is no contraction of the win-set from level to level. Each level of the win-set structure of the ICTY clearly conveys the information given to it by the level above it. The win-set structure associated with visa liberalization is instead complicated by each successive level of the structure and constricted negatively. In their structure each level is much more indeterminate with respect to the win-set that they convey compared with the win-set from the ICTY.

The ICTY win-set starts when the ICTY decides to bring an indictment against a suspect on the judgment of the Prosecutor. The Prosecutor is appointed by the UNSC and is given a four year term of office that can be renewed. After the appointment there is no effective measure to remove a Prosecutor that is following the mandate of the ICTY except refusing to reappoint them. Consequently, there is no natural constituency for the Prosecutor to continuously satisfy during the process of filing an indictment. The Prosecutor has sole authority to issue indictments and has no constituency to which they are responsible and thus does not have to take into account constituents' win-set when making decisions on indictments.

In order to implement its decisions in Kosovo, the ICTY must enlist the support of the Council of the EU, which has been given without caveat. In most situations, when another level is added to the structure, the overall win-set of the organization would contract because both levels have an indeterminate win-set and their intersection is smaller than that of each individual. But the ICTY and the Council have a special relationship in which they have the

exact same win-set. On the ground, it is EULEX who receives its information for possible win-sets from the Council. While the added level of EULEX ought to contract the overall win-set as well, it also receives a singular win-set from the Council which cannot be contracted further. The singular win-set is nearly perfectly conveyed to all involved, from the ICTY all the way down to the EULEX and Kosovo governments. And thus the win-set structure of the ICTY can efficiently convey and implement its win-set because each level is determined by the one above it for its own win-set.

The indeterminacy of the win-set structure in the case of the European Commission and the Council of the EU is due to the institutional structure of the Commission and its Level I negotiators in Kosovo. The European Commission Liaison Office to Kosovo is the Level I negotiator for the visa liberalization negotiations. They are directly overseen by the Commission and are charged with implementing Commission and EU policy concerning enlargement and *acquis* implementation. The Commission meanwhile is composed of Commissioners that are appointed by their home countries, each country has one commissioner, and that must be approved by the Parliament of the EU.⁸⁵ Furthermore, the Parliament must approve a Commissioner and has the right to remove the Commissioners through censure, the Commission has a constituency in the Parliament.⁸⁶ A win-set that originated in the EC is negatively constricted by the time that it reaches the negotiations table in Kosovo because of all of the constituents that must be satisfied by an agreement. The same can be said of the Council with their constituencies in their home countries.

⁸⁵ McCormick, John. *Understanding the European Union: a Concise Introduction*. New York: Palgrave Macmillan, 2008., p. 74

⁸⁶ *Ibid.*, p. 84

Before a win-set on visa liberalization is even decided upon by the Commission and Council, it has been constricted because of the nature of their constituents. In order to make an agreement that is agreeable to his constituents, a Commissioner or Councilor must be able to satisfy both the Parliament and those responsible for his appointment in his home country. So the win-set of the individual is already constricted before the EC itself can decide upon the win-set. The overall EU win-set will be further constricted by the individual win-set imposed upon it by each Commissioner. By the time that the possible win-set is conveyed to the Liaison Office to Kosovo, it has been constricted from a theoretical win-set that includes all possible agreements.

The imperfect nature of the conveyance of the win-set leads to confusion as to where a possible agreement might be made. As we have seen, the possible point where the EU will begin a visa dialogue with Kosovo has changed continuously. Because of the imperfect conveyance of the possible point where each individual level will accept an agreement, each successive level is uncertain as to what their constituents will accept. This point is not in and of itself of great concern. The problem occurs when there are so many levels and constituents that must be satisfied that the entire win-set structure is obscured and no one, inside or outside the structure, is quite sure where an agreement will be made. This is where Kosovo is right now with respect to visa liberalization. It seems as if no one in the EU is sure if, when, or where an agreement to open a visa dialogue will be reached.

Furthering the difficulty associated with beginning the visa dialogue is the status of Kosovo's sovereignty in the eyes of the EU member states. On this issue the lack of a consensus within the Council has serious ramifications for the policies goals that the EU might successfully pursue. One reason that the ICTY case is so unambiguous for the Council

that compliance has been made mandatory for the authorities in Kosovo is that it does not pre-suppose that Kosovo is independent and is thus not a controversial cause to support. Contrarily, visa liberalization implicitly supports the sovereignty of Kosovo as an entity separate from Serbia, which the non-recognizing EU states refuse to do. This split at the highest levels in the EU causes the difficulty in conveying the win-set to the Level I negotiators, because there is no consensus as to what the win-set is. In order for the Council to issue a clear win-set, the issues involved must look beyond the status of Kosovo and allow for an agreement among the Council members. Following the argument further, we can assume that areas upon which Kosovo will be able to make progress are those not tied to the question of the status of Kosovo's sovereignty. Unfortunately, those areas that will bring Kosovo closer to EU membership are directly tied to the sovereignty of the state. As a consequence it seems as if Kosovo is not really on track for EU membership at all.

Using this theoretical framework we can discuss the reasons for why no win-set exists that would allow for the beginning of a visa dialogue, but cannot comment on specific reasons. The most that we can say using two-level game theory is that the structure of the system concerning Kosovo makes it nearly impossible to figure out where an agreement might be made without a resolution go the status question. I would like to put forward several reasons that might explain the lack of specific comment from the EU about visas and Kosovo.

One reason is that the Council does not want Kosovo to have visa-free travel to the Schengen zone. This desire is not as foolish as it might sound. At 0.7 percent of the population of Kosovo, the country had the highest proportion of asylum request by

population, and fifth by absolute numbers, of anywhere in the world to the EU in 2009.⁸⁷ Such pressures might be increased if the EU were to allow visa-free travel for Kosovar citizens. The fear of pressure is especially cogent when considering the anti-Eastern sentiment coming from many Western EU countries this past year and the forced return of many Roma from France to Eastern Europe.⁸⁸ But if it were the case that the EU did not want Kosovo to begin visa-free travel to the EU, the EU might as well say so. It would not cost the EU any to tell Kosovo that visa-free travel is not in their future. In fact, Kosovo might then be able to redirect funds that are now going to fully update their visa practices for future liberalization to other projects that are more worthwhile and have an actual chance of success.

Another reason is that all or some of the EU might actually want Kosovo to have visa-free travel but cannot effectively implement a strategy for such a policy. This scenario seems the most logical and plausible. The asylum requests discussed above tell only part of the story. Some countries feel the pinch of Eastern and non-European illegal residents more than others. Greece, France, Italy, Germany, Spain and the Netherlands had the highest rate of removed illegal aliens in 2006.⁸⁹ These countries will not want to increase the number of unwanted aliens in their countries by making it simpler for other poor Eastern Europeans to enter. For the other European countries, where illegal residents are not as much of an issue, they may want to allow the citizens of Kosovo to travel freely to the Schengen zone but

⁸⁷ European Stability Initiative, *op. cit.*, p. 17

⁸⁸ In 2010 France had been severely reprimanded by other members of the EU for expelling thousands of Roma from Bulgaria and Romania that had been living in make-shift camps on the outskirts of cities. Critics cite the freedom of movement laws that pertain to all citizens of EU member states that France may have broken. Such sentiments tap into a growing fear among states bordering the EU, especially Turkey, that Western countries do not want further enlargement. And that, in fact, the previous enlargement may prove too difficult to assimilate into the EU system and threaten their chances at EU membership.

⁸⁹ Trauner and Imke, *op. cit.*, p. 432

cannot override the will of those countries that do not. Such a situation within the EU leads to the confusion in the win-sets that were talked about above and seems to be a further reason for Kosovo having no actual plan for future visa liberalization.

The problem though is that a Kosovo without a clear plan, one way or the other, toward visa liberalization with the EU is not without consequences. First, by treating Kosovo differently from the other countries in the region, the EU is creating a second class of countries within Europe: one with liberalized visa rules and one without. While it is true that the situation in Kosovo is different from that of other countries, if the EU wants a Kosovo that can function as a modern state in the future, it must start to treat Kosovo like one now. At the present rate it is becoming a state that is under international administration, but that international actors cannot effectively deal with. The fact that the EU cannot have effective relations with a territory that is under their supervision and that is supposedly on track for EU membership in the future will call into question the entire project of a common foreign policy. At present, the EU can only deal with Kosovo on issues that have no clear implications for sovereignty in either direction.

Furthermore, the success of the largest ESDP mission to date is at stake. The goal of EULEX is to provide Kosovo with functioning institutions that can negotiate and have regular relations with other countries. The EU must be able to aid EULEX complete its mission of capacity building without constantly being caught up in the trap of the final status of Kosovo. If Kosovo cannot even function properly with the EU, with whom they share some responsibilities of sovereignty, with who else in the world will they?

In this era of international administration, the factors that have made some areas of the administration better and others worse are easily teased out. The ICTY is successful in

implementing its mandate because its win-set is narrow and perfectly conveyed. The EU's win-set, on the other hand, is so imperfectly defined that we cannot even tell if it is narrow or wide, though we assume that it is fairly narrow. More of the policies that the international actors that currently administer Kosovo are pursuing fall into categories more similar to that of visa liberalization than ICTY compliance, because the track is to bring Kosovo closer to the requirements of the *acquis communautaire*. And will thus be difficult to implement in Kosovo because of the confusion of the status of Kosovo's sovereignty.

The future of an internationally administered Kosovo is thus bleak indeed. The fact that more of the imposed reforms are unclear due to the structures of the institutions that implement them means that more reforms will follow the path of visa liberalization and fall into a limbo of reform. If the EU is serious about reforming Kosovo and turning it into a modern state, the reforms that it imposes must have a clear and narrow win-set. Accordingly, the EU will need to speak with a singular voice more akin to that of the ICTY than those that it has used thus far.

The unitary structure of the ICTY gives it the ability to convey the initial win-set of the Prosecutor down to Kosovo on the ground nearly perfectly. The EU, on the other hand, has a more fractured structure. The fractured nature adds uncertainty to the size and placement of the overall EU win-set on visa liberalization. Because there is no certainty of the placement of the win-set, no agreement has the sure ability of being reached between the Kosovars and the EU on the issue of visa liberalization. Moreover, issues similar to visa liberalization that have a clear effect on the sovereignty issue will have the same roadblocks.

Future forms of international administration should attempt to avoid the pitfalls that are now plaguing the EU in Kosovo. Since the structure of the international administration,

and indeed the EU itself, is so complex and multi-tiered, the overall win-set of the EU can be concealed by disagreements within the Union. The issue of Kosovo's sovereignty is, at the moment, threatening to continue the process of international administration there indefinitely due to the inability of the EU to come to consensus on important reforms that need to be implemented in Kosovo.

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