

Kosovo: independence vs. legality?

*Assessing the extent of the legality of the independence
of Kosovo from international and European law*

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1 Introduction

On 17 February 2008, the Provisional Institutions of Self-Government Assembly of Kosovo adopted a Declaration of Independence¹ (*Appendix A*). The adoption of this Declaration of Independence meant that Kosovo was no longer a part of Serbia. This was not the first time the Kosovo Assembly declared the independence of Kosovo. The first attempt was proclaimed on 7 September 1990², but this attempt was not recognized by a great amount of other states, so no further consequent action was taken at that point.

Giving a complete overview of the history of Kosovo would lead to over a thousand pages, but before coming to my research question it is essential to know something about the history of Kosovo to get a better understanding of the situation in which the Declaration of Independence was invoked, so therefore I will give a short overview of the most important facts to later assess this Declaration³.

Before the urge to become independent from Serbia, Kosovo has been through a turbulent history⁴. In medieval times it was part of the Serbian state, with a majority of Serbian citizens living in the province of Kosovo. After decades of Ottoman rule when Kosovo was part of the Ottoman Empire, Serbia wanted to restore its power in Kosovo. As from 1912 Kosovo became part of Serbia again and in 1916 became within Serbia part of Yugoslavia. As time went by, the majority of Serbian citizens was replaced by a new majority of citizens in Kosovo; the Albanians. The Albanians favored an independent Kosovo as a sovereign state within the Federation of Yugoslavia over Kosovo being a Serbian province. In the Balkan War, things were relatively calm in Kosovo. After signing of the Dayton Treaty, things got out of hand. The Serbia rulers used excessive and disproportionate measures to stop the tensions between Serbs and Albanians, which

¹ <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (28-03-2008)

² H. Clark, *Civil Resistance in Kosvo*, London: Pluto Press 2000

³ http://www.kosovo.net/sk/history/kosovo_origins/default.htm (22-04-2008)

⁴ C. Rogel, Kosovo: *Where It All Began*, International Journal of Politics, Culture and Society, Vol. 17, No. 1

led to an escalation of the violations⁵. In the first months of 1999 international parties and Yugoslavia held a conference in Rambouillet, France. After a month of negotiation, Yugoslavia rejected the agreement. This rejection was followed by the Kosovo War. A major part of this Kosovo War was the NATO bombings on Yugoslavia, Operation Allied Force, which lasted from 23 March until 9 June⁶. The war ended on 9 June, with the signing of a Military Technical Agreement⁷, the so-called Kumanovo Agreement, which enabled a NATO-led Kosovo Force (KFOR) to enter the province of Kosovo to provide security. A day later, on 10 June, the UN Security Council passed Resolution 1244⁸(Appendix B), which was about postwar settlements. In 2006 negotiations over the finality of the Resolutions started. These negotiations led to the so-called Ahtisaari Plan, named after Martti Ahtisaari, the Special Envoy of the Secretary-General on Kosovo's future status, who was appointed to find a suitable solution for all parties. This Ahtisaari Plan proposed supervised independence for the province. This plan had to be approved by all parties, but was rewritten several times to get support from Russia, who would veto the plan in the UN Security Council when it was not acceptable to both Belgrade and Pristina. Agreement was not reached and on 17 February 2008, Kosovo declared its independence from Serbia.

A question that arises after this short overview of Kosovo's history is whether or not the Provisional Institutions of Self-Government Assembly of Kosovo were allowed to declare Kosovo's independence. General opinion in this case is divided. A lot of countries recognized the new sovereign state of Kosovo instantly, where some took their time to do some research before recognizing Kosovo. States that have formally recognized Kosovo at this moment⁹¹⁰ are, on date of recognition, Costa Rica, the United

⁵ <http://www.nato.int/kosovo/history.htm#B> (20-05-2008)

⁶ <http://www.nato.int/kosovo/all-frce.htm#pb> (20-05-2008)

⁷ <http://www.nato.int/kosovo/docu/a990609a.htm> (20-05-2008)

⁸ <http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> (22-04-2008)

⁹ <http://www.kosovothanksyou.com/> (23-04-2008)

¹⁰ <http://en.wikipedia.org/wiki/Image:CountriesRecognizingKosovo.png> (21-05-2008)

States of America, France, Afghanistan, Albania, Turkey, the United Kingdom, Australia, Senegal, Malaysia, Germany, Latvia, Denmark, Estonia, Italy, Luxemburg, Peru, Belgium, Poland, Switzerland, Austria, Ireland, Sweden, the Netherlands, Iceland, Slovenia, Finland, Japan, Canada, Monaco, Hungary, Croatia, Bulgaria, Liechtenstein, Republic of Korea, Norway and the Marshall Islands. Other states however, are not sure which way they should go, whether they would recognize Kosovo or not. They have not yet taken a stand on the matter.

When we take a better look at these countries which have or have not (yet) formally recognized an independent and sovereign Kosovo, it shows the high division of the countries within international organizations. The European Union is not allowed to recognize states. Recognition of new states is something to decide on by the Member States individually. Only by unanimity would this have been possible, but unanimity could not be reached¹¹. At this moment nineteen out of twenty-seven EU Member States have formally recognized Kosovo and two out of three of the candidate countries did so too.

NATO sticks to its Military Technical Agreement with Serbia¹². At this moment twenty of twenty-six Member States have formally recognized Kosovo together with two of the three candidate countries.

When it comes to the United Nations, the division shows off most. With Russia being one of the five permanent members of the Security Council, it will be difficult for Kosovo to gain membership of the United Nations, because approval by the Security Council is needed for admission to the United Nation¹³. For this UN recognition unanimity of the five permanent members is needed. These are besides Russia; France, the United

¹¹ <http://www.euractiv.com/en/enlargement/europe-split-kosovo-independence/article-170353> (06-05-2008)

¹² <http://www.nato.int/docu/pr/2008/p08-025e.html> (21-05-2008)

¹³ Charter of the United Nations, Chapter II, Article 4

Kingdom, the United States and China¹⁴. As seen above, France, the United Kingdom and the United States of America already have formally recognized Kosovo. China has expressed its concern and Russia has rejected the Declaration of Independence. The latter has even stated to use its veto-power to prevent recognition. So, the five permanent members are highly divided on the matter. Besides the permanent members, also the votes of five of the ten non-permanent members are needed. These fluctuate, so it depends on the states at this position of this quota whether or not five out of ten can be reached. At this moment 40 out of 192 of the UN Member States have formally recognized Kosovo as an independent and sovereign state.

The question to recognize or not to recognize Kosovo is more or less a question of legality. The countries that agree with the Kosovo government and find the Declaration of Independence a legal act have recognized Kosovo as a sovereign state. The definition of sovereignty I will use is the definition of the Oxford Dictionary; Sovereignty means: *"a territory existing as an independent state"*¹⁵. The countries that back the position of Belgrade that the Declaration of Independence is not based on legality did not recognize Kosovo. They hold, like Serbia, the opinion that the Declaration of Independence is a violation of the UN Security Council Resolution 1244¹⁶ and that therefore Kosovo can't be an independent sovereign state and that the independence has been declared only unilateral.

Therefore, it seems interesting to assess the legality of this independence and that is what the subject of this assessment will be. I will explore the legality of the independence from both an international and a European law perspective. I will provide a theoretical framework in the next chapter, also from both these perspectives and a two-fold analysis, which is also based on both perspectives.

¹⁴ Charter of the United Nations, Chapter V, Article 23

¹⁵ Shorter Oxford English Dictionary on Historical Principles, Sixth edition, 2007, pp. 2932

¹⁶ <http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43159> (06-05-2008)

I will do this based on one research question and three sub questions. The first sub question will be answered by the theoretical framework. The second and third sub question will be answered in the two analyses I will do and will be based on, first, international law and, second, European law.

The research question will be:

To what extent is the legality of the independence as declared by Kosovo authorities on February 17 2008 explainable from international and European law?

The sub questions I will use to help me through the research process are the following;

- 1. Which perspectives of European and international law can be distinguished with relation to legal statehood?*
- 2. To what extent is the Ahtisaari Plan a legal act seen from an international law perspective?*
- 3. Where is Kosovo to be placed on a continuum of the EU political admittance criteria?*

This research will be done in the form of a document analysis. I will review different books and articles on international and European law, international treaties, EU treaties, the Charter of the United Nations and the Ahtisaari Plan before answering my questions in the conclusion.

In the next chapter I will set out my theoretical framework. This will be about the different perspectives of international and European law with relation to statehood that can be distinguished nowadays.

This theoretical framework will be the basis for my analysis of the Ahtisaari Plan¹⁷ (*Appendix C*) in the fourth chapter. I will provide an answer to the question why the Ahtisaari Plan could not be the resolution for the problems in Kosovo based on the elements of statehood.

In the last chapter before my conclusions I will set out the independence of Kosovo on a continuum. This continuum is based on the extent on which the admittance criteria of the European Union are present in the Constitution of the Republic of Kosovo, which I will first set out, before putting Kosovo on a position on this continuum.

¹⁷ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008)

2 Theoretical Framework

States are the most important subject of international and European law. Therefore it is important to define what a state is, or should be and what the requirements are for calling an entity a state. Both international and European law therefore use definitions of what statehood is and what the requirements are which should be met.

In this chapter I will provide a theoretical framework that enables me to answer the sub questions in the following analyses. The purpose of an analysis is to compare the theory to the practice. The theoretical framework that will be provided in this chapter is the theory to which the example of the practice, the two documents in the analyses, will be compared. So, when the analyses are about explaining Kosovo's independence from both international and European law and I want to formulate conclusions on this matter, it is important to have a well-defined image of the perspective in which these analyses should be placed. Knowledge of the theory is needed to say something about the situations in practice; you need to know the rules before you can play the game.

The structure of this chapter will be explained in the following paragraph.

2.1 Structure

In this chapter I will first take a closer look at the different perspectives of statehood independence that can be distinguished nowadays in international and European law in order to be able further on to analyze first the Ahtisaari Plan and second to place Kosovo on a continuum based on the EU political admittance criteria. When a state becomes an EU Member State it fulfills the core principles of the EU: the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law¹⁸. So, when a state enters the EU, the EU sees this state as a state that also respects these values and is therefore seen as a state that is 'EU-worthy'. The criteria for

¹⁸ http://europa.eu/eur-lex/pri/en/oj/dat/2002/c_325/c_32520021224en00010184.pdf (08-07-2008)

admittance therefore will provide a good image to see to what extent a state already is 'EU-worthy'.

The research question I will use in this chapter is:

Which perspectives of European and international law can be distinguished with relation to legal statehood?

The chapter will consist of two parts. I choose this structure to be this way because Kosovo certainly is a part of the international community and it just might be or become a part of the European community. Therefore it seems reasonable to analyze first, the legality of the independence of Kosovo on an international level by the perspective of international law and second on a European level seen from European law. Furthermore the first analysis is about Kosovo on the point it has now reached. The second analysis also pays attention to what Kosovo could become in the future.

The first part provides a theoretical framework in order to be able to answer the second sub question and therefore will be primarily about statehood independence based on international law. I will assess the sources of international law that provide information about statehood independence.

The second part of this chapter provides the theoretical framework for the second part of the analysis; the third sub question. Placing Kosovo on a continuum based on EU political admittance criteria requires a theoretical framework on which this continuum is based. In order to be able to answer this question I will examine what the EU sees as criteria for admittance based on the treaties and other forms of European Law.

2.2 International law: statehood

Statehood independence can be seen in various ways. The method I will use is not the only one possible. It would also have been possible to analyze the concept of statehood independence by examining for example the Charter of the United Nations (..) or exploring the North Atlantic Treaty to be able to see what in the international community

can be seen as statehood independence. I however choose to do my research based on the elements of statehood as described in this theoretical framework.

On the other side, when assessing statehood independence, it is also possible to analyze different subjects. I choose to do my research on a nation state level, but NGO's, such as the Third World Network, and supranational organizations and institutions could also be subject to a research in this field. So the research I did is not the only way to assess this subject.

When assessing statehood independence, many definitions can be found in books and articles that have been written about international public law. Mostly, they see statehood independence as a combination of various elements. Some theories use only three elements, others use eight. The difference in the number of elements is the broadness of the definition of statehood independence. When eight elements are used, these elements include the three elements of another theory and even provide five more. For a complete overview I will list all found elements.

2.2.1 Elements of statehood

The order in which the elements are listed is based on the elements that are mentioned most in the literature I used. Used books and articles are the Montevideo Convention¹⁹ of 1933, which lists four elements of a state as a person of international law in article 1; population, territory, government and the capacity to enter into relations with other states. The Montevideo Convention was originally an Inter-American treaty and is not officially part of the Charter of the United Nations, neither is it ratified by numerous states as the official requirements of statehood. But it is still the classification that is used most of the times, mostly because it is the "best-known formulation of the basic criteria for statehood"²⁰. Other used theories are 'Principles of Public International Law' by Ian

¹⁹ <http://www.yale.edu/lawweb/avalon/intdip/interam/intam03.htm#art2> (25-06-2008)

²⁰ J. Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979

Brownlie²¹, the 'Encyclopedia of Public International Law'²² and 'International Law' by Antonio Cassese²³.

I Population

The concept of population is used to identify a group of humans, animals or other entities as belonging to each other. In international law, by population is meant a group of people that live in the same land or region. On the level of statehood, a population lives on the same territory. The concept of territory will be explained as the second concept of statehood.

When some people decide to settle at a certain place, that does not automatically make them a population. Therefore, a nation is needed. The relation between a population and a nation is the fact that the population are those people who live in the nation and feel a certain commitment to the nation. A population shares common beliefs and values like language. Who decides what exactly a population is and when a group of people is called a population is insecure. Both populations and nations have developed over years and are still developing. The most common perception is that all people living on the territory of a nation belong to the population.

The Montevideo Convention refers not only to population, but specifies this element to permanent population. The word permanent contributes the element of time to the element of population. What is meant is that the population is not going to fall apart any time soon, but that one can expect that that specific population is persistent.

In the Encyclopedia of Public International Law the so-called 'doctrine of the three elements' of Georg Jellinek is mentioned²⁴. According to Jellinek a state only consists if

²¹ Ian Brownlie, *Principles of Public International Law*, Sixth edition, Oxford University Press, 2003

²² Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*, Book 10, Elsevier Science Publishers, 1987

²³ Antonio Cassese, *International Law*, Second edition, Oxford University Press, 2005

it is established that a population lives on a territory under an organized government. The territory and organized government are elements that will be discussed later on, but also Jellinek sees population of one of the criteria of statehood. According to the Encyclopedia of Public International Law, state population is the most important element of statehood. This is because the other elements, territory and government, are there to serve the population of the state, so they are subordinate to the element of population.

II Territory

The word territory refers to a well-defined area. The meaning of territory in international law is the area that is inhabited by the population of a state. The territory is the area that covers the state area.

A territory is marked by borders. These borders define what does and what does not belong to the state's territory. These borders were drawn ages ago by governments, kings, emperors or church leaders and many are heavily fought about. Especially when populations are separated by territories and, subsequently, where groups of people live on one territory.

The Montevideo Convention does not only speak of a territory, but specifies this element to a defined territory. What is meant by this defined territory is the existence of an area with defined frontiers²⁵.

The Encyclopedia of Public International Law argues that state territory is a very important element of statehood and of international law, because government is entitled to take measures in that specific area²⁶. The appointed government had exclusive

²⁴ Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*, Book 10, Elsevier Science Publishers, 1987, pp. 424

²⁵ Ian Brownlie, *Principles of Public International Law*, Sixth edition, Oxford University Press, 2003, pp. 71

²⁶ Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*, Book 10, Elsevier Science Publishers, 1987, pp. 425

jurisdiction over its territory, which means that the government possesses sovereignty inside its territory. I will discuss the concept of sovereignty as a separate element of statehood independence later on.

III Government

A government from a national point of view consists of persons that have been democratically chosen to represent the population inhabiting a territory. Seen from an international law point of view a government is seen as an independent body that enforces power over a population on a territory²⁷.

What a government is is decided by the population of the territory. They have decided, mostly by a constitution, what they find a democratic way to have themselves represented by a group of people, democratically chosen by all people and what the rights and obligations are for these people and to what extent they can enforce rules on persons. There are many different forms of organizing a government which all have their advantages and disadvantages²⁸.

A government is organized with a goal in mind. This goal is to guarantee common goods. Common goods are things like freedom and equity. The group of people that are chosen aim, on the order of the population, at achieving these goods. Here fore institutions are needed that help aiming at and achieving the common goods. These institutions are mostly divided in three so-called powers. These are an executive, legislative and judicial power. They come from the Trias Politica theory of Montesquieu²⁹. According to this theory the power of the group of chosen people is equally divided over these three powers, which makes sure that it is not possible for one group to gain all power and could harm the democracy and its principles.

²⁷ Wouter G. Werner en Ramses A. Wessel, *Internationaal en Europees Recht; Een verkenning van grondslagen en kenmerken*, Europa Law Publishing, Groningen, 2005, pp. 202

²⁸ Robert A. Dahl, *On Democracy*, Yale University Press, 2000

²⁹ Montesquieu, *De l'esprit des lois*, 1748

Ian Brownlie in his book *Principles of Public International Law* considers effective government as an element of statehood. The existence of effective government according to him contains centralized administrative and legislative organs within a stable political community³⁰.

In the *Encyclopedia of Public International Law* the element of government in international law is considered to only exist "if the population, living on a delimited territory, is subject to the authority of a government which exercises jurisdiction corresponding to the requirements of international law"³¹. An essential factor for government is that the government has to be independent of other, foreign, governments in exercising its power.

Antonio Cassese sees a government as a "central structure capable of exercising control over a human community living in a given territory". This body has to be different and independent from other states.

IV Capacity to enter into relations with other states

The capacity to enter into relations with other states is the last element of the Montevideo Convention. Many other theories do not see this as an element of statehood and stop after the distinction of population, territory and government, because they don't see the capacity to enter into relations with other states as an element of statehood. Werner and Wessel argue that this is not a requirement of statehood, but that it should be seen the other way around; the capacity to enter into relations with other states is a result of the first three elements, not an element at itself³². I agree with them on this point, therefore I

³⁰ Ian Brownlie, *Principles of Public International Law*, Sixth edition, Oxford University Press, 2003, pp. 71

³¹ Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*, Book 10, Elsevier Science Publishers, 1987, pp. 426

³² Wouter G. Werner en Ramses A. Wessel, *Internationaal en Europees Recht; Een verkenning van grondslagen en kenmerken*, Europa Law Publishing, Groningen, 2005, pp. 201

will not use this as a rigid element of statehood, but I will say something about this point in my analysis of the Ahtisaari Plan.

V Independence

According to Ian Brownlie, independence is the “decisive criterion of statehood”³³. He mentions the theory of Guggenheim. Guggenheim distinguishes two quantitative tests based on which he distinguishes states from other legal orders. The first test is about the degree of centralization of its organs that is not found elsewhere. The second test is about the territory in which the state has a monopoly on executive and legislative issues.

Ingrid Detter de Lupis in her book ‘International Law and the Independent State’ defines independence in regard to territory as “The right to exercise therein, to the exclusion of any other state, the functions of a state”³⁴.

VI Sovereignty

The concepts of sovereignty and independence are often used as synonyms. The difference between the two lies in the fact that sovereignty is about the independence authority and independence about not being dependent of another state. The Encyclopedia of Public International Law provides a definition of sovereignty: “Whether a political community commanding public power is not, as of law, subject to a higher authority and, thus, independent of foreign authority”³⁵.

According to Ian Brownlie sovereignty is about the extent to which a state has or has not granted “extensive extra-territorial rights” to another state³⁶.

³³ Ian Brownlie, *Principles of Public International Law*, Sixth edition, Oxford University Press, 2003, pp. 71

³⁴ Ingrid Detter de Lupis, *International Law and the Independent State*, Third edition, Gower Publishing Company, Aldershot, 1989, pp. 4

³⁵ Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*, Book 10, Elsevier Science Publishers, 1987, pp. 397

³⁶ Ian Brownlie, *Principles of Public International Law*, Sixth edition, Oxford University Press, 2003, pp. 76

Tony Honoré in his book *About Law: An Introduction* provides two short and different definitions of sovereignty. According to him a state is sovereign 1) when it is independent in international law and 2) when it has a legislature that has the power to make law³⁷.

VII Self-declared

This element is not an official element of statehood and is not always used that way, but Werner and Wessel consider it to be an important element of statehood³⁸ and because the unilateral declaration of independence of Kosovo which plays an important role in my analysis, I choose to add this as an element to the list of elements of statehood. The meaning of this element is whether or not a political community has or has not claimed its states independence. Other states could regard a political community that complies with all other criteria as a state, but it seems wrong to call a political community a state, when the political community itself doesn't regard itself being a state.

2.3 European law: EU admittance

Since the foundation of the European Coal and Steel Company in 1951 it has expanded to what we know nowadays as the European Union, a political and economic union that consists of twenty-seven Member States. A big enlargement in comparison with the six founding Member States. Besides the twenty-seven Member States there are candidate-countries. These countries wish to be a Member State of the European Union, but before they are admitted, they have to fulfill the admission criteria that were set by the European Union.

³⁷ Tony Honoré, *About Law: An Introduction*, Oxford University Press, 1995, pp. 112

³⁸ Wouter G. Werner en Ramses A. Wessel, *Internationaal en Europees Recht; Een verkenning van grondslagen en kenmerken*, Europa Law Publishing, Groningen, 2005, pp. 206

These criteria can be divided into three categories, as set out by the European Council in Copenhagen in 1993³⁹. Therefore, the criteria are mostly known as the Copenhagen Criteria. The division can be made into economic criteria, political criteria and the ability to accept the Community acquis.

In this part of my theoretical framework I will focus on these political admittance criteria, because these are most relevant to the research question when assessing the legality of Kosovo's independence. I will discuss them in this chapter and analyze them in chapter four by putting Kosovo on a continuum to see to what extent Kosovo already does or does not already fulfill these criteria.

2.3.1 Political admittance criteria of the European Union

The political criteria for EU admission can be found in the text of the European Council meeting in Copenhagen in 1993. In this article, four criteria are set out. These are, first, the stability of institutions guaranteeing democracy, second, the rule of law, third, human rights and fourth, respect for and protection of minorities⁴⁰. I will discuss these elements separately.

I Stability of the institutions guaranteeing democracy

What is meant by institutions that can guarantee democracy is the institutions that are involved in democracy. Democracy in a state can be achieved by institutions with power over citizens that exist based on democratic principles. In most cases when talking about the institutions that are based on democratic principles, the Trias Politica of Montesquieu is what is meant. The division between executive, legislative and judicial power guarantees the principles of representative democracy that few are elected by many to represent their opinions and preferences. When organized by the theory of the Trias Politica a concentration of power with one institution is prohibited. In other words; the

³⁹ http://europa.eu/scadplus/glossary/accesion_criteria_copenhagen_en.htm (07-07-2008)

⁴⁰ http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf (07-07-2008)

power between the institutions is in balance. This way, the stability of democracy itself and the institutions can be guaranteed.

II Rule of law

The most fundamental principle of this element for democratic system is the primacy of the law. This means that both state and citizens are bound by law; no one is above the law. According to the European Commission this is best done in a system of representative government where this government draws its authority from the sovereignty of the people⁴¹. In this so-called Commission Communication the European Commissions lists some implications of the rule of law;

1. a legislature respecting and giving full effect to human rights and fundamental freedoms;
2. an independent judiciary;
3. effective and accessible means of legal recourse;
4. a legal system guaranteeing equality before the law;
5. a prison system respecting the human person
6. a police force at the service of the law;
7. an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society

III Human rights

According to the European Commission in its Commission Communication of 12 March 1998, human rights are “universal, indivisible and inter-dependent”. This means that human rights are to be respected everywhere, are for every human and are reciprocal. In the European Union, human rights are guaranteed based on the Charter of Fundamental Rights of the European Union⁴². Examples of human rights are the right to life, the equality before law and the right of education.

⁴¹ http://ec.europa.eu/external_relations/human_rights/doc/comm98_146_en.pdf (07-07-2008)

⁴² http://www.europarl.europa.eu/charter/pdf/text_en.pdf (07-07-2008)

IV Respect for and protection of minorities

A minority is defined as "a small group of people differing from the rest of a community in ethnic origin, religion, language, or culture"⁴³. All EU Member States have to do with minorities. The respect for and protection of these minorities is very important for the EU, because many disputes and large-scale violations wherein minorities were involved happened in the past. The EU wants to put a hold to this. Therefore an organization has been established; the Organization for Security and Co-operation in Europe (OSCE). The OSCE has an approach concerning minorities. This approach is "to identify - and seek early resolution of - ethnic tensions and to set standards for the rights of persons belonging to minority groups"⁴⁴.

An overlap between this element and the third element, human rights can be seen in article 1 of the Framework Convention for the Protection of National Minorities (FCNM)⁴⁵.

2.4 Conclusion

In this chapter I have given an overview of the theories that are used in international and European law for statehood and political EU accession. Based on this theoretical framework I will be able to assess the Ahtisaari Plan by the theory of statehood and put Kosovo on a continuum based on the fulfillment of the EU political admittance criteria in the Constitution of the Republic of Kosovo. For a more graphic image of the elements and criteria mentioned in this chapter I made a schematic overview⁴⁶. By having provided the theoretical framework I now can answer the sub question of this chapter.

The sub question of this chapter was:

⁴³ *Shorter Oxford English Dictionary*, Sixth edition, Oxford University Press, 2007, pp. 1791

⁴⁴ <http://www.osce.org/activities/13045.html> (07-07-2008)

⁴⁵ <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm> (07-07-2008)

⁴⁶ See: Appendix C

Which perspectives of European and international law can be distinguished with relation to legal statehood?

The answer to this question is bipartite. Seen from an international law perspective the answer to the question of perspectives of legal statehood is the elements of statehood that are distinguished in various theories. These elements are, most important, population, territory and government and also the capacity to enter into relations with other states, independence, sovereignty and the fact whether or not the statehood is self-declared. The other side of the answer, the European side is that the perspectives of legal statehood can be assessed by the political EU admission criteria.

What should be considered before analyzing the documents in chapter four and five is whether or not the basis that has been provided here for the analyses, the theoretical framework is for both the international law and the European law perspective should be seen as an 'Idealtyp'. The concept of the Idealtyp is introduced by the sociologist Max Weber. An Idealtyp is not something achievable, despite to what is often said, but more a theory to which to practice can be compared. The best example of an Idealtyp is the concept of bureaucracy. Organizations can be compared to this Idealtyp to determine the extent to what this organization can be called bureaucratic.

The theoretical framework on both perspectives cannot be seen as an Idealtyp as introduced by Max Weber. The first perspective, the elements of statehood all have to be fulfilled in order to be a state. Not all elements are very explicit. Therefore it is possible for states to make their own filling-in of the element, when still fulfilling it. Of course, it depends on the way you define the concept of a state. As we saw in this chapter, there are many different opinions and theories on this matter. But when analyzing a document on the basis of this theoretical framework, all elements have to be fulfilled in order to fulfill to be called a state. It is not just a reflection of the elements.

The second perspective, the EU political admittance criteria, is not an Idealtypen either. In order to become an EU Member State all criteria have to be fulfilled. When this is not the case, a state cannot become an EU candidate country.

So, in both cases the theoretical framework provides a theory to what the practice can be compared. It is possible to see to what extent all elements and criteria are fulfilled and determine Kosovo's position, but in order to fulfill the whole perspective, all elements and criteria have to be fulfilled.

In the following chapter I will present a methodological chapter in which I explain the method I will use for the upcoming assessments in the next chapters. I will explain my choices and explain how the operationalizations of the elements listed in this chapter can be seen in the documents of my analyses.

3 Methodology

In this chapter I will show the method I will use to be further on able to analyze the documents that will give an overview of Kosovo's legal statehood independence based on my theoretical framework and will show to what extent Kosovo can be seen as a state from an EU perspective. The most important question in this chapter is how the theory as provided in the theoretical framework can be recognized in the documents of analysis and how these answers should be formulated and interpreted.

First I will explain the documents I have chosen for my analysis. I will show their relevance to the subject and explain how I have come to this choice.

Second I will explain how I will do this analysis by making the connection between the theoretical framework and the documents of the analysis. I will explain how I will do this.

By these two steps a clear view will be given to make the connection between the theoretical framework and the analysis. When this is clear I will show the type of measurement I will use to interpret the outcomes of the analyses.

3.1 Chosen documents

As said before my analysis will be a document analysis and will be twofold. First I will explain the Ahtisaari Plan on the basis of the criteria for statehood independence. Second I will put Kosovo on a continuum based on the EU political admittance criteria. I will explain my choices for these documents in the following paragraphs.

3.1.1 Analysis 1: The Ahtisaari Plan

In my first analysis I will analyze the Ahtisaari Plan⁴⁷ on the basis of the criteria of statehood as described in the first part of my theoretical framework. The reason I choose the Ahtisaari Plan for my analysis is because of the clear overview that is given in the report. Relevant issues are mentioned point by point. Therefore it will be possible for me to analyze this report on the basis of the first part of my theoretical framework; the criteria for statehood.

The Ahtisaari Plan is suitable for being analyzed on the basis of the criteria of statehood because the Ahtisaari Plan provides a plan for Kosovo in which is explained how Kosovo should be best organized. This organization contains the elements of statehood. Therefore an analysis can be made of the Ahtisaari Plan.

3.1.2 Analysis 2: The Constitution of the Republic of Kosovo

The second analysis contains an analysis of the Constitution of the Republic of Kosovo⁴⁸ on the basis of the theory set out in the second part of the theoretical framework; the EU political admittance criteria. The Constitution of the Republic of Kosovo contains all elements that Kosovo wants to achieve and aims for. I will analyze the constitution by revising to what extent the elements of the EU political admittance criteria play a part in the Constitution of the Republic of Kosovo. Therefore the Constitution is relevant to the sub question of the chapter. The reason I choose the Constitution of the Republic of Kosovo for my analysis is because of the fact that it is a very new document. The constitution came into effect on 15 June 2008, which is at this moment just a month ago. Therefore it seems interesting to use this document for my analysis, merely because it reflects Kosovo's purposes in a good way.

⁴⁷ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008)

⁴⁸ <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (17-07-2008)

3.2 Theory in analyses

As stated above the most important question in this chapter is how the theory as provided in the theoretical framework can be recognized in the documents of analysis. In order to do this properly some selection criteria have to be worked out. In this paragraph I will do so. Because the twofold character of the analyses, I will divide this paragraph into two sub paragraphs.

3.2.1 Analysis 1: Selection criteria

In this paragraph I will go by every element as mentioned in the first part of the theoretical framework. I will make them ready for the assessment in the analyses in the next two chapters.

With regard to the element of *population*, the selection criterion will be whether or not in the Ahtisaari Plan is spoken of a well-defined Kosovo population and to what extent the characteristics of this element as spoken of in the first part of the theoretical framework are present in the Ahtisaari Plan. So, does the Ahtisaari Plan provide a definition for the population of Kosovo?

The second element of statehood I distinguished in my theoretical framework is *territory*. The question here is whether or not the Ahtisaari Plan has made provisions for a clear-cut area that will compound the population of the Republic of Kosovo. Most important characteristic of this element is the extent to which borders are mentioned in the Ahtisaari Plan.

The third element is *government*. The question here is not only whether or not there is a government in Kosovo, but whether or not this government is democratically chosen and whether or not the three powers are divided over three several institutions. The Ahtisaari Plan has to be very specific on this element in order to be able to fulfill this requirement.

Capacity to enter into relations with other states is the fourth element. I will not be very strict on this element, because of the reason explained in the theoretical framework, but it

seems very interesting to see what is stated in the Ahtisaari Plan about Kosovo's ability to enter into relations with other states.

Another very important element is the fifth element; *independence*. The element of independence is fulfilled when the state itself makes the decisions concerning the state. Especially in the case of Kosovo is, together with the next element, very important.

After independence comes the element of *sovereignty*. This element contains parts of the element of independence, but the big difference is that fact that sovereignty not only states that a state makes its own decisions, but also that no other state has power over the state in question.

The last element is the element that requires that the state calls itself a state. The statehood has to be *self-declared*. When a state does not consider itself a state, statehood is not an issue.

The extent to which these elements are present in the Ahtisaari Plan in the meaning that has just been posed in this paragraph determines whether or not Kosovo can be called a state based on the elements of statehood that can be distinguished in international law.

3.2.2 Analysis 2: Selection criteria

In this paragraph I will do the same as I did in the previous paragraph. I will make the elements ready for assessment in the analysis. The second analysis is about the question where Kosovo can be put on a continuum based on the political admittance criteria of the European Union. The theory of these elements is already described in the theoretical framework. The document that will be used for the analysis is the Constitution of the Republic of Kosovo. In this paragraph I only provide the selection criteria for the elements that have to be fulfilled in the constitution. Based on the extent of the presence of these elements in this document I will be able to put Kosovo on the continuum.

The first element in EU political admittance is *stability of the institutions guaranteeing democracy*. The criterion for this element is that this element has to be mentioned specifically in the Constitution of the Republic of Kosovo.

Rule of law is the second element of the EU political admittance criteria. This criterion too has to be mentioned specifically in the document of analysis. The fact that no person stands above the law is very important. Also the implications of the rule of law as described in the theoretical framework should be present in the constitution.

The third element is *human rights*. These too should have a very important place in the constitution. Not only should human rights be mentioned, but there should also be listed how human rights are implemented in the constitution.

The last element of the EU political admittance criteria is *respect for and protection of minorities*. Especially in Kosovo where minorities have been a reason of conflict, this element is very important and should be enlisted in the constitution.

3.3 Method of analysis

When the question is 'to what extent' something is relevant or when something has to be put on a continuum, a certain type of measurement should be included to specify what the outcomes of an analysis mean.

Variables of the research are the elements of both subjects of analysis. The measurement level is numerical, because all variables are interval variables. For the measurement I will use a four-point scale to show to extent to which an element is fulfilled by the document of analysis. Scoring on this scale varies from one to four with meaning:

1. - Element is not fulfilled
2. - Element is barely fulfilled
3. - Element is nearly fulfilled
4. - Element is entirely fulfilled

When scoring the elements this way, it is possible to make clear assumption in the conclusions, first, about the extent to which Kosovo can be seen as a state in the Ahtisaari Plan based on the elements of statehood that can be distinguished in international law and, second, about the position of Kosovo seen from the Constitution of the Republic of Kosovo based on the EU political admittance criteria.

3.4 Conclusion

In this chapter I answered the question how answers to the sub questions in the two analyses should be formulated. This formulation will be done based on the four-point scale I provided in this chapter. Based on of these four options a more well-defined answer can be formulated that answers to the extent to which the element or criterion has been fulfilled.

4 Analysis 1: The Ahtisaari Plan

In this chapter I will make my first of two analyses. This first analysis will be about the Ahtisaari Plan⁴⁹ based on the theoretical framework as provided in chapter two; the elements of statehood.

As already said in the introduction, the Ahtisaari Plan comes from Martti Ahtisaari who was appointed as Special Envoy for the future status process for Kosovo by the UN Secretary-General, Ban Ki-Moon. Previous to the Ahtisaari Plan, Martti Ahtisaari tried talks between Serbia and Kosovo. When these failed, he wrote the Ahtisaari Plan, which purpose was to “determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground⁵⁰”. Unfortunately, the Ahtisaari Plan was vetoed by Russia in the UN Security Council.

As explained in the previous chapter, I will analyze the Ahtisaari Plan by observing the extent to what the elements of statehood are present in the Ahtisaari Plan. To be able to interpret the results in the conclusion, I will measure the presence of the elements by rating them. This will provide an answer to the question whether or not the Ahtisaari Plan can be seen as a legal act, whereby the legality is to be assessed by the elements of statehood.

The sub question I will use in this chapter is the sub question already proposed in the introduction:

To what extent is the Ahtisaari Plan a legal act seen from an international law perspective?

⁴⁹ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008)

⁵⁰ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008), pp. 2

First, I will now begin with the assessment of the Ahtisaari Plan on the elements of statehood. Second I will rate the presence of the elements and I will end this chapter with a conclusion.

4.1 Presence of the elements and rating

The Ahtisaari Plan consists of several statements and recommendations explicated by sixteen paragraphs, including the conclusion.

In the analysis, I will use the same order as I used in the theoretical framework.

4.1.1 Population

The document does not provide a clear definition of the population of Kosovo. The concept itself is mentioned several times, mostly in combination with the denomination of the groups living in Kosovo, i.e. Kosovo Serbs, Kosovo Albanians and other minorities. The reason that the population is not very well-defined might be that when Kosovo is mentioned in the plan, what is meant is Kosovo as maybe defined in another UN document. Resolution 1244 does not provide an answer to the question what the UN sees as the population of Kosovo. Implications of the absence of this element for the analysis are that the strength of the conclusion that is going to be made is not as strong as when this element was present in the document.

So, this element is not entirely fulfilled in the Ahtisaari Plan. Population is merely understood as the people living on the Kosovo territory.

Because of the absence of a clear definition of the Kosovo population the rating on this element will be a 2: barely fulfilled

4.1.2 Territory

In the document is not spoken of a definition for the territory of Kosovo. The territory is supposed to be taken as known. But especially when the stakes are high from both sides,

it seems important to make sure that all parties have the same territory in mind, when talked about the territory belonging to Kosovo. This element is similar to the previous element; population. Implications for the absence of this element to the conclusion is that the absence of this element too, will make the strength of the conclusion weaker to what it would have been when this element had been present in the document.

So, the element is used in the document, but not well-defined.

Therefore, the rating will be a 2: barely fulfilled

4.1.3 Government

Government is an element that is frequently mentioned in the Ahtisaari Plan. Kosovo possesses its own institutions that manage internal affairs, following from page three: "Kosovo institutions have been created and developed and have increasingly taken on the responsibility of managing Kosovo's affairs"⁵¹. From point 10 in the document follows that Kosovo's institutions are based on democratic principles. In the second part of the Annexes, special provisions are made about decentralization and a justice system for Kosovo. There also is a definition provided: "Kosovo shall be a multi-ethnic society, governing itself democratically and with full respect for the rule of law and the highest level of internationally recognized human rights and fundamental freedoms"⁵²

So, the element is fulfilled in the document. A definition is provided and several paragraphs mention the presence of institutions.

Therefore, I will rate this element with a 4: the element is entirely fulfilled.

⁵¹ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008), pp. 3

⁵² <http://www.unosek.org/docref/report-english.pdf> (27-05-2009), pp. 6

4.1.4 Capacity to enter into relations with other states

Like the previous element, this element too, is mentioned in the Ahtisaari Plan. It is said in point nine that Kosovo has not yet been able to enter into relations with other state due to its uncertain political status⁵³. In the annexes is a paragraph dedicated to Kosovo in future international relations⁵⁴. Also, in point 10 of the plan it is stated that independence of Kosovo is the best option for its long-term relationship with Serbia. If things would continue as they were before Resolution 1244, this relationship would have been harmed.

So, the element has been fulfilled in the document and will therefore be rated with a 4: the element is entirely fulfilled.

4.1.5 Independence

The independence element is a special one considering the Ahtisaari Plan and is quite easy to assess. ~~The major recommendation in the Ahtisaari Plan about Kosovo's future is:~~ "Kosovo's status should be independence, supervised by the international community"⁵⁵. This means that Kosovo is independent in principle, but there is always someone watching and checking whether or not all is under control. This someone will be the so-called 'International Civilian Representative'. ~~I defined independence more or less as the~~ ability to make decision concerning internal affairs. When holding on to this definition, this element is fulfilled.

Therefore, this element will be rated with a 4: entirely fulfilled.

4.1.6 Sovereignty

The coherence between sovereignty and independence is already being made clear in the theoretical framework in the methodology chapter. Sovereignty goes a step further than independence and requires not only the ability to make its own decisions, but adds the

⁵³ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008), pp. 3

⁵⁴ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008), pp. 8

⁵⁵ <http://www.unosek.org/docref/report-english.pdf> (27-05-2008), pp. 2

fact that no other state, organizations or institution has the power to have a say about the state's internal affairs. As the major recommendation in the Ahtisaari Plan points out, the element of independence is fulfilled, but the element of sovereignty is not. This is because there is an institution, the UN, represented by the 'International Civilian Representative' that has supervision over Kosovo and its decisions made by its institutions. Therefore, this element is not fulfilled at all.

The rating therefore will be a 1: not fulfilled.

4.1.7 Self-declared

The element that requires that a state sees itself as a state and announces it to the rest of the world is not mentioned in the Ahtisaari Plan. The document was meant as a possible outcome that was suitable for all parties. Because a one-sided independence of Kosovo was not a suitable option, the Ahtisaari Plan does not mention it. This element is therefore not fulfilled. So, also this element is not entirely fulfilled in the document. This harms the strength of the conclusion, but as already stated in the theoretical framework, this element is not seen as an element of statehood by all theorists and scholars. It does harm the conclusion in my research, because I decided to use this as an element, but that would not have been the case if this was taken out of consideration.

This means that this element will be rated with a 1: not fulfilled.

4.2 Conclusion

In this chapter I analyzed the Ahtisaari Plan based on the elements of statehood as distinguished in international law. The sub question for this chapter was:

To what extent is the Ahtisaari Plan a legal act seen from an international law perspective?

The answer to this question is not easy. When assessing the most used elements for statehood, population, territory and government, these are not all entirely fulfilled. Other elements however, like independence and the capability to enter into relations with other states are entirely fulfilled. So it is not possible to make radical assumptions. The answer to the sub question in this chapter is not unambiguous.

As already said in the first part of the theoretical framework, this research could also have been done when taking another type of organization as a subject. This research has been done on the level of the nation-state, but when taking other rules and guidelines into account, independence is also assessable from for example the level of a supranational organization.

Based on the outcomes of the analysis of this chapter, the answer to the sub question is; not entirely. The extent of the Ahtisaari Plan being a legal act was based on the fulfilling of the elements of statehood as distinguished in international law. In the theoretical framework and the methodology chapter I stated that the answer **could only be 'yes'** in case of fulfilling all elements.

So, when we look at the extent of the Ahtisaari Plan being a legal act based on the elements of statehood as distinguished in international law the conclusion is that based on this theoretical framework the Ahtisaari Plan can not be seen entirely as a legal act. It does contain several elements that are fulfilled, but the requirement was that all elements should be fulfilled and this requirement is not fulfilled.

The next chapter will be about the second analysis; the position of Kosovo on the continuum based on the presence of the EU political admittance criteria **in Kosovo's** constitution. After this chapter, I will be able to provide an answer to the research question in the conclusion.

5 Analysis 2: The Constitution of the Republic of Kosovo

In this chapter I will assess the Constitution of the Republic of Kosovo⁵⁶⁵⁷. I will do this based on the theoretical framework I provided in the second part of chapter two; the EU political admittance criteria.

The structure of this chapter will be the same as the structure of the previous chapter, analyzing the Ahtisaari Plan. By rating them, I will assess the presence of the EU political admittance criteria in the Constitution of the Republic of Kosovo in the same order as I described them in the theoretical framework.

The sub question for this chapter is:

Where is Kosovo to be placed on a continuum of the EU political admittance criteria?

In the conclusion I will provide an answer to this question.

5.1 Presence of the criteria and rating

The Constitution of the Republic of Kosovo came into effect on 15 June 2008. Before this existence of this constitution Kosovo was under supervision of the United Nations based on Resolution 1244. Also during the period that the independence already had been declared, but when a constitution had not yet come into effect Kosovo was governed by the resolution⁵⁸.

The intention of this paragraph is to assess the presence of the EU political admittance criteria in the document, which is the Constitution of the Republic of Kosovo. After

⁵⁶ <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (17-07-2008)

⁵⁷ Not as an appendix to this research due to the great amount of pages of the document

⁵⁸ <http://www.kushtetutakosoves.info/?cid=2,1> (27-07-2008)

assessing each criterion, I will rate this criterion based on the rating-criteria as provided in the methodology chapter.

5.1.1 Stability of the institutions guaranteeing democracy

The criterion about the stability of the institutions guaranteeing democracy follows for the largest part from the fourth, sixth and seventh chapter of the constitution: Assembly of the Republic of Kosovo, Government of the Republic of Kosovo and Justice System. These represent the three elements of the Trias Politica: legislative, executive and judicial. These chapters do not specifically refer to the criterion. All institutions that one could list when assessing the institutions guaranteeing democracy are present, but the criterion itself is not mentioned in the constitution.

Because the criterion is not mentioned specifically as required, but all elements are elaborated, I will rate this criterion with a 3: nearly fulfilled

5.1.2 Rule of law

This criterion is, in contrast to the previous criterion, specifically mentioned in the document. The third paragraph of the first chapter states that Kosovo and the Kosovo institutions have “full respect for the rule of law”⁵⁹. Article seven also mentions the rule of law: “The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy” The principle of equality before the law is mentioned several times too, which strengthens this criterion, because equality before the law of all citizens is one of the elements listed in the theoretical framework, because it was mentioned in the Commission Communication.

⁵⁹ <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (17-07-2008), pp. 1

Therefore it is easy to see that this criterion is fulfilled. It will be rated with a 4: entirely fulfilled.

5.1.3 Human rights

The human rights that apply in Kosovo are mentioned specifically in article 22. Article 2 also mentions the human rights: "The Republic of Kosovo exercises its authority based on the respect for human rights and freedoms of its citizens and all other individuals within its borders". Also article seven: "The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy" and article seventeen: "The Republic of Kosovo participates in international cooperation for promotion and protection of peace, security and human rights" Article 21 provides the General Principles for the Republic of Kosovo. In these General Principles the human rights of its citizens take an important place. These General Principles are similar to the guidelines of the Commission Communication of the European Commission as described in the theoretical framework.

Article 22 contains a list of international agreement and instrument that guarantee human rights and fundamental freedoms. The first international agreement on the list for example is the 'Universal Declaration of Human Rights'. Even more examples can be found in the document, so what can be said about this is that the Republic of Kosovo finds these human rights very important and guarantees them for its citizens.

The criterion is obviously fulfilled and will therefore be rated with a 4: entirely fulfilled.

5.1.4 Respect for and protection of minorities

In this same list as described in the assessment of the previous criterion is one of the documents the 'Council of Europe Framework Convention for the Protection of National Minorities'. The respect for and protection of minorities is further specified in article 58, point 2, which states that "The Republic of Kosovo shall promote a spirit of tolerance,

dialogue and support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages⁶⁰.

This criterion too is fulfilled in the document and will therefore be rated with a 4: entirely fulfilled.

5.2 Conclusion

The aim of this chapter was to put Kosovo on a continuum based on the presence of the EU political admittance criteria in the Constitution of the Republic of Kosovo. The sub question this chapter was:

Where is Kosovo to be placed on a continuum of the EU political admittance criteria?

When all criteria had been fulfilled the answer would have been easy: based on the EU political admittance criteria Kosovo could become a candidate country. But in the case of the Constitution of the Republic of Kosovo not all criteria are entirely fulfilled. The first criterion, the one that requires the stability of the institutions guaranteeing democracy is not entirely but nearly fulfilled.

Therefore, when putting Kosovo on the continuum, it should be placed on 90 percent of the line. This 90 percent consists of 25 percent for every entirely fulfilled criterion and 15 percent for the first criterion that is nearly fulfilled. This 90 percent is a good reflection of Kosovo's position on the continuum.

The fact that the stability of the institutions guaranteeing democracy is not entirely fulfilled might be not so strange. The Republic of Kosovo and its institutions do not have a long history when it comes to the existence of the republic itself and its institutions, so it is difficult proving the stability of these institutions. In a few years, this stability will

⁶⁰ <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (17-07-2008), pp. 16

probably be easier to prove, which changes the place on the continuum in the direction of EU admittance.

6 Conclusion

The purpose of this last chapter is to provide an answer to the research question, which can be answered based on the answers of the sub questions previously dealt with in the last two chapters. This research question, as proposed in the introduction was:

To what extent is the legality of the independence as declared by Kosovo authorities on February 17 2008 explainable from international and European law?

Already in the introduction it was needed to give some explanation on the central concepts in the research question. Legality in this research was used as a concept following to the sub questions for the analyses. The meaning of legality in this research will be explained further on in this chapter. Independence in this research is the independent variable in the research. Independence in this case is the independence of Kosovo as declared by Kosovo authorities on February 17 of this year. It mostly meant its independence from Serbia, but also independence from every other country by having its own Constitution, governmental institutions and jurisdiction. So, independence in the research question means the independence of Kosovo and independence in the first part of the theoretical framework and in the first analysis is statehood independence, which lists the elements of statehood independence that should be fulfilled in order to be a state seen from the theory on this matter as described in the theoretical framework.

The answers of the sub questions provide us with a bit of an ambiguous image. The first analysis was the one about the Ahtisaari Plan. The Ahtisaari Plan was written by Martti Ahtisaari, the Secretary General Special Envoy on Kosovo's future. The purpose of the Plan was to find a suitable plan for all parties, to stop the violence in Kosovo. The Plan proposed supervised independence for Kosovo. The analysis, based on the elements of statehood, states that the Ahtisaari Plan cannot entirely be seen as a legal act. Not all elements were fulfilled and scored a four out of four on the scale as provided in the methodology chapter.

The second analysis was about the Constitution of the Republic of Kosovo. Its purpose was to put Kosovo on a continuum based on the political admittance criteria of the European Union. These so-called EU political admittance criteria are the criteria in one of three fields in which certain criteria have to be fulfilled before a country can become a Member State of the European Union. The outcome of this analysis was that Kosovo does not yet fulfill all criteria, but can do so in the future. Most criteria in this case were fulfilled, but in order to become an EU Member State all criteria, besides criteria in other fields, have to be fulfilled.

Based on these answers it is possible to answer the research question. I will answer the research question in two parts. The first part contains the international and European law constituent and the second part is about the legality. This second part can only be answered when the answer to the first part is clear. That is the reason for this split in the research question.

The first part of the research question, about international and European law was answered based on the theoretical framework in the two analyses. The international part was explained by whether or not the elements of statehood being present in the Ahtisaari Plan. The European part consisted of the presence of the EU political admittance criteria in the Constitution of the Republic of Kosovo. Both analyses have provided an answer to the sub questions. Therefore, the answer to the first part of the research question is that there is an international and European basis. The fact whether or not the concept of legality can be explained from this basis is the second part of the research question.

The concept of legality in this research can be answered by the question whether or not the requirement of the international and European law theoretical perspective was fulfilled. As stated above, the answer to both sub questions of the analyses was a bit ambiguous, but explainable. So the answer to the extent of the legality is not a clear 'yes' or 'no', but has to be defined more specific somewhere in between.

Therefore, the answer to the research question is that both international and European law provide a basis from which the legality of the independence of Kosovo can be explained. The extent of the legality cannot fully be explained by international and European law based on my theoretical framework, because based on the theoretical framework I provided it appears that both the elements of statehood in the Ahtisaari Plan and the EU political admittance criteria in the Constitution of the Republic of Kosovo are not entirely fulfilled. Therefore the legality is not entirely explainable by this theoretical framework.

The reason that the legality of the independence of Kosovo cannot entirely be explained by international and European law within this theoretical framework can be twofold. The first reason can be that the legality cannot be fully explained by international and European law alone, but that more sources are needed to explain the legality of the independence. International and European law in this case make a good start, but when one wants to fully explain the legality of the independence of Kosovo, more research in different fields and in other documents should be done.

Second, it is possible that the legality of the independence of Kosovo is fully explainable by international and European law, but not within the theoretical framework I provided in this research. As already said in the introduction, legality is a very broad concept, which can be explained from many fields, but within one field also in various ways. When another path was chosen in the theoretical framework, a slightly different answer would have been possible.

Now, what does this research learn us? This research has made an attempt to show one way in which the legality of the independence of Kosovo can be seen; from international and European law. Seen from these disciplines it is possible to partly assess the legality of the independence of Kosovo. The most important outcome of the research is that legality in fact really is the broad concept it is said to be. Seen from different disciplines and different points of view within these disciplines it is made clear that different answers could come up and it seems very interesting to investigate what these may be and whether or not it is possible to give an overall answer to the question of legality.

Also, there are certain things that do not seem right when you first look at them. The fact that the Ahtisaari Plan suggests supervised independence for Kosovo seems contradictory. When one thinks of the concept of independence, this independence does not have a supervisor. When taking a look at the elements of statehood we see that supervised independence is not per se harmful to the concept of independence but means that Kosovo can be independent but not sovereign, according to the theoretical framework. But can a country that is in name independent really be seen as independent when its sovereignty is at stake?

Second, when looking at the EU political admittance criteria it might seem strange that the institutions guaranteeing democracy are not very well-defined. On the one hand it seems reasonable that there is room for a country's own completion of this criterion, but on the other hand is the democratic principle very important for the European Union and should therefore be well-defined. What is right in this case?

The question posed in the title was 'Kosovo: independence vs. legality?' The purpose of this question was to raise the question that these two concepts excluded each other. After the research it is clear that the two do not exclude each other, but that independence is a concept that can be analyzed by examining the extent of its legality.

Therefore, the battle between independence and legality remains without a winner.

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Appendix A Kosovo Declaration of Independence

Assembly of Kosovo,

Convened in an extraordinary meeting on February 17, 2008, in Pristine, the capital of Kosovo,

Answering the call of the people to build a society that honors human dignity and affirms the pride and purpose of its citizens,

Committed to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness,

Dedicated to protecting, promoting and honoring the diversity of our people,

Reaffirming our wish to become fully integrated into the Euro-Atlantic family of democracies,

Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation,

Recalling the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,

Grateful that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration,

Proud that Kosovo has since developed functional, multi-ethnic institutions of democracy that express freely the will of our citizens,

Recalling the years of internationally-sponsored negotiations between Belgrade and

Pristina over the question of our future political status,

Regretting that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders,

Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,

Determined to see our status resolved in order to give our people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of our society,

Honoring all the men and women who made great sacrifices to build a better future for Kosovo,

Approves

KOSOVA DECLARATION OF INDIPENDENCE

1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

3. We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and

welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

4. We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process.

5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability.

6. For reasons of culture, geography and history, we believe our future lies with the European family. We therefore declare our intention to take all steps necessary to facilitate full membership in the European Union as soon as feasible and implement the reforms required for European and Euro-Atlantic integration.

7. We express our deep gratitude to the United Nations for the work it has done to help us recover and rebuild from war and build institutions of democracy. We are committed to working constructively with the United Nations as it continues its work in the period ahead.

8. With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbors. Kosovo shall also refrain from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

11. We express, in particular, our desire to establish good relations with all our neighbours, including the Republic of Serbia with whom we have deep historical, commercial and social ties that we seek to develop further in the near future. We shall continue our efforts to contribute to relations of friendship and cooperation with the

Republic of Serbia, while promoting reconciliation among our people.

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

Appendix B UN Security Council Resolution 1244 (1999)

Adopted by the Security Council at its 4011th meeting,
on 10 June 1999

The Security Council,

Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Recalling its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999,

Regretting that there has not been full compliance with the requirements of these resolutions,

Determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes,

Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party,

Recalling the statement made by the Secretary-General on 9 April 1999, expressing concern at the humanitarian tragedy taking place in Kosovo,

Reaffirming the right of all refugees and displaced persons to return to their homes in safety,

Recalling the jurisdiction and the mandate of the International Tribunal for the Former Yugoslavia,

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance

by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo,

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2;
2. Welcomes the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demands the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation;
3. Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized;
4. Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2;

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;
6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;
7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;
8. Affirms the need for the rapid early deployment of effective international civil and security presences to Kosovo, and demands that the parties cooperate fully in their deployment;
9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:
 - a. Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;
 - b. Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;
 - c. Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
 - d. Ensuring public safety and order until the international civil presence can take responsibility for this task;

- e. Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;
 - f. Supporting, as appropriate, and coordinating closely with the work of the international civil presence;
 - g. Conducting border monitoring duties as required;
 - h. Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;
10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;
11. Decides that the main responsibilities of the international civil presence will include:
- a. Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
 - b. Performing basic civilian administrative functions where and as long as required;
 - c. Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
 - d. Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
 - e. Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

- f. In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;
 - g. Supporting the reconstruction of key infrastructure and other economic reconstruction;
 - h. Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;
 - i. Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
 - j. Protecting and promoting human rights;
 - k. Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;
12. Emphasizes the need for coordinated humanitarian relief operations, and for the Federal Republic of Yugoslavia to allow unimpeded access to Kosovo by humanitarian aid organizations and to cooperate with such organizations so as to ensure the fast and effective delivery of international aid;
13. Encourages all Member States and international organizations to contribute to economic and social reconstruction as well as to the safe return of refugees and displaced persons, and emphasizes in this context the importance of convening an international donors' conference, particularly for the purposes set out in paragraph 11 (g) above, at the earliest possible date;
14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia;
15. Demands that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization as laid down by the head of the international security presence in consultation with the Special Representative of the Secretary-General;
16. Decides that the prohibitions imposed by paragraph 8 of resolution 1160 (1998) shall not apply to arms and related matériel for the use of the international civil and security presences;

17. Welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation;
18. Demands that all States in the region cooperate fully in the implementation of all aspects of this resolution;
19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;
20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;
21. Decides to remain actively seized of the matter.

Annex 1

Statement by the Chairman
on the conclusion of the meeting of the G-8 Foreign Ministers
held at the Petersberg Centre on 6 May 1999

The G-8 Foreign Ministers adopted the following general principles on the political solution to the Kosovo crisis:

- Immediate and verifiable end of violence and repression in Kosovo;
- Withdrawal from Kosovo of military, police and paramilitary forces;
- Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;
- Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;

- The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian aid organizations;
- A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA;
- Comprehensive approach to the economic development and stabilization of the crisis region.

Annex 2

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

1. An immediate and verifiable end of violence and repression in Kosovo.
2. Verifiable withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.
3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.
4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.
5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.

6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:
 - Liaison with the international civil mission and the international security presence;
 - Marking/clearing minefields;
 - Maintaining a presence at Serb patrimonial sites;
 - Maintaining a presence at key border crossings.
7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.
8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.
9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.
10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements, which are specified in the footnote below.(1) A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo:

Withdrawal

- Procedures for withdrawals, including the phased, detailed schedule and delineation of a buffer area in Serbia beyond which forces will be withdrawn;

Returning personnel

- Equipment associated with returning personnel;
- Terms of reference for their functional responsibilities;
- Timetable for their return;
- Delineation of their geographical areas of operation;
- Rules governing their relationship to the international security presence and the international civil mission.

Notes

1. Other required elements:

- A rapid and precise timetable for withdrawals, meaning, e.g., seven days to complete withdrawal and air defence weapons withdrawn outside a 25 kilometre mutual safety zone within 48 hours;
- Return of personnel for the four functions specified above will be under the supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands);
- Suspension of military activity will occur after the beginning of verifiable withdrawals;
- The discussion and achievement of a military-technical agreement shall not extend the previously determined time for completion of withdrawals.

Appendix C Theoretical Framework: schematically

Theoretical Framework: schematically	
International law: Elements of statehood	European law: EU political admittance criteria
<i>1. Population</i>	<i>1. Stability of the institutions guaranteeing democracy</i>
<i>2. Territory</i>	<i>2. Rule of law</i>
<i>3. Government</i>	<i>3. Human rights</i>
<i>4. Capacity to enter into relationships with other states</i>	<i>4. Respect for and protection of minorities</i>
<i>5. Independence</i>	
<i>6. Sovereignty</i>	
<i>7. Self-evoked</i>	

Appendix D The Ahtisaari Plan

United Nations S/2007/168

Security Council

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Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council

Pursuant to the statement of the President of the Security Council dated 24 October 2005 (S/PRST/2005/51), by which the Security Council requested that the Secretary-General provide regular updates on progress in determining Kosovo's future status, and in accordance with resolution 1244 (1999), I have the honour to convey herewith the report of the Special Envoy of the Secretary-General on Kosovo's future status and, in an addendum, the Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) prepared by my Special Envoy for the future status process for Kosovo, Martti Ahtisaari.

Having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement.

I should be grateful if you would bring these documents to the attention of the members of the Security Council.

(Signed) Ban Ki-moon

Report of the Special Envoy of the Secretary-General on Kosovo's future status

Recommendation: Kosovo's status should be independence, supervised by the international community

1. In November 2005, the Secretary-General appointed me as his Special Envoy for the future status process for Kosovo. According to my terms of reference, this process should culminate in a political settlement that determines the future status of Kosovo. To achieve such a political settlement, I have held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year. My team and I have made every effort to facilitate an outcome that would be acceptable to both sides. But after more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status.

2. Throughout the process and on numerous occasions, both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence. Even on practical issues such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, conceptual differences – almost always related to the question of status – persist, and only modest progress could be achieved.

3. My mandate explicitly provides that I determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground. It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

4. Nevertheless, resolution of this fundamental issue is urgently needed. Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future

status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.

5. The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence.

Reintegration into Serbia is not a viable option

6. A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs. This difficult relationship was exacerbated by the actions of the Milosevic regime in the 1990s. After years of peaceful resistance to Milosevic's policies of oppression — the revocation of Kosovo's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life — Kosovo Albanians eventually responded with armed resistance. Belgrade's reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention of the North Atlantic Treaty Organization (NATO), culminating in the adoption of resolution 1244 (1999) on 10 June 1999.

7. For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia — however notional such autonomy may be — is simply not tenable.

Continued international administration is not sustainable

8. While UNMIK has made considerable achievements in Kosovo, international administration of Kosovo cannot continue. Under UNMIK authority, Kosovo institutions have been created and developed and have increasingly taken on the responsibility of managing Kosovo's affairs. This has set into motion a dynamic political process, which has reinforced the legitimate expectations of the Kosovo people for more ownership in, and responsibility for, their own affairs. These expectations cannot be realized within the framework of continued international administration.

9. Further, while UNMIK has facilitated local institutions of self-government, it has not been able to develop a viable economy. Kosovo's uncertain political status has left it unable to access international financial institutions, fully integrate into the regional economy or attract the foreign capital it needs to invest in basic infrastructure and redress widespread poverty and unemployment. Unlike many of its western Balkans neighbours, Kosovo is also unable to participate effectively in any meaningful process towards the European Union — an otherwise powerful motor for reform and economic development in the region and the most effective way to continue the vital standards implementation process. Kosovo's weak economy is, in short, a source of social and political instability, and its recovery

cannot be achieved under the status quo of international administration. Economic development in Kosovo requires the clarity and stability that only independence can provide.

Independence with international supervision is the only viable option

10. Independence is the only option for a politically stable and economically viable Kosovo. Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia.

11. While independence for Kosovo is the only realistic option, Kosovo's capacity to tackle the challenges of minority protection, democratic development, economic recovery and social reconciliation on its own is still limited. Kosovo's political and legal institutions must be further developed, with international assistance and under international supervision. This is especially important to improve the protection of Kosovo's most vulnerable populations and their participation in public life.

12. Kosovo's minority communities — in particular the Kosovo Serbs — continue to face difficult living conditions. The violence perpetrated against them in summer 1999 and in March 2004 has left a profound legacy. While Kosovo's leaders have increased their efforts to reach out to Kosovo Serbs and to improve implementation of standards, protecting the rights of minority communities requires their even greater commitment. At the same time, Kosovo Serbs need to engage actively in Kosovo's institutions. They must reverse their fundamental position of noncooperation; only with an end to their boycott of Kosovo's institutions will they be able to protect effectively their rights and interests.

13. I therefore propose that the exercise of Kosovo's independence, and its

fulfilment of the obligations set forth in my Settlement proposal, be supervised and supported for an initial period by international civilian and military presences. Their powers should be strong but focused in critical areas such as community rights, decentralization, the protection of the Serbian Orthodox Church and the rule of law. These powers should be exercised to correct actions that would contravene the provisions of the Settlement proposal and the spirit in which they were crafted. Recognizing Kosovo's current weaknesses, the international community's intensive engagement should extend also to institutional capacity-building. I envisage that the supervisory role of the international community would come to an end only when Kosovo has implemented the measures set forth in the Settlement proposal.

14. Notwithstanding this strong international involvement, Kosovo's authorities are ultimately responsible and accountable for the implementation of the Settlement proposal. They will succeed in this endeavour only with the commitment and active participation of all communities, including, in particular, the Kosovo Serbs.

Conclusion

15. Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.

16. For over a year, I have led the political process envisaged in resolution 1244 (1999), exhausting every possible avenue to achieve a negotiated settlement. The irreconcilable positions of the parties have made that goal unattainable. Nevertheless, after almost eight years of United Nations administration, Kosovo's status must be urgently resolved. My recommendation of independence, supervised initially by the international community, takes into account Kosovo's recent history;

the realities of Kosovo today and the need for political and economic stability in Kosovo. My Settlement proposal, upon which such independence will be based, builds upon the positions of the parties in the negotiating process and offers compromises on many issues to achieve a durable solution. I urge the Security Council to endorse my Settlement proposal. Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history – one that is based upon peace, stability and prosperity for all.

Annex

Main provisions of the Comprehensive Proposal for the Kosovo Status Settlement

I. General

1. The aim of the Comprehensive Proposal for the Kosovo Status Settlement is to define the provisions necessary for a future Kosovo that is viable, sustainable and stable. It includes detailed measures to ensure the promotion and protection of the rights of communities and their members, the effective decentralization of government, and the preservation and protection of cultural and religious heritage in Kosovo. In addition, the Settlement prescribes constitutional, economic and security provisions, all of which are aimed at contributing to the development of a multiethnic, democratic and prosperous Kosovo. An important element of the Settlement is the mandate provided for a future international civilian and military presence in Kosovo, to supervise implementation of the Settlement and assist the competent Kosovo authorities in ensuring peace and stability throughout Kosovo. The provisions of the Settlement will take precedence over all other legal provisions in Kosovo.

II. Provisions of the Settlement

2. **Kosovo's governance.** The Settlement defines the basic framework for Kosovo's future governance. Kosovo shall be a multi-ethnic society, governing itself democratically and with full respect for the rule of law and the highest level of internationally recognized human rights and fundamental freedoms. Kosovo shall adopt a constitution to enshrine such principles. While the Settlement does not

prescribe a complete constitution, it defines key elements that must form part of that constitution. Kosovo shall have the right to negotiate and conclude international agreements, including the right to seek membership in international organizations.

3. Rights of communities. With respect to the protection and promotion of community rights, the Settlement addresses key aspects to be protected, including culture, language, educations and symbols. Albanian and Serbian shall be the two official languages of Kosovo, while other community languages — such as Turkish, Bosnian and Roma — shall have the status of languages in official use. To ensure adequate representation of communities in public life, the Settlement defines specific representation mechanisms for key institutions. Communities that are not in the majority in Kosovo shall continue to be guaranteed representation in the Kosovo Assembly. To protect their rights in the legislative process, the Settlement also provides that key laws of particular interest to communities may only be enacted if a majority of their representatives present and voting in the Kosovo Assembly agree to their adoption.

4. Decentralization. The extensive decentralization provisions are intended to promote good governance, transparency, effectiveness and fiscal sustainability in public service. The proposal focuses in particular on the specific needs and concerns of the Kosovo Serb community, which shall have a high degree of control over its own affairs. The decentralization elements include, among other things: enhanced municipal competencies for Kosovo Serb majority municipalities (such as in the areas of secondary health care and higher education); extensive municipal autonomy in financial matters, including the ability to receive transparent funding from Serbia; provisions on inter-municipal partnerships and cross-border cooperation with Serbian institutions; and the establishment of six new or significantly expanded Kosovo Serb majority municipalities.

5. Justice system. The Settlement includes specific provisions to ensure that the justice system is integrated, independent, professional and impartial. It provides for

mechanisms to achieve a justice system that is inclusive of all communities, and in which the judiciary and prosecution service reflect the multi-ethnic character of Kosovo. Moreover, the Settlement provides for, and is premised upon, the access to justice of all persons in Kosovo.

6. Protection and promotion of religious and cultural heritage. The Settlement places great emphasis upon ensuring the unfettered and undisturbed existence and operation of the Serbian Orthodox Church in Kosovo. The Church and its internal organization shall be recognized explicitly by the Kosovo authorities, its property shall be inviolable, and it shall enjoy tax and customs duty privileges. Protective zones shall be created around more than 40 key religious and cultural sites. Without prejudice to ownership of the property in protective zones, specific restrictions shall apply to activities within those zones to guarantee the peaceful existence and functioning of major religious and cultural sites. NATO shall also provide additional physical security for selected sites, until such time as the military presence decides the conditions have been met for a transfer of their protection responsibilities to the Kosovo Police Force.

7. Returns/protection of property. All refugees and internally displaced persons from Kosovo shall have the right to return and reclaim their property and personal possessions based upon a voluntary and informed decision. The Settlement reaffirms the principle that displaced persons shall be able to return to a place of their choice in Kosovo, and not only to their original place of residence. The Settlement also calls upon Kosovo and Serbia to cooperate fully with each other and the International Committee of the Red Cross to resolve the fate of missing persons.

8. Economy. The Settlement includes specific provisions designed to promote and safeguard sustainable economic development in Kosovo. The Settlement prescribes transparent procedures to settle disputed property claims and for a continued privatization process, both with substantial international involvement. In addition, the Settlement defines mechanisms to determine Kosovo's share of

Serbia's external debt, and to address the issue of property restitution.

9. **Security.** The Settlement provides for a professional, multi-ethnic and democratic Kosovo security sector, encouraging significant local ownership in its development, while retaining a level of international oversight necessary for ultimate success in this sensitive area. The Kosovo Police Force shall have a unified chain of command throughout Kosovo, with local police officers reflecting the ethnic composition of the municipality in which they serve. In Kosovo Serb majority municipalities, the Municipal Assembly shall have enhanced competencies in the selection of the police station commander. A new professional and multiethnic Kosovo Security Force shall be established within one year after the end of the 120-day transition period envisaged in the Settlement. It shall have a maximum of 2,500 active members and 800 reserve members. The Settlement stipulates that the current Kosovo Protection Corps shall be dissolved within one year after the end of the transition period.

10. **Future international presence.** In general, Kosovo shall be responsible for the implementation of the Settlement. To safeguard and support such implementation, the Settlement defines the role and powers of the future international civilian and military presences.

11. **International Civilian Representative.** The International Civilian Representative, who shall be double-hatted as the European Union Special Representative and who shall be appointed by an International Steering Group, shall be the ultimate supervisory authority over implementation of the Settlement. The International Civilian Representative shall have no direct role in the administration of Kosovo, but shall have strong corrective powers to ensure successful implementation of the Settlement. Among his/her powers is the ability to annul decisions or laws adopted by Kosovo authorities and sanction and remove public officials whose actions he/she determines to be inconsistent with the Settlement. The mandate of the International Civilian Representative shall continue until the

International Steering Group determines that Kosovo has implemented the terms of the Settlement.

12. European Security and Defence Policy Mission. The European Security and Defence Policy Mission shall monitor, mentor and advise on all areas related to the rule of law in Kosovo. It shall have the right to investigate and prosecute independently sensitive crimes, such as organized crime, inter-ethnic crime, financial crime, and war crimes. In addition, it shall have limited executive authority to ensure Kosovo's rule of law institutions are effective and functional, such as in the areas of border control and crowd and riot control.

13. International Military Presence. The International Military Presence shall be a NATO-led military mission. It shall continue the current task of the Kosovo Force (KFOR) to provide a safe and secure environment throughout Kosovo, in conjunction with the International Civilian Representative and in support of Kosovo's institutions until such time as Kosovo's institutions are capable of assuming the full range of security responsibilities.

14. Organization for Security and Cooperation in Europe mission in Kosovo. The Organization for Security and Cooperation in Europe, with an extensive field presence in Kosovo, is requested to assist in the monitoring necessary for a successful implementation of the Settlement.

III. Implementation

15. Upon the entry into force of the Settlement, there shall be a 120-day transition period during which the existing mandate of UNMIK remains unchanged.

16. During the transition period, the Kosovo Assembly, in consultation with the International Civilian Representative, shall be responsible for approving a new constitution and the legislation necessary for the implementation of the Settlement and the establishment of the new Kosovo institutions it calls for. The constitution

and legislation shall become effective immediately upon the conclusion of the transition period.

17. At the end of the transition period the UNMIK mandate shall expire and all legislative and executive authority vested in UNMIK shall be transferred en bloc to the authorities of Kosovo, in accordance with the Settlement.

18. Finally, general and local elections are to be held within nine months of the entry into force of the Settlement.