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**ANALYSIS OF THE
COMPREHENSIVE PACKAGE FOR
THE STATUS OF KOSOVO**

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Introduction

The objective of this paper is to provide an overall evaluation, analysis and interpretation of the Comprehensive Proposal for the Kosovo status document. The paper identifies confusing areas, difficult problems of implementation, and suggests a number of revisions.

It now evinces that an agreement between Prishtina and Belgrade was implausible. With this fear in mind, the negotiation process was primarily aimed to recognize legitimate fears and concerns of both sides and come up with a draft agreement that sets out a just solution as deemed by international stakeholders. Hoping for a consensual outcome between Prishtina and Belgrade does not look closer as time passes by, an imposed solution looks necessary. Some commentators have argued that the proposed Settlement is a lose-lose outcome, with which KIPRED does not agree. As it stands, the document has gone way beyond zero-sum, but falls short of a Pareto optimal. KIPRED believes that the paper could have benefited from more local input during drafting to ensure a more optimal win-win outcome, and this paper should be read as an endeavor in this direction.

This negotiated arbitration defines three main areas. First, it sets the framework of the future state of Kosovo by implicitly recommending a supervised independence. Second, it explicitly defines a special position of Serbs and of the Serbian Orthodox Church, including their relations with Serbia. Third, it provides for a narrow but powerful international trusteeship to oversee the implementation of the first two. Practically, Kosovo does get international subjectivity, though for some time it remains limited in exercising its sovereign powers.

The package fully reflects the principles set forth by the Contact Group. The document recognizes the will of the people, but not only that of the majority, but also of communities as groups, which conveys the spirit of this document as one of “group accommodation”. As such it provides sufficient treatment for the Serb community to nourish its culture and identity in Kosovo. The publication of this document makes the boycott of the Kosovo institutions by the Serbs untenable on the grounds of rights and power, henceforth may only be interpreted as having major conflicting political objectives.

Fortunately, the main aim of the Kosovar Delegation, independence is forthcoming, which is the big plus. However, this big gain would be a terrible loss to the Serbs were it not for such a comprehensive package for their rights. This naturally leads to some difficult compromises. By corollary, the document is largely about group accommodation and long-term rules of engagement between the majority and the Serb minority.¹ It is natural to assume that the majority has sufficient incentives and power to protect its own specific interests, hence there is no need to include them in the document.

Overall Evaluation and Interpretation

Primarily, the document provides the principles and elements upon which the Constitution and laws of Kosovo are to build on. This document has higher explanatory powers than the Constitution, and the authority for interpretation remains with the International Civilian Representative (ICR), which accounts to the International Steering Group (ISG), composed of France, Germany, Italy, Russia, United Kingdom, United States, European Union, European Commission, NATO.

Likely time-line	
Feb 2	Comprehensive Proposal
mid-March	Final Proposal (expected with status label)
?	New UNSC Res
120 days	Transition Period; Constitution takes effect, or Constitutional Framework is amended
D-Day	Declaration of independence;
2 years+	Evaluation

¹ Although the Comprehensive proposal does not distinguish between majorities and minorities, this paper uses the generally accepted terminology of international documents.

The document is expected to pave the way to a new Resolution of the Security Council, after which a 120 day transition period starts. However, the transfer of the UNMIK mission to the ICR is not as clear as it should be. ICR gains the authority to monitor the implementation and make recommendations to UNMIK during the transition stage – UNMIK’s legal power remains whereas its political power diminishes. Hence it can be concluded that the ICR gains political clout before it gains legal power and UNMIK loses the first before it loses the second.

The first problem related to this period is the limited local ownership that can be put in the Constitution. The drastic changes concerning the Constitution, including the gathering and work of a Constitutional Commission drafting and approval of the Constitution have to be finalized too fast. Such rush makes a national dialogue almost impossible and, as a result, the Constitution will enjoy lower legitimacy than it should.

Kosovars are to gain significant powers during and after the transition period. For the first time since the UN administration was installed in Kosovo, during the transition phase, the laws adopted by the Assembly of Kosovo do not have to be promulgated by UNMIK, i.e. the Special Representative of the Secretary General. Moreover, their initial adoption does not require double-majority. However, at the same time the Kosovo institutions paradoxically lose the chairmanship of the working groups in charge of the transfer of authority (assumed by ICR and UNMIK), a responsibility it currently has for most working groups. After the transition period, a number of laws require double-majority (2/3 of the Assembly and of community Members of Parliament) to amend them subsequently, which makes the system of government stable, but inflexible.

Overall, the supervised independence gives Kosovo most attributes of the state, and reserves only a few, such as security, justice, as well as the interpretation of the document. The ICR can take corrective measures to remedy, as necessary, any actions taken by the Kosovo authorities that it deems to be a breach of this Settlement, may annul laws or decisions adopted by Kosovo authorities, may “sanction or remove from office any public official or take other measures, as necessary, to ensure full respect for this Settlement and its implementation” (Annex IX, Art. 2.1 c and d). Further, the document requires the consent of the ICR when appointing the Director-General of the Customs Service, the Director of Tax Administration, the Director of the Treasury, and the Managing Director of the Central Banking Authority of Kosovo (CBAK).

Although it does not explicitly specify status yet, this proposal confers a number of features of statehood to Kosovo. A number of them are unambiguously associated with states only:

- a) The right to negotiate and conclude international agreements and to seek membership in international organizations (General Principles Art. 1.5 and Art. 2.1);
- b) Establish and maintain a security force recognizing its mandate to external threats at a later stage (Annex IX, Art. 1.1.a);
- c) The specific right to ratify international conventions (General Principles Art. 2.1);
- d) Assuming international debt (Annex VI);
- e) The recognition that all public property within Kosovo remains under its ownership;
- f) Air space control (Annex VIII, Art. 7).

A number of traits do not necessarily associate with statehood when taken alone, but should be treated as such given this document:

- g) The right to have national symbols. Some have argued that other entities have symbols (e.g. football teams), but the term “national” makes “symbols” a trait of statehood;
- h) Foreign affairs. As the document provides no restrictions to Kosovo’s authorities in carrying out foreign affairs, this should be treated as a fully transferred competence;
- i) Citizenship. While citizenship usually refers to the nation states, it does not necessarily mean so. There are examples when sub-national entities may be entitled to regulate citizenship of that entity, particularly in federations that recognize both citizenship of the entity and that of the federation;
- j) Specifying that Kosovo can “have no territorial claims against, and shall seek no union with, any State or part of any State” (General Principles Art 1.8) is also a feature of statehood; and

- k) The right (obligation) to invite an international mission to the country (General Principles Art. 1.10) is an exclusive power of states, although in this case it does not come with the authority to decide when such a mission ends.

The timing when Kosovo fulfills its obligations, and by corollary, when the international mission is no longer needed is unclear. The expiration of the package is unrelated to any measurable indicators or milestones that would mark the full implementation of the Settlement. Further, not knowing the Rules of Procedure of the International Steering Group (ISG), this leaves the evaluation under the full discretion of a body not yet established. In order that the implementation parties know what they will be judged upon, the benchmarks should be established in the document based on which the ISG can conduct the periodical review (Annex IX, Art. 5.1). Another revision needed is to enable the implementing parties to appeal the decisions of the ICR to the ISG.

Promoting the process of reconciliation among the communities in Kosovo and handling the issue of transitional justice are two very sensitive obligations given to the Kosovo authorities. Tolerance has become a political obligation upon Kosovo, however, reconciliation will hardly progress without full justice and reparations, which we recommend should be part of the package. Further, reconciliation would oblige all communities to engage in the process as mandatory for the fulfillment of the Settlement.

Security

The security sector remains either a reserved power or supervised by the international community, this time under the auspices of the ICR. The International Military Presence (IMP) continues the mission of KFOR with a gradual transfer of competences to Kosovo's institutions. Provisions of this Settlement enable Kosovo to assume increasing competencies in the area of defense, public security, intelligence service, emergency response and control of borders.

Kosovo is to establish a 'professional and multi-ethnic Kosovo Security Force (KSF)' numbered at 2,500 troops without any offensive capabilities with further military aspects to be developed later. This addresses security concerns in Kosovo and in the region. Such troops are to be controlled by "a civilian-led organization of the Government", which gives rise to the establishment of the future Ministry of Defense (MoD), the responsibility for which lies with NATO.

Perhaps the most challenging aspect of security is the disbandment of the KPC to be within one year of the Settlement coming into force. A number of reasons point out to potential tension arising out disbandment. The main dispute is the identity succession of the Kosovo Liberation Army (KLA) to the new force on which Kosovo Albanians insist. On the other hand, in order to be able to attract Serbs to the new force, the international community is trying to disband the KPC as a way to end such heritage. There is an obvious need for a creative solution that gives rise to a professional body without any past baggage, however, while addressing the tradition identified above.

Another concern is the unified chain of command of the police service. The main fear is the appointment of the local station commanders, where the municipality retains the last word. The Municipal Assembly sends the names of two candidates, from which the Ministry of Internal Affairs (MIA) is supposed to select one, a process that can be repeated only once. This solution puts in question the loyalty of the police station commanders in Serb-majority municipalities. One control that MIA should be given is the overall pool of policemen that acquire certain ranking which makes them eligible to become commanders. Hence, it is recommended that minimum requirements for ranking apply to all municipalities, including Serb ones, and this requirement to be included in the document.

Another novelty is that the police service accounts to municipalities as well, by informing them about operations to be undertaken by the central or special police forces in the area. This solution enhances the communication and the trust without compromising the chain of command.

Kosovo cannot have any territorial claims against any other state, however it is odd that the document does not provide the same safeguard to Kosovo's territorial integrity from other states. This raises fears of document's legal deficiency in outlawing that parts of Kosovo's territory to seek union with another state or partition from Kosovo.

One of the restrictions on Kosovo's intelligence services is that these are to address only threats to internal security. In a globalized world internal and external threats are often indistinguishable and such wording leaves Kosovo rather unprotected from transnational threats such as terrorism or organized crime. If such competencies are farfetched at the present, the document should provide the same wording as it does for external security, to grant them external competences at a later stage upon fulfillment of certain objectives.

While most security mechanisms are not yet established and the Constitution is under way it seems inappropriate to define reporting of the Kosovo Security Council (KSC) to the Prime Minister only, precluding the President from involvement in national security. Such a solution places excessive powers in single set of hands, which goes counter to the principle of checks and balances. Hence the recommendation to rephrase that KSC to report to an appropriate institution.

Decentralization

It is widely recognized that there is inherent tension between long-term integration and short-term preservation in post-crisis societies. The task of any such Settlement is to provide for the right balance between sufficient separation for the sake of security and avoid excessive segregation that may hamper integration in the future. It is thus essential that the document protects communities but also that it provides incentives for them to seek accommodation (promote centripetal vs. centrifugal incentives). The document provides for balance of powers, where the Albanian majority cannot violate ethnically-specific interests of the Serbs. On the other hand, Serbs will be able to govern themselves to a very high degree but Albanians can sleep calmly that the governance cannot be halted by any grouping.

Part of the balance identified above is the challenge to find the right equilibrium between functionality and local autonomy. The main criticism has been that decentralization makes Kosovo dysfunctional and territorially divided, which the paper tries to demystify below. For those who have hoped for top-down functionality who perceived it as subjugation of lower levels of governance this is a disappointing outcome. For those that rely on the rule of law and good-faith relationships with municipalities, it ensures sufficient functionality.

Perhaps the most serious potential problem is the enhanced inter-municipal cooperation that may acquire a number of features of non-contiguous political and territorial autonomy. The fact that municipalities can delegate members to a higher body with decision-making powers and the powers to hire and fire staff, makes this a middle-layer of governance in Kosovo, probably a non-cooperative one. Serb municipalities naturally face a number of issues that should be dealt either by: (a) the Center, and/or (b) them jointly, for example, curriculum for primary schools. However, the solution delineated above will likely lead to an institutional and legal mess of continuous disputes with the center and with the judiciary. Worse, it would centralize intra-Serb governance and be an easy prey of Serbia's influence.

In the spirit of the document, it should be made clear that Serb-specific issues must be solved by an institution where Serbs have significant influence, which can take the form or any of the following mechanisms (alone or in combination):

- (a) A specific section within each relevant Ministry;
- (b) A government office in northern Mitrovica staffed largely by Serbs;
- (c) Ministry of Communities in cooperation with other Ministries; or
- (d) Association of Serb-majority Municipalities of Kosovo.

Further, if such a regional level is to remain, it should be advisory only and must not be able to hire personnel. Further, the danger is that such a mechanism is to be allowed for all municipalities, which may lead to a multitude and diverse spectrum of regional-level authorities.

Another fear is that this may lead to segregation, hence integration must be made a higher priority than it has been. Examples abound such as the persistent incentive that Serbs resort directly to the ICR for any complaints. This should change to first seek resort with the central institutions, whereas the ICR only gets an appeal role. Another example is Mitrovica which was split into two municipalities and the Board retains only a coordination role.

Overall, decentralization is positive since it gives more responsibility and ownership to all local communities. In this case, the central level is not blamed for failure, but the local elected officials. An example of higher legitimacy auspicious for local communities is that the municipal councilor of minority background with the highest number of votes becomes Deputy President of the Municipal Assembly. Besides the “region”, all other decentralization remedies are by and large grounded in the European Charter of Local Self-Government.

Religious and Cultural Heritage

The title of this chapter is misleading for it does not address “religious and cultural heritage” of Kosovo, but the status of the Serbian Orthodox Church in Kosovo. Such mismatch between the content and the title leads to the conclusion that Serbdom is the main, or perhaps the sole, identity of Kosovo in historical, religious and cultural terms. It is only natural that a Settlement package addresses the status of the Serbian religious and cultural heritage, but the title should change to this effect.

There are two aspects of the issue of religion: (a) secularity of the state, and (b) treatment of various religious communities. Kosovo remains a secular country, which cannot be put under question, and the document does not discriminate in this regard. Division of religion from the state represents a concept widely accepted by Kosovo’s society, political institutions and religious communities. All the religions practiced by the majority of Kosovo’s citizens (Muslim, Serbian Orthodox and Catholic) have cohabited peacefully together for centuries. Problems arise with the unequal treatment of various religious communities, which may challenge the existing balance between state and religion.

Therefore, it does not help to any of the religious communities if they are treated unequally because it may easily raise dissatisfaction among them. The treatment offered to the Serbian Orthodox Church vastly surpasses that of the other religious communities and has the potential to generate aggressive reactions from other religious communities as well as exasperation in the wider public. As such it may also stir up religious communities to be more assertive for influence in public affairs. Further, provoked activism of one or more religious community may only go to the detriment of the freedom of religion as such. This is not to say that the SOC deserves no additional protection, it does, but several aspects should be reconsidered.

All the facilities of the Serbian Orthodox Church are protected from any intrusion requiring its own consent, which amounts to similar protection as diplomatic missions. Even in the case of alleged illegal activities, access to SOC churches is only permitted by consent even in addition to court order. The activities of the SOC are bound by Kosovo’s legislation, however, law enforcement is unclear for it will depend on the Law on Religious Freedom to be passed during the transition phase. To ensure that Kosovo’s legislation is enforceable and that churches are free of intrusion, UNOSEK should consider doing away with “consent”, but at the same time prevent a deluge of frivolous court orders. In this aspect, it should provide for a legal mechanism with appropriate ethnic representation that would be tasked to reviewing or issuing court orders to this effect.

A couple of concerns pertain to the protective zones of religious facilities. First, excessive restrictions are irritating, especially to the land owners, and adversely affect reconciliation. Second, a number of sites of general touristic attraction (e.g. Mirusha waterfalls) or historic importance (e.g. Isa Boletini Memorial

complex) must not fall under the protection area of any church, despite close proximity. Most importantly, it is rather offensive that a number of non-religious sites, most older than any community in Kosovo, have been put under the protection of SOC or of the “Serb community”. Sites such as the Medieval Town of Novo Brdo, Gazimestan, Vojnovic bridge (otherwise known as Stone Bridge), Zvecan Medieval Fortress are of particular importance to overall historical legacy of Kosovo and it is ill-chosen to “enhance their protection” by “lowering their importance”. The document must demand from the Kosovo institutions to protect these institutions en par with the highest international standards.

Immunity of church property is recognized with the document. With speculations about massive donations of public land to the church by some municipalities, there is concern that this would limit development opportunities for the community. Hence, inviolability granted by this document should only extend to the property recognized by the Settlement at the date it goes into effect. Any additional property acquired must not enjoy immunity from expropriation which is to be treated as private land.

The Implementation and Monitoring Council (IMC), responsible for ensuring full implementation of these points, should also commit an independent study of the value of all protected monuments to increase public acceptance of the need for protection and to enhance mutual understanding of cultures.

Further, restriction on recreation should be dropped of all protection zones. It is also essential that the document outlaws discrimination of visitors based on national or ethnic grounds. It may be a technical blunder, but reference to “the Republic of Serbian Orthodox Church” should be changed to “SOC”.

Missing Areas

Unfortunately, the document omits some critical issues affecting the people of Kosovo. The Pension Fund of Kosovo is inaccessible to the hundreds of thousands of Kosovar Albanians eligible for their pension. This is a violation of the human right and should be dealt in this document, which should provide that the Fund returns under the management of the relevant institution in Kosovo.

War reparation and full justice are also missing, hindering reconciliation and the implementation of the package. Hence, the document should provide for a process of reparations mandatory for all parties subject to the Settlement.

It is positive that the Unity Team unanimously recognizes the obligation of Kosovo to take up its share of the debt. However, no debt can be incurred on Kosovo for any borrowings after 1989 for it was under the forceful reign of Belgrade without democratic representation of its people in governing authorities. On the other hand, the same principle that obliges Kosovo to pay its debt also entitles it to a share of the succession.

Creative and Needless Confusions

A number of matters have been left confusing, most of them intentionally so, aiming to generate consensus from the parties and expecting to hammer out the details later on by the international community. Such “creative ambiguity” is necessary for not all details can be foreseen and leaves some difficult matters to be solved at more auspicious times. However, there are some aspects that may need clarification at this moment.

Perhaps the most “confusing” is the “spirit of the document” which serves as a light post, giving the ICR wide discretionary powers not only to interpret the terms of the document, but also to model all the legislation of Kosovo in line with this spirit. It is much more reasonable to drop the word “spirit” for complying with the “terms of the document” is sufficient.

Another solution which is too creative is the independence and funding of the University of Mitrovica-North. The confusion here is that it is under the municipality, which has two members in the board of the university, which compromises their autonomy. On the other hand, the Ministry of Education, Science and Technology (MEST) is not represented in the same board, although the applicable law guarantees its representation in the boards of public universities. Further, giving responsibility of funding and running of tertiary education to

this municipality may only perpetuate the powerful radical leadership there. The stronger the control of the municipality, the interests of the students for quality education will be met less. Moreover, the financing is left to this tiny municipality which has to draw the finances from the center. It is hence essential that the Board be independent of the municipality and to state that this institution is subject to accreditation by MEST, probably by an ethnically mixed committee.

The Serb focus of the document has perturbed some other communities. Bosniaks are also entitled to education (primary and secondary) in their own language. Due to similarity of the language, attendance in Serbian would be a practical solution in many instances, but some parts of the document make this more difficult, to the detriment of overall integration. UNOSEK should further attempt to make the University of Mitrovica-North most hospitable to communities who would like to study in Serbian.

According to the document, “inhabitants belonging to the same national or ethnic, linguistic or religious groups traditionally present on the territory or Kosovo (communities)” enjoy the same rights as all the citizens of Kosovo. Perhaps inadvertently, this provision gives the right to virtually any person in the planet to move to Kosovo. The probable intention was to prevent Kosovo authorities from introducing any immigration restrictions to its neighbors, and especially to the Serbs. However, the present wording makes Kosovo extremely vulnerable and may seriously limit Kosovo’s future border and visa regime. Kosovo’s liberal policy for “habitual residence” today, the criteria of which the document uses for “citizenship” make this paragraph is redundant and harmful.

One of the needless confusions is the requirement to “establish a parliamentary committee to oversee the security sector in accordance with this Settlement” (Annex VIII Art. 1.3). Such a committee exists already and has received plenty capacity building to exercise its mandate. It would be more practical and reasonable to ask from the existing parliamentary committee on security to assume additional responsibilities as foreseen by this Settlement rather than to ask for the establishment of a new one.

The document refers to the “Independent Judicial and Prosecutorial Commission (UPC)” (Annex IV, Art. 3.1.2). While UPC herein is used as an acronym for the IJPC, further on the document reveals that it talks about two different bodies, with distinct responsibilities (Annex IV, Art. 4.2.1). Although this section refers to a number of other documents as the highest legal document which supersedes the future constitution, it should eliminate these confusing parts.

Another issue is the appointment of the members of Kosovo Judicial Council (KJC). The KJC currently has members who are neither judges or prosecutors, since that is specifically mentioned in the applicable law. In contrast to the existing practice, the proposed document limits the composition of the KJC to judges and prosecutors and closes the door for members of the bar, professors of law and other distinguished jurists who may meet the highest standards of competence and integrity.

Perception Problems

As the document does not specify the status, it has to be very careful about the wording throughout the document. One such instance is terming Kosovo a multi ethnic society, which is in line with the present stage of the document that does not openly state the status (General Principles, Art. 1). This has raised tension coming from Kosovo Albanians who are distured with the continuation of an unclear status for Kosovo.

Municipal cooperation with Serbia is another wide concern. However, upon closer look, it evinces that there are sufficient legal and practical safeguards against any misuse of such cooperation. For example, any such cooperation must be approved by the Ministry of Local Government Administration which can suspend it.

A similar complaint is that the term “Serb” can be read throughout the document, but “Albanian” is nowhere to be found (except when listing official languages), which is perceived as negligence of the Albanian identity. This is a symbolic problem that needs to be addressed and explained in order to avoid needless negative vibes about the document. As stated above, the document is largely about the interethnic aspect of social and state organization, and this should be explained.

Implementation Difficulties

It is perhaps most difficult to forecast what can be problematic during implementation. Below are some of the matters identified as potentially problematic. Some of them may be problematic due to financial, technical, but most are due to persistent conflicting political considerations and ambitions of the parties involved.

On behalf of Kosovo, UNMIK has been part of international agreements, bilateral and multilateral, which continue to remain binding on Kosovo. As the bearer to the agreements changes from “UNMIK Kosovo” to just “Kosovo”, some contractual parties may not recognize Kosovo’s contractual power. It is essential not only that the Settlement document provide for automatic inheritance, but also that UNMIK transfers the contractual power to Kosovo prior to its departure and informs all relevant parties to this effect.

Producing multiethnic national symbols is probably too challenging for it requires a combination of various ethnic symbols and building of consensus over them. A more conducive wording may be to provide for “neutral” and/or “non-offensive” symbols. Nevertheless, even this option may not be acceptable to the wide Albanian majority as it considers that it must have some identification with the national symbols.

In terms of the binding effect of the package, Kosovo is obliged to cooperate in implementing the Settlement, but Serbia’s cooperation is left to “good faith”. If Serbia does not cooperate, the implementation of the Settlement will flounder with a likely lingering boycott by the Kosovo Serbs too.

Authorizing the end of operations of all illegal organizations is a positive development since this includes security structures of Serbia, party intelligence services and the bridge watchers. Unimpeded for years, these organizations will continue to operate unless the document provides for a vigorous mechanism to enforce their disbandment within a given time-limit.

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