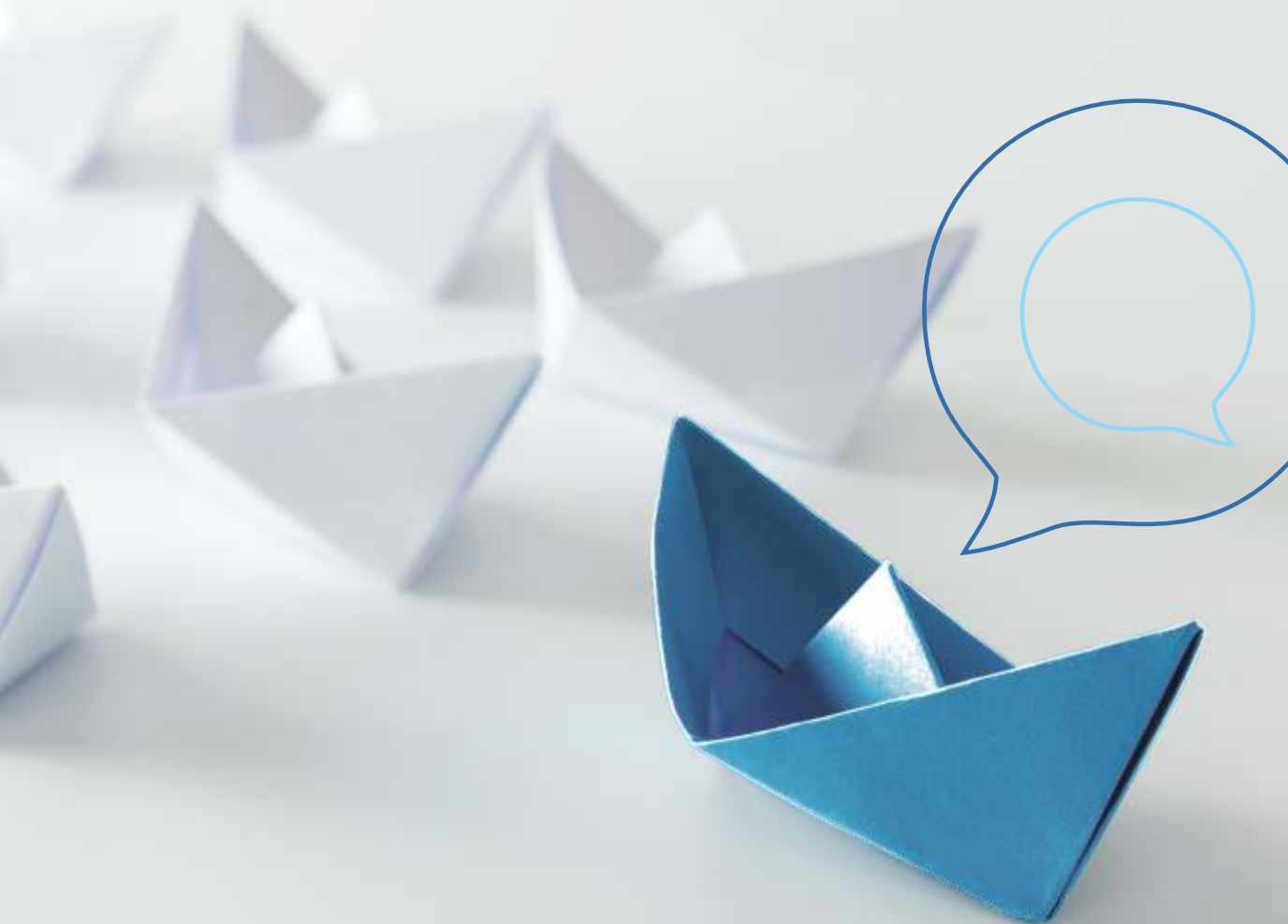


BALKAN DIALOGUES

THE STATUS OF THE SERBIAN ORTHODOX CHURCH AND ITS HERITAGE IN KOSOVO*



The BALKAN DIALOGUES is a project of the East West Institute (EWI)* implemented in cooperation with the Belgrade Fund for Political Excellence (BFPE), first hosted in Belgrade in 2019, with high-level events taking place in Berlin in December 2019, Munich in February 2020, online in July 2020 and at the Belgrade Security Forum in October 2020. Comprised of decision-makers and experts from the six countries of the Western Balkans (WB6), along with the European Union, United States, and Russia, the dialogues are designed to help increase and deepen understanding while building trust between representatives of varying geopolitical interests present in the region today. The idea for this publication came from the community brought together by the initiative.

Members of BALKAN DIALOGUES core team are Sonja Licht, Maja Piscevic, Cameron Munter, Ivan Vejvoda, John Jovanovic, Jovan Ratkovic, Marko Savkovic and Djordje Popovic.

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BALKAN DIALOGUES: THE STATUS OF THE SERBIAN ORTHODOX CHURCH AND ITS HERITAGE IN KOSOVO*

*With excerpts from contributions by **Igor Novakovic**, Research Director, International and Security Affairs Centre and Representative in Serbia, Council for Inclusive Governance; and **A.A.**¹

Rationale

The Serbian Orthodox Church (Church) religious and cultural heritage (Heritage) in Kosovo (including its network of living monastic communities) is fundamentally important, not only for the Kosovo Serb community but the Serbian nation as a whole, as the single most important source of their national, cultural, and religious identity. The political significance of this fact for the achievement of reconciliation between Serbs and Albanians in Kosovo, as well as between Belgrade and Pristina, on the one hand, and advancing the European Union integration processes of both Serbia and Kosovo, on the other, is further heightened by the widely-held view that the Church in Kosovo is the most endangered religious institution in Europe; as evidenced both by the fact that over the past two decades nearly 200 of the Church's holy sites have been destroyed, including 35 churches during a tragic three-day period in March 2004, and the disconcerting narrative propounded by influential Kosovo-based historians, public intellectuals, and politicians, that denies, negates, or minimizes the Serbian origin of this heritage. Thus, it is necessary, for the continuation of the dialogue between Belgrade and Pristina, to open the topic of the position and future status of the Church and its Heritage in Kosovo, which is overwhelmingly located in majority-Albanian areas. Despite efforts, the Ahtisaari Plan (Annex V) did not solve this issue. Revisiting existing arrangements in Kosovo as they relate to the Church and its Heritage is important irrespective of whether or not these go on to constitute a distinct part of the agreement on "comprehensive normalisation" between Serbia and Kosovo. There is a widespread and justifiable feeling that Pristina is the party to the dispute that will need to demonstrate the greatest possible level of flexibility with regards to this issue. However, given political realities in both Belgrade and Pristina, the likelihood of the success of an agreement on the Heritage would increase significantly should the international community take the tactical lead in proposing a way forward.

¹ A.A. is a former senior Serbian official whose identity is known to the editors of this document. The author has indicated the two principal reasons for his choice of anonymity: to write with greater frankness than would otherwise be proper, and to focus the reader's attention on the views expressed rather than the source of those views.

Few who understand the issue in detail and have followed developments on the ground would dispute that the existing protection regime, which is based on Annex V of the Ahtisaari Plan, has been insufficient. At least three reasons speak to this point: first, the unwillingness to include the principle of territoriality as part of the special position arrangements for some of the most important Heritage sites; second, the lack of a single legally-binding, executive-function dispute resolution and enforcement mechanism, coupled with the lack of binding international implementation guarantees; third, the absence of full and unambiguous implementation by Kosovo of various provisions contained in the Ahtisaari Plan.

Nonetheless, the provisions contained in Annex V of the Ahtisaari Plan represent a good baseline for building a stronger protection mechanism to secure and safeguard the Church and its Heritage in Kosovo in a long-term and sustainable manner. This paper presents several such options, each of which builds on Annex V as originally envisioned (but regrettably not fully implemented in the more than thirteen years since it was accepted by Pristina). Each of these options is *sui generis*, which is fully consistent with the logic inherent in the view that the "Kosovo case is *sui generis*." Thus, none of the strategic options put forward in this paper are cookie-cutter reproductions of existing models, although some of the options put forward draw conceptually from some of these, most notably the Lateran Treaty between Italy and the Vatican (Holy See), signed in 1929.

Options for a territorial solution

All the strategic options presented share a common set of goals and elements. The most important include, first, a robust and legally-binding internationally-backed and internationally-guaranteed mechanism for Church status and Heritage protection, which would need to be contained in a distinct international legal instrument guaranteed by the international community. This mechanism would be predicated on a tripartite categorisation of Heritage sites with respect to level of international protection, and include the principle of symbolic territoriality as part of special position arrangements for some of the most important Heritage sites, namely those four which are inscribed on the UNESCO World Heritage Sites (and UNESCO World Heritage Sites in Danger list), as well as several others.

Second, Pristina's limited competence and jurisdiction regarding the Church and its Heritage, and the transference of the rest to a novel institution endowed with robust executive powers to ensure the terms of whichever strategic option is chosen, are to be implemented in full. Third, the recognition by Kosovo of the international legal instrument's authority should be guaranteed by/enshrined in a constitutional amendment. Fourth, the renunciation by Kosovo of jurisdiction and responsibility over the Heritage in the context of the fulfillment of duties and responsibilities with regard to future membership in UNESCO or other international or regional organisations, should be made.

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Each of the five strategic options to secure and safeguard Heritage in Kosovo in a long-term and sustainable manner include the fully Implemented Annex V International Protection and on the top of this:

1. Church Affiliation or Membership in the Association of Serb Majority Municipalities in Kosovo. For all intents and purposes, the Church would be treated as a municipality and its Standing Representative a mayor; alternatively, its Heritage would fall under the jurisdiction of the Association/Community, without the benefit of membership.
2. Special Territorial Position Within Kosovo. Pristina grants the Church and its Heritage a special position within Kosovo ("soft extraterritoriality"), falling within the range of arrangements governing diplomatic missions, military bases on foreign territory, the seat of the Order of the Knights of Malta, and the Monastic State of Mount Athos.

"Extraterritoriality" (in the territorial sense) is a concept usually denoting a part of the territory where the laws of the host country do not apply, and which is governed by another country. In other words, the host country retains all sovereign rights on the territory where extraterritoriality applies, but its legislative framework does not apply.

There is the question of the durability of such a solution, as the sovereignty would de facto remain solely with Kosovo. However, this solution could be applied in combination with others suggested that view Heritage as of lower importance.

3. Enclave (Special Territorial Position Within Serbia). Serbia grants the Church and its Heritage a special position within Serbia in the event of the recognition of Kosovo by Serbia, a border/boundary demarcation correction, or similar territorial exchange.

An enclave - a territory or part of the territory of one country surrounded by the territory of another country - exists as a separate unit of the home country (except in cases where enclaves are the country itself), where the legal framework of the home countries applies, usually with specific solutions that make everyday life easier for the population living in them.

Enclaves as a solution would *de facto* and *de jure* mean the return of a part of the territory of Kosovo to the jurisdiction of Serbia. However, this would mean that only the most important monasteries and holy sites (defined through negotiations and not reduced to the Heritage as listed by UNESCO) are accorded this status, while a different solution would be found for the rest. A special regime of protection and a mechanism for cooperation between Serbia and Kosovo should also be established regarding the integration of the Heritage sites with their immediate environment, openness and security (in every sense), as well as other necessary direct arrangements.

While this solution would be favoured in general by most Serbian citizens and the country's elite, there could be a danger of backlash in Kosovo, as monasteries and holy sites could be perceived as representing "a gradual return" of Serbia to Kosovo. In that sense, also, there could be an issue of adjustment of the Ahtisaari provisions with the new status, in particular as regards the defined protection zones. With the application of this approach, Serbia would remain the holder of the Heritage on the UNESCO list, if the comprehensive agreement were to include a chair for Pristina in the UN and other international organisations.

Enclaves/exclaves are relatively common in Europe and its neighbourhood: BaarleHertog (a Belgian municipality in The Netherlands, which contains 6 Dutch counter enclaves), Kaliningrad (Russia), Autonomous Republic of Nakhchivan (Azerbaijan). In Serbia, the village of Sastavci, with about 1,400 inhabitants, belongs to the municipality of Rudo in Bosnia and Herzegovina, but is surrounded by the municipality of Priboj.

4. Dual Sovereignty (Condominium). Belgrade and Pristina agree to share sovereignty and jurisdiction over the Heritage, such that Kosovo's would in practice be symbolic, whilst that of Serbia would not. Belgrade cedes simultaneously the exercise of its jurisdiction over the Heritage to the Church.

A well-known case of a condominium in the Western Balkans is the internal condominium within Bosnia and Herzegovina, Brčko District, which is a part of both entities, the Federation of Bosnia and Herzegovina and Republika Srpska. After 2006, the district's international supervisor ended the use of entity laws, as well as the existence of borders between the entities within the district itself, and declared that the district could rely on its own laws, as well as the laws of Bosnia and Herzegovina. In other words, the district is formally part of both entities, but in practice it functions as an autonomous entity within Bosnia and Herzegovina.

Whilst in a practical sense this could be the most challenging option for implementation, given the complexity of the solution, in political terms it could be the most acceptable to both sides and the most durable.

5. Transfer of Sovereignty to a Third Party

5a. Dual Concession of Sovereignty to a Third Party. Serbia and Kosovo separately conclude identical agreements with the same third party (e.g., the EU, or with an ad hoc entity modeled on the ICO or OHR), conceding to it sovereign functions and jurisdiction over the Heritage. This third party then grants the right to exercise the jurisdiction over it to the Church. Thus, Serbia and Kosovo would not be direct parties to the same agreement with the same third party. Should the third party end up being the EU, the Heritage sites might in fact be considered as falling under the (non-sovereign) jurisdiction of the EU.

5b. Establishment of a Corpus Separatum (Special International Regime). The UN Security Council establishes a Special International Sovereign Regime over the Heritage in Kosovo, thereby transferring this aspect of sovereign jurisdiction to a third party (e.g. the EU, or an *ad hoc* entity modelled on the ICO or OHR), to serve as the Church's counterpart or to cede to it the exercise of its sovereign functions and jurisdiction regarding the Heritage. Should the third party end up being the EU, the Heritage sites might in fact be considered as falling under the (non-sovereign) jurisdiction of the EU.

Some of these options would neither require nor preclude implicit or explicit recognition or their inclusion in a larger package of “comprehensive normalisation”, whilst others would.

Reaching and implementing agreement on the Church and its Heritage

It is necessary to initiate a comprehensive and professional analysis of the current legal framework and enforcement of laws related to the status of the Church and the protection of its Heritage, which would serve as a basis for the formulation of a new unique legal solution in Kosovo law, and for the agreement between Belgrade and Priština; within the framework of negotiations, a special expert group should be formed to come up with the exact Heritage List, which should not be less than the list provided in Annex V of the Ahtisaari Plan. This list should define categories based on the importance and current status of the Heritage.

A precondition for a long-term agreement is resolving all property and legal relations, especially property that falls under the territory of special protective zones, in order to protect the "historical identity and natural environment, including the monastic life of the clergy" of the Heritage. In that sense, it is necessary to consider the possibility of expropriation of land on the territory of special protective zones, and also to start the process of the restitution of the Serbian Orthodox Church's property in Kosovo, as envisaged by the Ahtisaari Plan;

A territorial solution, based on the models of enclaves, extraterritoriality or double sovereignty, would be applied to the most important Heritage sites in Kosovo, but not limited only to those on the UNESCO List. For the less important, extraterritoriality or ownership without extraterritorial status could be applied.

The agreement should provide strong security guarantees for Priština, such that these territories would not in any way challenge its legitimate security concerns. The administration running it has to act in good faith and with full transparency, and with the necessary guarantees from the international community.

When defining the future status of the Church and its Heritage, it is necessary to provide effective guarantees for implementation within the set deadlines. In that sense, guarantees and sanctioning mechanisms by international actors are necessary.

Regardless of the model used in defining the status of the Church and its Heritage, it is necessary that the Serbian Orthodox Church based in Belgrade, i.e., the Diocese of Raska and Prizren, whose supreme authority is the Patriarch and the Holy Synod of the SOC, has *de facto* and *de jure* spiritual administration over them. However, a special civilian body, with a clear and strong link to the government in Belgrade, should be in charge of the protection and administration of the Heritage.

Notwithstanding the question of whether Belgrade and Pristina come to a “comprehensive settlement,” it is necessary to ensure that the Heritage is integrated in the immediate environment (in its political, economic and social dimensions), respecting the principle of cultural heritage as a civilisational value regardless of religious and ethnic differences. Heritage should become a point of improved communication and cooperation, which is necessarily predicated on its being accepted as a cornerstone of Serbian identity.

In the public socio-political discourse, it is necessary to avoid pseudo-historical interpretations in Kosovo, various forms of pressure, and challenging the legitimate rights of the Church over its Heritage in Kosovo. This requires a new narrative in Kosovo, but also in Serbia, which would assist the implementation of the new political agreement and encourage future cooperation. With the new solution, the Church and its Heritage should not be perceived as a challenge to Kosovo's sovereignty, and politicians on both sides should be obliged to promote the solution among the population and explain why it is in the common interest. It would be best to formulate a joint approach in the form of a campaign, with the inclusion of civil society and the media, and the active participation of EU officials.





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