

## Should Kosovo's Constitutional Court still have international judges?

22 September 2014

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The LSE's South East Europe programme blog hosts a debate on the legality of the international judges on the Republic of Kosovo's Constitutional Court (final post here). The issue is supremely important and timely, given the Court's interventions into Kosovo's ongoing government crisis and its broad powers. It deserves attention from anyone interested in the judicial side of international peace- and state-building efforts, and raises novel public international law questions. In this post, I raise two new issues that could decide the question, and suggest an alternative framework. Those unfamiliar with the dispute might want to read the LSE posts first and then come back here.

The first issue: what is in the "international agreement" created by the exchange of letters and the Assembly ratification?

As Doniqë Qerimi [pointed out](#), agreements can be established by exchanges of letters. Such exchanges need not be ratified to take effect, but in this case the Assembly of Kosovo ratified the agreement. So we can conclude a binding agreement exists. But what is it?

Normally, an exchange of letters goes like [this](#): "the first party writes a note to the other party, setting out the content of the agreement. The other party replies in the affirmative, usually by reproducing in full the original letter of the other party and expressing its consent thereto".

This is not what happened between Kosovo and the EU. President Jahjaga's letter set out in detail the powers delegated to EULEX and then added two more, new areas outside EULEX's mandate: the appointment of Constitutional Court judges (by EULEX) and of members of several institutions related to property disputes (by the EU Special Representative). High Representative Ashton's terse reply, in its one operative sentence, "accepts the invitation contained in your letter dated 14 April to continue to implement the mandate of EULEX Kosovo, as laid down in Joint Action 2008/124/CFSP, adopted by the Council of the European Union on 4 February 2008 as amended and in the spirit of mutual cooperation." (Qerimi cites this line but leaves out everything after "invitation".)

Nothing in the Joint Action or any of its [amendments](#) refers in any way to appointment of Constitutional Court judges or the power of the EUSR to appoint other Kosovo officials.

The “agreement” includes only those parts related to the EULEX mandate. That is most of President Jahjaga’s letter. Ashton could have accepted the rest and surely chose not to, probably for the reasons outlined by Andrea Lorenzo Capussela: [non-recognition](#) and the UN Security Council “umbrella” under which EULEX operates. Ashton’s reference to “Kosovo” instead of “Republic of Kosovo” underlines this.

There is, therefore, a valid international agreement between the EU and the Republic of Kosovo concerning the EULEX mandate, but there is no agreement granting EULEX or the EUSR new powers, because the EU did not accept the President’s offer of those powers.

I am not an expert on Kosovo constitutional law or public international law and I may have erred in this analysis. If that is so, and the agreement does grant the EU those powers, there is another issue to consider: who may be appointed as a judge of the Constitutional Court?

Article 114 of the Constitution specifies that judges “shall be distinguished jurists of the highest moral character, with not less than ten (10) years of relevant professional experience” and “shall serve for a non-renewable mandate of nine (9) years”. Article 4 of the Law on the Constitutional Court adds that judges must be citizens of the Republic of Kosovo; article 5 adds that they may not hold any other remunerated position other than as lecturer of law and may not be a member of any “party, movement or any other political organization”. This law was adopted while international judges still sat on the Court and includes a transitional provision, Article 55, to apply during the period of international supervision. But that period has ended and Article 55 no longer applies.

Therefore, if there is a right granted to EULEX by the exchange of letters, it applies only to the procedure in the current Constitution and law, whereby judges must be citizens of Kosovo. That the exchange of letters contemplated the possibility of an international official naming a domestic one is clear from Jahjaga’s letter, which offered the EUSR the power to name one “non-majority member” of the Kosovo Property Verification and Adjudication Commission.

Nothing in the exchange of letters derogates from the citizenship requirement, the constitutional prohibition on re-appointment, or its other provisions on length of mandate. This itself calls into

question the Presidential decree “confirming the continuation of mandate” of the three international judges. That [decree](#) cites only Article 84 (4) of the Constitution, Article 2 (“appendix 1”) of the ratification of the agreement with EULEX, and a letter from the EULEX head of mission dated 25

August 2014 that has not been made public. Article 84 (4) only gives the President the power to issue “decrees in accordance with the Constitution”; “appendix 1” is presumably the first letter in the exchange described above. Neither of these refers to extensions of mandate.

If I am wrong about this too, there is a final problem, though it is purely political. The grant of powers to EULEX, if valid, does not apply only to international officials. It extends to all new judges, including those representing the minorities. In this way, it circumvents the intent of the framers of the Constitution, that a concurrent majority of Assembly members holding seats reserved for Serbs and other non-Albanian communities must consent to the nomination of two judges. It seems undesirable, if not actually unconstitutional, to allow an international instrument adopted without this concurrent majority requirement, to derogate provisions aimed at protection of minority interests.

But what if all this is beside the point? What if it is good for Kosovo to keep its international judges for a few more years and this procedure, even if flawed, is the best way to do it? That may well be the view in Brussels and Pristina, though no official can admit it. The problems caused by non-recognition are real and have haunted EULEX since the eve of its deployment. One may believe that in such circumstances, the EU can cut itself some slack in observing the law.

Reasonable people can disagree on this. Some doubt whether international judges have helped; Capussela makes this case well in several [articles](#). Yet Bosnia still has three international judges nineteen years after its peace agreement and there are no serious efforts to get rid of them. The presence of foreigners lends the Court much-needed credibility during turbulent times and insulates it against political pressure.

I see the force of this view, but on balance I think it is more important for Kosovo and its international partners to stick to the law, an instrument that occasionally produces inconvenient results. I argued [recently](#) that the most important thing for the young Republic was strengthening its

institutions and growing a culture of respect for them. The Constitution should be at the heart of that process. It is hard for the EU to teach its future members to accept the rule of law if Brussels is too quick to bypass it – even for a worthy goal.