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The Limits of the EU Foreign Policy on the Kosovo-Serbia Negotiation.

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Abstract: The Parliament of Kosovo passed a controversial amnesty law in July 2013 within the context of the Brussels-led negotiations between Serbia and Kosovo. This article evaluates this law based on the five aspects of legality, rule of law, security, economy, and reconciliation. We find that the law entails serious problems and risks on each account except legality since its broad ambit includes common and economic crimes while providing possibilities for abuse. Moreover, internationals actors involved in the negotiation process exerted considerable pressure to adopt the amnesty which raises questions concerning their motives and strategy. We argue that the uncritical attitude towards the law can be explained by four principal factors, including a strong focus on the realist exigencies of diplomacy, internal interests of the European External Action Service, a neglect of non-legal consequences of the law, and a more general practice of exceptional and unaccountable policy-making in Kosovo.

Keywords: Kosovo; Amnesty; State Building; Reconciliation; Brussels Agreement
INTRODUCTION

On 19 April 2013, Serbia and Kosovo concluded the ‘First Agreement on Principles Governing the Normalisation of Relations’ in Brussels, a step that has been described as ‘historic’\(^1\) in the media and as a ‘milestone’\(^2\) by the Special Representative of the UN Secretary-General, Farid Zarif. The ‘Brussels agreement’ deals with a number of critical issues, including the creation of an association of Serb majority municipalities, the integration of police and judicial structures, and municipal elections. Within the context of the agreement, both parties also decided to enact an amnesty law which precludes the prosecution of certain criminal offences in Kosovo in order to facilitate the integration of Serbs into the institutional structures that they had previously contested. After months of domestic political and legal struggles in Kosovo, President Atifete Jahjaga signed the amnesty law on 18 September 2013.

While the course of the negotiations and the modalities of the Brussels agreement raise several interesting questions, the specific focus of this paper lies on the amnesty law. The law shows perhaps most clearly that an appreciation of the true value of the Brussels deal requires more detailed contextual analysis. On the one hand, one could take the view that it reflects the slow but steady ‘Europeanisation’ of the ‘Kosovo question’.\(^3\) It is this optimistic interpretation that is being echoed in the positive statements mentioned earlier. On the other hand, the law has sparked a lot of controversy in Kosovo, leading to public protest and an open petition of 12,500 citizens and 30 NGOs to change it.\(^4\) This is in fact unsurprising given the general circumstance that ‘the politics of who is entitled to mercy in what circumstances are almost inevitably a source of controversy and division’.\(^5\) Given the concern that the question has raised, this paper seeks to place the amnesty law in the wider context of peace and state building in Kosovo. More concretely, the objective is to assess the law as thoroughly as possible, drawing attention to the problems that it might create in a number of vital areas for peace and state building. The evaluation builds on recent works that have convincingly argued that the [negative] perception of amnesties as impunity is inadequate for they can play a constructive role in post-conflict contexts depending on their specific outlook.\(^6\) In addition, we inquire the role of external actors who took an uncritical stance during the drafting and enactment of the amnesty law. Our argument is that regardless of its eventual success or failure, the law represents an instance in which the international stakeholders decided to ‘shoot in the dark’ rather than search for a reasonable and balanced amnesty variant.

The first part describes the content of the law and its context, including the rocky process leading up to its coming into force at the beginning of October 2013. The second section evaluates the law on the grounds of legality, rule of law, security, economy, and reconciliation. While we do not claim to provide a definite assessment, we find that the law produces a number of serious problems and risks which cannot be ignored in a context of post-conflict reconstruction. The third part looks upon the active involvement of the international actors and identifies four reasons for their strikingly zealous advocacy of the amnesty law. These are a strong focus on the realist exigencies of diplomacy, internal interests of the European External Action Service (EEAS), a neglect of non-legal consequences of the amnesty law, and a more general practice of exceptional and unaccountable policy-making in Kosovo.

The Belgrade-Pristina Negotiations and the Amnesty Law

After the military conflict and the intervention by NATO in 1999, the international community, and more specifically the United Nations Interim Mission in Kosovo (UNMIK) was charged with the territorial

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administration of Kosovo in accordance with UN Security Council Resolution 1244. While this resolution created a relatively stable solution in terms of direct security, tensions remained between Serbs and Kosovars. Most crucially, both presented the Kosovo question as non-negotiable, meaning that for Serbs the territory is still at the heart of Serbia, while Kosovars insist on exercising their right to self-determination through independence. Still, many attempts were made to create a more sustainable solution to peace and stability in the region. The first UN mediated talks between Pristina and Belgrade took place in 2006 but failed to create progress. Former Finish President Martti Ahtisaari thereafter issued his Kosovo Status Settlement Proposal in which he recommended an independence supervised by the international community. This solution faced again strong resistance by Serbia (and Russia in the UN Security Council). A troika consisting of the U.S., the United Kingdom, and Russia launched subsequently another round of unsuccessful talks. An ‘International Steering Group’ was formed in 2008 to support the implementation of the Ahtisaari proposal, yet was once more rejected by Belgrade as not having any legitimacy in international law.

The situation changed when the Parliamentary Assembly of Kosovo declared its unilateral independence in 2008. This time it was a Serbian initiative which led the UN General Assembly (GA) to request the International Court of Justice (ICJ) to state its advisory opinion concerning the declaration of independence. In 2010, the Court held that the independence of Kosovo did not violate international law. As a response Serbia requested another round of negotiations at the GA, which in turn asked the EU to facilitate the talks. The EU accepted the request and assigned the EEAS the leading role in the process. Following the technical negotiations that started in March 2011, the first high-level meeting between the Prime Ministers of Serbia and Kosovo took place in Brussels on 19 October 2012. While a first agreement was reached on the collection of customs duties at borders, the positions of the parties were still far from close. At the UNSC session in March 2013, Kosovar Prime Minister (PM) Hashim Thaçi underlined the problems created by Serbia’s continued insistence on territorial integrity and separate institutions for Serbs in Kosovo, while the Serbian Government highlighted the importance of the human rights of the Serbian minority. The Brussels agreement of 19 April 2013 represents in this context a genuine advancement.

The ‘First Agreement on Principles Governing the Normalisation of Relations’ appears ‘simple and vague’ at first sight, but it contains a number of key provisions. The negotiating parties agreed in general terms to enable the integration of the Serbian minority in Kosovo’s political process, police, and judiciary, while the international community accepted on its part to monitor the municipal elections through the OSCE. More concretely, it envisages the creation of an association of Serb majority municipalities and place it within the constitutional order of Kosovo, essentially to ‘serve as a coordinating body between the municipal and central level of governance’. This association is supposed to coordinate the municipalities in exercising their powers, having ‘full overview of the areas of economic development, education, health, urban and rural planning’. In terms of security, the agreement provides for the integration of northern security structures into the Kosovar Police and for the appointment of a regional police commander for the four northern Serb majority municipalities of Northern Mitrovica, Zvecan, Zubin Potok and Leposavic. The judicial structures are to be incorporated and to operate within the Kosovar legal framework. The Appellate Court in Pristina is to establish a panel composed of majority Kosovo Serb judges for the Serbian municipalities, and a division of this court, the Mitrovica District Court, will sit permanently in the north. As envisioned in the agreement, municipal elections were eventually organized in the north at the end of 2013 under the monitoring of the OSCE. Both sides also agreed not to ‘block, or encourage other’s to block, the

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other side’s progress in their respective EU paths. Finally, an implementation committee was set up to work out in a detailed and coordinated manner the modalities of the general key points. The agreement paved thus the way on European level for the Serbian reception of a starting date for EU accession talks and for Kosovo’s Stabilisation and Association Agreement.

While the amnesty law is not mentioned in the Brussels agreement itself, it is referred to in the complementary ‘Implementation Plan’ which states that the law is a part of the necessary legal changes required for the implementation of the First Agreement. The overriding political goal of the law is thus to contribute to the integration of Serbian minority into the existing Kosovo institutions. In its September judgement, the Constitutional Court recognised that the law is primarily meant ‘to consolidate the legal order of Kosovo and to ensure the extension of state authority to all parts of the Republic’. The Serbian Minister of Justice also stated that the law was a prerequisite for the integration of courts and police forces. While the Implementation Plan envisaged the enactment of the law by mid-June 2013, the first draft law that was put to vote by the Assembly on 4 July failed to reach the quorum of 80 votes by 10. The Government reacted by removing one particularly controversial section of the law which provided for reductions of punishments for crimes including murder, manslaughter, harassment, defamation, assault and theft. A second version of the law was passed by Parliament on 11 July, but came into force only as the President signed it after constitutional proceedings were concluded in September.

The final version of the amnesty law provides a complete exemption from criminal prosecution or from the execution of punishment for such offenses for a specified list of crimes. In order to qualify for amnesty, an offence must have been committed before 20 June 2013 on the territory of Kosovo. For the most part, the law provides in article 3 an enumeration of the criminal offences that fall within the scope of the law. Two types of crimes can generally be distinguished, namely those that are amnestyed by default and those which require the further proof of having been committed with the aim of committing the criminal offence of call for resistance. The prior category includes what some have referred to as ‘purely political crimes’, namely assault on the Constitutional order of Kosovo, armed rebellion, endangering territorial integrity of the Kosovo, endangering the constitutional order by destroying or damaging public installations and facilities, espionage, alliance for anti-constitutional actions, inciting national, racial, religious or ethnic hatred, discord or intolerance, as well as the illegal ownership, control or possession of weapons. However, this category covers also unauthorized border or boundary crossing and the unlawful exercise of medical or pharmaceutical activity. The requirement of acting for the aim of a ‘call for resistance’ is added to more ‘common crimes’ which also includes some economic crimes. These contain threatening a candidate, preventing exercise of voting rights, misuse of economic authorizations, prohibited trade, tax evasion, smuggling of goods, avoiding payment of mandatory custom fees, destroying, damaging or removing public installations, endangering public traffic by dangerous acts or means, obstructing the performance of official duties, attacking official persons performing official duties, and

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11 Ibid.
13 Constitutional Court of the Republic of Kosovo, Constitutional Review of the Law, No. 04/L–209, on Amnesty [Case No. KG 108/13], 9 September 2013, at para. 84 [hereinafter ‘Constitutional Review’].
16 Law No. 04/L–209 on Amnesty, Article 2 [hereinafter ‘Amnesty Law’].
17 The article is further subdivided into sections that cover, respectively, crimes under (i) the Penal Code of the Republic of Kosovo, (ii) the Penal Code of Kosovo and the UNMIK Regulation 2004/19, (iii) Penal Law of KSAK 22/77, and (iv) the Criminal Code of the Socialist Federal Republic of Yugoslavia. These penal codes cover different material or temporal jurisdictions, dating in principle back to 1976. However, there are certain differences between the codes as to which crimes are covered.
18 Amnesty Law, Articles 3.1.1.13, 3.1.2.8, and 3.1.3.4.
20 These crimes are enlisted in articles 3.1 – 3.10 of the Amnesty Law which concerns the Penal Code of the Republic of Kosovo. As for the other three codes, they do not include any additional, and in fact not even all of the mentioned crimes. However, they do in some cases complement each other in material jurisdiction, thus producing a list of crimes comparable to the one mentioned.
certain criminal provisions under the Customs and Excise Code of Kosovo. The participation in a crowd criminal offence and hooliganism falls equally under the amnesty law. Still, the law exempts certain crimes from amnesty, including those committed against international officials and security forces, those that are ‘serious violations’ of international humanitarian law, and those that have resulted in ‘grievous bodily injury or death’.

As already mentioned, the period leading up to the enactment of the amnesty law saw some major setbacks. Particularly as it was discussed in Parliament, parts of civil society began mobilising against the law, contesting its intentions, the non-transparency of the process, and the impunity that it grants to those close to the Government. Commentators from civil society went as far as declaring that the law was ‘meaningless, unfair, anti-human and anti-state’ and ‘the worst thing that has happened to Kosovo so far’. These voices were represented in Parliament by the opposition Party ‘Self-Determination’ which claimed that the law ‘pardons Serbia’s criminal structures and organized crime, corruption and other offences to the detriment of our welfare’. Finally, civil society organisations initiated a petition against the draft law which was signed by around 12,500 citizens and supported by 34 organisations. In the open letter to the international community launching the petition, the organisations recognised that ‘amnesty is necessary to re integrate northern part of Kosovo in our legal framework’, but stressed that the first draft law was overbroad and that it would ‘undermine the entire rule of law efforts in Kosovo’. Following the protests and the defeat of the first draft bill, the Government reacted by introducing the abovementioned exemption of crimes that involve grievous bodily injury or death. Still, civil society organisations maintained that the changes were ‘cosmetic’ and that they did not affect the law in its substance. The law was passed as protests were continuing in front of the Parliament.

The last stage of the rocky road towards the enactment of the amnesty law involved a challenge of the law in front of the Constitutional Court of Kosovo. 13 MPs, including nine from the ‘Self-Determination’ Party, submitted the request for a constitutional review on 18 July 2013, one week after the law was passed by the Parliamentary Assembly. The applicants argued that the law violated in constitutional safeguards concerning the rights of injured parties to a fair and impartial hearing, a legal remedy against administrative decisions, and equality before the law. On 2 September 2013, the Constitutional Court declared the law to be generally compatible with the Constitution, accepting the applicants’ claim only for the specific provisions concerning the destruction or damage to property, arson, and the falsification of documents. The provisions were removed from the final version that was signed by the President, eventually entering into force on 4 October 2013.

EVALUATING THE AMNESTY LAW

While civil society organisations were very vocal in pointing out the shortcomings of the amnesty law, most international stakeholders did not share their concern. As US Deputy Assistant Secretary of State Philip Reeker stated rather dispassionately, ‘EU lawyers [and] some U.S. experts [have] all looked at this, and in fact, there is no widespread amnesty for serious crimes’. The hostility to the law was according to him based on ‘clear misunderstandings’ which could be resolved if people, including the opposed MPs, ‘go back and read’ the document. In this section we indeed seek to provide a thorough reading of the law,

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22 Amnesty Law, Articles 3.1.1.13.1 – 3.1.1.13.12.
23 Amnesty Law, Articles 3.1.1.14; 3.1.2.9.
24 Amnesty Law, Article 4.
30 Constitutional Review, paras. 28-35.
31 Constitutional Review, p. 83.
though not only focusing on its legal aspects, which we believe provides an insufficient analysis, but on its wider implications on the politics and the economy in Kosovo. More specifically, we look at the dimensions of legality, rule of law, security, economy, and reconciliation to assess the advantages and risks that the amnesty law entails.

**Legality**

As already mentioned in the previous section, the amnesty law faced considerable opposition, with civil society representatives arguing that the broad scope of the law ran counter constitutional norms. The MPs who requested the Constitutional Court to review the law held also that the amnesty law violated international law, in particular the guarantees under the European Convention on Human Rights [ECHR]. Notable support for this view came from the UN High Commissioner for Human Rights who pointed out that the amnesty law was an ‘issue of concern’. What is more, she told reportedly that ‘[i]t is very clear that with international standards and international humanitarian law, granting amnesty is a violation of international law, especially for very serious crimes’. While the ruling of the Constitutional Court toned down criticism concerning the legality of the amnesty law, it did not actually silence it. For instance, Ilir Deda from the Kosovar Institute for Policy Research and Development observed after the decision that ‘[t]he Constitutional Court did not have the fortitude to deal with the details of the amnesty law and [that] the removal of some sections or paragraphs was only throwing dust in the public eye, as ultimately the Court has allowed again to pardon serious offenses, organized crime, and high corruption on the entire territory of Kosovo. According to the ‘Self-Determination’ Party, the Court had issued a ‘contradictory’ decision in finding ‘a significant amount of legal regulation’ but not the bill as a whole to be in violation of the Constitution.

While the question of legality raises a complex set of issues, it is arguably the dimension of the amnesty law that can be assessed most conclusively. For one, it appears that the legality of the amnesty law received particular attention from national and international actors, spurred not least by the efforts of civil society. Kosovar Minister of Foreign Affairs Enver Hoxhaj assured the public at an early stage that none of the implementation points of the Brussels agreement (including the amnesty law) would require constitutional changes, indicating that constitutional compatibility was a primary goal from the outset. EU officials reaffirmed also that the amnesty law had to be in accordance with European standards, expressing ‘shock’ over a proposal to include amnesties for war crimes. The initial parliamentary defeat and amendment of the draft law and the constitutional proceedings further reinforced its consistency with the Constitution and with international law. With regard to legality at least, it appears that the amnesty law has been subject to substantive review. The procedural journey that ended with the ruling of the Constitutional Court measures up to the kind of constitutional control that one could expect in a functioning democracy.

Moreover, upon closer inspection of actual international practice, arguments questioning the legality of amnesty laws turn out to be much weaker than one might expect. The often lightly accepted assumption is that amnesty laws have recently become unacceptable, especially since the UN changed its stance at the

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33 Constitutional Review, paras. 36-43.
end of the 1990s when it explicitly rejected unlimited amnesties in both Sierra Leone and East Timor.40 However, Freeman and Pensky find that it is quite difficult to identify an anti-amnesty norm in either conventional or customary international law.41 Mallinder shows that the trends in the introduction of amnesty laws point to an overall increase in their number since the Second World War and a continued usage in the 2000s.42 Almost completely uncontroversial from the point of view of international law are amnesties that concentrate solely on political crimes while excluding international crimes (the Kosovar law with its exemptions clause falls within this category).43 But even when an amnesty law includes international crimes, it is unclear if this constitutes a breach of international law. Freeman and Pensky doubt this and suggest that ‘the most that one can proclaim is the existence of an emerging customary norm against amnesties that purports to cover international crimes’44. However, it is notable that this potentially ‘emerging’ or ‘crystalising’ norm cannot be found in the Rome Statute of the International Criminal Court which deliberately left open the question of the legality of amnesties.45

To conclude, it is difficult to challenge the constitutional and international legality of the final version of the amnesty law. International stakeholders such as the US Deputy Assistant Secretary of State are right in insisting that the law as such does not breach any legal rules. Still, the fact that international law imposes (at best) very few constraints on amnesty laws belittles this ‘achievement’ considerably. In fact, legality is hardly a suitable framework for the evaluation of the merits of the law.

Rule of Law

Even if an amnesty law is in conformity with constitutional and international legal norms, it still needs to be determined whether it strengthens or at least preserves the rule of law. Indeed, in debates on amnesty laws there has been a frequent profession of what Slye once called the ‘rule of law argument’, which holds ‘that, even assuming amnesties contribute to short-term social stability, in the long-term they undercut efforts to establish a stable democracy that honors human rights and the rule of law’.46 The argument is straightforward: amnesties are granted to ensure peace and enable the reintegration of perpetrators, but the same perpetrators will actually feel emboldened to continue committing crimes. Not all theorists share this opinion. Teitel suggests for instance that amnesties, especially when conceded individually and transparently, can function similar to punishment in clarifying and condemning past offences.47 While some have made the plausible general objection that such an interpretation ‘requires degrees of mental legerdemain that conceptualize the rule of law so elastically as to deny it any value’48, one can point to even more concrete consequences that the amnesty law could have on the rule of law in Kosovo.

Within the context of the public controversy around the law, the rule of law has been mentioned repeatedly. As the civil society organisations argued in their open letter, the amnesty law ‘will undermine the entire rule of law efforts in Kosovo’49. The basis for their claim was that the amnesty law amounted to a ‘universal amnesty’ on the entire territory of Kosovo of common crimes such as tax evasion, damaging public and private property, and illegal medical as well as pharmaceutical activities, the latter not even linked to any context of ‘resistance’. The opponents argued that the actual law went ‘beyond the objective’ of the Brussels agreement (which is the reintegration of Serbs into the constitutional order).50 The release of 1,174 Kosovar citizens until January 2014, almost all of which are ethnic Albanians charged for the

42 Mallinder, Amnesty, Human Rights and Political Transitions, at pp. 18-19.
43 Ibid., at p. 406.
45 Ibid., at pp. 61-64.
illegal possession of weapons, substantiates this claim. But some legal experts argued more crucially that the implementation would be problematic ‘because there are many people who are charged and they will try to misuse [the law] in the context of criminal cases’. Fear of abuse is especially high for corrupt persons who hold high positions in Kosovo’s industry and political structures, including government officials.

But how justified is this worry in reality? Two critical issues arise at this point, relating respectively to the substance and the institutional implementation of the law. Substantively, the central question seems to be what exactly constitutes a ‘call for resistance’ that converts a common into a political crime. The amnesty law delegates this question to judges and prosecutors, a common practice also in other countries. The fact that the law stipulates that the ‘call for resistance’ is supposed to be an ‘aim’ suggests though that the approach stresses the subjective element, meaning that it focuses on the intentions of the perpetrator rather than the outcome. The criterion is not unknown internationally as it has been used to examine requests to prevent extraditions. Originating from Swiss jurisprudence, it is usually coupled with an examination of the proportionality of the political component to the damage caused, normally requiring a ‘careful examination of the circumstances’ and a balance ‘of the various considerations’. However, identifying such a motive demands clarity on whether political conflict actually exists, with commentators stating that courts must develop the necessary criteria for such a determination. This aspect raises some serious difficulties in the context of Kosovo: apart from the enmity between Serbs and Albanians, are there any other ‘political conflicts’? Can other local groups or persons be said to have resisted the international administration until the declaration of independence in 2008? Does the declaration of independence mark a break in this context? Judges and prosecutors are left to consider these intricate matters without any particular guidance by the legislator. In fact, the only (rather confusing) remark made by officials was that the amnesty applies not only to Serbs as it ‘has not been drafted to serve any individual, any part of the territory or any ethnic group’.

Given the substance of the law, a lot will depend on the manner in which the judicial system handles its implementation. This will involve many actors, including judges, prosecutors, as well as the correctional service. The latter caused some early uproar by sending to the courts a list of 350 persons to be considered for early release. With some ‘notorious criminals’ (including murderers and corrupt officials) on the list, officials declared quickly that the list was ‘a mistake’. The Head of the Supreme Court guessed that the correctional service had ‘simply misunderstood’ the law. The shortcomings are, however, more structural in nature, so the implementation of the law is likely to remain problematic. The UN High Commissioner for Human Rights expressed during her 2013 visit concern ‘related to the weaknesses of the rule of law institutions in Kosovo, including the importance of ensuring the independence of the judiciary, […] case backlog, lack of trust in the judiciary and the lack of execution of judicial decisions’. The progress report of the European Commission notes also that political interference remains ‘a serious

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52 Fisnik Korenica in Gashi, ‘Shoqëria civile kritikon Kushtetuesen për Ligjin mbi amnistinë’, our translation.
54 Mallinder, Amnesty, Human Rights and Political Transitions, at pp. 137.
55 Van den Wyngaert in ibid.
61 UN Office of the High Commissioner for Human Rights, ‘Opening remarks’.
concern’ and that the judicial system still suffers from a lack of local capacities, case backlog\(^{62}\), deficient security for judicial personnel, witnesses, and plaintiffs, and inefficient legislation implementation.\(^{63}\) Most strikingly, Transparency International’s recent Global Corruption Barometer finds that people in Kosovo perceive the judiciary as the most corrupted institution.\(^{64}\)

Local elites are aware of the many problems and recognise their responsibility to improve the situation. High officials such as President Jahjaga stress regularly that corruption and organised crime are unacceptable and that the law must prevail.\(^{65}\) Against this background, one wonders why the amnesty law assigns to the judiciary the important task of defining common and political crimes. As the rule of law has not yet taken roots, a vague amnesty law is much more open to abuse. Such manipulation, in turn, is likely to undermine the ongoing efforts to establish the rule of law, in particular to reinforce people’s confidence in judicial institutions.

Security

As previously mentioned, amnesty laws are usually seen as a means to re-establish security in the wake of armed conflict and to ensure transition from authoritarian governments to democratic ones. Particularly in early transitional justice literature, examples from Latin America have made prominent the argument that amnesties, while running counter the demands of justice, are acceptable as long as they secure peace and promote political stability.\(^{66}\) As the Constitutional Court of Kosovo stated in its decision, amnesties ‘are introduced for example during conflicts to end the violence, as part of peace agreements in order to promote reconciliation between the parties involved’\(^{67}\). Security objectives, often of the most rudimentary kind as the absence of direct violence, play thus a central role in the passing of amnesty laws.

Almost fifteen years after the armed conflict and the intervention by NATO, ‘the greatest achievement’ in Kosovo remains the ‘the improved security situation and the considerable reduction in direct violence’\(^{68}\). The UN Secretary-General (UNSG) estimates the immediate security situation to be ‘generally calm, with occasional incidents reported in ethnically mixed areas’\(^{69}\). The announcement and passing of the amnesty law has changed little in this regard, neither improving nor worsening the condition noticeably. Some violent incidents occur in regular intervals, and the direct aftermath of the negotiations has in fact been characterised by elevated tensions. For instance, a hand grenade exploded in Northern Mitrovica on 18 June 2013, allegedly thrown by members of criminal groups.\(^{70}\) At the border to Northern Kosovo, and particularly in Mitrovica, there have been repeated ethnic provocations.\(^{71}\) The gravest incident occurred on 19 September 2013 (only a day after the amnesty law was signed by the President), when unknown subjects attacked a routine convoy near Žveçan/Zveçan on its route to Northern Kosovo, killing a EULEX customs officer.\(^{72}\) These and similar events call into question the evaluation of the UNSG which finds that both parties have shown an ‘increased commitment to prevent tensions on the ground’\(^{73}\) during the high level negotiations. Kosovar Deputy PM Edita Tahiri drew attention during the talks to the fact that the

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\(^{62}\) The backlog of cases is particularly troubling with over 235,000 cases pending before Kosovo basic courts in 2013 according to the Commission’s progress report. As a EU officer stated, the backlog is likely to remain for a long time. The heavy workload and pressure will affect the quality of judgments in a negative rather than a positive manner. Interview with European Union Officer on Kosovo, Brussels, 19 September 2013.


\(^{64}\) Transparency International, Global Corruption Barometer 2013, 2013, at p. 17.


\(^{67}\) Constitutional Review, para. 92.

\(^{68}\) Elisabeth Schleicher, Positive Peace in Kosovo: A Dream Unfulfilled, 2012, at p. 2.


\(^{70}\) ‘Hand grenade explodes in north of Mitrovica (Koha Ditore)’, http://media.unmikonline.org/?wysija-page=1&controller=email&action=view&email_id=392 (last accessed 29 December 2013).

\(^{71}\) For instance, a Serbian group dressed as Chetniks once also occupied the Northern part of the River Ibër bridge, threatening the ethnic Albanian citizens of Southern Mitrovica. See “Chetniks” at Ibër bridge threaten and insult Albanians’, http://media.unmikonline.org/?wysija-page=1&controller=email&action=view&email_id=407 (last accessed 29 December 2013).

\(^{72}\) UN Security Council, Report of the Secretary-General, at p.4

\(^{73}\) Ibid., at p. 4.
Serbian gendarmerie had no permission to patrol near the village of Karačeva and urged Serbia to stop such provocations.74

However, assessing the amnesty law only with regard to its limited short-term impact on security ignores the broader purpose of the law. The integration of the Serb minority into the institutional framework of the state is meant to ensure the gradual attenuation of ethnic divisions. A joint statement of several high-ranking EU officials and the US Embassy emphasises exactly that, declaring that the law ‘is a critical step in ensuring the full integration of all of Kosovo’s citizens into Kosovo institutions throughout the country’75. The more appropriate point of reference for assessing the amnesty is thus long-term security, the impact on which is not evident at the time of writing. In fact, if one looks at the prospective impact of the amnesty law, it is possible to identify both opportunities and risks.

The double-edged character of security-oriented decisions has a long history in Kosovo. For instance, members of the disbanded Kosovo Liberation Army (KLA) were granted ‘de facto amnesty’76 in the aftermath of the war, enabling NATO and UNMIK to maintain stability and achieve the gradual reintegration of fighters into their previous positions and the new Kosovo Protection Corps.77 Such a constructive role of amnesty laws in ‘disarmament, demobilisation, and reintegration’ programmes reflects experiences in other contexts.78 Still, in the case of Kosovo, the reintegration of KLA members has also had reverse effects, allowing for organised crime, corruption, and the ‘criminal infiltration of the newly created institutions’.79. The amnesty law runs a similar risk of reinforcing the challenge that criminal activity poses to security in Kosovo. The broad ambit of the law exacerbates again this risk as it includes the ‘common crimes’ of tax evasion, smuggling of goods, prohibited trade, evasion of import duty, and the attacking and obstructing of officials persons in performing their official duties. In other words, a security risk analysis of the amnesty law cannot afford the mistake initially made by UNMIK and KFOR and ignore ‘the elephant in room’ that is transnational organised crime.80 Criminal groups have also a negative impact on the direct security situation, as has been exemplified by a recent killing in Northern Mitrovica.81 In addition, it has become increasingly clear that the existence of so-called ‘mafia states’ poses as many problems to international security as to local law enforcement.82

Economy

For a comprehensive assessment of the amnesty law, it is also necessary to look at the economic implications and risks resulting from such a law. Two general points need to be considered here. Firstly, a possible weakening of the rule of law would most entail economic knock-on effects. Economies in transitional countries like Kosovo usually suffer from the lack of public trust that results from a lack of law enforcement and corruption.83 The availability of strong institutions that reinforce the rule of law can, by contrast, attract much needed foreign investment.84 In contexts such as Kosovo where there is political

81 In the beginning of 2014, a newly elected member of the Northern Mitrovican assembly was allegedly assassinated by organised criminal groups in Northern Kosovo; http://www.blic.rs/Vesti/Politika/434954/Ubijen-odbornik-Dimitrije-Janicijevic-u-Kosovskoj-Mitrovici (last accessed 20 January 2014).
stability but a weak rule of law, amnesties are less likely to do that. Secondly, the Pristina government might suffer direct losses in revenue in amnestying tax evasion, smuggling, and circumvention of import duties. This risk is particularly pertinent as reducing fiscal evasion is a central to the government’s plans to increase public revenue.

What is concretely at stake in the fight against informality? As the economy of Kosovo remains weak, large parts of the commercial activities take still place within the country’s ‘shadow economy’. A 2013 report prepared by the Riinvest Institute in collaboration with the German Friedrich Ebert Stiftung assigns numbers to the problem. Business managers and owners believe purportedly that around one third of sales are not being reported, meaning that no taxes are being paid. Around 37 per cent of labour is not legally declared either, with figures being as high as 70 per cent in agriculture, forestry, and fishing. Almost half of business respondents think that the levels of tax evasion in Kosovo were at least sometimes justified, reflecting ‘low levels of tax morale’ in Kosovo. The 2012 UNDP report cites Riniest’s assessment that the informal sector is responsible for around 25 per cent of the GDP, amounting to an approximate total sum of 1.2 billion EUR. By comparison, the state budget for the year 2013 is only slightly larger with about 1.6 billion EUR.

The economic aspect of the amnesty law received much less attention than arguments concerning legality, the rule of law, or security. Still, some newspapers brought up the issue during the controversy. Koha Ditore mentioned in this context that local businesspeople owed the state 212 million EUR according to the 2012 UNDP report cites Riniest’s assessment that the informal sector is responsible for around 25 per cent of the GDP, amounting to an approximate total sum of 1.2 billion EUR.

During the negotiations and at the time of the enactment of the amnesty law, officials highlighted that measures were geared to the promotion of reconciliation. Kosovar PM Thaçi emphasised for instance that ‘[the] amnesty law [was] ultimately a political act that leads to reconciliation of people’. Minister of Foreign Affairs Enver Hoxhaj stated before the UNSC that the law was passed ‘for the sake of the normalization of inter-State relations and in support of peace and reconciliation’. On the Serbian side, Justice Minister Nikola Selaković suggested similarly that the law is a measure which ‘opens the door’ to

Reconciliation

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67 Riinvest Institute, To Pay or Not to Pay: A Business Perspective on Informality in Kosovo, 2013, at p. 15.
68 Ibid., at pp. 21-22.
69 Ibid., at pp. 17-18.
70 UNDP, Kosovo Human Development Report 2012: Private Sector and Employment, pp. 23 and 56.
74 Interview with NATO Officer, Brussels, 14 October 2013.
77 UN Security Council, Record of the 7026th meeting, UN Doc. S/PV.7026, 29 August 2013, at p. 8.
Enacting amnesty laws for the purpose of reconciliation is commonplace and sometimes even reflected in the name of the law. However, what exactly does the concept of reconciliation signify? As Mallinder points out, literature on ‘restorative justice’ has come to understand reconciliation not simply as the absence of violence, but as a deeper ‘restoration’ of social relationships. Such a complex conception of reconciliation implies that the impact of an amnesty depends on both its design and its place in the transitional justice context. In fact, while she stresses the restorative potential of amnesties, Mallinder accepts that they have to be complemented by other initiatives and reform measures. As another analyst states, where amnesty is not linked to restitution, contrition, or acknowledgement of responsibility, it can hardly serve restorative justice. The most celebrated example of a ‘restorative amnesty’ is the conditional amnesty granted by the South African Truth and Reconciliation Commission which obliged perpetrators to give full public testimony to qualify for amnesty. Providing victims also with broad participation rights, the South African approach is widely regarded as having ‘furthered both truth and reconciliation to an extent unprecedented by any previous amnesty agreements’.

To be sure, the Kosovar amnesty law is fundamentally different from the South African arrangement. Amnesty decisions are taken in a more technical and less public manner, so the procedure does not reveal much information that can foster reconciliation. More crucially, the Kosovar amnesty does not encompass international and other grave crimes and pertains to offenses that took place after rather than during the time of conflict and oppression. In consequence, the law does not address most of the issues that continue to poison the relations between Albanians and Serbs, as for instance the fate of missing persons. A noticeable positive impact of the amnesty law on reconciliation is thus heavily dependent on other aspects, in particular on the progress and reception of the overall negotiation process. In case of failure, the amnesty might actually have a boomerang effect on inter-ethnic relation as already opposed parts of Kosovar civil society could blame Belgrade for imposing upon Kosovo a troublesome law. There is also the realistic possibility that the law could be perceived as unfair, with one local critic already calling for a ‘reciprocal amnesty’. The chances for such negative eventualities could have been decreased by a more inclusive and less hasty adoption of the amnesty law, which could have given larger parts of the population a sense of ownership over the measure.

Explaining the Support of International Stakeholders

Given its origins from the negotiation and its controversial nature, an assessment of the amnesty law must also take into account the role that external actors have played in its creation. With the notable exception

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99 Constitutional Review, at paras. 84 and 87.
100 Mallinder, Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice, at p. 39.
105 To facilitate reconciliation, participation should ideally already be ensured before the enactment of amnesty law. In the words of Mallinder, ‘where possible, the contribution of amnesty to reconciliation would be further strengthened by such communication strategies being two-way processes, with the views of all sectors of society […] being taken into account by the state when designing the amnesty’; see Mallinder, ‘Exploring the Practice of States in Introducing Amnesties’, at p. 139.
107 Kosovan Foreign Minister Enver Hoxhaj mentioned this point specifically to the UNSC, stating that this ‘is an issue that continues to haunt our society’; see UNSC, Record of the 7026th meeting, at p. 11. Di Lello and McCurn in their work on ‘grassroots transitional justice’ in Kosovo stress also the significance of the issue of missing persons; see Anna Di Lello and Caitlin McCurn, ‘Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo’, in: 21 East European Politics & Societies, 2013, p. 129, at p. 132.
of the UN High Commissioner of Human Rights who questioned the law with regard to legality, international stakeholders provided almost unconditional support for the law. In a meeting with PM Thaçi a day before the second reading of the amnesty law, EU High Representative [EUHR] Catherine Ashton called upon the Government and Parliament to demonstrate their commitment to the Brussels agreement by passing the law.109 A day earlier, the EU Special Representative had issued a statement together with a number of ambassadors from EU countries and the US, underlining ‘the importance of Kosovo enacting the draft Law on Amnesty’ and a ‘[swift Assembly adoption].’110 However, backing was not only given to the second, narrower draft of the amnesty law, but also to the one that was rejected by Parliament. French Ambassador Maryse Daviet for instance pointed out prior to the first reading that France ‘strongly want[s] this amnesty law to be ratified’111. The U.S. Deputy Assistant Secretary of State gave a similar impression a day after as he emphasized the significance of the law and criticized some media for misinforming the public by distorting the substantive content of the law.112

The problems surrounding the modalities and passing of the amnesty law certainly did not entirely escape the attention of the internationals. In what is arguably the most nuanced official statement, EU Special Representative to Kosovo Samuel Žbogar stated that the EU ‘understand[s] the concerns expressed by the public and during parliamentary debate’ while stressing the need ‘to pass a fair and transparent law on amnesty as soon as possible’113. Some officers went further in their unofficial and anonymous remarks. As already mentioned, the proposal to include international crimes caused a ‘shocked’ reaction by EU officials. Interviews with diplomats in Pristina reveal also that one can find recognition of the ‘very rushed’ process through which the law came about, with one interviewee stating even that the law represents ‘a rod [to beat] our own back with’.114 Still, the general attitude to the law remains at the least ‘indulgent’.115 If any doubts existed during the time of the debate, they were not reflected in the role of international actors generally, and European diplomats particularly, who were perceived as exerting a pressure to pass the law.116 Given the insights from our evaluation, these facts raise questions concerning the objectives and strategy pursued by the involved international actors.

Several theoretical explanations can be given for the supporting and even pushing attitude of the international actors. Most obvious is the realist one according to which the amnesty law represents a ‘necessary evil’, a concession to the inevitable ‘impediments of reality’.117 In this view, passing the amnesty law was necessary to pave the way for the agreement between Belgrade and Pristina and thus for any progress in the conflict surrounding northern Kosovo. There is certainly some truth to this claim, as accepted even by the civil society initiatives that went to the streets against the law. However, critical voices underline that it is questionable whether the broad ambit of the amnesty law is also a requirement of realism. Some of the diplomats hold such a view, suggesting that they generally ‘can’t go into conflict with [...] local interlocutors too much’.118 This implies, in other words, that international stakeholders had little choice but to accept the amnesty law as envisioned by the Thaçi Government. The problem with this

110 European Union Office in Kosovo, ‘Joint statement by the EUSR, the Heads of Mission of EU member states in Kosovo and the United States Embassy’.
115 Ibidem.
117 Freeman, Necessary Evils, at p. 6.
argument is that U.S. and EU experts have reportedly been involved in drafting both versions of the law.\textsuperscript{119} In fact, it is an open secret that international actors still retain a lot, if not even most influence over governance in Kosovo,\textsuperscript{120} particularly in such important matters as amnesty. Both the drafting process and final form of the law suggest thus that diplomatic realism alone cannot fully account for their actions.

A second and additional explanation for supporting amnesty laws pertains to specific national or organisational interests.\textsuperscript{121} In the context of Kosovo, Blockmans and Lehne claim that internal concern have been especially strong in the EEAS and its head, EUHR Catherine Ashton, who were ‘vindicated’ by the Brussels agreement.\textsuperscript{122} According to Blockmans, ‘the agreement between Belgrade and Pristina is a clear-cut and resounding diplomatic success for the EEAS, enabling it to dispel some of this recent criticism’\textsuperscript{123}. He also attributes part of this success to the high pace of the negotiation, which was running on a tight monthly schedule towards the end.\textsuperscript{124} The ‘proactive’ role of EUHR Ashton and the EEAS as mediators in the Kosovo negotiations have in fact been seen as the ‘most positive example’ of the EEAS arousing interests for its activities, an aspect in which its overall performance leaves much to be desired.\textsuperscript{125} Still, the U.S. and various European embassies displayed the same level of backing for the law, meaning that the internal considerations of the EEAS are only an additional factor, yet one that has motivated the primary mediator.

Thirdly, one must take into account the possibility that international actors underestimated, rather than wilfully ignored, the risks attached to an amnesty law. With amnesties constituting a ‘transitional justice issue’\textsuperscript{126}, it is clear that assessments are likely to be influenced by the field’s entrenched ‘legalism’\textsuperscript{127}. Less attention is in this case paid to the political context and the conditions under which an amnesty law is being enacted.\textsuperscript{128} The risk analysis undertaken by international actors has focused above all on legality and legal claims, possibly to the detriment of other aspects. Some evidence for such a conclusion can be found in the recurring emphasis on the involvement of international legal (but not any other) experts in the drafting process.\textsuperscript{129} Furthermore, the passing of the law (and other aspects of the Brussels agreement) took place in ‘record time’\textsuperscript{130}, making it unlikely that international actors achieved to shed light on all possible effects and eventualities.

Finally, it is crucial to note the particular political culture that has taken roots in Kosovo over a time of almost 15 years of international administration. Regardless of the exact name that one gives to this culture,\textsuperscript{131} its main feature is that it grants wide authority to international actors while largely disregarding

\textsuperscript{119} This point was highlighted by the U.S. Deputy Assistant Secretary; see ‘Prime Minister of Republic of Kosovo Hashim Thaçi meets Deputy Assistant Secretary of State Philip T. Reeker’.


\textsuperscript{123} Blockmans, ‘Facilitated dialogue in the Balkans vindicates the EEAS’, at p. 1.

\textsuperscript{124} Ibid., at p. 3.


\textsuperscript{126} Freeman, Necessary Evils, at p. 19.


\textsuperscript{128} Mallinder, Amnesty, Human Rights and Political Transitions, at p. 10.

\textsuperscript{129} See ‘Prime Minister of Republic of Kosovo Hashim Thaçi meets Deputy Assistant Secretary of State Philip T. Reeker’; Bassuener and Weber, ‘Not Yet a Done Deal: Kosovo and the Prishtina-Belgrade Agreement’, at p. 8.


accountability. The taking of exceptional measures (such as the amnesty law) is more common in such a context, and is thus perceived as much less problematic. Sahin contends that in the case of Kosovo, this state of affairs can be traced back to the NATO intervention in 1999 which constituted an exceptional breach of the international prohibition of the use of force.132 As the international administration took over after the intervention, a type of ‘good governance’ took roots that served mostly as ‘a way of bypassing the state’s links to society’133. As the local legitimacy of the international administration is decreasing over time,134 policies have come to be determined by negotiations between international and local élites, a comparably shortsighted and unaccountable process.135 In brief, in the political context of Kosovo, even a far-reaching policy measure is more likely to be implemented even without the necessary profound understandings of its risks and effects. Any dissent voiced by civil society is also not going to have the same influence as in ‘more regular’ political settings.

In sum, a range of factors seemed to have contributed to the uncritical support given to the amnesty law by international stakeholders. Above all an imperative of diplomatic realism, a fast enactment of the law was also in the interest of the leading external actor, namely the EEAS and EUHR Catherine Ashton. With the international political stakes being high, domestic factors shrunk in importance, leaving space only for a narrow debate on the legality of the measure. The almost exclusive focus on the legal appropriateness of the amnesty can be further explained by the ‘legalism’ that often characterises evaluations of transitional justice issues. In the particular context of Kosovo where even exceptional policy measures are not exposed to the same level of deliberation and accountability, these factors seemed to have been sufficient for alleviating any doubts about the appropriateness of the amnesty law as proposed and finally enacted by the Government.

CONCLUSION

Within the general negotiations that have taken place between Belgrade and Pristina, passing the amnesty law has proven to be particularly difficult and controversial. Civil society mobilised against the law in Kosovo, while the Government failed to gather sufficient votes in Parliament to pass the law on the first voting. After the law was adopted on the second reading, opposition MPs seized the Constitutional Court, arguing that the law violated international and constitutional standards. The Court found that this was true only for a number of selected articles and upheld the law as a whole. After several months of political and legal controversy, the law entered into force in the beginning of October 2013.

This paper has sought to analyse and evaluate the amnesty law with regard to its opportunities and risks. Although it is too early to give a conclusive evaluation, our analysis has discussed the potential impact of the law on a host of issues. We find that providing an accurate assessment is [and probably will remain] quite challenging.136 While the proponents of the law stress rightly that the final version of the amnesty law is in conformity with the relevant legal norms, this article illustrates that legality alone means rather little. Considerations of the rule of law, security, the economy, and reconciliation are equally pertinent. While the rule of law has not yet taken full roots in Kosovo, the amnesty law relies on a rather vague notion of ‘resistance’ to identify common crimes of a political character. The interpretation of the concept is left to the judiciary which is arguably the most corrupted institution in the country. In terms of security, the law runs a realistic risk of aiding organised criminal activity while not further decreasing the already low levels of direct violence between ethnicities. The inclusion of tax evasion and other economic crimes in the amnesty law could have adverse economic effects since the state renounces its right to collect...
considerable revenues from illicit commercial activities. Finally, the impact on reconciliation is also unclear as the law does not address the most central grievances of the ethnic communities. Adverse effects on inter-ethnic relations are a possibility, especially if the negotiations were to reach a deadlock. In sum, our assessment of the law confirms Freeman’s general observation that ‘when it comes to amnesty, there is much more ambiguity in the legal realm than many legalists are prepared to acknowledge, and [...] much less empirical certainty about amnesty’s benefits than many realists are ready to concede’¹³⁷.

Given the complex question raised by an in-depth analysis of the amnesty law, it is striking that ‘internationals’ active in Kosovo have given their uncritical support to the law. As the law is a product of the agreement made under the auspices of the EEAS, European and American negotiators and experts had to be fully aware of – if not even directly involved in – its drafting. The law did not pass on the first reading in Parliament, not least because of the strong and organised opposition from Kosovo’s civil society. The bill was nonetheless passed only a week later, with the improved second version containing all the mentioned shortcomings. In contrast to the view of experts that ‘there are actually dozens of significant choices in the design and negotiation of an amnesty that can, and should, affect our evaluation of any individual amnesty’¹³⁸, international stakeholders had made up their mind startlingly fast. Our review of the literature on amnesties and state building in Kosovo revealed a number of possible factors for this backing. Most importantly, the law represents an almost archetypal demand of realism which eclipses many other important aspects. The EEAS in particular had additional internal interests to achieve a ‘quick win’ as it has to prove itself as a new actor in the foreign policy arena. Where internationals made remarks about the amnesty law, they drew attention (as so often) only to the legality of the transitional justice issue. Finally, the political context of Kosovo was another ‘enabling’ factor, offering an environment where even momentous decisions can be made without many second thoughts. What remains is consequently another striking instance in which ‘institutions and rights are prioritised over local needs and interests, peace and stability over justice and development, and external values and principles [...] over the local culture and context’¹³⁹

¹³⁷ Freeman, Necessary Evils, at p. 7.
¹³⁸ Ibid., at p. 31.