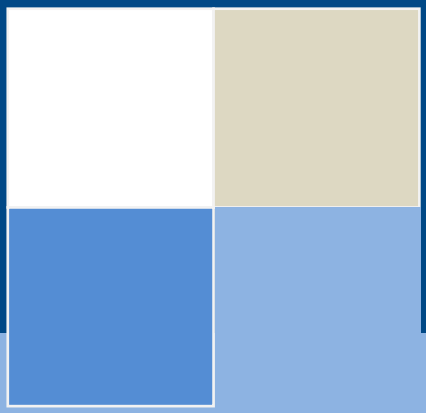
Assessment Report
Assembly of Kosovo, Committee for Foreign Affairs

GROUP FOR LEGAL AND POLITICAL STUDIES

A Policy Assessment of the Implementation and Implications deriving from the Law on International Agreements of the Republic of Kosovo



ABOUT GLPS

Group for Legal and Political Studies is an independent, non-partisan and non-profit public policy organization based in Prishtina, Kosovo. Our mission is to conduct credible policy research in the fields of politics, law and economics and to push forward policy solutions that address the failures and/or tackle the problems in the said policy fields.

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Introduction

This report assesses the text and implementation of the Law on International Agreements. The Assembly of Kosovo passed the law on 14 November 2011; it was published in the Official Gazette of the Republic of Kosovo on 16 December 2011; it came into force on 31 December 2011. The purpose of the law was to "establish the procedure on conclusion, endorsement, ratification, reserves and declarations, amendments and supplementations, withdrawal from the agreement, and implementation of international agreements of the Republic of Kosovo."[1] This report will assess the efficiencies of these procedures, the problems they might cause and how the procedures compare to other states in the region. It will also discuss how these procedures define—or fail to define—the role of Kosovo's institutions in international agreements. It will also see how well these procedures have been followed in international agreements.

There are limits to studying a law that is less than two years old, some endogenous to studying such a law, but others a result of the writing of this particular law. One endogenous problem is that there will be a limited number of cases to which the particular law applies. The long-term effectiveness and implementation of the law may not be appreciated from studying these particular cases. A second endogenous problem is that such a study magnifies early uncertainties and mistakes that may result from simple confusion and the lack of an effective system. This type of assessment is more effective for considering unforeseen complications of the law and for finding areas where it is being directly contradicted or ignored.

The Law on International Agreements on its own, however, makes no allowance for negotiations that began before the Law was put into place. As will be seen in some of the international agreements assessed, the assumption was made that the Law did not apply retroactively to ongoing negotiations, causing a delay in the law actually going into effect.

For these reasons, this report will examine both the law itself and how it has been implemented. The former will allow the report to consider possibilities for how the law might be used as it matures and its use grows more commonplace, while the latter will give insight into its early implementation and any problems that may be occurring.

The Law on International Agreements: An Appraisal

The Law on International Agreements details the procedure for how an international agreement is concluded, ratified and implemented. The two most important parts of this procedure grant full powers for concluding an agreement and determine how an agreement is ratified. This section will discuss how these two practices are defined in Kosovo's law and how they compare to other regional states. It will conclude by discussing miscellaneous other issues in the conclusion of international agreements.

[1] Law on International Agreements, Article 1

A) Full Powers

The right to negotiate, conclude and authenticate a written international agreement on behalf of a state is otherwise known as full powers. Under the Law on International Agreements, article 6, para.1, the President, the Prime Minister and the Minister for Foreign Affairs all automatically possess full powers.[2] The Law on International Agreements also gives full powers to all heads of diplomatic missions for Kosovo and all of Kosovo's accredited representatives at international organizations and international meetings.[3] Other officials may be granted full powers to conclude an agreement according to the law on international agreements.[4] Although article 6, para.1, of the law deliberately provides that a number of high ranked officials shall automatically possess full powers, article 7 apparently makes the use of these powers conditional upon the approval process guided by the same article. It is obvious that article 6 and article 7 of the law on international agreement conflict. Article 6 of the law leaves no assumption that any other supplementary authorization is necessary for that list of institutions to utilize the right to negotiate, conclude and authenticate a written international agreement. However, article 7, of the law, still, determines a procedure, via which, all officials, except the President of the Republic, have to undergo to assume full powers.

For all other officials, the Law makes receiving full powers much more complicated. First, it separates the right to negotiate from the rights to conclude and authenticate. The Ministry of Foreign Affairs consents on the commencement of negotiations, the composition of delegations and the time and location for negotiations, but this does not include the right to conclude an agreement.[5]

Whether these negotiators may negotiate on behalf of the Republic of Kosovo at all is murky according to the Vienna Convention on the Law of Treaties (henceforth VCLT). Article 8 renders moot any treaty concluded by an official not authorized to conclude an agreement unless full powers are given retroactively.[6] There is a provision in Article 7 (VCLT) that allows for "the practice of the States concerned" to negate the need for negotiators to have full powers,[7] but it puts pressure on the Kosovo Government to agree to any proposed treaty because it will otherwise be considered an unreliable negotiating partner.

However, another point of argument relates to the consent related to the commencement of negotiations related to agreements that will, presumably, fall within the realm of the article 10, para. 1. The law, in our opinion, wrongfully suggests that the Ministry of Foreign Affairs has the competence to also consent the commencement of the negotiations, the composition of delegations and the time and location for negotiations regarding these types of agreements.

Second, full powers are only granted after a draft agreement text goes through procedural review, a long bureaucratic process that slows down negotiations. Procedural review, outlined in Article 5 of the law, requires the responsible ministry to submit the draft text to all other relevant ministries and state agencies in Albanian, Serbian and the relevant foreign languages. These relevant foreign and state agencies give their opinions on the draft text that is

[2] *Ibid.*, Article 6, Paragraph 1
[3] Law on International Agreements, Paragraph 2
[4] Law on International Agreements, Article 6, Paragraph 3
[5] *Ibid.*, Article 8
[6] Vienna Convention on the Law of Treaties, Article 8
[7] *Ibid.*, Article 7

then sent to the Ministry of Foreign Affairs with the opinions attached.[8] This process allows the responsible ministry to negotiate an agreement without the knowledge of other relevant ministries or state agencies until a draft text is already in place. Only the Ministry of Foreign Affairs is kept apprised of negotiation progress, meaning that relevant ministries and state agencies lose supervisory power over their portfolios.[9] The process also prevents negotiators from concluding an agreement quickly. They have to delay negotiations and take draft texts and go through a long process to apply for full powers. This process also repeats itself if any significant changes are made to the draft text.[10] Unless the highest diplomatic officials are involved, Kosovo cannot be nimble in negotiations.

Third, the agreement has to go through another lengthy process of actually applying for full powers once the draft text has been negotiated and has gone through the procedural review process. If they are negotiating an agreement involving Article 10, Paragraph 1, this involves submitting the draft text in all the appropriate languages to the Government along with all of the opinions of the relevant state agencies and ministries, which then decides whether or not to submit a request to the President to grant full powers.[11] For all other agreements, the same documents are submitted the Ministry of Foreign Affairs, which then submits a recommendation to the Minister of Foreign Affairs.[12] The President or Minister must then grant full powers within 15 days.[13] This further lengthens the time between the negotiation of an agreement and the granting of full powers to negotiators. It also limits the review capability of the Government and the Ministry of Foreign Affairs, since they cannot risk Kosovo's credibility.

This process of full powers does not follow the patterns of other regional governments. In Albania, the President may give full powers to negotiators when the issue negotiated involves the Albanian state and the Prime Minister may give full powers when the issue negotiated involves the Albanian government. These designations come at the beginning of negotiations, not once a draft text is established.[14] The Albanian Government has supervisory power over negotiations, with the Ministry of Foreign Affairs consulting on negotiations. Thus the Ministry of Foreign Affairs cannot put the government in the position where it must endorse an agreement of which it does not approve.

Croatia is more liberal about who may approve negotiations, but also does not separate negotiation from other powers. The decision to initiate negotiations must come from either the President or the Government.[15] This decision comes with explicit instructions of the basis for negotiations, the composition of the delegation, the reason the international agreement is necessary, and who is empowered to sign the agreement.[16] If full powers are necessary for negotiators, they are granted at the beginning.[17] The President and the Government also supervise negotiations and must be consulted if the basis for negotiations changes.[18] The

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[8] Law on International Agreements, Article 5
[9] *Ibid.*, Article 8
[10] *Ibid.*, Article 8
[11] *Ibid.*, Article 7, Paragraphs 1, 4 and 5
[12] *Ibid.*, Paragraphs 2 and 6
[13] *Ibid.*, Paragraph 8
[14] Law on the Conclusion of Treaties and International Agreements (Albania), Article 4. Available at http://www.qbz.gov.al/doc.jsp?doc=docs/Ligj%20Nr%208371%20Dat%C3%AB%2009-07-1998.htm
[15] Law on the Implementation and Conclusion of International Agreements (Croatia), Articles 5 and 6
[16] *Ibid.*, Article 7
[17] *Ibid.*, Article 8
[18] *Ibid.*, Article 9

Ministry of Foreign Affairs as a whole has little independent power and serves mainly as repository for agreements and as the means of communicating to other states that the agreement has been put into force.

In Serbia, the Government must approve the beginning of any negotiations.[19] Similar to Croatia, the Government gives the proposed basis for any negotiations, consents on the delegation, determines why the negotiation is necessary and authorizes the head of the delegation to initial the agreement.[20] The Government must approve changes in these areas.[21] If the Government is satisfied that the agreement was negotiated on the approved basis, it approves who will sign the initialed agreement. Official approval comes from the Minister of Foreign Affairs, who holds power of attorney in signing international agreements, but the Government as a whole makes the decision.[22] Similar to Kosovo, the full power to sign an agreement is not given immediately, but only the Government must be consulted. The Ministry of Foreign Affairs once again does not have decisive power.

In Bosnia-Herzegovina, the decision to initiate negotiations towards an international agreement rests with the Presidency of Bosnia-Herzegovina.[23] The Presidency also chooses the delegation, but the Council of Ministers decides the basis for negotiations.[24] In choosing the delegation, the Presidency also authorizes a member of the delegation to sign the agreement as long as it is on the agreed upon basis for negotiations.[25] Any changes to the basis for negotiations must be approved by the Presidency and the Council of Ministers for negotiations to continue.[26] Bosnia-Herzegovina is thus unique from its counterparts in how it splits monitoring authority between the Government and the Presidency, but it maintains the need for these executive bodies to have control over all negotiations.

Even compared to these four states, Kosovo's Law on International Agreements grants full powers too late and creates a slow bureaucratic process where the Ministry of Foreign Affairs has disproportionate power. It is standard practice across all four of these states to give the President and/or the Government a role at the beginning of the negotiating process. Supervisory power is not given to the Ministry of Foreign Affairs, but to the Government as a whole. This should be applied to Kosovo as well. Depending on an informal ability of the Prime Minister to control the Ministry of Foreign Affairs and be apprised of its activities encourages one of two undesirable possibilities: either the Foreign Minister must always be weak to ensure the Government controls foreign policy or the Foreign Minister will dominate foreign policy with little oversight. A law should never encourage there to be either an unqualified minister running a ministry or a ministry run opaquely with no supervision.

Recommendation:

This report recommends amending the Law on international agreements to split competences between the President and the Government to approve full powers at the beginning of all negotiations. This in particular relates to the amendment of the article 5, article 6, article 7 and

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[19] Law on the Conclusion and Enforcement of International Agreements (Serbia), Article 3
[20] *Ibid.*, Articles 5 and 6
[21] *Ibid.*, Article 7
[22] *Ibid.*, Article 9
[23] Law on the Conclusion and Implementation of International Agreements (Bosnia-Herzegovina), Articles 5 and 6
[24] *Ibid.*, Article 7
[25] *Ibid.*, Article 12
[26] *Ibid.*, Article 8

article 8 of the law. Since competence over foreign policy is already split in the Kosovo Constitution between the President leading foreign policy and the Government proposing and implementing foreign policy, this would not be a radical change from standard policy. This should not be the technical split present in Bosnia-Herzegovina's law, which creates competing power bases in foreign policy, but the policy split in Albania's law. The President should approve the initiation of all negotiations of agreements in Article 10, Paragraph 1 of the current law, while the Government may approve the initiation of all other agreements. This ensures that the most important issues remain decided by the country's foreign policy leader, while the Government decides on more technical issues to remain nimble in these areas.

B) Ratification

Once an agreement is concluded, it must be ratified. Ratification may proceed in two ways, depending on the type of agreement. If the agreement falls under Article 10, Paragraph 1, the Assembly must ratify it with two thirds of all deputies voting for a law ratifying the agreement. In all other cases, the President must sign a decree ratifying the agreement.

In cases where the Assembly must ratify an agreement, it is nebulous how the agreement reaches the Assembly. Article 10, para. 3 indicates that either the Assembly chooses to ratify the agreement on its own initiative or the Government proposes ratification. However, Article 10, Paragraph 7 indicates the President must propose to the Assembly to ratify the Agreement.[27] According to the Office of the President, Article 18 of the Constitution gives the President and the Prime Minister both the right to submit international agreements to the Assembly, though it is not clear if "reporting" agreements and submitting them for ratification is the same.[28] To clear up the confusion, one method should be chosen.

While ratification is clearer for cases requiring presidential decree, it is still not a settled issue. If the agreement does not fall under Article 10, Paragraph 1, the Ministry of Foreign Affairs submits the agreement to the President. The President then ratifies the agreement by signed decree. In cases where the President signs the original agreement, however, the agreement is not considered ratified.[29] No substitute ratification process is offered. The Constitution indicates that these agreements are considered ratified once signed by the President and Article 10, para. 5 of the Law appears to be a needless, and unconstitutional.

With respect to ratification of international agreements, Kosovo is not much different from the remainder of the region. The provisions that require ratification by the Albania Assembly are the same as those specified in Article 10, Paragraph 1 of Kosovo's Law on International Agreements except for the addition of any agreements that require Albania to approve, amend, or repeal laws.[30] Outside of these provisions the President ratifies agreements.[31] The Albanian Assembly may decide that a referendum is needed on an agreement if the agreement gives an international organization state powers in Albania.[32] The Albanian Constitution only requires a majority of all Assembly members for ratification.[33]

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[27] *Ibid.*, Article 10
[28] Office of the President of the Republic of Kosovo, interview with the author, 16 October 2013
[29] Law on International Agreements, Article 10, Paragraph 5
[30] Constitution of the Republic of Albania, Article 121, Paragraph 1, available at http://www.osce.org/albania/41888
[31] Constitution of the Republic of Albania, Article 92, subsection ë
[32] *Ibid.*, Article 123
[33] *Ibid.* Article 121, Paragraph 2. It is unclear on what occurs when an international agreement might impose a law in specific policy areas defined in Article 81 of the Albanian Constitution where a three-fifths majority is required to pass a law, but

In Croatia, the Parliament must ratify by a majority vote all agreements changing or adding to its laws, having a political or military character, or taking on a financial commitment for Croatia.[34] Croatia's constitution also requires that agreements giving powers to an international organization or military alliance be ratified by two-thirds of the deputies.[35] If the agreement falls outside of these limits, the agreement may be ratified by the President at the proposal of the Government or by the Government itself.[36]

In Serbia, the National Assembly ratifies all agreements of political, military or economic character, agreements that take on financial commitment for Serbia, agreements that require changes to Serbia's existing legal code and agreements that cause Serbia to deviate from existing legal provisions.[37] The National Assembly ratifies by a majority of all deputies.[38] The Government certifies all other agreements.[39]

Bosnia-Herzegovina, unlike all other regional states, has a tremendously complex ratification procedure. The Ministry of Foreign Affairs must submit an opinion on ratification of all international agreements to the Council of Ministers, which must then submit an opinion to the Presidency. The Presidency then submits the international agreement to the Parliamentary Assembly to approve ratification. If the Parliamentary Assembly approves ratification, the Presidency then decides on ratification.[40]

Recommendation:

Kosovo has the most stringent ratification requirement for those agreements that must be ratified by the legislature, but is otherwise quite similar to other states. Kosovo's method of ratification is rather common across the region, where important issues are subjected to legislative ratification, but the President ratifies all other agreements. The requirement of a two-thirds majority for agreements that must be ratified in the legislature is a far higher threshold than other regional states with the possible exception of Bosnia-Herzegovina's tortuous lawmaking practice. This is not necessarily a bad provision, since it prevents a bare majority from pushing through international agreements. It does, however, incentivize the Government to classify as many agreements as possible as sitting outside the Article 10, Paragraph 1 list. The Assembly needs to be vigilant to make sure that it is not being illegally cut out of foreign policy.

Kosovo's Law on International Agreements does not require all international agreements changing Kosovo's laws to be ratified by the Assembly, however, an important omission compared to other states. The Law on International Agreements only requires the Government to submit laws to the Assembly to bring Kosovo into line with international agreements.[41] According

these specific areas are mostly domestic in nature and would only rarely be discussed in international negotiations.

[34] Law on the Implementation and Conclusion of International Agreements (Croatia), Article 18

[35] Constitution of the Republic of Croatia, Article 141

[36] *Ibid.*, Article 141

[37] Law on the Conclusion and Enforcement of International Agreements (Serbia), Article 14

[38] Constitution of the Republic of Serbia, Article 105

[39] Law on the Conclusion and Enforcement of International Agreements (Serbia), Article 14

[40] Law on the Conclusion and Implementation of International Agreements (Bosnia-Herzegovina), Articles 14, 15, 16 and 17. The requirements for a law to be passed or agreement to be ratified in the Parliamentary Assembly of Bosnia-Herzegovina are hideously complex and for that reason will not be included in this report. For more information on these procedures, see Article IV of the Bosnia-Herzegovina Constitution, available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf.

[41] Law on International Agreements, Article 15

to Article 19 of the Kosovo Constitution, international agreements overturn national laws. Neither the Government nor the President should be able to legislate by international agreement. The democratic functioning of Kosovo cannot survive such a capability. An additional provision should be added to Article 10, Paragraph 1 that the Assembly must ratify by a two-thirds majority all agreements that alter legislation. Neither the Government nor the President should be able to legislate by international agreements.

This report recommends that article 10 be amended. The role of the President and the Government should be clarified. In particular, this refers to the article 10, para.3 and article 10, para.7 which blur the distinction between the President and the Government competence to submit to the Assembly for ratification an international agreement that fall within article 10, para 1 of the law. In addition, article 10, para. 5 which acknowledges that in cases where the President signs the original agreement, the latter is not considered ratified, should be entirely amended/deleted. No substitute ratification process is offered. It should be reminded that the Constitution indicates that these agreements are considered ratified once signed by the President, and therefore, article 10, para. 5 of the law appears to be needless.

Other Issues

Reservations and declarations must go through of procedural review and must be included in the law or decree ratifying the agreement. They must be translated into all relevant languages. Withdrawal of these statements is subject to the requirements for ratification.[42] No acknowledgement is made of international law on reservations, a problem since the Vienna Convention on the Law of Treaties extensively regulates the use of reservations.[43] An amendment should be made to the Law making mention of these regulations.

The Republic of Kosovo gives consent to be bound by an agreement through ratification. The President may give the authority to negotiators to sign an agreement that enters into force upon signature, but such an agreement is still subject to ratification.[44]

Amendments to international agreements must be negotiated as if they were new agreements except in the case that the original agreements provided other means to amend them.[45] Denunciations of an international agreement must follow the provisions of the agreement, the rules regarding denunciations in international law and process outlined for the ratification of an agreement in Article 10.[46]

Ministries and state agencies may conclude international agreements with institutions of other states as long as they are not legally binding on the government of Kosovo and do not conflict with existing laws. The Ministry of Foreign Affairs must give its consent on the conclusion of the agreement and the text of the agreement must be deposited at the Ministry of Foreign Affairs.[47]

The Ministry of Foreign Affairs is responsible for the depositing of all international agreements where they must be deposited. It is responsible for drafting the instruments of ratification, notifying the other parties of the agreement that the necessary steps for ratification

[42] *Ibid.*, Article 11
[43] Vienna Convention on the Law of Treaties, Part II, Section 2
[44] Law on International Agreements, Article 7, Paragraph 3
[45] *Ibid.*, Article 17
[46] *Ibid.*, Article 18
[47] *Ibid.*, Article 12

have been completed and reporting to other parties of denunciation. The Ministry of Foreign Affairs also serves as a depository for international agreements and ensures their publication in the Official Gazette.[48]

The Law on International Agreements makes no allowance for the implementation of international agreements beyond stating, "The Government shall ensure the implementation of International Agreements."[49] While it generally avoids regulating the technicalities of how states implement international agreements beyond stating that they are bound to do so, the Vienna Convention on the Law of Treaties does regulate how to implement successive agreements in the same issue area.[50] The Law on International Agreements should be amended to include these provisions.

Role of Institutions in International Agreements

A) The Ministry of Foreign Affairs

The Law gives the Ministry of Foreign Affairs tremendous power over the initiation, negotiation and conclusion of agreements. Unless the official is of high enough rank to have full powers (according to the article 6 of the law) the Ministry of Foreign Affairs has the sole authority to authorize the commencement of negotiations. It also is the only ministry that must be notified on the progress of agreements. In the case of agreements outside of Article 10, Paragraph 1, it may give full powers without notifying other ministries and state agencies. An agreement could potentially only come to the attention of another authority when it is submitted to the President for ratification.

Since all international agreements fall within its portfolio,[51] it should be the most active body in monitoring their negotiation, conclusion and ratification. It also should be the ministry most involved in facilitating international agreements, since it must, on a regular basis, work on behalf of other ministries and state agencies when working in other states and in international organizations.[52] However, the Ministry of Foreign Affairs remains obligated to report to the President and Government on issues of importance, a category under which all international agreements should be. The Ministry of Foreign Affairs is also obligated to coordinate with the President and Prime Minister about the direction of foreign policy, meaning it should not have unlimited discretion.[53] Also, the amount of power given to the Ministry of Foreign Affairs in Kosovo, as noted above, has no parallel in the region. Its role in international agreements should be supportive and technical. Giving it independent decision-making power over international negotiations creates a dangerous parallel power base to that of the Government and the President.

Recommendation:

The role of the Ministry of Foreign Affairs needs to be reduced to facilitating and supporting negotiations as well as ensuring the publication of international agreements and deposit in the

[48] *Ibid.*, Articles 19 and 20
[49] *Ibid.*, Article 16, Paragraph 1
[50] Vienna Convention on the Law of Treaties, Article 30
[51] Law on the Foreign Ministry and Diplomatic Service of Kosovo, Article 4, Paragraph 2, Subparagraph c
[52] *Ibid.*, Subparagraph d
[53] *Ibid.*, Subparagraph h

relevant journals and repositories. It also should maintain records of all international negotiations and agreements. In addition, the section on Government has further defined the extent to which the role of the Ministry should be reframed.

B) The Assembly

If the Assembly wishes to have any role in the conclusion of international agreements, it must legislate that role for itself. The Law gives no role for the Assembly in international agreements except for a vote to ratify agreements that fall under Article 10, Paragraph 1. The Assembly's role in foreign affairs is ambiguous in Kosovo's law already. The Constitution gives it the competence to "oversee" foreign policy, but that oversight is not explicitly invoked in the Law on International Agreements. Any involvement by the Assembly in international agreements has been a courtesy paid by the negotiating officials and is usually considered a gratuitous step. Any involvement before ratification would not have precedent in a region where few states give their legislatures any powers in international relations. Only Macedonia's Constitution forces the Government to pass a law to define in which areas it can negotiate an agreement, a provision that does not apply to the President of Macedonia.[54] However, the Assembly does have a constitutional role in foreign policy and would be well within its rights to pass such legislation.

C) The President

The President's role in international agreements is one that needs greater clarification; the Law on International Agreements fails to do this. As the constitutional leader of Kosovo's foreign policy and the country's head of state, the President is the public face of Kosovo's foreign policy and has final say on the ratification of most international agreements. However it is impractical and inadvisable for the President to participate in most international agreement negotiations.

First, the Law on International Agreements practically removes the President from the negotiation of agreements. Beyond granting of full powers to negotiators in the case of important international agreements, taking an ambiguous role in the ratification of important international agreements and the ratification of less important agreements, the President has no defined role. This is especially true at the beginning of negotiations, where the President appears to have no role at all.

Second, if the President is truly the leader of foreign policy, he/she should be actively consulted on the negotiations of all international agreements. In important areas defined by Article 10, Paragraph 1, he/she must approve full powers for those who do not automatically have them under the current law anyway. Any amendment to the law should provide that any decision of the President should be made at the beginning of negotiations to make sure the President does not become fait accompli to an agreement of which he/she was never aware. On agreements outside of Article 10, Paragraph 1, he/she need not give approval for the beginning of negotiations—this duty may be done by the Government which is closer to the technical aspects of implementing a general foreign policy—but he/she should be made aware of ongoing negotiations before an agreement is finalized and brought up for ratification. Once an agreement needs to be ratified, Kosovo's credibility is at stake, making any denial of ratification inadvisable. The President should have more flexibility to fulfill his/her constitutional role as the head of the

[54] Constitution of the Republic of Macedonia, Article 119. Available at http://www.sobranie.mk/en/?ItemID=9F7452BF44EE814B8DB897C1858B71FF

country's foreign policy. The President should also have final say over commencing negotiations under Article 10, Paragraph 1, since these negotiations will often define Kosovo's future.

C) The Government

The role of the Government in international negotiations is also unclear, though it is hardly powerless, as the Minister of Foreign Affairs forms part of the Government. It decides whether the responsible ministry may apply to the President for full powers in agreements covered by Article 10, Paragraph 1, though, as discussed above, a positive recommendation is inevitable due to the risk in Kosovo's credibility. It is also involved in the ratification of these agreements, though how is not clarified. This lack of definition needs to change.

The Government should take ownership of the implementation of foreign policy and its role should be clarified. The Constitution gives the right to propose and implement foreign policy to the Government as a whole, not only the Ministry of Foreign Affairs. While the Ministry of Foreign Affairs should be the most involved, the Prime Minister leads the Government and should lead in implementing foreign policy. The Government as a whole should approve the commencement of negotiations outside of Article 10, Paragraph 1 and the Government, as a whole, should send agreements to the President for ratification. These steps should be taken at the discretion of the Prime Minister. In this fashion, the constitutionally established hierarchy of the Government may be maintained in the area of international agreements.

International Agreements

Sixty-one international agreements that were ratified after the Law on International Agreements went into effect appear in the Official Gazette of the Republic of Kosovo. This list is not a complete one, as it omits several of the agreements made with Serbia. These omissions do not contravene the Law on International Agreements, as the Ministry of Foreign Affairs is under no time limit to publish agreements in the Official Gazette, but, for the sake of transparency, international agreements should be made as accessible as possible in the Official Gazette.

Eleven of 61 agreements based on the opinion of the author **raised ratification difficulties** and five of these were an issue **where an agreement was ratified by presidential decree when**, under Article 10, Paragraph 1, **it may have required the Assembly's ratification**. In these five cases,[55] agreements that may have been political or military were ratified by presidential decree. The other six were confusing cases where the President signed the agreement and there was no ratification procedure that followed it. These questions are not an indictment on the procedure followed in these 11 agreements, nor does it approve of the procedure followed in the other 50 cases. However, these agreements do need clarification. One case where the President signed the agreement and there was no further ratification procedure is discussed below, but there is no clarification as of yet on any of the other agreements that may have needed ratification by the Assembly.

[55]Agreement between the Government of Republic of Kosovo and the Government of the United States of America Concerning Cooperation in the Area of the Prevention of Proliferation of Weapons of Mass Destruction; Military Financial Cooperation Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey (2012); Agreement between the Republic of Kosovo and the Republic of San Marino on the Establishment of Diplomatic Relations; Military Financial Cooperation Agreement between the Government of the Republic of Kosovo and the Government of the Republic of Turkey (2013); Bilateral Agreement between the Republic of Kosovo and the Grand Duchy of Luxembourg

Of the sixty-one agreements available in the Official Gazette, this report will consider the procedure used in several of them, while touching upon the agreements made in the Kosovo-Serbia dialogue. This sampling was not random. The original sampling tried to cover several types of agreements from several different ministries. The cases identified in this report were the agreements where questions were answered in a timely fashion by the responsible ministries.

a) Agreement between the Republic of Kosovo and the Government of the Republic of Bulgaria on the Readmission of Persons Residing without Authorization

The Ministry of Internal Affairs sent its requests to begin negotiations on readmission of persons residing without authorization with all EU member states on 18 September 2009 through the Ministry of Foreign Affairs. Since the Ministry of Foreign Affairs sent through the diplomatic communication, it was assumed that the Ministry of Foreign Affairs consented to the commencement of negotiations. The relevant ministries and state agencies[56] were included in the negotiation team. The Ministry of Foreign Affairs was considered to consent to the negotiating team as well as the logistics of negotiations when the representative of the Ministry of Foreign Affairs participated in the negotiations. All draft texts and all changes were sent to all ministries and agencies part of the negotiating teams in Albanian, Serbian and other relevant languages. The Ministry of Internal Affairs made sure to remain in constant contact with the Ministry of Foreign Affairs to ensure it had the authority to conclude an agreement. The Ministry of Foreign Affairs always responded within 15 working days. Once the agreement was concluded and signed on 19 June 2012, it was sent to the Ministry of Foreign Affairs with an explanatory note with the date and place of signature.[57] The agreement was ratified by presidential decree on 31 July 2012. It was published in the Official Gazette on 2 August 2012.[58] The Ministry of Internal Affairs, it should be noted, did not consider itself bound by the Law on International Agreements because negotiations began before the Law went into effect.[59]

In spite of its insistence that it was not under any obligation to follow the Law on International Agreements, the Ministry of Internal Affairs consistently followed the broad outlines of the Law in its negotiation of the agreement on readmission of unauthorized persons with Bulgaria. It used diplomatic channels for communications with Bulgaria; received some form of approval from the Ministry of Foreign Affairs to commence and to conduct negotiations; it ensured that all relevant ministries were informed and had access to draft texts and changes; it kept the Ministry of Foreign Affairs apprised of its progress at all times; it applied to the Ministry of Foreign Affairs for and received full powers; it submitted all of the proper documentation in the required languages; and the agreement, which fell outside of Article 10, Paragraph 1, was ratified by presidential signature.

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[56] The Ministry of Internal Affairs, the Kosovo Police, the Ministry of Foreign Affairs, the Ministry of Labor and Social Welfare and the Ministry of Local Government Administration

[57] Kosovo Ministry of Internal Affairs, e-mail message to the author, 11 October 2013

[58] Agreement between the Republic of Kosovo and the Government of the Republic of Bulgaria on the Readmission of Persons Residing without Authorization, available at http://gazetazyrtare.rks-gov.net/Documents/Marr.%20Ks%20-%20Bullgari%20(Mbi%20Ripranimin%20e%20Personave)%20(anglisht).pdf.

[59] Kosovo Ministry of Internal Affairs, e-mail message to the author, 11 October 2013

The negotiation of the agreement found some clever ways to avoid the more cumbersome aspects of the law. By ensuring that all relevant ministries and state agencies were somehow involved in the negotiating process, the Ministry of Internal Affairs avoided the delays of procedural review. In including a representative from the Ministry of Foreign Affairs, the Ministry of Internal Affairs ensured that the Ministry of Foreign Affairs was constantly updated.

The informality of the Ministry of Foreign Affairs' approval for commencing negotiations was troubling, however. Since assumptions were made that approval was default approval from particular actions, there was no **proper record of the sequence** of events that led to an agreement. While documents such as these do create some delays, they also make sure the law is followed and prevent miscommunications and misunderstandings.

The dismissal of the involvement of the Assembly was also troubling for its emphasis on one of the Law's weaknesses. The readmission agreement with Bulgaria was one of many agreements Kosovo had to conclude for its eventual goal of visa liberalization, an important project for Kosovo's foreign policy. As the monitor of Kosovo's foreign policy, the Kosovo Assembly should have been kept apprised of work towards this goal.

b) Agreement Between the Government of the Republic of Kosovo and the Government of the Republic of Bulgaria on Police Cooperation

The Ministry of Internal Affairs sent its request for police cooperation to Bulgaria through the Ministry of Foreign Affairs on 6 July 2011. It was assumed that, since the Ministry of Foreign Affairs had transmitted the message, it had given its approval. The relevant ministries and state agencies[60] were included in the negotiation process. The presence of a representative from the Ministry of Foreign Affairs was considered consent on negotiations. The Assembly was not consulted, since the agreement fell outside Article 18 bounds of the constitution. All draft texts and all changes were sent to all ministries and agencies part of the negotiating teams in Albanian, Serbian and other relevant languages. The Ministry of Internal Affairs made sure to remain in constant contact with the Ministry of Foreign Affairs to ensure it had the authority to authorize and conclude an agreement. The Ministry of Foreign Affairs always responded within 15 working days. Once the agreement was concluded and signed on 13 September 2012, it was sent to the Ministry of Foreign Affairs with an explanatory note with the date and place of signature.[61] The agreement was signed by the President on 14 November 2012 and published in the Official Gazette on 15 November 2012.[62] Once again, the Ministry of Internal Affairs considered the Law on International Agreements to not affect their negotiations since it had gone into effect after they began.[63]

The lack of application of the Law on International Agreements was more concerning in this case than the previous agreement with Bulgarian on the readmission of unauthorized persons. The majority of the time between notification of interest in an agreement and the

[60]The Ministry of Internal Affairs, the Kosovo Police and the Ministry of Foreign Affairs
[61] Kosovo Ministry of Internal Affairs, e-mail message to the author, 11 October 2013
[62]Agreement Between the Government of the Republic of Kosovo and the Government of the Republic of Bulgaria on Police Cooperation, available at http://gazetazyrtare.rks-gov.net/Documents/Marrveshje%20Ks-Bullgari%20(DMN-017-2012)%20anglisht.pdf.
[63] Kosovo Ministry of Internal Affairs, e-mail message to the author, 11 October 2013

signing of an agreement occurred after the Law came into effect. The Ministry of Internal Affairs position was consistent, but it highlights a problem where any negotiations started before 31 December 2011 would be exempt from the Law. The lack of clarity in the Law on whether it was applicable to ongoing negotiations caused this confusion and allowed for ministries to make assumptions. This is a failure of design in the original law that cannot be changed now, but it is important to note the costs.

c) Agreement Establishing a Sister State Relationship and Collaboration between the Republic of Kosovo and the State of Iowa (United States of America)

Negotiations between the state of Iowa and the Republic of Kosovo took place at the presidential level, partly out of an idiosyncratic United States preference to negotiate with the Office of the President of Kosovo. The President empowered two advisors to negotiate the details with representatives of Iowa. The President ensured that coordination took place between many relevant ministries and personally met with each relevant minister to discuss the negotiations of the agreement and make sure they were consulted.[64] Additional coordination took place at the adviser and administrative levels. Since the President was empowered to conclude an agreement on her own, there was no need to designate full powers. However, all advisors were designated authority in writing and written communication was maintained with the Ministry of Foreign Affairs apprising it of the Agreement.[65] The President signed the agreement on 7 July 2013.[66] The President's signature constituted ratification.[67]

This agreement clearly deemed Article 10, Paragraph 5 to be irrelevant in practice. The President's signature on the agreement was considered ratification, even though the Law requires a different ratification procedure to be used. This practical reality further trivializes the existence of Article 10, Paragraph 5 that was noted earlier to be a needless addition.

The Office of the President found a way to avoid procedural review and involve relevant ministries simultaneously. The procedural review process created such a bureaucratic barrier that the Office of the President preferred to consult with all of the ministries in the middle of negotiations. The practice used by the Office of the President may have given relevant ministries and state agencies more input into the negotiation process than would have occurred under procedural review, since negotiations were in flux and Kosovo's credibility was not in danger from a ministry raising an objection. The Office of the President did this without creating a large, unwieldy negotiating team, as the relevant ministries simply provide a support role to negotiations as opposed to being included in the actual negotiations.

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[64] The agreement was quite broad, including the areas of education, culture, tourism, sport, agriculture, the judiciary, law enforcement, health, the environment, transportation, information technology and local administration. The relevant ministries and state agencies for all of these areas needed to be consulted.
[65] Office of the President of the Republic of Kosovo, interview with the author, 16 October 2013
[66] Agreement Establishing a Sister State Relationship and Collaboration between the Republic of Kosovo and the State of Iowa (United States of America), available at http://gazetazyrtare.rks-gov.net/Documents/Marrveshaj%20Ks-IOWA%20(anglisht).pdf
[67] Office of the President of the Republic of Kosovo, interview with the author, 16 October 2013

d) Military Financial Cooperation Agreement Between the Government of the Republic of Kosovo and the Government of Republic of Turkey

Ministry of Kosovo Security Force negotiated the Military Financial Cooperation Agreement with the Republic of Turkey. Ministry of Kosovo Security Force assured the author that all procedures were properly followed for the agreement, but did not answer any of the author's questions regarding how the agreement was reached.[68] **This report will assume that the procedures were followed correctly.** The agreement was sent to the President for ratification in spite of its military character, which makes the latter an agreement presumably to be governed under Article 10, Paragraph 1 of the Law on International Agreements. However, the President ratified the agreement on 20 May 2013.[69]

e) Agreement for Financial Cooperation between the Government of the Republic of Kosovo and the Government of the Republic of Austria

The Ministry of Finance claims that this agreement, since it was the negotiation of a loan fell outside of the Law on International Agreements.[70] Article 6, Paragraph 3 of the Law states that the Assembly can grant full powers to a particular official by law. According to the Ministry of Finance, Article 52 of the Law on Public Financial Management and Accountability as well as Article 11 of the Public Debt Law gives the Minister of Finance full powers to negotiate agreements to incur debt on behalf of the government of Kosovo.[71] These agreements are subject to ratification by the Assembly. The Ministry of Finance did not address the specific negotiation of this agreement, but stated that it has followed all proper procedures in negotiating agreements, including consulting the relevant ministries and receiving authorization from the Ministry of Foreign Affairs when necessary. The Ministry of Finance did complain that the procedures for implementing the Law on International Agreements have not been clarified and argued that further regulation was needed.[72] The agreement was signed 12 July 2012 and the Assembly ratified the agreement 6 December 2012.[73]

The Ministry of Finance's argument that loan agreements stand outside of the Law on International Agreements' procedure for commencing negotiations is dubious. Article 52 of the Law on Public Financial Management and Accountability makes the Minister of Finance the authoritative representative for negotiating loan agreements, executing loans and guaranteeing

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[68] Ministry of the Kosovo Security Force, e-mail message to the author, 16 October 2013

[69] Military Financial Cooperation Agreement Between the Government of the Republic of Kosovo and the Government of Republic of Turkey, available at http://gazetazyrtare.rks-gov.net/Documents/Marrveshje%20Ks-Turki%20DMN-010-2013%20(anglisht).pdf

[70] Ministry of Finance, e-mail message to the author, 21 October 2013..

[71] The Ministry of Finance also cited Government Regulation of the Republic of Kosovo QRK-Nr. 22/2013. However, since this agreement was ratified in 2012, Government Regulation 22/2013 would not have been applicable.

[72] Ministry of Finance, e-mail message to the author, 21 October 2013

[73] Agreement for Financial Cooperation between the Government of the Republic of Kosovo and the Government of the Republic of Austria, available at http://gazetazyrtare.rks-gov.net/Documents/Ligji%20per%20Rat.%20te%20Marr.%20per%20bashkepunim%20financiar%20me%20Austrine%20(anglisht).pdf

the validity of loan documents.[74] This clause makes it so the Minister of Finance is the decisive voice in any negotiating team for international loans, but it does not mean the Ministry of Finance is exempt from the Law on International Agreements. The Minister of Finance is authorized to negotiate conditions for international loans on behalf of Kosovo, as stated in the Law on Public Debt, but the Minister of Finance must receive the authority to sign these agreements from the Government.[75]The Minister of Finance clearly does not have full powers to conduct negotiations over public debts.

The lack of regulation on implementing the Law on International Agreements is disturbing. When this agreement was negotiated, there was clearly uncertainty over whether the agreement fell within the bounds of the Law on International Agreements. Lacking direction, the Ministry of Finance opted to carve out their particular agreement from having to follow the Law on International Agreements using existing laws.

The Law on Public Debt contradicts the Law on International Agreements. In Article 10 of the Law on International Agreements, authorization to sign comes from the President as opposed to the Government. The Government had no competence to designate any authority to sign international agreements that fall under Article 10, Paragraph 1. This contradiction needs to be clarified, again, preferably with the President holding the authority to authorize the conclusion of loan agreements between states.

It is hard to be assured that the Ministry of Finance followed the Law on International Agreements. While it said that it followed all of the proper procedures when necessary, the utilization of different legal basis to negotiate and sign this type of agreements makes this conclusion moot.

Kosovo-Serbia Dialogue and the Law on International Agreements

The agreements of the Kosovo-Serbia dialogue provide difficult problems for the Law on International Agreements. All negotiations between Serbia and Kosovo will be seem political since the two states opposite positions on Kosovo's status. However, many of the agreements of the dialogue fall under rather mundane areas, like the nature of border checkpoints. These issues have important political significance to the two states negotiating, but would have little political impact if they were negotiated between Kosovo and any other state.

While negotiations began in 2011 and important agreements such as the IBM Agreement were concluded in 2011, many agreements have to be renegotiated and given finer details for implementation. This is the result of negotiations between two states that do not trust each other and have conflicting aims. Do the negotiations over particular protocols to the implementing of an agreement function as new negotiations towards a new agreement or as simply implementing the old agreement, which, according to Article 16 of the Law on International Agreements, is the Government's prerogative? It is possible that the Law on International Agreements has no effect on the Kosovo-Serbia Technical Dialogue since those negotiations started before the Law went into force.

[74] Law on Public Financial Management and Accountability, Article 52, available at http://gazetazyrtare.rks-gov.net/Documents/anglisht-73.pdf

[75] Law on Public Debt, Article 11 available at http://gazetazyrtare.rks-gov.net/Documents/anglisht-271.pdf. The Ministry of Finance omitted the need for authorization from the Government in its e-mail message on the subject.

To tackle these questions, this report will consider the recent agreement on the normalization of relations between the two states, the negotiations on IBM cooperation and the negotiations on energy and telecommunications. This report will not second-guess the Constitutional Court's decision that the agreement on the normalization of relations between Kosovo and Serbia was constitutional. It will instead investigate the procedures that were followed to see if any were out of line with the Law on International Agreements. In the case of the IBM negotiations, the report compares agreements with Serbia to similar agreements with other states to determine if different procedures were used. The subsection will conclude with an examination of the position of agreements with Serbia within international law.

A) The First International Agreement with the Republic of Serbia

On 18 October 2012, at the request of the Government, the Kosovo Assembly authorized the Government to negotiate with Serbia on normalization of relations and added a promise that the agreement would be ratified. According to the Constitutional Court this was an extraordinary step, one that had not been taken in the previous negotiations.[76] The Constitutional Court also notes that the Prime Minister had automatic authority according to both the Law on International Agreements and the general practice of states codified by the Vienna Convention on the Law of Treaties to negotiate with Serbia.[77]

While the Law on International Agreements states that the President must give authorization to conclude agreements that are under Article 10, Paragraph 1, Article 6, Paragraph 1 gives the Prime Minister full powers to conclude any agreement. Since the agreement was negotiated at the Prime Minister's level between the two parties, there appears to have been little doubt that the proper procedure was followed.

This assessment report considers the Constitutional Court judgment final and jurisdictionally fair and within the context of this court's constitutional authority. Therefore, this report does not put into contest or review any part of the Constitutional Court's judgment, but rather deals with the technical details of the Law on International Agreements, which the report considers from a point of view that goes outside the jurisdiction of the Constitutional Court.

To note, after the agreement was concluded, the Government submitted the law to the Assembly for ratification. This practice somewhat resolves how agreements under Article 10, Paragraph 1 should be submitted to the Assembly.[78] The Government may apparently submit agreements to the Assembly for ratification without consulting the President under this procedure. After the Government submitted the agreement to the Assembly for ratification, the law was ratified using proper procedure in the Assembly.[79]

First, the Assembly should never have authorized the Government to perform negotiations with Serbia. It had no authority do so and the Prime Minister, according to the law on international agreements (article 6), already possessed full powers to negotiate by virtue of his position. The Assembly would have been welcome to support negotiations and set out details about the type of agreement it would have been willing to ratify, but it had no authority over negotiations according to the Law on International Agreements.

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[76] Constitutional Court of the Republic of Kosovo, "Judgment in Case No. KO 95/13", 9 September 2013. Available at http://www.gjk-ks.org/repository/docs/gjkk_ko_95_13_ang.pdf. P. 18.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*, p. 19

This lack of authority is an issue of law, not of the constitution, since the Assembly still holds the right of oversight. If the Assembly would prefer to be more involved in international agreements, especially in international agreements with Serbia, it should amend the Law on International Agreements to give itself such authority.

The agreement unfortunately showed that the President could be excluded from international agreements. The contradictions in the current law left a wide enough room for interpretation that the President was eliminated from the conduct of foreign policy. It is worrying that, for such an important international agreement, the President appears to have been completely uninvolved in the process.

B) The IBM Agreement

The Integrated Border Management (IBM) Agreement was originally concluded in December 2011, making the Law on International Agreements inapplicable. However, much of the implementation of the agreement has been negotiated and renegotiated between the two states, potentially falling under the Law on International Agreements.

The IBM Agreement is distinct from other border deals, however, for its specific provisions. The IBM agreement with Serbia allows for Kosovo and Serbia to gradually set up the arrangements for its implementation with the help of the EU. These arrangements include crossing points, the type of facility and the assignment of legal responsibilities.[80] These are considered technical issues related to implementation, which is the preserve of the Government. Changes are to be negotiated within the agreement and are not subject to any ratification procedure. Even if these changes were considered amendments and not issues of implementation, according to Article 17 of the Law on International Agreements, they would not be subject to ratification since the agreement provides for technical protocol to be negotiated. The agreement provides otherwise for amendments as agreed upon originally. It is not even clear that the Law applies to the IBM Agreement. In all other cases, negotiations in progress were considered outside of the Law's jurisdiction when it came into effect. The whole Technical Dialogue with Serbia may be outside the Law's jurisdiction in this case.

If the substance of the agreement were to change, the President would ratify the amendments. It is difficult to dissociate any agreements with Serbia from their political meaning, but it is important to compare the IBM Agreement with its counterparts with other states. The Assembly has never ratified a border agreement with Albania. The only border agreement with Macedonia that needed to be ratified by the Assembly was the one marking. The President ratified all border agreements with Montenegro, even though there is no marked border between Kosovo and Montenegro. The IBM Agreement does not mark a border between Kosovo and Serbia and provides for services that the President has always ratified.

C) Energy and Telecommunications Agreement

Energy and telecommunications had been a long-running difficulty in the Kosovo-Serbia dialogue before the April 2013 Agreement on normalization. Point 13 of the first agreement normalizing relations between Kosovo and Serbia made clear that these two areas would be the next focus of

[80] Agreement on administrative border crossings, available at http://www.b92.net/eng/insight/pressroom.php?yyyy=2011&mm=12&nav_id=77639

negotiations, setting 15 June 2013 as a deadline for reaching a deal. Delays and disputes delayed agreement until 9 September 2013.[81] There does not appear to have been any effort at ratification.

This agreement, however, must go through ratification procedures. The argument against ratification is that, like the IBM Agreement discussed above, the agreement normalizing relations made negotiating an energy and telecommunications agreement a subset of the previous agreement. However, a distinction needs to be drawn between the IBM agreement, which waived the normal international agreement procedure so that technical details could be negotiated towards reaching a goal, and the agreement on normalizing relations, which assigned the two parties the next focus of negotiations. Negotiating an agreement on energy and telecommunications was a requirement of implementing the agreement normalizing relations between Kosovo and Serbia; signing and accepting that agreement as law was not. The agreement on energy and telecommunications should, therefore, be subject to ratification. If the agreement falls under the current Article 10, Paragraph 1, the Assembly must ratify it. Preferably, if it changes Kosovo law, the Assembly would still ratify it, though the current Law on International Agreements does not require this effort. The agreement should at least be ratified by presidential decree if it falls outside of Article 10, Paragraph 1.

Agreements with Serbia and International Law

The Government of Kosovo needs to consider the advisability of concluding agreements that may not be considered international agreements under international law and thus not held to the same binding standards. While "every state possesses capacity to conclude treaties"[82] according to international law, implicit in this statement is that states entering agreements recognize each other as states. **Kosovo treats its agreements with Serbia as international agreements**, as it should under the Law on International Agreements[83] since they are agreements between Kosovo and a foreign state in written from that should, according to Kosovo's standards be governed by international law. However, Serbia treats these agreements as **domestic, sub-legislative acts.** Whether these are agreements between states and subject to the rules of inviolability and good faith present in the Vienna Convention on the Law of Treaties is uncertain. The decision on whether to engage in such agreements is up to the Government, but it is something that should be considered.

Conclusion

In general terms, the law has been unevenly implemented. Authorization to commence negotiations has usually come from the correct authority, but in one case the responsible ministry has incorrectly assumed it already had authority (Ministry of Finance) and in another the wrong state body (Assembly) tried to give authority to negotiate to an official who already had it (Prime Minister). The responsible ministry or state agency for negotiations has normally either received full powers from the correct office to conclude an agreement or already held full powers to conclude the agreement. Relevant ministries and agencies have been given access to draft

[81] Gordana Andric, "Belgrade, Pristina strike telecoms and energy deal," *Balkan Insight*, 9 September 2013. Available at http://www.balkaninsight.com/en/article/belgrade-pristina-strike-deals-on-electricity-and-telecommunication.
[82] Vienna Convention on the Law of Treaties, Article 6
[83] See Law on International Agreements, Article 3, Paragraph 1, Subparagraph 5

texts and have given input on negotiations, though the process of procedural review has never been used. Ratification procedures have been well followed, though a subset of 11 agreements produced concerns and, in the case of the recent energy and telecommunications agreement, sometimes ratification has not occurred at all.

The authorization to commence negotiations and the granting of full powers has been uneven. In the case of the Ministry of Internal Affairs, authorizations were implied and assumed, not made explicit. In the case of the Office of the President, authorizations were carefully documented. For the Ministry of Finance, authorizations were likely required, but not sought because the Ministry of Finance was not sure on procedure. All authorizations should be explicit and fully documented so that the records on the negotiation of an international agreement can be audited. Making authorizations explicit also ensures that the Law is properly followed.

While procedural review has not been used, the process that has taken its place to make sure all relevant ministries are consulted is preferable. Under procedural review, relevant ministries and state agencies delay negotiations and have little real oversight since blocking an agreement puts Kosovo's credibility on the line. The processes used by the Ministry for Internal Affairs to include all relevant state bodies in negotiation and by the Office of the President to consult all relevant state bodies give these state bodies real input into negotiations and make Kosovo more nimble, avoiding the theoretical problems of procedural review outlined in this paper.

The procedure for implementing the Law on International Agreements needs to be made clear to all ministries and state agencies. Lack of clarity allowed the Ministry of Internal Affairs to make assumptions about procedure and pushed the Ministry of Finance to fall back on other laws to avoid having to work through the procedure for following the Law on International Agreements.

The Law on International Agreements needs to be reconciled with other existing laws. It seems unlikely that these are the only conflicts and a comprehensive study is required to find all of them. Ministries will otherwise assume which law holds superiority and act on that assumption.

Ratification has been problematic in some cases. The Article 10, Paragraph 5 provision that agreements signed by the President outside of Article 10, Paragraph 1 are not considered ratified made no sense in the abstract and has not been implemented in practice. The six agreements signed by the President in these cases are considered ratified. Five agreements[84] potentially fell under Article 10, Paragraph 1, but were **ratified by presidential decree**. None of the ministries asked about this issue have responded to why these agreements were considered outside Article 10, Paragraph 1 boundaries. This is not an indictment on the ratification process used in these five cases, but an explanation should be given. The recent agreement on energy and telecommunications with Serbia needs to go through **ratification processes**.

The Government, in practice, submits international agreements to the Assembly for ratification when necessary under Article 10, Paragraph 1. This issue is confused in the original law and by various Kosovo state bodies, so the use of a single procedure would be helpful. It is concerning that there is no role for the President in this process, since the President ratifies all other agreements and is considered the leader in foreign policy. A preferable scheme would have

[84] See Footnote 49

the Government submit all agreements to the President for ratification, with the President submitting those under Article 10, Paragraph 1 to the Assembly for ratification.

The Assembly's role remains **uneven and unresolved**. While it is considered the overseer of foreign policy, it is barely mentioned outside of ratification in the Law on International Agreements. Kosovo state bodies have an uneven record of consulting the Assembly on issues. The Ministry of Internal Affairs deemed it unnecessary for its agreements, while the Government asked for an unnecessary authorization to make an agreement with Serbia. If the Assembly wants a role in the negotiation of international agreements, it must legislate that role for itself.

In general, the Law on International Agreements will never be able to make up for the ambiguity surrounding whether or not the Law applied to ongoing negotiations. The Ministry of Internal Affairs assumed it did not and it is possible that any agreement in the Technical Dialogue between Kosovo and Serbia does not come under the law. This cannot be changed now, but it should be kept under advisement that future laws need to specify whether ongoing negotiations must comply.

The Law itself is in line with international law for the most part. Some portions, such as designating officials who are exempt from applying for full powers, are based on specific parts of Vienna Convention on the Law of Treaties. The dividing of negotiation from full powers is questionable under international law, but not illegal. The use of consent by ratification standardizes how Kosovo expresses consent and the Law puts in place a procedure to notify other contracting states of ratification. Other parts of the law are more sins of omission than they are contradictions of international law. Reservations are extensively regulated in international law and that should be noted in the Law on International Agreements. Implementation of overlapping agreements is regulate in international law and should be added to this law, since this will become a problem as Kosovo matures as a state.

There are some problems with the text of the Law. The Ministry of Foreign Affairs has too much power over the negotiations for international agreements. It is the only supervising authority for ongoing negotiations and it may approve the commencement of negotiations without the knowledge of the Government or the President. This type of power for a foreign ministry has no equivalent in the region. While the Ministry of Foreign Affairs should have the most interest in all international agreements, it cannot have unchecked discretion in this area. The Ministry of Foreign Affairs still must consult and apprise the Government and President on foreign policy priorities and that should apply to all international agreements. Discretion over the commencement of negotiations should be given to the President who leads foreign policy and the Government in implementing foreign policy. These institutions should also be kept apprised of negotiations in progress.

The Law on International Agreements separation of negotiation from other aspects of full powers is problematic. It undermines the legitimacy of Kosovo's negotiators and actually reduces oversight because supervising officials are under pressure to give negotiators full powers and avoid damaging Kosovo's credibility. Full powers should be given at the beginning of negotiations to allow for more credible negotiating. Depending on the type of agreement, either the President or the Government should grant full powers.

The original Law on International Agreements made a grave mistake omitting international agreements changing Kosovo's legislation from those that must be ratified by the Assembly. Every other state in the region includes such a provision, since the President and the Government would otherwise be allowed to legislate by international agreement without the

consent of Kosovo's legislative body. There must be an amendment to the law put in place that eliminates this possibility.

Recommendations

1. Article 10, Paragraph 1 of the Law on International Agreements should be amended so that the Assembly must ratify all agreements altering Kosovo's legislation. The current law risks legislation by international agreement.
2. A comprehensive study is required on conflicts between the Law on International Agreements and other existing laws. A determination is required in the case of each conflict to determine which law overcomes the other. Only in the designation of full powers is this issue settled.
3. Procedures for implementing the Law on International Agreements need to be clarified. Ministries have either tried to avoid the Law entirely or have made assumptions about its implementation.
4. The process of consulting all relevant ministries and state agencies during negotiations should be encouraged in place of procedural review. It is far more effective for ensuring that all relevant state bodies are consulted and makes Kosovo more nimble during negotiations. Procedural review should remain in the law to encourage this process and ensure that some form of consultation is required.
5. Authorizations to commence negotiations and to give full powers must be explicit and recorded in writing so that the process for concluding an international agreement may be audited. The current uneven implementation allows for miscommunications and impedes any investigation into how an agreement was reached.
6. The decision to use particular ratification procedures must be made explicit. The high threshold for ratification in the Kosovo Assembly incentivizes the Government to try and ratify agreements by presidential decree. Every ratification should come with an explanatory memorandum as to why that procedure was used, as opposed to merely citing a clause in the Constitution or the Law on International Agreements.
7. The President should hold the authority to approve the commencement of negotiations and give full powers for concluding agreements included under Article 10, Paragraph 1 of the Law on International Agreements. The President should also initiate all ratification procedures, by asking the Assembly for ratification, depending on the type of agreement.
8. The Government should hold the authority to approve the commencement of all negotiations and give full powers for concluding agreements outside of Article 10, Paragraph 1 of the Law on International Agreements. The Government should also be the supervisory body over international negotiations and propose agreements to the President to initiate the procedure for ratification.
9. The role of the Ministry of Foreign Affairs in agreements in which it is not the responsible ministry should be consultative and supportive. It should not be the decision-maker for commencing negotiations or supervisory authority over concluding international agreements. The current law gives it too much power.
10. The Assembly should never again pass a resolution "authorizing" negotiations. It has no authority in these areas, especially if the official already holds full powers. If the Assembly wishes to have this authority, it must amend the Law on International Agreements.
11. Article 10, Paragraph 5 of the Law on International Agreements should be repealed. It serves no purpose, is ignored and can only create confusion.

12. Article 11 should be amended to include a reference to international law regulating the use of reservations. The lack of a reference is noticeable, especially considering the Vienna Convention on the Law of Treaties' extensive regulation of the use of reservations.
13. Article 16 should be amended to include a reference to international law regulating the implementation of treaties in overlapping issue areas.
14. The Government should consider the advisability of negotiating agreements with Serbia. Since Serbia does not believe it is negotiating with a state and that the agreements are not subject to international law, it may make these agreements more vulnerable to breaking. These agreements should still be treated as international agreements in Kosovo domestic law, but their ambiguous status should cause concern.
15. The Ministry of Foreign Affairs is encouraged to publish all international agreements in the Official Gazette as soon as possible, including those negotiated in the Kosovo-Serbia dialogue.