

STALLING ON A PROCESS THAT NEVER HAPPENED: A review analysis of the border agreement between Kosovo and Montenegro

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STALLING ON A PROCESS THAT NEVER HAPPENED: A REVIEW ANALYSIS OF THE BORDER AGREEMENT BETWEEN KOSOVO AND MONTENEGRO

Introduction

Three years had passed since state representatives of Kosovo and Montenegro signed the agreement on state border between the two states during the Western Balkans Summit. The respective delegation deemed the agreement as an important event not only for the two parties involved, but also for the entire region, as it marks the path towards Euro-Atlantic integration¹. Nevertheless, the very agreement that was applauded during the Summit was met with fierce criticism and public dissatisfaction among both citizens and opposition parties in Kosovo, manifested by mass public protests and unorthodox means of political opposition². Allegedly, the original agreement fails to accurately distinguish the border line, leaving around 8200 hectares of Kosovar territory outside its jurisdiction. These allegations had been strongly disregarded, at times arrogantly so, by the previous *State Commission for Demarcation and Maintenance of State Borders*, as well as former Prime-Minister Isa Mustafa and former First Deputy Prime Minister and Minister of Foreign Affairs, currently President, Hashim Thaci. They continually disavowed any possibility that such alleged outcome could have resulted from the agreement. A three year-long political stalemate over the matter had been established, while both internal and external pressure for a solution continued to rise.

Announcing the Agreement and first reactions of the government and the public

On August 26th 2015, the Ministry of Foreign Affairs announced that the “Republic of Kosovo had concluded the demarcation process with Montenegro”³, following the principle agreement in place that the administrative border of the Former Yugoslavia would be then recognized as the state border⁴. This was only the second time that the Republic of Kosovo concluded the demarcation of its state borders, after having successfully done so previously with Macedonia in 2009⁵.

Promptly after the publication of the report from the *State Commission for Demarcation and Maintenance of State Border*, the work of which served as the basis for the agreement, the public displayed its strong agitation towards it. Opposition parties, namely Self-Determination Movement (VV), Alliance for the Future of Kosovo (AAK) and NISMA, independent experts, local residents that live along the state border line, and even MPs of ruling coalition came out against the original state border agreement by calling it inaccurate and deceitful. The main argument revolved around two main geographical disputed points, *Qafa e Cakorrit* and *Kulla e Zhlepit*. Allegedly, these two were left out of Kosovo’s territory as a result of wrong working in methodology and materials. *The State*

¹ “Kosovo and Montenegro conclude demarcation process in Vienna”, August 2015 available at: <http://www.mfa-ks.net/?page=2,217,2763>

² “Opposition Lawmakers released multiple canister of tear gas in the Kosovo’s Parliament in the latest series of protest against diplomatic agreement with Montenegro”, *New York Times*, February 2016, available at: <https://www.nytimes.com/2016/02/20/world/europe/kosovo-opposition-tear-gas-parliament.html>

³ “Kosovo and Montenegro conclude demarcation process in Vienna”, August 2015 available at: <http://www.mfa-ks.net/?page=2,217,2763>

⁴ “Drawing Boundaries in the Western Balkans: a People’s perspective”, *Safe World Report* (2011:6), available at: <http://www.qkss.org/en/Reports/Drawing-Boundaries-in-the-Western-Balkans-A-peoples-perspective-66>

⁵ “Demarkacioni i kufirit Kosovë – Maqedoni sukses i diplomacisë në Ballkan”, *Telegrafi*, November 2009, available at <https://telegrafi.com/demarkacioni-i-kufirit-kosove-maqedoni-sukses-i-diplomacise-ne-ballkan/>

Commission for Demarcation and Maintenance of State Borders, in accordance with the Montenegrin homologous body, had agreed to use cadastral data as the exclusive point of reference in harmonizing the state border line between the two states, adhering from the previous Yugoslav administrative borders⁶. Opposing experts argued that upon the dissolution of Yugoslavia, the transformation of the administrative border into state border was well evident, however there are no known cases in which such transformation has been made solely based on cadastral data⁷. Moreover, they argue that while cadaster is an important source of reference, international law does not recognize it as the sole criterion⁸.

Regarding their defense argument, government officials and members of the state commission claimed that the outcome of the agreement is based on, and in complete coherence with, the Yugoslav constitution of 1974. This is the earliest document that determined Kosovo's state borders as we know them now and recognized it as a federal unit of Yugoslavia. Therefore, the agreement guarantees that the Kosovo territorial integrity has remained intact. On that note, the American Embassy in Kosovo lined up to provide their support to the border state agreement. In a statement released in December of 2015, the U.S. Department of State determined that "the recently-delimited border closely aligns with the border as defined by the 1974 Constitution"⁹. Nevertheless, the opposition stood still by their initial condemnation towards the original agreement.

It should be noted that the conclusion of the state border state agreement was not a simple issue, because it also had severe implications in Kosovo's path toward European integration. The higher the resistance displayed against the agreement, the more often was the conclusion of the agreement presented as one of the two ultimate conditions for the much-longed visa liberalization - the other condition being the fight against organized crime and corruption. At first, government officials were the only ones to draw the connection. But it did not take long until EU officials and other diplomats tagged along to assure the public that their fate of free movement was tied to a state border process¹⁰, unprecedentedly so in the realm of EU integration. In all fairness, EU high end officials never explicitly stated that the conclusion of the agreement would solely push the visa liberalization process for Kosovo forward, always reminding the public about the importance of showing real signs of progress in fighting organized crime and corruption¹¹. In a game of *carrots and sticks*, the EU was waving the carrot reluctantly.

⁶ See text of the Report of the State Commission for Demarcation and Maintenance of State Borders on assessing the work of former State Commission for Demarcation and Maintenance of State Borders (2012 - 2015) , available at: http://www.kryeministri-ks.net/repository/docs/Raporti_Final_i_Demarkacionit-04.12.2017.pdf

⁷ Ibid

⁸ Ibid

⁹ See text of U.S. Embassy's Statement on Kosovo-Montenegro Border Demarcation Report, available at <https://xk.usembassy.gov/statement-kosovo-montenegro-border-demarcation-report/>

¹⁰ "EU's Juncker urges Kosovo solve border deal with Montenegro", *Chicago Tribune*, March 2018 available at <http://www.chicagotribune.com/sns-bc-eu--balkans-eu-20180228-story.html>

¹¹ Press point by Helga Schmid, Secretary General of the European External Action Service, after meeting with Kosovo Prime Minister Ramush Haradinaj, October 2017 available at https://eeas.europa.eu/delegations/kosovo_en/34619/Kosovo%20is%20Europe%20and%20Kosovo's%20future%20is%20with%20the%20European%20Union

The deadlock among members of parliament

Regardless of all things at stake, two political fronts were cemented, unwilling to compromise or recognize responsibility. On one side, the opposition front led by VV, AAK and NISMA, driven by the original persuasion that the agreement violates Kosovo's territorial integrity, deemed the momentum paramount to consolidate their political opposition and mobilize the public support.

Hence, they resiliently continued pushing forward the demand for revising the agreement. Whereas on the other side, the ruling coalition Democratic League of Kosovo (LDK) – Democratic Party of Kosovo (PDK), having already signed the agreement, found itself facing strong public and political scrutiny as they continually failed to secure the number of votes required to ratify the agreement in parliament. Their first attempt to ratify the agreement, on October 2015, was met by unconventional and unheard means of opposition as the opposition parties let off tear gas during the parliamentary session. A precedent measure of political opposition, the consequences of which are yet uncharted. The government made a second attempt, a year later, sending the agreement for a parliamentary vote, only to cancel it due to lack of support even within the parliament members of the ruling coalition. Constrained by the political and legal repercussions that could burden them in case of a withdrawal in positions, the ruling coalition remained adamant that the opposing claims are baseless and that the agreement is both historically and scientifically correct.

Nearing the end in negotiations between the State Commission and the Montenegrin counterpart

Failing to provide a solution to the stalemate, in 2017 the government fell after the parliament supported an opposition motion of no-confidence. Post-elections, a new government came into power led by the leader of AAK, Ramush Haradinaj. Haradinaj, a prominent voice against the agreement, had entered a pre-electoral coalition with his long time opposition partner NISMA, and previously ruling party PDK, who had strongly backed the state border agreement. As his first decision as the newly elected Prime Minister, Haradinaj discharged all members of *the State Commission for Border Demarcation and Maintenance*¹², making it a statement of intent of his position as one of the loudest opposition voices against the agreement. In two months' time, the newly assigned State Commission announced a report in which it concludes that the agreement on with Montenegro damages Kosovo's national interest. The report goes as far as claiming that the former State Commission had exceeded and violated its mandate, because instead, deceitfully, it had entered negotiations with the Montenegrin counterparts to determine a new state border¹³¹⁴.

However, the conclusions of the report were already predetermined to a large extent, given the fact that the members of the newly appointed commission had made their professional opinions clear to the public all along. The professional and political weight of the report was very much dependent on the volume of the factual support it provided to their strong claims, rather than on the arguments it made, which were already known. Admittedly so, the Commission's work

¹² See text of the Government decisions on September 2017, available at: http://kryeministri-ks.net/wp-content/uploads/docs/Vendimi_i_Mbledhjes_s%C3%AB_par%C3%AB_t%C3%AB_Qeveris%C3%AB_s%C3%AB_Republik%C3%ABs_s%C3%AB_Kosov%C3%ABs_2017.pdf

¹³ See text of the Report of the State Commission for Demarcation and Maintenance of State Borders on assessing the work of former State Commission for Demarcation and Maintenance of State Borders (2012 - 2015), available at: http://www.kryeministri-ks.net/repository/docs/Raporti_Final_i_Demarkacionit-04.12.2017.pdf

¹⁴ The U.S. Embassy considered these conclusions as “unsubstantiated, misleading and wrong”, available at <https://xk.usembassy.gov/u-s-embassy-statement-border-demarcation-agreement-2/>

failed to live up to expectation, and failed to make an impact in the already-exhausted public opinion.

The political stalemate began to see an end when, in the beginning of 2018, Kosovo and Montenegro presidents announced that they had reached an annex agreement in which a joint working body would be formed and authorized to identify the remaining disagreements¹⁵. Government officials were quick to present this annex agreement as the only viable solution to the political deadlock, because it ensured that concerns of losing territory will be addressed accordingly in the face of potentially new emerging evidence. The annex agreement did not convince a lot of people, but it sufficed for the Prime Minister and his coalition partner, NISMA, to take a turn in their position. Meanwhile VV, then opposition partner of Haradinaj, which still remained loud and clear against the agreement regardless of recent developments, accused Haradinaj of exchanging their common cause for his own political benefits. Haradinaj's figure sought pride in putting an end to this process, but his political career seemed to seek salvation through an annex agreement that, he for one would have called sinister to say the least had he been in the opposition. All things considered, after three eventful years of being one of the main opponents of the border agreement with Montenegro, Haradinaj finally gave into the United States' demands, EU conditions and internal pressure to accept the agreement and move forward. In March 2018, the government sent the latest modified "law on ratification of the border agreement on the state borders between the republic of Kosovo and Montenegro" into vote. Integral parts of law were the original agreements signed in August 2015, the annex agreement signed by the two respective presidents and paradoxically so, the official records of the State Commission that concluded that the agreement damages Kosovo's interest¹⁶. Amidst accusations, tear gas turmoil let off by VV members in their last desperate attempt to stall the agreement and prolonged delays, the parliament passed the law with two-thirds of votes¹⁷.

Conclusions: the political battles, the misuse of technical terms, EU motives and the insufficient annex agreement.

Looking back at the supposedly technical agreement that shackled the public and political discourse for three years, and turned into the biggest political clash in Kosovo's modern history, the following conclusions are made.

First, it was all a political battle in the end. In the beginning, when the agreement was first announced there was an immediate negative response. Claims of losing territory quickly became common. Local residents along the state border expressed their disturbing concern that the newly-signed agreement excludes some portion of Kosovo territory that they have considered *home* for generations now¹⁸. In a country where over 60% of population does not trust government institutions¹⁹, the perception that the agreement might actually be harmful and inaccurate was quickly embraced by the public. Instead of addressing the emerging concern, government officials immediately took on a defensive approach and canceled out any possibility a mistake could have

¹⁵ See text of the Annex Agreement:

[//ligjet.kuvendikosoves.org/Uploads/Data/Documents/Deklarataeperbashket_4M6f4zzg3S.pdf](http://ligjet.kuvendikosoves.org/Uploads/Data/Documents/Deklarataeperbashket_4M6f4zzg3S.pdf)

¹⁶ See text of the Draft Law on ratification of the Border Agreement

http://ligjet.kuvendikosoves.org/Uploads/Data/Documents/PLperratifeMarreveshjesperkufirinshtetore_BugHKcjCj.pdf

¹⁷ "Kosovo ratifies demarcation deal with Montenegro", *Prishtina Insight*, March 2018 available at <http://prishtinainsight.com/kosovo-ratifies-demarcation-deal-montenegro/>

¹⁸ "Demarkacioni me Malin e Zi, Rugovasiit reagojne ndja Murat Mehes", *Telegrafi*, Korrik 2015 available at <https://telegrafi.com/demarkacioni-me-malin-e-zi-rugovasiit-reagojne-ndaj-murat-mehes/>

¹⁹ "Kosovo Security Barometer", *Kosovar Center Security Studies* (2015) available at:

http://www.qkss.org/repository/docs/Kosovo_Security_Barometer_-_Fifth_Edition_523670.pdf

been made on their end. Needless to say, this had a counter-productive effect. Without questioning the sincerity of their motives, opposition leaders were sharp to realize the potential political consequence that this could have for their political rivals if they continue to make a strong case against the agreement. In doing so, they knowingly incorporated populist and nationalist elements in their discourse, having it already been proven that, among the few causes with the potential to mobilize the support of masses in Kosovo, national themes top the list. A scan review of the largest mass protests in Kosovo's modern history lists the following; the protest against the former Minister for Community and Returns, Alexander Jabllanovic after he had publicly insulted the mothers of missing persons from the late war; the protest against the new law on Trepca mine complex that could have left Trepca outside Kosovo's state control²⁰; the protest against the agreement on association of Serb Municipality that could potentially turn Kosovo into a dysfunctional state; and the protest against the agreement on state border with Montenegro for the already known reasons to this paper. A mass protest incited by a poor education system, deteriorating health system, corruption allegation, and the stalling of socio-economic developments has yet to outnumber the aforementioned ones. Therefore, unconditionally opposing the original state border agreement based on the argument that it is inaccurate was certainly going to be politically profitable for the opposition parties. In practical terms, the result of the 2017 elections marked a growth of vote by two-fold for the VV, while the AAK and NISMA are now ruling.

Secondly, concerns about the inappropriate use of technical terms in the public discussion of the issue are worrisome, just as the lack of practical knowledge by public officials. Demarcation is the translation of the word "shënjëzim" in Albanian, yet in the entirety of the three years long public discussion, the local appropriate word for *demarcation* had almost always been substituted with the word "*demarkacion*", which is the borrowed version from the English language. In the international state boundary-making practices, the process of *demarcation*, "by which a boundary is physically marked on the ground"²¹, follows a prior process named *delimitation* which is the "marking of the boundary site on paper, either on a map or in a verbal description of the boundary within the text of a law or treaty"²². While the public, as well as the officials, referred to the agreement as the *Border Demarcation with Montenegro*, the term *demarcation* is never used or mentioned in the original agreement²³. As a matter of fact, the process of demarcation (shënjëzimit) as we know it now, has not even started according to the original agreement of 2015 - Article 4 states that "the state border between the parties shall be marked within a period of two years from the entry into force of this agreement"²⁴. This leads to the assumption that Kosovo and Montenegro had entered and only recently concluded the process of *delimitation*, which is only the second stage of international boundary making, following *allocation*, and preceding *demarcation* and *maintenance* or *administration*²⁵. To further confirm that the concluded agreement arranged the delimitation process, Article 6 of the original agreement also includes a provision for the fourth stage process of boundary making, namely *maintenance*, by stating that "State Commissions for

²⁰ "Clashes Erupt as Thousands Protest in Kosovo", *Balkan Insight*, January 2015 available at <http://www.balkaninsight.com/en/article/massive-protests-in-prishtina-protesters-issue-ultimatum>

²¹ "Applied Issues in International Land Boundary Delimitation/Demarcation practices". *Organization for Security and Co-operation in Europe* (2011: 8), available at <https://www.osce.org/cpc/85263?download=true>

²² Williams, Paul (2016). Quick Guide: Delimitation and Demarcation of Federal Boundaries. *Public International Law & Policy Group*. Page 3.

²³ See text of the original Agreement on State Border between Montenegro and Kosovo available at http://ligjet.kuvendikosoves.org/Uploads/Data/Documents/28Marreveshja_Vb8AH3Vb8y.pdf

²⁴ Ibid

²⁵ Donaldson, John & Williams, Alison (2008). Delimitation and Demarcation: Analyzing the Legacy of Stephen B. Jones' Boundary-Making, *Geopolitics*, 13:4, 676-700 available at <http://dx.doi.org/10.1080/14650040802275503>

the state border of parties shall issue Common Instruction on marking of the state border, on maintenance of border line, on border markings and border zone between the Republic of Kosovo and Montenegro”²⁶.

Thirdly, EU’s perseverance with regard to the completion of border process between Kosovo and Montenegro is a result of a lesson learnt for the EU. Although, it was factually unprecedented in the realm of EU integration and rightly seen as an unfair requirement to Kosovo’s visa liberalization process, EU had no intention to further an already prolonged process of state border between future potential member countries. Cases of countries in the Balkans that have circumvented such a process for latter stages have become a liability to EU’s enlargement policy. Case given, Croatia’s accession to the EU was stalled for years by the member state Slovenia over 26-year-old territorial disputes²⁷. Croatia joined the Union in 2013, only after Slovenia had been convinced to lift the blockade after the two countries were persuaded to submit their claims to the Permanent Court of Arbitration²⁸. In a turn of events, in 2015 Croatia withdrew from the arbitration process and rejected court’s verdict which ruled in favor of Slovenia²⁹. While the disagreement over the border line between Croatia and Slovenia persist to this day, implication of such precedent are unsettling for the prospect of EU enlargement strategy for the Western Balkans. Border disputes are well evidenced in this region, and similar played out scenarios where one member countries could stall the other’s integration process are easily replicable across the region given the political and historical background of the region. In order to avoid this, high-end EU officials promised to themselves to “never agree again to put off until later the resolution of border problems”³⁰, and for the same reasons the newly announced strategy for Western Balkans spells out the need for fundamental reforms and good neighborly relations³¹. Consequently, while unfair in itself, it was a result of precautions measures the EU is undertaking to avoid future implications that introduced the completion of state border process between Kosovo and Montenegro as a criterion for Kosovo’s visa liberalization process.

Lastly, the annex agreement which brought the entire process to an end shows no strong basis to address the main concern over the original agreement. Despite the way it was presented to the public by government officials, the annex agreement in fact provides little to no legal basis to support the claims by Haradinaj that it ensures the two disputed points, Cakorr and Zhlep, will be revised and corrected accordingly³². Paragraphs 3 and 4 of this annex agreement, also known as the Joint Statement of presidents of the two states, state that “Parties agree that during this process, a Joint working body will identify and address potential disagreements during the process of marking state borders according to this annex agreement”, and “the Joint working body will

²⁶ See text of the original Agreement on State Border between Montenegro and Kosovo available at http://ligjet.kuvendikosoves.org/Uploads/Data/Documents/28Marreveshja_Vb8AH3Vb8y.pdf

²⁷ “Slovenia-Croatia border disputes underlines fragility of EU’s Balkan project”, *The Irish Times*, January 2018 available at <https://www.irishtimes.com/news/world/europe/slovenia-croatia-border-dispute-underlines-fragility-of-eu-s-balkan-project-1.3344135>

²⁸ “E.U. hoped balkan border deal would be model for peace. Then it collapsed”, *The New York Times*, December 2017 available at <https://www.nytimes.com/2017/12/29/world/europe/slovenia-croatia-border-eu.html>

²⁹ <https://www.reuters.com/article/us-croatia-slovenia-border/croatia-and-slovenia-fail-to-move-forward-in-talks-on-border-dispute-idUSKBN1ED1YB>

³⁰ “Juncker: Slovenia-Croatia dispute jeopardises Balkan enlargement”, *EUObserver*, January 2017 available at <https://euobserver.com/justice/140471>

³¹ Strategy for the Western Balkans, *European Commission Press Release*, February 2018 available at http://europa.eu/rapid/press-release_IP-18-561_en.htm

³² “Haradinaj: me Aneks-Marrëveshjen Përmbushëm Kushtet për Liberalizim”, *Kallxo*, February 2018, available at <http://kallxo.com/haradinaj-me-aneks-marreveshjen-permbushem-kushtet-per-liberalizim/>

specifically revise and correct the sectors in the direction of Cakorr and Zhlep”³³. While the annex agreement includes these two provisions that potentially allow revisions by mutual agreement, it does not modify either Article 2 or 7 of the original agreement where the types of documents that served as basis for delimitation, and will be used for demarcation are specified. The core argument against the original agreement by the opposition at the time was exactly the type of documents and materials used in the process. If the joint working body deriving from the annex agreement will base its mandate in the same type of working material as the previous state commissions did, they are destined to reach matching conclusions. All things remaining the same, how are the disputes over Cakorr and Zhlep ever going to be revised and corrected if the joint working body is bound to reach identical conclusions to the original agreement while it remains in force for the time being? Hence, the annex agreement did not provide an actual viable solution to the disagreements, but surely played a vital role to break the deadlock at least for now.

To put an end to the matter, in response to submitted claim by VV representatives in which they argue that the recently approved law on state border with Montenegro is unconstitutional³⁴, the constitutional court announced its verdict against it concluding that the agreement was in compliance with the constitution³⁵.

³³ See text of the Annex Agreement

http://ligjet.kuvendikosoves.org/Uploads/Data/Documents/Deklarataeperbashket_4M6f4zzg3S.pdf

³⁴ “VV: Demarkacioni në Kushtetutese”, *RTV 21*, March 2018 available at <http://rtv21.tv/vv-demarkacioni-ne-kushtetuese/>

³⁵ “Gjykata Kushtetuese vendosi për kërkesën e VV-së për demarkacionin”, *Kallxo*, April 2018 available at <http://kallxo.com/gjykata-kushtetuese-vendosi-per-kerkesen-e-vv-se-per-demarkacionin/>

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