



POLICY BRIEF

KOSOVO SECURITY FORCE IS AN ARMY

Legal Arguments

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I. Introduction

Legal restrictions imposed on armament, number of members and competencies of the Kosovo Security Force (KSF) make it not considered an army by the public. The possibility of amending the Constitution to transform KSF into the army has been discussed in the public debate. This legal opinion will argue that under the Constitution of the Republic of Kosovo, KSF is already a military force and constitutional amendments are not required to eliminate current restrictions which prevent it from becoming fully-fledged military force. All current restrictions may be eliminated by amending the relevant legislation within existing provisions of the Constitution.

Amendment of the Constitution would require the approval of two thirds (2/3) of all members of the Parliament, including two thirds (2/3) of all members of the Parliament holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo. On the other hand, as the legislation on KSF does not constitute legislation of vital interest (Article 81 of the Constitution), amendments of the legislation on KSF could be adopted by the Parliament only by a majority vote of MPs present and voting (Article 80.1 of the Constitution).

II. Current legal-constitutional arrangements of the Kosovo Security Force

Kosovo Security Force (KSF) is regulated by the Constitution of the Republic of Kosovo and the Law no. 03/L-046 on Kosovo Security Force, amended by the law no. 03/-108 and law no. 04/L-115.

KSF is a security institution, which under the Constitution of the Republic of Kosovo, serves in protecting the constitutional order and territorial integrity, public order and safety, and which operates under the constitutional authority of the democratic institutions of the Republic of Kosovo (Article 4, para. 7). KSF is defined as a national security force for the Republic of Kosovo (Article 126, para. Shall protect the people and Communi-

ties of the Republic of Kosovo based on the competencies provided by law (article 126, para. 2). KSF shall be professional, reflect ethnic diversity of the people of the Republic of Kosovo and shall be recruited from among the citizens of the Republic of Kosovo article 126, para. 4). The President of the Republic of Kosovo is the Commander-in-Chief of the KSF (Article 126, para. 3), while the Commander of the KSF shall be appointed by the President of the Republic of Kosovo upon the recommendation of the Government (Article 126, para. 5).

According to Law no. 03/-046 amended by the Law no. 04/L-115, the KSF shall be an all-volunteer force drawn from all strata of society in accordance with this law (article 9, para. 1). KSF will be designed and prepared to fulfill security functions not appropriate for the police or other law enforcement organizations (article 9, para. 3).

In another words, KSF shall be lightly armed and shall not have heavy weapons, such as tanks, heavy artillery or offensive air capability (article 10, para. 2). A full review of these restrictions shall be conducted not earlier than five (5) years from the date of entry into force of the Law No. 03/L-046 on Kosovo Security Force; KSF initial tasks under the law are:

- i. to participate in crisis response operations, including peace support operations. This will include operations outside the territory of the Republic of Kosovo where invited to do so;
- ii. to assist civil authorities in responding to natural and other disasters and emergencies, including as part of a regional or international response effort;
- iii. to conduct explosive ordnance disposal;
- iv. to assist civil authorities through civil protection operations.

Also, by law, KSF initially shall comprise of an active component of maximum 2500 personnel and a reserve component of maximum of 800 personnel (Article 14).

Legal limitations imposed regarding armament, number of members and competencies of the KSF, which

are not of a military nature but mainly emergency crises response and natural disasters, make KSF not considered an army.

At this point it should be noted that the name does not determine whether an institution is military or something less than military. The term “army” can be defined as the totality of the armed forces of a country¹ in the sense of an organized body of military personnel, which is professionally trained and geared for battle². A country can have an army without naming the body as military, because the substance of that body, i.e. functions, competencies, armament and organization determine whether it is military or not. Germany’s military is officially called “Bundeswehr”, if translated literally in Albanian means “defense of the federation”. The Israeli military is titled “Israeli Defense Forces”. Similarly, the Australian military is titled “Australian Defense Force”. Disregarding their names, they are military forces due to their competencies, armament and organization and because of the military function they perform.

In this sense, the Republic of Kosovo may have its own army, even the term “army” is not officially designated, but if it assigns the functions, competencies, armament and organization which is typical for a military force. KSF could be considered an army in the full sense if legal restrictions mentioned above in terms of armament, functions and competencies are eliminated and if it legally is designated the security institution of military nature of the Republic of Kosovo. This raises the question whether these restrictions can be eliminated without amending the Constitution of the Republic of Kosovo and whether KSF may be considered an army.

III. Does the Kosovo’s Constitution prevent KSF legislation amendment that would eliminate restrictions in terms of armament and competencies of KSF

The Constitution does not contain restrictions regarding the competencies and armament of KSF, as defined by law. It defines KSF as national security force which protects the people and communities of the Republic of Kosovo based on the competencies provided by law (article 126, para. 1 and 2). Language and expressions used in the Constitution provide enough room for interpretation to conclude that the Constitution does not prohibit treating KSF an army and does not prevent the elimination of current restrictions only through amending the legislation.

KSF’s main constitutional function is to protect the citizens and communities of Kosovo. Given that under the Constitution, the Republic of Kosovo is a country of its citizens (Article 1, para. 2) and sovereignty of the Republic of Kosovo stems from the people and belongs to the people (Article 2, para. 1) protection of the citizens and communities of Kosovo implies the defense of the sovereignty of the Republic of Kosovo including all other attributes that make the Republic of Kosovo an independent and sovereign country. The verb “protect”, as used in the Constitution to set the KSF function, means to save someone or something from any attack or any other danger.³ In military terminology, the verb “protect” means organizing the defense and combat against the enemy using weapons to protect a country.⁴ The fact that the Constitution describes KSF as a force implies that she should have available all physical means, including weapons necessary to successfully implement its function, which is to protect the citizens and communities of Kosovo. In

1 Albanian Academy of Science/Institute of Linguistics and Literature, Dictionary of Contemporary Albanian, Tirana: 2002, p. 1413.

2 Oxford Dictionaries: Definition: “Army”, at: (<http://www.oxforddictionaries.com/definition/english/army>, last access on 08.16.2015).

3 Albanian Academy of Science/Institute of Linguistics and Literature, Dictionary of Contemporary Albanian, Tirana: 2002, p. 754.

4 Ibid.

addition, the Constitution explicitly uses the term “recruitment” (Article 126, para. 4), an expression which is typically used for military force. Similarly, KSF has a “commander”, as a typical expression of a military force. Based on literal interpretation of the Constitution one may conclude that there are sufficient constitutional grounds for considering KSF a force of military nature.

This interpretation is also supported by normative context within which the Constitution has arranged the KSF. KSF is part of security institutions and ranks first among all other institutions. Other security institutions include non-military components, such as the Kosovo Police, Kosovo Intelligence Agency, Security Council and Civil Aviation Authority. Compared with these institutions, and considering the language used in the Constitution, KSF emerges as a security institution of a military character, just like any other country.

The Constitution does not define the functions and powers of the KSF beyond the “protection of citizens and communities”, but delegates lawmakers the power to define these by law (article 126, para 2). Restrictions regarding competencies and armament are not defined by the Constitution but by law. This law may be amended to eliminate the existing legal restrictions in order for KSF to effectively implement its constitutional function of protecting citizens and communities. In fact, based on the Constitution, KSF is already an army, but because of legal restrictions, it seems and is perceived as something less than an army, which has no constitutional basis.

IV. Does “Ahtisaari Plan” prevent the KSF transformation to military force?

The question that may arise is whether the Comprehensive Proposal for the Kosovo Status Settlement dated 26.03.2007 (Ahtisaari’s package) prevents KSF treatment as an army. KSF establishment was envisaged by the

Ahtisaari’s package (Annex VIII, article 5.1)⁵. The current legal restrictions in terms of armament, the number of its members and competencies have been defined in this document. Annex VIII, Article 5.2 stipulates that KSF shall be lightly armed and will possess no heavy weapons such as tanks, heavy artillery or offensive air capability. KSF is to consist of no more than 2,500 active members and 800 reserve members. According to Annex VIII, article 5.4, initially, the KSF will be primarily responsible for crisis response, explosive ordinance disposal and civil protection. Also, the KSF will be designed and prepared to fulfill other security functions, not appropriate for the police or other law enforcement organizations.

Since the Ahtisaari’s Plan was not voted by the United Nations Security Council, Kosovo after the declaration of independence and adoption of the Constitution of the Republic of Kosovo has incorporated Ahtisaari’s package as part of the Constitution. Article 143 of the Constitution of the Republic of Kosovo provides the following:

1. All authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo’s obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary actions for their implementation.
2. The provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.
3. The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws and other legal acts of the Republic of Kosovo and the provisions of the agreement, the latter shall prevail.

With this provision, the Constitution has provided Ahtisaari’s package superiority vis-a-vis Constitution and all other normative acts of the Republic of Kosovo. Al-

⁵ Article 5.1: Kosovo will establish a new Security Force (KSF), which will be professional and multiethnic.

though limitations in terms of armament, number of members and competencies of KSF were not included in Article 126 of the Constitution, the provisions of the Ahtisaari's package have been directly applicable with legal effect on the Constitution itself. For this reason, as long as Ahtisaari's package was in force, KSF faced restrictions mentioned above in the constitutional level and it was impossible to eliminate them through amendments of the law.

This legal situation has changed after the completion of the international supervision of Kosovo on 10.09.2012 which preceded the constitutional amendments dated 07.10.2012. These constitutional amendments dismissed all the provisions dealing with Ahtisaari's package, as well as enforcement and superiority of this document. With the entry into force of these amendments, the Ahtisaari's package has no normative force and is not applicable anymore in the Republic of Kosovo. With this, all the provisions that had to do with restrictions in terms of KSF have been invalidated. Since 07.10.2012 KSF constitutional basis is only Article 126 of the Constitution of the Republic of Kosovo without any of the restrictions that were previously set out in the Ahtisaari's package. Since that date, the current restrictions regarding armament, and competencies of KSF members are no longer in constitutional rank, but at the rank of the law. For this reason, the Ahtisaari's package does not prohibit the treatment of KSF as an army and does not prevent amending the legislation to eliminate current restrictions.

V. Does Declaration of Independence prevent the treatment of KSF an army?

In the Declaration of Independence dated 17.02.2008 representatives of the people of Kosovo declared, *inter alia*, as follows:

We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations

of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan

Representatives of the people of Kosovo are committed to implement all the obligations deriving from the Ahtisaari's package, including those dealing with restrictions in terms of the KSF. This commitment is made as unilateral statement with legal force in the field of international law. However, this commitment must be interpreted in its historical context and for the purposes it had in that context. Kosovo has made this commitment to testify to the international community that she is ready to implement all the recommendations contained in the Ahtisaari's package and to accept an international supervision for this purpose. This commitment is realized when on 10.09.2012 the international community representatives involved in the supervision of Kosovo stated that Kosovo has met all obligations arising from the Ahtisaari Plan and that Ahtisaari's package finds no application. This statement was not made by Kosovo, but by the international community. Fulfilling the obligations deriving from the Ahtisaari Plan, and concluding the international supervision, is a typical case of "*rebus sic standibus*"; a recognized doctrine applied in international law. According to this doctrine, a country is released from an obligation if the factual basis establishing the liability has changed radically.⁶ Factual basis for Kosovo's commitment to adhere to the Ahtisaari's package was the fact that at the time when Kosovo made this commitment, this package has not been implemented, requesting a serious commitment

⁶ J. Crawford, "Brownlie's Principles of Public International Law", Oxford: 2012, p. 393.

from Kosovo. This changed in the moment when the international community stated itself in 2012 that the Ahtisaari Plan obligations are met, eliminating the factual basis for the commitment of Kosovo in 2008. For this reason, according to the doctrine *“rebus sic stantibus”*, Declaration of Independence presents no legal barrier to treatment of KSF as an army.

VI. Does the Resolution 1244 (1999) stop KSF treatment as an army?

Resolution 1244 (1999) has authorized the creation of an international military presence in Kosovo with the following functions:

- Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;
- Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;
- Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered;
- Ensuring public safety and order until the international civil presence can take responsibility for this task;
- Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;
- Supporting, as appropriate, and coordinating closely with the work of the international civil presence;
- Conducting border monitoring duties as required;
- Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;

The international military presence under Resolution 1244 is the NATO-led KFOR. Given the fact that Resolution 1244 authorized an international military presence in Kosovo, one may ask whether resolution 1244 prevents treatment of KSF as the military of the Republic of Kosovo.

Firstly it should be noted that the Republic of Kosovo, a country not a member of the United Nations, is not obliged to abide by a resolution of the Security Council of the United Nations. The International Court of Justice (ICJ) confirmed that non-member states have no duty to apply Article 25 of the UN Charter, which requires member states to implement Security Council resolutions.⁷ This also applies to the Republic of Kosovo while she is not a member of the United Nations. This means that Resolution 1244 is not directly applicable within the legal system of the Republic of Kosovo, unless normative acts of the Republic of Kosovo provide the resolution any legal force.

In the Declaration of Independence, representatives of the people of Kosovo declared:

“We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).”

At first reading, it might be interpreted as a commitment of Kosovo to implement Resolution 1244 (1999) as a whole and with its direct action. However, this part of the statement of declaration of independence should be read together with the following statement according to which:

“We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the

⁷ International Court of Justice, Advisory Opinion of 21 June 1971 on the Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), para. 126.

basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability".

Accordingly, the international presences in Kosovo, including international military presence established pursuant to resolution 1244 (1999), exercise their duties stipulated by this resolution rather than the judicial power of this resolution, but on the basis of invitation and consent of the Republic Kosovo as a sovereign state. Exercise of any powers by the international presences in Kosovo, even if they are defined by Resolution 1244 (1999), have the consent through legal basis of Kosovo, not the Resolution 1244 (1999). In addition, invitations and consent of Kosovo are provided with the condition *"until such time as Kosovo institutions are capable of assuming these responsibilities"*. Ultimate interpreter of when this condition is to be considered fulfilled is the Republic of Kosovo, because of the declaration of Kosovo. However, the fact that the international community, represented by countries that have been involved in the supervision of Kosovo's independence, concluded that Kosovo has met all the requirements of the Ahtisaari's package, means that international community itself has concluded that Kosovo is able to assume additional responsibilities, including those in the field of security.

In this context it should be taken into account the advisory opinion of the International Court of Justice dated 22.07.2010, upholding that Kosovo's declaration of independence did not violate the international law, including Resolution 1244. The argument upon which the ICJ based its conclusion is that MPs who declared Kosovo's independence did not operate within Resolution 1244, but acted as representatives of the peo-

ple of Kosovo outside the framework of the interim administration of the United Nations. In this capacity, the MPs have not been addressees of Resolution 1244, therefore this resolution does not create legal obstacle to independence. The only possibility to argue that the declaration of independence did not violate Resolution 1244 and the international law was the argument that the declaration of independence was done out of Resolution 1244. If ICJ had judged that MPs acted within Resolution 1244, ICJ would have concluded that the declaration of independence was in violation of the international law. With this, the ICJ confirmed that the entire process of the declaration of independence is beyond Resolution 1244 and has no connection with it, and the entire constitutional and legal order of Kosovo is placed outside of Resolution 1244 (1999).

In addition, the text of Resolution 1244 (1999), as mentioned above, does not prevent the KSF treatment as an army. The resolution envisages ensuring the withdrawal and preventing the return into Kosovo of military, police and paramilitary forces of the Federation and the Republic, but this does not mean that Kosovo does not have a military force of its own established and organized in collaboration with the International Military Presence, such as KSF. Also, the demilitarization of KLA is no legal obstacle, because the KSF is strongly established in 2008 which in legal viewpoint, has no institutional links with the KLA. Other tasks of the international military presence under Resolution 1244 (1999) have been concluded (e.g. creating a secure environment in which refugees and displaced persons can return; ensuring public safety and order until the international civil presence can take responsibility for this task or can be performed in parallel with a military force in Kosovo. In all views, Resolution 1244 (1999) presents no legal barrier to treatment of the KSF as an army under the Constitution of the Republic of Kosovo.

Even at the constitutional level, any reference to the international military presence under Resolution 1244 (1999) has been eliminated. Article 153 of the Constitution of the Republic of Kosovo of 2008 provides the following:

Notwithstanding any provision of this Constitution, the International Military Presence has the mandate and powers set forth under the relevant international instruments including United Nations Security Council Resolution 1244 and the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. The Head of the International Military Presence shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in theatre regarding interpretation of those aspects of the said Settlement that refer to the International Military Presence. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in this Article.

Upon completion of supervised independence in 2012, this provision of the Constitution was deleted (Amendment 14 of the Constitution of 2012) and this has removed any constitutional obligation regarding the international military presence and its competence pursuant to Resolution 1244 (1999).

VII. Conclusion

Above arguments indicate that there is no legal-constitutional barrier to KSF's treatment as an army, and amending the legislation, not the Constitution, would eliminate current restrictions on its functions, competencies, armament and the number of members.

The necessary changes may be accomplished by amending the Law no. 03/L-046 on Kosovo Security Force, amending the law no. 03/-108 and law no. 04/L-115 deleting provisions that contain restrictions regarding competencies, armament and personnel of KSF and clarifying KSF's role as military force in accordance with Article 126 of the Constitution of the Republic of Kosovo.

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