



Bosnia, Kosovo and the EU: Is Accession Possible without Full Sovereignty?

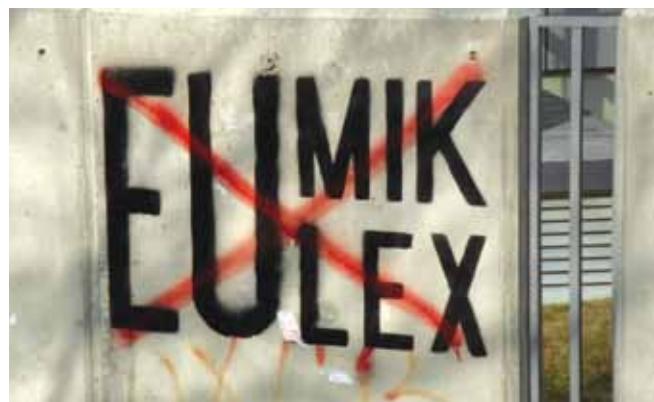
Wolfgang Koeth, Senior Lecturer, EIPA Maastricht

31

Bosnia and Kosovo are the only two members of the EU enlargement zone that have never tried to apply for EU membership, given that both are too far from complying with the required minimum standards. But besides lacking basic capacities, these two potential candidates share another common feature: both are limited, to different degrees, in their national sovereignty. This lack of sovereignty not only limits the capacity of the potential candidates to negotiate or to enter into agreements with the EU; it also undermines their readiness to undertake serious reforms. The EU tries to dodge the political blockades that are the root cause of the problem by focusing on the technical issues; this might provide a temporary relief but cannot substitute a realistic accession perspective, which is currently absent. However, without this perspective, the EU's 'normative power' in these countries will continue to erode – which bears the risk that both Kosovo and Bosnia will, in the end, try to solve existing problems through unilateral measures, such as partition. Given its lack of ability to provide alternatives, the EU has to realistically consider such outcomes and think about the possible consequences.

Introduction

At a time when the EU is fully absorbed with resolving its internal problems and saving the Euro, it seems that enlargement has slid down to the bottom of the EU's list of priorities. Although a number of Member States are quite open in expressing their aversion to further EU enlargement beyond Croatia and Iceland, the EU regularly and ritually confirms the European perspective of the Western Balkans and Turkey. In the meantime, the membership negotiations with two candidate countries, Turkey and FYROM, are blocked due to their bilateral disputes with Cyprus and Greece respectively. In March 2012 Serbia scored a diplomatic victory by attaining the status of candidate country; but its actual accession perspective is distant, given the unresolved Kosovo question. Whereas Montenegro might have some hopes for a successful EU integration due to its small size and the absence of ethnic tensions, the membership perspectives for Albania, Kosovo and Bosnia seem, at present, more distant than ever.



'Anti-EU painting in Pristina'. Credits: Wolfgang Koeth

This article will look in detail at the particular situation of the only two potential candidates that have so far – for particular reasons – never applied for membership: Bosnia and Kosovo. Beyond their smouldering ethnic conflicts and their lack of institutional capacity to face the challenges of membership, these two countries share another distinctive feature: they do not enjoy – to different degrees – full sovereignty. But would less-than-fully-sovereign countries technically be able to become members of the EU? What is the nature of these limitations to sovereignty? What are the conditions of these countries to become fully sovereign, and would this be a pre-condition for further progress towards EU integration? What might be the unintended consequences of full sovereignty? To which extent is the accession perspective of these potential candidates determined by political developments in Belgrade, Brussels or in other European capitals, rather than in these countries themselves?

Kosovo and Bosnia: same dilemma, in reverse

At first glance, both Kosovo and Bosnia appear to bear a degree of similarity: limited sovereignty, weak institutions and an unwillingness of a national minority (in both cases Serbian)

to integrate into a common state. Something shared by both countries is that their very own territorial integrity is granted by external factors: in each of the two cases it was the verdict of the international community after a devastating war, with the resulting arrangements overseen by an international supervisory body with executive powers (The Office of the High representative/OHR in Bosnia; The International Civilian Office/ICO and the EU Rule of Law Mission/EULEX in Kosovo).

However, the similarities end here. The Bosnian state owes its existence to a top-down initiative of the US and the international community from the 1995 Dayton conference; it was endorsed internationally but only grudgingly accepted by most of its citizens, given the lack of a common identity among its people. On the other hand, the Republic of Kosovo, self-proclaimed in 2008 on the territory of the former UN protectorate *against* the resistance of the international community, enjoys the support of the overwhelming majority of its citizens. Unlike Bosnia, Kosovo has the *ownership* of the vast majority of its people.

Limited sovereignty: self-inflicted vs. imposed from above?

Limitations of sovereignty can take three different forms: a. through the presence of international caretakers with executive powers; b. through the inability to exercise sovereign powers; and c. through non-recognition on the international stage. The first scenario applies to both Bosnia and Kosovo; the second applies to Bosnia; and the third to Kosovo.

a. Limited sovereignty through the presence of international caretakers

The international arrangements that have prompted the emergence of both Bosnia and Kosovo as distinct entities on the international map, following a devastating conflict, had put in place a number of safeguards to guarantee the survival of the new entity: the 1995 Dayton agreement that created Bosnia had foreseen an Office of the High

At first glance, both Kosovo and Bosnia appear to bear a degree of similarity: limited sovereignty, weak institutions and an unwillingness of a national minority (in both cases Serbian) to integrate into a common state.

Representative (OHR), mandated by the international community. The High Representative would guarantee, through his executive powers ('Bonn powers'), the respect of the Dayton agreement. The Constitution of Bosnia and Herzegovina, technically an annex to the Dayton agreement, provides for a share of power between the different ethnically-based entities of the common state.

Kosovo, as a former Serbian province, became a UN protectorate after the withdrawal of the Serbian troops following UN Security Council Resolution 1244 that, in 1999, put an end to the Kosovo conflict. Gradually, the UN administration (UNMIK) transferred some of its powers to the newly created local institutions of self-government.

In the wake of Kosovo's unilateral declaration of independence in 2008, the residual powers of UNMIK (in particular police, justice and customs) were transferred to an EU Rule of Law mission (EULEX). Although EULEX was set up prior to the declaration of independence, it not only survived the creation of the new state – its executive role was even enshrined into the Kosovo constitution¹. Currently, around 1400 EU police, customs officials,

but of little practical impact⁶: These three municipalities account for less than 3% of the Kosovo population, and the writ of Pristina has never reached out to these municipalities, which still largely operate as de facto parts of Serbia⁷. The Kosovo government is building state institutions that are admittedly still weak, but steadily albeit slowly increasing their capacity⁸ – and this with major assistance from the EU⁹.

In both Bosnia and Kosovo, limited sovereignty stands in the way of EU integration.

judges and prosecutors with an executive mandate not only complement the work of their local colleagues, but have the power to overrule their local hosts. In addition, an International Civilian Office Exercises functions similar to those of the OHR in Bosnia.

b. Self-inflicted limitation of sovereignty

Although Bosnia's sovereignty is still technically limited through the installation of the OHR in 1995 as overseer with executive powers the OHR has gradually over the last few years taken a more hands-off approach, making the limitations to Bosnia's sovereignty at present rather symbolic. And even this might not last for long: the phasing-out of the OHR has been foreseen since 2008 and might eventually happen in the near future. But already now, if Bosnia wanted, it could largely function as a sovereign state. Bosnia's sovereignty is universally recognised and it has a seat at the UN. Its present limitations to the full exercise of sovereignty are largely self-inflicted. Whereas joint institutions exist, they are extremely weak and partly dysfunctional¹², given that ethnic Bosnians, Croats and Serbs are essentially concerned about retaining powers for their own entities. The almost complete lack of a common identity among the different communities of Bosnia and the resulting limitations for transferring further competences to the central authorities have made it difficult for the Bosnian entities to agree on the choice of legitimate representatives at the state level. In Bosnia, state sovereignty is largely lying fallow, as the constituent parts of the state cannot agree on how to make use of them.

c. Limitation of sovereignty imposed from above

After its unilateral declaration of independence in 2008, the Republic of Kosovo has been recognised by 90 UN members and by 22 out of the 27 EU Member states³. The five states that have not recognised Kosovo have not done so for reasons unrelated to Kosovo itself: Spain, Greece, Cyprus, Romania and Slovakia fear that the recognition of Kosovo could send the wrong signals to their own national minorities. Given the lack of unanimity among the EU Member States, the EU has never recognised Kosovo as a state; although, since 2005, Kosovo has the status of a potential⁴ candidate for EU accession⁵.

But this lack of international recognition does not stop Kosovo from internally assuming its state-like role. Within its borders, Kosovo's statehood is hardly contested. The refusal of the three Serbian-populated municipalities of Northern Kosovo to integrate into the state is of high political,

Limited sovereignty as an obstacle to accession

Whatever its nature, self-inflicted or imposed from above, in both Bosnia and Kosovo, limited sovereignty stands in the way of EU integration. This happens in three ways: a. through the lack of motivation and ownership such limited sovereignty entails (for both countries); b. through the impossibility to agree on a coordination structure/ a common interlocutor for the dialogue/negotiations with the EU (Bosnia); and c. through the impossibility to sign legal agreements as a result of the non-recognition (Kosovo)

a. Lack of sovereignty = lack of ownership

Where a potential candidate is not fully competent in dealing with all the aspects relevant to EU enlargement (such as the Rule of Law), it becomes very difficult to effectively measure the progress of the institutions towards meeting the accession criteria. The concept of international overseeing implies the power to overrule locally-taken decisions. Responsibilities that are normally dealt with by local institutions are given to an international body (OHR Bosnia; ICO/EULEX Kosovo). This undermines the principle of local 'ownership'. Within the EU enlargement methodology, the principle of 'ownership' (or the political will on the side of the candidate to engage in reforms, as opposed to reforms imposed from outside) is a central mantra for the EU when it comes to preparing the (potential) countries for accession. 'Ownership' is not compatible with decisions imposed from outside: why, for example, should the authorities from Republika Srpska refrain from making irresponsible and populist statements (like calling for a referendum on secession) if they can reasonably assume that these decisions will be vetoed by the international caretaker anyway? Why should the Kosovo justice institutions take risks by indicting a highly influential local politician for corruption, if this 'hot potato' can be handled by the EU Rule of Law mission?

b. Lack of coordinating powers and of a common interlocutor for the EU

In the Bosnian case, the failure of the constituent entities of state to agree on a common political vision is the biggest obstacle to making progress towards accession. Given the unwillingness to agree on the repartition of powers¹⁰ and on common interlocutors to talk with the European Commission, how could Bosnia become a credible partner to effectively negotiate its way through the 120 000 pages of *acquis*, let alone to meet the political criteria? Therefore, as long as the central government does not even have the power to effectively coordinate the action of the different entities and to ensure that they speak with one voice to Brussels, Bosnia's European perspective will remain distant¹¹.

c. Lack of legal personality due to non-recognition

Given the objection of five Member States to recognise Kosovo as a state – and thus as a subject of international law with a legal personality and treaty-making powers – the EU cannot conclude any legal agreements with Kosovo¹². It is therefore, among others, unable to sign a Stabilisation and Association Agreement (SAA) with the young state – a fundamental hurdle in Kosovo's way towards accession. Bosnia signed its SAA back in 2008, but is not politically able to fill it with substance; Kosovo, on the other hand, might arguably have sufficient substance¹³ but is not able to get the legal framework, due to external factors beyond its control.

The EU's approach: technical solutions to political problems

The EU is very much aware of these dilemmas and is trying to work around these political blockages by tackling them from a technical angle: in Bosnia, the EU accepts that the entities are free to legislate on areas that are relevant to EU integration at their level, as long as the resulting legislation is not in conflict with the *acquis*. This approach, which is in line with the BiH constitution – which regulates the internal distribution of powers – has the merit of keeping the dialogue on track at a technical level, even if progress is made at a snail's pace¹⁴.

The neo-functionalism approach of using a technical method in order to achieve political effects was also used in Serbia/Kosovo:

Is the EU barking up the wrong tree by focusing on the technical issues and ignoring the political realities?

the EU was able to use its normative power¹⁵ to coax Serbia into signing a number of technical agreements with Kosovo, given that for Serbia the conferral of the (rather symbolic^{16 17}) candidate status was of utmost political importance. These technical agreements concluded between Belgrade and Pristina since March 2011 have the potential to overcome some of the fallout from Kosovo's diplomatic isolation: both sides have agreed on modalities for policing their common borders (or administrative boundaries, as the Serbian side insists), on collecting customs fees and on the recognition of travel documents, number plates and diplomas. Finally, in February 2012, and under significant pressure from the EU, Serbia and Kosovo reached an agreement about the representation of Kosovo at regional organisations¹⁸, with the potential of overcoming Kosovo's isolation.

Whilst they have surely boosted Serbia's efforts towards EU integration, have these technical arrangements also opened the way towards Kosovo's eventual EU accession? It is true that, as an incentive for Kosovo to endorse the February 2012 agreement¹⁹, the five non-recognising Member States

agreed to allow the Commission to draft a feasibility study on the conclusion of an SAA²⁰. But even in the case that the Commission recommends entering into negotiations on such



'A Vision for the Future - Election campaign in Kosovo'
Credits: Saskia Drude

an agreement²¹, it is unlikely that the SAA with Kosovo will be signed, given the fundamental opposition of at least some of the five objecting Member States against recognition²². Similarly, in Bosnia, any eventual progress on the technical level risks being invalidated by the inability of the entities to find a common interlocutor for the accession negotiations at state level.

The end of an illusion?

Is the EU barking up the wrong tree by focusing on the technical issues and ignoring the political realities? So far, the EU is sticking to the position that over time the different ethnic groups in Kosovo and in Bosnia will overcome their mutual distrust and animosities and that they will work together on building a multiethnic society based on the principles of democracy and rule of law²³. There is a broad consensus within the EU that the international overseeing of both Bosnia and Kosovo should be limited, thus advocating the full sovereignty of Bosnia and – implicitly – of Kosovo²⁴. However, for the EU, the idea that the people of Bosnia and Kosovo might decide otherwise and conclude that keeping the common state in its present form is not a viable option, is – at least officially – not to be considered.



'Bosnia: The Inter-Entity Boundary Line/IEBL'.
Credits: Julian Nitzsche

But are there other options for Bosnia and Kosovo than following the path traced for them by the EU, once they become masters of their own destiny? Although there might be a degree of similarity in both cases, the potential alternative options are different for both countries; however, there are more potential choices for Kosovo than for Bosnia.

For Kosovo, Serbia's desire to enter the EU could create a windfall opportunity: Serbia knows that it has few chances to join the EU unless the fundamental question of Kosovo's status is resolved in a sustainable manner²⁵. This would amount to – given the absence of other feasible options – a full recognition of Kosovo by Belgrade.

However, such a scenario would most likely involve a land swap between Serbia and Kosovo. In spite of official denials, both sides have actually been considering this option and have warmed to the idea ever since²⁶. Pristina knows that it is unlikely to ever extend its writ over the northern part, which is increasingly being felt like a millstone around its neck²⁷. And for Serbia, gaining the almost exclusively Serbian northern part in exchange for the unruly, Albanian-populated Preshevo valley seems a decent price to pay for a realistic membership perspective. International reservations about a precedence this would set for other regions in the Balkans are not necessarily justified: as this would be a mutually agreed solution between two (then) sovereign states, it could not be compared with other Balkan regions such as FYROM or Bosnia.

The partition/land swap scenario is so far abhorred by the EU, as it would highlight the failure of its previous approach towards the Western Balkans. However, it is an option which – like it or not – will definitively be on the table. However, what might be feasible for Kosovo is not at all an option for Bosnia. For Pristina, the loss of the Serbian North would hardly make any difference in practice, given that its writ never extended to the North²⁸. Bosnia, on the other hand, is unlikely to survive without the Republika Srpska²⁹, especially as there would be nothing that Bosnia could get in exchange. From a Serbian point of view, such a breakaway might seem, at first glance, as an attractive alternative to a dysfunctional state: Republika Srpska, with its rather well functioning institutions, could have the technical capacities to engage as a partner into a dialogue with the EU. But this would ignore the consequences for the Bosnian-Croat federation, where competences are dispersed in an unsustainable way among a multitude of local entities that are not able to survive on their own. It is highly likely that Bosnians would react with armed force in an effort to prevent an RS breakaway³⁰, risking a new wave of violence and chaos in the region.

Conclusions

Brussels' approach of focusing on the technical dialogue while blending out the political dimension is unlikely to bring Kosovo and Bosnia closer to the EU. Above all, full external and internal sovereignty is a necessary precondition to seriously engaging in the accession process; but whether a fully sovereign Bosnia or Kosovo will follow the roadmap traced by the EU which leads through reconciliation and the building of a multi-ethnic society based on the rule of law, cannot be taken for granted. At least for Kosovo, there are alternative ways of solving one of the fundamental obstacles – the question of the Serbian minority in the north – through a land swap. This option is, on the other hand, not open to Bosnia. Furthermore, the land swap option does not mean that all obstacles in Kosovo's way towards accession will be removed: even in case of a historical agreement between Serbia and Kosovo involving the recognition of the Republic of Kosovo by Belgrade, not all of the five resisting EU Member States are likely to automatically recognise Kosovo. For Cyprus, the Kosovo question is linked to its separatist Turkish minority³¹. Endorsing Kosovo would be – regardless of the circumstances – considered as a first step towards international recognition of the Republic of Northern Cyprus^{32 33}. Thus comes the vicious circle: without resolving the Cyprus question, there will be no recognition of Kosovo by all 27 Member States. Without recognition by all EU Member States, there is no membership perspective

for Kosovo. Without a credible perspective for Kosovo, there is no credible membership perspective for Serbia. Without a perspective for Serbia, there is no credible perspective for the rest of the Western Balkans (except for Croatia and, eventually, Montenegro). Whereas the key to unlocking Bosnia's process of EU integration lies within the country itself, the key to Kosovo's integration process lies, in the long run, in Nicosia and in Ankara.

Notes

- ¹ This was done by the fathers of the Kosovo constitution as a transitional arrangement, hoping that it would increase Kosovo's credentials and accelerate its recognition by the EU and the international community.
- ² Bosnia was without a state-level government for almost 15 months following the October 2010 elections.
- ³ Complete list of countries recognising Kosovo can be found at www.kosovothankyou.com.
- ⁴ The EU uses the terms 'candidate countries' and 'potential candidates', but never uses the term 'potential candidate countries' as this might be considered an implicit recognition of Kosovo.
- ⁵ European Commission, A European Future for Kosovo, COM(2005) 156, 20 April 2005.
- ⁶ North Kosovo: Dual Sovereignty in Practice Crisis Group Europe Report No 211, 14 March 2011.
- ⁷ OSCE report: parallel structures in Kosovo 2006-2007. <http://www.osce.org/kosovo/24618>
- ⁸ European Commission 2011 Enlargement Strategy – Conclusions on Kosovo http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_conclusions_en.pdf
- ⁹ After the declaration of Independence in 2008, the European Commission alone has, under the Instrument for Pre-Accession (IPA), allocated close to €1 billion to Kosovo, mainly for institution building and infrastructure. http://ec.europa.eu/enlargement/pdf/key_documents/2009/miff/act_part1_en.pdf (p. 8).
- ¹⁰ This repartition of powers between the different levels of government is, to a degree, determined in the constitution of BiH, which is an annex to the Dayton agreement.
- ¹¹ For example, because of a lack of agreement on whether it is the state or the entities that should be in charge of veterinary and sanitary regulation, the accession of Croatia in 2013 is likely to further isolate Bosnia, as it will no longer be able to export eggs, meat and dairy produce to its neighbour. <http://www.economist.com/blogs/easternapproaches/2011/11/free-trade-and-old-grudges-balkans>.
- ¹² As the question of recognition of new states pertains to the EU's Common Foreign and Security Policy (CFSP), decisions have to be, as a matter of principle, taken in unanimity. (Article 24 TEU).
- ¹³ The 2009 Kosovo study by the European Commission is regarded as an unofficial feasibility study for the conclusion of an eventual SAA with Kosovo. Whereas this study shows a number of shortcomings, these shortcomings are not uncommon in other potential candidates which nevertheless have managed to secure such agreements with the EU. An 'official' feasibility study is currently under preparation http://ec.europa.eu/enlargement/pdf/key_documents/2009/kosovo_study_en.pdf
- ¹⁴ Interviews, DG Enlargement, March 2012.
- ¹⁵ Manners, I., The Normative Ethics of the European Union, *International Affairs* 84, No 1 (2008).
- ¹⁶ This status of a EU candidate does not alter in itself the nature of EU-Serbia relations: although a precondition for opening accession negotiations, candidate status will not imply that accession negotiations will be opened. Having been conferred candidate status in 2005, FYROM was not able to start accession

negotiations due to a veto by Greece over the name issue. Neither is there a direct link between candidate status and the amount of EU financial assistance. According to the European Commission's Multi-Annual Financial Framework, over the financial perspective 2007-2013, EU financial assistance per capita to Serbia (€185) is already three times higher than that given to Turkey (€63) – a candidate country since 1999. http://ec.europa.eu/enlargement/pdf/key_documents/2009/miff/act_part1_en.pdf (p. 8).

¹⁷ Ehrke, M., Serbien – Zwischen Kosovo und der EU, *Friedrich-Ebert-Stiftung Belgrade*, February 2012 p. 5.
<http://library.fes.de/pdf-files/id-moe/08918.pdf>

¹⁸ This agreement allows Kosovo to represent itself and to speak for itself, provided that it does not display symbols of statehood and adds a footnote to its name tag containing a reference to UNSCR 1244 and to the 2010 ruling of the International Court of Justice on the legality of Kosovo's unilateral declaration of independence.

¹⁹ This agreement is highly controversial in Pristina as it is widely seen in Kosovo as being in conflict with its own constitution, given the banning of state symbols and the reference to UNSCR 1244.

²⁰ 'The proposal for a feasibility study would not have been possible without the agreement with Serbia on regional cooperation achieved in the context of the Belgrade/Pristina dialogue'. Füle, S., 16 March 2012. <http://www.egovmonitor.com/node/48042>.

²¹ It is assumed that such a study would note a lack of technical preparedness of Kosovo to enter into SAA negotiations.

²² 'Cyprus will never recognise Kosovo'.
<http://www.srbija.gov.rs/vesti/vest.php?id=59832>

²³ The 'European Partnership' for Kosovo lists as a short-term key priority the need to '*create a climate for reconciliation, inter-ethnic tolerance and sustainable multi-ethnicity (...)*' Council Decision (2008/213/EC) of 18 February 2008. The European Partnership for Bosnia mentions the need to 'pursue efforts aimed at reconciliation between citizens of the countries in the region and enhance efforts to find definitive solutions to pending bilateral issues' as a short-term key priority. (Council Decision 2008/211/EC).

²⁴ Should EULEX be terminated, the gap will be filled by the Kosovo authorities, as Pristina has excluded a (more than symbolic) return of UNMIK. The UN is also not willing to take on such responsibilities again.

²⁵ Few Member States would like the Cyprus scenario to be repeated: the Island was accepted as a full member of the EU in 2004, in spite of having failed to resolve the ethnical division of the island before that date. Having lost its leverage over the Greek Cypriot government after accession, no further progress was since made. This unresolved conflict has stymied the EU's ability to act on a number of fields, such as EU-NATO strategic cooperation or the accession talks with Turkey.

²⁶ 'Pristina will not accept partition but gives some hints it might consider trading the heavily Serb North for the largely Albanian-populated parts of the Preševo Valley in southern Serbia'. International Crisis Group, Kosovo and Serbia after the ICJ Opinion, August 2010 (p. 3).

²⁷ *ibid.*, p. 11.

²⁸ North Kosovo: Dual Sovereignty in Practice Crisis Group Europe Report No 211, 14 March 2011.

²⁹ Whereas ethnic Serbs in the Northern municipalities account for 3% of Kosovo's population, ethnic Serbs in the Republika Srpska account for almost one-third of Bosnia's citizens.

³⁰ For Bosniaks and many Croats, allowing RS to secede would be a reward for the ethnic cleansing that accompanied Bosnia's birth. See ICG Report: What Does Republika Srpska Want?.

www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/214%20Bosnia%20---%20What%20Does%20Republika%20SRPSKA%20Want.pdf

³¹ 'We are on your side, not only because your case is similar to ours, but because it is a matter of principles', Demetris Christofias, President of Cyprus, during a state visit to Belgrade, 23 February 2009.
http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=02&dd=23&nav_id=57371

³² 'The one thing that Kosovo and Cyrus have in common, as far as the situation in these regions is concerned, is that in both cases, the basic principles of international law and legality, as well as UN decisions, are constantly being violated!' Christofias, D., President of Cyprus, 26 August 2008.
http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=03&dd=26&nav_id=4881

³³ 'Cyprus has unfortunate experience with such decisions.' President of the Cypriot Parliament, Karoyian, M., 8 April 2008.
<http://www.srbija.gov.rs/vesti/vest.php?id=44932>