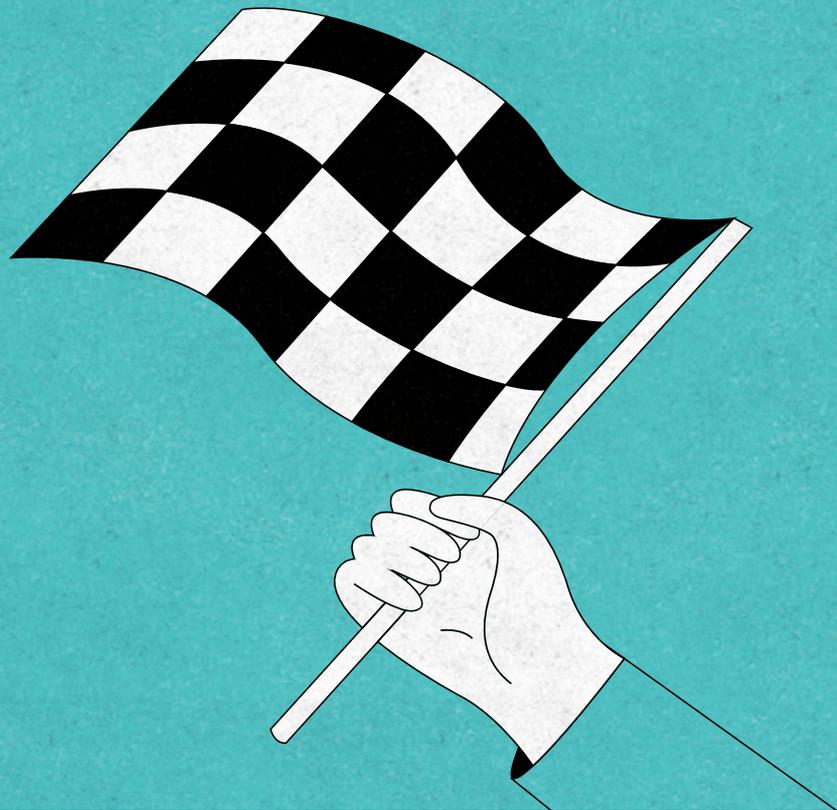


HOW TO RECOGNIZE REALITY? THE ISSUE OF SERBIA'S RECOGNITION OF KOSOVO

BODO WEBER AND AGRON BAJRAMI

Berlin – Prishtina
June 2018

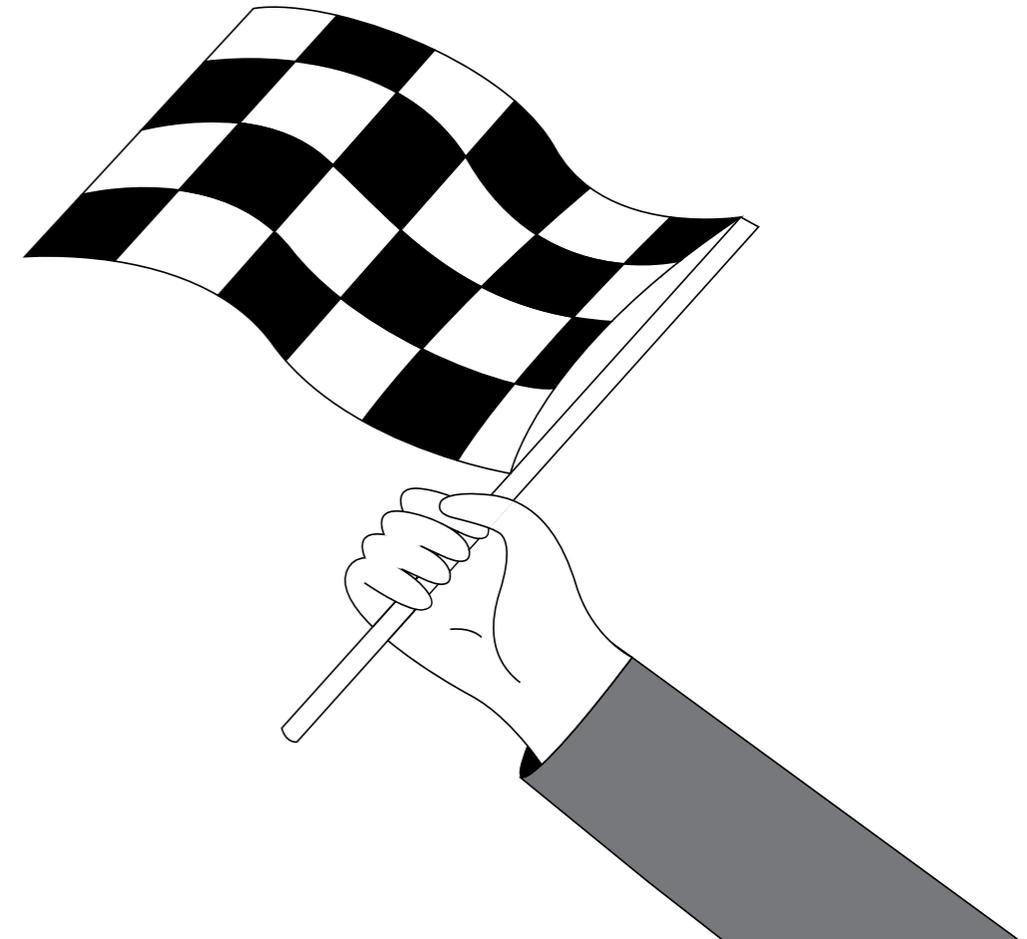


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A DPC-KFOS Policy Note Paper

Policy Note Paper Series “Strengthening the Kosovo Perspective”

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This Policy Note Paper Series is part of the dialogue and advocacy project “Strengthening the Kosovo Perspective – Negotiations on a Final Comprehensive Agreement between Kosovo and Serbia,” jointly organized by the Democratization Policy Council (DPC, Berlin), the Kosovo Foundation for Open Society (KFOS, Prishtina) and the Group for Legal and Political Studies (GLPS, Prishtina), and supported by KFOS.

PREFACE

This paper is the first of a series of policy notes that will be published over the course of this year, dealing with the so-called “new phase” in the EU-led political dialogue between Kosovo and Serbia. Specifically, the series will address the negotiations over a final, comprehensive, and legally binding agreement on full normalization of relations between the two countries. It will cover the most important aspects and elements of a potential future agreement from both a Kosovan and international perspective, as part of a wider dialogue and advocacy project entitled “Strengthening the Kosovo Perspective - Negotiations on a Final Comprehensive Agreement Between Kosovo and Serbia” organized by the Democratization Policy Council (DPC, Berlin), the Kosovo Foundation for Open Society (KFOS) and the Group for Legal and Political Studies (GLPS; both based in Prishtina).

Through a variety of activities, the project strives to facilitate a dialogue process among Kosovo policymakers, civil society actors, and Western officials on Kosovo’s position in the upcoming negotiations. Rather than offering ready-made recommendations on Kosovo’s negotiating position, the policy notes intend to serve as a catalyst for intense and fruitful debate and dialogue. Using this approach, the authors, as well as the organizers of the overall project, aim to help overcome structural constraints relating to the forthcoming negotiations on a comprehensive final agreement. Their ultimate objective is to contribute to a sustainable solution to the Kosovo-Serbia dispute that will end the status of both countries as unfinished states and create important preconditions for a lasting peace in the region and for the sustainable democratic transformation of both Kosovo and Serbia.

EXECUTIVE SUMMARY

In February 2018 outgoing German Foreign Minister, Sigmar Gabriel, infuriated Serbian government officials when he stated that “acceptance of Kosovo’s independence [is] a central condition” for EU accession. Gabriel had broached perhaps the most contentious issue in Western efforts to solve the status dispute between the two countries: Serbia’s recognition of Kosovo as an independent state and full, normalized relations.

The issue has appeared in international negotiations in various, more or less explicit forms ever since the West’s recognition that Kosovo independence was the only remaining solution to the long-term status dispute. The EU-led political dialogue, which linked Belgrade’s acceptance of the loss of Kosovo to its EU membership aspirations, originally left the question of recognition unaddressed, deferring the issue to a later stage in the process. The unclear legal nature of the 2013 April Agreement enabled Serbia to *de facto* recognize the reality of an independent Kosovo without having to do so in legal terms. The issue was emphasized in the political arena after the July 2017 announcement of a new phase in the dialogue and upcoming negotiations on a final, comprehensive and legally binding agreement on full normalization.

The current debate on recognition, particularly in Serbia, has fallen victim to the escalating discourse and political spin that dominates the political atmosphere in the long, ongoing interim period before the real start of negotiations. Any

serious discussion undertaken by the EU - supported by the US - requires a preparatory reset. This should include the reaffirmation of the original framework and aims of the political dialogue: full territorial integrity and sovereignty for both Kosovo and Serbia in their governed borders; full exercise of international subjectivity by Kosovo; full normalization of bilateral relations; and institutional functionality for the state of Kosovo. The discourse in Serbia (and in both Kosovo and Brussels) must be relocated back within that framework. Once this is achieved, discussion on the issue of recognition will most likely focus on the two options that have historically dominated the debate: full, formal recognition of Kosovo by Serbia; or a reduced legal form modelled on the 1972 Basic Treaty between East and West Germany.

Full formal recognition, including the exchange of ambassadors, would be the most clear-cut solution. It would communicate within Serbia the clear message that Kosovo is gone. Equally, for Kosovo Serbs it would emphasize that their state is the Republic of Kosovo. Further, it would urge the non-recognizer states within the EU and UN Security Council to abandon their resistance to recognizing Kosovo. However, such a U-turn has the highest risk of failure in a subsequent constitutional referendum in Serbia to remove Kosovo as an integral part of its state.

Such a risk could be averted by adoption of a reduced form of recognition along the two Germanies treaty, substantially adapted to apply to

the local context. Such a limited form of recognition would involve different risks, including the deliberate misinterpretation in Serbia and among Kosovo Serbs that Kosovo's independence is not definitive, and the reinforcement of the non-recognizers' current policy position. For those reasons, this option would only be viable, from the perspective of Kosovo and the key Western actors if it resulted in the same outcome of agreement as in the case of full formal recognition. The only difference would be that Serbia and Kosovo exchange "permanent representatives" rather than ambassadors. In this case, the West's narrative would be framed in terms of a major concession to Serbia, which would shift responsibility for full implementation to Belgrade. Firm guarantees would therefore be required from Serbia.



The current debate on recognition, particularly in Serbia, has fallen victim to the escalating discourse and political spin that dominates the political atmosphere in the long, ongoing interim period before the real start of negotiations.

01 INTRODUCTION

On February 15, 2018, outgoing German Foreign Minister Sigmar Gabriel visited Prishtina. At a press conference with Kosovo Prime Minister Ramush Haradinaj, Gabriel infuriated Serbian government officials when he stated:

“If Serbia wants to move toward the EU, the building of the rule of law is a primary condition. But naturally, so is the acceptance of Kosovo's independence. That is a central condition to take the path toward.”¹

This was the most uncompromising statement regarding the issue since the initiation of the EU-led political dialogue on the question of Serbia's recognition of Kosovo by any EU (and Western)

official, hence the reason for Belgrade's anger. In 2008, most Western countries considered Kosovo's declaration of independence as the only remaining viable solution to the long-term status dispute between the two Western Balkan countries. In 2011, German Chancellor Merkel opened a space for political dialogue when she explicitly linked Serbia's EU membership aspirations with Belgrade's recognition of an independent Kosovo as an incontrovertible fact.² Yet the political dialogue, which officially began in 2012, did not define the *legal form* in which Serbia should recognize Kosovo as an independent state. The issue was finally placed on the agenda with the July 2017 announcements of a “new phase” in the dialogue and upcoming negotiations on a final,

1 “Sigmar Gabriel tells Serbia it must accept Kosovo's independence to join EU,” *Deutsche Welle*, February 15, 2018, available at: <http://www.dw.com/en/sigmar-gabriel-tells-serbia-it-must-accept-kosovos-independence-to-join-eu/a-42593839>.

2 Bodo Weber, Agron Bajrami, *The Original Framework of the Political Dialogue*, DPC-KFOS policy note, Berlin-Prishtina, May 2018, p.2. Available at: <http://www.democratizationpolicy.org/summary/the-original-framework-of-the-political-dialogue/>.



If Serbia wants to move toward the EU, the building of the rule of law is a primary condition. **But naturally, so is the acceptance of Kosovo's independence. That is a central condition to take the path toward."**

SIGMAR GABRIEL

comprehensive agreement on full normalization of relations between Serbia and Kosovo. This agreement will be the first within the dialogue which is legally binding, thus negotiations on the question of recognition are inevitable.

Unlike Serbian officials' interpretation of Minister Gabriel's statement,³ his announcement left the concrete legal form of Serbia's recognition of the Republic of Kosovo open. Since the beginning of Western mediated negotiations on the status dispute, two options have emerged as potential solutions:

1. A formal recognition of the Republic of Kosovo by Serbia.

2. A reduced form of recognition, modeled along the 1972 Basic Treaty between Western and Eastern Germany (known as the German-German, and later the two Germanies agreement).

This paper analyzes potential solutions for the issue of Serbia's recognition of Kosovo. This is considered as one of the most politically sensitive issues in the upcoming negotiations over a final comprehensive agreement. The first section examines the role the question of recognition played in earlier Western attempts to solve the status dispute, as well as in the framework of the political dialogue so far. The second section analyzes and compares the two potential solutions - full formal recognition or the model of the German-German agreement - using cost-benefit analysis. The political implications of both options are considered in relation to the overall aim of the political dialogue as originally defined by the West (territorial integrity and sovereignty of Kosovo and full exercise of international subjectivity; and full normalization of bilateral relations between Serbia and Kosovo). The final section offers observations for the upcoming negotiations on an agreement between Kosovo and Serbia.

³ "Serbian FM tells German counterpart to 'accept reality'," *B92*, February 16, 2018, available at: https://www.b92.net/eng/news/politics.php?yyyy=2018&mm=02&dd=16&nav_id=103503.

THE QUESTION OF RECOGNITION IN INTERNATIONAL STATUS DISPUTE NEGOTIATIONS TO DATE

The question of the recognition of Kosovo as an independent state by Serbia appeared in different forms during the negotiations led by UN mediator Martti Ahtisaari and subsequently by the 'Troika.' The negotiations denoted the failure of the Western conflict mediation approach to settle the status dispute.

UN Special Envoy Martti Ahtisaari's plan for the status dispute, the Comprehensive Proposal for

the Kosovo Status Settlement (CSP),⁴ proposed a supervised independence for Kosovo and was therefore rejected by Serbia after being presented to the parties in February 2007. The proposal excluded the question of Serbia's recognition of Kosovo entirely. Despite this, by the end of the Vienna consultations Kosovo negotiators made the assumption that the proposed supervised independence also implied full and formal recognition by Serbia at some point.⁵

⁴ https://web.archive.org/web/20091009130102/http://www.unosek.org/docref/Comprehensive_proposal-english.pdf.

⁵ Interview with former member of Kosovo's negotiating team, Prishtina, May 2018.

The subsequent Troika⁶ process, which lasted for four months (August-December 2007), was intended to “leave no stone unturned in the search for a mutually acceptable outcome.”⁷ During the talks, the Ischinger-Wisner-Kharchenko team “urged the parties to consider a broad range of options for Kosovo’s status...(and) explore together with both sides every reasonable status outcome for Kosovo to determine where there might be potential for a mutually acceptable outcome,”⁸ by “taking an active role in identifying areas of possible compromise.”⁹

According to a former member of the Kosovo team, the German diplomat Wolfgang Ischinger proposed the “German-German” model during the Troika talks, but the suggestion was disregarded by the Kosovo team who felt that, after the Vienna talks, further concessions towards Serbia were not possible.¹⁰ Serbia also refused Ischinger’s proposal, claiming it was “just another name for independence.”¹¹ As anticipated, the Troika negotiations concluded without success, and on February 17, 2008 the Kosovo parliament declared independence, necessitating the unilateral implementation of the Ahtisaari proposal’s governance elements.¹² Nevertheless, the “German-German” model continued to be considered by some Western diplomats as a potential solution to the unresolved Kosovo-Serbia status dispute.

The EU-led political dialogue between Serbia and Kosovo, initiated following German Chancellor Angela Merkel’s assumption of EU leadership on the process in summer 2011, paved the way for a comprehensive settlement of the long-term status dispute. The purpose of the dialogue – Serbia’s acceptance of an independent Kosovo – and its ultimate aims – full territorial integrity and sovereignty of Kosovo and the full exercise of international subjectivity for both states as members of the EU and the UN – were made relatively explicit by Merkel and other EU and US officials.¹³ The issue of recognition, however, remained undefined.

As described by a German government official, the aim of the dialogue was much more than recognition – a comprehensive and sustainable solution to the status dispute, with the end goal of both Serbia and Kosovo’s full membership in the EU as independent states, including the realization of all preconditions necessary (i.e. full normalization of bilateral relations). Merkel’s interventions were based on an understanding that the dialogue approach would be both incremental and long-term, and her August 2011 conditions for Belgrade defined only the initial steps of that path. Despite this input, there existed no plan that mapped out all the subsequent steps. As a result, the Chancellor’s office did not deal with the question of recognition during the initial years of the dialogue.¹⁴ Similarly, in its

seven-point plan on Serbia’s EU integration, the so-called Schockenhoff group,¹⁵ made up of MPs from Merkel’s conservative ruling party, did not address the issue of recognition. Members of the Schockenhoff group discussed both options – full formal recognition and the two Germanies model – but did not settle on a final position.¹⁶

However, as the start of the political dialogue reignited discussion about the need for a final settlement, the issue of the German-German model reappeared in public discourse too. As former EU envoy to Balkans, Stephan Lehne, stated at the time:

“The German-German model is frequently misunderstood. Essentially it would mean normalization without recognition. Both parties would set aside their legal disagreements regarding the status and would agree on a cooperation framework that would allow them to solve the problems and to work together on many issues of mutual interest.”¹⁷

The idea was quickly dismissed by the Kosovo government, with then Foreign Minister Enver Hoxhaj stating that the ideas were “unacceptable.”¹⁸ Another important actor in favor of the “German-German” model was Ahtisaari’s deputy mediator, Austrian diplomat Albert Rohan. He stated:

“[The German-German model] would have positive effects. If (the) German-German model is applied, this would stop the obstacles for Kosovo membership in international organizations, especially (the) UN. Tradition-



According to a former member of the Kosovo team, the German diplomat Wolfgang Ischinger proposed the “German-German” model during the Troika talks, but the suggestion was disregarded by the Kosovo team who felt that, after the Vienna talks, further concessions towards Serbia were not possible.

ally, membership of a country in (the) UN is interpreted as implicit recognition from other members. So, this would be an elegant way out for (the) five EU members that don’t recognize Kosovo.”¹⁹

6 Troika members were Wolfgang Ischinger (EU) Frank Wisner (US) and Alexandar Botsan-Kharchenko (Russia)

7 Report of the EU/US/Russia Troika on Kosovo, December 4, 2007, p. 1. Available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20723.pdf>.

8 Troika press communiqué: the Baden Conference, November 28, 2007. Available at: <https://2001-2009.state.gov/p/eur/rls/or/95787.htm>.

9 Report of the EU/US/Russia Troika on Kosovo, December 4, 2007, p. 2.

10 Private conversation with a former member of the Kosovo negotiating team during the Troika process, Prishtina, May 2018.

11 Then Serbia PM Vojislav Koštunica reaction, as reported in Belgrade weekly *Vreme*, December 2007. See English translation at: <https://www.worldpoliticsreview.com/articles/1422/independence-or-substantial-autonomy-the-serbian-proposals-for-kosovos-final-status>.

12 Kosovo Declaration of Independence, February 17, 2008. Available at: https://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf.

13 Bodo Weber, Agron Bajrami, *The Original Framework of the Political Dialogue*, DPC-KFOS policy note, Berlin-Prishtina, May 2018, pp.2-4. Available at: <http://www.democratizationpolicy.org/summary/the-original-framework-of-the-political-dialogue/>.

14 Interview with German government official dealing with the Serbia-Kosovo dialogue during 2011-13, Berlin, June 2018.

15 For details, see: *The Original Framework of the Political Dialogue*, DPC-KFOS policy note, p.3.

16 Interview with former Schockenhoff group member, Berlin, May 2018.

17 “Lehne: With dialogue, substantial autonomy for the north,” Interview for *Koha Ditore*, October 21, 2012, pp. 1 and 3.

18 “Hoxhaj: Regarding the North, we shall talk only with citizen there,” *Koha Ditore*, October 23, 2012, p. 4.

19 “Rohan: Ahtisaari plan already offers substantial autonomy,” interview for *Koha Ditore*, October 24, 2012, pap. 1 and 3.

Despite their earlier resolution to hold out for unequivocal recognition, hints of indecisiveness became apparent among the Kosovar leadership. FM Hoxhaj suddenly expressed interest about the benefits of the German-German model, stating:

“The advantage for Kosovo, according to this model, is not only in regulating a normal relationship, but also what the model offered to (the) two Germanies. Both became members of (the) UN. Such a model is therefore interesting to consider. The proposal to establish liaison offices [between Kosovo and Serbia] is an important element of this model. Also the notion of good neighborly relations is part of this concept.”²⁰

Most Kosovo politicians, however, continued to oppose the proposal because of the historical context of the Basic Treaty that regulated relations between West and East Germany, ultimately concluding in the post-1989 (re-)unification. As the former Speaker of Kosovo Parliament Jakup Krasniqi contended in 2011:

“that model was about a German-German nation, while the circumstances, conditions and whole situation in the relations between Prishtina and Belgrade is different.”²¹

The 2013 April Agreement, too, did not directly touch upon the question of recognition, enabling the Serbian government to maintain its position of refusing to consider recognition of Kosovo's independence.²² Nevertheless, Serbian government officials' signing of the agreement amounted to a



[The German-German model] would have positive effects. If (the) German-German model is applied, this would stop the obstacles for Kosovo membership in international organizations, especially (the) UN.

ALBERT ROHAN.

de facto recognition of Kosovo's status as an independent state. Some Serbian legal experts at the time even suggested that it amounted to an implicit *de jure* recognition.²³ An explicit *de jure* recognition was not achieved because Serbia took advantage of the undefined legal nature of the agreement, as provided by the EU's External Action Services (EEAS). Judges of the Constitutional Court of Serbia, in an overtly political vote, rejected an opposition request to verify the (un) constitutionality of the April Agreement.²⁴

20 “Hoxhaj: German-German model, interesting for UN,” interview for *Koha Ditore*, November 5, 2012, pp. 1-2.

21 Jakup Krasniqi statement for the press, June 28, 2011. As reported by *Koha Ditore*, front page, June 29, 2011.

22 Bodo Weber, *A Date for Belgrade? Conditionality, German leadership and Serbia's path to the EU*, DPC policy paper, Berlin, June 2013, p.6. Available at: <http://www.democratizationpolicy.org/pdf/serbiapolicy.pdf>.

23 Vesna Rakić-Vodinić, “Kome/čemu je doista odzvonilo?,” *Peščanik*, May 24, 2013. Available at: <http://pescanik.net/2013/05/komecemu-je-doista-odzvonilo/>.

24 Interview with constitutional judge, Belgrade, 2017.

FULL FORMAL RECOGNITION OR IN A REDUCED FORM?

In 2013 Serbia *de facto* accepted the reality of an independent Kosovo, but was not yet required to do so in legal terms. The issue of the legal recognition of Kosovo has only recently re-emerged in the run up to the negotiations on a final, comprehensive agreement, which would be legally binding. The debate about alternative options – full recognition or some reduced form, modeled along the two Germanies agreement – misses an important point: any comprehensive agreement signed by Serbian state officials would have the same constitutional legal effect, even without any reference to the question of recognition. By signing a legally binding agreement with the representatives of the Republic of Kosovo, Serbia would be required to change its constitution, by removing or reformulating the passage in the Preamble that defines Kosovo as an integral part of Serbia, and by removing the part of article 182

which names Kosovo as one of the autonomous provinces of Serbia. Such constitutional amendments would have to be approved first by the Serbian parliament, and then by a majority of citizens in a subsequent referendum.²⁵

The current political atmosphere in Serbia regarding the upcoming Brussels negotiations is characterized by nationalist rhetoric, confusion, and tension. This atmosphere have been enabled by the long interim period since the announcement of the new phase in the dialogue. Political rhetoric is dominated by the ruling elites' masking of the real framework of the political dialogue and their advocacy for partition or land-swap “solutions,” both of which fall outside the red lines set by leading Western capitals. Against such a background, any discussion about the issue of recognition and its constitutional implications for Serbia is

25 Interview with Serbian constitutional law experts, Belgrade, 2017.

currently meaningless, as it ignores the political reality of the negotiations. With the debate in and between Serbia and Kosovo escalating in this strategic vacuum, the West will first have to bring the process back under control in order to prepare the stage for the upcoming negotiations. A preparatory reset will be necessary, starting with defining the negotiating framework and its objectives as was more or less explicitly defined at the beginning of the political dialogue.²⁶ This includes setting the tone for the negotiations in Serbia (and Kosovo) by reestablishing the post-April 2013 narrative: Serbia must accept the reality that its sovereignty over Kosovo is irrevocably gone. This reminder is required to steer the focus away from Serbia's long-term denial and the heavy burden this implies for its future, towards a governmental focus on ensuring regulations that will enable normal lives for Kosovo Serbs north and south of the Ibar.

Only when this state is achieved will there be a basis for a genuine discussion on the issue of recognition, both within Kosovo and Serbia and on EU-US side, and for negotiations on the rationale and implications of the potential options. The following section suggests initial considerations for future discussion on these issues.

A Full formal recognition

A comprehensive agreement including a commitment by Serbia and Kosovo to formal reciprocal recognition, realized through the exchange of ambassadors, would be the most clear-cut solution. It would serve as the basis for the establishment of fully normalized relations as bilateral relations. It would be the clearest indication within Serbia, for its citizens and elites alike, that Kosovo had moved beyond the point of no return in terms of sovereignty and independence. Further, it would clearly communicate to Kosovo Serbs that the Republic of Kosovo is their home country, regardless of any close ties with Serbia they and their political representatives might uphold in the future. It is likely this would ease the tensions between Albanian and Serb politics within Kosovo. For Kosovo Albanians, political elites and citizens alike, it would be a clear signal that the EU-led negotiations over a final comprehensive agreement are genuine, and ease tensions in the negotiations on the issues where there is a need for compromise.

Serbia's formal recognition of Kosovo would also convey a clear message to the five EU member states and two members of the UN Security Council who refuse to formally recognize Kosovo. In addition, it would unmask any continued refusal to recognize Kosovo by these states as being unrelated to the defense of Serbia's interests or any principles of international law - as the non-recognizers profess.²⁷

²⁶ See: Bodo Weber, Agron Bajrami, *The Original Framework of the Political Dialogue*, DPC-KFOS policy note, Berlin-Prishtina, May 2018. Available at: <http://www.democratizationpolicy.org/summary/the-original-framework-of-the-political-dialogue/>.

²⁷ For a detailed analysis of the issue of EU and UN membership for Kosovo (and Serbia) in the context of negotiations on a comprehensive, final agreement, see the authors' upcoming policy note *Kosovo's Path Toward EU and UN Membership*, to be published July 2018.

However, formal recognition would also represent the highest hurdle for the implementation of an agreement due to Serbia's need to change the constitution. Any constitutional amendment to remove Kosovo from the Constitution of the Republic of Serbia would first have to be approved by a two-thirds majority in parliament, then a majority in a referendum with a turnout of above 50 percent of registered voters.²⁸ The difficulty of achieving this benchmark was exemplified in the 2006 referendum that approved the current Serbian constitution. Drafted in haste and supported by the entire political elite, from the far right to the far left, the anti-Kosovo-independence constitution was put to a popular vote. Despite a powerful campaign with no opposition, and that included *inter alia* vocal contributions from the Serbian Orthodox Church,²⁹ the referendum required substantial levels of fraud to achieve the 50 percent electoral benchmark.³⁰

Looking ahead to the upcoming negotiations, even if Serbian officials recommit to the original dialogue framework and return to the reality-based position and narrative on Kosovo of 2013, the formal recognition of Kosovo still represents a challenging U-turn. Given President Vučić's strong position, a constitutional amendment might be passed in the Serbian parliament relatively smoothly, and might also achieve the approval of a majority of Serbian voters. However, passing the requisite 50 percent electoral threshold will prove an uncertain endeavor.

B The 1972 German-German Basic Treaty

Background, context, content and implications of 1972 Treaty

On December 21, 1972 the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) signed the 'Basic Treaty',³¹ the first agreement since the end of WWII that regulated relations between the two German states. For almost two decades Western Germany had not recognized its eastern neighbor as an independent state. However, following the relaxation of relations between the West and the Eastern bloc, and due to the practical implications of Western Germany maintaining its stance towards recognition of its Eastern neighbor, there was a heightened awareness of the need for change. The 1972 treaty therefore aimed to balance the need for normalized bilateral relations with an affirmation of both states' international subjectivity, but without the Federal Republic fully recognizing the GDR as a sovereign, independent state. The tough compromise for FRG was in recognizing the GDR as a *de facto* state through the treaty. Following the signing of the agreement the Constitutional Court went further than the government in its review of the Basic Treaty, confirming the status of the GDR as a subject of international law.³² Despite this recognition, the FRG maintained its historical aim of the reunification of Germany as enshrined in the Preamble to the 1949 constitution.³³

²⁸ Ustav Republike Srbije, Article 203. Available at: <http://www.ustavni.sud.rs/page/view/139-100028/ustav-republike-srbije>.

²⁹ In addition, the voting lasted an unusual two days.

³⁰ *Ustav na prekretnici*, Komitet pravnika za ljudska prava - YUCOM, Belgrade, 2011, pp.8-9. Available at: [http://www.yucom.org.rs/upload/vestgalerija_103_9/1363188009_GSO_ustav%20na%20prekretnici_%20\(1\).pdf](http://www.yucom.org.rs/upload/vestgalerija_103_9/1363188009_GSO_ustav%20na%20prekretnici_%20(1).pdf).

³¹ Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic and Supplementary Documents, Signed at Berlin, December 21, 1972

³² Interview with German expert on international law, 2018.

³³ Grundgesetz für die Bundesrepublik Deutschland, Präambel, 23. Mai 1949. Available at: <http://www.documentarchiv.de/brd/1949/grundgesetz.html>.

The *de facto* recognition of two independent states was confirmed by Article 2 of the treaty:

“The Federal Republic of Germany and the German Democratic Republic will be guided by the purposes and principles embodied in the United Nations Charter, in particular the sovereign equality of all States, respect for independence, autonomy and territorial integrity, the right of self-determination, the preservation of human rights, and non-discrimination.”³⁴

This was reinforced by the provisions of Article 6 that noted that the two states would:

“proceed on the principle that the jurisdiction of each of the two States is confined to its own territory. They shall each respect the other’s independence and autonomy in its internal and external affairs.”³⁵

Article 4 further specified:

“that neither of the two States can represent the other internationally or act in its name.”³⁶

The only limitation to formal, legal recognition between the states was included in Article 8, which described that, instead of an exchange of ambassadors between the two Germanies,

“The Federal Republic of Germany and the German Democratic Republic will exchange permanent representations.”³⁷

A letter from the FRG government to its eastern counterpart at the time underlined that the agreement did not address or affect the constitutional aim of reunification.

The treaty pathed the way for the development of normal bilateral relations between the two German states and simultaneously facilitated the admission of both states to the UN.

A meaningful way to apply the Treaty model

No treaty could simply be imported from elsewhere to the context of the Kosovo-Serbia status dispute, not least because in 2011-13 the EU and the US had already defined the framework and ultimate outcome of the political dialogue.³⁸ This, among many other factors, means the Basic Treaty model would have to be significantly adapted to the context.

The insistence on reunification inherent in the German historical context is inappropriate and cannot not be transferred to the Serbia-Kosovo issue. But, because the provisions of the Serbian constitution that relate to Kosovo differed significantly from the relevant passage in the FRG constitution - insofar as they portray Kosovo as still being part of Serbia - the unavoidable legal changes made to the Serbian constitution would necessarily eschew any reference to reunification in the constitution. The German treaty articles cited above could be largely copy-pasted, includ-

ing the article on the exchange of permanent representatives. Clauses explicitly obligating Serbia to actively support Kosovo’s bid for EU and UN membership and for Kosovo to offer reciprocal support for Serbia’s EU membership would be required in addition. Ultimately, this approach would mean demanding from Serbia the same as in the case of full formal recognition. The only difference being that both countries’ embassies in the other state would not be called embassies but ‘permanent representations.’

To be effective, such an EU-US strategy would require a nuanced approach, underpinned by a narrative urging Serbian elites’ and citizens’ acceptance that Kosovo is gone but that, as a Western concession, offers a reduced recognition of Kosovo’s independence, thus acknowledging Serbia’s historical grievances related to Kosovo.

Potential advantages from an international and Kosovo point of view

The potential advantages, from both an international and Kosovan perspective, are clear. In theory, Belgrade would accept and commit to almost the same terms as in the case of a final comprehensive agreement that included full formal recognition. But at the same time, such an agreement would relieve the pressure for Serbian officials, the signatories of the agreement, to achieve buy-in from their citizens. This would improve the chances of a Serbian constitutional amendment to remove Kosovo as an integral part of the state of Serbia from its constitution being approved in a future referendum.



In theory, Belgrade would accept and commit to almost the same terms as in the case of a final comprehensive agreement that included full formal recognition. But at the same time, such an agreement would relieve the pressure for Serbian officials, the signatories of the agreement, to achieve buy-in from their citizens.

Potential risks and the need for guarantees

An agreement modeled along the German-German treaty would also carry substantial risks from an international and Kosovan perspective. Such a concession could be perceived by the Serbian political elites as an invitation to definitively disregard Kosovo’s independence. It could simultaneously raise equivalent hopes among Kosovo Serbs. It would therefore be essential that the EU and the US (as well as Kosovo) insist, in the form of a (legal) condition, that Belgrade’s official narrative on the nature of the comprehensive agreement and of the concession regarding recognition mirrors that of Western capitals and Prishtina.

³⁴ Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic and Supplementary Documents.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid. “Permanent representations” equaled embassies all but in their title.

³⁸ Those are: Full territorial integrity and sovereignty of Kosovo (and Serbia), full exercise of international subjectivity by Kosovo, full normalization of bilateral relations, as well as institutional functionality of the state of Kosovo.

Belgrade's partial recognition of Kosovo as an independent state could also strengthen the case for non-recognition amongst the non-recognizers in the EU and the UNSC. Additionally, it may facilitate Serbia's strategy to covertly undermine Prishtina's membership bid in the EU and UN.

The case of recognition, or non-recognition of Kosovo, remains primarily a political, rather than a legal question. Because of this, there are no guarantees that all non-recognizers, in particular Russia, would follow Serbia's lead and alter its position on Kosovo, regardless of what form of recognition Serbia is offered. In this context, it would be essential for the EU and US, and particularly for Prishtina, that a concession on recognition is linked with strict guarantees by Belgrade that it would push for recognition of Kosovo by the non-recognizers in equal terms as it would in the case of full formal recognition.

In the case of an agreement without full, formal recognition, in order to guarantee equal outcomes as in the case of a final, comprehensive agreement, substantial additional guarantees from Serbia are required. Additional conditions would require to be added to the future comprehensive agreement implementation plan, with detailed benchmarks and timelines. A concession to Belgrade would mean the shifting of responsibilities to the Serbian side.



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CONCLUSIONS

The question of Serbia's recognition of Kosovo has been the most contentious issue in all of the international attempts to resolve the Serbia-Kosovo status dispute to date. At times the issue has been explicitly addressed, but more often is only considered implicitly. In the framework of the EU-led political dialogue with its incremental approach, the contentious issue of recognition has never been confronted, but rather deferred for a later stage in the process. The issue only re-emerged after the July 2017 announcement of a new phase in the dialogue, and of upcoming negotiations on a final, comprehensive agreement on full normalization of relations between Serbia and Kosovo.

The discussion on Serbia's recognition of Kosovo has focused on two alternative options that were raised many years ago - full, formal recognition, or a reduced form of recognition, modelled along the 1972 Basic Treaty between East and West Ger-

many. To date, the discussion has been largely superficial and an important aspect has been missed entirely, that is, the fact that any legally binding agreement, signed by Serbia with the representatives of the Republic of Kosovo, entails the same legal consequences as full, formal recognition. This would result in an amendment to Serbia's constitution to remove the provisions that define Kosovo as an integral part of the Serbian state.

There is no possibility of any meaningful debate within Serbia and Kosovo, and between the two in Brussels, until the EU, with the support of the US, sets the stage for the upcoming negotiations. This process should include the reaffirmation of the dialogue's original framework and underscoring its ultimate aims - territorial integrity, sovereignty and full exercise of international subjectivity for Kosovo, and the development of normal bilateral relations between Kosovo and Serbia. In addition, the EU's approach must be designed to de-esca-

late the tensions in the discourse (in both Serbia and Kosovo) on the new phase back towards the narrative established in the original framework.

The discussion on recognition, i.e. on the two potential options, will not be straightforward, as there are a number of advantages and risks that must be considered. A full formal recognition would be the most clear-cut solution but potentially the most risky, because it depends on the success of a referendum in Serbia to remove Kosovo from its constitution. A reduced form of recognition that uses the Basic Treaty as a blueprint, adjusted to the specific context of the Kosovo-Serbia dispute and that maintains the aims of the political dialogue, will require substantial further work on a final agreement. It would demand that Belgrade provide additional guarantees, which would place a substantial political burden on Serbia. Such an approach, however, is perhaps the most likely to pass the test of a referendum on constitutional changes.

At this point in time there is no way of knowing which of the two options is more likely to succeed. In the case of accepting a reduced form of Serbia's recognition of Kosovo, the West will be required to present the comprehensive agreement to Serbia as a major concession. This shifts the responsibility for implementation to Belgrade. If Kosovo agrees to this concession, it would have to rely on the West for firm guarantees of results. Whichever option is ultimately selected, the ball should be firmly in Serbia's court.



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