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Washington Agreement is (not) an Internationally Binding Bilateral Treaty

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ABSTRACT

In September 2020, the former U.S. administration under President Donald Trump organized a signing ceremony in the White House between Kosovo and Serbia. The parties signed respective documents, committing themselves to economic normalization. Colloquially referred to as the "Washington Agreement," the signed documents were presented as a breakthrough in reconciliation between former wartime foes. However, the true nature of the Washington Agreement (W.A.) remains disputed to this day. This study examines the accurate nature of this agreement, including its legal weight and contractual ramifications. This will be achieved by analyzing the W.A.'s core, legal nature, the status of the U.S. concerning the Agreement, and the lack of credibility-enhancing devices in the W.A. a detailed assessment will be made using qualitative research methods that are expected to lead to the conclusion that the W.A. is not a bilateral agreement that is legally binding for the signatories. Rather, it is more a letter of intent and manifestation of goodwill by Kosovo and Serbia, respectively.

KEYWORDS: U.S., Kosovo, Serbia, Washington Agreement

POVZETEK

Septembra 2020 je nekdanja ameriška administracija pod predsednikom Donaldom Trumpom organizirala slavnostni podpis v Beli hiši med Kosovom in Srbijo. Strani sta podpisali ustrezne dokumente, s katerimi sta se zavezali k gospodarski normalizaciji. Podpisani dokumenti, pogovorno imenovani „Washingtonski sporazum", so bili predstavljeni kot preboj v spravi med nekdanjimi vojnimi sovražniki. Vendar je resnična narava Washingtonskega sporazuma (W.A.) še danes sporna. Ta študija preučuje natančno naravo tega sporazuma, vključno z njegovo pravno težo in pogodbenimi posledicami in sicer z analizo bistva, pravne narave W.A., statusa ZDA v zvezi s sporazumom in pomanjkanja mehanizmov za povečanje verodostojnosti v W.A.. V tem obsegu bo opravljena podrobna ocena z uporabo kvalitativne raziskovalne metode, ki naj bi pripeljala do zaključka, da W.A. ni dvostranski sporazum, ki je pravno zavezujoč za podpisnike z vidika mednarodnega prava; bolj je pismo o nameri oziroma izkaz dobre volje s strani Kosova oziroma Srbije, kar po mednarodnem pravu ne pomeni zavezujočega sporazuma.

KLJUČNE BESEDE: ZDA, Kosovo, Srbija, Washingtonski sporazum

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Introduction

The paper focuses on the respective agreements signed by Kosovo Prime Minister Avdullah Hoti and Serbian President Aleksandar Vučić on September 4, 2020, to normalize economic relations between their two countries.[2] The deal was reached after significant American lobbying for several months. Both Hoti and Vučić signed a separate piece of paper presented as an agreement. The signing ceremony was held in the White House in Washington, DC in the presence of U.S. President Donald Trump, and the signed deal was called the Washington Agreement (W.A.) Despite the enthusiastic insistence by the host that the two sides reached a "historic" and a "major breakthrough" bilateral agreement that was intended to normalize first their economic relations, laying the ground for political reconciliation, this agreement was criticized right from the start. "It is actually neither historic nor a breakthrough," (Lika, 2020). Meanwhile, some issues such as: whether it was a binding contract from the point of international law, what are its consequences for Belgrade and Pristina, are they binding for the parties, what is the host's role and obligation have remained not answered.

Consequently, these are the primary research purposes that prompted this paper. The paper's research question is: is a confusion on the character of the W.A. fueled by the fact that Kosovo and Serbia signed only its piece of paper separate from each other? The two documents are almost identical but nevertheless different. Replying to this question will help to decipher another dubiety of the W.A. It is created by including in it some clauses that are not related to the relations between Kosovo and Serbia at all, like banning the use of 5G equipment supplied by "unreliable suppliers," decriminalization of homosexuality, and classifying Hezbollah as a terrorist organization.

The paper hypothesizes that the W.A. is not a proper binding bilateral treaty between two states as Kosovo and Serbia did not include credibility-enhancing devices in their deal; there are no legally enforceable obligingness or ramifications for Pristina and Belgrade that will lead unstoppably to implementation of the W.A., which makes it a weak agreement or even only a letter of intent. Another hypothesis that would be examined argues that the implementation of the W.A. is primarily

2 Kosovo's version of the W.A. is available online on the government's home website that is listed as a source in the literature section of this paper (Dokumente, 2020), while the Serbian version is not officially accessible online for the public.

a matter of the goodwill of the parties to the Agreement to accomplish what they have committed to in the Oval Office. To find out if the raised hypotheses are correct, this analysis will try to identify the true character of the W.A. by analyzing the empirical material and international legislation that regulate agreements between states (treaty law); analyzing a specific form of the W.A., examining its content that the parties agreed on and seeking to solve the dilemma if this deal between Kosovo and Serbia can be considered as an international binding bilateral agreement.

States Parties with Bitter Past

Dispute between Kosovo and Serbia is considered one of the most significant territorial issues in Europe. The two sides went through the 1998-1999 war between the independence-seeking Kosovo Liberation Army (KLA) and the Serbian armed forces. In addition to the enormous destruction in Kosovo, the war resulted in over 13,000 casualties, most of them Albanians. NATO needed to intervene militarily for the war to end, Serbian forces to leave Kosovo, and a UN administration to be established over this territory. These dramatic events and a change in the balance of power on the ground led to Kosovo's 2008 declaration of independence, which was promptly recognized by all Western powers and 22 of the 27 members of the European Union. At the same time, eastern powers, Russia and China, have made it clear that they will support Serbia's refusal of Kosovo's independence. In practice, this means, as Jamar & Vigness point out, that Kosovo faces a huge obstacle towards its full international recognition. "Russia has refused to acknowledge Kosovo's independence and, with a permanent seat on the U.N. Security Council, Russia's veto (along with China's) is speculated to be one of the key reasons why Kosovo has not had a successful status declaration by the U.N. Security Council" (2019, pp. 916-917).

Relations between Kosovo and Serbia have deteriorated dramatically since Kosovo's declaration of independence in 2008. The political tensions that prevail in the relations between Pristina and Belgrade spill over into the field and among the people on both sides, continuously producing intolerance and antagonism on ethnic grounds between the two nations. After the International Court of Justice (ICJ) has delivered an advisory opinion in July of 2010 in which it concluded that "the declaration of independence of Kosovo adopted on February 17 did not violate international law" (ICJ, 2010), the U.N. Gene-

ral Assembly adopted in its sixty-fourth session in September of 2010 a resolution, acknowledging "the content of the advisory opinion of the International Court of Justice" on Kosovo and welcoming "the readiness of the European Union to facilitate the process of dialogue" between Kosovo and Serbia (UN, 2010). Consequently, in 2011, the EU launched negotiations between the two countries, which are officially still ongoing and whose crown is the so-called Brussels Agreement reached in April 2013 (Elmehed, 2015). Despite not recognizing each other, the two parties have taken a significant step with this agreement towards resolving the specific problems that have ruled between them for decades, laying the ground to address the most prominent dispute between them – the political status of Kosovo.

Accordingly, previous U.S. administrations of presidents George W. Bush and Barack Obama were not involved directly in the mediation of the talks between Kosovo and Serbia as the mediating driving seat has been mandated to the EU. Nevertheless, U.S. diplomacy has continuously backed Brussels negotiations under the EU's baton aimed at ending this long-simmering dispute in South-eastern Europe, noting both sides that they are expected to normalize relations as a precondition for accelerating their rapprochement with EU membership. The negotiations between Kosovo and Serbia, as well as the Western Balkans at all, were not enjoying special attention by U.S. foreign policy since the election of Trump as president. More effective American action was missing despite warnings that the U.S.' lack of interest in the Balkans "underscores inconsistencies in U.S. policy and highlights the lack of clear leadership in a region where Russia's recent activity risks exacerbating political and social instability" (Stronski, Himes, 2021, p.3).

Just a year ahead of the November 2020 elections, the U.S. administration all of a sudden awoke from its hibernation over the Balkans, showing great interest in improving the relations between Kosovo and Serbia by advancing their negotiations for normalization. It was evident from the very beginning that this push by the U.S. to address tensions between Serbia and Kosovo was inspired by the domestic political needs of President Trump, who was to run the presidential election with very little or any success on the international stage. Trump appointed in October 2019 the then U.S. ambassador to Germany and his loyal associate, Richard Grenell, as a special envoy for Kosovo and Serbia. His task was to restart a stalled dialogue between Serbia and Kosovo aimed at ending their long-simmering dispute and deliver

"a diplomatic victory in the Balkans before the November election for a president short on such achievements" (Kingsley, Vogel, 2020). Aware that the relations between Kosovo and Serbia have been so complex that it was impossible to imagine a significant political shift between the parties during the night, Grenell chose the economy and transport as a framework in which to identify issues on which he could ensure consensus and readiness for cooperation between the two sides (U.S. News, 2020). Lika called it "the economy-first-politics-next logic to solve the long-standing fight between Belgrade and Pristina" (2020). This strategy proved to be correct because the economy and transportation both present a bottleneck in the relations between the two countries. Railway and air traffic have not functioned between the former foes since the war. At the same time, they are only connected by an old network of poorly maintained roads built in former Yugoslavia. After almost a year-long shuttle diplomacy between Pristina and Belgrade, Grenell managed to bring the two sides to an agreement to commit to the normalization of their economic relations, which will be sealed in the presence of President Trump in the White House.

The Core of the Washington Agreement

Contemporary international theory and treaties in practice have no strict limits on what can and cannot be the subject of international agreements between two or more states. Principally, the parties can conclude agreements on everything in their common interest, on everything they are responsible for, without harming others or the international order. The W.A. does not conflict with this standard. Still, its content is unusual, to say the least, something not seen very often in international agreements' practice. Presented as an agreement to renew and develop economic ties between Kosovo and Serbia and titled "Economic Normalization" (but with parties' names omitted in the title), the Agreement in its first and only introductory sentences states that "Serbia (Belgrade) and Kosovo (Pristina) agree to move forward with economic normalization" (Dokumente, 2020).

The subsequent five clauses of the contract consistently adhere to the economic nature of the contract, i.e., its title. They are divided not by a number of articles as most international agreements, when listing the parties' tasks, but by bullet points. In the first two provisions, the parties pledge to "implement the Belgrade-Pristina highway agreement pre-signed on February 14, 2020" and "the Belgrade-Pristina rail

agreement pre-signed on February 14, 2020". The second paragraph of the second article of the W.A. states that "both parties will commit to a joint feasibility study on options for linking Belgrade-Pristina rail infrastructure to a deep seaport in the Adriatic" (ibid.).

The U.S. appears not only like a mediator but implementing party equal to Kosovo and Serbia in the third article of the agreement. The wording of this article suggests that this country could even be considered a third party just in relation to some clauses of the W.A. despite not signing it. This would be given more attention later in the paper. This part of the agreement, with a substantial role of the U.S., commits Kosovo and Serbia to "work with the U.S. International Developing Finance Corporation and EXIM on memorandums of understanding" to operationalize the Peace Highway (between Kosovo and Serbia) and the rail link between Pristina and Merdare (major border crossing between the two states). The parties commit also to support SME's, additional bilateral projects and agree on U.S. International Development Finance Corporation full-time presence in Serbia (ibid.).

Like previous articles of the W.A. on the improvement of economic and transportation ties between Kosovo and Serbia[3], the following five articles of the Agreement list the commitments of the two signatories to a set of topics that have already been on the agenda of the EU sponsored talks and were agreed between Kosovo and Serbia (opening of the reconstructed Merdare border crossing financed by the EU, mutual recognition of diplomas and professional certificates) or were launched earlier by some Western Balkans' states like "Mini-Schengen zone"[4]. The list of economic topics agreed upon by the parties ends with one that really represents a novelty for the signatories. It is the commitment of Pristina and Belgrade to work together with the American side on a "feasibility study for the purposes of sharing Gazivode/Ujman Lake, as reliable water and energy supplies." In addition, in the remaining and almost half of the agreement, the economy gives way to politics, primarily to American international goals. Kosovo and Serbia commit to: the prohibition of the use of 5G equipment "supplied by

3 The author notes that EU already committed itself to upgrading current road network or building up a new one between Kosovo and Serbia which is identical to the one foreseen in the W.A., but will not pay attention to this as it can drag the paper to debating the relations between the U.S. and EU.

4 "Mini-Schengen" (later renamed as "Open Balkan" initiative) refers to an idea promoted by Prime Minister of Albania Edi Rama, Prime Minister of North Macedonia Zoran Zaev, and President of Serbia Aleksandar Vučić, to enhance regional economic cooperation among the Western Balkan states by implementing the "Four Freedoms" of the EU, i.e., free movement of goods, services, capital, and people. Kosovo had previously refused to endorse the Mini-Schengen/Open Balkan idea out of fear that it might turn into an alternative to full membership in the EU.

untrusted vendors in their communication networks," information-sharing on airline passenger screening within the framework of broader U.S. cooperation in the Balkans," working "with the 69 countries that criminalize homosexuality to push for decriminalization", and designating Hezbollah "in its entirety as a terrorist organization" (ibid.).

The unusual eclecticism between bilateral issues concerning only Kosovo and Serbia, on one, and U.S. foreign policy objectives, on the other hand, continues in the W.A. with a "non-economic" part, that draws upon three specific political commitments concerning the interest of the signatories: "protection and promotion of freedom of religion"; solving the fate of missing persons and "identifying and implementing long-term, durable solution for refugees." This section continues with a peculiar declaration of a diplomatic ceasefire between Kosovo and Serbia. They commit to declaring a moratorium on lobbying for international recognition (Pristina) and the so-called international de-recognition campaign against Kosovo (Belgrade). This clause has taken effect immediately (ibid.). "The cherry on top" of the eclectic agreement with mixed bilateral and trilateral goals comes with the W.A.'s last bullet-pointed sixteen (and so-called Israeli) clause. The Kosovo version of the Agreement reads: "Kosovo (Pristina) and Israel agree to recognize each other mutually", (ibid.). In the Serbian version of the text, this clause reads: "Serbia (Belgrade) to open a commercial office, and a ministry of state offices, in Jerusalem on September 20, 2020, and move its embassy to Jerusalem by July 1, 2021," (Exit, 2020). The text of the 16th clause of the W.A. is different completely in the versions signed by Hoti and Vučić. It creates room for arguing that, in general, we have two separate political commitments of Kosovo and Serbia to the U.S. mediator or two different versions of the same document, or even two separate contracts. The remaining text in both versions of the W.A. is indeed 95 percent identical in content, but still, they are different by single and completely independent clause. Such content ignites professional reservations, arguing that the W.A. could not even to a small and albeit very loose and confusing extent be defended as a binding bilateral treaty.

The Legal Nature of the Washington Agreement

As it could be seen in the previous chapter, a major controversy surrounding the W.A. consists of commitment of Kosovo and Serbia to work in parallel on resolving their bilateral disputes equally to achieving

specific U.S. foreign policy priorities, which have little or no connection with the parties. This dichotomy serves as a strong argument that the agreement is not a legally binding treaty but, in the first place, a political commitment that does not create any legal obligations of the signatories to each other. "It is unlikely that the U.S. had the intention to enter into legal obligations, or that Serbia would have intended to implicitly recognize Kosovo as a state by entering into a treaty that would include Kosovo as a party," (Muharremi, 2021). "There are several clauses in the Agreement which have absolutely nothing to do with normalizing economic relations between Kosovo and Serbia, and whose inclusion therein thus verges on the ridiculous," (Lika, 2020).

Such assessments reflect the unusualness of the W.A. that comes into light first by the way this agreement was signed. Each party signed its own version of the deal, which the other party did not sign. It is an unusual form to reach an internationally binding bilateral agreement. This behavior is puzzling and promptly noticed. "There was not a single document that both sides signed, but actually two fairly similar separate documents which Serbia's President Aleksandar Vučić and Kosovo's Prime Minister Avdullah Hoti signed individually," (ibid.). "It appears that the so-called 'historic deal' is nothing more than a series of pledges signed by both parties in two separate and different documents," (Xhambazi, 2020). As far as we could assume, each party was in the possession and left Washington, DC with the version signed only by each of them separately, but not by the other party, so that it could be assessed that the W.A. consists of two almost identical but different versions of the Agreement which are confirmed separately by the signature of only one party. Theoretically, this may present a major obstacle in treating the two different versions of the W.A. as an international bilateral treaty.

Those who defend the W.A. as a full-blown international treaty can say that the international law is flexible in such cases, defining the notion of a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (UN, 1969). But, due to its unusual form, the existence practically of two versions of one same agreement and the lack of credibility-enhancing devices as a significant feature of an international treaty, it will be a challenge to apply the above cited article of the Vienna Convention on the Law of Treaties to the case of the

W.A. or subsume this agreement under the Convention with justification that it adheres to the international law in all necessary legal terms. The latter will be discussed in more detail later in this paper.

It remains unclear also the way of adoption of the W.A. in the White House. The Vienna Convention on the Law of Treaties says in Article 9 that "the adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up," (ibid.). Internationally recognized tools by which parties may express consent are a signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession. Kosovo and Serbia opted for signatures for expressing their consent to the W.A., but the international law did not make them automatically the parties to the Agreement. "However, simply signing a treaty does not usually make a State a party... A State does not take on any positive legal obligations under the treaty upon signature. Signing a treaty does, however, indicate the state's intention to take steps to express its consent to be bound by the treaty at a later date" (UN, 2011). "Neither Kosovo nor Serbia ratified or otherwise submitted the Washington Agreement to internal acceptance procedures" (Muharremi, 2021). "In brief, what was signed at the Oval Office was simply not a bilateral agreement" (Lika, 2020).

"States can create obligations under international law when they make unilateral commitments that are specific, publicly announced, and made by authorized state representatives, and which, given all the circumstances, create a good faith expectation on the part of the addressee that such commitments will be respected as legal obligations," (Muharremi, 2021). Speaking further about the legal shortcomings of the W.A. some more questions had arisen promptly, even on September 4, 2020. They have not been answered so far. "It is unclear whether leaders provided each other with a copy of their respectively signed document. It is also unclear what kind of powers these documents would hold, beyond an informal understanding between parties?" (Exit, 2020). Also, we still do not know if and how Pristina and Belgrade's consent to be bound by the W.A. would be ratified at home? We also do not know if the signatories were able to take a look at the other party's version of the Agreement? Did they express consent to be bound by only their own text but not the text in possession of another side? Were they aware of the entirely different sixteenth (Israeli) clause of the Agreement in Kosovo and Serbian versions of the text? Did the parties exchange the texts of the Agreement betwe-

en themselves after signing them? Or they did it only with the American host?

Another confusing point of the Washington Agreement consists of the signatures. Hoti and Vučić put their signatures in the same place of their version of the text (in the lower-left corner of their version of the Agreement). It could not happen accidentally and only could mean that the author of the draft of the (bilateral) Agreement did not anticipate the possibility of each version being signed by both parties. The W.A. parties also did not envisage any procedures for notifications and communications as well as for judicial settlement, arbitration, and conciliation as it is foreseen by the Vienna Declaration on the Law of Treaties (UN, 1969). The Agreement also lacks a provision designing the depositary of a treaty that would keep "custody of the original text of the treaty and of any full powers delivered to the depositary" and would take care about "registering the treaty with the Secretariat of the United Nations." (ibid.,pp.26-27). The agreement also lacks numbers on the pages of both texts as each of the two versions consists of two pages, but neither carries numbers of pages. The pages of both versions are not stapled but fastened with a paperclip. In the view of the author, all these shortcomings further reinforce the impression that it is not plausible to consider the W.A. as an internationally binding interstate treaty but as two separate unilateral declarations.

Interpretation and the Washington Agreement

International law has laid a strong foundation for the interpretation of treaties. They are found, inter alia, in articles 31. to 33. of the Vienna Convention on the Law of Treaties (UN, 1969). Establishing a way to authentically interpret the content of an international agreement, usually by an independent body, is an essential element for its smooth implementation and for resolving any misunderstandings that its parties may have over the meaning of one or more provisions of the treaty that they reached. In their agreement signed in the presence of the U.S. President Trump and his closest associates, Kosovo and Serbian top representatives did not envisage any instrument for a binding interpretation of their agreement if the need for such an interpretation occurs or proves as necessary. A powerful sponsorship over an international agreement, like the U.S. one in the case of the Kosovo and Serbia economic normalization agreement, may mean that just as they complied with the invitation to Washington DC to sign an agreement,

they are tacitly reconciled that the U.S. has the final say in deciphering of its provisions if disagreements over the content arise between the signatories to the Agreement. Even if this is true, it cannot substitute an agreed mechanism for interpretation, which will be a part of the deal and will come to force if a situation arises, making such interpretation of the content of this agreement as necessary. That is why the lack of an interpretation mechanism agreed by the parties is another weak point of the W.A.

As previously and briefly noted, an additional complication for the W.A. to be accepted as a proper bipartite treaty binding for both the states consists of the Israeli clause in the 16th paragraph of the agreement. The texts of this clause in the versions of the agreements which Hoti and Vučić took home are entirely different, envisaging completely different steps that the two sides should take regarding Israel. This situation is not provided for in the international law on treaties. Even when it envisages different actions of the signatories, the text of an international treaty is supposed to be identical in all versions belonging to its parties. Strictly interpreted, the fact that the text of the 16th task in the Kosovo and Serbian versions is completely different makes these two versions more look like two separate agreements than a single one, despite the fact that the remaining text in the W.A. is identical in both versions.

A legal mess continues to steam from further detailed academic interpretation of the Agreement, especially when you ask the question if Hoti and Vučić can consider that Kosovo and Serbia have reached an agreement with each other at all. Legally, it would be very difficult to prove this because Vučić's version does not have Hoti's signature, while Hoti's lacks Vučić's signature. Even if it will be established that Hoti verbally stands behind what is written in Vučić's version as well as that Vučić verbally stands behind what is written in Hoti's version, it will be very difficult to defend as binding the provisions in Hoti's version (and only with his signature), which prescribes what not only Kosovo but also Serbia should do or not, or in Vučić's version (and only with his signature) what not only Serbia but also Kosovo should do or not. This just reinforces additionally the hypothesis elaborated in the text on a few occasions so far that there is not one but two different agreements that without a problem could be called the Kosovo and Serbia economic normalization agreement(s).

Such a situation is not envisaged by international law and could be considered as a rare precedent in the history of international treaties that regulate relations between states. The most famous case of having two different texts of the same international bilateral agreement is the Treaty of Waitangi reached in 1840.[5] This agreement is a "historic pact between Great Britain and a number of New Zealand Maori tribes of North Island" that "purported to protect Maori rights and was the immediate basis of the British annexation of New Zealand" (Lotha, 2021). The Vienna Convention on the Law of Treaties (UN, 1969) as the most updated codification of treaty law does not even anticipate such a situation that occurred in the W.A. On the contrary, in Article 31 ("Interpretation of treaties authenticated in two or more languages"), it says that "the terms of the treaty are presumed to have the same meaning in each authentic text" (ibid.). This regulation cannot be applied and is powerless for a situation when there are two different versions of the same agreement as it is the case with the W.A. The Convention further states that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted," (Ibid.), but, all the same again, this does help when the parties to an agreement pursue different meanings of the same text of an article(s), but not when there are two different texts as in the case the W.A.

Analyzing both Kosovo and Serbian versions of the Agreement it can be noticed that, intentionally or otherwise, they are written in the style of a unilateral commitment of the signatories to a third party and not as a text around which the two parties have reached a common language and want to translate it into an internationally binding bilateral agreement. "It looks like the two parties and the mediator opted for the softest agreement format by which they expressed political commitments as they are unwilling to undertake binding obligations because of political sensitivities or other reasons," (Muharremi, 2021). "It becomes clearer that what was signed in the Oval Office on September 4, is not a bilateral agreement between Kosovo and Serbia, but rather a mutual commitment by them to serve Trump's reelection purposes

5 The Treaty of Waitangi was a written agreement by which New Zealand became a colony of the Great Britain and Maori became British subjects. However, Maori and Britain had different understandings and expectations of the treaty what led to warfare in 1844–47 and the New Zealand Wars of the 1860s. Some people argue that there are two treaties: te Tiriti, the Maori version, and the treaty, the English version. The treaty has two texts. It was drafted in English and then translated into Maori. The Maori version is not an exact translation of the English as the meaning of the English version was not exactly the same as the meaning of the Maori translation, especially with regard to the crucial question of sovereignty in the first article. In the English text, Maori leaders gave the Queen "all the rights and powers of sovereignty" over their land. In the Maori text, Maori leaders gave the Queen the complete government over their land as the word 'sovereignty' had no direct translation in Maori. Maori believed that they kept their authority to manage their own affairs and ceded a right of governance to the Queen in return for the promise of protection.

in the U.S.," (Lika, 2020). That is why a rigorous analysis of the format in which it was written and of the way in which the parties made their commitments leads to a strong impression that the text of the two versions of the W.A. is more appropriate for the format of a letter of intent[6] than for an internationally binding agreement as the parties are just outlining the commitment to the wish-list which they will probably intend to formalize later in a legally strict agreement.

U.S. is (not) a Third State to the Washington Agreement

The Vienna Convention on the Law of Treaties (UN, 1969) in article 35 ("Treaties providing for obligations for third States") clearly states when a country which is not a party to the agreement can be bound to it as a third State: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing". We can rightly assume that Kosovo and Serbia themselves have not established formally any obligation for the U.S. as the third state to the W.A. Neither such obligations were committed separately "expressly" and "in writing" by the host in the White House as neither of the two versions of the Agreement bears any American signature.

So it is difficult to prove legally that the U.S. is a third party to the W.A. However, we face in this case another confusing moment for international law: we have a country that is legally not a third State to the treaty, but commits itself to its task(s) like the U.S. does in the third and seventh article of the W.A. Commitments which the U.S. takes over in these two articles suggest that this country sometimes may not and sometimes may be considered as a third State (regarding the third and seventh article of the W.A.) despite not legally being declared as such. So, being or not being a third State, the status of the U.S. in the Agreement unavoidably remains another confusing element of the W.A. as, on the one hand, officially this country is not a third party, while, on the other hand, it appears as an implementing partner in the third and seventh article of the W.A. that projects the significant economic and infrastructural projects for Kosovo and Serbia. The U.S. committed itself (not "in writing" but by remarkable attendance of its officials, star-

6 "A letter that formally states what someone plans to do although this is not a legal promise of official contract" (Cambridge Dictionary, 2021).

ting from President Trump to the signing ceremony in the White House) that it will work with Kosovo and Serbia in the operationalization of the Peace Highway (between Kosovo and Serbia), operationalization of the rail link between Pristina and Merdare), providing financial support to support SME's, additional bilateral projects (including U.S. International Development Finance Corporation full-time presence in Serbia) as well as in engaging with Pristina and Belgrade on "feasibility study for the purposes of sharing Gazivode/Ujman Lake, as a reliable water and energy supplies" (Dokumente, 2020).

By the way, the legal status of the U.S. in relation to the W.A. is not even mentioned in the thanking letter signed by President Trump at the end of the signing ceremony in the White House (Exit, 2020). Trump applauded the highest representatives of the both sides for "bravery in making progress towards Serbia-Kosovo normalization" and "historical diplomatic breakthrough" (ibid.). The letter, however, does not say a single word about the status or obligations of the U.S. in implementing the W.A. When journalists asked Grenell if Kosovo and Serbia had signed an agreement with each other or with the U.S., he replied, "they signed an agreement to work with each other, they did not sign with the U.S, we are not a signature" (Xhambazi, 2020).

Lack of Credibility-Enhancing Devices and Washington Agreement

As the most important subjects of international relations, led by their priorities and self-interests and acting within their competencies, states enter permanently into international agreements, tending to address their own concerns, in the first place or expecting to make some political or economic gains. These agreements vary widely along with two major formats. Some are formal and binding with huge legal impact and serve as law-making treaties. In contrast, others fall short of that classification and are labeled instead as "soft law"[7] or even non-binding agreements because they do not include: sophisticated monitoring mechanisms on state conduct, formal inspections of state behavior and compliance by neutral observers; and, consequently, dispute resolution procedures that are present in hard law treaties.[8] According to Guzman, when states enter into an agreement, they have the option

7 The term "soft law" refers to weak legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law.

8 "Hard" law refers to actual binding legal instruments and laws. In contrast with soft law, hard law gives states and international actors actual binding responsibilities as well as rights. The term is common in international law where there are no sovereign governing bodies.

of adopting one of the existing forms. "If they evidence an intent to be 'bound' the agreement is labeled a treaty, and if they do not demonstrate such an intent, it is labeled 'non-binding,' or 'soft law" (2005, p.583). Binding treaties impact on signatory states' behavior more than non-binding soft law agreements that do not have enforcement mechanisms to identify violations and their costs or provide for some formal sanction like the binding ones do. When entering into international agreements, states prefer soft law but no provisions for dispute resolution or monitoring.

The majority of scholars agree that this omission serves the parties to an international agreement to weaken the force and credibility of their commitments, in particular when they do not enter into international treaties voluntarily but it is imposed on them as it is reasonably claimed to happen in the case of the W.A. reached by Kosovo and Serbia. "It is only when international law will aid a country in its quest for power that such a country will abide and give recognition to such laws, but in a situation where international law becomes a hindrance to a country's quest for power, that country will not give any recognition to that international law but will rather carry on with their actions and ambitions to be powerful and influential in the international arena" (Kwarteng, 2018, p.5). Boyle claims that the use of soft law instruments enables states to agree to more detailed and precise provisions because their legal commitment, and the consequences of any non-compliance, are more limited. "Soft law consists of general norms and principles, not rules," (1999).

Although signing a treaty rather than soft law (including mandatory dispute resolution, and choosing to put monitoring procedures in place) increase the impact of an agreement on state behavior, Kosovo and Serbia under the U.S. mediation have entered into the W.A. as a way of exchanging promises about future conduct towards normalization of their economic relations, but without adopting enforcement techniques that ensure performance. They have not chosen to enter into a hard law agreement and include a dispute resolution mechanism though agreements are more valuable if they can bind the parties more effectively. The W.A. lacks credibility-enhancing devices that would impact and increase the effectiveness of this agreement and the credibility of the promises made by Kosovo and Serbia. It is difficult to find out why Kosovo and Serbia failed to design their agreement in the White House in a "heavy law" way by including dispute resolution provisions

as well as monitoring, reporting and verification in order to maximize the credibility of their commitments.
In general terms, states choose soft law because it is less binding on them and, therefore, gives them greater flexibility. This flexibility is desirable for various reasons, including the ability of states to deal with an uncertain world or to reduce pragmatically the costs of termination or abandonment. According to Kwarteng, countries will do anything to become powerful rather than giving recognition to international law. All countries strive to outweigh one another in the international system, and that is more important to states than submitting their quest for power to the recognition of any international law," (2018, p.5). " As a result, States often enter into soft law agreements rather than treaties, typically fail to provide for any dispute resolution procedures, and frequently require little or no monitoring or verification of performance," (Guzman, 2005, p.587). In the view of the realism school of thought, power is an essential element in the international system, and that explains the reason why countries will do everything within their possible means to bind themselves as less as possible to international agreements because "the more powerful you are as a country, the more influential you become in the international system and as such countries will not compromise their quest to be powerful for the recognition of any international law or convention" (Kwarteng, 2018, p.5).

Although consisting of an exchange of promises between Kosovo and Serbia for their unilateral or bilateral actions (in some of them, the U.S. appears as an implementing party, so in these cases we have trilateral commitment), the findings of the author's examination so far suggest that the W.A. is far from being a full-blown and binding treaty for Kosovo and Serbia. This view has also been expressed by Lika. "Anyhow, at the end of the day, the two clauses concerning Kosovo's and Serbia's relations with Israel won Kosovo an additional recognition but, like the rest of the deal, do not create any binding commitment between Belgrade and Pristina," (2020). Along with some other significant shortcuts, which have been discussed more in previous chapters, the lack of credibility-enhancing devices like governance, dispute resolution, tangible sanctions triggered by the violation, or failure to comply with it make the W.A. a weak and not-imposing deal. It is based on political but not legal commitment. Moreover, its form looks less like a strongly binding bipartite agreement where Kosovo and Serbia legally unambiguously take over the challenging task of normalization of their economic relations as the overture of their political reconciliation. Still, it

looks more like a statement on good intentions by the parties to each other and to the American host.

Lack of deadlines and mechanisms to ensure the implementation of the Agreement Guzman explains as "the desire of states to retain control over disputes. When a dispute arises, the argument goes, states prefer to resolve the dispute through bargaining and diplomacy rather than third-party adjudication" (2005, p.593). Consequently, such a format of the W.A. could not include in the text provisions for enforcement of the tasks that the two countries committed to implement or for dispute resolution procedures if misunderstandings break out between them. Except for their steps toward Israel and an obligation of Serbia not to carry out its de-recognition campaign against Kosovo in the next 12 months, on one, and obligation of Kosovo not to seek any membership in international organizations in the same timeline, on the other hand, there is no even any other deadline for the rest of 10 tasks listed in the W.A..

Conclusion

This research confirmed its major hypothesis: the W.A. signed by Kosovo and Serbia on November 4, 2020, in the White House is not an internationally binding bilateral treaty or 'hard law' – as these binding treaties are called sometimes – because it does not result in legally enforceable obligingness or ramifications for Pristina and Belgrade that will provide the implementation of the Agreement or, if not, will result in the tangible sanctions for a failure of one or both signatories to comply with international law. "Signing a treaty rather than soft law, including mandatory dispute resolution, and choosing to put monitoring procedures in place, all increase the impact of an agreement on state behavior," (Guzman, 2005, p.588). The W.A. does not bind the two parties because they did not provide for any credibility-enhancing devices in their deal reached by the U.S.' mediation. The lack of these devices prevent the Agreement to enjoy the legal force as a fully-fledged international treaty does.

The W.A. is not itself legally enforceable, which makes it a fragile agreement when it comes to its implementation. Whether it will be implemented or not depends primarily on and is a matter of goodwill of the parties to the Agreement or on the willingness of the U.S. - as the driving mediator force in its conclusion – to use diplomatic pressure to persuade Kosovo and Serbia to accomplish what they have committed to each other in the Oval Office. If this happens, realists will be able to use this case for arguing that the leading world power's political sponsorship over the W.A. could be a stronger guarantee for its implementation than the inclusion of internationally accepted credibility -enhancing devices, which provide the parties' accountability if they do not act accordingly. It remains to be seen if American political and diplomatic power will be used as the strongest leverage tool that can impose the W.A. implementation in a situation where there is no any legal dispute settlement that improve the probability of compliance by Pristina and Belgrade.

Another element that strongly weakens the legality and implementation ability and enforceability of the W.A. consists of the existence of the two variants of the text of the same Agreement, i.e. two W.A.s, which instead of being identical – which is a basic precondition for the legality of an international treaty that tends to bind its parties to their promises - differ from each other. This is one of the most puzzling

elements of the W.A. that contributes to its unusualness and dubiety, enhancing additionally its implementation capacity's weakness. Although the difference is small and refers to only one (Israeli) clause completely different in the Kosovo version from the one in the Serbian version of the W.A. text, any legal interpretation, or arbitration, would establish that these two versions were two non-identical documents.

If the W.A. is not an internationally binding bilateral treaty, the question is what it is then? The format in which the W.A. is written mostly resembles an introductory and non-binding letter of intent where parties state their concrete intentions, because it consists of a kind of a declaration or confirmation of a purely political understanding between its parties without a legal component which makes the Agreement enforceable by the international law. The (two variants of) W.A. consist of a non-binding bilateral wish-list containing Kosovo and Serbian joint economic topics mixed with American foreign goals. "It seems that in the Kosovo-Serbia deal, the Trump Administration got the causal arrows the wrong way around" (Lika, 2020). And even in case it is treated as a legal bilateral agreement, our analysis also holds that the W.A. could be listed in the category of legally poor agreements that make up the so-called soft law.

Not wanting to deal with the political background that generated the W.A. (as this would drag this paper into the political arena and the inevitable elaborations about the W.A. as a politically motivated agreement intended to be used for the domestic needs of then U.S. President Trump[9]), the author considers that from the point of international law, Kosovo and Serbia just expressed in the W.A. goodwill to initiate the process of economic normalization between them. But, they did not set deadlines or a mechanism for monitoring the implementation, the evaluation and the accountability for faults in accomplishing their commitment.

Fortunately, there are not many such agreements with such a puzzling and eclectic content because they lead to legal uncertainty in international relations. These relations are already dominated by the tendency of states to preserve their sovereignty and not to assume obligations that would mean limiting this sovereignty or delegating to someone

9 In the aftermath of the signing ceremony in the Oval Office, Trump tweeted, "Another great day for peace with Middle East–Muslim-majority Kosovo and Israel have agreed to normalize ties and establish diplomatic relations. Well done! More Islamic and Arab nations will follow soon". Although Kosovo is not an Islamic or Arab nation, but European and secular one.

else some of the elements of their sovereignty. Therefore, states are extremely careful about what they take on when concluding agreements with others. In the world of imperfect agreements, the W.A. is an example of how agreements should not be made if the parties sincerely intend to commit themselves to fulfilling their obligations under legally founded deals with other states. Kosovo and Serbia do not have any legal instruments at their disposal to force the other party to comply with the obligations under the Agreement. It is not known at all within what period these obligations should be fulfilled by both sides and what will happen if one of the parties refuses or acts contrary to the Agreement.

Along the expected diplomatic pressure from Washington, DC, another element that could encourage Kosovo and Serbia to take seriously over what they pledged in the White House is their reputational loss before the eyes of the international community if they fail to implement their promises. Pristina and Belgrade should not forget that when making a promise before the Trump administration, the two parties have pledged also their reputation as a form of collateral for their eventual non-compliance with the W.A. The parties to the Agreement have to be aware that a violation of international commitments, then, imposes a reputational cost that is felt when future agreements will be sought by Kosovo and Serbia. However, the way things are today in the relations between Kosovo and Serbia – and they are not good because they are dominated by tensions and extreme political animosity – it turns out that the greatest opportunity for the W.A. to be implemented lies in Washington, DC, not Pristina and Belgrade.

It remains to be seen if the U.S. will be intensively engaged in the implementation of the W.A., demonstrating the prevalence of real policy in nowadays international relations by which the implementation of an interstate agreement depends more on whether a world power stands for it, and less on the use of modern credibility-enhancing standards of international law that ensure performance.

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