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Publication**

**OPTIONS FOR A 'LEGALLY BINDING NORMALIZATION
AGREEMENT' BETWEEN KOSOVO AND SERBIA**

DISCUSSION PAPER

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EXECUTIVE SUMMARY

Kosovo's and Serbia's leaders have started talks which should lead to a legally binding normalization agreement between Kosovo and Serbia. The EU demands both parties to reach such an agreement as a prerequisite for their European integration. Various options, and combinations thereof, are on the table. The purpose of this discussion paper is to look at these positions and interests and to assess some of the options which are being discussed in public on how the legally binding agreement might look like. The purpose is not to recommend a solution but to stimulate discussion. Each option will be assessed in view of how it will (i) affect Kosovo's sovereignty and identity as a 'Western' state, and (ii) how it could contribute to order and sustainable peace between Kosovo and Serbia. The discussion paper is deliberately biased in the sense that it will assess options as to how they could suit Kosovo's interests but at the same time suggest possible modalities for reconciling interests and achieving sustainable normalization between Kosovo and Serbia. The underlying belief is that whatever the final outcome of the agreement, it will only succeed if all sides make reasonable and constructive demands and not just pretend to have the willingness to reach an agreement.

Even though the EU facilitates the talks between Kosovo and Serbia, its role and influence in reaching a normalization agreement is limited in several aspects. The EU and its member states do not have a uniform position towards Kosovo as a state which weakens the EU's bargaining power. In the absence of a clear EU position both parties may look for other actors, which have both power and a clearer policy towards Kosovo, such as the United States and Russia, to be involved in the upcoming talks and to make use of their bargaining power in support of their respective interests. The EU has also 'no solution prepared in advance', no expressed preferences concerning the content of the normalization agreement and wants the parties to come to an agreement by themselves.

Kosovo and Serbia have diametrically opposed positions and interests which need to be reconciled if a sustainable compromise is to be achieved. Kosovo expects that the agreement will resolve the fundamental political differences between Kosovo and Serbia and remove Serbia's resistance against Kosovo's independence. Kosovo expects a full and unconditional, preferably formal, recognition by

Serbia as an independent state. Kosovo has an interest in ensuring that the agreement will pave the way for Kosovo's full membership in the UN, the EU and other international organizations, and recognition by the five EU member states which so far have not recognized Kosovo. Kosovo has also an interest in preserving its territorial integrity and to ensure full and exclusive jurisdiction over all of its territory. In view of Kosovo's commitment to Euro-Atlantic (Western) values and aspirations to fully integrate into Western institutions, Kosovo has an interest in ensuring that its policy preferences are aligned with those of the West not only in relation to Kosovo but also in view of West's strategic objectives concerning the Western Balkans and globally.

Serbia wants a compromise solution which brings concrete benefits and which is face-saving for Serbia. Such a compromise solution would not mean for Serbia to grant a formal recognition of Kosovo as an independent state. Serbia's preference is to obtain EU membership without recognizing Kosovo as an independent state. Serbia has also an interest in keeping as much influence in Kosovo as possible. This could be achieved by partitioning Kosovo whereby Serbia would take the municipalities in the north of Kosovo. It has also an interest in strengthening the position of Kosovo Serbs in Kosovo, for example through an association of Serb municipalities which has not only executive powers beyond the level of local government but which might also have substantial territorial autonomy. The ideal situation for Serbia would be to partition Kosovo and to get an association with territorial autonomy for the remaining Serbs in Kosovo.

Whatever the interests of Kosovo and Serbia are, their political leaders may have different agendas. In view of their domestic political pressures, and for fear of losing political power, none of them seems to have an interest in a quick and constructive compromise, despite continuous lip-service to the contrary. This may complicate and delay the process of reaching a legally binding agreement to the detriment of both Kosovo and Serbia.

In view of these interests and positions, the paper analyzes some of the options which seem to be able to be extended and adapted to the Kosovo-Serbia conflict because of a similar problem structure and political constellations. These options include the 'Croatian-Yugoslav/Serbian' model, the 'German' model, the 'Partition/Exchange of Territory' model, the 'British-Irish' model, and the

‘South Tyrol’ model. From among these options, the partition/exchange of territory is the most controversial and dangerous option due to all the uncertainties surrounding it and the vast potential for adverse and unintended consequences. The ‘Croatian-Yugoslav/Serbian’ and the ‘German’ model have certain advantages but they do not address core interests and positions maintained by Kosovo and, respectively, Serbia. The ‘British-Irish’ and the ‘South Tyrol’ model offer more complex solutions which intend to preserve territorial integrity while ensuring self-determination and autonomy for minorities.

Whatever the final outcome of the agreement, if there will be any, it will only succeed if all sides make reasonable demands and not just pretend to have the willingness to reach an agreement. It will also require that the final agreement replaces UNSC resolution 1244 (1999); without that, there is the risk that the agreement will not produce the desired effect of Kosovo joining the UN, the EU and other international organizations. It will also be important that political leaders do not put their personal interests before the interests of the people they have to represent. In the end, the agreement will be about people and not only about territory. This will require not only Kosovar and Serb political leaders to act responsibly and with restraint but it will demand the same from political leaders of major powers which are involved and have an interest in normalizing relations between Kosovo and Serbia.

I. INTRODUCTION

Since the EU announced in early 2018 that it expects a legally binding normalization agreement between Kosovo and Serbia as a prerequisite for them to join the EU, political leaders and the public in both countries seem to be wondering as to how this process will develop and what the outcomes will be. There is hope in reaching a final settlement which will resolve the conflict between Kosovo and Serbia and which will pave the way for both to join the EU and have peaceful relations with each other. However, the political realities and interests on the ground may require more caution and beware of setting expectations too high. In his recent book ‘A World in Disarray’, Richard Haass, former advisor to US President George H. W. Bush, cautions that *‘in foreign policy, managing a situation in a manner that fails to address core or what are sometimes described as final status issues can be preferable to attempting to bring about a solution sure to be unacceptable to one or more of the parties and that could as a result provoke a dangerous response’*.¹ Given that the policy preferences of Kosovo and Serbia in respect of Kosovo’s independence and sovereignty are diametrically opposed to each other, there might be in the end a diluted agreement which will not address the core and final status issues and will keep the conflict just dormant but not resolved. For short term diplomatic purposes this might be a success but not for a lasting and sustainable resolution of the conflict.

Henry Kissinger cautioned that *‘it is a mistake to assume that diplomacy can always settle international disputes if there is good faith and willingness to come to an agreement’*.² All sides would have to make ‘reasonable demands’ or otherwise *‘diplomatic conferences would be occupied with sterile repetitions of basic positions and accusations of bad faith, or allegations of unreasonableness and subversion’*.³ An agreement between Kosovo and Serbia which would lead to a sustainable resolution of the conflict would therefore have to be based on reasonable demands and be acceptable for both parties. Identifying what is reasonable requires an assessment of the positions and interests of both parties and how they can be reconciled to lead to a win-win situation. It should also be emphasized that whatever the modalities of the normalization will be, decision-makers must answer the question if they will serve primarily the interests of the people and their future or if they will be ‘just about territory’. The purpose of this

¹ Haass, R. (2018). *A world in disarray: American foreign policy and the crisis of the old order*. New York: Penguin Press.

² Kissinger, H. A. (2013). *A World Restored: Metternich, Castlereagh and the Problems of Peace, 1812-22*. Brattleboro, VT: Echo Point Books & Media.

³ Ibid.

discussion paper is therefore to look at these positions and interests and to assess some of the options which are being discussed in public on how the legally binding agreement might look like. The purpose is not to recommend a solution but to stimulate discussion.

1. BACKGROUND

The Kosovo conflict is lingering since 1989 when Serbia suspended Kosovo's status as an autonomous province within the Socialist Federal Republic of Yugoslavia and established direct rule over the former province. The ensuing official policy of ethnic segregation and discrimination against Albanians, exclusion from participation in economic and political institutions, and increased impoverishment which forced a large number of Albanians to seek refuge in Western Europe formed the ingredients of an armed conflict which culminated in 1997 to 1999. In view of massive expulsion and crimes against civilians by Serbian armed forces and failed attempts by the international community to mediate at the Rambouillet Conference in 1999 an agreement between Serbs and Albanians, the North Atlantic Treaty Organization (NATO) intervened militarily in 1999. The Serbian military and government apparatus abandoned Kosovo following the signing of the Military-Technical Agreement in 1999 and the United Nations (UN) deployed an international mission to provide an interim administration of Kosovo. The mandate of the international civilian mission (UNMIK) and of the NATO forces on the ground (KFOR) was enshrined in UN resolution 1244 (1999) which was adopted by the UN Security Council. Since then, Kosovo was governed by the UN while Serbia ceased to exercise any form of effective government over Kosovo, although it never abandoned its claim that Kosovo is part of Serbia.

In 2008, Kosovo declared its independence from Serbia on the basis of the Comprehensive Proposal for a Settlement of the Kosovo Status which was endorsed by the UN Secretary-General but which was not submitted to the UN Security Council because of a veto which was announced to be invoked by Russia and China. Kosovo's declaration of independence was preceded by efforts to facilitate a negotiated settlement between Kosovo and Serbia, the so-called Vienna talks between 2006 and 2007, led by the special envoy of the UN Secretary-General, Martti Ahtisaari. Failure to reach an agreement and to endorse the Comprehensive Proposal for a Settlement of the Kosovo Status in the Security Council led to Kosovo's declaration of independence. A number of Western

States, which immediately had recognized Kosovo as a state, formed an international supervision committee to supervise Kosovo's independence for a certain period of time to make sure that Kosovo fulfills its obligations under the Comprehensive Proposal for a Settlement of the Kosovo Status. These obligations related primarily to rights of minority communities and to ensuring compliance with democratic and rule of law standards. The period of supervised independence ended in 2012 when the international supervision committee dissolved itself after having concluded that Kosovo had met the requirements under the Comprehensive Proposal for a Settlement of the Kosovo Status.

Since 2011, the European Union (EU) assumed a leadership role in facilitating dialogue between Kosovo and Serbia. Between 2011 and 2012 Kosovo and Serbia reached a number of technical agreements, such as on freedom of movement of citizens between Kosovo and Serbia, cadastral records, customs duties, and recognition of university degrees. In 2013, Kosovo and Serbia reached an agreement on 'first agreement of principles governing the normalization of relations' which provided for the establishment of an Association/Community of Serb majority municipalities in Kosovo, and the integration of Serb security and judicial structures into Kosovo's security and justice system. In 2015, a number of further agreements, the so-called 'Brussels Agreement Package', were reached related to Kosovo's country code, energy, the association/community of Serb municipalities and justice.

The dialogue between Kosovo and Serbia, facilitated by the EU, had some positive impact. It helped the northern municipalities, which are predominantly Serb (Northern Mitrovica, Zvečan, Leposavić, Zubin Potok), to accept and gradually integrate into Kosovo's governance structures, to establish Kosovo customs control at the northern border with Serbia and to hold elections in the northern municipalities. However, relations between Kosovo and Serbia, and its northern municipalities, are still far from normalized. The Kosovo Serbian political faction 'Lista Srpska' is a political instrument in the hands of Belgrade, which seems to be more loyal to the government in Belgrade than it is willing to represent the interests of the Kosovo Serbs. Key policies which are vital for the consolidation of Kosovo's statehood, such as the transformation of the Kosovo Security Force into an army, are boycotted by Lista Srpska using constitutional mechanisms to block this process. Serbia continues an aggressive policy to obstruct Kosovo's membership in international organizations and

further recognitions. It goes even so far as to induce countries which have recognized Kosovo to withdraw their recognition. Both sides claim that the agreements which have resulted from the technical dialogue and the Brussels package are not being implemented by the other side. Last but not least, there is no direct communication between Kosovo and Serbia. The EU serves as a facilitator and as a mail-box when communication between both sides is required such as in the case of judicial assistance. Meetings between Kosovo and Serbia are facilitated and organized by the EU as there is no genuine will on either side to meet as equals and in the spirit of good neighborly relations.

While the agreements reached so far between Kosovo and Serbia are not legally binding and rather reflect political arrangements, and since there is no normalization despite the dialogue, the EU has decided to elevate the dialogue from a technical to a political level to result in a legally binding normalization agreement. In its Western Balkans Enlargement Strategy of 2018, the EU states that

*‘without effective and comprehensive normalization of Belgrade-Pristina relations through the EU-facilitated Dialogue there cannot be lasting stability in the region. A comprehensive, legally binding normalization agreement is urgent and crucial so that Serbia and Kosovo can advance on their respective European paths’.*⁴

A legally binding normalization agreement between Kosovo and Serbia seems to be a prerequisite for both countries to become EU members.

The EU’s role and influence in reaching a normalization agreement is limited in several aspects. In respect of Kosovo, the fact that five EU member states do not recognize Kosovo has led the EU to adopt a status neutral position towards Kosovo and to not recognize it formally as a state. The Stabilization and Association Agreement between the EU and Kosovo explicitly states that this agreement does not constitute or imply a recognition of Kosovo by the EU. In view of the five non-

⁴ European Commission (2018). *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*. Strasbourg.

recognizers, the EU and its member states do not have a uniform position towards Kosovo as a state which weakens the EU's bargaining power. In the absence of a clear EU position both parties may look for other actors, which have both power and a clearer policy towards Kosovo, such as the United States and Russia, to be involved in the talks and to make use of their bargaining power in support of their respective interests. The EU has also 'no solution prepared in advance', as stated by Commissioner Hahn in early 2018. The EU has, at least so far, no expressed preferences concerning the content of the normalization agreement and wants the parties to come to an agreement by themselves. However, there might be some options, such as an exchange of territories, which are not preferred by individual EU member states but that does not seem to reflect a consolidated EU policy. The EU also seems to have no definite timeframe for reaching an agreement although Kosovar and Serbian politicians have indicated in public statements a preference for reaching an agreement as quickly as possible.

2. APPROACH

Writing an assessment about positions, interests and possible options for a normalization agreement at this stage is like trying to hit a very fast-moving target. There is a fast dynamic in the process leading to the beginning of the talks on a normalization agreement with different options and negotiation formats mentioned in public discussion. While so far it seemed to be talks between Kosovo and Serbia facilitated by the EU, now several countries have indicated their interest in being part of the talks. What looked so far as third-party facilitated or mediated bilateral talks now shows signs of an upcoming multilateral conference including the most influential European states, the US, and perhaps Russia.

Whatever the format of the talks will be, efforts to achieve a sustainable 'normalization' of relations between Kosovo and Serbia will have to look at the underlying interests of both parties as a benchmark for assessing any options which may or may not be useful to serve as a model. A number of options were already mentioned by different international and local actors in public discourse, such as the 'Agreement on the Foundations of Relations' between the Federal Republic of Germany and the German Democratic Republic (1972), or a partition or exchange of territories between Kosovo and Serbia. Lessons drawn from historical institutionalism and realist policy-decision making

suggest that decision-makers will look at past solutions for guidance and try to adapt them to the 'Kosovo-Serbia' context. The concern is that reference to a model without considering the political context for which it was designed and without assessing how it is adaptable to the interests of the parties may produce sub-optimal 'copy-cat' solutions which may lead to short-term diplomatic success but not reconcile the conflicting positions and interests which is essential for achieving sustainable normalization between Kosovo and Serbia.

The present paper is deliberately biased in the sense that it will assess options as to how they could suit Kosovo's interests but at the same time suggest possible modalities for reconciling interests and achieving sustainable normalization between Kosovo and Serbia. The key question asked in this paper is therefore how the options will affect and advance Kosovo's interests and minimize threats and challenges to Kosovo as a sovereign state while trying to find common ground for an agreement.

II. POSITIONS AND INTERESTS

A nation's collective identity constitutes its interests, and these interests then constitute that nation's policies and actions.⁵ Kosovo's 'identity card' is its declaration of independence which constitutes Kosovo as a democratic, secular and multi-ethnic republic and as a member of the Euro-Atlantic family of democracies. It explicitly states that 'for reasons of culture, geography and history, we believe our future lies with the European family'. Being a responsible member of the international community and embodying its values, in particular those of the Western culture and civilization, is the golden thread throughout the declaration of independence. Kosovo's very close relationship with the US and its Western European allies, and its aspiration to join NATO and the EU, is a clear expression of this Western identity. However, centuries of Ottoman domination have left their imprint on Kosovo's identity. On the one hand there is recent evidence of growing sympathy towards Turkey as an ally who supports Kosovo's independence but on the other hand Turkey is also seen as a former occupying force which has culturally influenced Kosovo's society to such extent that it is now torn between Orient and Occident. The contradicting positions of Kosovo's leadership in relation to Turkey are a clear expression of this ambivalent relationship with Turkey.

Serbia is also a western European country and belongs to the western culture. However, its commitment to Western values and norms is less accentuated. Serbia geographically belongs to Europe but it does not necessarily share all values considered as European. Its strong orientation towards Russia, the identification of the state with the Serbian nation, and its orthodox/Slavic heritage, which sets collectivism before individual responsibility, express a certain distance to core Western liberal values.⁶ Serbia's very close relationship with Russia, its open opposition and hostility to the West during the Yugoslav and Kosovo war, and its refusal to join NATO, while it aspires to become a member of the EU are expressions of an identity which gives relations with Russia and pursuit of Slavic/orthodox interests priority over alignment with the interests of the West.

⁵ Wendt A. (1999). *Social Theory of International Politics*. Cambridge: University Press.

⁶ Ristic I. (2007). Serbian Identity and the Concept of Europeanness. *Panoeconomicus*, 185-195.

1. KOSOVO'S POSITION AND INTERESTS

The legally binding agreement is for Kosovo similar to a peace treaty. Kosovo expects that the agreement will resolve the fundamental political differences between Kosovo and Serbia and remove Serbia's resistance against Kosovo's independence. According to Haass⁷, diplomacy and negotiations tend to reflect realities on the ground and not change them. NATO's intervention in 1999 indeed created a new reality on the ground in Kosovo. Serbia was forced out of Kosovo and excluded from further governing it. Kosovo was placed under international administration under the umbrella of which Kosovo developed independent institutions that formed the basis for the independent state of Kosovo. Martti Ahtisaari referred in the Comprehensive Proposal for a Settlement of the Kosovo Status to Serbia's irreversible loss of effective government over Kosovo as the main reason why Kosovo should be an independent state. The agreement with Serbia must therefore reflect this new reality and not allow for Serbia to gain more power in Kosovo which could lead to a reversal of the new reality created by NATO's intervention and the UN's subsequent replacement and removal of Serbian government.

For Kosovo, a peace treaty in form of an international agreement with Serbia means first and foremost a full and unconditional, preferably formal, recognition of Kosovo by Serbia as an independent state. Several Kosovo politicians have expressed their expectation that the agreement will result in a mutual recognition of Kosovo and Serbia. Kosovo will want to ensure that it has exclusive jurisdiction over the whole territory and that Serbia is excluded from interfering in Kosovo's affairs. In addition, Kosovo has an interest in ensuring that the agreement will pave the way for Kosovo's full membership in the UN and other international organizations. It means the recognition by the five EU member states which so far have not recognized Kosovo and which would remove political obstacles to Kosovo's accession to the EU.

Kosovo has also an interest in preserving its territorial integrity and to ensure full and exclusive jurisdiction over all of its territory. This would include full sovereignty and control over its resources and assets such as the Gazivode Lake and the Trepca mines. Kosovo has an interest in avoiding the

⁷ Haass, R. (2018). *A world in disarray: American foreign policy and the crisis of the old order*. New York: Penguin Press.

establishment of an association of Kosovo Serb municipalities which would have executive powers which exceed local government functions. It has certainly no interest in an association which would have central government functions and powers and which could develop into a third layer of government with elements of territorial autonomy for the Serb majority municipalities.

Further to that, Kosovo has an interest in delineating the border with Serbia in a way that does not result in loss of territory. It will want reparations from Serbia for damages caused during the war and to resolve the issue of missing persons. Kosovo will also want a regulation of state succession issues especially in regard of property outside of Kosovo, debts and archives related to Kosovo in accordance with international law as well as compensation for pre-war social, health and pension insurances which were not paid out to Kosovo nationals.

In view of Kosovo's commitment to Western values and aspirations to fully integrate into Western institutions, Kosovo has an interest in ensuring that its policy preferences are aligned with those of the West not only in relation to Kosovo but also in view of West's strategic objectives concerning the Western Balkans and globally. Kosovo, which was 'liberated' by the West, whose independence was promoted and supported by Western states, and whose security depends on NATO and the West, has an interest in refraining from policies which may contradict Western values and interests in respect of Kosovo. This may narrow the range of options available to Kosovo but this is the price to be paid for being a member of the West.

2. SERBIA'S POSITION AND INTERESTS

Serbia's close relationship to Russia and its national and Slavic/orthodox policy preferences allow Serbia to pursue a policy which is opposed to Western and Kosovar values and interests in respect of Kosovo, as it has done historically. According to Serbia's president Vucic, Serbia wants a compromise solution which brings concrete benefits and which is face-saving for Serbia. However, such a compromise solution would not mean for Serbia to grant a formal recognition of Kosovo as an independent state. Serbia's preference is to obtain EU membership without recognizing Kosovo as an independent state. If Serbia has to grant a form of recognition due to external pressure, it will

try to avoid an explicit recognition and it will prefer a recognition of Kosovo at most as a de-facto regime, and definitively not as a state.

Serbia has also an interest in keeping as much power and influence in Kosovo as possible. This could be achieved by a partitioning of Kosovo whereby Serbia would take the municipalities in the north of Kosovo. It has an interest in strengthening the position of Kosovo Serbs in Kosovo, for example through an association of Serb municipalities which has not only executive powers beyond the level of local government but which might also have substantial territorial autonomy. The ideal situation for Serbia would be to partition Kosovo and to get an association with territorial autonomy for the remaining Serbs in Kosovo. Serbia will also want to gain preferential treatment for the Orthodox Church in Kosovo and its properties, preferably some form of extraterritorial status. It will also want to continue exercising influence over Kosovo's institutions through local Serb parties which could use existing constitutional mechanisms to block developments which are against Serbia's interests, such as the creation of a Kosovo army.

In addition to avoiding Kosovo's recognition as an independent state, Serbia has an interest in further weakening Kosovo's international standing as a state and in preventing Kosovo's accession to international organizations. The best option for Serbia would be to get into the EU without having Kosovo recognized as a state, to maintain influence in Kosovo to obstruct Kosovo's internal consolidation as a state, and to weaken, if not reverse, Kosovo's position in the international arena. Serbia has certainly no interest in addressing issues related to war damages, missing persons and state succession issues.

3. STATE INTERESTS OR POLITICAL LEADERSHIP INTERESTS?

A recent research conducted by the Research Institute of Development and European Affairs and the Balkans Policy Research Group indicated that there is a certain willingness especially among Serbian political leaders to consider a 'do nothing, wait and delay' approach in respect of talks with Kosovo. For Kosovo, this is not an option as it will keep Kosovo's status as an internationally recognized state in limbo. Unfortunately, this option seems to be as realistic as it is a serious threat to Kosovo's sovereignty. The Balkans and the EU are witnessing a power shift in favor of Russia

relative to the US. The more the US confronts its EU partners with controversial policies, such as the withdrawal from the Iran deal, and by imposing tariffs on EU partners, the more there may be the tendency of certain EU states to consider if not bandwagoning with Russia, at least to adopt a more Russia-friendly foreign policy. Some former Eastern European countries are already adopting a pro-Russia attitude, such as Hungary, and the new Slovenian government might follow suit. Italy, which is an important factor in the Balkan, is openly adopting a more pro-Russia attitude within the EU. Serbia, which is the most pro-Russian country in the Balkans, might see this as an opportunity to delay talks with Kosovo until a new power structure is in place which will favor Russia's and Serbia's position in relation to Kosovo. In addition to the structural shifts, Vucic might have no real interest in reaching an agreement with Kosovo because of domestic politics. Vucic has to expect that whatever agreement he reaches on Kosovo, it will likely cost him votes and endanger his prospects for re-election and perhaps even pose a risk for his future political career.

Vucic's calculation has also to consider the trade-offs involved, i.e. whether the membership in the EU is worth giving up on Kosovo. Vucic understands that Kosovo is effectively lost but it is still a good card to play against the EU and perhaps other states to extract benefits. Brexit, the Greek financial crisis, now also Italy with a financial and very likely political crisis, Spain's problems with Catalonia, the rise of anti-EU authoritarian regimes in Eastern Europe, and the weak consensus between Germany and France about the EU's future reforms, are signs that the EU is facing serious problems. Even if membership in the EU is still attractive for Serbia, it would not be rational to reach an agreement too quickly as otherwise Serbia would give up its card which it can use to extract benefits from the EU. It would make more sense for Vucic to pretend that negotiations will happen and to talk about certain aspects but without getting to the point of reaching an agreement. With this he will avoid the perception that Serbia is deliberately blocking an agreement and at the same time he will buy time. Vucic would look like the 'good cop', while Dacic and others could continue their obstructive policy towards Kosovo. At the same Serbia could assess developments in the EU and global and regional power shifts to what extent they are getting in favor of Serbia. Even if talks begin, it is not for granted that Serbia will not walk away from the talks when its interests require so. Serbia has a track-record of refusals to sign international agreements in respect of Kosovo despite massive international pressure, such as at the Rambouillet conference or the Vienna talks.

A similar logic might apply to Kosovo's political leadership. The Damocles Sword hanging over the heads of Kosovo's most senior political leadership is the Kosovo Specialist Chambers. Almost all current key leaders are mentioned in the 'Marty Report' as suspects for having been involved in serious crimes during the war. The present government constellation, which includes all former Kosovo Liberation Army (KLA) fractions, is in the best position to reach an agreement with Serbia which may require political compromises. Such an agreement is not conceivable with any other political party. This was proven in the case of the demarcation agreement with Montenegro. LDK was not able to get this agreement through parliament for ratification. The same agreement, with some cosmetic adjustments, was pushed through parliament by the present government with the active support of the Prime Minister, who was a firm opponent of the same agreement. The message was clear: only if KLA related political parties are in power there is a chance for important policy decisions to be made and to be implemented. Nobody else can get things done in Kosovo. However, the moment an agreement is reached with Serbia, there will be no need for this government and the Kosovo Specialist Chambers can do its job without causing much political harm and the prospects for indictments increase. It is therefore, from a rational perspective, in the interest of Kosovo's political leadership to stay as long as possible in power and to remain important and needed for reaching an agreement with Serbia and with this to avoid the Kosovo Specialist Chambers. The best approach for this would be to delay an agreement. The 'good cop, bad cop' game played by Vucic and Dacic seems to be replicated by Thaci and Haradinaj although less accentuated than in Serbia. While Thaci publicly calls for a compromise solution with Serbia and presents himself as a regional statesman who wants reconciliation and stable relations with Serbia, sometimes at the expense of Kosovo's interest, Haradinaj seems to try to slow down the technical dialogue with Serbia and puts on more firm tones as regards the final agreement ('no correction or changes of borders', or 'no agreement unless there is mutual recognition').

Despite all the lip-service by Vucic and Thaci for a quick compromise solution, an assessment of their interests does not support what they say in public. While it is understandable that Serbia would want to delay an agreement, a similar logic from the Kosovar leadership would be highly irresponsible and a threat to Kosovo's sovereignty from 'inside'.

III. OPTIONS

A number of different options were mentioned and discussed in public. The present paper will look at those which have received a high degree of attention and which could be extended and adapted to the Kosovo-Serbia conflict because of a similar problem structure and political constellations. These options include the ‘Croatian-Yugoslav/Serbian’ model, the ‘German’ model, the ‘Partition/Exchange of Territory’ model, the ‘British-Irish’ model, and the ‘South Tyrol’ model.

1. CROATIAN – YUGOSLAV/SERBIAN MODEL

Overview

The ‘Croatian-Serbian’ model might be attractive as it relates to two former entities of the former Yugoslavia and which could, by extension, be applied to Kosovo and Serbia. It refers to the Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia (1996). Following the Dayton Accords (1995) and with the end of hostilities, Croatia and the Federal Republic of Yugoslavia (FRY), which is today the Republic of Serbia, agreed to ‘respect each other as independent, sovereign and equal states within their international borders’ (Art. 1). The key elements of the agreement are the following:

- (i) Croatia and FRY agreed to respect the sovereignty, territorial integrity and independence of the other in accordance with international law;
- (ii) They recognize each other’s continuity as a state;
- (iii) The regulation and delimitation of their border should be made by agreement;
- (iv) They agree to establish full diplomatic and consular relations;
- (v) They commit to address missing persons, the return of refugees, property rights issues, amnesty, social, health and pension insurance, the status of Prevlaka and state succession issues through subsequent agreements and policies.

Assessment

This option includes all aspects which are in Kosovo's interest. Adopting this model would mean that Kosovo would be formally recognized by Serbia as an independent state and it would create internationally binding commitments to resolve by subsequent agreements outstanding issues which are in Kosovo's interest (border, missing persons etc.). For Kosovo, this would be the best possible option.

However, it is very unlikely that Serbia would accept such an agreement, unless significant concessions are made to accommodate Serbian interests in Kosovo. The concessions demanded by Serbia could include an association/community of Serb majority municipalities with executive powers not limited to the municipal level and robust safeguards for the Orthodox Church, in addition to the rights and privileges already granted to the Serb community under the Constitution. Without such concessions it would hardly be an agreement which would bring 'concrete benefits' to Serbia and offer it a face-saving way out of the Kosovo problem. This would be the price to be paid for Kosovo in return for explicit recognition by Serbia.

2. GERMAN MODEL

Overview

The 'German' model attracted some important attention in public as a possibly viable option for normalizing relations between Kosovo and Serbia. It refers to the Agreement on the Foundations of Relations between the Federal Republic of Germany and the German Democratic Republic (1972). After World War II Germany was divided into two entities, i.e. the Federal Republic of Germany (West Germany) and the German Democratic Republic (East Germany). West Germany maintained that it was the sole representative of the German people and regarded East Germany as a satellite of the Soviet Union refusing to recognize it as an independent state. The agreement marks a shift in West German policy towards East Germany which was so far characterized by the 'Hallstein' doctrine. West Germany considered every recognition of East Germany by another country as an

unfriendly act and reserved the right to take retaliatory measures against the recognizing country. West Germany's new 'East Policy', which abandoned the 'Hallstein' doctrine, intended to achieve 'change through rapprochement' and to ease tensions with the Eastern bloc, and in particular East Germany.

West Germany and East Germany agreed to:

- (i) Establish good neighborly relations based on the principle of equality
- (ii) Respect the purposes and principles of UN Charter
- (iii) Confirm the inviolability of their borders and mutual respect for their territorial integrity;
- (iv) Represent themselves in international relations;
- (v) Respect each other's jurisdiction which is limited to their respective territory
- (vi) Respect the independence of both states in their internal and external affairs
- (vii) Exchange permanent representatives
- (viii) Address border demarcation
- (ix) Facilitate the solution to questions concerning Berlin and travel between the two entities.

With this agreement West Germany did not extend a formal recognition to East Germany. It was at best a recognition of the other's jurisdiction or as a de-facto regime. On the one hand, West Germany had constitutional constraints to formally recognize East Germany. On the other hand, West Germany did not want to go further than granting a 'de-facto' recognition of East Germany because it wanted to extract further concessions from East Germany in subsequent talks in return for a formal 'de-jure' recognition at a later stage. The agreement also did not address issues related to citizenship and state succession in order to avoid an implied recognition of East Germany by West Germany. In a side letter submitted before the signing of the agreement, West Germany reserved the right to pursue national unification with East Germany irrespective of this agreement.

Although West Germany did not formally recognize East Germany, the agreement paved the way for West and East Germany to become members of the UN as the agreement provided that both entities would represent themselves in international relations.

This agreement was only possible because the Soviet Union was on board. West Germany had made arrangements with the Soviet Union which opened the door for the agreement with East Germany. In fact, the key aspects of the agreement were already negotiated and agreed upon between West Germany and the Soviet Union before formal talks with East Germany had begun. West Germany's policy change towards East Germany was not a matter of idealistic inspiration but a reflection of a realist assessment of the political powers on the ground. East Germany was gaining more and more international recognition and West Germany's policy to isolate East Germany was about to falter. The more East Germany got consolidated internationally as a state, the less power West Germany could project and the risk was real that the 'Hallstein' doctrine would fade away as a West German policy failure.

Assessment

Adapting this model to the Kosovo-Serbia situation could have following implications for Kosovo:

- (i) Kosovo would preserve its territorial integrity subject to a border delineation/demarcation agreement to be negotiated subsequently with Serbia.
- (ii) Kosovo would not be recognized by Serbia as a state because a formal and explicit recognition would not be part of this agreement. Kosovo could claim implied recognition by Serbia but this would be left open to interpretation and certainly be denied by Serbia.
- (iii) It is not guaranteed that Kosovo would get membership in the UN. The agreement between West Germany and East Germany worked for the two entities to get into the UN because their interests and the interests of the two superpowers, i.e. US and the Soviet Union, were aligned. The Soviet Union had already given its green

light to this agreement even before it was signed and neither of the superpowers had an interest in vetoing the admission of the two German states to the UN. The constellation of interests is not the same in the case of Kosovo. Kosovo's primary obstacle to admission to the UN are China's and Russia's veto. Even if Kosovo and Serbia reach an agreement, China and Russia will not be bound by it. China and Russia could still claim that Kosovo is not a state as Serbia has not extended a formal recognition. Apart from that, Russia has no interest in losing Kosovo as a bargaining chip in respect of Crimea. Vetoing Kosovo's admission to the UN keeps Kosovo on the diplomatic table for eventual concessions by the US and the EU for Crimea. China could have the same considerations due to Taiwan but it also could keep Kosovo as a bargaining chip for other disputes with the US. It would be necessary to have agreement at the level of the permanent member of the Security Council to enable Kosovo to get admission to the UN. Neither Russia nor China would be willing to give their consent unless in return for some concrete political benefit for them.

- (iv) It is not guaranteed that Kosovo would get membership in the EU. Even if Kosovo and Serbia reach an agreement it does not mean that all EU member states will agree to Kosovo's membership in the EU. Spain's objection to Kosovo as a state is not necessarily related to Serbia's non-recognition of Kosovo. Spain's problems with separatist movements in Catalonia and perhaps other parts of Spain (e.g. Basques) are a domestic problem which does not allow it to recognize Kosovo whatever the differences may be between Kosovo and Catalonia. Spain's attitude towards Kosovo at the Sofia Summit in May 2018 is indicative of this. Spain's argument not to recognize Kosovo is stronger if Serbia has a chance to normalize relations with Kosovo without formally recognizing it. Other EU non-recognizing states may have similar motives to reject Kosovo's membership in the EU even if Kosovo and Serbia reach agreement.
- (v) The establishment of the Association is already agreed upon and it is to be expected that Serbia will insist in it whatever the agreement with Kosovo. In view

of Vucic's statement that Serbia will want to have concrete benefits from an agreement with Kosovo, an agreement following the German model is not a guarantee that Serbia will not demand more powers for the Association, perhaps even some form of territorial autonomy for Serb dominated municipalities.

- (vi) The agreement would not address sovereignty-related issues, such as succession, which are in Kosovo's interest. It is also likely that sensitive issues, such as border delineation/demarcation and missing persons will be left out for subsequent agreements, if any.

The implications for Serbia would be much better:

- (i) Serbia would fulfill the EU's demand for an agreement with Kosovo as a prerequisite for membership in the EU without having to formally recognize Kosovo.
- (ii) The political costs for Serbia would be relatively low as its leadership could claim that Serbia has not recognized Kosovo and that it has not given up on Kosovo. On the other hand, Serbia could move faster towards EU membership and eventually join the EU without formally recognizing Kosovo.
- (iii) Serbia could still claim that Kosovo is not a state as other countries, such as Russia and Spain, in alignment with Serbia or acting out of self-interest would create obstacles for Kosovo to join the UN, the EU and other international organizations.
- (iv) Serbia would retain influence in Kosovo through Kosovo Serb political parties and relevant constitutional mechanisms which these parties' possibilities to block political processes, which are not in Serbia's interest. In addition, if the

Association is established, Serbia's influence could be even stronger depending on the powers which will be accorded to the Association.

Although praised as a model, which could be adopted for an agreement between Kosovo and Serbia, this model would not suit Kosovo's interests and actually give Serbia advantages which would by far exceed those for Kosovo. In terms of relative gains, this model is not optimal for Kosovo, in fact it is dangerous. This model could only work if agreement is reached between the permanent members of the Security Council not to obstruct Kosovo's admission to the UN, and if there is consensus among all EU member states not to reject Kosovo's membership in the EU (provided it fulfills the membership requirements which are independent of Kosovo's status as a state).

3. PARTITION AND EXCHANGE OF TERRITORY

The idea of a partitioning and possibly exchange of territory began to make headlines in early 2018 when publicly suggested by Serbia's foreign minister Dacic as the 'only realistic and long-term solution' to the conflict between Albanians and Serbs. While Vucic did not publicly distance himself from this proposal, Kosovar media reported that Kosovo's President Thaci and Albania's Prime Minister Rama might, at least, consider this option. Public discussion of partition and exchange of territory intensified in July 2018. Political leadership in Serbia and Kosovo's President Thaci seems to seriously consider this option (although he uses language such as 'correction of borders' which in the end will mean partition and exchange of territory). Albanian parties in the Presheva Valley have also expressed their desire to join Kosovo, which is supported by some Kosovo Albanian politicians (e.g. Avdullah Hoti (LDK)). The majority of Kosovo Albanian political parties, and especially Prime Minister Ramush Haradinaj, oppose the idea of partition. So far, neither the US nor certain EU member states, among them primarily Germany, seem to agree to a partitioning and exchange of territory. The EU remains silent in this matter.

This option could mean the partitioning of Kosovo alone or in combination with an exchange of territory with Albanian dominated parts of Serbia (Presheva Valley) as a form of border adjustment

between Kosovo and Serbia. Partitioning could mean that the territory of Kosovo north of the river Ibar would be ceded to Serbia, and if exchange of territory is included, that the Presheva Valley would become part of Kosovo. The territories in question are roughly of the same size, i.e. the northern municipalities of Kosovo with ca. 1007 km² and the Presheva Valley with ca 1200 km². If perhaps coupled with safeguards to protect the interests of the Orthodox Church in Kosovo, Serbia could formally recognize Kosovo as an independent state.

The idea of partitioning Kosovo is an idea which was actively promoted by Serbia since the mid 1980's. Prominent international personalities also showed sympathy for this idea, such as the former British Ambassador to Yugoslavia Sir Ivor Roberts and the commander of KFOR, Sir Mike Jackson.⁸ The International Crisis Group stated in 2010 that 'Pristina will not accept partition but gives some hints it might consider trading the heavily Serb North for the largely Albanian-populated parts of the Presheva Valley in southern Serbia.', by implying that the implications of an autonomy for the northern Serb dominated municipalities for the overall stability and effective functioning of Kosovo could outweigh the risks and costs associated with an exchange of territory with Serbia in return for full recognition.⁹

Legal Aspects of Partition and Exchange of Territory

An exchange of territory would be legally possible in form of an international agreement between two sovereign states provided this agreement would not violate ius cogens norms. In 2016, The Netherlands and Belgium signed a border correction treaty with which they agreed to exchange territory and in this way to adjust their border. With this, the two EU member states settled peacefully an ongoing territorial dispute. In this context, the Belgian foreign minister stated that "the agreement shows that borders can also be exchanged peacefully." Even if the tract of land in question is not vast (equivalent to 23 football fields), it shows that the exchange of territory, in principle, is an acceptable and workable practice even in the EU and between EU member states. The exchange of territory between The Netherlands and Belgium does not have the political implications and complexity of an exchange of territory between Kosovo and Serbia, but it shows

⁸ Ker-Lindsay J. (2011). Principles and the Partition of Kosovo. *Peace Review*, 23 (2), 228-234.

⁹ International Crisis Group (2010). Kosovo and Serbia after the ICJ Opinion. Europe Report N°206.

that legally it can work. The conclusion of such agreement would imply Serbia's recognition of Kosovo as an independent state because the exchange of sovereign territory is only possible between sovereign states. Such agreement would therefore resolve the problem of recognition or not by Serbia. *Ius cogens* norms are peremptory norms in international law which prevail over agreements reached by sovereign states. These norms include the prohibition of aggression, the prohibition of crimes against humanity and other systematic violation of human rights. Provided the exchange of territory is designed and implemented in a way that (i) there would be no forcible transfers of populations, (ii) acquired rights of individuals living in the territories which are subject to the exchange would be protected, (iii) the affected individuals would have a choice to retain their existing nationality or acquire the nationality of the other state, and (iv) the exchange of territory does not diminish human rights guarantees and legal protection mechanisms, such agreement would not be in violation of international law. Even if Kosovo's current borders reflect the international law principle of *uti possidetis* which was applied to all entities of the former Yugoslavia upon its break-up, this principle does not prevent sovereign states to alter the border by agreement and exchange territory.

Arguments for Partition and Exchange of Territory

The idea of partitioning Kosovo and exchanging territory with Serbia highly controversial. On the one hand, there are some arguments made in favor of partitioning and exchange of territory. In 2000 John Mearsheimer made the 'case for partitioning Kosovo'.¹⁰ He suggested that 'NATO should pursue a settlement that partitions the province, creating an independent Albanian Kosovar state. This new state would control most of current Kosovo, while the Serbs would retain a slice of north and northwestern Kosovo. The Albanian-controlled portion could remain independent or unite with Albania if it chose'. He considered the option of the US working 'to reconcile the Kosovar Albanians and the Serbs to living together in a multiethnic democracy'. However, for Mearsheimer this would be a 'pipe dream' because history would not provide an example where ethnic groups agreed to share power in a democracy after a large-scale civil war. Such wars would end 'only with a dictatorship that restores order by the knout, or with partition'. Mearsheimer's key point was that 'ethnic separation breeds peace, while failure to separate breeds war'. Separating Albanians and Serbs and giving each of them what they believe is their territory would offer better incentives for real peace and

¹⁰ Mearsheimer J. (2000). The Case for Partitioning Kosovo. Carpenter T.D. (Ed.). *NATO's Empty Victory: A Postmortem on the Balkan War*. Washington D.C., 133-138.

reconciliation than trying artificially to make them live together which is only possible due to the presence of a NATO force on the ground. Mearsheimer also points out that ‘some borders are untenable and preserving them causes conflict, not peace’.

A partitioning of Kosovo and an exchange of territory could be a face-saving solution for both Serbia and Kosovo.¹¹ Retaining the northern part of Kosovo would make it much easier for Serbia to extend formal recognition to Kosovo than if its leaders would have to justify to their public why they are giving up a Serb dominated territory in Kosovo and still open the door for Kosovo’s full independence. Kosovar leaders could justify the loss of the northern part with the argument that in return an Albanian dominated territory has joined Kosovo. The Constitution could be changed to reflect the new reality while still maintaining constitutional safeguards to protect the human rights and community rights of the remaining Serbs in line with European human rights standards. Both sides could also make the argument that an exchange of territory would come close to restoring the territory of Kosovo as it existed originally. It was only at the end of World War II that Yugoslav leadership attached Leposavic, which is today among the largest of the northern Serb dominated municipalities to Kosovo, and carved out what today is known as the Presheva Valley to attach it to Serbia in order to change the demographic composition of Kosovo.

The point could also be made that a partitioning of Kosovo would just reflect and legalize a political reality on the ground which was created by the international community back in 1999. The partitioning of the northern part of Kosovo happened in fact in 1999 when NATO forces prevented the Kosovo Liberation Army from entering the territory of Kosovo north of the Ibar and created there a ‘safe haven’ for Serbs fleeing from the southern parts. NATO forces also did not intervene to stop the forceful removal of Albanians by the Serbs in the north, as much as they did not prevent the same from happening to the Serbs in the south.¹² Serbia continuously maintained parallel government structures in the north despite NATO and UN presence. In spite of efforts to disband these parallel structures and to integrate the Serbs in the north into Kosovo’s institutions, the territorial proximity to Serbia and a weak Kosovo government penetration in the north would allow Serbia to quickly regain control of the north if political circumstances allow or demand this.

¹¹ Ker-Lindsay J. (2011). *Supra* note 6.

¹² International Crisis Group (2005). *Bridging Kosovo’s Mitrovica Divide*. Europe Report N°165.

Arguments against Partition and Exchange of Territory

On the other hand, partition and exchange of territory are objected mainly for the following reasons.¹³

- (i) The states which promoted Kosovo's independence, i.e. the United States and its European allies, designed Kosovo as a multi-ethnic society and they have invested much in this idea. The Constitution defines Kosovo explicitly as a multi-ethnic society. The EU in particular went to great lengths after Kosovo's declaration of independence to give life to the idea of a multi-ethnic Kosovo by trying to integrate the northern municipalities into Kosovo's governance structures. Partitioning Kosovo along ethnic lines would destroy the idea of a multi-ethnic Kosovo and it would turn it into another Albanian state next to Albania. It could also be interpreted as a failure of the Western idea of multi-ethnic states and societies not only in Kosovo but in the Western Balkans.
- (ii) The Contact Group Guiding Principles of November 2005 make clear that there should be no return of Kosovo to the pre-1999 situation, no partition of Kosovo, no union of Kosovo with any or part of another country, and that the settlement needs to be acceptable to the people of Kosovo.¹⁴
- (iii) The Report of the Special Envoy of the Secretary-General on Kosovo's future status which was submitted to the UN Security Council in 2007 and which recommended supervised independence for Kosovo did not consider partition as an option.¹⁵ It only discussed Kosovo's return to Serbia, continuing international administration, and supervised independence as options. This implies that partition was ruled out as a

¹³ Independent International Commission on Kosovo (2000). *The Kosovo Report*. Oxford: University Press.

¹⁴ Kosovo Contact Group Statement, London, 31 January 2006. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf

¹⁵ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council. (<https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kosovo%20S2007%20168.pdf>)

matter of principle. As Kosovo's declaration of independence confirms that it is 'in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement'¹⁶ one could make the argument that Kosovo's Declaration of Independence rules out partition as well. Kosovo's Declaration of Independence is not just a 'political' declaration of independence. It has also legal implications as it constitutes a legally binding unilateral statement under international law on which other states have relied when recognizing Kosovo.¹⁷

- (iv) There are concerns that population transfers could follow, i.e. Serbs from southern Kosovo to Serbia or the northern part of Kosovo and Albanians from northern Kosovo to move south of the river Ibar. This would also raise questions about the rights of the Serbs remaining in Kosovo and of the Albanians remaining in Serbia.
- (v) A partitioning of Kosovo would threaten the economic viability of Kosovo because vital assets, such as the Gazivode Lake and some of Trepca's mines, could then belong to Serbia.
- (vi) Partitioning Kosovo along ethnic lines could set a dangerous precedent for other countries which have similar ethnic problems, such as Macedonia and Bosnia-Herzegovina. If the international community accepts partitioning along ethnic lines in Kosovo, what would speak against this in the case of Macedonia and Bosnia-Herzegovina? A partitioning of these two countries could destroy the order created in the Western Balkans since the Dayton Agreement and perhaps lead to new conflicts.

¹⁶ Kosovo Declaration of Independence of 17 February 2008 (https://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf).

¹⁷ Letter from US President Bush to President Fatmir Sejdiu of Kosovo Recognizing Kosovo as an Independent and Sovereign State. (<https://www.gpo.gov/fdsys/pkg/WCPD-2008-02-25/pdf/WCPD-2008-02-25-Pg236-2.pdf>).

Discussion

These arguments should be carefully considered and discussed. *First*, while Kosovo is a multi-ethnic society on paper, in reality it is an ethnically segregated society. While there are here and there examples of Serbs and Albanians living together, in general both groups are separate with little interaction between them. The best indicator for this is that young Albanian and Serb Kosovars do not speak each other's language and have to communicate in a foreign language to understand each other. If language is a barrier, then knowledge of each other's culture, literature and history is in an even worse state. However, this does not mean that Albanians and Serbs would not be able to form a multi-ethnic society but this requires that Serbia agrees to recognize Kosovo, to abandon its policy of obstructing Kosovo's sovereignty and to send a clear signal to Serbs in Kosovo that they belong to Kosovo and that their future is in Kosovo as an independent state.

Second, it is not clear how much speculations about possible population transfers and a new conflict are based on proper polls and to what extent they are advanced as strategic arguments. On the one hand, the majority of Kosovo's Serbs lives south of the Ibar and they do not seem to support partition. Some local Serb politicians have already announced a massive exodus of Kosovo Serbs in case Kosovo is partitioned. Other Kosovo Serb politicians, however, have announced a Serb exodus whatever the agreement will be. On the other hand, the massive population transfers have already happened in 1999 and shortly thereafter with Serbs leaving the southern part of Kosovo and fleeing north of the Ibar and Albanians from the north fleeing southwards. Serbs and Albanians who have remained are unlikely to create new massive population movements for the simple fact that those who wanted to leave have already left and those who decided to stay are likely to stay whatever agreement Kosovo and Serbia will reach. If Kosovo and Serbia agree on partition and exchange of territory there is a very low chance of a new conflict between them but it does not rule out the option of internal conflicts in Kosovo as a result of an internally non-consensual partition and the ensuing shift in internal power relations. However, an exchange of territory might mean that Kosovo would get Serbia's military base near Bujanovac and perhaps even threaten Serbia's control over Pan-European Corridor X which connects Serbia southwards with Macedonia and Greece, and northwards with Croatia, Slovenia and Austria. This might be a point of future conflict and one could ask why Serbia would allow Kosovo to take over these two strategic assets. At this point, and in view of the above, it is simply unpredictable what chain of events and unintended consequences

could be caused by partition/exchange of territory, and what kind of political dynamics they will trigger.

Third, Kosovo's economic viability and normal livelihood only partially depend on the few assets which could fall to Serbia. Three out of five Trepca mines are located south of the Ibar and would remain with Kosovo. However, revitalizing Trepca, whether only the mines south of the Ibar or all of them, will require significant amounts of fresh capital and efficient management structures which are not in place now. It will also take time until the impact of revitalization efforts, even if Kosovo starts with them today, will positively affect Kosovo's economy. What Kosovo needs are substantial economic, legal, educational and political reforms to attract and retain investment and to generate domestic production and consumption driven by production and not remittances or third party donations. These reforms do not depend on Trepca. The weak spot for Kosovo is the Gazivode Lake which supplies Kosovo with water for drinking, irrigation and the generation of electricity. If this lake falls in its entirety to Serbia, it would be able to exert pressure on Kosovo by diverting or blocking the flow of water to Kosovo that may keep the doors opened for further tensions or even armed conflict between Kosovo and Serbia. In terms of geopolitical economic viability, Kosovo therefore insists in having ownership and control over the Gazivode Lake. But even if Kosovo owns and controls the lake, this would not prevent Serbia from 'using the water source from the water table in their jurisdiction on the Lake of Gazivode or from Ibar River upstream area to the Montenegro state border', and to divert the water volume to Sandzak (Tutin, Novi Pazar and Raska).¹⁸ Serbia seems to have the upper hand as long as it controls the incoming water flow which feeds the Gazivode Lake regardless if Kosovo owns and controls the lake. However, if Serbia would stop the water, it would also cut off the Serbs in Kosovo's northern municipalities from access to the water, which would be politically and financially very costly for Serbia. Serbia would have enormous difficulties in justifying why it violates the Kosovo Serbs' right to water (UN General Assembly resolution 64/292 of 28 July 2010) while it pretends to protect their interests. Serbia could also incur liability under international law on the use of transboundary watercourses in an 'equitable and reasonable manner', the protection of international watercourse ecosystems, and the duty to prevent the causing of significant harm to other watercourse states. The problem of the Gazivode Lake and

¹⁸ Mijacic Lj. (2018). Lake of Gazivoda a Bed of Nails. (<https://mljubisa.wordpress.com/2018/07/31/lake-of-gazivode-a-bed-of-nails/>).

the water supply from Serbia to Kosovo is therefore very complex and will require a comprehensive agreement on transboundary water management.

Fourth, it should be carefully discussed if the partitioning and exchange of territory in Kosovo would indeed be a precedent for other countries in the Western Balkans. The fear is that following Kosovo's partition, Serbs and Croats in Bosnia-Herzegovina would claim secession and unification with Serbia, respectively Croatia, which would eventually lead to the dissolution of Bosnia-Herzegovina and perhaps even a new conflict between Croats, Muslims and Serbs. Albanians in Macedonia could also claim unification with Albania or Kosovo. There are those who claim that partitioning Bosnia-Herzegovina into three separate ethnic states might perhaps be a better solution¹⁹ than the status quo since even two decades after the Dayton Accords Bosnia and Herzegovina is a 'failed state in the heart of Europe' due to the inability of Serbs, Croats and Muslims to overcome their disagreements²⁰. Irrespective of that, the case of Kosovo is about the relations between two states, one of which, i.e. Kosovo, is recognized as a state by more than half of the members of the UN but is contested by the state from which it has separated i.e. Serbia. The partitioning and exchange of territory would be by agreement between two states. Macedonia and Bosnia-Herzegovina are different cases. In the case of Bosnia-Herzegovina, the Dayton Agreement of 1995 and UN Security Council resolution 787 (1992) confirm the territorial integrity of the Republic of Bosnia and Herzegovina and preclude any unilateral secessions. In Macedonia, the Ohrid Agreement of 2001 granted Albanians more rights in return for them accepting the territorial integrity of Macedonia. In both cases there are agreements in place which have resolved a conflict and where the parties have agreed to respect the territorial integrity of the respective state. In the case of Kosovo and Serbia both parties still have to agree on how to resolve their outstanding conflict in a manner that fits Kosovo's special situation. However, Kosovo's partitioning/exchange of territories could create the perception of fundamentally changed political circumstances which could trigger demands for the revision of the existing political and legal arrangements in respect of Bosnia-Herzegovina and Macedonia. In addition, even if, from a legal perspective, Kosovo would not be directly a precedent for other hot spots in the Western Balkans, partitioning/exchange of territory in respect of Kosovo would mean a substantial deviation from current the US and European policy of preserving multi-

¹⁹ Mearsheimer J. and Pape R. (1993). A Partition Plan for Bosnia. *The New Republic*, June 14, 1993, pp. 22-28

²⁰ The Institute for Stabilization and Transition (2017). Bosnia and Herzegovina: Failed State in the Heart of Europe. <http://www.stabilizationandtransition.org/pdfs/IST-1508165727.pdf>.

ethnic and liberal democracies in the Western Balkans. This could be used by Russia as an argument to legitimize its policy in relation to Crimea, South Ossetia and Abkhazia to undermine Ukrainian and Georgian sovereignty, a policy which is opposed by the US and the European Union. Turkey may also have an interest in supporting partition in order to create spill-over effects in the Sandzak, a Bosnian-Muslim populated territory in Serbia, and to extend its influence from Kosovo through the Sandzak to Bosnia-Herzegovina. This could easily develop into a security dilemma for Serbia and Turkey which could also entangle Kosovo, the region and the EU into a security competition with uncertain outcome.

Concluding Remarks on Partition/Exchange of Territory

Partitioning/exchange of territory is the most controversial and dangerous option due to all the uncertainties surrounding it and the vast potential for adverse and unintended consequences. It will be a particularly dangerous and adventurous option for Kosovo if it pursues it without the consent of the US and its Western allies who may oppose this option in view of their global and regional strategic interests. Kosovo cannot afford to alienate its Western allies as this would not only affect its security but also its state identity and its Euro-Atlantic political orientation. The idea of a multiethnic and democratic Kosovo within its current borders is grounded in current Western interests and values and makes Kosovo part of the West. It motivated not only NATO's humanitarian intervention in 1999 but also US and European support for Kosovo's independence. While a partition/exchange of territory looks simple and attractive, and perhaps even a 'patriotic' solution, Kosovo's leadership should be careful with this due to its uncertain implications for Kosovo's citizens and the region.

4. BRITISH – IRISH MODEL

Overview

In 1998 the conflicting parties in Northern Ireland concluded a Multi-Party Agreement which established a new set of arrangements for self-government in Northern Ireland, for relations between Northern Ireland and the Republic of Ireland, for relations between Northern Ireland and Great Britain, and for relations between the United Kingdom and the Republic of Ireland. The Multi-Party Agreement was endorsed by the United Kingdom and Ireland as a bilateral international agreement which entered into force in December 1999.

The essential feature of this agreement is that it is based on the principles of self-determination and consent and that there is no 'longer any question of an absolute or territorial British claim to sovereignty, without reference to the wishes of the people' in respect of Northern Ireland.²¹ The agreement combines elements of internal self-determination with those of external self-determination.

In regard of internal self-determination, the agreement grants Northern Ireland extensive self-government and a set of new institutions which embed the different actors into a cohesive governance structure. An Assembly exercises legislative powers over devolved competencies and an Executive Committee of Ministers functions as the government of Northern Ireland. The principle of 'parallel consent' for important decisions makes sure that both parties in Northern Ireland have a say and are equal in terms of power. A North-South Ministerial Council is established to facilitate consultation and cooperation between Northern Ireland and the Republic of Ireland, while a British-Irish Council establishes cooperation between Northern Ireland and other devolved administrations in the United Kingdom, such as Scotland and Wales. On top of that, a British-Irish Intergovernmental Conference of the governments of the United Kingdom and the Republic of Ireland deals with all matters of bilateral interest in respect of Northern Ireland which are not devolved powers.

²¹ Ahern B. (1998). The Good Friday Agreement: An Overview. *Fordham International Law Journal*, 22 (4), 1196-1199.

Most importantly, the agreement recognizes the right to external self-determination of the people of Northern Ireland to decide whether they want to stay in the United Kingdom or to join the Republic of Ireland. The United Kingdom and the Republic of Ireland specifically agreed to

- (i) recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
- (ii) recognize that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;
- (iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;
- (iv) affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

- (v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;
- (vi) recognize the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

Assessment

This model could be adapted to relations between Kosovo and Serbia as an alternative to immediate partition and exchange of territory. The model could work in the following way:

- (vii) Instead of exchange of territory, the northern municipalities of Kosovo and the Presheva Valley would be granted reciprocally territorial autonomy with devolved powers and new governance structures while remaining under the authority of Kosovo (i.e. the northern municipalities) and Serbia (i.e. Presheva Valley). Kosovo and Serbia would endorse this by way of a formal agreement and make the necessary constitutional changes to reflect this form of internal self-government.
- (viii) Kosovo's membership in the UN would be a 'condition precedent' for the agreement (a) to give effect to arrangements on territorial autonomy and (b) to pave the way to Serbia's membership in the EU. If, under such an arrangement, Russia and China block Kosovo's membership in the UN, they will do more harm

to Serbia than to Kosovo because they will deny Serbs in northern Kosovo internal and external self-determination and block Serbia's membership in the EU.

- (ix) Arrangements in the agreement on the exercise of external self-determination, whether by the Serbs in northern Kosovo or by the Albanians in the Presheva Valley, would take effect only upon Serbia's and Kosovo's membership in the EU. As both Kosovo and Serbia would be in the EU, whatever choice the 'people' then make, they will stay within the EU and both countries will be required to ensure that such process is conducted in line with EU standards. If both countries are in the EU, the 'people' might even have no incentive to exercise their right to external self-determination as it would not matter much whether they are in Kosovo or in Serbia when they can enjoy the fundamental freedoms of free movement, employment and establishment across the EU. If the five non-recognizing EU member states block Kosovo's membership in the EU they will also harm Serb interests by denying the Serb population in northern Kosovo to join Serbia.

- (x) Granting territorial autonomy in the northern municipalities would make the association obsolete but Serbs in the south, like other minority communities, would still benefit from human rights and community rights as guaranteed by the Constitution as a constrain on democratic decisions by the Albanian majority. This may not be in the interest of the Serbs south of the Ibar but 'sacrificing the Serbs' in the south would be the price to pay if Serbia insists in territorial autonomy for the northern municipalities and a partition of Kosovo.

Serbia would fulfill its obligation to have a normalization agreement with Kosovo as required by the EU, and the Serbs in northern Kosovo would be granted internal and external self-determination. Serbia could save face by claiming that it has achieved territorial autonomy for Serbs in northern Kosovo with the possibility to join Serbia. Kosovo would have a seat in the UN and claim full international sovereignty, it would achieve territorial autonomy for the Albanians in the Presheva Valley with the option for them to join Kosovo when in the EU, and fulfill the requirement of

having a normalization agreement with Serbia as a prerequisite for EU accession. Due to internal self-determination in the north, Kosovo would not have to establish an association of Serb municipalities. Discussions about a partition/exchange of territory would be deflected by making both parties focus on EU integration. Perhaps there will be even no interest in partition when both countries are in the EU. The downside is that the idea of a multi-ethnic Kosovo would be abandoned if the option to exercise the right to external self-determination would be activated. In this case, the same concerns about Western interests and ideas will apply as in the partition/exchange of territory option with the difference that both Serbia and Kosovo are then members of the EU and hopefully both 'Western' states. This option is also dangerous for Kosovo if it agrees to such a solution without ensuring that it is recognized by Serbia and that it is a member of the UN and the EU before the right to external self-determination can be exercised.

5. SOUTH TYROL MODEL

Overview

The South Tyrol Autonomy model is widely praised as a success story of ethnic conflict resolution which provides for extensive autonomy for minorities while preserving the territorial integrity of the state.²² South Tyrol, situated in the north of Italy and on the border with Austria, is home to a predominantly German-speaking minority. South Tyrol, formerly part of Austria, was annexed by Italy and by the peace treaties of Saint-Germain-en-Laye (1919) and Rapallo (1920) awarded to Italy. After World War II, the Paris Conference of Foreign Ministers (1946) decided that South Tyrol should remain part of Italy.

The question of the German-speaking minority in South Tyrol was addressed in the Paris Agreement of 1947 between Austria and Italy (known as the 'Gruber – De Gasperi' Agreement). The agreement provided guarantees for education in the mother language, equality of German and Italian language

²² The following part draws from Pföstl E. Tolerance Established by Law: the Autonomy of South Tyrol in Italy. http://www.mcrg.ac.in/EURAC_RP2.pdf; Rautz. G. South Tyrolean Autonomy as a Model for Coexistence between Ethnic Groups. http://bgazrt.hu/dbfiles/htmltext_files/0/000000180/Gunther%20Rautz.pdf.

in public administration, bilingual place names, equal opportunities in the public sector and autonomy in respect of legislation and law-enforcement. However, Italy created the Italian dominated Autonomous Region of Trentino – South Tyrol, which included two provinces, (i) the Province of Bozen/Bolzano with a majority German-speaking population and (ii) the Province of Trento, with a predominantly Italian population. The Autonomy Statute for Trentino – South Tyrol, which was designed to implement the ‘Gruber – De Gasperi’ Agreement, entered into force in 1948. The Autonomy Statute failed primarily for two reasons to give full effect to the Gruber – De Gasperi’ Agreement. First, although legislative and executive powers were devolved to the provinces, the political and legislative power remained concentrated in the Italian dominated region and the Italian government. The Italian government also delayed the adoption of implementing regulations which were required to give full effect to the Autonomy Statute.

In view of these shortcomings, and Italy’s unwillingness to enter into negotiation with Austria on South Tyrol, Austria initiated before the United Nations the adoption of a UN General Assembly resolution in 1960 which required both parties to resume negotiations. The resolution also reaffirmed that Italy was required to grant autonomy for the non-Italian minorities population of South Tyrol and confirmed Austria’s role in this process. As a result, a committee of German-speaking South Tyroleans and Italians, and an Austrian-Italian committee of experts prepared a new agreement which consisted of 137 implementation measures (known as the ‘Package’). The ‘Package’ was transposed into the second Autonomy Statute which entered into force in 1972. In 1992 Austria formally submitted a ‘Declaration of Settlement of Dispute’ to the UN Secretary-General marking the formal settlement of the dispute between Austria and Italy on South Tyrol.

The second Autonomy Statute retains the regional structures but shifts political, legislative and executive power away from the region to the provinces. The legislative powers of the provinces cover economic, social and cultural areas, such as place names, urban and rural development, environmental protection, mining, agriculture, tourism, transport, primary and secondary education, trade and public health. Defense, foreign policy, public order and safety, monetary and fiscal policy, civil and criminal law remain powers of the central Italian government. The Italian government does not have the power to veto provincial legislation but it may request the Italian Constitutional Court for a review of the constitutionality of provincial acts.

The second Autonomy Statute provides for an ethnically divided governance system ensuring a strict institutional separation of the Italian and German speaking groups, complemented by the principles of coexistence, proportional ethnic representation and bilingualism. Positions in public offices and administration are made available in proportion to the size of the population of the linguistic groups. Every citizen is therefore required to declare officially to which linguistic group he/she belongs. The educational system is based on the principle of separation. There are separate primary and secondary schools for Italian and German speaking citizens, while instruction in the other language is mandatory. German and Italian have equal legal standing before public administration and courts. Place names and public broadcasting must also be bilingual. The provincial Assembly, which is the highest law-making body in the province, elects the provincial government. Both the Assembly and the Government must ensure proportional representation of the linguistic groups. The presidency of the Assembly rotates between representatives of the respective ethnic groups.

Although the Tyrolean model institutionalizes ethnically divided governance, and leads to ‘parallel societies’, its key element is power-sharing through

- (i) devolution of power from the center to the provinces and high degree of autonomy;
- (ii) joint exercise of government by all ethnic groups based on the principle of proportionate representation; and
- (iii) minority protection through minority veto for the protection of vital interests and constitutional law review mechanism.

Assessment

The ‘South Tyrol’ model has a number of advantages.

- (i) The model could be easily implemented in Kosovo. Kosovo’s constitutional and legal system have already incorporated devolution, power-sharing, minority protection and

proportionate ethnic representation. The powers granted to minority communities and Serb majority municipalities, including those agreed upon in the First Agreement on Principles Governing the Normalization of Relations and for the establishment of an Association/Community of Serb majority municipalities reflect the governance principles inherent in the South Tyrol model.

- (ii) While the Serb community would be granted extensive autonomy, Kosovo's central government would exercise 'sovereign' powers throughout Kosovo (defense, foreign policy, economic and monetary policy).
- (iii) Kosovo's territorial integrity would be preserved. Possible risks and unintended adverse consequences with 'spill-over' effects from a partition/exchange of territory would be eliminated. The idea of 'multi-ethnic' democratic societies would be preserved as a model for resolving ethnic conflicts in the Western Balkans.
- (iv) The present European security and political architecture of the Western Balkans, on which the European Western Balkans Enlargement strategy is built, would be preserved which would facilitate Kosovo's and the region's integration into the EU.

However, there are certain questions and aspects which need careful examination.

- (i) The first concerns the territorial scope of the autonomy. If the South Tyrol model is adopted, will it mean that the northern Serb majority municipalities have to be reorganized into a 'region' or 'province' with their own Assembly and Government? If so, what about the Serb population south of the Ibar? Or will the Association/Community of Serb majority municipalities exercise devolved powers for all Serb majority municipalities throughout Kosovo? The homogeneity and concentration of the German speaking population in South Tyrol allowed for a limited territorial scope of the autonomy. This would not be possible in Kosovo due

to the fact that Serb majority municipalities exist on both sides of the Ibar. The future Association/Community is therefore in a better position to safeguard the interests of the Serb community throughout Kosovo than a 'region' or 'province' north of the Ibar.

- (ii) The agreement on the establishment of the Association/Community of Serb majority municipalities, perhaps coupled with additional safeguards and implementing measures, would have to be elevated to the level of an international agreement between Kosovo and Serbia. The legal status of the Association/Community and the powers devolved to it would be internationalized. Serbia could be given legal mechanisms to act as guardian of the Serb community interests in Kosovo akin to Austria's role in relation to the German speaking community in South Tyrol, such as to submit violation of the agreement to the International Court of Justice. In return, Serbia would have to recognize (explicitly or impliedly) Kosovo as an independent state which would pave the way for Kosovo's membership in the UN and the EU.
- (iii) In order to neutralize a possible Russian and Chinese veto for Kosovo's membership in the UN, the agreement between Serbia and Kosovo would have to be endorsed by the Security Council. This would also terminate UN SC resolution 1244 (1999). An agreement endorsed by the Security Council would also have to be respected by the EU member states which so far have not recognized Kosovo. Kosovo must also avoid that the implementation of the agreement becomes a condition for Kosovo's membership in the UN. It took Italy two decades to get Austria to submit a Declaration of Settlement of Dispute to the UN. If something similar would be the condition for Kosovo to join the UN, Serbia could use this instrument to continue keeping Kosovo's international status in limbo.
- (iv) There must be constitutional and legal safeguards in place which, on the one hand, make sure that vital minority interests are protected (such as the present double-majority requirement for vital legislation) but which, on the other hand, ensure that

the minority does not abuse its power to block policies which are sovereignty related, such as foreign affairs and defense. The safeguards would have to be addressed at constitutional and legislative level when transposing the agreement with Serbia into Kosovo legislation. Serbia's role as a possible guardian of Serb interests in Kosovo must be limited to the legal aspects of the agreement excluding any possibility to interfere politically in Kosovo's internal affairs 'through the backdoor' of this agreement.

IV. CONCLUSION

As stated in the introduction, the purpose of the paper is to stimulate discussion and not to offer solutions or to make predictions about the outcomes of the upcoming talks between Kosovo and Serbia. It is important for Kosovo's political leadership to be aware of the advantages and disadvantages of these models and to have a clear idea about what are Kosovo's interests and how these models, or combinations thereof, might affect them. Discussing combinations of these options may also stimulate creative thinking and help in developing diplomatic flexibility and fallback options. Each option should be assessed objectively in view of how it will (i) affect Kosovo's sovereignty and identity as a Western state, and then (ii) how it could contribute to order and sustainable peace between Kosovo and Serbia. Whatever the final outcome of the agreement, if there will be any, it will only succeed if all sides make reasonable demands and not just pretend to have the willingness to reach an agreement. It will also require that the final agreement replaces UNSC resolution 1244 (1999); without that, there is the risk that the agreement will not produce the desired effect of Kosovo joining the UN, the EU and other international organizations. It will also be important that political leaders do not put their personal interests before the interests of the people they have to represent. In the end, the agreement will be about people and not only about territory. This will require not only Kosovar and Serb political leaders to act responsibly and with restraint but it will demand the same from political leaders of major powers which are involved and have an interest in normalizing relations between Kosovo and Serbia.