

The “Washington Agreement” Between Kosovo and Serbia

Background

On September 4, 2020, Kosovo’s Prime Minister Hoti and Serbia’s President Vučić signed and separately submitted to U.S. President Trump a document titled “Economic Normalization,” referred to as the “Washington Agreement.”¹ The Trump administration praised the Washington Agreement as a historic commitment and a “major breakthrough” in relations between Kosovo and Serbia.² This *Insight* explores the content and legal nature of the Washington Agreement, as well as subsequent political developments and implications of the Agreement for future relations between Kosovo and Serbia.

Kosovo declared independence in 2008, but Serbia does not recognize Kosovo as an independent state. Kosovo’s declaration followed an unsuccessful attempt by the United Nations (UN) to mediate a settlement between Kosovo and Serbia, known as the Comprehensive Proposal for a Kosovo Status Settlement.³ This document proposed independence for Kosovo, subject to safeguards for Kosovo’s minorities and temporary international supervision. Facing threats by Russia and China to veto a UN Security Council resolution to adopt this proposal, Kosovo opted to make a unilateral commitment to its terms when declaring independence.

Since 2011, the EU has mediated a dialogue between Kosovo and Serbia, after the International Court of Justice concluded that Kosovo’s declaration of independence did not breach international law.⁴ The purpose of the dialogue was to gradually normalize relations between Kosovo and Serbia by negotiating several technical agreements. The dialogue between Kosovo and Serbia was suspended in 2018 when Kosovo imposed

trade tariffs on Serbian goods. The EU has repeatedly made clear that one of the main prerequisites for Serbia and Kosovo to join the EU is a comprehensive and legally binding agreement on the normalization of their relations, but it has not clarified if this must include the recognition of Kosovo by Serbia. In July 2020, Kosovo and Serbia indicated their willingness to resume the dialogue. The Washington Agreement mediated by the U.S. was meant to promote that dialogue and economic normalization between Kosovo and Serbia as a major step toward future political normalization.

The Washington Agreement

The declarations submitted by Kosovo and Serbia are identical in wording and content, apart from their respective commitments regarding relations with Israel.⁵ Kosovo and Serbia committed to the following:

- To implement the Belgrade-Pristina highway agreement and the Belgrade-Pristina rail agreement of February 14, 2020, which were mediated by then-U.S. Special Envoy Richard Grenell.
- To cooperate with the U.S. International Development Finance Corporation and the U.S. Export-Import Bank (EXIM) to finance bilateral infrastructure projects.
- To open and operationalize the Merdare Common Crossing Point Facility. In 2011, Kosovo and Serbia had signed an agreement on integrated border management that provided for joint border crossing facilities, but Serbia refused to deploy staff to such facilities.
- To join the “Mini Schengen Zone” of October 2019. “Mini-Schengen” refers to an idea promoted by Prime Minister of Albania Edi Rama, Prime Minister of North Macedonia Zoran Zaev, and President of Serbia Aleksandar Vučić, to enhance regional economic cooperation among the Western Balkan states by implementing the “Four Freedoms” of the EU, i.e., free movement of goods, services, capital, and workers. Kosovo had previously refused to endorse the Mini-Schengen idea out of fear that it might turn into an alternative to full membership in the EU.⁶
- To mutually recognize diplomas and professional certificates, which would complement the implementation of the Four Freedoms and the Mini-Schengen Zone.

- To prepare, in cooperation with the U.S. Department of Energy, a feasibility study for sharing the Gazivoda/Ujman Lake, which is an artificial lake at the border between Kosovo and Serbia.
- To promote freedom of religion and implement court decisions related to the Serbian Orthodox Church and to restore Holocaust-related unclaimed Jewish property. Kosovo has granted significant legal safeguards to the Serbian Orthodox Church in Kosovo. However, a ruling of the Kosovo Constitutional Court adjudicating a property dispute in favor of the Serbian Orthodox Church has not yet been implemented, causing political tensions.
- To increase efforts to locate and identify missing persons and to resolve issues related to refugees and internally displaced persons by establishing a point of contact to facilitate cooperation between Pristina and Belgrade. The issue of missing persons has been highly controversial between Kosovo and Serbia since the end of the conflict in 1999. Around 1,600 persons, most of them Albanians, are still listed as missing. Kosovo continually accuses Serbia of delaying and obstructing efforts to identify mass graves in Serbia and to relocate the remains of victims.⁷

Kosovo and Serbia also agreed to diversify their energy sources, to increase airline passenger screening and information-sharing between them by using U.S.-provided systems, to prohibit 5G equipment supplied by untrusted vendors (which aims primarily at Chinese providers), to decriminalize homosexuality, and to designate Hizballah as a criminal organization.

In addition, Kosovo committed to implement a one-year moratorium on seeking membership in international organizations. Seeking recognition by other states and membership in international governmental organizations is a key priority of Kosovo's foreign policy to strengthen its international standing as an independent state. In response, Serbia lobbied numerous countries that had recognized Kosovo to withdraw their recognition, and around 15 states did so.⁸ In consideration for Kosovo's moratorium, Serbia committed to implement a one-year moratorium on its de-recognition campaign.

Kosovo also committed to recognize Israel (and Israel, separately, to recognize Kosovo), while Serbia committed to establish a commercial office and a ministry state office in Jerusalem, and to move its embassy there by July 1, 2021. Although Kosovo did not commit to establish an embassy in Jerusalem as part of the Washington Agreement, it decided to do so as part of the mutual recognition with Israel.

The Legal Nature of the Washington Agreement

There is controversy surrounding the legal nature of the Washington Agreement. One perspective sees the Washington Agreement as a trilateral agreement between the U.S., Serbia, and Kosovo. This view has been rejected by Serbia's President Vučić, who sees the Washington Agreement as consisting of bilateral agreements between Serbia and the U.S. and between Kosovo and the U.S.⁹ The third view is that the Washington Agreement is not a legally binding treaty at all but only a political commitment that does not create any legal obligations.¹⁰

The key element of a treaty is the intention to create obligations under international law. A treaty differs from a political commitment in that the latter does not manifest an intention to create international legal obligations.¹¹ The intention to create legal obligations must be determined from the terms of the agreement itself and the circumstances of its conclusion.¹² The International Court of Justice confirmed that an exchange of letters could constitute a treaty even if one of the parties later claimed that it did not have the intention to create legal obligations.¹³ Legally binding commitments may also take the form of agreements mediated by third parties, such as the Algiers Accords between the U.S. and Iran, mediated by the government of Algeria.¹⁴ However, political commitments are useful when the parties are interested in cooperating but are unwilling to undertake binding obligations because of political sensitivities or other reasons. With respect to the Washington Agreement, it is unlikely that the U.S. had the intention to enter into legal obligations, or that Serbia would have intended to implicitly recognize Kosovo as a state by entering into a treaty that would include Kosovo as a party. Further, neither Kosovo nor Serbia ratified or otherwise submitted the Washington Agreement to internal acceptance procedures, nor did they officially make it available to the public.

Another way to look at the Washington Agreement is to consider it as two separate unilateral declarations addressed to the U.S. that create separate obligations under international law for Kosovo and Serbia. States can create obligations under international law when they make unilateral commitments that are specific, publicly announced, and made by authorized state representatives, and which, in view of all the circumstances, create a good faith expectation on the part of the addressee that such commitments will be respected as legal obligations.¹⁵ The two declarations were formally signed in the presence of U.S. President Trump by Serbia's President and Kosovo's Prime Minister and with broad media coverage. While a treaty would have been too politically sensitive, two separate declarations addressed to the U.S. may achieve the purpose of establishing legally binding commitments without exposing any party to legal risks as to matters of statehood and recognition. For all these reasons, the description of the Washington

Agreement as two separate legally binding declarations rather than a treaty or as just a political commitment seems plausible.

Kosovo and Serbia After the Washington Agreement

The intention of the U.S. behind the Washington Agreement was not only to facilitate the normalization of relations between Kosovo and Serbia, but also to support peace in the Middle East by committing Kosovo and Serbia to strengthen diplomatic relations with Israel and to establish their embassies in Jerusalem. Although Kosovo is by its Constitution a secular state, Israel welcomed Kosovo as the first Islamic majority nation to establish an embassy in Jerusalem.¹⁶ The provisions on restricting the purchase of 5G equipment from untrusted vendors and on the Hizballah also bear clear signs of U.S. foreign policy priorities embedded in the framework of the Washington Agreement. While overall the EU welcomed the Washington Agreement, it criticized the provisions on establishing embassies in Jerusalem as diverging from the EU's position.¹⁷ Turkey and Islamic countries also criticized this decision.¹⁸ However, on February 1, 2021, Kosovo and Israel formally established diplomatic relations, and Kosovo promised to establish its embassy in Jerusalem.¹⁹

While the Trump administration promoted economic normalization without addressing the controversial issue of Kosovo's recognition by Serbia, the new administration under President Biden has already set a different tone. President Biden urged Kosovo and Serbia to normalize their relations based on "mutual recognition," clearly indicating that recognition is now on the table.²⁰ In view of President Biden's stated goal of improving relations between the U.S. and the EU,²¹ it is expected that the Biden administration will work more closely with the EU in facilitating a legally binding agreement between Kosovo and Serbia and push for a form of recognition of Kosovo by Serbia. U.S. Secretary of State Anthony Blinken has confirmed that the Washington Agreement will remain valid until changes are made to it in the future.²²

On the Serbian side, President Vučić still maintains that recognition of Kosovo is not an option.²³ Meanwhile, in Kosovo, snap elections held on February 14, 2021, resulted in a landslide victory of the opposition movement "Vetvendosje" under the leadership of Albin Kurti, who opposed talks between Kosovo and Serbia. In his first public statements after the elections, he confirmed that the dialogue between Kosovo and Serbia would not be his government's priority.²⁴ Kurti also opposed the Washington Agreement,²⁵ which raises doubts as to his willingness to implement Kosovo's commitments thereunder once the new government is established. It is expected that the U.S. and EU will put pressure

on Kurti to engage in dialogue with Serbia, and that Kurti will have to balance his principled opposition to dialogue with political reality.

Following its recognition of Kosovo, Israel expects Kosovo to establish its embassy in Jerusalem, a move that will put Kosovo in conflict with the EU, Turkey, and Islamic countries. When faced with pressure from Turkey, Kurti indicated that, once in government, he will reconsider the decision to establish an embassy in Jerusalem, a move that will jeopardize relations with Israel and perhaps the U.S. Serbia will face the same pressures if it decides to move its embassy to Jerusalem. The implementation of this part of the Washington Agreement will be the most controversial politically and will largely depend on the position of the new U.S. administration, which has yet to crystallize.

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¹ Vivian Salama, *Serbia and Kosovo sign economic normalization agreement in Oval Office ceremony*, CNN (Sept. 4, 2020), <https://edition.cnn.com/2020/09/04/politics/serbia-kosovo-agreement/index.html>.

² Jeff Mason et al., *Trump lauds economic steps between Serbia and Kosovo*, REUTERS (Sept. 15, 2020), <https://www.reuters.com/article/usa-serbia-kosovo-int-idUSKBN25V2LX>.

³ Letter dated Mar. 26 2007 from the Secretary-General addressed to the President of the Security Council (S/2007/168).

⁴ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22).

⁵ Text available at <https://www.new-perspektiva.com/wp-content/uploads/2020/09/Washington-Agreement-Kosova-Serbia.pdf>.

⁶ Emina Muminovic, *Mini-Schengen, Regional Economic Area and Common Regional Market: What is what?*, EUROPEAN WESTERN BALKANS (Dec. 15, 2020), <https://europeanwesternbalkans.com/2020/12/15/mini-schengen-regional-economic-area-and-common-regional-market-what-is-what/>.

⁷ Xhorxhina Bami, *Kosovo Missing Persons' Families Seek to Join Talks with Serbia*, BALKAN INSIGHT (Oct. 7, 2020), <https://balkaninsight.com/2020/10/07/kosovo-missing-persons-families-seek-to-join-talks-with-serbia/>.

⁸ Agata Palickova, "15 countries, and counting, revoke recognition of Kosovo, Serbia says", EURACTIV (Aug. 27, 2019), <https://www.euractiv.com/section/enlargement/news/15-countries-and-counting-revoke-recognition-of-kosovo-serbia-says/>.

⁹ Press Release of Sept. 9, 2020, available at <https://www.predsednik.rs/en/press-center/news/agreement-on-normalisation-of-economic-relations-signed-in-washington>.

¹⁰ Sandra Maksimovic, *What did Serbia and Kosovo sign in Washington?*, EUROPEAN WESTERN BALKANS (Sept. 17, 2020), <https://europeanwesternbalkans.com/2020/09/17/what-did-serbia-and-kosovo-sign-in-washington/>.

¹¹ Aust, Anthony. *Modern Treaty Law and Practice* (p. 17). Cambridge University Press. Kindle Edition.

¹² *Id.*

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- ¹³ See Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994.
- ¹⁴ Text available at <https://www.nytimes.com/1981/01/20/world/text-of-agreement-between-iran-and-the-us-to-resolve-the-hostage-situation.html>.
- ¹⁵ See Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974.
- ¹⁶ Toi Staff, *Netanyahu: Kosovo to be first Muslim-majority nation to open Jerusalem embassy*, THE TIMES OF ISRAEL (Sept. 4, 2020), <https://www.timesofisrael.com/netanyahu-kosovo-to-be-first-muslim-majority-nation-to-open-jerusalem-embassy/>.
- ¹⁷ Georgi Gotev, *EU regrets Kosovo's decision to open an embassy in Jerusalem*, EURACTIV (FEB. 2, 2021), <https://www.euractiv.com/section/enlargement/news/eu-regrets-kosovos-decision-to-open-an-embassy-in-jerusalem/>.
- ¹⁸ Behlul Cetinkaya, *Kosovo's embassy move violates UN resolutions: Turkey*, AA (Feb. 2, 2021), <https://www.aa.com.tr/en/turkey/kosovos-embassy-move-violates-un-resolutions-turkey/2130724>.
- ¹⁹ Rami Ayyub, *Israel and Kosovo establish diplomatic relations in virtual ceremony*, REUTERS (Feb. 1, 2021), <https://www.reuters.com/article/israel-kosovo-relations-idINKBN2A12SL>.
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- ²¹ Matthew Karnitschnig, *Biden takes the EU back to the future*, POLITICO (Feb. 18, 2021), <https://www.politico.eu/article/joe-biden-europe-position-munich-security-conference-speech/>.
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- ²⁴ Marko Savkovic, *How does Kurti see the dialogue?*, EURACTIV (Feb. 11, 2021), <https://europeanwesternbalkans.com/2021/02/11/how-does-kurti-see-the-dialogue/>.
- ²⁵ Politiko, *Kurti: Washington Agreement Has Nothing to Do with Serbia and Kosovo*, POLITIKO (Sept. 24, 2020), <https://politiko.al/kurti-washington-agreement-has-nothing-to-do-with-serbia-and-kosovo/>.