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**INTERNATIONAL JOURNAL OF  
 ADVANCED RESEARCH (IJAR)**

Article DOI:10.21474/IJAR01/7146  
 DOI URL: <http://dx.doi.org/10.21474/IJAR01/7146>



### RESEARCH ARTICLE

#### RECOGNITION OF KOSOVO WITH REGARD TO INTERNATIONAL LAW.

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#### Manuscript Info

##### Manuscript History

Received: 20 March 2018  
 Final Accepted: 22 April 2018  
 Published: May 2018

##### Keywords:-

Recognition of States, International Law,  
 Kosovo, Statehood.

#### Abstract

In the present international system, state recognition is given much importance due to the issues relating to statehood. Recognition of states is a legal issue associated with international law. According to the international law, there are traditional and modern criteria to be considered when giving recognition to states. An entity has to be considered as a State in the international system if those criteria are satisfied. The objective of this study is to find out whether the discussed entity can be given state recognition with regard to the international law criteria. This research is a qualitative research based on secondary data. The data analysis procedure is done through the case study method. The case used in this study is Kosovo. In analyzing the case, the international law provisions in giving recognition to states will be applied to the particular case in order to assess its compatibility to be identified as a state. Finally after analyzing the , it can be concluded that Kosovo cannot be given recognition with regard to the international law, but after some changes in government system, then it can be identified as a state.

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#### Introduction:-

The concept of statehood is very subjective. Different people hold different ideas about as to what is a state. While some states give recognition to states, other states are reluctant to give recognition due to many political reasons. International recognition is immensely important to survive in the world.

Therefore, states strive to achieve recognition among the international community since states find that it's best to interact with others in the international system than being isolated. State recognition is broadly perceived to be a political issue with legal consequences. Though giving recognition to states should be made solely based on international law and legal perspective, in the contemporary international system it has become more political and policy based. In order for a state to be functional there should be at least some kind of recognition from other states in the world.

Thus states give practice to customs, interstate negotiations and produce treaties.<sup>1</sup> Recognition of states can be done expressly or impliedly. <sup>2</sup> By now recognition of states has become a very debatable topic in the international law.

<sup>1</sup>Scott, S, 2012. *International Law in World Politics*. 2nd ed. New Delhi: Viva Books.pp.19.

<sup>2</sup> Ibid.,P.23.

This is because giving recognition to states does not solely depend on international law. It is always connected with the foreign policy objectives of other states in the world. This means even though a state is given de jure recognition or recognition by law, some states in the international arena will not be willing to carry on relations with that state. This includes not having political, economic and most importantly diplomatic relations with that particular state. This emphasizes that the way states handle their foreign policies can influence another state's recognition in the international system. Thus, this can be identified as de facto recognition which means recognizing a state factually. Therefore it is important for a state to achieve both de facto and de jure recognition in the international arena. In addition to that the most important two theories in giving recognition to states are the constitutive and declaratory theories<sup>3</sup> which play a major role in granting international recognition.

“State is a complete association of free men, joined together for the enjoyment of rights and for their common interest”

-Hugo Grotius-

The states in the international community have two interests. One is national interests and the other is international interests. Every state in its full potential tries to protect its national interests. Therefore it is necessary to identify the traditional and other additional criteria which make an entity, a state in the international arena. “The State is an association of a considerable number of men living within a definite territory, constituted in fact as a political society and subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of the association, with the assistance of the law, and to regulate and protect the rights of the members, to conduct relations with other states and to assume responsibility for its acts.”<sup>4</sup>

#### **Literature Review:-**

##### **Statehood:-**

Legal writers throughout the history have suggested many definitions of statehood. The States system began with the collection of negotiated treaties resolving the Thirty and Eighty Years Wars known as the Westphalia Peace in 1648. Though not fully realized and widely accepted at the time, the principles inherited from Westphalia Treaty such as the domestic authority and non-interference have made their way to define the modern States system as well. Westphalia is also significant because scholars derive their implicit models of State emergence from two opposed understandings of this early European experience with State consolidation and sovereignty.

Fiore (1874) stresses on power politics as well as law. According to Fiore, The State is an association of a considerable number of men living within a definite territory which is made as a political entity. That entity is the subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of that entity with the assistance of the law. That sovereign has the power to control and protect the rights of the members of that political entity, conduct relations with other states and to assume responsibility for its acts. If these criteria are satisfied, then that entity is regarded as a state by Fiore.

Baty (1930) called a state as an organized people or an assemblage of human beings among whom the destiny of an ascertainable number usually prevails. This emphasizes on sovereignty as well. The existence of an organized political power over a territory and people is meant as sovereignty. Baty believed that the internal character of the states depends on the culture and traditions of the land the people live in. He also proposed as a criterion of statehood. It is a characteristic similar to independence, though perhaps better described as self-containment: "the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world.

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<sup>3</sup> Worster, W. (2010). *Sovereignty: two Competing Theories of State Recognition*. Exploring Geopolitics, Geoeconomics and Geostrategy: Available at:[http://www.exploringgeopolitics.org/publication\\_worster\\_william\\_sovereignty\\_constitutive\\_declaratory\\_statehood\\_recognition\\_legal\\_view\\_international\\_law\\_court\\_justice\\_montevideo\\_genocide\\_convention](http://www.exploringgeopolitics.org/publication_worster_william_sovereignty_constitutive_declaratory_statehood_recognition_legal_view_international_law_court_justice_montevideo_genocide_convention). [Accessed 28 July 2015].

<sup>4</sup> Grant, T.D, 2012. Defining Statehood: The Montevideo Convention and its Discontents. HeinOnline, 37,pp.409-414.

Being different from other writers, Hans Kelsen attempted to define statehood in terms of law. He believes that the state is not the individuals who live in it, but the assemblage of individuals and this assemblage is the function of the order which regulates their mutual behavior. One of the unique results of the pure theory of law is its recognition that the coercive order which constitutes the political community that is called a state is a legal order.

#### **State Sovereignty;-**

“At the beginning, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community and no final and absolute authority exists elsewhere”

- F.H. Hinsley –

In the present world sovereignty can be defined as the independence of a state which allows that state to act independently at its own discretion to take decisions with regard to its internal and external affairs without violating another state's rights. In the contemporary world it is necessary to distinguish between “internal” and “external” sovereignty. Internal sovereignty is the structure or constitution of a state. External sovereignty is in relation to the relations between states. Internal sovereignty thus conceived has to do with the state's authority over its subjects, while the second notion refers to the independence or autonomy of states. These two are interdependent. If a state or its people are sovereign over their monarchy, then outsiders are constrained from interfering. Internal sovereignty gives states or people certain autonomy or liberty in their international relations.

This reflects the general acceptance by States of its customary nature as a basic rule of international law. There are two main aspects of thought in respect of State sovereignty. First is that there are number of attempts in the international community to restrain State sovereignty in favor of international co-operation among sovereign States for allegedly universal values such as human rights. The second aspect is the conventional tendency among some States' jealously to retain their sovereignty in the face of supposedly unfavorable circumstances in the world.

#### **Conceptual Framework:-**

In considering the laws of giving recognition to states, the most important or the prominent theories of recognition are,

1. Constitutive theory of recognition
2. Declaratory theory of recognition

#### **Constitutive Theory of Recognition:-**

The word “constitutive” derives from the word “constitute.” It means the constituting or creating a state. According to Crawford, a state becomes an international person only through international recognition.<sup>5</sup> Therefore constitutive recognition is the rights and duties pertaining to statehood derived from recognition by other states. This theory emphasizes that existing of a new state in the international system should be done with the consent of the other existing states in the international system.<sup>6</sup> Yet this is problematic to a certain extent as an issue arises whether an entity can be regarded as a state merely by the acceptance or recognition of one state in the international system. This will lead to conflicts between the existing states with regard to the recognition of a new state. Therefore constitutive theory emphasizes that recognition of states should be done collectively, not unilaterally.<sup>7</sup> Constitutive recognition is a necessary act before a state is regarded as a recognized state.<sup>8</sup> Furthermore this unilateral recognition is not made available according to the United Nations Charter.

For instance Israel is not recognized as a state in the Arab world, and is it not recognized as a state by the other states in the world

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<sup>5</sup> Crawford, J. 'Statehood and Recognition.' *The Creation of States in International Law*, by Crawford, James R. 2nd edn (Oxford, 2007; published online Feb. 2010. Oxford Scholarship Online,

<sup>6</sup> Ibid

<sup>7</sup> Hajjaj, R, 2012. *International recognition: Evolving Statehood Criterion*. Masters in Law. Hungary: Central European University

<sup>8</sup> Kozhevnikov, F.I. et al, 1978. *International Law*. 1st ed. Moscow: Foreign Languages Publishing House.

Also critiques argue that constitutive theory allows other existing states to involve in to the affairs of an emerging state. The law should be more advanced as merely the consent of existing states should not make another state.

#### **Declaratory Theory of Recognition:-**

This theory emphasizes that an entity in the international arena becomes a state only when the technical criteria of statehood as mentioned in international law are completed. This theory believes that recognition of states itself is a political act which involves different ideologies of different states. Scholars argue that recognition is important for states to exist, but recognition is not necessary to create a state. This particular theory upholds that a state may exist without being recognized by other existing states, but it should be treated as a state by the other states.<sup>9</sup>

Worster criticizes the declaratory theory stating that States also do not obtain international rights on the international system until they are recognized. Therefore it is problematic that vesting the recognition of a state on the hand of other states. Also the declaratory theory may undermine the principle that international law is the law made by states. The other difficulties with the theory include the selection of the criteria to apply and the instability and unpredictable nature of competing versions of criteria and the differences in applying those criteria to different states. These issues may lead one to wonder whether the declaratory theory constrains the discretion of states to a substantial degree.

Thus it can be concluded that Constitutive theory is based on the fact that, a state has to fulfill certain criteria to be recognized as a state. There are instances where even if those criteria are satisfied that entity will not be regarded as a state if collective consent is not given by the existing states. In contrary Declaratory theory states that, collective recognition by the existing states is not required. If an existing state wishes to carry on relations with an emerging state, they should do so even if other existing states in the system do not want to do so.<sup>10</sup>

#### **Methodology:-**

The study is based on qualitative research which is aimed at gathering in-depth understanding towards the discussed phenomenon. A number of secondary sources such as books, journals, articles and news reports were used. In addition to this, UN Resolutions, material sources of international law such as treaties, conventions, and court rulings have proven to be invaluable for this study. The data analysis procedure is done in the case study method. Case studies are analyses of persons, events, decisions, periods, projects, policies and institutions which are studied holistically by one or many methods. The case study method used in this study is the descriptive case study method which is used to get an in depth analysis of the particular case.

#### **Data Presentation and Analysis:-**

Kosovo was ruled by Bulgaria from the 9th century until Serbs gained control of Kosovo in the 12th century. After the medieval Serbian state lost the Battle of Kosovo, the territory came under Turkish rule. The Ottoman Turks lost control over Kosovo in 1912. Kosovo then came under the de facto authority of the Kingdom of Serbia, but the Kingdom of Serbia and the Ottoman Empire never ratified a treaty on the giving up of Kosovo, due to the outbreak of World War I. Following the Austrian and Bulgarian occupation during World War I, Kosovo became a part of the newly created Kingdom of Serbs, Croats and Slovenes in 1918 officially renamed the Kingdom of Yugoslavia in 1929.<sup>11</sup>

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<sup>9</sup> Kozhevnikov, F.I. et al, 1978. *International Law*. 1st ed. Moscow: Foreign Languages Publishing House.

<sup>10</sup> Hajjaj, R, 2012. *International Recognition: Evolving Statehood Criterion*. Masters in Law. Hungary: Central European University

<sup>11</sup> Vidmar, J, 2009. *International Legal Responses to Kosovo's Declaration of Independence*. Vanderbilt Journal of Transnational Law, Vol. 42:779, 784-787.

**Map 1:-** Map of Kosovo

**Source:** *Maps of World* .Available at: <http://www.mapsofworld.com/kosovo> (2015)

Kosovo is land-locked territory which consists of mostly mountain areas. It borders Serbia to the north and east, Montenegro to the northwest, Albania to the west, and Macedonia to the south as visible in the above map. Capital of Kosovo is Prishtina.<sup>12</sup>

#### **Statehood criteria:-**

The word “statehood” is heard the Montevideo Convention on rights and Duties of States comes in to mind of any international relations scholar. Montevideo Convention puts down the basic criteria for statehood.

“The state as a person of international law should possess the following qualifications:

1. A permanent population
2. A defined territory
3. A government
4. Capacity to enter into relations with other states”

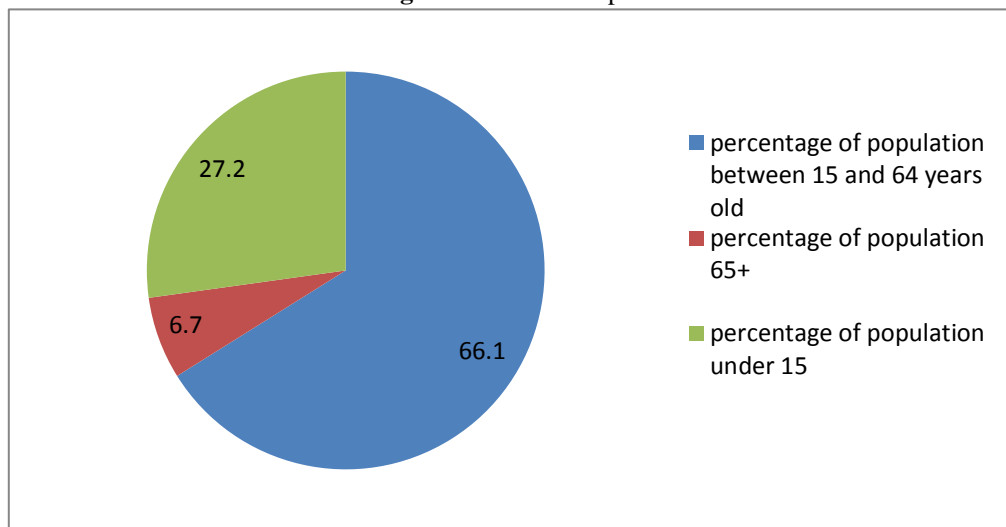
-Article 1 Montevideo Convention 1933-

#### **Applying the Traditional Statehood Criteria to Kosovo:-**

##### **Permanent Population of Kosovo:-**

Population means the number of people in a defined area. As mentioned before there is no minimum number of population that should be fulfilled for an entity to be considered as a state. Kosovo does have a population which consists majorly of Albanians. As of 1 January 2015, the population of Kosovo was estimated to be 1,840,927 people. This is an increase of 0.62 % or 11, 343 people compared to population of 1,829,584 in 2013. In 2014 the natural increase of population was positive, as the number of births exceeded the number of deaths by 11,892. Kosovo consists of 948, 140 males and 892,787 females according to 2014 census. According to Kosovo census the percentage of population consists of these age groups.

<sup>12</sup>Maps of World. 2013. Kosovo Map. [ONLINE] Available at: <http://www.mapsofworld.com/kosovo/>. [Accessed 17 October 2015].

**Figure 3:-Kosovo Population**

**Source:** Prepared by the author using the statistics from - Country Meters. 2014. Kosovo Population. (Available at: <http://countrymeters.info/en/Kosovo>.)

Thus it is undebatable that Kosovo consists of a population which is the first traditional criteria for an entity to be considered as a state according to the Montevideo Convention.

#### **Defined Territory of Kosovo:-**

Under 1946 Yugoslavian constitution Kosovo is a region under the republic of Serbia but not a republic by its own. Yet in 1991 Kosovo Assembly announced its independence as an independent territory. Through this independence, Kosovo's secession from Serbia took place. Serbia does not accept this secession and considers Kosovo as a part of Serbia while Kosovo considers itself as an independent territory. Serbia made a claim to the United Nations pointing out that Kosovo's declaration of independence is illegal according to the international law concept of secession. In the international law.

Professor Ralph Wilde states that in order for a state to separate from its parent state, that state should have the consent of the parent state. Under international law, a new state can be formed out of the territory of an existing state, and its formation and recognition by third states will be legal provided everything is taking place with the approval of the parent state. Therefore Professor Wilde says that Kosovo Albanians do not have the power of self-determination as it cannot be considered as an independent territory from Serbia. He further points out that Kosovo is not governed by its own as the UN and NATO still look after the affairs of Kosovo. Thus according to Wilde, Kosovo is not a separate state; it's only a part of Serbia.

In contrast Crawford, in his book *Creation of States in International Law* points out that even if a territory is a party to a territorial dispute that does not affect that statehood's claim of statehood. It was also ruled in the case of *Island of Palmas*, that territory can be considered as a territorial state if it engages in rights.

The International Court of Justice ruled that Kosovo's unilateral declaration of independence from Serbia in February 2008 does not contribute to any violation of international law.

Therefore Kosovo's secession from Serbia leads to many issues as many people have different perspectives with regard to that issue. Thus it is difficult to say whether Kosovo has a separate territory of its own to be called as a separate state.

#### **Government of Kosovo:-**

Kosovo does not fulfill this criterion as Kosovo is still supervised by the United Nations and NATO. Though Kosovo has a democratic government that is chosen by its citizens through elections, those elections are organized and supervised by the UN, EU and other international bodies. The likely appointed government functions through

legal acts based on a constitutional framework and through laws passed by the legislative organs, which are approved by the special representative of the UN Secretary General. NATO enforces laws relating to international security, and the UN police forces enforce laws relating to internal law and order. The judicial system operates under the control of United Nations Interim Administration Mission in Kosovo (UNMIK), which uses international judges. Therefore, it is visible that every institution of Kosovo has an international component.

**Kosovo's capacity to enter into relations with other states:-**

Capacity to enter into relations with other states is a consequence of being recognized as a state rather than a criterion for statehood. Only if an entity is recognized in the international system other states get into relations with that. Kosovo in the present has diplomatic relations with 74 countries. Kosovo operates 24 embassies abroad and is host to 22 Embassies. Kosovo has membership in several International Organizations.

The following figure indicates very clearly the world's reaction towards Kosovo recognition as it vividly shows which states engage in relations with Kosovo. Russia, Asia, Latin America and African states do not engage in relations with Kosovo. Russia's issue regarding Kosovo will be discussed further in this study.

In addition to that Kosovo is a member of many international organizations such as the International Monetary Fund, World Bank, European Bank for Reconstruction and Development, Organization Internationale de la Francophonie, South- East European Cooperation Process and Central European Free Trade Agreement. Kosovo has its own Bilateral Relations and International Organization Department to take care of its international relations.

**Additional Statehood Criteria:-**

**Independence of Kosovo:-**

Independence and sovereignty of states are considered as the same. In order to decide independence, it is necessary to know the difference between formal and actual independence. Formal independence is when the external and internal powers of the government are taken by a separate authority of an assumed state. Actual independence is the minimum degree of real government power owned by the authorities of the assumed state. Both these types of freedoms are necessary for a state to be independent.

In the case of Kosovo, governmental responsibilities are exercised by another international actor such as the United Nations. Therefore, Kosovo has formal independence. The uncertainty regarding the legality of Kosovo's unilateral declaration and the degree to which it may be said that the international presence actually externally controls Kosovo rather than influences Kosovo's governing authority, it is unclear whether this criterion would be met or not.

**Secession of Kosovo:-**

The core legal issue relating to the Kosovo declaration of independence is whether Kosovo has the right to separate from Serbia under international law. As stated by several different precedents, people have a right to so-called external self-determination only if its rights to internal self-determination are not being fulfilled by its central government. In the case of Kosovo, it is certainly true that Kosovo Albanians who share a common ethnicity, culture, language, religion, and social values that distinguish them clearly from the Serbs. Additionally, it is clear that their rights to internal self-determination had not been respected by Serbia.

In other words, the 1974 Constitution of the Yugoslavia specifically granted autonomous status to Kosovo, and Kosovo became a fully functional province operating in the federal structure of the former Yugoslavia.

Therefore Kosovo's right to internal self-determination had not been respected by Serbia. Considering that the Kosovo rights to internal self-determination will be fulfilled in the future, but not now, then Kosovo would have no right to external self-determination, like Quebec, and thus no right to secede from Serbia. Also Serbia would respect the Kosovo rights to internal self-determination in the future. Then Kosovo would have the right to external self-determination and thus the right to secede from Serbia. Interestingly, although most of the Western world recognized Kosovo as a new state in the weeks that followed its declaration of independence, none of those outside recognizing actors invoked the legal theory of secession to justify Kosovo's separation from Serbia.

**Self – Determination of Kosovo:-**

Subjecting the people of Kosovo to a period of authority under the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO Kosovo Force (KFOR) might somehow create a right of external self-

determination and a right to independence for Kosovo. The problem in Kosovo is that, prior to the UN administration Kosovo was not free from external control as it was a part of Serbia. Another category of external self-determination is based on the extinction of the larger state as in the context of the southern Balkan wars in the first half of the 1990s. European states took the position that the state of the Socialist Federal Republic of Yugoslavia (SFRY) had ceased to exist, and therefore Kosovo had a right to external self-determination.

So Serbia, including Kosovo, was the external self determination element, and ultimately it ended up as an independent state. The Albanians in Kosovo had argued that the high degree of autonomy Kosovo had been given within the Serb Republic under the old Socialist Federal Republic of Yugoslavia (SFRY) made it an external self-determination unit in the early 1990s. The problem regarding international law with the disintegration of the SFRY is that four of the six Republics of the federal state unilaterally declaring independence could have been regarded either as a set of unilateral secessions without the consent of the 'parent' state. This is not in conformity with international law. Further the extinction of the larger state, in which case there was no single state from which to break away as each component thereby enjoying a right of self-determination.

In the international law of statehood the recognition practice of states can be constitutive and it can itself form part of the legal framework in borderline cases when it is widespread. If so politics can be regarded as determiners of the legal situation in terms of which entities were going to be regarded as constituent components for the purposes of external self-determination. This might leave two autonomous regions within the Serb Republic.

**De facto State of Kosovo:-**

De facto state is a state which conforms to every statehood criteria yet which is not recognized as a state by the international community. Most importantly a de facto state has to have a population and a defined territory. With regard to the Kosovo case, Kosovo has a defined territory and a population. Secondly, the de facto state should not gain the fully international recognition. Even if some states recognize the state as there are some states that do not recognize that entity. Therefore Kosovo is not a state in the international system even though Kosovo is a member of some international organizations. Therefore Kosovo is a de facto state. Most importantly to be considered as a de facto state, that entity has to show their will to rise as a de jure state either by a declaration of independence or separation. That criterion is also fulfilled by Kosovo. Therefore Kosovo is a de facto state in the international arena that wishes to achieve the de jure status.

**Conclusion:-**

According to the traditional statehood criteria mentioned in the Montevideo Convention 1933, Kosovo has a permanent population, defined territory and the capacity to enter in to relations with other states. Yet the problem arises whether Kosovo has an independent government which can conduct independent elections and government alone without the UN support, as UNMIK assists Kosovo with administration issues. Due to this reason though all the other criteria of the Montevideo Convention are satisfied, the criteria of having an effective government criteria is not satisfied. Therefore, accepting Kosovo as a state with regard to the traditional statehood criteria, according to the Montevideo Convention is challenging. If the UNMIK is dissolved and Kosovo is allowed to continue its own administration, then the traditional statehood criteria will be satisfied with regard to Kosovo. According to the international law, for an entity to secede from its mother state, that parent state has to give her consent for that secession. In the case of Kosovo, Serbia is the parent state of Kosovo and Serbia has never given its consent for Kosovo's declaration of independence. Therefore, Kosovo's declaration of independence can be identified as violating the international law which makes it difficult to recognize Kosovo as an independent state.

**Recommendations:-**

As mentioned before, Kosovo is a de facto state which can achieve the de jure status. If the United Nations Interim Administration Mission in Kosovo (UNMIK) is taken away from Kosovo and if the UN lets Kosovo to carry on its own administration, Kosovo can be identified as an independent state which has an effective government which functions independently. Furthermore, if Serbia and Kosovo enter into negotiations and Serbia grants their consent to Kosovo's secession there will be no any issue at all because then Kosovo will be an independent entity without any influence from the UN.



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