

Kosovo's Chances of UN Membership: A Prognosis

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Abstract

The International Court of Justice has ruled that Kosovo's unilateral declaration of independence neither violated general rule of international law nor the *lex specialis*. As of the time of writing, 86 UN Member States have recognized Kosovo as a State. With the judicial pronouncement in their favour, the authorities in Kosovo are likely to apply for membership in the United Nations. This paper reviews the rules and practice of UN membership admission and assesses Kosovo's chances of success should it apply to the world body for admission. It argues that ordinarily, Kosovo meets the requirements for admission into the UN but political considerations of the permanent members of the Security Council would constitute a clog in Kosovo's ambition to become the 194th member of the United Nations. However, four options are proffered as ways out of the political logjam that is sure to surface if and when, Kosovo puts in an application for admission into the membership of the UN.

A. Introduction

On July 22, 2010, the International Court of Justice delivered its Opinion on the Kosovo secession as requested by the UN General Assembly by virtue of its resolution to that effect.¹ In the Opinion, the Court held that the unilateral declaration of independence by Kosovo neither violated general international law nor the *lex specialis* – Security Council Resolution 1244 (1999); and the Constitutional Framework for Provisional Self-Government in Kosovo (Constitutional Framework).² Although an Advisory Opinion of the ICJ is not binding until it becomes the subject of a Chapter VII action of the Security Council, it is expected that Kosovo authorities and its supporters in the international community would want to rely on the Opinion to press for Kosovo's admission into the membership of the UN. One therefore needs to examine the membership provisions of the UN under the UN Charter in order to have a fair assessment of the chances of Kosovo's ascension to its membership.

¹ See GA Res. A/RES/63/3, 8 October 2008, endorsing Serbia's request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law.

² *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, paras. 84, 114, 121 and 122.

B. Membership of the United Nations

The United Nations Organization popularly referred to, as the “United Nations” or “UN” is the body saddled with the responsibility for maintaining international peace and security.³ Enforcement actions can only be ordered by the Security Council under Chapter VII of the UN Charter, except when such measures are ordered by the General Assembly under the Uniting for Peace Resolution, in matters threatening international peace and security, in which there is no consensus in the Security Council due to veto by any of the permanent members. From a mere 51 members at inception in 1945, the membership of the UN has grown to 193⁴ as of today. In fact, the UN is the largest international organization in the world today.

Although, the UN does not recognize States, admission of an entity into its membership, signifies that that entity has been accepted as a State by all its members, notwithstanding opposition by some States, like most Arab States to Israeli statehood. Admission thus, has the effect of recognition and once admitted, the statehood of the entity becomes conclusive even as against States who voted against its admission.⁵

Although it has been argued that recognition is not required for the creation of a State,⁶ it has however been admitted that for statehood to be functional, there should be at least some form of recognition from existing States.⁷ The above proposition is however controversial and constitutes the

³ Article 24 of the UN Charter charges the Security Council with the maintenance of international peace and security; Under the Uniting for Peace Resolution, GA Res. 377 (V) A, 3 November 1950, para. 1, the General Assembly may take decisions for the maintenance of international peace and security, if the Security Council fails to discharge its responsibility due to lack of unanimity of the permanent members.

⁴ See full list of UN members showing its growth from inception till date at <http://www.un.org/en/members/growth.shtml#2000> (last visited 29 April 2012).

⁵ T. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, (2009), 252-257; J. Dugard, & D. Raic, ‘The Role of Recognition in Law and Practice of Secession’, in M. Kohen, (ed.), *Secession: International Law Perspectives* (2006), 94, 99.

⁶ J. Crawford, *The Creation of States in International Law* (2006), 93.

⁷ Dugard & Raic, *supra* note 5, 98-99; D. Raic, *Statehood and the Law of Self-Determination*, (2002), 427, where the author argues that “recognition does consolidate statehood.”; *Caglar v. Billingham (Inspector of Taxes)*, Special Commissioner’s Decision, 7 March 1996, para. 182, where the tribunal stated, “in view of the non-recognition of the Turkish Republic of Northern Cyprus by the whole of the international community other than Turkey we conclude that it does not have functional independence as it cannot enter into relations with other States” see also M.

debate between proponents of the constitutive and declaratory theories of recognition.⁸ But due to the fact that many States have achieved recognition as a State by admission to the United Nations,⁹ there is no known independent sovereign State today that is not a member of the UN. The only recognized State that remained a non-member was Switzerland due to its neutral State status¹⁰ but it joined the membership in 2002. This is without prejudice to pending applications by entities whose statehood is still in dispute like Taiwan. The fact that such entities have not been admitted into the UN underscores the fact that their statehood has not yet been settled in the opinion of the international community. As a matter of fact, reference to international community is almost a reference to the UN.¹¹ The collective recognition by the UN minimizes the arbitrariness inherent in unilateral recognition by States. This is perhaps the reason why every newly established State frantically aspires to become a UN member. Such membership is indeed constitutive and conclusive of statehood today.

Shaw, *International Law*, 6th ed. (2008), 448, where the author stated, “[...] if an entity, while meeting the conditions of international law as to statehood, went totally unrecognized, this would undoubtedly hamper the exercise of its rights and duties [...] but it would not seem in law to amount to a decisive argument against statehood itself.”

⁸ For a detailed discussion of the constitutive and declaratory theories of recognition, see H. Kelsen, ‘Recognition in International Law: Theoretical Observations’, 35 *American Journal of International Law* (1941) 4, 605, 609, where the author insists that if no State recognizes a new entity, it ceases to be a State because “there is no such thing as absolute existence.”; D. Ijalaye, ‘Was Biafra at Any Time a State in International Law?’, 65 *American Journal of International Law* (1971) 3, 551, 559, who argues that the recognition of Biafra by five States did not constitute Biafra as a State, though his argument is based on the fact that the recognitions were premature and therefore invalid. But see J. Brierly, *Law of Nations*, 6th ed. (1963), 139; A. Cassese, *International Law*, 2nd ed. (2005), 73-74, for the view that recognition is an acknowledgement of a factual situation that has been in existence and merely declaratory of the readiness of the recognizing State to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.

⁹ Dugard & Raic, *supra* note 5, 99-100, where the authors insist that “[...] this procedure for recognition co-exists alongside the traditional method of unilateral recognition [...] the law of recognition that fails to take account of this development cannot lay claim to be an accurate reflection of State practice.”

¹⁰ For discussions on Swiss neutrality status and subsequent admission into UN membership, see Grant, *supra* note 5, 244-249

¹¹ R. Zacklin, ‘Beyond Kosovo: The United Nations and Humanitarian Intervention’, in C. Ku & P. Diehl, (ed.), *International Law, Classic and Contemporary Readings*, (2003), 367, 368.

Besides, the UN is also able to engage in collective denial of recognition to entities that were created from situations in breach of international *jus cogens* rules like the use of force, self-determination, racism or racial discrimination and human or humanitarian rights.¹² The doctrine of collective non-recognition has its origin from the invasion of Manchuria by Japan in 1932, in which a puppet State of Manchukuo was created out of China by Japan. The US Secretary of States, Henry Stimson, then declared the US determination not to recognize the new State on the ground of violation of the Pact of Paris of 1928 on renunciation of war.¹³ The Assembly of the League of Nations subsequently called on members not to recognize the new State.¹⁴ The Stimson's doctrine is no longer known by that name in international law as it has since been re-affirmed in the UN Charter, Resolutions and Declarations.¹⁵ States therefore, have a duty not to recognize an entity that is created in violation of *jus cogens* rules of international law as mentioned above and also not to recognize territories acquired by the use of force.¹⁶

It is pertinent to note that admission by the UN of an entity into its membership irresistibly settles or amounts to recognition of statehood of the said entity¹⁷ and the law seems not to leave any room for political manoeuvre in the admission procedure of the UN.

¹² See the cases of Southern Rhodesia for violation of the right to self-determination, SC Res 216 (1965), 12 November, 1965, para. 2; South African Bantustans on grounds of racism and racial discrimination, UNGA Res 31/6A, October 26, 1976, paras 2 and 3; and the Turkish Republic of Northern Cyprus (TRNC) on grounds of the use of force, SC Res 541(1983), 18 November, 1983, paras 6 and 7; SC Res 550 (1984), 11 May, 1984, paras 2, 3 and 4.

¹³ Art. 1, Pact of Paris (Kellogg-Briand Pact), 27 August 1928, available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm> (last visited 29 April 2012).

¹⁴ League of Nations Official Journal (1932), Special Supp. No. 101, 87-88, cited in D. Turns, 'The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law', 2 *Chinese Journal of International Law* (2003) 105, 123, footnote 77.

¹⁵ Art. 2(4), UN Charter; Paragraph 10, Principle I, Friendly Relations Declaration 1970. For a fuller discussion of the Stimson's doctrine, see, D. Turns., *supra* note 14, 114-130.

¹⁶ See SC Res 662 (1990), 9 August 1990, para. 2, on Kuwait, enjoining members not to recognize the annexation of Kuwait by Iraq; SC Res 242 (1967), 22 November 1967, preambular para. 2, SC Res 476 (1980) and 478 (1980), annulling the purported annexation of Jerusalem by Israel. For a fuller account of non-recognition in the UN era of situations arising from the use of force or aggression, see Raic, *supra* note 7, 122-127.

¹⁷ *Supra* note 5.

I. Law and Practice of the UN Charter

Membership is made up of the original members that “participated in the UN Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present UN Charter and ratify it in accordance with Article 110”.¹⁸ Other States however may become members subject to fulfillment of certain conditions.

Article 4 of the UN Charter provides:

- Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
- The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

From the above provision, it is clear that an entity other than an original member that aspires to the membership of the UN must be a State; and a peace-loving one at that. It is not open to non-State entities. In interpreting paragraph 1 of Article 4, the ICJ in *Conditions of Admission of a State to the United Nations (Charter, Art. 4)*,¹⁹ held that “[t]he natural meaning of the words used [in article 4(1)] leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example.”²⁰ It held further, the paragraph did not admit of extraneous conditions to be demanded nor did it allow for the superimposition of political considerations upon them as to deny membership to an applicant that fulfils them.²¹ But the Court however admitted that nothing under the provision of Article 4 prevents either the Security Council or the General Assembly from verifying facts that would establish the fulfilment or otherwise by an applicant of the conditions stated

¹⁸ Art. 3, UN Charter.

¹⁹ *Conditions of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports 1948, para. 57.

²⁰ *Id.*, 62.

²¹ *Id.*

in paragraph 1, for admission.²² The ICJ emphatically ruled that the request by a member to make its consent to the admission of a State dependent on the admission of other applicants was an extraneous condition, not envisaged under; and therefore incompatible with the letter and spirit of Article 4 of the Charter.²³ While the Court's pronouncement above was commendable, the admission of new members into the UN has not been devoid of extraneous political considerations.

In the period between 1948 and 1954, the Western capitalist permanent members and their Eastern socialist counterparts, especially the United States and the Soviet Union, frustrated each other's admission recommendations by the use of veto until in 1955, when there was the East-West Compromise Package in which 16 States²⁴ belonging to both axes and some non-aligned states were admitted into the UN. Other compromise admissions were those of East and West Germany in 1973 and South and North Korea in 1991.²⁵ In the 1960s and the period following, in which there was massive decolonization of territories, more States were admitted into the UN without much objections and any delay in admission was mainly due to delay in application by the emergent States and not as a result of negative votes from the Security Council or General Assembly.²⁶ The last two admissions by the UN were those of Montenegro, as the 192nd member-State in 2006, having peacefully seceded from the Union of Serbia and Montenegro under a constitutional provision, and South Sudan in 2011.²⁷

²² *Id.*, 63.

²³ *Id.*, 65.

²⁴ Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Laos, Libya, Nepal, Portugal, Romania and Spain. See "Growth in United Nations Membership, 1945-present", available at <http://www.un.org/en/members/growth.shtml> (last visited 29 April, 2012).

²⁵ E. McWhinney, *Self-Determination of Peoples and Plural-ethnic States in Contemporary International Law: Failed States, Nation-building and the Alternative, Federal Option* (2007), 40. For full details of the political intrigues of UN admission in the cold war era, see Grant, *supra* note 5, 145-202; B. Conforti & C. Focarelli, *The Law and Practice of the United Nations* (2007), 33-38.

²⁶ Grant, *supra* note 5, 202.

²⁷ South Sudan was admitted as the 193rd member of the United Nations on July 14, 2011. South Sudan's independence on July 9, 2011, followed a referendum in January 2011, secured under the Comprehensive Peace Agreement of 2005 between the Government of Sudan and the Sudan Peoples' Liberation Movement/Sudan Peoples' Liberation Army. The admission met with no opposition. See UN News Service, 'UN Welcomes South Sudan as 193rd Member State', (14 July 2011) available at

An attempt by Taiwan to obtain membership of the UN in 2006 was strenuously blocked by China PRC, a permanent member of the Security Council because China denies Taiwan's statehood, insisting Taiwan is a part of the Peoples' Republic of China.²⁸ Palestine's attempt to get recognized as a State through UN membership in September 2011²⁹ did not yield anything much, because the US threatened to veto any recommendation for admission of Palestine as a UN member. The ground for such stance was that Palestinian statehood should come as a result of peaceful negotiations with Israel.³⁰ This is in spite of the fact that the UN has not been able to do anything concrete on the Israeli-Palestinian conflict for over six decades.

In the days of the Yugoslav break-up, the UN membership of Macedonia was opposed by Greece on the ground that the name "Macedonia" is synonymous with a province in Greece and that a constitutional provision of the Applicant State instilled fears on Greece that the former may be harbouring irredentist ambitions over the affected territory of Greece. This prompted the UN to admit Macedonia under the provisional name, "Former Yugoslav Republic of Macedonia" (FYROM) "for all purposes within the United Nations pending settlement of the difference that has arisen over the name of the State".³¹ Efforts at reaching a settlement over the name led Greece and Macedonia to sign the Interim Accord of September 13, 1995, in which Greece agreed to recognize Macedonia as an independent and sovereign State³²; and not to object to membership application of Macedonia into international or regional organizations of which Greece is a member.³³ Greece later objected to Macedonia's membership application to the North Atlantic Treaty Organization (NATO) on the same name issue. Macedonia instituted a case

<http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Su> (last visited 29 April 2012).

²⁸ Art. 2, China's Anti-Secession Law 2005, available at <http://www.taiwandc.org/aslaw-text.htm> (last visited 29 April, 2012).

²⁹ See Note of September 23, 2011, by the Secretary General to the General Assembly and the Security Council, UN Doc. A/66/371 and UN Doc. S/2011/592, 23 September 2011, Annex I and II.

³⁰ See Washington Wire, 'Text of Obama's Speech at UN' (21 September 2011) available at <http://blogs.wsj.com/washwire/2011/09/21/text-of-obamas-speech-at-u-n/> (last visited 29 April 2011).

³¹ SC Res 817 (1993), 7 April, 1993, para. 2, adopted without vote: S/PV.3196, 2-3; GA Res. 47/225, 8 April 1993: A/47/PV.98, 6.

³² Art. 1, para. 1, Interim Accord, 13 September 1993.

³³ *Id.*, Art. 11, paragraph 1

at the International Court of Justice, which ruled that Greece was in breach of Article 11 paragraph 1, of the Interim Accord in objecting to Macedonia's admission into NATO membership.³⁴

Thus, the admission practice of the UN has become dogged by issues that ordinarily wouldn't have been in contemplation of Article 4 (1) of the Charter. Grant has therefore asserted that right from the East-West Compromise days, the substantive criteria for admission set out in Article 4 are no longer mandatory except one – statehood. The criteria, according to him, have become permissive rather than restrictive; the result, being universal membership and presumed right of membership.³⁵ Conversely, Crawford asserts that the Cold War era and the strong support for decolonization tended to muffle debates about statehood and a shifting tendency towards universal membership.³⁶ Crawford's view seems to be based on the massive admissions witnessed in the 1990s following the collapse of the former Yugoslavia and USSR. The issue of statehood was never considered in all the admissions made in the period. Perhaps, it was presumed.

II. UN Membership and Unilateral Secession

It is imperative to discuss another special case of admission, which is quite different from the cold war and decolonization cases already discussed above. It is the case of entities created as a result of secession. Although, the UN is guided by the traditional requirements of statehood in admission of new members, many entities have been denied membership due to their mode of creation rather than failure to meet the requirements of statehood. This is more pronounced nowadays in the cases of entities created out of unilateral secession. The admission of Bangladesh into the UN membership was delayed due to a veto by China in 1972 to the draft resolution³⁷ to recommend admission, on the ground that Bangladesh failed to comply with General Assembly Resolution³⁸ calling for troop withdrawal on both sides.

³⁴ *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, ICJ Reports 2011, paras 98, 101, 103 and 113.

³⁵ Grant, *supra* note 5, 251 and 295-297.

³⁶ Crawford, *supra* note 6, 182.

³⁷ SCOR 659th Meeting, August 26, 1972 (11-1 (China) :3 (Guinea, Somalia and Sudan).

³⁸ GA Res 2793 (XXVI), 7 December 1971.

Bangladesh was subsequently admitted in 1974³⁹ after Pakistan decided to recognize it as a State. Generally, the UN does not admit a new entity that came into existence as a result of unilateral secession⁴⁰ unless the parent State acquiesces. This was what happened in the Bangladesh case.

Exceptions however include where the secessionist group has been recognized as a unit entitled to self-determination for purposes of decolonization. An occasion in which the UN recognized an entity as independent (but not by admission), without the consent of the parent State in a colonial context, where the administering State had forcefully prevented the entity from exercising its right to self-determination was in Guinea Bissau, which unilateral declaration of independence was welcomed by the General Assembly of the UN at a time when Portugal was still resisting the forces of the *Partido Africano para a Independência da Guiné e Cabo Verde* (African Party for the Independence of Guinea-Bissau and Cape Verde) (PAIGC) in 1973.⁴¹ Other examples were Indonesia, against the Netherlands and the cases of Eritrea and the Baltic States, which were forcefully annexed by the USSR. It has been suggested that self-determination has developed as an additional criterion of statehood.⁴² The violation of the principle of self-determination was a reason for non-recognition of Southern Rhodesia.

III. UN Membership and State Succession

Another important issue that plays out at the UN admission process may be gleaned from membership bids of successor States. When a new State emerges from an already existing State, which is a UN member, does the new State inherit UN membership from its parent State? What of situations of dissolution of States? Does any splinter State have the right to continue the legal personality of the former parent State so as to continue its membership of international organizations?

The issue of succession into membership of an international organization was first tackled by the UN in 1947, following British grant of independence to India and Pakistan. British Raj India was an original

³⁹ SC Res 351 (1974), 10 June 1974; GA Res 3203 (XXIX), 17 September 1974.

⁴⁰ Shaw, *supra* note 7, 206.

⁴¹ See GA Res 3061(XXVIII), 2 November 1973, paras 1 and 2. For a fuller discussion of entities recognized despite non-fulfillment of the traditional requirements of statehood, see Shaw, *supra* note 7, 201-206.

⁴² Shaw, *supra* note 7, 206; Raic, *supra* note 7, 437.

member of the UN. Upon the partition at independence, Pakistan applied that both Indian and Pakistan become automatic members of the UN. While India was allowed to continue as an original member, the Security Council recommended Pakistan to be admitted as a new member. The issue was then referred to the First Committee by the General Assembly. In order not to delay Pakistan's admission, the First Committee voted to recommend Pakistan's admission to the General Assembly but simultaneously referred the matter to the Sixth Legal Committee, with the question, "What are the legal rules to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject?" The Sixth Committee proffered the following Principles:

- "That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist."
- "That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the *United Nations*, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter."
- Beyond that, each case must be judged according to its merits.⁴³

⁴³ U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee dated 8 October, 1947)., available at <http://daccess-dds-ny.un.org/doc/UNDOC/DER/NL4/716/51/PDF/NL471651.pdf?OpenElement> (last visited 2 May 2012)

The issue was replayed in the botched application of the Federal Republic of Yugoslavia (FRY), later known as Serbia and Montenegro, to continue the UN membership of the Socialist Federal Republic of Yugoslavia (SFRY) as the Rump State; and the successful application by the Russian Federation to continue the membership of the former USSR in the UN. In the two cases, both entities emerged from dissolution of their predecessor States. In fact, in the case of the USSR, the Minsk Declaration of December 8, 1991 clearly stated that the entity known as the USSR “has ceased to exist as a subject of international law and a geopolitical reality.”⁴⁴ In the Yugoslav case, the Badinter Commission in its Opinion No. 1 found that the SFRY was in the process of dissolution and called on constituent republics to apply for recognition as independent States; and in Opinion No. 8, the Commission ruled that the SFRY “no longer exists”. So, one would have thought that both FRY and Russia were new States as their predecessor States had lost their international legal personality; and in accordance with the Sixth Legal Committee Principles above, should have applied afresh for membership. But as it happened, while Russia was allowed to continue the membership of the former USSR in the UN, the FRY was not allowed to continue the membership of SFRY in the UN. It was requested to apply afresh for membership. Grant⁴⁵ opines that the reason for the different treatment is that while successor States from the former Yugoslavia denied

⁴⁴ The Minsk Agreement, 8 December 1991, preamble para. 1.

⁴⁵ Grant, *supra* note 5, 230.

FRY's claim to continuity of the legal personality of SFRY,⁴⁶ those of the USSR agreed that Russia should continue the legal personality of USSR.⁴⁷

Zimmermann asserts that in international law, entities emerging from secession cannot acquire membership of an international organization by succession unless the entity can successfully show that as a predecessor State, from which part of its territory secedes, it continues the international legal personality of the said State and cites the Russian case as an example.⁴⁸ This seems to be a rehash of the first principle of the Sixth legal Committee. In other words, the crucial agreement of splinter States at Alma-Ata, that Russia should continue the legal personality of the former USSR was conclusive proof that Russia continued the legal personality as a predecessor State from which entities have seceded; a fact not present in the Yugoslav dissolution, whose constituent States vehemently opposed its continuation in international law by FRY.⁴⁹ The consent of constituent States proposition seems to have been applied when Montenegro declared independence in accordance with the Constitution of Serbia and

⁴⁶ SC Res. 757, 30 May 1992, preamble para. 10, where the SC said that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the membership of the former Socialist Federal Republic of Yugoslavia in the UN has not been generally accepted"; SC Res 777, 19 September 1992, para. 1, where the SC "considered that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of [SFRY] in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations [...]"; GA Res 47/1, 22 September 1992, para.1, where the GA resolved that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations and therefore, should apply for membership in the United Nations [...]" For details of opposition to the FRY's claim to continue SFRY's membership in the UN, see Grant, *supra* note 5, 214-227.

⁴⁷ See Decision of Council of Heads of State of the Commonwealth of Independent States (CIS), Alma-Ata, December 21, 1991, para. 1, Annex V to letter dated December 27, 1991 from the Representative of Belarus to the UN, addressed to the Secretary General, UN Doc. A/47/60-S/23329, 30 December 1991.

⁴⁸ A. Zimmermann, 'Secession and the Law of State Succession', in M. Kohen, (ed.), *Secession: International Law Perspectives* (2006),, 208, 220; Grant., *supra* note 5, 228, where the author cited the Report of the UN Sixth Legal Committee 1947 on States Emerging from the Territory of a member State as authority for the proposition

⁴⁹ For fuller discussion of the India/Pakistan and Yugoslav/USSR automatic membership issue, see, M. Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', 28 *Cornell International Law Journal*. (1995)1, 29,, 33-64.

Montenegro⁵⁰ in 2006. A secession provision in the Constitution had stated that a “member state that implements this right [secession] shall not inherit the right to international personality” of the Union.⁵¹ Upon the independence of Montenegro, Serbia was allowed to continue the legal personality of Serbia and Montenegro in the UN while Montenegro applied afresh for UN membership.

The law applicable to the question of membership of the UN is meshed with political considerations. The same will hold true for the admission process, as the following section demonstrates.

C. Procedure for Admission under Article 4(2)

The political aspect of the admission procedure comes out glaringly under Article 4(2) above. The procedure for admission has already been stated. It requires a favourable recommendation from the Security Council, which is then effected by voting in the General Assembly. The expression, “in the judgment of the Organization” under Article 4(1) must be read in conjunction with this procedure. The judgment is that of individual existing members and this is where political interests and considerations come to play. Permanent members of the Security Council have vetoed or supported membership applications according to their own political interests and inclinations. What amounts to a “peace-loving State”, has been subjected to various political interpretations.

At the San Francisco Conference on International Organization in 1945, the USSR opposed the inclusion of Argentina as an original member of the United Nations on the ground that it cannot be classified as a “peace-loving State”, having sided with the Axis until the dying days of the second World War, when it shifted support to the Allies obviously on sensing the impending victory of the Allies. Argentina was finally admitted as an original member following a compromise at the Conference that also saw Poland being admitted as an original member. But in 1947, the USSR again opposed the admission of Ireland and Portugal to membership of the United Nations on the ground that the two nations, having remained neutral during the second World War, cannot be deemed to be “peace-loving”. This issue in addition to USSR’s request that its vote for admission of Italy into the

⁵⁰ Constitutional Charter of the State Union of Serbia and Montenegro (4 February 2003) available at http://www.worldstatesmen.org/SerbMont_Const_2003.pdf (last visited 1 May, 2012).

⁵¹ *Id.*, Art. 60.

United Nations membership be predicated on the similar admission of Hungary, Romania, Bulgaria and Finland, led the General Assembly to request an advisory opinion from the International Court of Justice.⁵² A single veto by any of the permanent members of the Security Council overrides the majority decision to admit an entity.

An attempt by the General Assembly to circumvent this power of the Security Council in the determination of admission into the membership of the UN was defeated in 1950, when the International Court of Justice held that the General Assembly can only admit a member upon a "favourable recommendation" by the Security Council.⁵³ But in an Individual Opinion, Judge Alvarez drew attention to an emerging new international law and held:

"Even if it is admitted that the right of veto may be exercised freely by the permanent Members of the Security Council in regard to the recommendation of new members, the General Assembly may still determine whether or not this right has been abused and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Council.

[...] a State whose request for admission had been approved by all the Members of the Security Council except one and by all the Members of the General Assembly would nevertheless be unable to obtain admission to the United Nations because of the opposition of a single country; a single vote would thus be able to frustrate the votes of all the other Members of the United Nations ; and that would be an absurdity."⁵⁴

The above Individual Opinion says much about the bottleneck constituted by the use of vetoes in the admission process. While the conditions spelt out under Article 4(1) constitute a legal regulation and should guide the discretion of member States to vote for or against the admission of an applicant without extraneous requirements as the ICJ held in the *Admission Opinion*, the exercise of the discretion in whether the

⁵² *Conditions of Admission of a State for Membership in the United Nations* (1948), *supra* note 19. For further details of the Argentine controversy and cold war political grandstanding of Permanent members of the Security Council on admission of new members, see Grant, *supra* note 5, chapters 2 and 3.

⁵³ *Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 and 9-10.

⁵⁴ *Id.*, Individual Opinion of Judge Alvarez, 20-21.

conditions have been met or not, is a fact-finding one which a voting State is at liberty to expound so far as it is done within the legal regulation. The reasons for voting in a particular manner cannot be regulated. In the words of the Court:

“Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control.”⁵⁵

For there to be a favourable recommendation of an applicant by the Security Council, all the permanent members must concur but since the reasons that prompt the vote of a Member State are not subject to control, it is really at this stage in the Council that considerations other than legal come to play. The politicization of the admission procedure was so acute during the Cold War that members concluded that substantive admission criteria would have to be put aside, if East-West animosities were not to suspend membership in the UN in a deepfreeze.⁵⁶ Even with the end of the Cold War, there are other political factors that may present themselves though not of the magnitude witnessed in the Cold War era. Once a permanent member casts a negative vote, the admission ambition of an applicant would have been scuttled because, such a matter will not even get to the General Assembly since the recommendation is not favourable.

For instance, judging from the massive support and ovation that greeted the speech of the Palestinian Authority President, Mahmoud Abbas, at the 66th Session of the General Assembly,⁵⁷ it may well be correct to conclude that Palestine would have been admitted as a UN member had the General Assembly had the opportunity to vote but as it is, the issue has never come before the General Assembly because, the Security Council has not deliberated on it due to a US threat of veto. Although the considerations

⁵⁵ *Conditions of Admission of a State for Membership in the United Nations*, *supra* note 19, 60.

⁵⁶ Grant, *supra* note 5, 199.

⁵⁷ The text of Abbas' speech at the 66th Session of the General Assembly of the UN on September 23, 2011, is available at <http://mwcnews.net/focus/letters-to-editors/13647-abbas-speech.html> (last visited 29 April 2012). The ovation was so intense that Israeli Prime Minister in his own speech was prompted to remark, “I didn't come here to win applause. I came here to speak the truth.” See Benjamin Netanyahu's 2011 UN Speech, 23 September 2011, available at <http://mwcnews.net/focus/letters-to-editors/13648-netanyahu-un.html> (last visited 29 April 2011).

of voting States, sometimes influenced by political motives, are expected to be centred and revolve around the legal regulations in Article 4(1), as it is, there is no mechanism in place to ensure that States comply with this while deliberating on the admission of a new State. So, the admission procedure of the UN is fraught with political considerations. The mere fact that the UN refuses membership is therefore, not conclusive that the unsuccessful entity does not meet the requirements of statehood or the conditions for admission spelt out in article 4(1) of the Charter, but may be due to the political rather than legal considerations involved in the admission process.

D. Kosovo and UN Membership

In the *Conditions of Admission of a State* case⁵⁸, the ICJ enumerated the five conditions under Article 4(1) of the Charter, for admission of a new member into the United Nations. From the stated conditions, which have earlier been discussed above, it becomes imperative therefore to examine the case of Kosovo in order to establish whether it has met the conditions for admission as a member of the United Nations.

I. Kosovo as a State

The traditional requirements for statehood are established under the Montevideo Convention on the Rights and Duties of States 1933 as follows:

- “(a) A permanent population;
- (b) A defined territory;
- (c) An effective government; and
- (d) Capacity to enter into relations with other States.”⁵⁹

The requirement of a permanent population means a stable population inhabiting the territory without reference to their number.⁶⁰ Thus, a nomadic population may not qualify for a permanent population.⁶¹ But the Vatican

⁵⁸ *Supra* note 19.

⁵⁹ Article 1, Montevideo Convention on the Rights and Duties of States.

⁶⁰ Shaw, *supra* note 7, 199.

⁶¹ *Id.* But note the ICJ Opinion in the Western Sahara case: *Western Sahara*, Opinion, ICJ Reports 1975, para. 152, which held that nomadic peoples have certain rights in respect of the territory which they traverse: “The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes [...], and their burial grounds in one or other territory. These basic elements of the nomads' way of life [...] were in some measure the subject of tribal rights [...]”.

City, which population is not permanent, is recognized as a State and a Permanent Observer in the UN. It must be noted however, that this is a peculiar situation.⁶² Kosovo's population consists of majority Albanians and minority Serbs and other ethnic groups, which is well recognized by the UN at least since the international administration of the territory by the UN under Security Council Resolution 1244 (1999). The history of the population in Kosovo dates back to pre-Yugoslav era and although, there were persistent feuds between Albanians and Serbs over ownership of the territory, the population has however remained considerably stable.⁶³ Thus, Kosovo may be said to possess a permanent population.

On the requirement of a defined territory, Kosovo's territory is not in dispute and is well recognized by the UN. Even prior to the international administration, the territory of Kosovo was never in doubt as it was an autonomous region, well defined in all Yugoslav Constitutions including the 1989 Serb-manoeuvred amendment that stripped Kosovo of its autonomous status. The permanent population and the defined territory of Kosovo have never been in dispute and it has continued to be so recognized, even after the unilateral declaration of independence on February 17, 2008. What is in dispute is the *imperium* over it. The Northern part of Kosovo inhabited by Serbs has refused to be part of the new State. But it would seem this may not constitute any great impediment to the statehood of Kosovo, as a State may be recognized in international law despite its undefined and unsettled boundaries. What is important is the presence of a consistent band of territory which is undeniably controlled by the government of the alleged State.⁶⁴ An example of such instance is the State of Israel which is recognized by the international community despite the prevalent disputation of its existence and frontiers by its Arab neighbours. Again, Albania was recognized by many States at a time when its borders were still in dispute.⁶⁵

⁶² For fuller details of the international status of the Vatican City, see Crawford, *supra* note 6, 222-225.

⁶³ For a fuller account of Albanian/Serb relationship in Kosovo, see G. Jansen, 'Albanians and Serbs in Kosovo: An Abbreviated History: An Opening for the Islamic Jihad in Europe', available at <http://lamar.colostate.edu/~grjan/kosovohistory.html> (last visited 29 April 2012).

⁶⁴ Shaw, *supra* note 7, 199. At page 200 Shaw observes, that "What matters is the presence of a stable community within a certain area, even though its frontiers may be uncertain."

⁶⁵ See *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. The Netherlands)*, Judgment, ICJ Reports 1969, 3, 32, para. 46, where the Court held, "There is for instance no rule that the land frontiers of a State must be fully delimited

Another requirement of statehood is that of an effective government in place. In the *Aaland Islands* case,⁶⁶ the Committee of Jurists observed that Finland could not be considered to have achieved statehood “until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of the foreign troops.”⁶⁷ Since the declaration, there has been massive foreign military presence in Kosovo in the form of the Kosovo Force (KFOR) and the European Union Rule of Law Mission in Kosovo (EULEX) for the maintenance of peace and security under UN oversight. This was done in order to ensure the maintenance of law and order, the safety of returning refugees and the disarmament of irregular forces. The Northern part of Kosovo, inhabited by Serbs is not under the control of the central government of Kosovo. But the Provisional Institutions of Kosovo in collaboration with the United Nations Interim Administration Mission in Kosovo (UNMIK) institutions have been in control of the territory before and since the declaration. In the light of the above pronouncement, it seems that only when the international forces and administration ceases, Kosovo could be assumed to have a government in place that can effectively control the territory.

However, it would appear that State practice does not support the above position. States have been recognized in circumstances when there was no effective government in place. Normally, this is the case where the entity is an adjudged self-determination unit, being forcefully prevented from exercising that right by the colonial administration. This was what happened in the case of Guinea Bissau, which unilateral declaration of independence was welcomed by the General Assembly of the UN at a time when Portugal was still resisting the forces of the PAIGC in 1973 and the PAIGC was not yet in control of a majority of the population or a substantial part of the territory.⁶⁸ Another example was the case of Congo, which was admitted as a member of the UN in 1960, at a time when there was breakdown of government, with two factions claiming to be the legitimate representatives of Congo. Shaw concludes that the evolution of

and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.”

⁶⁶ League of Nations Official Journal Sp. Supp. No. 4 (1920) 3. The report is available at <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf> (last visited 29 April 2012).

⁶⁷ *Id.*, 8-9.

⁶⁸ See GA Res. 3061(XXVIII), 2 November 1973, paras 1 and 2.

self-determination has affected the standard necessary as far as the actual exercise of authority is concerned and that a lower level of effectiveness, at least in decolonisation situations, seems to have been accepted.⁶⁹ It must however be pointed out that Kosovo was not a colonial territory but a part of a sovereign State, Serbia. Although its actions in the unilateral declaration would seem to be in the exercise of the right to self-determination at least in the remedial sense of it, the principle of territorial integrity of a sovereign State, upheld by most States does not seem to make the above situation applicable to Kosovo. As a matter of fact, most States that have not recognized Kosovo do so, on the basis of the inviolability of the principle of territorial integrity.

But recent State practice seems to have extended the application of the above proposition beyond colonial situations. Croatia and Bosnia-Herzegovina were recognized and admitted into UN membership at a time when foreign troops under the auspices of the Dayton Accords 1995 were in control of substantial areas, owing to fratricidal civil wars. Somalia's statehood is not in doubt in the international community despite the fact that there has been no effective government since 1991. Finally, Kuwait's statehood was upheld by the international community even while it was effectively under Iraqi control after the annexation in 1990. It must however be admitted here, that a distinction exists between acquiring statehood and maintaining same. While the Kosovo case has to do with acquiring statehood, the two latter cases have to do with maintaining already acquired and recognized statehood. Nevertheless, the fact that statehood may be maintained in spite of loss of control of territory may still ring true for establishment of same in deserving circumstances like the Bosnia-Herzegovina case.

So, the fact that a minority part of Kosovo is presently not under the control of the Provisional Institutions; or the presence of foreign troops in the administration thereof does not seem to derogate from its statehood. More so, Kosovo in paragraph 5 of the independence declaration, invited NATO and other international security presences to continue to provide

⁶⁹ Shaw, *supra* note 7, 205. Generally speaking, the same author argues at p. 200, that the requirement of an effective government "is not a pre-condition for recognition of an independent country. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs." For a fuller discussion of entities recognized despite non-fulfillment of the traditional requirements of statehood, see *Id.*, 201-206

security in Kosovo until the national institutions are capable of assuming these responsibilities. This is in consonance with practice even among established recognized States.⁷⁰ So, Kosovo's invitation to the international security presences may cure any defect inherent in that argument.

The last criterion for statehood is the capacity to enter into relations with other States. It has been argued that the capacity to enter into relations with other States is a consequence and not a criterion for statehood.⁷¹ Furthermore, it is also asserted that the capacity to enter into relations is not limited to sovereign States; as international organizations, non-independent States and other bodies can enter into legal relations with other entities.⁷² It is however necessary for a State to be able to enter into such legal relations with other States. The essence of this capacity lies in the necessity of the independence of the entity in question.⁷³

If the entity is not politically or economically independent, it would merely be a puppet State of its sponsors. For example, the South African Bantustans were not recognised as States because it was clear that their budgets and existence were controlled or sponsored by South Africa. It must be conceded that many States are surviving today upon aid donated by richer nations. This has not derogated their political independence. The Bantustans, having been created by South Africa, part of which territory they were, ordinarily would have met the criteria for statehood as there is a presumption of independence of a territorial unit granted independence by its metropolitan State in international law.⁷⁴ However, the Bantustans seem not to have been recognised as States, due to the apartheid connotations behind their establishment, which is a violation of *jus cogens* rules of international law.⁷⁵

⁷⁰ President Camille Chamoun of Lebanon invited the United States to send forces to protect American citizens and to preserve the territorial integrity of Lebanon during a rebellion that had foreign support in 1958. See Lebanon-UNOGIL (United Nations Observation Group in Lebanon) available at <http://www.un.org/en/peacekeeping/missions/past/unogilbackgr.html> (last visited 29 April 2012).

⁷¹ Crawford, *supra* note 6, 61.

⁷² Shaw, *supra* note 7, 202.

⁷³ *Id.*

⁷⁴ Crawford, *supra* note 6, 89.

⁷⁵ See statement of Minister of State at the Foreign and Commonwealth Office, "the very existence of Bophuthatswana is a consequence of apartheid and I think that that is the principal reason why recognition has not been forthcoming". 126 House of Commons Debates, cols 760-761, 3 February 1998, cited in Crawford, *supra* note 6, 89. See also the case of Southern Rhodesia in 1965, where the UN called on member States not to

Situations capable of derogating independence are substantial illegality of origin, where an entity comes into existence in violation of basic rules of international law; entities formed under belligerent occupation; and substantial external control of the State.⁷⁶ Derogation of independence due to illegality of origin by way of violation of basic rules of international law has been exemplified in the South African Bantustans above. An example of a puppet State created under belligerent occupation could be seen in the invasion of Manchuria by Japan in 1932.⁷⁷ But the Allied occupation of Iran from 1941 to 1946 in order to forestall fears of impending German control was not treated as a belligerent occupation so as to render the Iranian regime a puppet government. The occupying forces of Britain and Soviet Union had reiterated that they had no intention to tamper with the sovereignty and territorial integrity of Iran and that the occupation will be temporary.⁷⁸ It therefore, would seem that the intention of the occupying power is relevant in determining whether the occupied State has lost its independence and has become a puppet State.

For independence to be derogated there must be “foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.”⁷⁹ An example of a situation in which substantial external control derogated independence of an entity can be seen in *Loizidou v. Turkey*.⁸⁰ Here, the European Court of Human rights held Turkey responsible for acts of officials of the Turkish Republic of Northern Cyprus (TRNC), on the ground that, “[i]t is obvious from the large number of troops engaged in active duties in Northern Cyprus that her [Turkish] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her [Turkish]

recognize the unilateral declaration of independence on grounds that it was an illegal racist minority regime. GA Res. 2024 (XX), 11 November 1965; SC Res. 216, 12 November 1965, para. 2.

⁷⁶ Crawford, *supra* note 6, 74-76.

⁷⁷ Raic, *supra* note 7, 78.

⁷⁸ See Tripartite Treaty of Alliance (Britain, USSR and Iran), 29 January 1942, 144 British and Scottish Foreign Practice 1017, Art. 1, 4 and 5. For a fuller discussion of the incidents of independence and foreign occupation, see Crawford, *supra* note 6, 74-89.

⁷⁹ I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), 72-74.

⁸⁰ *Loizidou v. Turkey* (merits), ECHR, 18 December 1996, 108 *International Law Reports*, 443, 466-467, para. 56.

responsibility for the policies and actions of the “TRNC””. In other words, TRNC was not an independent State but a puppet State of Turkey.

Kosovo has had the presence of foreign troops in its territory both prior to and after the independence declaration but its capacity to enter into international relations may not have been undermined by that fact. This is because the troops are not attributable to individual States as to be able to label Kosovo as the puppet of such State. This seems to be the most important distinction between Kosovo and other States that have been denied recognition on grounds of not being factually independent. The troops are there under the auspices of the United Nations and the EU. In other words, the troops are troops of the international community and are there to maintain the peace until Kosovo authorities are strong enough to take over the entire control of the territory as stated in paragraph 5 of the Independence Declaration. This does not derogate its independence. This is evident from the 86 UN Member States recognitions so far, and Taiwan. Some of these recognizing States have established full diplomatic relations with Kosovo. This is in addition to its admission to the membership of both the World Bank and the International Monetary Fund,⁸¹ all showing that Kosovo has the capacity to enter into international relations. From the foregoing therefore, Kosovo seems to have met the requirements for statehood entrenched in the Montevideo Convention.

Beyond the Montevideo Convention, a regional instrument spells out another set of requirements for recognition of statehood too. In 1991, the European Community adopted Guidelines for the recognition of States that were emerging from the Balkan and Soviet crises.⁸² After affirming the EC's commitment to the principle of self-determination and its readiness to recognize new States in accordance with normal standards of international practice and the political realities of each case, the Guidelines stipulated the norms and standards that should be fulfilled as pre-conditions for recognition by the new entities as follows:

“respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki

⁸¹ US Department of State, “Kosovo Joins the IMF and World Bank”, available at <http://www.state.gov/r/pa/prs/ps/2009/06a/125489.htm> (last visited 29 April 2012).

⁸² EC Declaration on Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, 62 *British Yearbook of International Law* (1991), 559-560, reproduced in D. J. Harris, *Cases and Materials on International Law*, 6th ed. 2004, 147-148.

and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
guarantees for the rights of ethnic and national groups and minorities in accord with the framework of the CSCE;
respect for the inviolability of all frontiers which can only be changed by legal means and by common agreement;
acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation, as well as to security and regional stability;
commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.”

Kosovo being an entity in Europe, in its declaration of independence, amply undertook to comply with the above; both expressly and by necessary implication.⁸³ Kosovo virtually accepted to comply with everything under the EC Guidelines in the independence declaration.⁸⁴ The adoption of fundamental rights and freedoms as defined by the European Convention on Human Rights⁸⁵ is an indication that Kosovo agrees to be bound by the ideals stated in the EC Guidelines. More so, the Independence Declaration was drafted in close collaboration with most key Western powers.⁸⁶ Kosovo, in the independence declaration, created self-imposed *erga omnes* obligations which States could rely on; and demand compliance with.⁸⁷ This accounts for the almost instantaneous recognition it drew from these States.

⁸³ See text of the Kosovo Independence Declaration, 17 February 2008, para. 2, available at <http://www.assembly-kosova.org/?cid=2,128,1635> (last visited 29 April 2012), which states, “We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.”

⁸⁴ For instance *id.*, para. 8 of the declaration where Kosovo accepts the *uti possidetis* rule of non-violability of frontiers and the non-use of force; and paras 10 and 11, where Kosovo undertakes to promote peace and stability of South East Europe and to forge good and friendly relationship with neighboring States including Serbia.

⁸⁵ *Id.*, para. 4.

⁸⁶ M. Weller, *Escaping the Self Determination Trap*, (2008), 141.

⁸⁷ *Id.*

Weller describes the Kosovo secession as a “supervised independence”.⁸⁸ Kosovo therefore seems to have met the conditions stipulated in the EC Guidelines above in addition to the traditional requirements discussed earlier. Thus, Kosovo may have met the conditions for statehood, which should entitle it to seek membership of the UN.

II. Kosovo as a Peace-Loving State

As has been revealed above, the failure of an applicant to demonstrate that it is a peace-loving State has been a ground for objecting to its admission into UN membership. This underscores the importance accorded the requirement of an applicant State being “peace-loving”, which however, has remained largely political.⁸⁹

On the ground of being a peace-loving State, paragraphs 8, 9 and 10 of the Kosovo Independence Declaration addressed this, when Kosovo undertook to refrain from the use or threat of the use of force in any manner inconsistent with the purposes of the United Nations; seek membership of international organizations in which Kosovo shall seek to contribute to the pursuit of international peace and stability; and declared its commitment to the peace and stability of South East Europe. Such undertakings are only consistent with a peace-loving State. Besides, Kosovo was the victim of violence or the use of force, prior to the events that led to the declaration. This was much acknowledged in the various UN Resolutions⁹⁰ and the eventual takeover of the administration of Kosovo from Serbia by the UN under Resolution 1244 (1999). It must however be emphasised that the fact that Kosovo was the victim of violence does not *ipso facto* present it as a

⁸⁸ *Id.*, 142-143; See also D. Efevwerhan, & R. Ahmad, ‘Secession: New Trends and Practice after the Cold War’, 7 *Soochow Law Journal* (2010) 2., 1, 30-31, where the authors described the occurrence as an “internationally supervised or assisted secession”.

⁸⁹ See Grant *supra* note 5, regarding the Argentine controversy and other admission crisis.

⁹⁰ For instance, see SC Res. 1160, 31 March 1998, condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo; and imposing an arms embargo on Yugoslavia. In SC res. 1199 (1998), 23 September 1998, the Security Council declared that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region, and demanded that all parties to the conflict cease hostilities while the security forces of FRY and Serbia withdraw from Kosovo. It should be mentioned however, that Kosovo Liberation Army (KLA) forces were also admonished to cease all forms of terrorist acts in the above Resolutions.

peace-loving State. But in the absence of any contrary facts, Kosovo may be classified as a peace-loving State.

This is fortified in the case of the admission of Siam (Thailand) as a member of the UN in 1946. France and USSR had objected to its admission on the ground that there were territorial disputes and non-maintenance of diplomatic relations with Siam respectively. Siam gave an assurance that the territorial disputes between it and France will be referred to the ICJ, while it promised to establish diplomatic relations with the USSR. Such assurances proved satisfactory that Siam was a peace-loving State and paved the way for its admission. It must however be mentioned that diplomatic relations with other States is not in itself a criterion for admission. Grant opines that Siam may have given such assurances because USSR was a permanent member of the Security Council and its objection could prove fatal to Siam's admission.⁹¹

III. Acceptance of Charter Obligations

As has been stated while considering the statehood of Kosovo; from the independence declaration, it is clear that Kosovo has accepted UN Charter obligations as these obligations were part of the Ahtisaari Plan referred to in the declaration. Agreement to accept the Ahtisaari Plan⁹² is therefore, an acceptance of UN commitments and obligations under the UN Charter. It was also argued that that included the acceptance of EC Guidelines, which themselves include compliance with the UN Charter. The list of States that have recognized Kosovo includes 22 members of the EU. This attests to the above assertion of having accepted the EC Guidelines. Paragraph 8 of the independence declaration overtly puts the issue of acceptance of Charter obligations to rest. It states:

“We accept [...] and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states.”

⁹¹ Grant, *supra* note 5, 55.

⁹² Independence Declaration, *supra* note 83, para.3.

From the above, there seems to be nothing on ground to suggest that Kosovo has not accepted UN Charter obligations. On this point again, Kosovo may have satisfied the requirement.

IV. Ability to Carry out Charter Obligations and Willingness to do so

The issue of whether a State is capable of carrying out its obligations under the Charter is again, another thorny one. This is because the phrase “in the judgment of the Organization, are able and willing to carry out these obligations” in the last part of Article 4(1) portends grave difficulties for Kosovo's ambition to join the membership of the United Nations. The judgment of the organization here is actually the judgment of the individual member States that will undertake the determination as to whether or not Kosovo is capable and willing to carry out Charter obligations, which may not be apolitical. A vivid example of this, albeit in the League of Nations era was Liechtenstein, whose membership application to the League was rejected on the ground that though, it was a State, it was too small to carry out its obligations under the Covenant.⁹³ This discretion of the members is not subject to control. It may therefore be subject to abuse. Crawford is of the view that where the ability or willingness to observe international law is impaired by lack of responsibility for public order, the question should not be one of ability to obey international law but that of failure to maintain any State authority at all.⁹⁴ From all that has been discussed above however, one may also argue that Kosovo has both the ability and willingness to carry out Charter obligations. This is borne out by the invitation in paragraph 12 of the independence declaration on all States “to rely on this declaration [...]”. There seems to be nothing to suggest otherwise for now.

In the final analysis, it is submitted that Kosovo seems to have met the conditions required for admission into the membership of the United Nations. However, it needs be noted that mere fulfilment of the requisite

⁹³ League of Nations, First Assembly, Plenary Meetings, Annex C, 667-668, cited in Crawford, *supra* note 6, 177. A similar concern was expressed by France and US when Maldives was admitted as a member of the UN in 1965. Deliberations on this issue of small States not being capable of carrying out Charter obligations, led to a re-activation of the Security Council Committee on Admission of New Members after 1971, with a view to providing the members and the Security Council with appropriate information and advice. Grant, *supra* note 5, 60-61.

⁹⁴ Crawford, *supra* note 6, 91-92.

conditions under Article 4(1) is not conclusive. Whether the admission criteria are permissive or not, the issue of whether Kosovo qualifies as a State to be admitted as a UN member, is still not conclusive. The procedure for admission still has to be fulfilled. It is in this procedure that the crucial issue of statehood will be determined and Kosovo's admission bid will meet with difficulties.

E. Kosovo's Manner of Creation and Recognition

Another issue that deserves discussion here is the manner of creation of the State of Kosovo. This is because of the earlier assertion that entities created as a result of a unilateral secession from a sovereign State, outside a colonial context, usually do not receive recognition by the international community. Kosovo was a region in Serbia and not a colony. From the very day that Kosovo proclaimed its independence, recognitions came pouring in from powerful nations like the United States, Britain, France, Germany and a majority of EU member nations. As of May 2010, 69 UN member States had recognized Kosovo as an independent State. After the ICJ Opinion on Kosovo on July 22, 2010, that the unilateral declaration of independence did not violate any general rule of international law or the *lex specialis*, 17 additional States⁹⁵ have since recognized Kosovo thus, bringing the total number of UN Member States' recognition till date to 86⁹⁶ – more than thrice the number of recognitions accorded Taiwan since 1971. Taiwan is a non-UN member that has also recognized Kosovo. The Sovereign Military Order of Malta, a non-state entity, but a UN Permanent Observer, also recognises Kosovo as a State. Russia; and Serbia understandably, however oppose the secession of Kosovo as a violation of Serbia's territorial integrity and against the spirit of Resolution 1244 (1999).

Although international organizations do not recognize States in international law, they however have the capacity to make status statements and admit an entity that they think has fulfilled the requirements of statehood. Thus, Kosovo has been admitted into the membership of the

⁹⁵ Honduras, Kiribati, Tuvalu, Qatar, Guinea Bissau, Oman, Andorra, Central African Republic, Guinea, Niger, Benin, Saint Lucia, Gabon, Nigeria, Kuwait, Cote D'Ivoire and Sao Tome and Principe.

⁹⁶ List of recognitions available at <http://www.mfa-ks.net/?page=2,33> (last visited 29 April, 2012). As of the time of going to press, Ghana, Haiti and Uganda have also recognized Kosovo, bringing the total number of recognitions to 89.

International Monetary Fund and the World Bank.⁹⁷ There are very bright hopes that the Council of Europe will admit Kosovo, when the latter applies for membership as more than two-thirds of its member-States have already recognized Kosovo. The Organization of the Islamic Conference has supported and welcomed the independence of Kosovo.⁹⁸ It is also hoped that many more States will recognize Kosovo, following the clean slate given its declaration of independence by the ICJ. Does it therefore not look like the recognition accorded Kosovo by the US and EU countries within hours of the declaration were premature, in which case, such recognitions were illegal in international law? One may need to re-examine the antecedents of the Kosovo secession briefly in order to address this issue.

After several efforts by the international community to seek a mutual settlement to the crisis including efforts at the settlement talks based on the Comprehensive Proposal all failed, the UN Secretary General's special representative, Martti Ahtisaari, recommended "supervised independence" for Kosovo when he wrote: "[...] I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community."⁹⁹ The Troika, made up of the EU, US and Russia also tried in last minute efforts to reach an amicable settlement. The Troika also reported that no amicable solution could be agreed on by the parties. The above finding from an envoy of the UN Secretary General that the only viable option was independence; coupled with the self-imposed limited sovereignty by Kosovo became the basis upon which the EU and NATO based their support for Kosovo as planning for the "international supervision" appeared to have started soon afterwards.¹⁰⁰

⁹⁷ Both effective from June 29, 2009, *supra* note 81.

⁹⁸ OIC News, 'Secretary General of the OIC declares support to the Kosovo Independence' (18 February 2008) available at http://www.oic-oci.org/topic_detail.asp?t_id=840&x_key=Kosovo (last visited 29 April, 2012), where the Secretary General of OIC, observed, "The Islamic Umma wishes them [Kosovo] success in their new battle awaiting them which is the building of a strong and prosperous state capable of satisfying of its people."

⁹⁹ Letter dated 26 March 2007 from the Secretary General, addressed to the President of the Security Council and Report of the Special Envoy of the Secretary General on Kosovo's future status UN Doc S/2007/168, 26 March 2007; Comprehensive Proposal for the Kosovo Status Settlement, letter of Secretary General to the President of the Security Council, UN Doc S/2007/168/Add. 1, 26 March 2007, para. 5.

¹⁰⁰ C. Warbrick, 'Kosovo: The Declaration of Independence', 57 *International and Comparative Law Quarterly* (2008) 3, 675, 678.

The Ahtisaari Proposal has also been criticised for actually giving Kosovo the leverage to declare independence after the Security Council failed or neglected to adopt a resolution on the Comprehensive Proposal.¹⁰¹ It must however be stressed that the international community may have tried the best they could in the settlement of the Kosovo-Serbia crisis without success. That prompted the UN Secretary General to appoint his envoy to come forward with a Comprehensive Proposal for the settlement of the crisis. The envoy, having arrived at the above conclusion, which was supported by the Secretary General and recommended for approval to the Security Council, the failure of the Council to reach a decision on the recommendation would have left the situation hanging on indefinitely. That would not have been in the interest of the people of Kosovo nor the entire region that would have been engulfed in the crisis had there been a resumption of hostilities between the parties. As the EU put it in its Memorandum on Resolution 1244, justifying its mission in Kosovo (EULEX) and support for Kosovo's independence:

“Acting to implement the final status outcome in such a situation is more compatible with the intentions of 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.”¹⁰²

Pleasant and convincing as the above statement of the EU may sound, it is however not so straight forward in the view of Russia. This is where the problem really lies. The above historical and political context seems therefore to be the crux of the recognition and non-recognition Kosovo has received so far.

For example, while it would be agreed that the humanitarian catastrophe that the crisis generated justified the intervention by NATO, the perceived non-compromising stance of Serbia in the negotiations that sought to find a political solution to the crisis, may have made Western powers more determined to ensure a successful secession for Kosovo. It has been stated earlier how key Western powers participated in doctoring the independence declaration in order to give it a legal foundation in international law and to ease likely opposition from the international

¹⁰¹ M. Weller, *supra* note 86, 138.

¹⁰² See P. Reynolds, 'Legal Furore over Kosovo Recognition' (16 February 2008) available at <http://news.bbc.co.uk/2/hi/europe/7244538.stm> (last visited 29 April 2012).

community. Thus, the recognition that flowed in from these States was spontaneous, premature but not unplanned. It was actually done as punishment or sanction for the “political bad behaviour”¹⁰³ of Serbia; and this was political.

On the other hand, key States that refused to recognize the secession apart from Serbia, which is the most aggrieved, did so not because of their firm belief in the norms of international law of sovereignty and territorial integrity, but in consideration of the political consequences that await them at home should they decide to recognize the Kosovo secession. Such States like Spain, Russia, China, Argentina, Israel, Indonesia and a host of others, all have some kind of secessionist conflict at home. That is not to say, however, that their insistence on the territorial integrity of Serbia lacks merit in international law. The point being made here is that but for the fear of such consequences at home, these States may not have been too keen on the territorial integrity argument. Instructively, Argentina and Israel overtly referred to the Falklands/Malvinas and the Palestinian crises in their respective domains as reason for not wanting to recognize Kosovo as a State.¹⁰⁴

From all that has been said, political considerations played a great role in the recognition of Kosovo by some States and the non-recognition by others. As a matter of fact, the traditional criteria for recognition of statehood were not much in consideration in the Kosovo secession. Perhaps, they were assumed or presumed to exist. What was uppermost in the minds of recognizing or non-recognizing States were the national and regional interests of the States concerned. It must however be conceded that since international law is based on State's practice and the consent of States, there is no way the political and economic interests of States can be fully separated from the application of international law norms. In any case, whatever the interests, they have all been beautifully wrapped in one form of legal norm or the other. This is evident in the role played by the Contact

¹⁰³ On the doctrine of recognition as a sanction for political bad behavior, see, A. H. Berlin, 'Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors', 31 *University of Pennsylvania Journal of International Law* (2009), 531.

¹⁰⁴ See B92, 'Argentina rules out recognition' (29 February 2008) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=02&dd=29&nav_id=48079 (last visited 29 April, 2012); The Jerusalem Post, 'Israel won't recognize Kosovo, for now' (19 February 2008) available at <http://www.jpost.com/Israel/Article.aspx?id=92481> (last visited 29 April, 2012).

Group and the International Steering Group,¹⁰⁵ both of which Russia belongs, at the initial stage of the Kosovo crisis.

In the Guiding Principles¹⁰⁶ of the Contact Group for a Settlement of the status of Kosovo, which formed the basis of the status talks and virtually the Ahtisaari Comprehensive Proposal for Kosovo Status Settlement, the Contact Group stated its view of what should form the basis of the settlement thus:

“The settlement of Kosovo’s status should strengthen regional security and stability. Thus, it will ensure that Kosovo does not return to the pre-March 1999 situation. Any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e. no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected.”¹⁰⁷

The true intention of the above paragraph is in doubt. What situation of pre-March 1999 must not be returned to for instance? Is it the oppressive situation of Kosovo Albanians or the status of Kosovo as a region in Serbia? From the tone of the last two sentences in the above paragraph, talking of non-union of Kosovo with any country or part of any country; and that the territorial integrity of regional neighbors will be fully respected, it would seem that the Contact Group had in mind that Kosovo would never return to be part of Serbia in FRY again. Subsequent paragraphs talking of Kosovo not posing a security threat to its neighbors; fighting organized crime and terrorism; cooperating effectively with international organizations and international financial institutions; and the need for a continued international civilian and military presence to ensure supervision of compliance with the status settlement and implementation of standards,¹⁰⁸ all point to the fact the Contact Group was already preparing Kosovo for an independent statehood.

¹⁰⁵ The International Steering Group (ISG) comprises France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO.

¹⁰⁶ Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, UN Doc S/2005/709, 10 November 2005, Annex.

¹⁰⁷ *Id.*, para. 6.

¹⁰⁸ *Id.*, paras 7-10.

The Principles emphasized that the progress of the status process shall not only be determined by the level of engagement of the parties but also on the conditions on the ground. It however envisaged that the Security Council will remain actively seized of the matter and that the final decision on the status of Kosovo shall be endorsed by the Security Council.¹⁰⁹

The Ahtisaari Comprehensive Proposal¹¹⁰ provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement¹¹¹ but made the mandate of the ICR subject to full review by the International Steering Group (ISG), “no later than two years after the entry into force of this Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention”¹¹² and making the mandate of the ICR terminable when the ISG determines that Kosovo has implemented the terms of the Settlement.¹¹³ The only thing missing from the above analysis was a Security Council Resolution for Kosovo's independence. The declaration had to be made without a Security Council resolution when it became clear that Russia would veto a draft resolution that had the effect of implementing the Ahtisaari Plan, sponsored by Belgium, France, Germany, Italy, the UK and the United States, which was accordingly withdrawn before a vote could be held on it.¹¹⁴ It becomes a bit confusing, at what stage Russia fell out with members of the group. But it clearly establishes the political interest theory earlier propounded.

The political undertones of the recognition or otherwise of Kosovo were also pointed out in the statement of the representative of the Western Sahara on the Kosovo secession:

“The example of Kosovo clearly shows that the international community exercises the policy of “two weights two measures” when it comes to deal with the process of independence and this is due to the interests to big powers[...] the decolonisation process in Western Sahara, which is on the agenda of the UN's Fourth Committee for Decolonisation since more than 30 years,

¹⁰⁹ *Id.*, preambular paras 6 and 8.

¹¹⁰ UN Doc S/2007/168/Add. 1, *supra* note 99.

¹¹¹ *Id.*, Art. 12.

¹¹² *Id.*, Annex IX, Art. 5.1.

¹¹³ *Id.*, Annex IX, Art. 5.2.

¹¹⁴ M. Weller, “Kosovo's Final Status”, 84 *International Affairs* (2008) 6, 1223, 1225-1226.

has still not found solution despite the numerous resolutions of the UN's Security Council that recognise to(sic) the Saharawi people the right to self-determination. We assisted a hurry to support the independence of Kosovo, despite the fact that this case wasn't even registered in the Fourth Committee."^{115]}

The foregoing political manifestations are surely going to be replayed at the Security Council whenever the issue of Kosovo's UN membership is on the agenda. Russia has voiced its opposition to the independence of Kosovo, in support of Serbia. It called on an emergency meeting of the Security Council to condemn the declaration but the purpose was defeated due to lack of unanimity of the veto wielding members. So, Kosovo's UN membership is not likely to be in view for now as it is sure to be scuttled by Russia in the Security Council. This is because of the requirement of a "favorable" recommendation from the Security Council before the General Assembly can vote for its admission under Article 4(2) of the Charter, earlier discussed.

China, another permanent member of the Security Council, though refuses to recognize Kosovo may not pose any great threat to Kosovo's UN membership bid. China's opposition is in line with her traditional foreign policy of respecting the territorial integrity of States. China has been calling on Serbia and Kosovo to work out an amicable solution to the problem and does not seem to be as vehemently opposed to Kosovo's independence as Russia.¹¹⁶ If there were a vote in the Security Council on Kosovo's application, China may at worst abstain from voting. It will not vote in favour so as not to send wrong signals back home and is not likely to veto in order not be seen in bad light by supporters of Kosovo. But Russia is likely to cast a veto unless there are compromises struck. Such potent power of a single State over the wishes of the majority has become the bane of the UN in modern era. Unfortunately, it will continue to be so for the near future, unless there is a reversal or a pre-determined abandonment of the ICJ's

¹¹⁵ See *Union de Periodistas y Escritores Saharawi* (UPES), 'Process of Independence: POLISARIO Front denounces the policy of 'two weights two measures' (21 February 2008) available at http://www.upes.org/bodyindex_eng.asp?field=sosio_eng&id=819 (last visited 29 April, 2012).

¹¹⁶ See Xinhuanet News, 'China calls upon Serbia, Kosovo to continue to solve differences through dialogue' (30 November 2011) available at http://news.xinhuanet.com/english2010/china/2011-11/30/c_131277944.htm (last visited 29 April 2012).

Competence of Assembly Regarding Admission to the United Nations Opinion, which is not likely.

However, in the long run, should the Kosovo UN membership issue be presented at the UN, the political or economic interests of member States, especially in the Security Council, may lead to certain compromises being struck among contending stakeholders that may result in the final admission of Kosovo as the 194th member of the United Nations. Such compromises have always been there even at the formation of the United Nations as evidenced in the Argentine controversy¹¹⁷ and the East-West Compromise Package.

F. The Prognosis

A prognosis of events to come in the long run would however present the following options and likely compromises. Serbia has applied for membership of the EU. That application has not received a favourable response. It is believed that its application is being treated with disinterest due to its violation of key EC rules and practice, like human rights and respect for minorities' rights. If Serbia is desperate to obtain membership of the EU, it may be persuaded to recognize Kosovo, as a requirement for admission.¹¹⁸ As it is well known, about 22 out of the 27 member States of the EU have recognized Kosovo. Such a trump card from the EU, if successful, would render Russia practically incapable of exercising its veto. Russia's insistence on not recognizing Kosovo has been on the ground that the territorial integrity of Serbia must be respected. If Serbia recognizes Kosovo, Russia would not be able to object again – a situation similar to what happened when Pakistan recognized Bangladesh.¹¹⁹ This much can be

¹¹⁷ Grant, *supra* note 5, 25-27.

¹¹⁸ See I. Traynor, 'Serbia's Road to EU may be Blocked as Checkpoints Return to Balkans', (4 December 2011), available at <http://www.guardian.co.uk/world/2011/dec/04/serbia-kosovo-eu> (last visited 29 April 2012). The British Foreign Secretary, William Hague was quoted as saying, "We do want to see a very strong [Serbia] commitment to the dialogue with Kosovo", as Britain joined Germany, Austria and The Netherlands in threatening to veto a decision on Serbia's admission to the EU.

¹¹⁹ It would seem that Serbia is already working in that direction as it has signed an agreement with Kosovo to allow the latter to participate in international conferences and to manage their joint borders. See The New York Times, "Kosovo and Serbia Reach Key Deal", (24 February, 2012) available at

borne out from the statement of Russia's ambassador to Serbia, "Russia's stand is rather simple – we are ready to back whatever position Serbia takes."¹²⁰ It means if Serbia decides to recognize Kosovo, Russia will back it. If this happens, it will then pave the way for Kosovo's admission into the membership of the UN.

Perhaps, another option would be to excise the Serb majority areas from Kosovo in order to join them to Serbia. It may be easier to placate Serbia if the Serb minority areas of Northern Kosovo were excised from Kosovo and be made part of Serbia. With this done, Serbia would not have much moral justification to insist on having Kosovo since Kosovo Serbs will now be among their own kith and kin in Serbia. Serbian President has said, "I will continue convincing my colleagues in the EU that Serbia has legitimate interests in Kosovo that we will not renounce."¹²¹ But this is most unlikely as this was not envisaged under UN Resolution 1244. Other instruments including the Ahtisaari Comprehensive Proposal for Kosovo Status Settlement, talk of Kosovo as an "undivided multi-ethnic society".¹²²

A further likely option will be a compromise deal to be brokered between Russia and the United States and its allies similar to the East-West Compromise Package of 1955. This will be for the Western allies and their permanent members to agree to the admission of South Ossetia and Abkhazia into UN membership in return for Russia's consent to Kosovo's admission to the same body – a situation already criticized in the *Admissions Opinion*. But given the Western nations condemnation of Russia's involvement in the two secessions and their support for Georgia, whose territorial integrity has been violated by Russia's conduct, this is most unlikely as the West would not want to betray Georgia's confidence.

Closely related to this, is the fact that Russia is currently requesting the EU to accord its citizens the right to visa-free travel and movement

http://www.nytimes.com/2012/02/25/world/europe/25iht-kosovo25.html?_r=1 (last visited 29 April 2012).

¹²⁰ See B92 'Ambassador Underlines Russian Backing', (12 June 2009) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=06&dd=12&nav_id=59780 (last visited 29 April 2012).

¹²¹ See B92 'Tadić: EU Requests Should Serve as Incentive' (16 December 2011) available at http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=12&d=16&nav_id=77838 (last visited 29 April, 2012).

¹²² UN Doc S/2005/709 *supra* note 106, Annex para. 6; UN Doc S/2007/168/Add. 1 *supra* note 99, Art. 1.1.

within the Union.¹²³ This is a right accorded only to citizens of member States of the EU. Russia is not an EU member but its desire to benefit from EU policies without necessarily being a member may also be the bait that the EU may dangle before Russia to coax it to support Kosovo's UN membership bid, given earlier stance of the EU that Russia embraces democracy and human rights in order to be able to join the Union.¹²⁴ This will however depend on whether or not the EU has other more pressing issues to settle with Russia than the recognition of Kosovo. But such request for recognition of Kosovo may prove to be a formidable addition to other conditions in view of the part the EU has played in Kosovo so far. Russia, however, due to sovereignty sake may not give in to such requests from the EU. But in all, the EU's option of membership for Serbia, discussed above, is therefore, the most potent alternative for achieving Kosovo's UN membership.

G. Conclusion

The Kosovo situation will linger on for some time to come but it is suggested here that a consideration of the Individual Opinion of Judge Alvarez, in the *Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion*, to the effect that the General Assembly should be able to determine whether a veto has been abused or not in the admission of a new member, deserves some consideration. In this way, obvious abuse could be check-mated. However, this would entail an amendment of the UN Charter and may not be easy to attain.

But perhaps, a suggestion may be made here that a Uniting for Peace Resolution be invoked in the case of disagreement among the Permanent Members in the Security Council over Kosovo's admission. This is due to the fact that the Kosovo situation was brought about or aided by the UN itself under Chapter VII as a measure to maintain international peace and security, when Serbia's *imperium* over Kosovo was suspended under Resolution 1244 (1999). It is conceded that the final status or independence

¹²³ See Rianovosti, 'Medvedev urges EU to work with Russia on scrapping visa regime' (1 June 2010) available at <http://en.rian.ru/world/20100601/159252066.html> (last visited on 29 April 2012).

¹²⁴ See European Alternatives, 'EU-Russia Relations: a chance not to be missed' available at <http://www.euroalter.com/2010/eu-russia-relations-a-chance-not-to-be-misse> (last visited 29 April 2012).

was not approved by the Security Council but judging by the wide support Kosovo has received in terms of recognition and the fact that the UN is still ably represented there, there is no denying the fact that Kosovo will not be rejoined with Serbia again. To continue to deny such an entity UN membership is counter-productive and will continue to endanger international peace and security, which was the basis of the adoption of Resolution 1244 in the first place. The same applies to Taiwan, which continuous denial of statehood could trigger a conflict that will endanger regional and international peace should China decide to forcefully reclaim the island. This is in view of the fact that the Taiwan issue has been left hanging since Japan surrendered it to Allied powers as part of the peace terms after the Second World War.

As the EU Representative has correctly put it in respect of Kosovo, “Acting to implement the final status outcome in such a situation is more compatible with the intentions of [Resolution] 1244 than continuing to work to block any outcome in a situation where everyone agrees that the status quo is unsustainable.”¹²⁵ Besides in an era of universality of the UN, there seems to be no justifiable reason to continue to deny admission to an entity, which independence was aided, supported and recommended by the UN Secretary-General; and further preserved in an ICJ Opinion requested by the General Assembly. If a veto prevents Kosovo from becoming a UN member, Kosovo may choose to remain a non-member State of the UN but such veto will be an indirect encouragement to oppressive regimes to violate the human rights of their people in the guise of territorial integrity. Furthermore, remaining a non-member of the UN will be quite contrary to the aims and objectives of the UN as well as its status as a universal organization.

¹²⁵ Reynolds, *supra* note 102.