

BALKAN DIALOGUES

STATUS OF KOSOVO FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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BALKAN DIALOGUES:

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The main purpose of this policy study is to provide basic information and recommendations on the current international legal status of Kosovo and the possibility of reaching a comprehensive legally binding agreement between Serbia and Kosovo on this topic. The agreement should resolve all the disputed issues between Kosovo and Serbia and is planned to be the final result of their negotiations under the EU mediation strategy. This Policy Study provides **six main conclusions** regarding the current and future status of Kosovo from the perspective of international law. It starts with the analysis of the situation at this particular moment in time, proceeding to concrete conclusions and recommendations (part of conclusions of the Report) concerning the possibility of reaching a comprehensive legally binding agreement between Kosovo and Serbia.

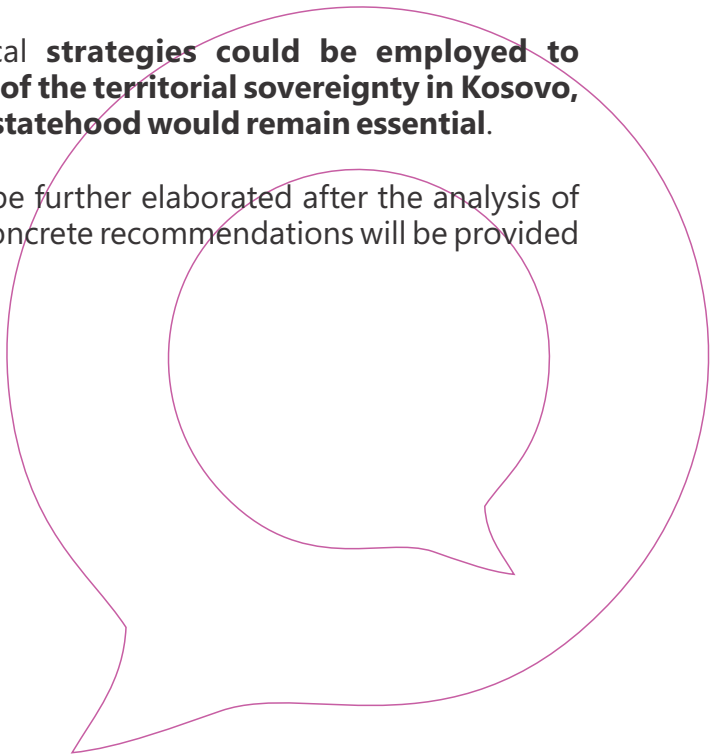
The policy study combines a review of the current academic literature (with an emphasis on international law, but also covering international relations and peace studies) with news stories and official documentation.

The main **conclusions are the following one:**

- 1> The best term for the current international (legal) status of Kosovo is **contested statehood** - notwithstanding complicated theoretical stances on the international legal status of Kosovo, the fact remains that some 90 UN member states, including two permanent members of UN Security Council, do not recognise Kosovo as an independent state. This is a major obstacle for its UN membership and definite confirmation of statehood;
- 2> The main condition for achieving **a sustainable solution** for the status of Kosovo - **reconciliation** between two communities - has not been fulfilled. This has serious consequences for the process of negotiation between Kosovo and Serbia.

- 3> However, if the high political officials of Serbia and Kosovo do decide to conclude a legally binding agreement in the near future, **international law provides various means and instruments for its conclusion**. Political will of the key actors is crucial, and the international law could be its instrument.
- 4> **Flexibility of international law** regarding the conclusion of a legally binding agreement between Kosovo and Serbia **is not completely unlimited**. There are two main limitations: **treaty provisions must be in line with the *jus cogens* norms** of international law and the implementation of said provisions must be **in accordance with the international human rights law**.
- 5> The sixth conclusion relates to the issue of the legal nature and legal consequences of the comprehensive legally binding agreement between Kosovo and Serbia. It can be concluded in this regard that **it is possible**, at least theoretically, **to have an agreement without the official recognition of Kosovo by Serbia**. This, however, would open several related issues – the comprehensiveness of such an agreement, consequences for the EU membership of Kosovo and Serbia, etc.
- 6> Various legal and political **strategies could be employed to decrease the importance of the territorial sovereignty in Kosovo, but the issue of Kosovo's statehood would remain essential**.

All these conclusions will be further elaborated after the analysis of the current situation and concrete recommendations will be provided at the end of Report.



Introduction: Situation analysis

It is difficult to create a definite border between the past and the present. It is equally difficult to start telling the story of Kosovo and Serbia starting from any one specific moment in history. But, regardless of where the story starts, and wherever the border between history and the present may be, there is no doubt that there are fundamental differences between the Serbian and Albanian historical narratives on Kosovo (Nakarada, Tepšić, 2015; Doli, 2019). Furthermore, the process of reconciliation between these two peoples has barely started. It is led by local NGOs and supported by foreign institutions, but the support of the authorities in Belgrade and Pristina is lacking. That is one of the main reasons why negotiations between Kosovo and Serbia are perceived as a zero-sum game and why it is so hard to reach any sort of compromise during the process of negotiation. Additionally, the legal status of Kosovo is still controversial from the standpoint of international law.

The need for a comprehensive legally binding agreement is a direct consequence of **Kosovo's status of contested statehood**. This is still the term which adequately describes the position of Kosovo in the international arena. The defining feature of contested states is the internationally disputed nature of their purported statehood, manifested in their lack of international recognition (Geldenhuis, 2009).

States have a wide discretion when deciding whether or not to recognise an entity as a state. Notwithstanding endless legal debates between the declarative and constitutive theory on the relationship between the act of recognition and statehood (Crawford, 2006), the very existence of contested states points to the significance of the act of recognition, at least from the perspective of world politics. The UN membership is usually seen as tantamount to a *de jure* collective recognition and the birth certificate of a state. When an entity becomes a member of the UN, its statehood is no longer deemed contested.

Although a slight majority of the UN General Assembly member states do recognise Kosovo as an independent state (the exact number is also contested, especially after the de-recognition campaign), formal conditions for Kosovo's membership in the UN (recommendation of the UN Security Council and the two-thirds majority in UN General Assembly, *ICJ Advisory Opinion Conditions of Admission of a State to Membership in the United Nations*), which could be viewed as a final confirmation of its statehood, are still missing. In addition, even though the ICJ Advisory Opinion on the Declaration of Independence is sometimes perceived as the stamp on Kosovo's statehood, this conclusion is not correct since ICJ expressly refused to deal with this issue (*ICJ, Advisory Opinion on the Declaration of Independence*, para. 51). The described situation has some major negative consequences for Kosovo, and that is probably one of the reasons why its main motive for participation in negotiations is the possibility that they would lead to "mutual recognition".

On the other hand, Serbia's chances of regaining full control over Kosovo are very slim. According to the UNSC Resolution 1244, Serbia's legal order in Kosovo is simply "suspended", but it is the Kosovo's institutions that have effective control over the territory (with international presence and a specific situation in some of the northern municipalities). It is a fact that after the Advisory Opinion of the ICJ on the Declaration of Independence there has been no consensus among the permanent five members of the UN Security Council regarding proper interpretation of UNSC Resolution 1244, and that there is actually no one who can authoritatively confirm that Resolution 1244 or general international law guarantee the territorial integrity of the Republic of Serbia including the territory of Kosovo (Wood, Milanović, 2015). Therefore, our legal inclination to look at the existence of a state in a binary way (state/non-state) is perhaps misleading and maybe, at least sometimes, should be viewed as a process - in the case of Kosovo with a crucial role of the "international element" (Dori, 2019). To conclude, when fundamental international legal issues are highly contestable, the party that effectively controls the disputed territory is at a great advantage. Serbian officials are aware of this fact. It is, therefore, reasonable to conclude that both Kosovo and Serbia should be aware that some sort of compromise regarding the agreed status of Kosovo will need to be reached.

However, the history of negotiations between the representatives of Belgrade and Pristina has not been easy. We should mention at least those that were the most important: the Rambouillet Conference in February 1999, formal negotiations on the status of Kosovo in 2006 and 2007 mediated by the UN, the Troika process in 2007, and finally the EU mediated negotiations which have been ongoing since 2011 (Bergmann, 2018). Between 2011 and 2015, the EU mediated talks resulted in sixteen signed agreements. Some issues, however, remained unresolved, including that concerning the legal status of Kosovo (Bieber, 2015). Another topic is, of course, the lack of implementation of at least some of the signed agreements. In November 2018, Kosovo's government imposed 100% tariffs on imports from Serbia, which resulted in a serious negotiations deadlock.

In 2020, various international actors, including the EU and USA, took special efforts to make progress in negotiations concerning the future status of Kosovo. The signing of the document on economic normalisation by President Vučić and Prime Minister Hoti in Washington on 4 September 2020 represented another such attempt. It did not, however, result in the signing of a comprehensive legally binding agreement on the normalisation of relations.

What could "normalisation of relations between Kosovo and Serbia" and the conclusion of a comprehensive agreement mean in these circumstances? Some authors argue that, for Belgrade, "normalisation" means everything except recognition, while "normalisation" without recognition is inconceivable for Pristina (Gashi, Novaković, 2017). It should be underlined once again, however, that the statehood of Kosovo and Serbia's recognition of that statehood are not the same thing, as will be further elaborated in the next section of this study. Things are even more complicated regarding the EU membership of Kosovo and Serbia, and Serbia's recognition of Kosovo (these issues will also be the topic of the next section).

What are the potential implications of the described international legal framework concerning Kosovo's status and the conclusion of a comprehensive agreement?

There are two main paths to Kosovo's membership in the UN:

- 1> *De jure* or *de facto* recognition by Serbia, followed by 9 of the 15 votes and the absence of a "veto" in the UN Security Council and the two thirds majority in the UN General Assembly;
- 2> Special guarantees that Kosovo will become a UN member state even without Serbia's recognition.

On the other hand, it is less certain what Serbia might ask for as the part of comprehensive agreement. It could be the safety and protection of human rights of Serbs and a special status for the Serbian Orthodox Church in Kosovo. Or it could be some form of territorial concession, and/or a significant financial package and a faster path towards EU membership. There are, however, numerous challenges in guaranteeing any of these.

Policy options and International Law

One of the main functions of the (international) law is to establish possible futures for the society (Allot, 1999). The past and the present limit our choices for the future, but there is still room for making decisions - including those on the future of relations between Serbia and Kosovo. In this section, six main conclusions mentioned in Executive summary will be elaborated in more details.

3.1 The argument that Kosovo is an example of the concept of contested statehood was already mentioned in an earlier section of the study. One should add a few clarifications regarding this argument here. As already discussed, in order to definitely confirm its statehood, Kosovo is expecting that "mutual recognition" will be the outcome of the process of negotiations with Serbia. However, at least theoretically, this goal can be accomplished even without Serbia's recognition. Therefore, recognition should probably be viewed as an instrument for achieving the key objective - UN membership. However, it should be recalled in that regard that not even Serbia's recognition represents a formal guarantee of Kosovo's UN membership. This fact has serious consequences for the process of negotiations between Belgrade and Pristina, as it could mean that Russia and China must become involved in it at some point, be it directly or indirectly. It is not possible to guarantee Kosovo's membership in the UN without their approval.

On the other hand, it seems that Kosovo's EU membership requires Serbia's recognition. The EU enlargement policy may be in crisis, but both Serbia and Kosovo still insist that this membership is one of their priorities. In a very recent interview, Susanne Schütz, German Foreign Office's Director for the Western Balkans, repeated yet again that 'regarding the issue of mutual recognition, it is not possible that two EU member states do not recognise each other' (Kossev interview, 17 September). Therefore, it is possible to imagine a comprehensive legally binding agreement between Serbia and Kosovo without Serbia's formal recognition, but in such a case Kosovo might probably have to ask for guarantees that:

- 1) it will become a UN member;
- 2) Serbia recognise Kosovo before it [Serbia] becomes a EU member state.

However, it is not easy to imagine what would constitute reliable guarantees in this context - especially concerning the second request.

3.2 One of the reasons why international guarantees are necessary in this context is **the absence of reconciliation between the Serbian and Albanian people**. It could be argued that the term "reconciliation" is almost overused in this case. However, one of the main problems in the process of reconciliation between the Serbs and Albanians is that this process has been led mostly by NGOs and enthusiasts, without support of political leaders. This is quite obvious if one takes a look at media reports, the substance of school textbooks, etc. In this case, dehumanisation of the Other and lack of compassion for "Their" losses and suffering is the main obstacle for reaching any sort of compromise through negotiations. There is an enormous lack of trust between the parties, and the past twenty years have not been used by either to build capacities of sustainable multi-ethnic societies. That is one of the main reasons why the negotiations on the status of Kosovo are understood as a game in which "winner takes all". Of course, the status issue will always be the most important, but in these circumstances, it is almost impossible to reach a sustainable solution. Furthermore, **the need for reconciliation would not disappear even if a comprehensive legally binding agreement between Kosovo and Serbia is signed** and contemporary relations between Serbia and Croatia could be a good illustration of this fact.

It seems that international actors, especially the representatives of EU and US, are not willing to wait for reconciliation as a precondition for a sustainable solution between Kosovo and Serbia. Their argument is that the current situation is the main cause of uncertainty and instability in the region. The process of negotiations between Serbia and Kosovo with EU mediation is still under way and its main goal is to reach a comprehensive legally binding agreement. Hence, this study needs to provide the answer on how international law norms could be used to facilitate the conclusion of such an agreement. After all, numerous EU representatives declared many times that the agreement between Kosovo and Serbia must be in accordance with international law.

3.3 It should be stressed that **international law is a very flexible normative system which allows a wide discretion of subjects during the process of conclusion of international agreements.** Put differently, the famous request that the future agreement between Serbia and Kosovo should be in accordance with international law is in fact not so difficult to achieve. However, one should not conclude from this statement that just *any* agreement reached between Kosovo and Serbia would be in accordance with international law.

3.4 If a treaty, at the time of its conclusion, is in conflict with peremptory (*jus cogens*) norms of international law, it is considered null and void (the Vienna Convention on the Law of Treaties, Art. 53). This means that provisions of such a treaty have no legal effect. Therefore, the provisions of any future comprehensive agreement between Kosovo and Serbia must be in accordance with the *jus cogens* norms of international law. These are international law norms that are accepted by the entire international community of states, and from which no derogation is accepted. There is no authoritative list of all the peremptory norms, although there is a consensus that they are very rare. One of the non-conclusive lists is that which is offered by the International Law Commission and includes the following norms: prohibition of aggression, genocide, crimes against humanity, slavery, torture, etc. One norm from this list could be especially relevant for the future agreement between Kosovo and Serbia - the right to self-determination of peoples. According to the conclusions made by the International Law Commission, **if any provision of the future agreement between Kosovo and Serbia violates this right, no part of the agreement would have legal effect** (International Law Commission, 2019).

The problem, of course, is that the substance of the right of self-determination of people is a highly contested topic in international law. Nevertheless, there is a consensus that, by virtue of that right, peoples are allowed to freely determine their political status, and it is therefore reasonable to conclude that 'the right to free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people' (Declaration on Friendly Relations, 1970). There have been some rumours that the future comprehensive agreement could include a provision which would deny the right of the newly established Kosovo state to unify with Albania, but it seems that this sort of provision could be contrary to the peoples' right of self-determination.

In addition, emphasis on free will of the people during the implementation of the right of self-determination means that **the exercise of the right of self-determination is sometimes followed by popular consultation such as a referendum**. However, the practice on this issue is not conclusive, and many scholars have already critically assessed the examples of referendums organised as part of the procedure for exercising the right of self-determination (Fisch, 2015). Moreover, some of the issues concerning referendums in such situations still remain: who is entitled to vote; what is the needed majority, etc. It is, therefore, reasonable to conclude that **there are no precise legal rules on the issue of organising a popular consultation as part of the implementation of the right of self-determination**. In any event, even the example of dissolution of Yugoslavia illustrates the fact that there must be some flexibility when it comes to the forms of exercise of said right.

In the case of Kosovo, **negotiations about its future status could include referendums** on the self-determination of peoples, but key elements of that part of the agreement must be based on three questions: **what are the disputed municipalities or areas, who will have the right to vote and what will be the required majority?**

Besides the self-determination of peoples, there are other international law norms that ought to be taken into consideration in the context of the future comprehensive agreement. One is the status of the remaining Serbs in Kosovo. Even after the comprehensive agreement, some Serbs will arguably remain in Kosovo and some Albanians will remain in Serbia. Therefore, it will be very important to re-evaluate the status of Serbs in Kosovo's constitutional system. Since the issue of the Community/Association of Serb Municipalities is the topic of another Balkan Dialogue Thematic Report the emphasis here will be on the issue of protection of human rights in Kosovo in the general sense of the word.

Serbs living in Kosovo satisfy the criteria required for a minority status (of course, if Kosovo is treated as a state) under Article 27 of ICCPR and the Declaration of Minority Rights, which means that **they should have the right to enjoy their culture, profess and practice their own religion, and use their own language even without the above mentioned Community/Association of Municipalities.** Individual and collective rights of the people of Kosovo are already formally protected by the Kosovo Constitution (Articles 21-62), whereas the collective rights are stipulated in its Articles 57-62. However, the implementation of these norms is a highly contested issue among the Serbs and Albanians in Kosovo. It should be recalled in this regard that, given that Kosovo's statehood is contested, it still has no capacity to be a signatory to international instruments of consensual character. However, Ahtisari's Plan already considered that binding Kosovo to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) would serve as one of the most important international safeguards for domestic human rights protection. Article 22(2) of the Constitution therefore stipulates that human rights guaranteed by, *inter alia*, the ECHR and its Protocols are directly applicable to Kosovo, and that, in the case of conflict, they will have priority over the provisions of domestic laws. This was also confirmed by the practice of Kosovo's Constitutional Court. On the other hand, it is highly debatable whether the case law of the ECtHR is legally binding on Kosovo, notwithstanding Article 53 of its Constitution. These issues could be of strategic importance in the process of protection of human rights and fundamental freedoms of Serbs in Kosovo regardless of the powers of the future Community/Association.

On the other hand, proper guarantees of the implementation of human rights are missing. That is, at least, the dominant perception of Serbs who live there. They have no confidence in the work of Kosovo's institutions, including the judiciary. The rule of law in Kosovo, as in the rest of the region, remains something that is yet to be achieved, and the effective protection of human rights thus remains a whim of political will. Such a situation can cause severe consequences in multi-ethnic societies. The issue, therefore, is whether or not it is possible to provide **international guarantees or mechanisms for the protection of human rights in Kosovo.**

Another important issue regarding the conclusion of a comprehensive agreement between Kosovo and Serbia is the possible forced transfer of population across the future borders. This holds true in any scenario: partition, exchange of territories, even without any changes to the borders/boundaries. It should be stated that **forcible transfer/deportation could constitute a war crime if committed in the context of an armed conflict, or a crime against humanity.** In addition, **the practice of forcible transfer/deportation is also prohibited by the human rights law,** meaning that displacement of populations must comply with several specific rights such as the right to life, dignity, liberty and security of those affected; the right to freedom of movement; freedom to choose one's own residence; the right to seek safety in another part of the country, to leave the country and seek asylum; the right to family life and the need to ensure family unity; the right not to be arbitrarily deprived of property and possessions.

One should, however, be aware that formal guarantees of these rights in comprehensive agreements are not sufficient to protect the Albanian and Serbian populations from unwanted displacement. Namely, there are more subtle techniques for displacing populations from certain areas, such as intimidation or discrimination, and stakeholders should make every effort to minimise the possibility of their utilisation.

3.5 The fifth conclusion of the study report is that **it is possible**, at least theoretically, **to reach an agreement between Serbia and Kosovo without Serbia's official recognition of Kosovo**. But, that would open several related issues - comprehensiveness of such an agreement, consequences for the EU membership of Kosovo and Serbia, etc.

Namely, after the President of Serbia and the Prime Minister of Kosovo signed the documents on economic normalisation in Washington on 4 September this year, many commentators concluded that this represented the *de facto* recognition of Kosovo by Serbia. They argued that a state's representative cannot sign an agreement with another entity without *de facto* recognising it as a state. This, however, is not true. First of all, this document can hardly be called a treaty or agreement from the perspective of the Public International Law (Hrnjaz, 2020). Second, even if one presumes that this is an agreement or a treaty, agreements between state and non-state parties are not unheard of in international practice and international law (Quigley, 1997). Some of those agreements even raised the issue of contested statehood of some of the parties thereto. Although such agreements can raise the issue of implicit recognition, states use various tactics to avoid this conclusion, the most frequently used among them being expressly declaring that the conclusion of the agreement does not constitute implicit recognition (Dörr, Schmalenbach, 2012). Therefore, one can deduce that, from the perspective of international law, **it is theoretically possible for Serbia and Kosovo to sign a legally binding agreement without recognition**. If one wants to speculate further, it is even possible to imagine a situation where the agreement between Serbia and Kosovo stipulates that Serbia does not recognise Kosovo as an independent state, but which obliges Serbia not to block the membership of Kosovo in any international organisation, including the UN. However, it looks like the EU and most of the EU member states' officials believe that a "comprehensive legally binding agreement" should mean mutual recognition between Serbia and Kosovo, and that this time no one from EU member states wants to use creative ambiguity concerning key issues such as the Kosovo's status.

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One should, however, be aware that formal guarantees of these rights in comprehensive agreements are not sufficient to protect the Albanian and Serbian populations from unwanted displacement. Namely, there are more subtle techniques for displacing populations from certain areas, such as intimidation or discrimination, and stakeholders should make every effort to minimise the possibility of their utilisation.

3.6 The sixth and final conclusion of this study report is that various legal and political **strategies could be employed to decrease the importance of the issue of territorial sovereignty in Kosovo, but that the issue of Kosovo's statehood will still remain essential.** Both the EU and USA took various steps to decrease the importance of the issue of Kosovo's statehood. The European Union employed the tactic of negotiating "technical" issues, especially during the negotiations on the Brussels Agreement (Bieber, 2015). The USA decided to place emphasis on the economic normalisation of the relations between Serbia and Kosovo, hoping that the improvement of economic relations might foster the accomplishment of an agreement on the political issues, including the status of Kosovo. However, the liberal thesis - that trade, economic interdependence and development promote peace - is under the heavy fire of various critics, and in the case of relations between Serbia and Kosovo has very limited empirical support (Milošević, Hrnjaz, 2017).

This, however, is just one of the various strategies that could be employed to decrease the importance of the issue of the status of Kosovo. Another would be to offer (international) guarantees for the protection of human rights of Serbs in Kosovo. Finally, territorial autonomy could be offered for municipalities in the northern part of Kosovo, where Serbs are the majority population. It seems that the Serbian political leadership (albeit not necessarily the public opinion in Serbia) has definitely given up on the idea that all of Kosovo could ever again be placed under the control of Belgrade. President Vučić's "demarcation" proposal was deliberately vague, although it is difficult to see how "demarcation" could mean sovereignty of Serbia over the entire territory of Kosovo. On the other hand, Kosovar political leaders do not have a consensus on the issue of legal status of the municipalities with Serb majority. The last meeting between representatives of Belgrade and Pristina has been cancelled since representatives of Pristina didn't want to negotiate about the Community/Association of Municipalities with Serb majority. Nevertheless, it seems that at least most of them are ready to grant some special powers for those municipalities (under the conditions that these do not mean "a state within the state"). Hence, the question is: can international law provide a solution for this key negotiating issue - the status of municipalities with majority Serb population, especially those in the northern part of Kosovo?

Of course, it is not possible to develop all possible scenarios regarding this issue here (especially because there is another thematic report dedicated to this topic), but it is safe to remind once again that international law is flexible enough to support almost any agreement between Kosovo and Serbia, including the issue of powers of the municipalities with Serb majority. There are many viable solutions for this problem already present in international practice. But, the main thing which should be kept in mind regarding these solutions is that even though there is only one sovereign(ity), there are many jurisdictions/powers. Therefore, if key political actors want to achieve this agreement, they could look for some creative solutions for territorial pluralism and power-arrangements in Kosovo (Basta, McGerry, Simeon, 2015).

Despite the fact that various creative solutions could be applicable in the case of Kosovo and Serbs living there, the main issue still remains – lack of trust between the communities. This is crucial because the Serbian side does not believe that Pristina will implement the part of the agreement which refers to the Serb majority municipalities even if Serbia does recognise Kosovo or oblige itself not to block Kosovo's membership in the UN. On the other hand, the Kosovo side does not believe that Serbia will not block Kosovo's membership in the UN even that if Kosovo implements the part of the agreement that concerns the status of municipalities with majority Serb population. There are several consequences of the above situation: a) the sequence of the steps is important, and it seems that certain things will have to be done more or less simultaneously; b) there must be constitutional and international guarantees that specific parts of the agreement will be implemented.

Still, even if all these conditions are fulfilled, the issue of sovereignty and statehood cannot be mitigated. Namely, some recent examples, such as Brexit, illustrate the fact that states, and the territoriality of human beings, are here to stay despite all the technological and other contemporary changes. Various strategies for decreasing the importance of the legal status of Kosovo are therefore more than welcome (protection of human rights of all the people living in Kosovo, economic corporation, some sort of territorial autonomy for municipalities with Serb majority, etc.), but it is the sovereign who decides on the exception(s). That is another reason why one must insist on the issue of reconciliation. Our societies need it, with or without comprehensive legally binding agreements.

Conclusions and related recommendations

The six main conclusions of this Thematic Report have been mentioned several times. There are several recommendations in that regard:

- 1> The process of reconciliation between Serbia and Kosovo is needed with or without comprehensive legally binding agreement, but this time it should be led by politicians in power;
 - 2> The key issue of negotiations between Kosovo and Serbia is not the issue of recognition but the issue of Kosovo's UN membership and that fact have serious consequences on the process of negotiations;
 - 3> All stakeholders must be aware of the fact that comprehensive agreement must be in accordance with *jus cogens* norms of international law and especially the right of self-determination of peoples. However, the exact way of every aspect of implementation of this right is not expressly regulated by international law which means that certain dose of flexibility is welcome and needed;
 - 4> Protection of human rights in Kosovo must be internationally guaranteed;
 - 5> Notwithstanding all strategies for decreasing the significance of the issue of Kosovo's status which are more than welcomed, this issue will remain crucial.
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