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The Kosovo Advisory Opinion: Legal Analysis and Political Effects

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Arbenita Rrmoku

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LIST OF ABBREVIATIONS

EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
KFOR	Kosovo Peacekeeping Forces
KLA	Kosovo Liberation Army
KPC	Kosovo Protection Corps
KSC	Kosovo Special Chamber
KVM	Kosovo Verification Mission
LDK	Democratic League of Kosovo
NATO	North Atlantic Treaty Organisation
OSCE	Organisation for Security and Co-operation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
SPO	Special Prosecutor's Office
SRSG	Special Representative of Secretary General
STIF	Special Investigation Task Force
UN	United Nations
UNESCO	United Nation Educational Scientific and Cultural Organisation
UNHCR	UN Hight Commissioner for Refugees
UNMIK	United Nations Mission in Kosovo
UNOSEK	UN Office of the Special Envoy of the Secretary General
UNSC	United Nations Security Council
UNSG	Unite Nations Security General
VCLT	Vienna Convention Law of Treaty

Introduction

There is a wealth of literature, books, and many articles discussing and analysing the legal and political aspects of the Kosovo Advisory Opinion (KAO).[1] This thesis aims to give a critical legal analysis of the KAO, which was the attempt to transform an age-old conflict into a legal procedure. But a full understanding of this still requires the inclusion of the recent history of the conflict as well as its roots dating back to past centuries. The thesis is rounded up by a chapter on the political impact of the KAO. Therefore, it is divided into three chapters;

1. The Historical Background of KAO;

2. The Legal Content of the KAO; this chapter describes the arguments of Kosovo and Serbia and some selected UN member states. An account of the majority opinion of the Court is followed by a short report on some declarations, separate opinions and dissenting opinions.

3. The Political Impact of the KAO; this chapter deals with immediate and long-term effect on the political development during the last eleven years.

All conflicts are in a way 'special', but the parties to the Kosovo conflict place particular emphasis on its 'uniqueness'. Though many scholars of international law and experts on political science and international relations might consider the Kosovo case to be just another in the long list of cases where the principle of self-determination conflicts with the principle of territorial integrity, in the view of the two conflicting parties their situation is unique.

From the very beginning, it should be noted that in the parties' opinion, this uniqueness is deeply rooted in the historical background. Kosovo has a long and convoluted history dating back to the Middle Ages, and beyond which repeatedly has been used to legitimise political actions, increasingly so around the end of Tito-Yugoslavia and the gradual dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). The suppression of the Kosovo Albanians in the 1980ies, highlighted the beginning of this process and was forcefully brought to an end in

[1] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), International Court of Justice (ICJ), 22 July 2010.
https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf

1999 by the most extensive air campaign executed in Europe since WWII, 'Operation Allied Force' by the North Atlantic Treaty Organization (NATO).[2]

The uniqueness argument is not only an issue of history but also permeates both the discussion on legal and political issues until today.

With respect to the legal issues, the hypothesis could be advanced that the unique features allow distilling criteria for a sub-rule to solve at least partially the conflict between the 'principles of territorial integrity' of states on the one hand, and the 'self-determination' of peoples on the other.[3] It might be said that there cannot be one general rule on primacy between conflicting principles of law. The rules on primacy, which are usually enumerated in treatises on legal methods (such as "lex specialis derogat legi generali"),[4] are a shorthand expression for the result of an analysis. It is only after analysing the arguments and interests concerned that at least sometimes the conclusion can be arrived at that one principle prevails in a specific group of cases. Frequently, such sub-rules for an exception from a sweeping principle can be found by carefully analysing and distinguishing all relevant criteria. In the case of 'external self-determination', the emerging sub-rule roughly says: the principle of territorial integrity gives way to self-determination under "certain exceptional circumstances": these include grave oppression and persecution of a people inhabiting a certain territory and denial of autonomous political structures by the government of a state, which result in a justified, severe, and lasting loss of trust of the people in question in their relations with the oppressive state; an additional requirement should be the exhaustion of all other remedies, i.e. the seceding party must have seriously attempted to reach consensual solutions by way of bona fide negotiations.[5]

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[2] Jennifer Trahan, Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes, (Cambridge University Press, 2020), 58-65.

[3] Cf. Hanspeter Neuhold, The Law of International Conflicts: Force, Intervention and Peaceful Dispute Settlement, (Martinus Nijhoff Publishers, 2015), 5.

[4] "The special rule trumps the general rule"; cf. Franz Bydlinski and Peter Bydlinski, Grundzüge der Juristischen Methodenlehre (3rd ed. UTB, 2018), 34; cf. also Malcolm N. Shaw, International Law, (8th ed. Cambridge University Press, 2017), 48, 92-95.

[5] This corresponds to the concept of 'remedial secession', which could be considered to be an emerging lex specialis to the broad rule (principle) of territorial integrity. cf KAO, Judge Yusuf, Separate Opinion, paras 4ff and Judge Trindade, Separate Opinion, paras 97-163, 165-168, 205-209; Helen Quane, Self-Determination and Minority Protection after Kosovo, in: James Summers (Ed.) Kosovo: A Precedent? (Martinus Nijhoff Publishers, 2011), 207; Marc Weller, Contested Statehood: Kosovo's Struggle for Independence, (Oxford University Press, 2009), 16-20; Marc Weller, Escaping the Self-determination Trap, (Martinus Nijhoff Publishers, 2008), 59-69, 154-159; Fernando R. Tesón, Introduction: The Conundrum of Self-Determination, in: Tesón R. Fernando, (ed.) The Theory of Self-Determination, (Cambridge University Press, 2016), 19; See also the overview and criticism e.g. by Stephan Oeter, The Kosovo Case – An Unfortunate Precedent, (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, ZaöRV, Vol.75, 2015) 62-67.

With respect to the political dimensions, the uniqueness argument still plays an essential role in domestic and international politics. From Serbia's point of view, its request for the Advisory Opinion was rational at least in a political sense. Obviously, Serbia had the optimistic expectation that the International Court of Justice (ICJ) would consider the Declaration of Independence (DoI) to be a violation of international law. However, independently of the outcome of the KAO, the proceedings before the ICJ gave Serbia an international stage to present its case; furthermore, the request to the ICJ helped the Serbian government to save face domestically and finally, it was instrumental in delaying the process of recognition of Kosovo.

1 The Historical Background

Issues of international law are often very closely related to issues of political science and history; it can even be argued that these academic fields are only different tools for analysing the same objects, the case of self-determination, of the emergence of new states, or the 'birth of nations' is convincing evidence.[6] This is based on the very nature of the object under observation. The concept of a 'people', which constitutes itself as a unit in a primarily cultural and socio-ethnic sense, then the concept of a 'nation' which may strive for recognition as a separate state under international law, usually breaking away from another state whose integral 'sovereign territory' the people of the emerging state inhabit, all these concepts are tools used to describe the process even though they are concepts used by various academic disciplines.[7]

Both parties, Kosovo and Serbia, provided the ICJ with lengthy statements about the historical background of the conflict, even though both focus on the events of the 20th century, starting basically with the Balkan War of 1912. Still, both parties to the conflict also rely on medieval times and even on antiquity to corroborate their political and legal arguments. Each side

[6]Cf. Neuhold, International Conflict, 3 (on interdisciplinary approach).

[7]James Summers, Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations', (Martinus Nijhoff Publishers, 2008), 2-3, he describes the concepts as follows: "The concept of a nation is similar to a people … In legal usage too, there is little to separate them… both peoples and nations have been considered to have a right of self- determination, as well as other common rights. The most significant difference is that the concept of nation can be broader than a people and refer also to political institutions. Thus, while a "nation" has been used synonymously with a "state", it is difficult to equate a state with a people"; Another attempt of a definition is contained in Summers, Peoples and International law, 2 fn.1: "nation ...a large community of people of mainly common descent, language, history etc., usually inhabiting a particular territory and under one government.", "people ...the persons composing a community, tribe, race or nation"; cf. also Crawford James, The Creation of States in International Law, (2nd ed. Oxford University Press, 2006), 124ff.

> "believes different things because each has been taught different things, and as they reach further back into time it becomes easier to argue whatever they want in order to find support for their view of the present".[8]

Because of the continuing political weight of these narratives, it makes sense to discuss not only modern history but to shed some light also on antiquity and middle ages.

1.1 From Antiquity until Tito's Death

The Albanian narrative believes that the oldest settlements in present-day Kosovo are descendants of Illyrian tribes (Dardanians) dating from 2000 BC. The term Dardania (and Dardanians) dates back to the name of a Roman province[9] located in the area of present-day Kosovo.[10]

The Slavic tribes (Croatian and Serbs) made their appearance in antiquity only in the middle of the 6th century (AD) and first settled in Rascia (today's Novi Sad). The Serbs of that time developed dispersed tribal territories with tribal chiefs; for many centuries, they did not have a common state with a common leadership.[11]

As the whole Western Balkans in the first millennium AD, Kosovo was first part of the Roman Empire and then came under the influence of Byzantium.[12] Only towards the end of the 12th century did Kosovo come under the rule of the emerging Nemanja Dynasty (1184 - 1455).[13]

The whole territory was taken over by the Ottoman Empire in the 1450s, in the same decade when Byzantium was conquered in 1453.[14] From then onwards until 1912, Kosovo (with a short interruption from 1878 to 1881) was under the Ottoman rule, and there was no Serbian state until 1878. A new Serbia came into existence only by the decision of the Berlin Conference, of 1878, but then without comprising the territory of Kosovo.[15]

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[8] Tim Judah, Kosovo What Everyone Needs to Know, (Oxford University Press, 2008), 30.
[9] Noel Malcolm, Kosovo A Short History, (MacMillan Publishers, 1999), 31,32, 40.
[10] Malcolm, Kosovo, 22-40; Židas Daskalovski, Claim to Kosovo: Nationalism and Self-determination, in Florian Bieber and Židas Daskalovski, (Ed.) Understanding the War in Kosovo, (Frank Cass Publishers, 2003), 16-116-18, 36-48.
[11] Malcolm, Kosovo, 24; John Wilkes, The Illyrians, (Blackwell,1995),271; Daskalovski, Claim to Kosovo, 12-15.
[12] Malcolm, Kosovo, 23; Robert Elsie and Bejtullah Destani, Kosovo, a Documentary History from the Balkan Wars to World War II, (I.B. TAURIS, 2008), 2.
[13] Elsi and Destani, Kosovo, 2; Malcolm, Kosovo, 41ff.
[14] Malcolm, Kosovo, 41.
[15] Malcolm, Kosovo, 41; Elsi and Destani, Kosovo, 2.

In the same year, 1878, the Albanian national movement led to the foundation of the League of Prizren, which governed Kosovo until 1881, when the Ottoman Empire re-established its sovereignty.[16]

After the Balkan wars of 1912 and 1913, Kosovo was forcibly occupied by Serbia; at that time, it was not legally incorporated into the Serbian Kingdom. On what date and by which act of international and/or constitutional law Kosovo was incorporated into Yugoslavia (founded in 1918) before WWII remains an open question.[17] Malcolm points out that the law passed by the 'Presidency of the People's Assembly of Serbia' on "3 September 1945 establishing the Autonomous Region of Kosovo … to be a constituent part of Serbia" provides only a dubious legal basis, as this "formality" was based on the decision of a communist "Peoples Regional Council of Kosovo" whose members were 75% Serbs, thus by no means representative of the Kosovo population.[18]

From the 19th century onwards, the Serbian claim to Kosovo has been based on medieval history, in particular, on religious history; some orthodox churches and monasteries, have survived since the Nemanjid time. This claim is made despite more than 500 years of interruption of statehood. As Malcolm observes, "...there is no more continuity between the medieval state and today's Serbia than there is between the Byzantine Empire and Greece".[19]

The most important single chapter of the Serbian narrative of historic national identity until today is the Battle of Kosovo of 1389. It has become a "totem and talisman"[20] of Serbian identity. The Serbian narrative claims that the battlefield "is a symbol of disunity and treason".[21] In contrast to this narrative, it is a historic fact, that a coalition army which included Hungarians, Bulgarians, Bosnians, Romanians and Albanians, all fought together with Serbs against the Turkish invaders.[22]

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[16] Malcolm, Kosovo, 221ff, 226.
[17] Malcolm, Kosovo, 264ff, Weller, Contested Statehood, 27.
[18] Malcolm, Kosovo, 315f; ("only thirty-three out of the 142 members the council were Albanian"). Written Contribution to ICJ of the Republic of Kosovo (17 April 2009), 45ff.
[19] Malcolm, Kosovo, xlvii f; Noel Malcolm, Is Kosovo Serbia? We ask a Historian, (the Guardian, 2008). https://www.theguardian.com/world/2008/feb/26/kosovo.serbia.
[20] Malcolm, Kosovo, 58.
[21] Slobodan Milošević, Speech at the 600th Anniversary of the Battle of Kosovo, extensive quote in Human Rights Watch, Under Order, Wae Crimes in Kosovo, (part 2, 2001), 24.
[22] Malcolm, Kosovo, 58- 80; Miranda Vickers, Between Serb and Albanian a History of Kosovo, (Columbia University Press, New York, 1998), 13; Judah, Kosovo, 20ff.

Against all this historic evidence the anniversary of this "legendary event" is still celebrated and still plays a role "as a source of inspiration for identity building" and as an argument against surrendering sovereignty over a Serbian 'heartland'. [23]

In contrast to these mythological aspects of history, the events from 1912 to 1999 have direct relevance for legal and political arguments concerning the DoI. An international commission reported in 1914 that innumerable atrocities were committed "with the view to the entire transformation of the ethnic character of regions inhabited exclusively by Albanians".[24] The whole period between the wars was characterised by the attempt to reduce the share of the Albanian population, partially by expelling Albanians, partially by settling Serbian colonists.[25]

The International Kosovo Report qualifies the era between the wars as "three decades of government-sponsored colonisation by Serbs", including large-scale land expropriations.[26]

In contrast, the policy of the SFRY after WWII accepted the Kosovo Albanian identity and increased autonomy, albeit reluctantly.[27] Tito's government returned one-third of the land expropriated between the wars to the Kosovo Albanians.[28] With the demise of Aleksander Ranković, Vice-President and Minister of Interior of Yugoslavia,[29] the general suspicion of the Albanian ethnicity was eased and a period of equal treatment and promotion of Albanian interests set in.[30]

From 1967 onwards, Kosovo significantly improved; later on, the period until Tito's death in 1980 was dubbed the 'Golden Age' of Kosovo. The 1970s additionally brought about social and economic improvements for both Kosovo and Yugoslavia.[31] Education improved at all

[23] Peter Hilpold, The Kosovo Opinion of 22 July 2010: Historical, Political and Legal Pre-Requisites, in: Peter Hilpold, (Ed.) Kosovo and International Law (Martinus Nijhoff Publishers, 2012), 1-2.
[24] Carnegie Endowment, Report (1914), 151 quoted in Malcolm, Kosovo, 254; see also Weller, Contested Statehood, 27: The details ("whole villages reduced to ashes … unarmed and innocent populations massacred") resemble the events of 1998-1999.
[25] Elsi and Destani, Kosovo, 3; See also, Malcolm, Kosovo, xlvi-xlvii, 264ff.
[26] Kosovo Report: Conflict, International Response, Lessons Learned, (Independent International Commission on Kosovo, Oxford University Press, 2000), 34.
[27] Judah, Kosovo,49; Wolfgang Petritsch, Robert Pichler, Kosovo- Kosova. Der lange Weg zum Frieden, (Wieser Verlag, 2004), 36-37.
[28] International Commission on Kosovo, 34; Malcolm, Kosovo, 317.
[29] Petritsch, Pichler, Kosovo- Kosova, 38-39; Malcolm, 324-325, Aleksander Ranković who was in favour of stronger Serbian influence lost the power fight against Edvard Kardelj favouring decentralization.
[30] Malcolm, Kosovo, 320-333.
[31] Judah, Kosovo, 55-63.

levels, the foundation of the University of Prishtina in 1970 facilitated higher education in Albanian language. Modest welfare became widespread, and a local academic elite emerged.[32]

Also, great constitutional improvements were achieved. It was of symbolic importance that the unpopular supplement "and Metohija" introduced in 1945 was dropped again. Within the framework of the new SFRY constitution of 1974 Kosovo's status for all practical purposes became equal to the six constituent Republics of Yugoslavia, whose populations were classified as nations, while the Albanian population of Kosovo and the Hungarian population of Vojvodina only qualified as nationalities, because they had their ethnic basis in Albania and Hungary, respectively outside of SFRY. This distinction was the legal background for not granting an Autonomous Province the right of self-determination to which Republics were entitled. [33] But equally to the Republics, Kosovo became a full member of the Presidency of SFRY; and, equal to them, it even had the power to veto changes of the Federal Constitution of the SFRY. At the same time, Kosovo was free to amend its own Constitution and gained a right of approval for amendments to the Constitution of the Socialist Republic of Serbia.[34]

1.2 1980 to 1990: from Tito's Death to the Abolishment of Kosovo's Autonomy

When Tito died, Yugoslavia as a whole was in a critical economic situation, but Kosovo, still considered to be the poorhouse of Yugoslavia, was in an even worse situation.[35] The reason for this decline was probably a misguided economic policy emphasising heavy industry at the expense of agriculture,[36] furthermore, coal and metals extracted from Kosovo mines and electricity generated there were sold to industries outside Kosovo at low prices.[37]

The economic situation had its effect on students of Prishtina University, who lived under miserable conditions.[38] Major student protests broke out in March 1981, but the harsh reactions of the police quickly provoked the solidarity of workers and the general population (involving between 30,000 and 40,000 demonstrators).

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[32] Judah, Kosovo, 56.
[33] Judah, Kosovo, 57; Weller, Contested Statehood, 28, "Republic Status … in all but name"; Malcolm, Kosovo, 324- 327; Petritsch, Pichler, Kosovo – Kosova, 39- 41.
[34] Weller, Contested Statehood, 35.
[35] Petritsch, Pichler, Kosovo – Kosova, 43, 45, 50; Petritsch, Pichler, Kosovo – Kosova, 41.
[36] Malcolm, Kosovo, 336; Holm Sundhaussen, Jugoslawien und seine Nachfolgenstaaten 1943-2011 (Böhlau Verlag Wien, 2014), 215- 229.
[37] Summers, Disputed Independence, 8; Malcolm, Kosovo, 337.
[38] Petritsch, Pichler, Kosovo – Kosova, 41ff; Weller, Contested Statehood, 29.

The scope of complaints became broader and included general social and political issues such as poor wages, preferential public employment of Serbs and Montenegrins (who formed some 15 per cent of the total population but held 30 per cent of all government positions[39]) and occasionally the demand for equal status of Kosovo as a separate Republic. Belgrade qualified all these demands as counter-revolutionary and Albanian nationalism; it brutally reacted with an increased federal police force supported by some 30,000 soldiers equipped with heavy weapons and tanks.[40] The exact number of people killed and arrested cannot be ascertained.[41]

The riots of 1981 in Kosovo were a turning point in the political atmosphere in Kosovo and in the whole of Yugoslavia. The disproportionate reaction of Belgrade triggered the nationalist sentiments not only in Kosovo but also between the various ethnicities all over Yugoslavia.[42] There is now widespread consensus that these tensions did not simply emerge (or re-emerge) but were purposefully unleashed by politicians supported by the intelligentsia and to some extent by the clergy.[43]

They gradually led to the disintegration of the Federation. The ideology mantra of the Tito-era 'brotherhood and unity' was on the retreat.[44] Serbian historians started to describe the history of the Serbs in Kosovo as "an unending ethnic chronicle of martyrdom".[45] This pervasive climate of victimisation of the Serbs received scientific legitimacy by the so-called 'Memorandum of the Serbian Academy of Science and Arts', also known as the SANU Memorandum.[46] It was a political turning point and it broke a taboo.[47] as it directly attacked the ideological and constitutional basis of the SFRY, which had attempted to strike a balance between all the nations and nationalities of Yugoslavia. It also openly criticised the late Marshall Tito as a born Croatian for disadvantaging Serbian interests.[48] Open Serbian

[39] Malcolm, Kosovo, 337, fn. 8.
[40] Malcolm, Kosovo, 344ff; Judah, Kosovo, 80; Summers, 9.
[41] In a report published in 1986 a Belgrade Magazine reports a figure of 1.200 "substantial prisons sentences" and 3000 for "up to three months", Malcolm, Kosovo, 335.
[42] Judah, Kosovo, 61; Malcolm, Kosovo, 337ff.
[43] Malcolm, Kosovo, 337-356; Sundhaussen, Jugoslawien, 25- 28, 239-316; Petritsch, Pichler, Kosovo – Kosova, 44-57; Weller, Contested Statehood, 40. ("the ethnic conflict has been engineered").; Julie A. Metus, Kosovo: How Myths and Truth Started a War, (University of California Press, 1999) 2f.
[44] Petritsch, Pichler, Kosovo – Kosova, 42; International Commission on Kosovo, 37f; Weller, Contested Statehood, 29.
[45] Malcolm, Kosovo, 338.
[46] The draft of the Memorandum had been written in 1985; in 1986 it leaked out and was partially published, Petritsch, Pichler, Kosovo – Kosova, 46ff; Malcolm, Kosovo, 340ff.
[47] Malcolm, Kosovo, 341.
[48] cf. also Human Rights Watch, Under Order, War Crimes in Kosovo (Part 2, 2001), 22-23.

nationalism directed against all the other nations and nationalities became socially and politically acceptable.[49]

On 24 April 1987, Milošević at a local demonstration of riotous Serbs who were attacked by the local police with their batons, intuitively grasped the atmosphere and shouted to the crowd and at the same time into the national TV cameras the famous sentence "No one should dare to beat you".[50] During a few months, the former "grey apparatchik"[51] had turned from a director of a state-owned bank into a populist leader who quickly learned to appeal to the public at large. Two years later, in June 1989, on the occasion of the 600-year celebration of the Battle of Kosovo at the battle field, Milošević addressed a huge crowd; the figures assessing its size vary between 500,000 and 2 million.[52]

Relying on his populist authority, Milošević step-by-step dismantled the constitutional autonomy of Vojvodina, Montenegro and finally of Kosovo. When demonstrations of some 100,000 students, workers and miners of Trepca resulted in a general strike against the abolishment of Kosovo's autonomy,[53] a state of emergency was declared on 1 March 1989.

Federal troops and police moved into Kosovo, and hundreds of people were arrested and indicted. Finally, on 23 March 1989, while the federal army with tanks and the federal secret police surrounded the Parliamentary building in Prishtina, the change of the Constitution as planned by Belgrade was voted upon, abolishing the 1974 Constitution and thus effectively ending the autonomy of the province of Kosovo.[54] The army crushed widespread protests all over Kosovo, and the secret police and riot police arrested demonstrators and many members of the Kosovo Albanian elite without access to lawyers and without due process.[55]

1.3 1990 to 1997: Rugova's Passive Resistance met by Increased Governmental Repression

After the abolishment of Kosovo's autonomy, years of suppression of Kosovo Albanians and of Serbianisation policies followed. First, at Universities, and after a short time in almost all

[49] Malcolm, Kosovo, 300f: "a virtual manifesto for the Greater Serbian policies".
[50] Malcolm, Kosovo, 341f.
[51] Judah, Kosovo, 65. Malcolm, Kosovo, 342; Petritsch, Pichler, Kosovo – Kosova, 52ff.
[52] Petritsch, Pichler, Kosovo – Kosova, 55.
[53] Weller, Contested Statehood, 37.
[54] The vote was taken in a tumultuous and irregular procedure, large numbers of security police officers and communist party functionaries from Serbia were present and, according to some reports even cast a vote; nevertheless, no two-thirds majority was reached. Malcolm, Kosovo, 344; Weller, Contested Statehood, 37; Petritsch, Pichler, Kosovo–Kosova, 57ff.
[55] Malcolm, Kosovo, 344f.

schools, the use of the Albanian language became illegal. Albanian place names were substituted by Serbian names; then schools and universities were forced to go underground; Albanian language TV, radio and newspapers were shut down, and archives and libraries were pilfered and destroyed.[56]

Some 6,000 Kosovo Albanian teachers and professors were dismissed.[57] Most of Kosovo Albanian doctors and health workers employed by the public health system were dismissed; soon thereafter the rest of the Kosovo Albanians government employees. Albanians in Kosovo could buy or sell landed property only with special permission; publicly funded flats were reserved for Serbs.[58]

Arbitrary arrest and police violence were legalised. The police were authorised to detain people for "informative talks" for up to three days without stating grounds. Summary imprisonment of up to two months for 'verbal crimes' such as insulting the patriotic feelings of Serbians was introduced and occurred regularly; searching private houses and flats without judicial warrants was common.[59] Many Kosovo Albanian felt pressured to emigrate; they were suppressed as an ethnicity, their economic prospects were poor, and young men tried to escape the draft into the Yugoslavian army, not wanting to risk their life in the wars in Croatia and Bosnia; some 400,000 emigrated mainly to Western Europe during these years,[60] an exodus aptly dubbed 'silent ethnic cleansing'.[61]

The restrained reaction of the Kosovo Albanians surprised foreign observers.[62] In December 1989, a new political movement called the 'Democratic League of Kosovo' (LDK) was founded. It started in two organisations of intellectuals, the Association of Philosophers and

[56] Elsi and Destani, Kosovo, 7; Summers, Disputed Independence, 15; Malcolm, Kosovo, 352.
[57] Judah, Kosovo, 73; Malcolm, Kosovo, 349.
[58] Malcolm, Kosovo, 346.
[59] According to the Council for the Defence of Human Rights and Freedoms in Kosovo, 2,157 physical assaults by police, 3,553 raids on private dwellings and 2,963 arbitrary arrests were recorded in 1994. Malcolm, Kosovo, 349-350.
[60] International Commission on Kosovo, 47.
[61] Vickers, History of Kosovo, 288; Malcolm, Kosovo, 353. Judah, Kosovo, 73f.
[62] In a documentary of the TV Klan about "Austrian engagement in Kosovo" at minute 19:58, 44:11, and 43:50 the Austrian diplomat Albert Rohan reports about the question he had put to Rugova in 1991: "What do you say to your people who tell you your policy of peaceful means does not advance our cause, it does not improve our situation?" … "I told him sooner or later especially young people will take to arms, it is unavoidable if nothing happens". Rugova's answer was: "We are still here. Kosovo Albanians are still in Kosovo and this is a big achievement". Later on, in the interview at minute 43,50 Rohan added "at that time I thought it was not a strong explanation but later, after 1998/1999 when there was the expulsion of the Albanians then I thought maybe Rugova really had a point, the fact that the Albanians were still in Kosovo was an achievement in itself". Available: https://www.youtube.com/watch?v=aL7wBSZrAjI&t=2184s, accessed on 17 July 2021.

Sociologists and the Association of Writers of Kosovo,[63] whose President Dr Ibrahim Rugova, Professor of literary history, was appointed President of the new movement. LDK observed a policy of strict non-violence, instead of following the Balkan tradition of "hatreds that lie in constant and violent competition".[64] LDK's leadership was convinced that there was no alternative in order to avoid a spill-over of the wars around them and escalation of Serbian suppression.[65]

Within this overarching non-violence policy, two guidelines were observed.[66] First, LDK tried to internationalise the Kosovo issue, but even though Rugova had become an international public figure, the cause of Kosovo was pushed to the back by the atrocious war in Croatia and Bosnia. Second, they created a shadow regime with a Kosovo assembly, elections, a referendum for independence, a government in exile located in Bonn.[67] Beyond its symbolic value, this shadow government catered to very practical needs of the population, in particular in the fields of education[68], social care and the health services.[69]

This policy of non-violence was successful as it kept Kosovo out of the Balkan wars between 1991 and 1995. At the time, the majority of Kosovo Albanians supported Rugova's policy which was also praised internationally. It was only after the Dayton Peace Treaty when this policy of restraint did not bear fruits that the ethnic Albanian population gradually lost patience.

At the time, both the EU and the US considered Milošević to be a valuable peacemaker[70] and thought that, after Srebrenica and Dayton, he had learned his lesson.[71] As a result, Rugova lost his appeal in the West and at the same time the support of the increasingly disappointed Kosovo Albanians.[72] The non-violence policy unravelled. Finally, as the Austrian Diplomat Rohan had predicted to Rugova in 1991, after the disappointment of Dayton in December 1995, many Kosovo Albanians, particularly young people, took up arms financed by the Kosovo Albanian

[63] Malcolm, Kosovo, 347f; Vickers, History of Kosovo, 249ff.
[64] Weller, Contested Statehood, 40.
[65] Maliqi, Nonviolent Resistance, 9, 2; Malcolm, Kosovo, 348.
[66] Malcolm, Kosovo, 348; Summers, Disputed Independence,15.
[67] Malcolm, Kosovo, 348ff.
[68] The catacomb schooling system catered to some 400.00 pupils and students at all levels of education; Malcolm, Kosovo, 349; Judah, Kosovo, 74. The former Austrian Minister of Education Erhard Busek reports that Austrian Universities recognised degrees of the 'illegal' Kosovo Albanian Universities without any problems, see video https://www.youtube.com/watch?v=1qfiNg8dLtM, Accessed 24 July 2022.
[69] Malcolm, Kosovo, 351.
[70] Malcolm, Kosovo, 353.
[71] Judah, Kosovo, 71; Sundhausen, Jugoslawien, 378.
[72] Malcolm, Kosovo, 354; International Commission on Kosovo, 50f; Sundhausen, Jugoslawien, 378. All of them emphasize the lack of support by the international community.

diaspora.[73] Various groups of fighters had already existed before but started to organise themselves from 1996 onwards and took up fighting the Serbian police; this was the nucleus of the UÇK (Ushtria Çlirimtare e Kosovës, also known as the Kosovo Liberation Army- KLA).[74]

Its formation was accelerated by the simultaneous collapse of the public structures of Albania due to a gigantic financial 'pyramid' scheme tolerated by the government, which had robbed large parts of the Albanian population of their savings. Army deposits were abandoned and plundered; as a result, Kalashnikovs could be bought for as little as 5 $ each.[75]

In 1998, the KLA did no longer limit itself to the defence of villagers but turned to attacking police stations and ambushing patrols. Rugova gradually lost both control and credibility.[76] 'Robert Gelbard, the US Special Envoy' to the region, criticised the extreme reactions of the Serbian police but also qualified the KLA as a terrorist organisation.[77] In a similar vein, the SC Resolution 1160 (March 1999) condemned KLA as terrorists and called upon all sides to stop fighting immediately and to enter into a political dialogue.[78]

Nevertheless, the fighting continued. Serbian retaliatory actions were now mainly directed against the civilian population rather than the KLA. Serbian forces shelled and bombed village after village, expelling the inhabitants, plundering and destroying houses, killing people, and animals and burning crops.[79] Some 300 Albanian villages were destroyed, and an estimated 250,000 to 300,000 people were driven from their homes[80] between March and October 1998.

The American diplomat Richard Holbrooke took over.[81] The Milošević-Holbrooke agreement of October 1998 installed the 'Kosovo Verification Mission' (KVM), a mission of the Organisation for Security and Cooperation (OSCE) to monitor a ceasefire.[82] The ceasefire was not successful.[83] In hindsight, it seems that Milošević assumed that he could break Serbia's

[73] Malcolm, Kosovo, x-xi.
[74] Henry H. Perritt Jr, Kosovo Liberation Army (University of Illinois Press, 2008).
[75] Judah, Kosovo, 75ff (on the emergence of KLA), p.80 (on the collapse of Albania); Malcolm, Kosovo, 354.
[76] Malcolm, Kosovo, xi, 355.
[77] Malcolm, Kosovo, 354f; Judah, Kosovo, 81-82; Petritsch, Pichler, Kosovo – Kosova, 105.
[78] Summers, Disputed Independence, 16f.
[79] Malcolm, Kosovo, xii.
[80] Malcolm, Kosovo, xii.
[81] Judah, Kosovo, 82; Petritsch, Pichler, Kosovo – Kosova, 104ff.
[82] Malcolm, Kosovo, xii; Judah, Kosovo, 82f; Weller, Contested Statehood, 66; Petritsch, Pichler, Kosovo – Kosova, 104ff. KVM had been preceded by the much smaller Kosovo Diplomatic Observer Mission (KDOM) which had been founded for a similar purpose after the Yeltsin-Milošević agreement of June 1998, Petritsch, Pichler, Kosovo – Kosova, 120f, 141.
[83] Petritsch, Pichler, Kosovo – Kosova,145ff; including unpublished documents and further references.- Three UNSC Resolutions 1160 (31 March 1998), 1199 (23 September 1998), 1203 (24 October1998) had little effect

promises without sanctions.[84] As was to be demonstrated in 1999, he underestimated the sensitivity of Western public opinion since the massacre of Srebrenica and the commitment as well as the determination of the Western powers and had overestimated their reluctance to go to war. By that time Rugova, however, despite being re-elected as President of his shadow republic in spring of 1998, had lost most of his influence to KLA. When the USA and the "Contact Group"[85] searched for a reliable representative of the Kosovo Albanian cause[86], they had to include KLA leaders.

1.4 1998 to 1999: Armed Resistance Turning into War, Ethnic Cleansing, 'Operation Allied Force' [87]

By Christmas 1998, the newly established KVM of some 1,800 members was fully operational,[88] reporting regularly to UN Secretary-General Kofi Annan, the SC.[89] Fighting was reduced by both sides, Albanian refugees started to return.[90] However, in late December KVM witnessed new Serbian forces entering Kosovo and an offensive against KLA positions; on the other side, KLA had also been rearming.[91]

The atmosphere was extremely tense. Public files, land registers and museum treasures were removed to Belgrade.[92] Additional 15,000 Serbian troops were waiting along the border.

The atmosphere was extremely tense when in early January 1999, four Serbian policemen were killed. In a retaliatory reaction, Serbian forces attacked the KLA on 15 January near the village Recak. Serbian police together with paramilitary troops took over the village and the next morning, the KVM reported finding the corpses of 45 Kosovo Albanians, all civilians, most of

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on the events happening on the ground; they had required an immediate ceasefire, substantial greater autonomy for the Kosovo Albanians, prompt and complete investigation of all atrocities committed against civilians, full cooperation with the ICTY and international supervision, Summers, 16-17; cf. Neuhold, International Conflict, 102, fn 389.

[84] Malcolm, Kosovo, xii.

[85] The Contact Group consisting of USA, Russia, UK, France, Germany, Italy, was originally created for coordination proposes in the Bosnian war and had been revived in 1997. Petritsch, Pichler, Kosovo – Kosova, 106f.

[86] Malcolm, Kosovo, xiv; Weller, Contested Statehood, 108-109, 123-125.

[87] Petritsch, Pichler, Kosovo – Kosova, 100 – 229, 347- 358.; with a detailed report of the development between February 1996 until the breakdown of the diplomatic efforts of the Rambouillet process. Ambassador Wolfgang Petritsch was the head of the group of diplomats representing the "Contact Group"; he had been Austrian Ambassador to Belgrade from 1997-1999; from October 1998 to July 1999 he was 'Special Envoy of the European Union for Kosovo'; as such he was the European Chief negotiator in February and March 1999.

[88] Human Rights Watch, Under Order, 55.

[89] Weller, Contested Statehood, 66.

[90] Malcolm, Kosovo, xvi.

[91] Malcolm, Kosovo, xvi; Judah, Kosovo, 84, see also Petritsch, Pichler, Kosovo–Kosova, 252f and 154ff.

[92] Malcolm, Kosovo, xvi.

them elderly men, some women and one child.[93] The head of the KVM, Ambassador William Walker, called it 'no doubt' an 'act of massacre'.[94] Serbia contested this assessment, claiming that the corpses were KLA members killed in action,[95] but thorough gathering of evidence corroborated the initial findings of KVM.[96]

The Recak massacre resulted in an international outcry, a turning point was reached. The international public with the collective memory of Srebrenica would no longer condone the regular attacks on whole villages and their civil population, legitimised as counter-terrorism measures.[97] It became plausible if not evident that a large-scale operation of ethnic cleansing had been started. The Serbian army moved into Kosovo in large numbers, supported by police and paramilitary groups in a logistically orchestrated way. Tanks and artillery bases were established along the Macedonian and Albanian borders apparently to deter a possible NATO ground attack. All this was in clear breach of the Holbrooke–Milošević agreement.[98]

The US and its NATO partners gradually approached the conclusion that NATO intervention similar to 'Operation Deliberate Force', which helped to end the Bosnian war, might become necessary.[99]

But the Contact Group resolved that a final diplomatic attempt to settle the crisis should be made; Kosovo Albanians and the Serbs were invited to the castle of Rambouillet near Paris, where they met on 6 February.[100] The plan proposed to the parties provided for an immediate end of violence, the disarmament of the KLA, the withdrawal of all Serbian forces supervised by 30,000 NATO troops and no unilateral change of the 'interim status', plus a mechanism for the 'final settlement' after an 'interim period' of three years. The plan was supported by a strong

[93] Judah, Kosovo, 84; Petritsch, Pichler, Kosovo – Kosova, 159-164; Weller, Contested Statehood, 105.
[94] Rrecaj, Contemporary Interpretation, 122.
[95] The credibility of the Serbian contestation was undermined by various obstructions of evidence gathering by KVM after the incident; FRY declared the Head of the KVM, Ambassador William Walker as "persona non grata", a decision which was frozen by the SC. The FRY also first prevented and then delayed impartial forensic investigations by Finnish forensic experts who had been in Kosovo since summer 1998; the Finnish team could carry out their autopsy only a week after the killing, and had access to the site only in November 1999 and March 2000; furthermore, Serbia refused access to Louise Arbour, chief prosecutor of the ICTY; Weller, Contested Stathood,105, 170; Malcolm, Kosovo, xvi; International Commission on Kosovo, 81.
[96] All the evidence gathered by the Finnish team invalidated the Serbian claim: Petritsch, Pichler, Kosovo – Kosova, 162, 164; International Commission on Kosovo, 81.
[97] Petritsch, Pichler, Kosovo – Kosova, 158; Weller, Contested Statehood, 108.
[98] International Commission on Kosovo, 80f.
[99] Weller, Contested Statehood, 150- 167; Petritsch, Pichler, Kosovo – Kosova, 170-171.
[100] For the first time KLA leaders (as their head the young Hashim Thaci) were included in the delegation of Kosovo; Rugova participated but took a back seat; Petritsch, Pichler, Kosovo – Kosova, 171ff; see also Weller, Contested Statehood, 123-149, 150 -154; International Commission on Kosovo, 82; Petritsch, Pichler, Kosovo – Kosova, 162.

statement to the press by NATO Secretary-General Xavier Solana of 28 January and an equally strong statement by UN Secretary-General Kofi Annan to the NATO Council at NATO Headquarters.[101]

At the final date set, on 23 February, a "political settlement" was reached which both delegations accepted, though "subject to consultations" with the people of Kosovo viz the FRY authorities. The plan[102] was still vague with respect to the 'final settlement' of Kosovo. After three years an international meeting should be convened "to determine a mechanism for a final settlement for Kosovo on the basis of the expressed will of the people … and the Helsinki Final Act …".[103] In addition, many issues of the exact implementations were still open as the details of the "international presence" after the cease-fire. Both sides went home to obtain final approval for this 'Interim Agreement'.[104]

When the Conference reopened in Paris on 15 March 1999, the Kosovo side from the beginning communicated its willingness to sign, while the Serbian head of delegation greeted the negotiation team of the Contact Group with a four-letter-word.[105] As already signalled during the weeks after RambOuillet, the Serbian side clarified, both in style and substance, that they were not willing to cooperate any longer; in particular they rejected the compromise clause on the final settlement.[106]

Later on, the Serbian side claimed that the rather technical part of the Rambouillet Draft[107] on privileges and immunities for the NATO troops in the territory of FRY had been totally surprising and unacceptable.[108] The attempts of the diplomats continued almost until the last

[101] Weller, Contested Statehood, 109; UN Press Release (SG\SM\6878, 28, January 1999).
[102] Petritsch, Pichler, Kosovo – Kosova, 175, 256ff.
[103] The phrase "on the basis of the will of the people" was introduced in the final stage of the Rambouillet negotiations as a compromise instead of the term "a referendum" (which had been demanded by the Kosovo delegation); the reference to Helsinki Final Act implied respect for the territorial integrity of FRY, Weller, Contested Statehood, 133.
[104] Judah, Kosovo, 84; Petritsch, Pichler, Kosovo – Kosova, 166ff; Weller, Contested Statehood, 150.
[105] Weller, Contested Statehood, 151; Petritsch, Pichler, Kosovo – Kosova, 220.
[106] Judah, Kosovo, 86f; Petritsch, Pichler, Kosovo – Kosova, 216, 259; see also Petritsch's testimony at the Milošević Procedure, before the ICTY, (070301IT; available at : https://www.icty.org/en/in-focus).
[107] Originally Chapter 7, at the end of Annex B.
[108] The evidence provided by Petritsch to the contrary is convincing. The Serbian team had been informed on the text in good time and did not want to negotiate on it in Paris; furthermore, the text corresponded to similar provisions in the Dayton treaty of 1995 which were a template for Rambouillet; in 1999 the Dayton Agreement was still in force allowing NATO troops moving through the FRY into Bosnia: Petritsch, Pichler, Kosovo – Kosova, 259ff; Weller, Contested Statehood, 145, 151, qualifies the Serbian criticism as "entirely without substance".

day.[109] On the afternoon of 23 March, the representatives of the Contact Group in Belgrade could only confirm the failure of the Rambouillet process.[110]

The patience of the Western powers was expiring. None of them wanted to be responsible for a repetition of events such as the Srebrenica atrocities. Their concerns were by no way unfounded. On 15 March while the Paris talks were still going on, the Serbian side had intensified the activities against the civilian population, the Army had moved into the Podujevo region, an action which resulted in some 25,000 to 40,000 new refugees[111] on top of the 150,000 to some 200,000 refugees estimated by UNHCR for the period of January to mid-March 1999.[112] By 19 March, the OSCE had withdrawn the KVM personnel on security grounds.[113] Before the bombing had started and while last offers were still made to the FRY,[114] it became evident that Milošević had started to execute a large-scale ethnic cleansing programme.

> "FRY forces were engaged in a well-planned campaign of terror and expulsion of the Kosovo Albanians … most frequently described as one of 'ethnic cleansing' … the responsibility of that campaign rests entirely on the Belgrade government."[115]

This summary of the events, published by the Independent International Commission in 2001, had later on been confirmed by the evidence collected and presented in the first instance and in the appellate procedures Prosecutor v. Milutinović et al.[116] In the procedures five Serbian senior officials of the political, military and police establishments had been convicted: they were Nikola Šainović, Deputy Prime Minister of FRY, Nebojša Pavković; Commander of the 3rd Army of the Yugoslavia forces, Vladimir Lazarević; 'Commander of the Pristina Corps of the Army of Yugoslavia', Sreten Lukić; 'Head of the Serbian Ministry of the Interior', and Dragoljub Ojbanić; 'Chief of the General Staff of the Yugoslav Army'. All of them were

[109] Petritsch, Pichler, Kosovo – Kosova, 219, 265. Last talks between Majorski and Milošević had broken down on 23rd March 1999, one day before the bombing started.
[110] Petritsch left Yugoslavia on March 24 after the foreign relations advisor to the President of FRY, Bojan Bugarcic had declared that "the security of Petritsch can no longer be guaranteed". Petritsch, Pichler, Kosovo – Kosova, 228f,265,354.
[111] Cf Petritsch, Pichler, Kosovo – Kosova, 354-355.
[112] International Commission on Kosovo, 82.
[113] International Commission on Kosovo, 82.
[114] International Commission on Kosovo, 82.
[115] International Commission on Kosovo, 88.
[116] Prosecutor v. Milan Milutinović, Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić (IT-05-87-T), Judgment, 26 February 2009. (Available: http:/www/icty.org/case/milutinovic/4jug). Milutinović, was acquitted, the others were convicted. The appellate decision confirmed the decision of the Trial Chamber: see Prosecutor v. Sainović et al. (IT-05-87, available at: https://www.icty.org/en/case/milutinovic). Dragoljub Ojbanić, Chief of the General Staff of the Yugoslav Army; had been convicted by the Trial Chamber, was sentenced to 15 years', and had chosen not to appeal.

convicted of participating "in a joint criminal enterprise", "aimed at modifying the ethnic balance in Kosovo and ensuring continued control by the Serbian authority"[117].

With respect to the crimes committed by the Serbian army and Interior Serbia police forces[118],

> "the Trial Chamber found that there was a broad campaign of violence directed against the Kosovo Albanian civilian population conducted under the control of FRY and Serbian authorities who were responsible for mass expulsions of Kosovo Albanian civilians from their homes as well for incidents of killings, sexual assault and intentional destruction of mosques" [119] between March and May 1999.

The President of FRY, Slobodan Milosevic, who had been indicted before the ICTY as early as May 1999 for 'crimes against humanity' in Kosovo, later on, for various crimes in the Balkan War of 1992 -1995, had died after 4 years of trial on 11 March 2006, before a verdict on the charges could be returned.[120]

More than 1.4 million Kosovo Albanian were displaced, some 850,000 had fled into countries outside Kosovo, while the rest was displaced within Kosovo; this amounted to some 90 per cent of the entire Kosovo Albanian population.[121] Two thirds of the houses were destroyed.[122]

After two ultimatums, NATO started 'Operation Allied Force' on 24 March. A meeting of the UNSC was convened at the request of Russia on the same day. When the bombing was justified by the UK as a 'humanitarian intervention, this met with strong Russian opposition, but a draft Resolution introduced by Russia to condemn NATO's use of force received only three votes in favour and 12 votes against; as five non-NATO states voted against it, NATO considered its position to be strengthened. However, it was evident that in view of the veto power of Russia and China a UN mandate could not be obtained.[123] Later on, the summary of the International

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[117] See Prosecutor v. Sainovic et al (IT-05-87), 4 (Available on the information sheet: https://www.icty.org/en/case/milutinovic).
[118] Human Rights Watch, Under Order, 9 – 12 (part 1, executive summary). The chain of command of the government forces included paramilitary forces. The most well-known of these was the group known as the "Serbian Volunteer Guard" led by Zeljko Raznatovic also called "Arkan" (case IT- 97-27, available at: https://www.icty.org/en/case/zeljko_raznatovic).
[119] See Prosecutor v. Sainovic et al (IT-05-87), 4 (Available on the information sheet: https://www.icty.org/en/case/milutinovic).
[120] Prosecutor v. Slobodan Milosevic, (IT- 02-54: Available at: https://www.icty.org/en/case/slobodan_milosevic).
[121] Judah, Kosovo, 88; cf. Human Rights Watch, Under Orders, 4 (part 2); International Commission on Kosovo, 90 and Annex 1, p.304. Petritsch, Pichler, Kosovo – Kosova, 255.The figures vary slightly due to different time periods.
[122] Prochazka, Vom Krieg zur UN- Verwaltung in Petritsch, Pichler, Kosovo – Kosova, 278.
[123] Weller, Contested Statehood, 155-159.

Kosovo Report qualifying the NATO military intervention as 'illegal but legitimate' gained wide acceptance.[124]

When the first waves of bombs finally reached the FRY, the ongoing Serbian terror against the population in Kosovo was not stopped but intensified.[125]

Why Milosevic in March 1999 did not give in to NATO pressure as quickly as he had done in 1995 in the case of the Balkan wars has been the topic of much speculation.[126] It has been argued that the Serbian side in 1999 was, militarily speaking, better prepared than the Bosnian Serbs and relied on Russian support in general and in particular on President Yeltsin´s promise to veto any action against Serbia in the UNSC; Milosevic probably also underestimated the Western commitment to stop the atrocities and hoped – as the worst case scenario – to ensure a lasting ethnic cleansing effect, even if Serbia would eventually have to submit to some extent. However, the continuing flow of refugees all over Europe resulting from the ongoing 'ethnic cleansing' strengthened the commitment of NATO.[127]

Almost immediately after the bombing started, various attempts of a diplomatic exit were made. Jevgeny Primakov, the Russian Prime Minister, travelled to Belgrade on 30 March and tried again twice in April. At the same time Joschka Fischer, German Foreign Minister under strong pressure from his Green party, started his own plan. On 6 May, the summit of the G8 in Bonn/Petersberg provided a platform for a common position[128]. In the meantime, UNGS Kofi Annan had appointed Martti Ahtisaari as the UN mediator. As soon as Russia had consented to the withdrawal of practically all Serbian forces and to the military presence of a UN peace force heavily relying on NATO, Ahtisaari, Victor Chernomyrdin and Strobe Talbott, US Deputy

[124] International Commission on Kosovo, 4; Neuhold, International Conflict, 104; Hanspeter Neuhold, Legal Crisis Management: Lawfulness and Legitimacy of the Use of Force in: From Bilateralism to Community Interest (Essay in Honour of Judge Bruno Simma), (Oxford University Press 2011 pp. 278-296), 288- 290; Weller, Contested Statehood, 155-159, 163-164, gives an overview on the emerging concept of 'humanitarian intervention'. - An attempt of Yugoslavia to seek interim measures against NATO in the ICJ failed because the Court denied its jurisdiction, Weller, Contested Statehood, 159-161.

[125] International Commission on Kosovo, 82f, 88ff;"The war quickly took a direction that surprised and shocked the world. The FRY military and paramilitary forces launched a vicious campaign against the Kosovar Albanian population"; see also Prochazka, Vom Krieg zur UN-Verwaltung 268ff.

[126] On the deeper roots and similarities of the problems in the two cases Neuhold, International Conflict, 86f; on the differences Petritsch und Pichler, Kosovo – Kosova, 262ff, 267, 271-281.

[127] Cf Petritsch, Pichler, Kosovo–Kosova, 262- 265; Prochazka, Vom Krieg zur UN-Verwaltung; in Petritsch and Pichler, Kosovo–Kosova, 264ff, who also gives a detailed account of the war; Weller, Contested Statehood, 165, 167.

[128] The Petersberg Resolution of the G8 later on became Annex I of SC Resolution 1244 (1999); cf. Prochazka, Vom Krieg zur UN-Verwaltung 273-274.

Secretary of State, could draft a common peace plan[129]. The Serbian parliament accepted the peace plan on 3 June 1999, and a 'Military Technical Agreement' between NATO and the Yugoslavian Federal Army, providing for the complete withdrawal of all Serbian forces within 11 days was reached on June 9 (Agreement of Kumanovo).[130]

The UNSC Resolution 1244 (1999), which included the Petersberg Resolution and the peace plan of Ahtisaari, Tchernomyrdin and Talbott as Annexes, was passed on 10 June. On the same day the bombing ended.[131]

1.5 From SC Resolution 1244 (1999) to the Declaration of Independence (2008)

The SC Resolution 1244 (1999) was primarily concerned with the period of the interim administration. However, immediately after it entered into force, the enforcement and maintenance of the ceasefire were in the forefront. As provided in the SC Resolution 1244 (1999)[132] an effective security presence had to be established under the auspices of the UN. Annex II para 4 explicitly authorised "substantial NATO participation" as well as "unified command". This military "Kosovo Force (KFOR)" consisted in the beginning of about 50,000 soldiers charged with supervising the permanent withdrawal of FRY forces (including Serbian police and paramilitary), disarming and demilitarising KLA and establishing a 'secure environment' that would allow the safe return of refugees and the secure operation of transitional administration and humanitarian aid.[133] Even though Serbian Forces withdrew smoothly in accordance with para 3 of SC Resolution 1244 (1999) and the Kumanovo Agreement and some sort of order was established quickly, KFOR was not successful in providing security for the Serbian part of the population against acts of revenge.[134]

The scope of the task to be executed by the international community under the UN mandate was 'mind-boggling'.[135]Around 1.4 Kosovo Albanians were displaced persons, two-thirds of

[129] The plan later on was included in SC Resolution 1244 (1999) as Annex II, Prochazka, Vom Krieg zur UN-Verwaltung in Petritsch, Pichler, Kosovo – Kosova, 274.
[130] Prochazka, Vom Krieg zur UN-Verwaltung, 267- 276 in Petritsch, Pichler, Kosovo – Kosova; Weller, Contested Statehood,165-178.
[131] United Nation Security Council Resolution 1244 (1999), (10 June 1999, S/ RES/ 1244 (1999)) (available; https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1244(1999)&Lang=E).
[132] See para 3,6, 7 and 9 as well as in Annex II of the SC Resolution 1244 (1999),
[133] Neuhold, International Conflict, 82; Weller, Contested Statehood, 179ff.
[134] The exact numbers of the Serbian refugees are very much disputed, the International Kosovo Report, 108 assesses the number of Serbs who left at some 100,000; see also the statistic of crimes after June 1999; Judah 91-92; sub-chapter 1.6 below.
[135] Thomas G. Weiss et al. (Eds.), The United Nations and Changing World Politics, (4th ed., Westview Press, 2004), 76, cf. above quotes in fn. 121 f.

them abroad, whose safe return had to be organised; large parts of the infrastructure and of some 120,000 houses (two-thirds of habitable space) were damaged or destroyed.

UNSC Resolution 1244 in para 6 provided for an "international civil presence"[136] under the control of a Special Representative (SR) to be appointed by the SG in consultation with the SC, who should closely cooperate with the "international security presence" of KFOR.

Almost dictatorial powers[137] of the SR including foreign policy, in the beginning total legislative power and veto power vis-à-vis the administration were considered to be indispensable.[138] The civil administration was divided into four so-called pillars: first pillar: Civil Administration; second pillar: Police and Justice; (the first two pillars were under the direct responsibility of the UN and in the beginning included the resettlement of the returning refugees carried out by the UNCHR);[139] third pillar: Economic Reconstruction (organised by the EU); fourth pillar: Institution Building, democratisation, human rights, training of local officials (organised by the OSCE).

To speed up and implement a system, in May 2001 UNMIK adopted a "Constitutional Framework" that provided general elections, and as a result of this a parliamentary assembly, a government with a Prime Minister and the office of a President, as head of state. The arrangement was officially called the "Provisional Institutions of Self-Government" (PISG).[140]

The original idea of the UNMIK administration was that these institutions should put the house of Kosovo in order before the 'final status' of Kosovo should be decided. The priority was described as "Standards before Status" and endorsed by the SC in 2002 and 2003.[141] But in March 2004, serious riots directed against local Serbs and Serbian culture monuments, lasting for three days and resulting in19 people being killed,[142] which KFOR could hardly contain, proved that Kosovo certainly was not "on the path to becoming a peaceful ethnic democracy".[143]

[136] Weller, Contested Statehood, 180.
[137] Weller, Contested Statehood, 180.
[138] Neuhold, International Conflict, 87.
[139] This taske was phased out by June 2000.
[140] Ker-Lindsay, Kosovo, 17; Weller, Contested Statehood, 181- 185.
[141] Weller, Contested Statehood, 186 with references; Ker-Lindsay, Kosovo, 18- 20.
[142] Ker-Lindsay, Kosovo, 20f. (8 Serbs and 11 Albanians); Weller, Contested Statehood, 187.
[143] Ker-Lindsay, Kosovo, 21.

The top Norwegian diplomat Kai Eide, asked for a report to the UN, clearly diagnosed in a first report that the "Standards-before-Status-Policy" had failed and in a second report, delivered in 2005, recommended that final status talks should start. His summary was "that the time has come to commence this process"[144] (i.e. to address Kosovo's future final status).

The Security Council went along with Eide's recommendation and authorised the commencement of the status process[145]. UNSG Kofi Annan appointed Martti Ahtisaari, who had already been involved in the ceasefire talks with Milošević as his special envoy for status talks[146]. Upon request of Ahtisaari, the Austrian Diplomat Albert Rohan was appointed as his deputy. The two together recruited some staff, known as UNOSEK, United Nations Office of the Special Envoy for Kosovo, and started with what was later called the Vienna Final Status Negotiations.

From the very beginning, it had been clear within the UN and in all interested political circles that Kosovo would hardly settle for less than independence, while the same outcome was unacceptable to Serbia[147]. At the same time, it was clear to everybody concerned that the idea of standards before status was dropped. Still, there was a certain hope that the goal for Kosovo to obtain EU membership would create sufficient attraction and pressure to work towards "standards". The Contact Group, which had been deeply involved in the former Rambouillet/Paris negotiations, met again in Washington to prepare its common position[148] and became the everyday political forum for Ahtisaari, in addition to the organs of the UN. From the beginning, it was evident that Russia would support the Serbian view calling for something "less than independence" but offering more than "mere autonomy" and the claim that a solution must be the result of a *consensus* between Pristina and Belgrade.

On the other hand, the EU had publicly supported the Kosovo-Albanian point of view that the solution must be in compliance with "the will of the people" of Kosovo. The negotiations led by Ahtisaari and UNOSEK went on for thirteen months; its various convolutions and side steps including the problems created by interior politics in Kosovo and in Serbia have been described

[144] The relevant parts of the Eide-Report are reprinted in: Ker-Lindsay, 134-140, Appendix B: Summary of the Eide Report; cf, also Ker-Lindsay, Kosovo, 21-22; Judah, Kosovo, 111; Henry J. Perritt, Jr, The Road to Independence for Kosovo, A Chronicle of the Ahtisaari Plan, (Cambridge University Press, 2010); Weller, Contested Statehood, 187-189.
[145] Cf. Weller, Contested Statehood, 189 with precise references.
[146] Ker-Lindsay, Kosovo, 26.
[147] Weller, Contested Statehood, 191.
[148] Cf. their common "Guiding Principles" and Statement reprinted by Ker-Lindsay, 142ff.

by various authors.[149] On 26 January 2007, Ahtisaari delivered his proposal to the Contact Group, then to Belgrade and to Pristina. The 58-page document[150] immediately met with refusal on the part of Belgrade. In view of the very strong opposition of Serbia, supported by Russia, the Security Council adopted the Russian proposal for a fact-finding mission to Belgrade and Pristina.[151] However, neither this mission nor a visit of the US Secretary of State, Condoleezza Rice, to Moscow, nor a further G8 summit in view of the threat of a Russian veto, nor any further discussions within the Contact Group and between Belgrade and Pristina resulted in consensus.

Nevertheless, these discussions finally led to the formation of the so-called 'Troika'. Upon a proposal from Germany, the EU Foreign Ministers agreed that a mediating team consisting of three senior diplomats from Russia, the US and the EU should have a final try. The EU appointed the highly reputed German diplomat Wolfgang Ischinger, at the time German Ambassador to London, who took up the role of a chairman. The discussion between the Troika and the two parties went on until 7 December 2007. In a closed session of the Security Council on 19 December 2007, the Troika Report was discussed. The informal summary by Ambassador Ischinger ("We have left no stone unturned") resounded in the common joint statement of the US and the EU

> "We would have liked the Security Council to play its role. But as today's discussion have once again shown, the Council is not in a position to agree on the way ahead. We regret this, but we are ready to take on our own responsibilities … We underline our shared view that resolving the status of Kosovo constitutes a sui generis case that does not set any precedent..."[152]

Eight weeks later, on 17 February 2008, Kosovo declared its independence.

1.6 The KLA Post-War-Conflict

The role of the KLA before and during the internal and international fighting between 1998 and 1999 has been described above.[153] However, the historical background would be incomplete

[149] Ker-Lindsay, Kosovo, 63ff; cf also Summers, Disputed Independence, 3.
[150] See the text reprinted in Ker-Lindsay, Kosovo, 147ff.
[151] The various attempts by the international community to reach a consensus are described with Ker-Lindsay, Kosovo, 63-101; Weller, Contested Statehood, 220-239.
[152] Quote taken from Ker-Lindsay, Kosovo, 100.
[153] Chapter 1.4 and 1.5.

without considering the alleged war crimes committed by members of the KLA. The ongoing importance of the issue can only be understood within the context of the post-war role of the KLA. Though KLA was demilitarised according to SC Resolution 1244 (1999)[154], many of its former members joined either the 'Kosovo Protection Corps' (KPC) militia type organisation a or the 'Kosovo Police Service' (KPS)[155], and many of its former commanders became commanding officers in these organisations. Other KLA leaders became important politicians, such as later Prime Minister and then President Hashim Thaci and later Prime Minister Ramush Haradinaj, who also founded influential political parties.

During the period since the end of the war, the KLA members have been tried by four different types of courts: ICTY, local Kosovo Courts under UNMIK administration (until 2008), later under EULEX (2009-2019), and finally by the 'Kosovo Specialist Chambers' (KSC), including the 'Specialist Prosecutor's Office' since 2015.

The two most famous cases tried by the ICTY after the war were Prosecutor v. Haradinaj et al.[156] and Prosecutor v. Limaj et al.[157] They concerned six KLA members, five of them high-ranking KLA leaders and later politicians. While Ramush Haradinaj (who at the date of his indictment in 2005 was Prime Minister of Kosovo) and Idriz Balaj were acquitted by the Trial Chamber, Lahi Brahimaj, who had been a member of the KLA general staff, was initially sentenced to six years. After retrials had been ordered in all three cases, all of them were finally acquitted in 2012.

In the Limaj et al. procedure, Fatmir Limaj, a commander of KLA who at the time of the indictment in 2003 was a Member of Parliament (and later on Minister), and Isak Musliu, also a former commander, were found not guilty by the Trial Chamber as well as by the Appeals Chamber; Haradin Bala was sentenced to 13 years of imprisonment. Balaj was a simple guard at a prison camp and convicted for mistreating, torturing, and murdering prisoners. All appellate judgments were passed in 2007.

[154] Para 9 (b) and para 15.
[155] Judah, Kosovo, 93, 95; Armend R. Bekaj, The KLA and the Kosovo War from Intra-State Conflict to Independent Country (Berghof Foundation Series, 2010), 27-37.
[156] The Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj (IT-04-84 and IT 04-84 bis; available in: https://www.icty.org/en/case/haradinaj).
[157] The Prosecutor v. Fatmir Limaj, Isak Musliu & Haradin Bala, (IT- 03-66, available in: https://www.icty.org/en/case/limaj).

Despite the broad mandate contained in Article 1 of the statute of ICTY and its authority to claim primacy over any national investigation and proceedings resulting from the Balkan Wars, it was clear that the ICTY could only handle the most severe cases. Therefore, the UNMIK administration had to establish a general criminal judiciary not only but also addressing war crimes of both sides. UNMIK soon turned to recruiting international prosecutors and judges in particular to handle war crime cases. The details varied but usually resulted in one or two foreign judges being included in the trial panel. In principle, this technique was maintained when in 2009, the 'European Union Rule of Law in Kosovo' (EULEX) became operational.[158]

From 1999 to 2008 (under the UNMIK Administration), UNMIK prosecutors filed indictments against 3 Serbs, 19 Albanians and 1 Montenegrin; these 23 indictments resulted in only one conviction. The EULEX prosecutors (from 2009- 2018) filed indictments against 11 Serbs, 39 Albanians, one Montenegrin and one from the Roma, Ashkali and Egyptian (RAE) community; all in all, 34 Albanian, 4 Serb and one Montenegrin were convicted.[159]

Both under the UNMIK administration and EULEX, the above-mentioned courts were general Kosovo Courts with international prosecutors and judges participating in cases of war crimes.

A new method of transitional justice was added in 2015, when the Kosovo Specialist Chambers (KSC) and Specialist Prosecutor's Office (SPO) were created.[160] This special Court has its origin in a shocking report by the 'Council of Europe Parliamentary Assembly', prepared by the Swiss prosecutor and politician Dick Marty as the rapporteur,[161] published a few months after the ICJ advisory opinion on Kosovo (KAO). In his report, Marty launched the claim that KLA leaders during the war had been engaged not only in detaining, torturing, and killing but

[158] Humanitarian Law Center Kosovo, An Overview of War Crime trials in Kosovo 1999-2018 (2018), 286-288; Amer Alija, the Effectiveness of UNMIK and EULEX in the Pursuit of Criminal Justice in Kosovo, in: Aidan Hehir, Fortuna Sheremeti (Eds.), Kosovo and Transitional Justice the Pursuit of Justice after Large-Scale Conflict, (2021, Routledge), 63-66; The UNMIK criminal judiciary was based on UNMIK Regulation 2000/64 of 15 December 2000, amended by UNMIK Regulation of 2001/34, 15 December 2001.

[159] Humanitarian Law Center, Overview of War Crime, 411-414.

[160] Kosovo Specialist Chambers & Specialist Prosecutor's Office. (https://www.scp-ks.org/en); Aidan Hehir, Introduction: power and the pursuit of "justice" in Kosovo, in: Aidan Hehir, Fortuna Sheremeti (Eds.), Kosovo and Transitional Justice the Pursuit of Justice after Large-Scale Conflict, (2021, Routledge), 9-11; Robert Muharremi, "The Kosovo Specialist Chambers and Specialist Prosecutor's Office," 20 (11) ASIL Insights (May 26,2016), https://www.asil.org/insights/volume/20/issue/11/kosovo-specialist-chambers-and-specialist-prosecutors-office.

[161] Dick Marty, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Council of Europe Parliamentary Assembly Report, (07 January 2011, Doc. 12462; available in: https://www.scp-ks.org/sites/default/files/public/coe.pdf).

also in drug and organ trafficking.[162] Among the suspects were former President Hashim Thaci and other well-known figures of Kosovo political life.

The Marty Report led to the creation of the Special Investigation Task Force (SITF) in September 2011 by the European Union to conduct an in depth investigation of the allegations of the Dick Marty Report. The statement of the SITF Chief Prosecutor was published on 29 July 2014,[163] and the thorough investigation resulted in the statement of the Chief Prosecutor of the Task Force that it "will be in the position to file indictments against certain senior officials of the former KLA"; the report, however, admitted that a "level of evidence" … "to prosecute" … "organ harvesting and trafficking" … "we have not yet secured".[164]

Under strong pressure of the USA and the EU, Kosovo parliament, with the government's support, established KSC and the SPO on 19 August 2015 as a "hybrid court".[165] Both were founded as part of the Kosovo judicial system, but they are completely staffed by foreign prosecutors, judges, investigative forces and Court administrators, among others charged with the witness protection programme. The Court is located in The Hague, Netherlands, in order to provide a secure environment for witnesses. Its mandate is to try "crimes against humanity, war crimes and other crimes under Kosovo law, which were commenced or committed in Kosovo between1 January 1998 and 31 December 2000"; "to prosecute individuals for crimes alleged in the January 2011 Parliamentary Assembly of Europe Report" the Marty Report.[166]

Only in 2020, the first indictments were filed by the SPO. The indictment charging Thaci et al. was disclosed in April 2020 and confirmed by the Pre-Trial judge on 26 October 2020; the indictment covers ten-counts including alleged crimes of "prosecution, imprisonment, other inhumane acts, torture, murder, enforced disappearance of persons" but does not contain a charge of organ harvesting between March 1998 and September 1999.[167] After the arrest, the

[162] Dick Marty related his allegations to an ongoing procedure against the doctors of the Medicus Clinic in Prishtina. This procedure finally led to the convictions of six doctors but no evidence of a connection to KLA was established by the Canadian prosecutor and Finnish investigator. The claim is not mentioned in the recent indictment of Thaci by the KSC (see below).
[163] Statement of the Chief Prosecutor of the Special Investigative Task Force (SIFT) (29 July 2014 https://balkaninsight.com/wpcontent/uploads/2019/01/Statement_of_the_Chief_Prosecutor_of_the_SITF_EN.pdf).
[164] Statement of the Chief Prosecutor of SIFT, 3.
[165] Hehir, Transitional Justice, 11f.
[166] Kosovo Specialist Chambers & Specialist Prosecutor's Office (Available at: https://www.scp-ks.org/en). The SIFT personnel was taken over by the SPO.
[167] Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (Case No. KSC-BC-2020-06; available in: https://www.scp-ks.org/sites/default/files/public/cis_thaci_et_al-en.pdf); Kevin W. Gray,

four accused were transferred to the detention facilities of the KSC in The Hague. Thus far no procedure has been closed.

2 Legal Content of the KAO[168]

2.1 Background and Structure of the Advisory Opinion

Following Kosovo's DoI, of 17 February 2008, Serbia drafted a proposal to the GA to ask the ICJ for an advisory opinion on the legality of the DoI. Since a single Member State cannot obtain an advisory opinion, this was the only way how Serbia could channel its attempt to get the highest legal authority, the ICJ, involved. On 8 October 2008 Serbia's proposal was adopted by the GA Resolution 63/3 (2008), requesting the ICJ to give an advisory opinion on the question:

"Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law"?[169]

The ICJ delivered its advisory opinion on 22 July 2010, where nine-to-five of the judges considered that the ICJ should exercise its jurisdiction to render an advisory opinion, whereas a ten-to-four majority of the judges concluded that the DoI "did not violate international law".

After an introductory 'Chronology of the Procedure'[170], the advisory opinion consists of five major parts:

Part I 'Jurisdiction and Discretion'[171] covers the issues of the competence of the ICJ to render an advisory opinion. The basis lies in Article 65 of the Statute of the Court, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorised"[172] under the UN Charter. The Court first affirms unanimously its jurisdiction and then in a second step decides by nine-to-five votes that it should make use of its discretionary power to exercise its authority.

First Indictment Announced at the Kosovo Specialist Chambers, 24 (23) ASIL Insights (September 10, 2020), https://www.asil.org/insights/volume/24/issue/23/first-indictment-announced-kosovo-specialist-chambers.

[168] The KAO generated great interest among states because it relates to issues of independence movements faced by many states; as a result, the Court received a large number of submissions from states; 36 states and the authors of the DoI filed written statements; these triggered additional 14 written comments; 28 states and the authors of the DoI participated in the oral proceedings, which took place from 1 to 11 December 2009.

[169] KAO, para 1.

[170] KAO, paras 1-16.

[171] KAO, paras 17-48; on jurisdiction: paras 19-28; on discretion: paras 29-48.

[172] KAO, paras 19-28.

Part II is entitled 'Scope and Meaning of the Question'. Here, the Court lays the basis for the self-imposed limits of its opinion.[173]

Part III on 'Factual Background' deals with the history from the SC Resolution 1244 (1999) until the Declaration of 17 February 2008.[174]

Part IV, the main part of the decision on the question "Whether the Declaration of Independence is in Accordance with International Law", first deals with general international law and denies any violation of general international law, then goes to some length to confirm that the DoI was not in violation of the SC Resolution 1244 (1999) and the UNMIK Constitutional Framework. The identity of the authors of the DoI and their role when signing is important for the Court to decide whether they acted in violation of the SC Resolution 1244 (1999) or measures adopted thereunder.[175]

Part V 'General Conclusions' states that the jurisdictional part was decided by nine votes to five, and the main part on the substantive law issues by ten votes to four. It is perhaps worth noting that the four judges who voted against the decision on the substance of the case were all among the five judges opposing the jurisdictional decision.[176]

Nine judges attached their own view to the decision two of the declarations (Judges Tomka and Simma), three dissenting opinions, (Judges Koroma, Bennouna, Skotnikov) and four separate opinions (Judges Keith, Sepúlveda-Amor, Trindade and Yusuf).[177]

2.2 Jurisdiction and Discretion of the ICJ

2.2.1 Jurisdiction

Despite the clear wording of Article 96 of the UN Charter which provides the GA or the SC with the authority to request the ICJ to issue an advisory opinion, the Court carefully considers whether an obstacle results from Chapter IV. Article 12 para 1 of the UN Charter forbids the GA to "make any recommendation with regard to … (any) dispute or situation while the

[173] KAO, paras 49-59; and para 123, sub-para 3.
[174] KAO, paras 57–63.
[175] KAO, paras 78-121.
[176] KAO, para 122.
[177] Judges in favour were: President Owada (Japan); Judges Al-Khasawneh (Jordan), Buergenthal (US), Simma (Germany), Abraham (France), Keith (New Zealand), Sepúlveda Amor (Mexico), Cançado Trindade (Brazilian), Yusuf (Somali), Greenwood (Unit Kingdom). Whereas against were: Vice-President Tomka (Slovakia); Judges Koroma (Sierra Leone), Bennouna (Morocco), Skotnikov (Russian Federation).

Security Council is exercising in respect to that dispute or situation the functions … assigned to it in the … Charter"; an exception applies if the SC so requests. The Court dismisses this argument because it is up to the GA to decide what to do with the advisory opinion. Obtaining the advisory opinion does not necessarily entail a recommendation; the GA it is by no means forced to make any recommendations.

Furthermore, the Court scrupulously affirms that the requirement of a 'legal question' is fulfilled, but it also states that the question has political aspects. However, this does not deprive the issue of its character as a legal question. The Court acknowledges that political motives might have inspired the request and is aware of the political implications its opinion might have but nevertheless considers the requirement of a 'legal question' as being fulfilled.[178]

2.2.2 Discretion

In this first step, the Court unanimously affirms the existence of its jurisdiction. However, this does not mean that the Court automatically has to exercise its authority under the Statute of the Court; it has the discretionary power to refuse. In the second step, the Court accepted the request for the advisory opinion and decided to exercise its jurisdiction. Some of the dissenting judges[179] and some commentators[180] argue that the Court was ill-advised to do so.

First, the Court considers that the motives of Member States sponsoring the involvement of the ICJ "are not relevant to the Court's exercise of its discretion ...".[181] Some of the participants of the procedure had critically drawn attention to the motives of Serbia, the sole sponsor of the GA request (included in Serbia's statement before the GA) to obtain a

> "politically neutral, yet judicially authoritative guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law." Serbia explicitly claimed that "supporting (its) draft resolution would serve to reaffirm the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court ..."[182]

[178] KAO, para 27.
[179] KAO, para 123 sub para 3.
[180] Cf. the discussion by Marc Weller, Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion? (Cambridge University Press, LJIL, Vol. 24, 2011), 133-134.
[181] KAO, para 33.
[182] KAO, para 32.

In the Court's view, however it is its task "to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations"[183], which requires it not to look at the states but at the organs of the UN who are entitled to request its advice.

If the organs ask for an advisory opinion, it is the task of the Court within the framework of the UN organs to answer. It is also not its task to second-guess whether the GA "needs" the advice or whether it is "useful" for the GA if it has decided to seek such advice. In the same vein, considerations that its opinion might "lead to adverse political consequences" are no reason to refuse the request. It is again up to the GA to consider such potential adverse effects.[184]

Finally, the Court dismisses an argument derived again from Article 12 of the UN Charter. The fact that the GA must not pass a recommendation once the SC has decided to act does not amount to an 'exclusive competence' of the SC. The GA is "entitled to discuss the declaration of independence and, in the limits"[185] considered by the Court even "to make recommendations in respect of the declaration of independence ... or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council".[186] Quoting its advisory opinion on the "Construction of a Wall in the occupied Palestinian Territory"[187], the Court notes an "increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter ...".The Court concludes that, "there are no compelling reasons for it to decline to exercise its jurisdiction …"[188]

2.3 The Substantive International Law of the DoI

2.3.1 The Scope and Meaning of the Question Addressed to the Court [189]

After clearing the jurisdictional issue, the Court in part II enters the area of the substantive law questions of the case and starts with the discussion of the 'scope and meaning of the question'. The Court clearly says from the outset:

> "The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration ... whether or not Kosovo has achieved statehood

[183] KAO, para 29.
[184] KAO, paras 34-35.
[185] KAO, para 44.
[186] KAO, paras 36ff, 44-45.
[187] KAO, para 43.
[188] KAO, para 41. As mentioned above in 2.1. this decision was taken by a majority vote nine-to-five; KAO, para 123 (2).
[189] KAO, paras 49- 56.

> ...nor about the validity or legal effects of the recognition of Kosovo by those States which have recognised it as an independent State… The Court accordingly sees no reason to reformulate the scope of the question".[190]

The paragraph is very important for the technique of the opinion. The Court clearly enumerates a number of related and important issues which it does not cover, as they are not asked for. Amongst them, the Court explicitly excludes the 'legal consequences' of the DoI, and the questions of the statehood and recognition of Kosovo. Many participating states have observed and commented on the narrowness of the question put to the Court.[191]

In para 56, the Court then goes one step further. At first sight, it only looks like a piece of semantics when the Court equates the wording of the request whether it was "in accordance with international law" to the question of whether or not "the applicable international law prohibits" the DoI. In its own opinion, it is the task of the Court to simply determine whether the DoI was adopted "in violation of international law".

The seemingly small semantic equation implies the clarification of the Court's limited view on an additional issue. The Court, in its opinion, by the question put to it furthermore is not required to decide whether "international law conferred a positive entitlement on Kosovo unilaterally to declare its independence".[192] The Court concludes that it is perfectly possible for the DoI "not to be in violation of international law without necessarily constituting the exercise of a right conferred by it".[193] Thus, the Court is keen to stress that it only has to answer the first question, not the second one. [194]

These two steps, first the narrow interpretation of a "narrow and specific question" (excluding "legal consequences" of the DoI) and secondly the equation of the phrase "in accordance" with

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[190] KAO, para 51.
[191] E.g. Written Statement of the United Kingdom, 5; Written Statement of the US, 10; Written Statement of France, 3.
[192] KAO, para 56.
[193] KAO, para 56.
[194]The Court here seems to be influenced by the Lotus Case, decided by the Permanent Court of International Justice (PCIJ): The French ship 'Lotus' had collided on the high seas with a Turkish ship, which sank; eight Turks died. The French officer on watch of the Lotus at the time of collision was convicted by a Turkish Court, imprisoned for 80 days and fined. The French Government referred the dispute to the PCIJ. The Court decided that Turkey had not violated international law because there was no rule in international law prohibiting Turkey from prosecuting the French officer. Turkey according to the Court did not need a specific entitlement under international law to prosecute the French officer. A traditional conceptual foundation of international law, which is derived from the Lotus case states that in international law a behaviour is considered lawful unless a rule specifically prohibits it. (PCIJ, Series A, No. 10, 7 September 1927), 19-20 (https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf).

"not in violation" [195] are the tools by which the Court attempts to make its pronouncement acceptable both for Kosovo and for Serbia, as well as for their respective supporters.

Marc Weller emphasises that the Court should not be criticised for not addressing the underlying questions of self-determination, the consequences of the DoI and recognition, in other words, for "not answering the questions it was – with great deliberation – not asked". To frame the question the way it was "may have been a miscalculation" by Serbia, but not "attributable to the Court".[196] Or put more succinctly, "The Court gave a narrow answer to a question which … has been poorly formulated".[197] It might have been "helpful to learn more about post-colonial law and self-determination, statehood and recognition," as some of the judges had wished,[198] but the Court is not "an agency mandated to illuminate legal developments in the abstract … or dedicated to advancing the law or its scholarly discussion".[199]

2.3.2 The Factual Background of KAO [200]

This part of the opinion covers the historical developments in Kosovo from the SC Resolution 1244 (1999) to the DoI.

The Court does not cover the period before SC Resolution 1244 (1999), neither the war of 1999, nor the 20 years (or almost 90 years) of history before that, even though the two main participants Serbia and the authors of the DoI and many participants in the proceedings[201] had put forward their views on the preceding history, both in their written submission and in their oral pleadings.[202] This of course is closely connected to the "narrow and specific" approach of the Court: If one avoids all the issues related to the legal consequences of the DoI and the

[195] Cf. the criticism of Judge Skotnikov, Dissenting, para 15 and of Judge Bennouna, Dissenting, para 53.
[196] Weller, Modesty, 132.
[197] James Crawford, Kosovo and the Criteria for Statehood in International Law, in: Milanovic, et al. (eds.), The Law and Politics of the Kosovo Advisory Opinion (Oxford University Press, 2015), 280.
[198] Weller, Modesty, 132; this refers in particular to Judge Trindade's Separate Opinion and to Judge Simma, Declaration, para 9; Judge Sepúlveda Amor, Separate, para 33; and Judge Yusuf, Separate, para 5.
[199] Weller, Modesty, 132.
[200] KAO, paras 57–77.
[201] Among others, the following states referred to the events before SC Resolution 1244 (1999) in their statements: Albania, Austria, Estonia, Poland, Switzerland, Slovenia, Luxembourg, Finland, the United States, Germany, United Kingdom, Norway, Brazil, Spain and Japan. The Russian submission emphasises victimisation of the Serbian population and the "acts of terrorism" of the KLA; also, Cyprus and Spain, though not contesting the ethnical cleansing by Serbia argued in favour of Serbia's legal position; cf. Daniel H Meester, The International Court of Justice's Kosovo Case, Assessing the Current State of International Legal Opinion on Remedial Secession (Cambridge University Press, CYIL ,Volume 48, 2011), 215–254; cf. also, Weller, Contested Statehood,146, fn 39.
[202] Summary contained in Judge Trindade, Separate, para 139ff, para 149ff.

questions of entitlement to self-determination on the basis of suppression, ethnic cleansing and the doctrine of remedial secession, one does not need to cover questions of facts and evidence related thereto.[203]

As the Court explicitly "considers that it is not necessary to resolve (the) questions (of the right to self-determination or the right of remedial secession) in the present case"[204], it does not need to discuss the "sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of 'remedial secession' were actually present in Kosovo".[205]

In view of what the Judges and the whole world knew about the facts, and in view of evidentiary results obtained by the ICTY[206] , an institution founded by the UN, it can only be attributed to the judicial restraint that the Court avoided dealing with these facts completely and summarily qualified them as "maintained by some participants" of the procedure, even though there was strong support for remedial secession from many states.[207] There were also states with opposite view.[208] The Court diplomatically abstained as much as possible from covering contested ground.

2.3.3 Is the DoI in Accordance with International Law?[209]

This part is the biggest of the advisory opinion; it is divided into two major subheadings, the first one concerning the compatibility of the DoI with general international law, and the second one concerning its compatibility with the SC Resolution 1244 (1999) and the Constitutional Framework.[210] As mentioned above, the identity and the specific capacity of the authors of the DoI when signing is pivotal for this part of the decision.

[203] Cf. the criticism of Judge Trindade, Separate, para, 35, 162 (total "abstraction of the human sufferings").
[204] KAO, para 83, sub-para 1.
[205] KAO, para 82, last sentence.
[206] Cf. above Chapter 1. in particular subchapter 1.3 and 1.4.
[207] Written Statement of Netherlands, para 3.1ff; Written Statement of Switzerland, 60-68; Written Statement of Germany, 33-34; Written Statement of Finland, 11-12; Written Statement of Estonia, 2.1; Written Statement of Slovenia, 2; Written Statement of Albania, 78- 84.
[208] Written Statement of Serbia, 589; Written Statement of China, 2-7; Written Statement of Romania, 119-159; Written Statement of Cyprus, 132-149; Written Statement of Slovakia, 6-17.
[209] KAO, paras 78–121.
[210] The complete term is: "Constitutional Framework for Provisional Self Government in Kosovo"; it is a UNMIK Regulation passed in May 2001; see Ker-Lindsay, Kosovo, 17-18, fn 46 (see also above chapter 1.3.1).

2.3.3.1 General International Law [211]

At the end of this rather short part, the Court concludes[212] that, "general international law contains no applicable prohibition of declarations of independence." Accordingly, … the DoI "did not violate general international law". This conclusion can certainly be considered to be an application of the Lotus principle.[213]

The Court first refers to numerous instances of declarations of independence in the eighteenth, nineteenth, and early twentieth centuries; in no case "the act of promulgating the declaration was regarded as contrary to international law". State practice "during this period contained no prohibition of declarations of independence".[214]

The Court then proceeds to the development in the twentieth century, when many states emerged, by claiming a right of colonies "to break away ... from alien subjugation, domination, and exploitation". The Court clearly qualifies this as a "right to independence" created during the second half of the twentieth century when many states came into existence by the "exercise of this right". This new right of colonial secession is confirmed by the Court, but the Court does not mention any relevance for the DoI of Kosovo.[215] The Court does not even consider an application or extension of the principle of colonial secession on Kosovo, even though arguments of a "colonisation" and "apartheid regime could be made".[216]

The Court then turns to the argument of some of the participating states that a prohibition of DoI is implied by the principle of territorial integrity.[217] The Court enumerates the three most important provisions of international law on the topic and quotes their wording[218]:

- Article 2(4) of the Charter of the United Nations: "All Members refrain *from the threat or use of force* against the territorial integrity or political independence of *any State.*" (italics added)

[211] KAO, paras 79-84.
[212] KAO, para 84.
[213] See above 2.3.1. For this very reason it has been strongly criticised in the Declaration of Judge Simma.
[214] KAO, para 79.
[215] KAO, para 79.
[216] One of the obstacles against this argument is the "salt-water theory" frequently regarded as a part of the right of colonial secession, cf. Crawford, Creation of States, 610-612.
[217]KAO, para 80; e.g. Serbia, Russia, China and Spain.
[218] KAO, para 80; cf. Crawford, The Creation of States, 118-121.

- An almost identical formulation is contained in the General Assembly Resolution 2625 (XXV) (1970) entitled "Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations."

- Principle IV of the Declaration on Principles Guiding Relations between the Participating States in the Final Act of the Helsinki Conference on Security and Co-operation of 1975: "the *participating States* will refrain in their mutual relations … from the *threat or use of force* against the territorial integrity … of each of the participating *States.*" (italics added)

The first element of the international law sources, the prohibition of threat or use of force, is taken up in the next paragraph.[219] The Court here takes note that several participants have drawn attention to SC Resolutions condemning certain declarations of independence which in their opinion contain a general rule prohibiting unilateral declarations of independence. Three special cases were invoked. The Court considers all three cases to be 'exceptional'.[220]In the case of Northern Cyprus, the case of Southern Rhodesia and in the case of Republika Srpska, the declarations of independence in the Court's wording were illegal "either because of the unlawful use of force or egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)".[221] As it has pointed out, "the illegality of those declarations stemmed not from their unilateral characte as such", but from their connection to "…egregious violations of … general international law …". In the view of the Court the exceptional character of these three declarations of independence[222] rather confirms that no general prohibition may be inferred from practice.[223]

Finally, the Court turns to the argument of a general 'right to self-determination' and the right of 'remedial secession' in cases of gross violations of human rights, which by many participants of the proceedings have been claimed to have happened in the case of Kosovo. In view of the "radically different" opinions and positions of the participants in the proceedings who had raised these points, and considering that the Court finds the decision on these issues as "not

[219] KAO, para 81.
[220] KAO, para 81.
[221] KAO, para 81.
[222] Summers, Disputed Independence, 45.
[223] KAO, para 81. (last sentence); here the Court followed quite closely the arguments of Austria; cf. Gerhard Hafner and Nadia Kalb, Structure and Content of the Austrian Statements, 262; see furthermore detailed analysis of the problem in Written Comments of the US, 18 fn. 54ff; and Written Statement of Germany, 29ff "in international practice declarations of independence had only been held to violate international law if conjoint with some other violation".

necessary", the Court avoids taking a stance on these points of law. As pointed out above[224] the court had taken the same restrictive approach when it had analysed the factual background of the case; the Court there had strictly avoided describing the specific and concrete aspects of facts which characterise the case of Kosovo.[225]

2.3.3.2 Compatibility with SC Resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder[226]

The Court first clarifies that the SC Resolution 1244 (1999) and the Constitutional Framework are to be considered a part of international law which it must analyse in order to establish accordance with (or violation of) international law. Within the "hierarchy of norms", the SC Resolution 1244 (1999) derives its international law character from being based on Chapter VII of the UN Charter.[227] UNMIK regulations, which include the Constitutional Framework, adopted by the Special Representatives of the Secretary-General (whose powers are also derived from the SC Resolution 1244 (1999)), can be traced back to the UN Charter. Therefore, the Constitutional Framework is part of "a specific legal order" but ultimately based on the UN Charter and applicable only to Kosovo, the purpose of which is to regulate during the interim phase the "meaningful self-government in Kosovo pending a final settlement".[228]

1. **Interpretation of the SC Resolution 1244 (1999)**[229]

After having established that the SC Resolution 1244 (1999) and Constitutional Framework[230] are part of the relevant international law to be considered, the Court goes on to analyse the appropriate methods of interpretation of SC Resolutions.[231] It starts out with the rules on interpretation of the Vienna Convention on the Law of Treaties (VCLT), Articles 31 and 32, which "may provide guidance", but emphasises from the beginning that additional 'factors' must "be taken into account"[232] when analysing a 'resolution' which represents the view of a

[224] See sub chapter 2.3.2.
[225] KAO, para 82; see also paras 51-56.
[226] KAO, paras 85-121.
[227] Cf. Preamble of SC Resolution 1244 (1999), recital 13; KAO, para 85.
[228] KAO, para 89; (paras. 89-91 deal with the special issues resulting from the fact that this system of international legal character is applicable only in a limited territory).
[229] KAO, paras 94-100.
[230] Passed by UNMIK Regulation 201/9 (15 May 2001); cf. Ker-Lindsay, Kosovo, 17.
[231] Cf. Sean D. Murphy, Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999), in: Milanovic, et al. (eds.) The Law and Politics of the Kosovo Advisory Opinion (Oxford University Press, 2015), 1ff, 32-34 (on the methodology of the Court).
[232] KAO, para 94.

'body' and not the outcome of negotiations between states as concluding parties to a bilateral or multilateral treaty.

While with a treaty two or more parties reach a consensus, in case of resolution of SC the view of the SC is the result of a voting process, often reached by majority vote and binding on non-participating members states and sometimes even on additional addressees.[233] It thus resembles a legislative act of domestic law. Without going into the details of the analogous application of Article 31 and 32 VCLT, the Court enumerates three specific factors to be analysed: 1. "Statements by members of the Security Council made at the time of the … adoption" of the resolution, 2. "other Resolutions" of the SC on the same or comparable issues and 3. "subsequent practice of … United Nations organs and … States affected."[234] It is evident that these criteria have some relation to the concepts of "ordinary meaning of terms in their context" (Article 31(1)), to other "arguments or instruments" of the parties (Article 31(2) VCLT) and "subsequent practice" in Article 31(3) VCLT.[235] However, even though these three criteria are being used by the Court, its argument is very much focused on the "object and purpose" test. The Court concludes that the

> "object and purpose of the resolution was to establish a temporary exceptional legal regime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilisation of Kosovo and … was designed to do so on an interim basis".[236]

It can be said that the Court went to some length to discuss methods of interpretation when establishing "object and purpose" of a resolution, but the main methodological outcome is the rather close reliance on the historic events in particular as far as they are enshrined in the resolution, including its preamble and the two annexes. In so far, the Court follows its own recommendation to "analyse statements by representatives of members of the Security Council made at the time of their adoption"[237] in order to construe and define the meaning of SC Resolution 1244 (1999).[238] This is evident if one is aware of the fact that Annex 1 contains the

[233] KAO, para 94, 116.
[234] KAO, para 94, last sentence.
[235] KAO, para 94.
[236] KAO, para 100.
[237] KAO, para 94.
[238] Even though the Court very thoroughly identifies the history surrounding the "object and purpose" of Resolution 1244 (1999), it does not rely on Article 32 VCLT and draws no analogy to the statements of members of the SC mentioned in KAO para 94. Cf. criticism of the Court's conclusions; Falk, Agora, 50 fn 4; for the

Statement of the G 8 Foreign Minister Conference of 6 May 1999 and Annex 2 the final offer for the ceasefire agreement proposed to Milosevic by Ahtisaari in his function as representative of the EU, Viktor Chernomyrdin, former Prime Minister and then envoy of the Russian Federation and Strobe Talbott, US Deputy Secretary of State.[239]

2. Is the DoI in accordance with the SC Resolution 1244 (1999) and the UNMIK Constitutional Framework[240]?

Proceeding from here, the Court outlines the next two steps; in the first step the Court establishes again the capacity of the authors of the DoI[241] but now not in relation to general international law but in relation to the "special" international law of the SC Resolution 1244 (1999). In the second step (after denying their capacity as part of the provisional institutional framework), it interprets again the SC Resolution 1244 (1999), whether it contains a prohibition against addressees outside the provisional framework, such as the Kosovo Albanian leadership.

a. In which capacity did the authors of the DoI sign it?

At the beginning, the Court asks itself whether

> "Security Council Resolution 1244 (1999) or the measures adopted thereunder, introduce a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 Februar 2008. In order to answer this question, it is first necessary … for the Court to determine precisely who issued that declaration."[242]

An analysis of the 'identity of the authors' of the DoI follows.[243] The purpose of this analysis is obvious. If the DoI had been a declaration of the "Assembly of Kosovo", it would have been adopted by the Assembly, which is one of the "Provisional Institutions of Self-government" within the "Constitutional Framework". In this case, the SC Resolution 1244 (1999) and the Constitutional Framework would have to be applied directly and would be the yardsticks for assessing legality. In this connection, it is relevant that under the Constitutional Framework

methodological problems of interpretation of the SC Resolution 1244 (1999) see also Murphy; Reflections on the ICJ, 1ff; cf. also below fn. 266.
[239] Ker-Lindsay, Kosovo, 15; see also above fn. 128f.
[240] KAO, paras 101-121.
[241] Cf. above 2.3.3.1 in connection with *general* international law and KAO, para. 80.
[242] KAO, para 101.
[243] KAO, paras 102-109.

"external relations of Kosovo" were the "exclusive prerogative of the Special Representative of the Security General".[244]

The Court relies on several arguments:[245] first, the declaration is not made "on behalf" of the "Assembly of Kosovo", but starts out with the words, "We, the democratically-elected leaders of our people hereby declare Kosovo to be an independent and sovereign state".[246] The whole Albanian text, which is the sole original text, does not make any reference to the "Assembly of Kosovo".[247]

The DoI furthermore is not signed "on behalf" of the Assembly but individually by each elected member, including the Prime Minister and the Speaker of the Assembly, plus by the President of Kosovo.[248] It should be added that the original Albanian text had been first read out by the Prime Minister, then voted upon and finally signed. It has always been emphasised that all elected representatives including the elected representatives of non-Albanian communities (Bosniaks, Turkish, Askhali, Egyptian, Gorani, Roma) but except the members of the Serb community participated.[249]

A further argument has been derived from the fact that the DoI was not officially presented to the 'Special Representative of the Secretary General' (SRSG), who under the Constitutional Framework had the exclusive prerogative to handle external relations of Kosovo (see above), but the SRSG was fully aware of it and had taken notice. In spite of his prerogative, and in contrast to other occasions when foreign relations had been concerned, the 'Special Representative' never rejected the DoI as contrary to the Resolution 1244 (1999) and the Constitutional Framework.[250] Finally, the DoI was never published in the 'Official Gazette' as all other resolutions of the Assembly. The Court winds up with the conclusion:

> "that taking all factors together the authors of the declaration of independence ... did not act as one of the Provisional Institutions of Self-Government within the Constitutional

[244] KAO, para 106.
[245] Comprehensively analysed by Murphy, Reflection on the ICJ, 26-28.
[246] The Albanian original text of the DoI, correctly translated into English and French, can be found in Kosovo's first Written Contribution, (Annex I, available at: https://www.icj-cij.org/public/files/case-related/141/15678.pdf); Only the dossier "transmitted on behalf of the Secretary General" contains in an English and French translation the heading "Assembly of Kosovo", KAO para 107.
[247] Cf. KAO, para 107; see also preceding footnote on the mistranslation in the dossier of the Secretary General of the UN.
[248] Murphy, Reflections on the ICJ, 23 fn. 94.
[249] Second Written Contributions of Kosovo, 10, including reference to the statement of the Kosovo Minister of Foreign Affairs, Skender Hyseni made in the SC.
[250] KAO, para 108.

Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration".[251]

b. Did the authors of the DoI still act in violation of the SC Resolution 1244 (1999) or the Constitutional Framework[252]?

After establishing the capacity of the authors of the DoI as "outside the framework of the interim administration", the Court asks the vital question, "Did they act in violation" of the SC Resolution 1244 (1999) or the Constitutional Framework;

aa) With respect to content: In the opinion of the Court, the SC Resolution 1244 (1999) only provided an "interim regime for Kosovo, with the view to channelling the long-term political process to establish the final status".[253] The SC Resolution 1244 (1999), in contrast to other similar resolutions of the SC, did not spell out any conditions[254] for the final status and did not reserve for the SC itself the 'final determination' of the situation in Kosovo. It just *"remained silent"* on these issues.[255]

In the opinion of the Court, it is obvious that neither the SC Resolution 1244 (1999) nor the Constitutional Framework defined the content of the final status of Kosovo. If the SC had decided to establish conditions for the final status, the Court argues, those conditions would have been specified in the SC Resolution 1244 (1999). But in contrast e.g. to its Resolution 1251 of June 1999 (only 19 days after the SC Resolution 1244 (1999)), where the SC prescribed for the final statues of Cyprus a single sovereignty, a single personality, and a single citizenship no conditions and no contents are provided for in the Resolution 1244 (1999).[256]

In short, as a prohibition cannot be derived from the wording of the Resolution, in the Court's opinion an 'argumentum e silentio' is allowed; this is supported by the almost simultaneous SC Resolution 1251(1999) ("contemporaneous practice"). The Court also strongly emphasises that the SC Resolution 1244 (1999) did not prescribe the involvement of the SC for the "final

[251] KAO, para 109; this line of reasoning was rejected by Judge Koroma, Dissenting, paras 11ff, and Judge Bennouna, Dissenting, 44 ff.
[252] KAO, paras 110-121.
[253] KAO, para 114, sub-para 1.
[254] KAO, paras 114-115.
[255] KAO, para 114 sub-para 3.
[256] The Court here again relies on the *contemporaneous* practise of the SC in similar cases; cf. its remarks on interpretation in KAO, para 94 last sentence (argument; see also parallel "other resolutions" discussion on general interpretation of SC Resolution 1244 (1999) in KAO, paras 94-100; and above 2.3.3.2).

solution", in contrast to similar other resolutions.[257] This was criticised not only by dissenting judges,[258] but also in literature.[259] For E.g. in Neuhold's view, a problem arises from para 19 of the SC Resolution 1244 (1999): another SC Resolution would have been necessary, because under para 19 the international civil and security presences (UNMIK) are to continue "unless the Security Council decides otherwise".

It can be argued, however, that after the DoI had been pronounced both the civil and military presence of UNMIK and KFOR continued and had only gradually been reduced; at the time of the KAO both the civil and the security presence still operated in Kosovo.[260]

Thus, in the Court's opinion the SC Resolution 1244 (1999) does not preclude the adoption of the DoI, "because the two instruments operate on a different level"; while the SC Resolution 1244 was only concerned "with a view of channelling a political process", the DoI "attempts to determine" the status of Kosovo separately and independently.[261]

bb) With respect to the addressees the SC Resolution 1244 (1999), the Court now again asks itself to whom the SC Resolution 1244 (1999) is addressed.[262] That is of course a different question from the question discussed above (under (a) who the authors of the DoI were) but it is closely related. Because as the Court concluded that the SC Resolution 1244 (1999) did not impose any obligation on other actors except on the UN Member States, the organs of the UN (Secretary-General, Special Representative) etc, it appears obvious that there was no intention of the SC to impose any prohibition on anybody else, particularly not on the Kosovo Albanian leadership, so these "non-addressees" could not have violated non-existing obligations.

For the Court, the proof that nothing else was intended is the fact that the SC in other resolutions on Kosovo had explicitly addressed other actors; if the SC had considered it to be appropriate

[257] KAO, para115 sub-para 3.
[258] For detailed discussion, see Murphy, Reflections on the ICJ, 28 (fn.3-5); Weller, Modesty, 137ff.
[259] Neuhold, Hanspeter, The Return of History in the Balkans after the Cold War: International Efforts at Crisis Management and Conflict-Resolution, in: Bischof, et.al. (eds.) Austria's International Position after the End of the Cold War (Innsbruck University Press, Volume 22, 2013), 177; fn 32; cf. also Neuhold, International Conflict 2015: 91; Counterarguments are presented by Murphy, Reflections on the ICJ, 9ff.
[260] Only in 2012 the "International Steering Group" (ISG) and its International Civilian Office (ICO) which have been set up in execution of the Ahtisaari plan by the SRSG were terminated; Neuhold, International Conflict, 92.
[261] KAO, para 114 last sub-para.
[262] KAO, para 115ff.

to include the "Kosovo Albanian leadership" as addressees.[263] It would have done so expressly, as it had done on other occasions.[264]

The result is: The Court cannot see any "prohibition binding on the authors of the Declaration of Independence, against declaring independence"[265] contained in the SC Resolution 1244 (1999). Furthermore, the Court cannot see that such a prohibition "could be derived from the language of the Resolution understood in its context and considering its object and purpose".[266] The argument that according to para 11(a) of the SC Resolution 1244 (1999) the "international civil presence" will have to organise and oversee the development of "autonomous self-government pending a political settlement" is refuted again by the argument that this sentence is limited to the interim period "pending a political settlement".[267] In the Court's view, it was the obligation of the "civil presence" to try to reach a negotiated political settlement, but there was no obligation included to reach it, once this proved to be impossible. Its wording "cannot be construed to include a prohibition addressed in particular to the authors of the declaration of independence".[268] In particular, there was, in view of the Rambouillet accord which emphasizes the "will of the people", no limitation to mere autonomy as the final status.[269]

In other words, as the 'authors' of the DoI were not addressees of any obligation to limit themselves to autonomous "self-government" and to reach a "political settlement", they were free to unilaterally adopt the DoI without reaching consensus with Serbia. As they were not part of the "Provisional Institutions of Self-Government" and not addressees of the rules applicable to them, they were equally not bound by any of the measures emanating from the SC Resolution 1244 (1999).

The final outcome of the KAO is summarised:

> "The Court has concluded … the adoption of the declaration of independence … did not violate general international law, Security Council resolution 1244 (1999) or the

[263] KAO, para 116; Murphy, Reflections on the ICJ, 39- 40, on non-state addressees; with discussion of the opinions of Judge Bennouna and Judge Skotnikov.
[264] KAO, para 115f: The Court notes specifically that SC Resolution 1244 (1999) did address "the KLA and other armed Kosovo Albanian groups" to disarm and in three SC Resolutions, 1160 (1998), 1199 (1998) and 1203 (1998) the "Kosovo Albanian leadership".
[265] KAO, para 118.
[266] KAO, para 118; The Court quotes these important elements of interpretation from the VCLT (see also paras 94, 98, 100).
[267] KAO, paras 113ff.
[268] KAO, para 118.
[269] KAO, para 118: The Court, however, adds: "The language … is at best ambiguous in this regard"!

Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law".[270]

2.4 Some Remarks on the Declarations to the Advisory Opinion of the Court, the Separate Opinions and the Dissenting Opinions

It has been stated in this that the Court has used much restraint in various aspects[271] and performed a difficult balancing act to make its opinion acceptable both for Kosovo and for Serbia as well as for their supporters.[272] It is not surprising that many judges made use of their possibility to give different reasoning for the same outcome or expound the arguments for their dissenting votes.

2.4.1 On Jurisdiction

Though the Court has found unanimously that in principle it has jurisdiction to give the advisory opinion,[273] five out of fourteen judges held that the Court should rather have made use of its discretionary power to abstain from using this jurisdiction.[274]

One of these judges, Vice-President Tomka, summarises:

> "The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of juridical restraint".[275]

Four judges did not only dissent on the issue of jurisdictional discretion but also voted against the outcome. The denial to exercise jurisdiction thus was their first line of defence against the majority decision as a whole.

The arguments vary slightly, but all of them see some prejudicial conflict with Article 12 of the UN Charter on jurisdiction.[276] The sharpest formulations against the lack of judicial restraint by complying with the request for an advisory opinion are used by Judge Bennouna, who

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[270] KAO, para 122.
[271] Cf. 2.3.1, 2.3.2, 2.3.3.1.
[272] Cf. the analysis of the predicament of the Court trying to solve an issue of law with strong political content. Weller, Modesty, 133.
[273] KAO, para 123, subpara 1; cf. above sub-chapter 2.1.
[274] KAO, para 123, subpara 2; cf. above sub-chapter 2.2.
[275] Vice-President Tomka, Declaration, para 35, see also para 6; cf. also Judge Skotnikov, Dissenting, para 9 on the "largely political" character of the competence of the SC and Judge Bennouna, Dissenting, para 15.
[276] Vice-President Tomka, Declaration, para 5-9; Judge Bennouna, Dissenting, para 1-26; Judge Skotnikov, Dissenting, para 1-11.

criticises that the Court turned itself into a "decision-maker, in the place of the Security Council", it was led into taking over the functions of "a political organ" [277] of the UN, because the SC was unable to perform them. Judge Bennouna[278] notes the blockade within the SC due to the threat of a veto by Russia against the Ahtisaari plan.[279] "It is essential", Judge Bennouna states, that the Court is

> "not exploited in favour of one specific political strategy or another, and … not enlisted either in the campaign to gather as many recognitions as possible of Kosovo's independence by other States, or in the one to keep these to a minimum".[280]

Even Judge Keith, who is the only judge opposing the exercise of jurisdiction but at the same time "agreeing with the substantive ruling",[281] misses a clear need to give an opinion and doubts the lawfulness of the jurisdiction because thus far the GA had hardly dealt with the case,[282] and the responsibility had been almost exclusively with the SC.[283]

2.4.2 On Substantive Law.

The arguments of the judges complementing and contradicting the majority reasoning can be roughly divided into two groups.

2.4.2.1 Separate Opinions and Declarations

The first group consists of the four judges[284] who criticise the "overly restrictive and narrow reading of the question"[285] but concur with the majority.

Among them, Judge Simma[286] complains in his declaration:

> "by unduly limiting the scope of its analysis, the Court has not answered the question put before it in a satisfactory manner. To do so would require a fuller treatment of both

[277] Judge Bennouna, Dissenting, para 7.
[278] See also Vice-President Tomka, Declaration, para 4 and 6.
[279] Judge Bennouna, Dissenting, paras 9-30.
[280] Judge Bennouna, Dissenting, para 15.
[281] Judge Keith, Separate, para 19.
[282] Mainly by deciding budget matters, para 9.
[283] Judge Keith, Separate, para 9.
[284] Judge Simma, Judge Sepúlveda-Amor, Judge Trindade, Judge Yusuf; cf. Falk, Agora, 50 who uses the phrase "surgical delimitation".
[285] Judge Yusuf, Separate, para 2.
[286] Detailed analysis is contained in Armin von Bogdandy and Marc Jacob, The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion, in: Fastenrath et al. (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (Oxford University Press, 2011).

prohibitive and permissive rules of international law as regards declarations of independence and attempted acts of secession". [287]

Most outspoken is Judge Trindade's separate opinion, who criticises strongly the Court's attitude as it had examined the case only "in abstract", without[288] even mentioning the claims of the participants about "the factual background and its historical context". After all, "the grave humanitarian crisis in Kosovo … (was)… a human tragedy marked by the infliction of death, serious injuries of all sorts, and dreadful suffering of the population… The Court should not have limited itself to… making abstractions of the factual background …". Forcefully concluding, Judge Trindade argues:

> "No State can invoke territorial integrity in order to commit atrocities … nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimised. What has happened in Kosovo is that the victimised "people" or "population" has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination. The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not vice-versa." [289]

In contrast to the rather short declaration of Judge Simma, the almost 100-page Separate Opinion of Judge Trindade is phrased as a strong plea for humanism, considered to be a driving force of the development of international law.

Similar to Judge Simma, Judge Sepúlveda-Amor would have preferred the Court to take a broader perspective; in particular, he misses the analysis of the right to self-determination, remedial secession, the powers of the SC in relationship to territorial integrity and the effects

[287] Judge Simma, Declaration, para 3; Stezana Trifunovska, The Impact of the 'Kosovo Precedent' on Self-Determination Struggles, in: James Summers, (ed.) Kosovo: A Precedent? (Martinus Nijhoff Publishers, 2011), 389, commenting on Judge Simma´s criticism of the ICJ writes: "The way in which the Court deals with the question of the General Assembly leaves the impression that it did not dare to articulate and clarify the impact of the law on self-determination and secession on the principles of territorial integrity and inviolability of boundaries". Cf. Weller, Modesty, 12ff; Crawford, Criteria for Statehood, 28; Oeter, Kosovo Case, 51.
[288] Judge Trindade, Separate, para 46.
[289] Judge Trindade, Separate, para 46.

of recognition.[290] In his opinion, by not doing so the Court did not fulfil its advisory function within the framework of the UN Charter.[291]

Also Judge Yusuf squarely criticises the restraint of the Court not to address the issues of self-determination and remedial secession.[292] He is sceptical of the arguments of the majority, which rely on the narrow phrasing of the question, the complicated interpretation of the SC Resolution 1244 (1999), and the identity of the authors of the DoI[293] in a similar manner as the dissenting judges (still to be discussed below); but rather than voting against the outcome of the majority, he offers an alternative to the majority opinion. He relies on external self-determination and the concept of remedial secession, but instead of opening floodgates and totally eroding the principle of territorial integrity (of which the dissenting judges warned), he carefully delimits the applicability of this instrument and goes to some length to define under which – narrow – circumstances remedial secession may be argued. He clearly addresses as a basis the Declaration on Friendly Relations[294] and its so-called "saving clause", which limits the full protection of the principle of territorial integrity to

> "States conducting themselves in compliance with the principle of equal right and self-determination of peoples … and thus possessed of a government representing the whole people".[295]

2.4.2.2 Dissenting Opinions

The four dissenting judges share a rather outspoken style in their criticism, which is in contrast to the balanced manner of the majority and rather diplomatic wording of the concurring judges. Vice-President Tomka criticises the majority for its "adjustment" to "political developments and realities" incompatible with his own "judicial conscience" and qualifies the arguments as "plainly incorrect" and a "post hoc intellectual construct".[296]

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[290] Judge Sepúlveda Amor, Separate, para 35.
[291] Judge Sepúlveda Amor, Separate, para 19, 35.
[292] Judge Yusuf, Separate, para 4ff.
[293] Judge Yusuf, Separate, para 4ff.
[294] "The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States". Judge Yusuf, Separate, para 11.
[295] Judge Yusuf, Separate, para 223; for Support cf. Quane, Self-Determination and Minority Protection, 208, cf. also the case note in Harvard Law Review, Recent International Advisory Opinion (Volume, 124:1098, 2011), 1102. cf. also above fn.5.
[296] Vice- President Tomka, Declaration, para 1, 12, 19, 20, 35.

Judge Koroma qualifies the structure of the majority opinion as a "misconception", their basic arguments a "judicial sleight of hand", and the opinion as a whole an "instruction manual for secessionist groups the world over".[297] Judge Skotnikov calls the majority opinion "as erroneous as it is regrettable" and considers the majority's opinion on general international law to be "a misleading statement which … may have an inflammatory effect".[298] Judge Bennouna describes the Court's opinion on general international law "at best a sophism" … "logical in appearance alone", the Court's assistance to the GA as "trivialized", saying that such declarations are "no more than foam on the tide of time".[299]

Though many of the arguments against the reasoning of the majority of the opinion (in particular those against the historical context and its impact on the interpretation of object and purpose of the SC Resolution 1244 (1999), as well as the arguments against the "authorship" of the DoI) have some intellectual appeal, it has been clear from the outset that the dissenting judges have a very firm opinion against any (remedial) secession beyond the narrow "colonial" context. It is quite telling that Judge Koroma quotes the Declaration … concerning Friendly Relations without the "saving clause"[300], which according to Judge Yusuf is a decisive argument for remedial secession under narrow and limited circumstances. In the same vein, Judge Koroma quotes the famous findings of the Supreme Court of Canada in the Quebec case, "International law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state" only in an incomplete and selective manner.[301] The evident limitation of the Canadian finding that the citizens of Quebec enjoyed a reasonable degree of internal self-determination is not mentioned.

These observations on the arguments of the four dissenting judges should not be understood as a wholesale rejection of their line of reasoning; they quite aptly draw the attention to flaws and shortcomings of the majority's opinion.[302]

[297] Judge Koroma, Dissenting, paras 4, 19, and 20.
[298] Judge Skotnikov Dissenting, para 11, 17.
[299] Judge Bennouna, Dissenting, para 40, 67.
[300] Judge Koroma, Dissenting, para 22.
[301] Judge Koroma, Dissenting, para 22-23.
[302] It may be allowed to mention that the countries of origin of the four dissenting judges all adhere to a rather strict policy of sovereign and territorial integrity related to the historical experiences of each of them (Slovakia: Hungarian minority, Russia: e.g. Chechnya, Morocco: Frente Polisario, and Western Sahara, Sierra Leone: civil war against the Revolutionary United Front).

3 Political Impact of the KAO

3.1 Political Tactics and Strategies of Serbia when Triggering the ICJ Proceedings

The political strategy and tactics of Serbia when it decided to approach the GA with the request for an advisory opinion of the ICJ had many aspects.[303] Any analysis of Serbia's political position in 2008 must first be aware that the Serbian government urgently wanted to do something on the international scene to stop the wave of recognition of Kosovo; at the same time, it was under nationalistic pressure from its own population to whom it wanted to prove that it was not prepared to give up simply.

More precisely, three arguments obviously influenced the Serbian decision-makers: First, Serbia was surprised by the broad recognition of Kosovo as a state immediately after the DoI. As it had always contested Kosovo's right of secession and insisted on territorial integrity it made sense to use legal reasoning against recognitions.

The second, argument for Serbian decision-makers related to the first argument was that the request for the advisory opinion even in the worst case of a negative or an ambiguous result could help to delay the speed of the recognition of Kosovo.[304] This worked out[305] at least as long as the ICJ procedure lasted. The momentum of the recognition movement was almost stopped as most countries adopted a 'wait-and-see' attitude until the ICJ had delivered its opinion.

Third, Serbia might have been influenced by an additional observation; when Serbia asked the GA for an advisory opinion, nine ICJ judges were from states that *had not* recognised Kosovo and only six from recognising countries; this could have misled Serbia to assume "favor judicis" among the majority of judges.[306]

Much has been said about the options available on how to approach the ICJ and about the wording of the question put to the Court. There was no way to sue Kosovo as it was and still is not a party to the Statute of the ICJ; suing Kosovo furthermore could be construed as an implicit recognition of its statehood. To sue any or all states who had recognised Kosovo could

[303] Cf. Ker-Lindsay, Explaining Serbia's Decision to Go to the ICJ, in: Milanovic, et al. (eds.) The Law and Politics of the Kosovo Advisory Opinion (Oxford University Press, 2015), 2-6, 8; cf. above after fn.5.
[304] Ker-Lindsay, Explaining Serbia's Decision, 8.
[305] The impact of the proceedings and of the KAO on the recognition process see below 3.3.
[306] International Crisis Report, Kosovo and Serbia after the ICJ Opinion (Europe Report No. 206, 26 August 2010), 4 (20).

antagonise important states, particularly EU member states whose goodwill was essential for Serbia's EU membership aspirations. The avenue left open was to convince the UNGA to ask the ICJ for an advisory opinion. This path was eased as the attempts of the EU to dissuade Serbia from judicial procedure started to undermine the credibility of the EU's emphasis on the rule of law in international politics.[307]

Whatever the calculations or miscalculations were, the whole project was certainly largely due to the pressure from internal Serbian politics. As Serbia could not do much else in order to demonstrate its firmness to the 'Greater-Serbian' sentiment and the nationalistic feelings whipped up by large parts of the political spectrum again and again, it turned to international legal proceedings. If one looks at the volume and the number of contributions of countries to the KAO proceedings, the discussions still going on in foreign policy circles and academia,[308] Serbia was quite successful in putting the legal question of Kosovo on the international agenda. This long-term result emerged even though the result of the KAO was negative for Serbia.

3.2 The Immediate Reactions of Kosovo and Serbia after the KAO

In comparison to the emotions triggered by the DoI in 2008, the immediate reactions in both countries after the ICJ delivered its advisory opinion were "moderate".[309] But the mood on the afternoon of 22 July 2010 could not have been more different in the two capitals. In Pristina, the Members of Parliament who had assembled to watch live transmission of the promulgation by the ICJ presiding Judge applauded, drank champagne, and hugged each other. The Kosovo politicians "praised the opinion as a historical decision".[310] The Prime Minister of Kosovo, Hashim Thaci immediately declared: "We expect new recognitions, the strengthening of our state, we expect to secure visa liberalisation, we expect a more positive progress report and we expect to secure an EU perspective".[311]

At the same time in Belgrade, the ICJ opinion caused a shock. The Serbian President Boris Tadic said immediately after the KAO had become public: "Serbia will never accept the

[307] Ker-Lindsay, Explaining Serbia's Decision, 4-6; Weller, Modesty, 130-134.
[308] See below 3.2-3.5.
[309] Solveig Richter, The Political Future of Kosovo after the ICJ Opinion: Status Question (Un-) Resolved? In Peter Hilpold (Ed.) Kosovo and International Law, the ICJ Advisory Opinion of 22 July 2010 (2012), 64.
[310] Richter, The Political Future of Kosovo after the ICJ Opinion, 264.
[311] Bojana Barlovac, Lawrence Marzouk and Petrit Collaku, Pristina, Belgrade React to ICJ Shock Decision (Balkaninsight, 22 July 2010. Available on; https://balkaninsight.com/2010/07/22/pristina-belgrade-react-to-icj-shock-decision/).

unilaterally proclaimed independence of Kosovo as we feel one-sided ethnically driven separatism is against the principles of the UN".[312]

A few days later Serbian MPs solemnly adopted a Resolution entitled "The Decision on the Continuation of Activities in the Defence of Serbian Sovereignty and Territorial Integrity", announcing the use of all "available diplomatic and political means to preserve the country's sovereignty and territorial integrity". The Serbian Foreign Minister Vuk Jeremic announced: "that 55 states are a step away from recognising Kosovo, but that the Serbian government is doing everything to prevent that from happening".[313]

To support its government in this, attempt the Serbian Parliament additionally, authorised the government to undertake all efforts to secure the adoption of a Resolution by the GA of the UN in order to continue the fight against secession at the UN level.

3.3 The international reaction to the KAO

The landmark opinion of the ICJ had wide international repercussions being welcomed by top US and EU officials, from Secretary of State Hillary Clinton, and German Foreign Minister Guido Westerwelle, to the 'High Representative of the European Union for Foreign and Security Policy', Catherine Ashton and other personalities.[314]

States which had supported Kosovo before the KAO increasingly urged other States to recognise Kosovo's independence. In particular, the US and Germany and other EU states felt confirmed in their attitude toward Kosovo's right to secession and asked other countries to follow suit. Germany's Minister for Foreign Affairs, Guido Westerwelle anticipated the later position of the EU in the UNGA and asked Kosovo and Serbia ''to cooperate constructively and pragmatically to tackle questions arising in their day-to-day coexistence".[315] But his strong plea, on the occasion of his visit to Prishtina a month later, to the five EU non-recognisers (Slovakia, Romania, Greece, Cyprus and Spain) to follow the example of the other EU member

[312] Serbia Rejects UN Legal Ruling on Kosovo's Secession (BBC News, 23 July 2010. Available on: www.bbc.co.uk/news/world); Kosovo welcomes Court ruling, (Al Jazeera, 23 July 2010. Available on: https://www.youtube.com/watch?v=zmSu0xMdKL4).

[313] Bojana Barlovac, Serbia MP's Back Kosovo Policy (Balkaninsight, 27 July 2010. Available on: https://balkaninsight.com/2010/07/27/serbian-mps-back-govt-s-kosovo-policy/).

[314] Bojana Barlovac, Lawrence Marzouk and Petrit Collaku, World Reactions to ICJ Advisory Ruling on Kosovo (BalkanInsight, 23 July 2010. Available on: https://balkaninsight.com/2010/07/23/world-reacts-to-icj-advisory-ruling-on-kosovo/).

[315] Official Statement of the Auswaertiges Amt, in Richter, The Political Future of Kosovo After the ICJ Opinion, 266 fn 6.

states[316] was refuted by them. Each of these EU states was and still is afraid that separatist leaders of minorities in their territory could feel entitled to invoke the KAO.[317]

The most important critics of the KAO were Russia, the longstanding ally of Serbia and China, both permanent members of the SC with the clout of having veto power. Both of them upheld their position that the principles of territorial integrity prevent unilateral secession and the status question could only be decided by consensus between Kosovo and Serbia.[318]

About six months after the publication of the KAO the 'International Crisis Group'[319] diagnosed:

> "The opinion was a defeat for Serbia, but not a victory for Kosovo; it ended Belgrade's hopes of using the ICJ as a springboard to re-open talks on Kosovo's status and makes it more likely that it will accept a formula to sit with Kosovo's leaders as equal partners in a dialogue process."[320]

The paper then goes on to enumerate the issues unresolved between Kosovo and Serbia: "The ICJ advisory opinion will not change any of this. Only further diplomacy can."[321] Unfortunately, this twelve-year-old analysis still applies: The talks are still going on; Serbia has not yet acknowledged Kosovo's status as an independent and sovereign State. But in a 2021 report, the International Crisis Group points clearly to the core of the problem: "the main issue at stake is precisely what previous ambiguity was designed to obscure, which is recognition of Kosovo's independence". This "ambiguity", the 2021 report argues, might originally have been a "constructive ambiguity" ehen it was written into the UNGA Resolution 64/298[322], but the

[316] Michael Marterns, Westerwelle fordert Anerkennung des Kosovos (Frankfurter Allgemeine, 27 August 2010. Available on: https://www.faz.net/aktuell/politik/ausland/balkan-reise-des-aussenministers-westerwelle-fordert-anerkennung-des-kosovos-11027369.html).
[317] Solveig Richter, The Political Future of Kosovo After the ICJ Opinion, 266.
[318] Richter, The Political Future of Kosovo After the ICJ Opinion, 266.
[319] In a paper "Kosovo and Serbia after the ICJ Opinion, Europe Report No 206-26 August 2010.- The International Crisis Group is a think tank of high reputation due to the quality of its reports but also due to the composition of its highest organs (former or present trustees) who are high diplomats and former foreign ministers e.g. Martti Ahtisaari, Carl Bildt, Emma Bonino, Sigmar Gabriel, Federica Mogherini and personalities like George Soros and Lawrence Summers.
[320] International Crisis Report, Kosovo and Serbia After the ICJ Opinion,1.
[321] International Crisis Report, Kosovo and Serbia After the ICJ Opinion,3.
[322] See below 3.4.

report continues, "today disagreement on Kosovo's status slows progress on every other topic".[323]

3.4 UNGA Resolution 64/298 (2010)

As mentioned above a few days after the publication of the KAO the Serbian Parliament called upon its government to use all available means to preserve Serbia's "sovereignty and territorial integrity" including initiating the adoption of a GA resolution asking for new negotiations on the status of Kosovo.[324]

Only a days after the announcement of the KAO Serbia submitted a Draft Resolution to UNGA containing the preamble "mindful of the fact that secession cannot be an acceptable way for resolving territorial issues".[325] Together with its Draft Resolution Serbia filed a position paper in which it argued that the Court had not endorsed Kosovo's claim to statehood,

> "Moreover, the Court did not affirm the Province of Kosovo's right to secession from the Republic of Serbia … remains a territory subject to an international regime, whose finals status is undetermined. It is therefore not an independent sovereign state . . . it is our profound belief that unilateral attempts at secession must never be automatically recognized." [326]

But as Marc Weller put it, there "was no appetite in the General Assembly to endorse Serbia's wish for reopening Kosovo's status issue … Serbia had been given by the General Assembly its day in Court."[327] The general attitude was that the UN had sponsored cumbersome negotiations leading to the Ahtisaari plan and the efforts of the Troika under the SC authority, plus complying with Serbia's request for the Advisory Opinion had given Serbia sufficient opportunity to be heard. Now Serbia was "left internationally isolated"[328], a situation which led Serbia to give up its unilateral motion and brought it in line with the policy of the EU States. Serbia which at this time under its President Boris Tadic by no means wanted to prejudice its

[323] International Crisis Group, Relaunching the Kosovo-Serbia Dialogue (Europe Report No, 262 of 25 January 2021), 9.
[324] Richter, The Political Future of Kosovo after the ICJ Opinion, 265; Bojana Barlovac, Serbian MPs Back Govt's Kosovo Policy (Balkan Insight, 27 July 2010. Available on: https://balkaninsight.com/2010/07/27/serbian-mps-back-govt-s-kosovo-policy/).
[325] Weller, Modesty, 145.
[326] Weller, Modesty, 145.
[327] Weller, Modesty, 145.
[328] Weller, Modesty, 145.

aspirations for EU membership gave in and drafted the new motion in cooperation with the EU.[329]

The ensuing GA Resolution 64/298, passed by the 120th GA on 9 September 2010[330] was very short. It first "acknowledges the content of the advisory opinion…" took notice of the KAO and second welcomes the readiness of the EU

> "to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region . . . would be to promote cooperation, achieve progress on the path to the EU and improve the lives of the people."

The GA Resolution 64/298 did not even mention that the ICJ had found the DoI to be in compliance with international law; furthermore, it avoided drawing any conclusions as to Kosovo's statehood. Quite aptly it has been observed that this "concession" to the EU meant a short-term diplomatic failure for Serbia but due to the broad and rather unspecific wording of the resolution, Belgrade won new room for manoeuvre in the long term providing Serbia with the possibility to continue the negotiations within the EU facilitated dialogue. And on top of that Serbia soon thereafter was rewarded for its flexibility by the green light for its application for membership in the EU.[331]

3.5 The Impact of the KAO on Kosovo's Recognition as State and Serbia's Derecognition Campaign

Fourteen years from Kosovo's DoI onwards Kosovo and Serbia have been engaged in fighting for recognition and against recognition.

On the day of the DoI, Kosovo was recognised by Costa Rica, on the following day by the USA, France, Albania, Turkey, the UK and Argentina, within three further days Australia, Germany, Denmark and Italy followed. As of 20 February 2022, Kosovo is recognised by 117 states. The last state to recognise was Israel in 2020.[332]

[329] Richter, The Political Future of Kosovo After the ICJ Opinion, 265.
[330] General Assembly of the United Nations, Resolution 64/298, (9 September 2010).
[331] Richter, The Political Future of Kosovo After the ICJ Opinion, 265.
[332] See detailed list in Kosovo's Ministry of Foreign Affairs website. (Available on: https://www.mfa-ks.net/politika/484/lista-e-njohjeve/484.).

It has been argued above[333] that probably the most important argument for Serbia to initiate the KAO proceedings was the hope to slow down the rate of recognitions and if successful to stop it. When in 2010 the KAO turned out as it did the Kosovo leadership felt entitled to be optimistic and to expect a wave of new recognitions.[334]

Kosovo's Ministry of Foreign Affairs[335] started carefully planned and structured diplomatic activities in 2011. From 2012 to 2014 Kosovo additionally implemented various formal and non-formal lobby type actions, which were supported by the 'British Foreign and Commonwealth Office' and the Norwegian Ministry of Foreign Affairs and carried out with the help and know-how of the British Council in Kosovo.[336] These efforts resulted in a relatively slow but ongoing flow of recognitions until 2014, and since then a "trickling" of one or two per year.[337] All in all, the KAO certainly had some positive influence on recognition, but the expectations of Kosovo's politicians proved over-optimistic.[338]

In particular, Kosovo could not persuade even one of the five EU-denier states to change its attitude.[339] Although the majority of the EU member states (22 out of 27) have recognised Kosovo, five are still withholding their recognition namely Greece, Cyprus, Slovakia, Romania and Spain Spain's position is of particular importance; it is framed by the longstanding tensions with the Basque minority (below 1 Mio) and the Catalan minority (almost 8 Mio) which despite considerable autonomy fight for independent statehood. Because of the size and the political clout of Spain as well as the peculiar twists of interior politics during the escalating tension between its central government and the Catalan minority Spain became "Kosovo's strongest opponent in Europe";[340] when the Catalan leaders invoked the KAO, the Spanish government

[333] See above 3.1.
[334] Kosovo's Foreign Minister Skender Hyseni made the statement: "We call upon states that have delayed recognising… Kosovo pending the Opinion to move forward towards recognition. Nothing in the opinion given by the Court casts any doubt on the statehood of Kosovo." Quote taken from Agon Demjaha, Kosovo's Strategy for Recognition and Engagement in: Ioannis Armakolas, James Ker-Lindsay (Eds.), The Politics of Recognition and Engagement EU Member State Relations with Kosovo (Palgrave Macmillan, 2020), 23.
[335] "Strategy for Achieving Full International Recognition of the Republic of Kosovo"; see details with Demjaha, Kosovo's Strategy for Recognition and Engagement, 24ff.
[336] Demjaha, Kosovo's Strategy for Recognition and Engagement, 24-25.
[337] Recognitions in 2010:3; in 2011:13; in 2012:13; in 2013:7; in 2014:5; in 2015:1; in 2016:2; in 2017:2; in 2018:1; plus, recognition by Israel in 2021 as result of the Washington Agreement of 4 September 2020: Demjaha, Kosovo's Strategy for Recognition and Engagement, 28-29; see also website of Kosovo Ministry of Foreign Affairs: https://www.mfa-ks.net/politika/484/lista-e-njohjeve/484.
[338] Demjaha, Kosovo's Strategy for Recognition and Engagement, 24.
[339] The details are well covered in Armakolas and Ker-Lindsay (eds.) The Politics of Recognition and Engagement, containing an overall discussion and in depths essays on nine Member States.
[340] Ruth Ferrero-Turrion, Spain: Kosovo's Strongest Opponent in Europe in: Armakolas, Ker-Lindsay (Eds.), The Politics of Recognition and Engagement, 215ff; Hanna Jamar, Mary Katherine Vigness, Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral

rather than pointing at the differences of Kosovo and the Catalan case sharply rejected the KAO and recognition.

In all five denier states, the reasons are based on "domestic problems with minorities" and fear of the governments setting a precedent for a breakaway. For similar reasons on the African continent 11 states still refuse to recognise Kosovo due to "problems with indigenous secessionist movements". [341] In particular, Kosovo is not recognised by Serbia's long-time supporter Russia. With the exception of the three Baltic States the former Soviet Republics have refused to recognise Kosovo due to close 'foreign policy' relations with Russia.[342] Furthermore, Russia and China strongly object to its membership in international organisations. Due to their veto power in the Security Council of the UN, both have additional leverage. Russia, while thus supporting Serbia and criticising the KAO, does not hesitate to invoke it to justify its actions in Georgia, Abkhazia, South Ossetia as well as in Ukraine.[343]

Serbia immediately after the KAO did not only engage in a campaign to prevent Kosovo from receiving new recognitions but also from joining international organizations. In 2015 together with the Russian diplomatic network, it prevented Kosovo from joining the 'United Nations Educational, Scientific and Cultural Organisation' (the "UNESCO")[344]. Kosovo failed by three votes to reach two-thirds of the majority. This was seen as a "moral victory in almost impossible condition" by Serbian President Tomislav Nikolic.[345] In 2018 Kosovo failed to join the International Criminal Police Organisation (the "Interpol").[346] Similarly, this has been seen by Serbian President Aleksandar Vucic as a clear "victory".

During the last years, the Serbian diplomatic offensive to prevent further recognition and membership of international organisations was exacerbated by a campaign for "derecognition"[347]. Serbia claims to have persuaded some 12 countries to have derecognised

Declaration of Independence, (German Law Review, Vol.11 2019), 913, 920-925; Demjaha, Kosovo-Spain Relations and the dilemmas on the Problem of Non-Recognition, (SEEU Review, Volume 14, 2020), 69ff.
[341] Visoka, Kosovo, 413.
[342] Visoka, Kosovo, 413.
[343] Visoka, Kosovo, 412.
[344] James Ker-Lindsay, The Counter-diplomacy of State Recognition, in: Gëzim Visoka, et al. (Eds.) Routledge Handbook of State Recognition (Routledge, 2020), 297.
[345] John Irish, Kosovo Fails in Bid to Gain UNESCO Membership (Thomson Reuters, 5 November 2015. Available on: https://www.reuters.com/article/us-kosovo-serbia-unesco-idUSKCN0SY1CW20151109).
[346] Ker-Lindsay, The Counter-diplomacy, 301.
[347] Gezim Visoka, John Doyle and Edward Newman, Statehood and Recognition in World Politics in: Gëzim Visoka, et al. (Eds.) Routledge Handbook of State Recognition (Routledge, 2020), 16; Visoka, The Derecognition of States, 328 ff.

Kosovo, most of them rather exotic.[348] Only recently Vucic declared that "If anyone decides to recognize Kosovo's independence, we will immediately launch a campaign to withdraw recognition".[349]

Serbia's campaign for derecognition and its strong diplomatic campaign against membership in international organisations induced Kosovo to impose 100% of customs tariffs on goods manufactured in Serbia as a "retaliatory measure" hoping to make Serbia drop the derecognition campaign.[350] This step was highly criticised by the US and EU which forced Kosovo to withdraw the tariffs.[351] As part of the "Washington Agreement"[352] brokered by the Trump Administration in September 2020 a one-year moratorium both for the recognition endeavours of Kosovo and the derecognition campaign of Serbia was agreed upon.

After this short description of the 14 years of the fight over recognition, it becomes obvious that the question of the political impact of the KAO must be answered in a differentiating way.

As it has been shown Serbia's initiative was highly efficient to stop the "flood" of recognitions for the length of the procedure before the ICJ. When the KAO was published it certainly supported Kosovo for some years. But even though the KAO still provides a central argument in Kosovo's fight for the recognition of its statehood.[353] It is however still important for Kosovo's political reputation, as the ICJ, the highest judicial authority of the world's "founding fathers" has confirmed, that Kosovo did not violate international law when declaring the DoI.

3.6 EU Facilitated Dialogue between Kosovo and Serbia

Six months after the publication of GA Resolution 64/298, in March 2011 for the first time after the KAO, High Representative Catherine Ashton[354] mediated the talks on behalf of the EU at the prime ministers level. The first phase of the talks was considered 'technical', several

[348] Ker-lindsay, The counter-diplomacy, 297.
[349] Milica Stonjovic, Xhorxhina Bami, Kosovo-Serbia, Recognition Disputes to Resume as Moratorium Ends. (Balkaninsight, 3 September 2021. Available on: https://balkaninsight.com/2021/09/03/kosovo-serbia-recognition-disputes-to-resume-as-moratorium-ends/).
[350] Gëzim Visoka, The Derecognition of States, in: Gëzim Visoka, et al. (Eds.) Routledge Handbook of State Recognition (Routledge, 2020), 328.
[351] As to the background cf. International Crisis Group, Kosovo-Serbia Dialogue, 8.
[352] Robert Muharremi, The "Washington Agreement" between Kosovo and Serbia, (American Society of International Law (ASIL), Insights, Vol. 25, Issue 4, 2021), 1-5; cf. also International Crisis Group, Kosovo-Serbia Dialogue, 8.
[353] Cf. the lecture delivered by Kosovo's President, Vjosa Osmani-Sadriu, Strengthening Kosovo's Statehood: Challenges and Success Stories, (Vienna Diplomatic Academy, 22 June 2021. Available on: https://www.youtube.com/watch?v=dq2D9fdcrFY).
[354] Former "High Representative of the European Union for Foreign Affairs and Security Policy" (2009-2014).

agreements were reached between 2011 and 2013 such as "civil registry books, cadastral records, customs stamps, and mutual acceptance of education diplomas, integrated border management, telecommunications and energy".[355] These "technical" agreements were in line with the intentions underlying the wording of GA Resolution 64/298 (2010). It can be argued that without the KAO and the ensuring GA Resolution 64/298 (2010) the EU-moderated dialogue with its progress in many small steps, all of them of a rather technical nature but important for citizens of both countries, might not have been achieved at all or might have been achieved much later. Without the KAO as a means of solving an international dispute, it is doubtful if and when negotiations between the parties would have been restarted, and in addition whether the "facilitation" by the EU would have been arranged.

One could argue that the case is a good example of how an advisory opinion without having a direct binding effect can have an important political influence in promoting the solution of international problems.[356] Another aspect deserves mentioning: The EU facilitated dialogue can be qualified as a case of mediation by an international organisation.[357] Perhaps one can even find a "pattern" of development wherein as a first step an advisory opinion helped to overcome a highly contested issue of law which was then followed by an ensuing second step of mediation, as mediation is much better suited to solve a complex multitude of less structured issues. Such issues are much better to be solved by an open-ended negotiation process rather than by a judicial process. In addition to other qualifications as a mediator,[358] the EU also had strong "carrots" to offer, namely the perspective 'to accession to the EU' with the added advantage of a variety of pre-accession finance.[359]

One of the decisive steps that the EU soon took in relation to the "carrot" was to make clear to both sides that there must be a "comprehensive normalisation" of the relations of both parties before they could join the EU.

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[355] Krenar Gashi, Simulated Power and Power of Simulations: The European Union in the Dialogue between Kosovo and Serbia, (Journal of Common Market Studies (JCMS, Volume 59. Nr.22, pp. 206-221, 2021), 208.
[356] Cf. Neuhold, International Conflict, 198.
[357] Cf. Neuhold, International Conflict, 180-18; see also Weller, Contested Statehood, 122-123, sketching a typology of mediators (though in relation to the Rambouillet process).
[358] Cf. Neuhold, International Conflict, 182.
[359] As of October 2021 Serbia, has received €2,79 billion EU pre-accession funds from 2007-2020 in addition the European Investment Bank has provided €5,5 billion soft loans since 1999 and further €240 millions of investments; €164 million were paid as disaster relief after the floods of 2014. Cf. Serbia on its European path, (ec.europa.eu/neighbourhood-enlargement, October 2021).

In the case of Serbia, this was explicitly included in the 2014 EU Negotiation Framework for Serbia, which requires a 'legally binding' agreement enabling "comprehensive normalisation of relations" with Kosovo before accession. What exactly "normalization" should be was unclear, but from the very beginning, it has been clear even though this has been shrouded in diplomatic language that recognition of Kosovo's statehood by Serbia was essential.[360] As mentioned above the idea behind the text of GA Resolution 64/298, carefully worded by EU diplomats, was that "the dialogue in itself" would gradually transform the atmosphere of the bilateral relations through the ongoing negotiations process and would result, at least for practical purposes, in the recognition of Kosovo´s statehood. It was expected that this would somehow result in a smooth transition into normalisation.[361]

While during the beginning of the dialogue as mentioned above only technical questions were discussed, in 2012 negotiations between the EU High Representative Catherine Ashton, Kosovo's Prime Minister Hashim Thaci and Ivica Dacic the new Serbian Prime Minister,[362] led to an agreement of substantial political importance on the "Association/Community of Serbian Municipalities" (the "ACSM") with a Serbian majority.[363] This agreement in its time was considered to be a success[364] but in hindsight, it was the beginning of the collapse of the dialogue.

3.7 The Big Stumbling Block: The Association of Serb Majority Municipalities

This agreement signed on 19 April 2013 is usually referred to as the Brussels Agreement; officially it has the title "First Agreement of Principles Governing the Normalization of Relations".[365] But the ambitious words "Normalization of Relations" was not fulfilled by its content. What the document meant by the term "normalization" remained ambiguous. The agreement did not cover the status issue of Kosovo at all. Its main purpose was to detail the rules on the protection of the Serbian minority already provided for in the Ahtisaari Plan,[366]

[360] Cf. International Crisis Group, Kosovo-Serbia Dialogue, 3.
[361] See above 3.4.
[362] In 2012 Boris Tadic lost the presidential election to Tomislav Nikolic.
[363] Cf. Neuhold, International Conflict, 92.
[364] Neuhold, International Conflict, 92 (with a short overview); for details see below chapter 3.7.
[365] Law, No 04/L-199 on Ratification of the First International Agreement of Principle Governing Normalization of Relations between Republic of Kosovo and Republic of Serbia, (27. June. 2013, Available on: https://kryeministri.rks-gov.net/en/documents/law-no-04-l-199-on-ratification-of-the-first-international-agreement-of-principles-governing-the-normalization-of-relations-between-the-republic-of-kosovo-and-the-republic-of-serbia/), (hereinafter "First Agreement"); BPRG, Association of Serb Municipalities, 13, fn. 4.
[366] Report of the Special Envoy of the Secretary-General on Kosovo's future status (S/2007/168), This Report includes the "Comprehensive Proposal for the Kosovo Status Settlement" reprinted by Ker-Lindsay, Kosovo, 155.

namely the ASCM:[367] It goes back to an innocuous provision of the "Comprehensive Proposal for the Kosovo Status Settlement"[368] (i.e. the essential part of the Ahtisaari Plan). The basic idea was taken from the "European Charter of Local Self-Government" (the "ECLSG"),[369] which provided the model of "Associations"; in the ECLSG "Associations" clearly mean organisations which merely support municipalities in the exercise of their tasks without any legislative or governmental function of their own.[370]

Albert Rohan, Ambassador and deputy to the "Special Envoy of the Future Status Process for Kosovo" by UNSG in 2005, in his interview in 2018 explained that the idea behind it was to authorise the municipalities to create common organisations but only for lobbying and advisory purposes, as in Austria and Germany the "Österreichischer Städtebund" and "Deutsche Städte - und Gemeindebund". This is the common understanding all over Europe. The meaning which has been attributed to this "Association" in the Brussels Agreement of 2013 and even more so two years later in the "General Principles of Establishing an Association of Serb Majority Municipalities 2015" goes far beyond the scope and the meaning in the Ahtisaari Plan and the model of the ECLSG.[371]

The insistence of Serbia to add to these tasks local "governance functions" as a third constitutional law layer between the central government and the municipalities with regulatory and executive functions of the association according to Rohan was never envisaged by the Ahtisaari Plan and goes against the spirit of the ECLSG. Kosovo's society and government were and still are afraid of allowing a 'Republika Srpska'-model where the autonomous entity can carve out for the Serbian dominated region a separate local governance structure and block

[367] International Crisis Group, Kosovo-Serbia Dialogue, 5; BPRG, Association of Serb Municipalities, 13-18, contains a detailed report on the negotiation process including the roots of the issue in the Ahtisaari Plan.
[368] In Art 6 (3) and Annex 3 (9.1) of the Ahtisaari Plan.
[369] European Charter of Local Self-Government (European Treaty Series- No. 122, Strasbourg, 1985); its Article 10 (2), contains the following provision: "The entitlement of local authorities to belong to an association for the protection and promotion of the common interests and to belong to an international association of local authorities shall be recognised in each state". This provision had been included upon recommendation of the Austrian diplomat Albert Rohan in Article 6 (3) of the Ahtisaari Plan.
[370] Albert Rohan, KTV–Kohavision, (interview) (Available on: https://www.youtube.com/watch?v =dTp20Sn9DOE&t=1731s, 17 February 2018, min: 14:20. Accessed; 3 July 2021).
[371] BPRG, Association of Serb Municipalities, 15, fn. 22. As to the international models for inter- municipal cooperation see the thorough analysis in Adrian Zeqiri, Pieter Troch, Trim Kabashi, The Association/Community of Serb-Majority Municipalities, (European Centre for Minority Issues Kosovo (ECMI, Kosovo) 2016), 8-18; Report Submitted to the European Union/ European External Action Service by the Government of the Republic of Kosovo, Brussels Agreements implementation State of Play (1 January – 15 June 2016. (Available on: https://kryeministri.rks-gov.net/wp-content/uploads/docs/Kosovo_Report_on_State_of_Play_in_the_Brussels_Dialogue_15_June_2016-signed.pdf)

the national decision-making process. In a nutshell, Ambassador Rohan described with these remarks the controversy about the ACSM.[372]

The controversy[373] fully developed when the "General Principles of Establishing an Association of Serb Majority Municipalities 2015" were negotiated within the framework of the dialogue. The outcome of the "General Principles" of 2015 met with fierce domestic resistance from the left-wing Self-determination Movement (Vetevendosje - LVV), at this time the Parliamentary opposition in Kosovo, led by Albin Kurti.[374] After President Atifete Jahajaga had called upon the Kosovo Constitutional Court to decide on the constitutionality, the Court passed a detailed decision and declared that 23 of the "general principles" as unconstitutional (in particular the regulatory and executive powers of ACSM). While the EU pressured to introduce the ACSM at least as far as it is in accordance with the constitution, Serbia insisted (and still insists today) on full implementation, including regulatory and executive powers for the ACSM.[375]

The Constitutional Court noted that the ACSM shall not have "full and exclusive authority", and also shall be structured in the way as the "Association of Kosovo Municipalities", is and shall be compatible "with the spirit of the Kosovo Constitution".[376] While the opposition and large parts of civil society understood the judgment as "a death knell of the association dream" the coalition government of the time relied on its 86 out of 120 seat majority and on the ratification of the "Brussels Agreement" by Parliament in 2013.

EU High Representative Federica Mogherini in a speech before the Assembly of Kosovo in May 2016 stated that the ACSM "will follow the recent ruling of the Constitutional Court, which guides to ensure that the Statute of the Association will reflect Kosovo's laws when it is drafted."[377]

In addition to the controversy on the ACSM, mutual provocations together with the land-swap proposal secretly negotiated by the two leading politicians of Kosovo and Serbia Thaci and

[372] Albert Rohan, KTV–Kohavision, (interview), min: 14:20. See above section 3.7).
[373] The exact content of the Brussels Agreement of 2013 and of the "General Principles" of 2015 as well as the details of the controversy are well described in Balkans Policy Research Group (BPRG), The Association of Serb Municipalities: Understanding Conflicting Views of Albanians and Serbs, (Available on: https://balkansgroup.org/wp-content/uploads/2017/01/BPRG_Pub-02_ASM_ENG_WEB.pdf, 2007), 14-21.
[374] Six years later in February 2021, Kurti and his electoral alliance won a landslide victory at the parliamentary election.
[375] BPRG, Association of Serb Municipalities, 15-21; cf. International Crisis Group, Kosovo-Serbia Dialogue, 5.
[376] BPRG, Association of Serb Municipalities, 19-21.
[377] BPRG, Association of Serb Municipalities, 21.

Vucic[378] finally led to a complete breakdown of the EU-facilitated dialogue. Between 2016 and 2021 the dialogue for all practical purposes was in limbo without much progress. This by no means was improved by the heavy-handed involvement of the Trump Administration, and its newly appointed Special Envoy for the Kosovo and Serbia, Richard Grenell, who pushed aside the European activities and started a competing "mediation process" culminating in the "Washington Summit" of September 2021[379]. The instability of Kosovo's government and constitutional controversies over the competencies of President Thaci with respect to the powers of parliament and government during Thaci's secret negotiations over the land swap[380] added to the precariousness.[381]

The strong resistance of EU capitals and the sudden indictment of Thaci by The Kosovo Specialist Chambers and Specialist Prosecutor's Office[382] in the summer of 2020 did not improve the outlook for the "Washington Summit" of 4 September 2020. In Washington Kosovo's Prime Minister Avdullah Hoti (who had stepped in for Thaci), Serbian President Vucic and President Donald Trump signed various unilateral "commitments", the wording of which are almost identical, their legal quality unclear and complicated.[383] As to the content, they contain some economic issues, a sort of a "diplomatic ceasefire" declaration for one year (Kosovo promising to make no attempts to join international organisations, Serbia to stop its

[378] Martin Russell, Serbia- Kosovo Relations Confrontation or Normalisations? (European Parliamentary Research Service (EPRS). Available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/ 635512/ EPRS_B RI (2019) 635512_EN.pdf. 2019), 2; the main incidents were:
-January 2017; without Kosovo's consent, not even consultation, a Serbian train decorated with the slogan "Kosovo is Serbian" reached North Mitrovica.
-January 2018; the consensus-orientated ethnic Serb politician of Kosovo, Oliver Ivanovic, who had criticised Belgrade for not cooperating, was murdered.
-March 2018; the Belgrade representative, Marko Duric tries to enter Kosovo without following the procedures applicable and is expelled from Kosovo.
-August 2018: Kosovo and Serbian Presidents Thaci and Vucic announce in vague terms the idea of a land-swap during the Summer Seminar at Alpbach, Austria. The proposal seemingly has the support of the USA (and does not meet with clear resistance by Russia) but is strongly rejected by Germany and other European countries; International Crisis Group, Kosovo-Serbia Dialogue,7-8; EPRS, Serbia-Kosovo Relations, 7-8.
-November 2018: Kosovo's attempt to join Interpol is thwarted by Serbia, as a retortion Kosovo introduces 100% customs duties on imports from Serbia. The EU facilitated dialogue comes to a complete standstill.
[379] Muharremi, The "Washington Agreement" between Kosovo and Serbia, 1-5.
[380] For details see International Crisis Group, Kosovo-Serbia Dialogue, 7-8; EPRS, Serbia-Kosovo Relations, 7-8.
[381]Perparim Isufi, Xhorxhina Bami, US Dismisses Kurti's Claims About Secret Land Swap Talks (BalkanInsight, 27 March 2020. Available on: https://balkaninsight.com/2020/03/27/us-dismisses-kurtis-claims-about-secret-land-swap-talks/,).
[382] See historical part sub-chapter 1.6.
[383] Muharremi, The "Washington Agreement" between Kosovo and Serbia, 1-5.

derecognition campaign), the promise of Israel to recognise Kosovo and a commitment of both Serbia and Kosovo to move their embassies to Israel to Jerusalem.[384]

The Washington interlude, which from the beginning had a doubtful legal value, lost even its political importance quickly. First, it seems that with the indictment of President Thaci and later on with the overwhelming victory of Kurti from the LVV in the snap parliamentary elections of February 2021 the tables of internal politics in Kosovo have been completely turned.[385] Secondly, it is quite unclear which implications the Israel part of the "deal" has had and will have for EU-Balkan relations. Finally, with the new Biden administration, the relationship between Kosovo and the US has improved again as President Biden has been a strong supporter of Kosovo in his political past but even more so because Biden has made it clear that in contrast to President Trump his administration wants to cooperate with Europe.[386]

3.8 The new Kurti Administration: The Restart of the Brussels Dialogue 2021

In February 2021 Albin Kurti, leader of the Vetevendosje (LVV) and his electoral alliance-partner Vjosa Osmani–Sadriu, who shortly before parliamentary elections of 2021, had founded a new party "Guxo" (Dare), won an overwhelming historic victory (67 seats out of 129 MP's).

The new joint list commands not only a comfortable majority in parliament but also the presidency thus providing unusual stability and power to the new government.[387]

Almost at the same time the new US Administration of President Joe Biden clarified that it wanted to build on the Washington Agreement but in contrast to the Trump Administration in close cooperation with the EU.[388] Biden urged both parties to work on mutual recognition.[389]

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[384] This issue is highly sensitive to the EU as the EU Council has strictly refused the transfer of the EU Member States embassies to Jerusalem.

[385] International Crisis Group, Kosovo-Serbia Dialogue, 9.

[386] For a detailed analysis of the Biden-Strategy see Edward P. Joseph, From Crisis to Convergence: A Strategy to Tackle Balkans Instability at its Source (Wilson Center, Available on: https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/SAIS%20FPI%2C%20WWICS%20Report%2C%20From%20Crisis%20to%20Convergence%2C%20Strategy%20to%20Tackle%20Balkans%20Instability.pdfpdf, 18 January 2022), 18, 20.

[387] Perparim Isufi and Xhorxhina Bami, Kosovo Parliament Elects Albin Kurti as Prime Minister, (BalkanInsight, 22 March 2021. Available on: https://balkaninsight.com/2021/03/22/kosovo-parliament-elects-albin-kurti-as-prime-minister/); Kosovo MPs Elect Lawyer Vjosa Osmani As President, (Deutsche Welle, available on: Kosovohttps://www.dw.com/en/kosovo-mps-elect-lawyer-vjosa-osmani-as-president/a-57099573, 04 April. 2021).

[388] Kosnett: Biden Administration Fully Accepts Washington Agreement, (RTK Live, available on: https://www.rtklive.com/en/news-single.php?ID=18913. 07 May 2021).

[389] Orlando Crowcroft, President Joe Biden says 'mutual recognition' key to Kosovo-Serbia talks (Euro News, available on: https://www.euronews.com/2021/04/20/president-joe-biden-says-mutual-recognition-key-to-kosovo-serbia-talks, 20.04.2021).

Even though Kurti during his election campaign and afterwards had proclaimed that Kosovo's recognition by Serbia is of secondary importance[390] and Vucic, again and again, has vowed that under his stewardship there will be no recognition of Kosovo, in Spring 2021 Josep Borell, the EU High Representative of the Union for Foreign Affairs and Security Policy, and Miroslav Lajcak, the EU Special Representative for the Belgrade-Pristina Dialogue and the Western Balkan regional issues, restarted the Brussels Dialogue.[391]

The first meeting between Kurti and Vucic was held on 15 June 2021 and ended with 'radical differences'; while Kurti put four new proposals on the table Vucic was only willing to discuss the ACSM.[392]

The second meeting on 19 July 2021 turned out to be even more confrontational: Kurti proposed a "declaration of peace between Kosovo and Serbia" with 6 Articles signed by both states as the basis for a comprehensive peace treaty including the issues of missing persons and recognition. In addition, he wanted to give three books to Vucic on Serbia's war crimes history in Kosovo during the 19th and 20th centuries. Both the declaration and the books were rejected by Vucic[393]; the Special Representative Lajcak qualified the meeting simply as "a hard one". In September 2021, the tensions between Kosovo and Serbia reached a new climax on the issue of temporary license plates for cross-border traffic.[394] With a week's notice the Kosovo government announced that it will apply the same rules which have been applied to Kosovar cars entering Serbia for many years, to Serbian cars entering Kosovo. The Kosovo government maintained to apply the principle of reciprocity.[395]

The third meeting between Kurti and Vucic planned for late 2021 was cancelled. It was quite evident that the leverage of the EU upon the parties had lost much of its grip. At the end of

[390] Ardit Orana and Ramadan Llazi, Kosovo-Serbia dialogue: Consequences of the status-quo, (Kosovo Centre for Security Studies (KCSS), (Available on: https://qkss.org/en/publikimet/dialogu-kosove-serbi-pasojat-e-status-quo-se, March 2022), 10. "Kosovo can live without Serbia's recognitions".
[391] KCSS, Kosovo – Serbia dialogue: Consequences of the status-quo, 7.
[392] Lulzim Peci, The First Meeting between Kurti and Vucic in Brussels: A Dynamic Status Quo? (Available on: https://kossev.info/the-first-meeting-between-kurti-and-vucic-in-brussels-a-dynamic-status-quo/. 02 July 2021).
[393] Did the two meetings between Kurti and Vucic produce any results? (Euro news, Available on: https://euronews.al/en/balkans/2021/07/24/did-the-two-meetings-between-kurti-and-vucic-produce-any-m:results/, 24 July 2021).
[394] Balkan Policy Research Group (BPRG), Kosovo-Serbia Dialogue: Implementing the FoM and IBM for the benefit of the People, (Available on: https://balkansgroup.org/en/kosovo-serbia-dialogue-implementing-the-fom-and-ibm-for-the-benefit-of-the-people/, March 2022), 16-21, contains the very technical background of the agreements on Freedom of Movement and on Integrated Border Management.
[395] BPRG, Kosovo-Serbia Dialogue, 5ff.

2021,[396] an optimist could perhaps have hoped that things might change after the Serbian elections on 3 April 2022. Even though Serbia was allowed to open four new chapters in its bid for EU membership, the European Commission in its Serbia Report 2021, was quite explicit in addressing many shortcomings concerning the functioning of democratic institutions, the rule of law and fundamental rights. The European Commission quite clearly repeated that without "a legally binding normalization agreement including in its international relations" between Kosovo and Serbia there could not be Serbian membership in the EU.[397]

3.9 Postscript

The geopolitically dramatic invasion of the Federation of Russia in Ukraine on 24 February 2022 has repercussions worldwide. The more than 100 years of close ties between Serbia[398] and Russia put Serbia into a difficult dilemma. On the one side, it could not help but to vote in favour of the condemnation of Russia's invasion by the GA of the UN.[399] On the other side Vucic, who has won the elections of 3 April 2022 by a comfortable majority until today, refuses to join the EU sanctions against Russia. However, this would be an obligation of each EU candidate. At the same time, Vucic repeatedly has declared that Serbia has to continue its path towards EU membership even though the percentage of Serbs opposing it for the first time has surpassed the percentage in favour of EU membership.[400] As many analysts say, Serbia indeed is between a rock and a hard place. Serbia still tries to strike a balance between advantages of Russian friendship, including Russia's and Chinese veto power in the UN Security Council and Russia's fossil fuels on the one hand as well as the perspective of EU membership including EU finances on the other hand.

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[396] In spite of the postscript following in the text below this is the cut-off date for this paper, which the author has decided upon with respect to the events and scholarly literature.

[397] European Commission, Serbia 2021 Report- Communication on EU Enlargement Policy, 78-79. (19 September 2021). Available on: Serbia-Report-2021.pdf (europa.eu)).

[398] The dilemma of Serbia is well described in an article by Marton Dunai, Serbia's president Alexandar Vucic rejects sanctions on Russia (Financial Times, Available on: https://www.ft.com/content/0041d1a9-7fbd-4ea3-8176-e8b7d99e4a92 21 April 2022).

[399] Milica Stojanovic, Serbia Backs UN Resolution Condemning Russian Attack on Ukraine, (BalkanInsight, 2 March 2022. Available on: https://balkaninsight.com/2022/03/02/serbia-backs-un-resolution-condemning-russian-attack-on-ukraine/).

[400] Katy Dartford & AP, For the first time, a majority of Serbs are against joining the EU - poll (Euronews, 22 April 2022, Available on: https://www.euronews.com/2022/04/22/for-first-time-a-majority-of-serbs-are-against-joining-the-eu-poll); only 20% of Serbs view EU positively says polling expert, (Euractive, 11 April 2022. Available on: https://www.euractiv.com/section/politics/short_news/only-20-per-cent-of-serbs-view-eu-positively says-polling-expert/): Both sources report on a poll conducted in March 2022 by Ipsos Agency. The survey showed that 44 per cent of the participants were against EU membership, though in a referendum 46 per cent of Serbian citizens would support EU accession. Only 21 per cent had a positive opinion on the EU. Euractive in 2021 reported that 62 per cent would vote in favour membership in a referendum.

President Vladimir Putin's recent analysis of the KAO qualifying it as an argument legitimating the declaration of statehood of the Donetsk People's Republic and Luhansk People's Republic and Russia's invasion does not make life easier for Vucic.[401]

In the meantime, Kosovo has applied for membership in the Council of Europe. It is hard to predict whether this will change the rules of the game for Kosovo and the whole Western Balkan.[402]

4 Conclusion

Both parties to the conflict and many countries participating in the KAO proceedings provided the ICJ with long explanations on the historical aspects, often dating back to antiquity and the middle ages, leading up to the date of the DoI.

Though the majority opinion of the Court has a chapter on the factual background,[403] it is limited to the period from 1999 to 2008 (SC Resolution 1244 (1999), the UN Interim Administration of Kosovo, negotiations towards the "final status" led by Ahtisaari with the ensuing attempts to reach a consensus with Serbia and its supporters in the Security Council, and the failed final Troika negotiations).

The preceding age-old history of the conflict was deliberately left aside as the Court considered that "it is not necessary to resolve questions (of the right of self-determination or remedial secession) in the present case"[404]; as a result of this legal conclusion, the Court in its view did not need to discuss "as to whether the circumstances which some participants maintained would give rise to remedial secession were actually present".[405]

Despite the limitation followed by the Court, the thesis describes the full historic background mainly for three reasons:

[401] Dean B. Pineles, How the 'Kosovo Precedent' Shaped Putin's Plan to Invade Ukraine (Balkan Transitional Justice 9 March 2022, available on: https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine/).
[402] Ardita Zeqiri, Kosovo Submits Application to join Council of Europe (Prishtinainsight, 12 May 2022, available on: https://prishtinainsight.com/kosovo-submits-application-to-join-council-of-europe/).
[403] KAO, paras 57-77.
[404] KAO, para 81 sub-para 1.
[405] KAO, para 82; cf. Chapter 2.3.2.

— First, the historical background helps to understand the various actors, institutions and countries participating, including the Court itself; this is primarily a historical argument.

— Secondly, it can be argued that even though the majority of the Court avoided discussing self-determination and remedial secession, large parts of the Declarations, the Dissenting and the Separate Opinions cannot be fully understood without the background of the "special circumstances". Even if the concept of "remedial secession" for the time being might only be considered a doctrine, its more or less explicit acceptance by some of the Judges might very well show the direction of "international law in the making"; this is a legal argument.

— Third, the historical background is indispensable to understand the political development since the KAO.

The "judicial restraint" exercised by the majority of the Court[406] has been criticised by many. But it has rightly been said that this restraint, to a large extent, was determined by the narrow scope of the question phrased by Serbia. Furthermore, the ICJ (despite being the judicial institution within the UN framework) to fulfil its functions, was probably well advised to limit itself to an opinion which could be supported by a substantial majority of ten to four. And it is fair to note that:

a) The limited Opinion according to which the DoI did "not violate international law" (which in the Court's Opinion is equal to being "in accordance with international law") "did contribute to a reduction of tension over Kosovo".[407]

b) The KAO by avoiding the issue of remedial secession, has not discarded the doctrine. Furthermore it has provided for Judge Cancado Trindade and Judge Yusuf, two of its persuasive advocates, a platform to present and expound it. It would not be the first case in which the law in the making was first stated in forceful separate or dissenting opinions.

[406] Cf. Details in Charter 2.3.
[407] Mark Weller, The Sound of Silence Making Sense of the Supposed Gaps in the Kosovo Opinion. In: Marko Milanovic and Michael Wood, The Law and Politics of the Kosovo Advisory Opinion, (Oxford University Press, 2015), 214.

Finally, some short remarks as to the political impact of the Opinion:

- Despite the limitations of the Opinion, the statement by the Court that the DoI did not violate international law has been and still is the cornerstone of the national identity of Kosovo as a state.

- The KAO certainly helped Kosovo with its international recognition (which now stands at some 60 per cent of the UN Member States).

- The KAO served as a useful stepping stone for the “EU facilitated dialogue” between Kosovo and Serbia, mandated by UNGA Resolution 64/298 (2010). It could be argued that this could be a model for the division of labour between the tools of advisory opinions to clarify narrow legal issues in contrast to open-ended questions to be solved in negotiations facilitated by a mediator.

- Contrary to many expectations, the "normalisation” between Kosovo and Serbia thus far could not be achieved. Unfortunately, progress of both countries on their way to EU membership is inextricable linked to this “normalisation”. The unexpected attack of the Russian Federation on Ukraine puts the traditional friendship between Serbian and Russia to a hard test and might weaken the effect of Russia's support.

- Finally, it should be mentioned that interior politics play an enormous role both with Kosovo and Serbia in their bilateral relations but also for other actors on the international level. They are difficult to understand and to influence.

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6 Abstract (English)

On 22 July 2010, the 'International Court of Justice' (ICJ), announced its advisory opinion on Kosovo's Declaration of Independence (DoI) of 17 February 2008. In its first chapter, this thesis examines the historical background of the underlying conflict culminating in the ethnic cleansing of 1999 and Kosovo's long road to independence by its DoI in 2008.

The second chapter analyses the legal issues of the KAO. It deals with the contributions of states participating in the proceedings, the arguments of the majority of the Court and the main ideas contained in separate opinions and declarations of concurring and dissenting judges. The thesis demonstrates how the Court, after confirming its jurisdiction, narrowed the scope of the question put to it and abstained from all issues related to the question of remedial secession and statehood, thus limiting the factual background of the opinion and its political relevance.

The third chapter covers the political impact of the KAO. The most important long-term effect of the KAO is its contribution to the political identity of the young state. The chapter furthermore describes the effect on Kosovo's recognition endeavours and Serbia's de-recognition campaign, as well as the obstacles Kosovo comes across when applying for membership with international organizations. The chapter further analyses how the KAO paved the way for GA resolution 64/298 (2010), which mandated the EU-led dialogue between Serbia and Kosovo. The chapter shows that diplomacy thus far could not solve the problems that the KAO had not solved.

7 Abstract (German)

Am 22. Juli 2010 verkündete der Internationale Gerichtshof (IGH) sein Gutachten (KAO) über die Unabhängigkeitserklärung des Kosovo. Im ersten Kapitel dieser Arbeit wird der historische Hintergrund des zugrundeliegenden Konflikts untersucht, der 1999 in der ethnischen Säuberung gipfelte, und schließlich zur Unabhängigkeitserklärung des Jahres 2008 führte.

Das zweite Kapitel analysiert die rechtlichen Aspekte der KAO. Es befasst sich mit den Beiträgen der am Verfahren beteiligten Staaten, den Argumenten der Mehrheit des Gerichtshofs und den Hauptgedanken, die in den einzelnen Stellungnahmen und Erklärungen der zustimmenden und abweichenden Richter enthalten sind. Es wird aufgezeigt, wie der Gerichtshof nach der Bestätigung seiner Zuständigkeit den Umfang der ihm gestellten Frage einschränkte und sich aller Themen enthielt, die mit der Frage der „remedial secession“ und der Staatsbildung zusammenhingen, wodurch die historischen Fakten ausgeblendet und die politische Relevanz des Gutachtens eingeschränkt wurden.

Das dritte Kapitel befasst sich mit den politischen Auswirkungen der KAO. Die wichtigste langfristige Wirkung der KAO ist ihr Beitrag zur politischen Identität des jungen Staates. Das Kapitel beschreibt außerdem die Auswirkungen auf die Anerkennungsbemühungen des Kosovo und die Kampagne Serbiens zur Aberkennung der Anerkennung sowie die Hindernisse, auf die der Kosovo bei der Bewerbung um die Mitgliedschaft in internationalen Organisationen stößt. Das Kapitel analysiert ferner, wie die KAO den Weg für die Resolution 64/298 (2010) der Generalversammlung ebnete, die den EU-geführten Dialog zwischen Serbien und dem Kosovo initiierte. Das Kapitel zeigt, dass die Diplomatie bisher nicht in der Lage war, die Probleme zu lösen, die die KAO nicht gelöst hatte.