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Creative Interpretation of International Law and the Status of Kosovo in International Relations

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Introduction: the case of Kosovo's unilateral declaration of independence in 2008 is specific in many ways. Although some Western politicians and theorists claim that it is *sui generis*, the only thing that appears unique in this process is the creative interpretations of international law emanating from the U.S. and the EU. These interpretations created a new political reality, and thanks to this, the case of Kosovo has become more complex than before. **Purpose:** the paper attempts to explain the key events that determined the resolution of the status of Kosovo. This explanation proves how necessary it is to scrupulously insist on the provisions of international law and respect for signed agreements in order to resolve complex political conflicts. Creative interpretations have not contributed to the resolution of the conflict, but have created patterns and the potential for new confrontations. **Methods:** theoretical methods of analysis, synthesis, modeling, analogy; empirical methods of description, interpretation; special scientific methods: historical method, method of legal norms interpretation. **Results:** the analyzed events indicate that legal norms were interpreted and contextualized in a way that suited the geopolitical goals of the U.S. and the EU. Such interpretations and contextualizations were necessary for the U.S. and the EU to portray the process of declaring Kosovo's independence as legal and so that they could lobby for Kosovo's recognition in international relations. **Conclusion:** creative interpretations of international law, relying on political pressure and threats of force (or on actual use of armed forces), have not contributed to resolving the Kosovo case in the way the U.S. and the EU wanted. More than half of the UN member states still do not recognize Kosovo, and the question of legitimizing the status of this entity remains open. At the same time, the U.S. and the EU have created an unpleasant precedent that can now be (mis)used elsewhere in the world. Their actions have also significantly undermined the authority of international organizations such as the UN and the International Court of Justice, which may negatively affect international relations in general.

Keywords: Kosovo; secession; unilateral proclamation; Serbia;
FR Yugoslavia; international law; USA; EU

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Избирательная интерпретация международного права и статус Косово в международных отношениях

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Введение: ситуация одностороннего провозглашения независимости Косово в 2008 году является специфической во многих отношениях. Хотя некоторые западные политики и теоретики утверждают, что это уникальный процесс, единственное, что представляется в нем уникальным, – это избирательная интерпретация международного права со стороны США и ЕС. Такая интерпретация создала новую политическую реальность, вследствие чего ситуация в Косово стала еще более сложной, чем ранее. **Цель:** в статье предпринята попытка объяснить ключевые события, которые определили решение вопроса о статусе Косово. Данное объяснение доказывает, насколько важно неукоснительно придерживаться положений международного права и соблюдать подписанные соглашения для разрешения сложных политических конфликтов. Избирательные интерпретации не способствовали разрешению конфликта, но создали модель и потенциал для новых конфронтаций. **Методы:** теоретические методы анализа, синтеза, моделирования, аналогии; эмпирические методы описания, интерпретации; специальные научные методы: исторический метод, метод толкования правовых норм. **Результаты:** проанализированные события свидетельствуют о том, что правовые нормы интерпретировались и контекстуализировались таким образом, чтобы соответствовать геополитическим целям США и ЕС. Это было им необходимо для того, чтобы представить процесс провозглашения независимости Косово как легитимный и иметь возможность лоббировать признание Косово в международных отношениях. **Вывод:** избирательное толкование международного права, основанное на политическом давлении и угрозах применения силы (либо на фактическом применении силы), не способствовало разрешению ситуации в Косово так, как того хотели США и ЕС. Более половины государств – членов ООН по-прежнему не признают Косово, и вопрос о легитимизации статуса этого образования остается открытым. В то же время США и ЕС создали негативный прецедент, который теперь может быть использован в других странах. Их действия также существенно подорвали авторитет таких международных организаций, как ООН и Международный Суд ООН, что может иметь негативное влияние на международные отношения в целом.

Ключевые слова: Косово; выход из состава; одностороннее провозглашение; Сербия; Союзная Республика Югославия; международное право; США; ЕС

Introduction

One of the examples of separatism, probably best known in the first decade of the 21st century, is Kosovo. Many politicians have tried to explain in what way Kosovo is a unique case. There were also theorists with similar views [5; 10]. The secession of Kosovo from Serbia is 'a textbook case of how countries, through an illegal use of force, aim to create a new legal reality, according to the maxim *ex injuria jus oritur*' [6, p. 132]. In this context, the attempt undertaken by Kosovo Albanians is no special case. What makes it special is that the United States, Great Britain, France, and Germany have supported this separatism, primarily because of their geopolitical goals, and hence the attempts to legalize it. And what is particularly interesting – they did so using creative interpretation of international law coupled with

political pressure and harsh military threats. In this particular case, the sequence of events that led to the secession of Kosovo from the Republic of Serbia was triggered by an illegal international use of force in violation of Article 4(2) of the United Nations Charter. We have seen, and we can see even now, something similar in different parts of the world. Just as we see that some entities that have proclaimed independence are gaining partial legitimization of their status in international relations. Kosovo is not a unique case. We will prove this thesis by analyzing the key legal acts that have decisively influenced the status of Kosovo and by demonstrating how it became possible for Kosovo Albanians to unilaterally declare independence. This unilateral decision cannot be analyzed without the wider context. Therefore, a historical review of events from 1998 to 2008 will be provided.

Negotiations in Rambouillet and NATO Aggression Against the FR Yugoslavia

A quarter of a century after NATO's aggression against the Federal Republic of Yugoslavia, Russian Foreign Minister Sergei Lavrov noted: 'I think that, starting in 1991, the disintegration of Yugoslavia and the separation of Kosovo from Serbia were in the plans of the West. The NATO aggression has its roots in 1998, when the Belgrade authorities controlled this Serbian region. Terrorist attacks began there and the Kosovo Liberation Army was formed. There is evidence that it was financed and armed by Americans and Germans' [7].

Was the separation of Kosovo from Serbia really planned back in 1991? There are certainly some indications that this is true, but until the historical archives are opened, such a thing cannot be confidently asserted. In this paper, we will explain the phenomenon of creative interpretation of international agreements/resolutions. Creative interpretation served to contextualize certain political events or political processes. This is how, in fact, the appearance of legality was given to political decisions. Including the one with the most far-reaching consequences: the acceptance and recognition of the unilaterally declared independence of Kosovo Albanians.

In order to examine the unilateral decision of Kosovo Albanians to proclaim independence in 2008, it is necessary to return a decade back, in 1998. An armed conflict between the Kosovo Albanians paramilitary formation (Kosovo Liberation Army – KLA) and the police and military forces of Yugoslavia escalated in mid-1998. However, it was already in early autumn (September) that Albanian formations suffered a complete defeat. At that time, the U.S. and NATO directly intervened in this process, demanding that the Yugoslav authorities withdraw military and police forces from Kosovo and stop using force. Political pressure became unbearable. In October 1998, NATO started to threaten with bombing, and despite the military victory on the ground, the president of the FR Yugoslavia was forced to begin negotiations with the special envoy of US President, Richard Holbrooke. The result was the Milošević – Holbrooke Agreement, the content of which became part of Resolution 1203 (1998) of the UN Security Council. This Agreement and the Resolution that followed establish: the need to pursue the peaceful resolution of the conflict in Kosovo by further political negotiations; that violence and terrorism 'have to stop immediately'; that any political solution 'must respect the territorial integrity, sovereignty and internationally recognized borders of the Federal Republic of Yugoslavia' in accordance with the basic principles of the OSCE; that the future must be sought in 'peace, equality, integration, economic prosperity and free common life'; that, having this in mind, 'it is necessary to harmonize the legal solutions that establish Kosovo self-government with the legal frameworks of

the Republic of Serbia and the FRY' in accordance with 'international norms'; to organize within nine months 'free and fair elections for the Kosovo authorities', including local communities, with the supervision of the international community'; to guarantee the rights of national communities in Kosovo to 'preserve and manifest their national, cultural, religious and linguistic identity', while respecting international standards; to guarantee 'establishment of police under the local administration' in order to respect the security of all citizens and national communities; as well as that there will be amnestied participants in the conflict, that is, they will not be 'prosecuted' before state courts for criminal offenses related to the conflict in Kosovo¹.

The agreement also approved partial withdrawal of the forces of the Yugoslav Army and the Special Forces of the Police of Serbia from the territory of Kosovo, or their return to their previous posts in the territory of Kosovo, disarming of the members of the so-called KLA, as well as the establishment of the OSCE Kosovo Verification Mission, having 2,000 members, with the authority to monitor the implementation of the agreed. The OSCE mission was also supported by NATO, whose aircrafts had the right to monitor the activities of the Yugoslav Army in the territory of Kosovo. That is why the FRY authorities signed two additional agreements – with NATO on October 15 and with the OSCE one day later. 'The NATO Mission Agreement stipulates that NATO surveillance airplanes have the right to fly over the territory of Kosovo and Metohija and for this purpose: 1) a security zone along the borders of Kosovo and Metohija, at a depth of 25 kilometers, is established, on which the aviation and air defense of the Yugoslav Army will not have any activities during the surveillance flights of NATO aircraft; 2) missions above Kosovo and Metohija will be conducted by pilot and non-pilot aircrafts, introducing a safety margin of 30 minutes before and after a flight for low-flying airplanes with pilots, during which there will be no activities of Yugoslav air forces and anti-aircraft defense; 3) NATO will deliver weekly plans of its flights to Kosovo and Metohija to the Yugoslavian Flight Control; 4) civilian aircraft flights will be provided without any restrictions during NATO missions throughout the airspace of the FRY; 5) Yugoslav war planes can fly over Kosovo and Metohija and the security zone, except during NATO surveillance missions; 6) NATO and Yugoslav air forces will not interrupt each other during their missions; 7) unless otherwise determined, NATO aircrafts will enter and exit Kosovo and Metohija through the airspace of Albania and FYR of Macedonia' [4, pp. 783–785].

It turned out, however, like in a number of other situations, that the Yugoslav authorities expressly fulfilled their most important obligation – withdrawing more than 6,000 soldiers and removing checkpoints from important traffic nodes (26 October), military and police officers from Kosovo and Metohija, while the so-called KLA only

¹ United Nations Security Council. Resolution 1203 (1998). 24 October 1998.

regrouped and started a new round of mobilization among Albanians, returning to the positions they had lost in September [14]. There was no demilitarization of the KLA. Because of this, the armed conflict, after relatively peaceful October and November, started raging again in December. The USA and NATO concluded that the Milošević – Holbrooke Agreement was insufficient to secure peace and forced a new round of political pressure, with threats of bombardment, to compel the authorities of the FR Yugoslavia to start political negotiations with Kosovo Albanians. This represented the first creative interpretation by the collective West of the provisions of the signed agreements. Simply put, in practice, what was valid was not what was written on paper, but what they interpreted from what was written.

Negotiations were conducted from February 6 to March 19, 1999, and Eric Herring described them as ‘the politics of Rambo(uillet)’ [3, p. 225]. Ratko Marković, one of the members of the Yugoslav delegation, states: ‘It was just a play for the outside world, with third-rate actors. The only true truth about Rambouillet is just the geographical fact – the show was really held in the city of Rambouillet, near Paris, in France. /.../ Although the gathering in Rambouillet was called negotiations, there were no negotiations there during the two delegations’ stay. Negotiations exist when their participants are in the same room, sitting at a table and looking face to face, and when they have a white paper in front of them that they will fill with the text of the agreed content. In Rambouillet there was none of this. /.../ The participants could only meet randomly in the corridors, passing by each other without a word, and the text from which the ‘agreement’ was made was given to the participants only in ‘pieces’, while the two most important pieces, which make up its core content, were handed over four hours before the end of the Rambouillet conference. According to a witness, B. Maiorski, who was a Russian representative within the ‘Troika’, did not sign these parts on the grounds that they were not subject to joint preliminary deliberations. This mess of the so-called agreement was merely an apparition of an agreement. In all likelihood, this was the real intent because the ‘agreement’ served as a good camouflage for the decision taken before and outside of Rambouillet’ [8].

Analyzing everything that was happening in the famous castle not far from Paris, from a time distance and with a series of new data and testimonies, it can be concluded that everything related to the Rambouillet process was problematic. Although the negotiations formally lasted from February 6 to March 19, it turned out that the two sides – Yugoslav and Albanian – had the opportunity to meet in the same room only once.

In addition to the ‘strange’ negotiation process, the document, which contained as many as 87 pages in the final version in the English language with the

accompanying annexes, can also be described as controversial. According to Ian Bancroft, Henry Kissinger said about the text offered in Rambouillet: ‘It was a provocation, an excuse to start bombing. It was a terrible diplomatic document that should never have been presented in such way’ [1].

What was that ‘terrible’? The document was apparently prepared earlier, a few months before the Rambouillet talks. Negotiations were supposed to serve to just agree on details. This Interim Agreement for Peace and Self-Government in Kosovo consisted of an introduction (it talks about the equality of all citizens of Kosovo and Metohija, human rights and freedoms, self-government, confidence-building measures, etc.) and eight chapters. The first chapter concerns the future ‘Constitution of Kosovo’, the political structure of the province, the mixed electoral system (a total of 120 deputies, of whom 80 are elected directly and 40 are elected by national communities), the functions of the ‘president of Kosovo’ (elected by the Assembly for a term of three years), including the authority to represent the province in front of the republic and federal bodies, the formation of the Constitutional Court, the Supreme Court, and other judicial bodies in the vertical. It is easy to see that in this part the proposed text of the agreement had very much in common with the later ‘Ahtisaari Plan’.

The second chapter deals with public security, proposing the establishment of ‘local police’, but also stresses that the security of the the FR Yugoslavia’s ‘international borders’ (with FYR Macedonia and Albania) would be ensured by federal authorities. It also underlines the inevitable role of the OSCE in the processes related to public security and in the organization of the electoral process for provincial institutions and local self-government bodies, which is described in the third chapter.

The fourth chapter of the agreement, dedicated to humanitarian aid, infrastructure renovation, and economic development, also provoked almost no disputes, nor did the sixth chapter, which defines the role and powers of the ombudsman¹. In the middle of the second week of negotiations, the negotiating parties agreed on most of the positions in these five chapters, as well as on the principles of the agreement outlined in the introductory part. The key controversies arose around the seventh and eighth chapters, while there was also a lively debate about the content of the fifth chapter (this chapter was interpreted by interested parties depending on how it was contextualized by each of them). The fifth chapter discusses the implementation of the agreement, which would be carried out by a special Implementation Mission, established in coordination between the EU and the OSCE. ‘All the powers that, according to the Milošević – Holbrooke Agreement of 13 October 1998, were vested in the Verification Mission for Kosovo and Metohija and its head are transferred to the

¹ United Nations. Interim Agreement for Peace and Self-Government in Kosovo.

Implementation Mission and its head. In order to implement the agreement, it was stipulated that a Joint Commission should be set up comprising the head of the Implementation Mission, one representative of the FRY and one of Serbia, one representative of each national community in Kosovo and Metohija, the President of the Assembly and a representative of the President of Kosovo and Metohija. /.../ The Head of the Implementation Mission was perceived the person in charge of the implementation of the entire agreement, including relations with the national communities in the province, the republic and federal authorities, as well as with the international community. The Implementation Mission would operate in accordance with the laws of Kosovo and Metohija, Serbia and the Federal Republic of Yugoslavia, but would also enjoy diplomatic status in accordance with the Vienna Convention on Diplomatic Relations' [13].

The seventh chapter further elaborates the implementation process and suggests several more solutions that were problematic for the Yugoslav side. As Predrag Simić notes with regard to paragraph a. of Item 1 of this chapter, 'On the bases of Chapter VII of the UN Charter, the United Nations Security Council is called upon to adopt a resolution that will accept and apply the solutions contained in this chapter, including the establishment of multinational military forces in Kosovo. The Parties invite NATO to establish and direct international forces in accordance with the provisions of this chapter. They also confirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia' [13].

According to paragraph b, 'The parties agree that NATO will establish and deploy a force (hereinafter 'KFOR') that can be composed of ground, air and maritime units from a NATO and non-NATO nations, operating under the authority and subject to the direction and political control of the North Atlantic Council (NAC) through NATO chain of command. The Parties agree to facilitate the deployment and operations of this force and agree also to comply fully with all the obligations of this Chapter'¹. As an apparent concession to Russia, the last paragraph says: 'It is agreed that other States may assist in implementing this Chapter. The Parties agree that the modalities of those States' participation will be the subject of agreement between such participating States and NATO'². The remainder of this chapter provides exhaustive military details of the cessation of hostilities in Kosovo and Metohija, of the demilitarization and withdrawal of forces, including provisions on the deployment of units of the Yugoslav Army (1,500 + 1,000 support troops) and Serbian police (2,500 policemen) who will remain on the international borders of the FRY.

An integral part of the document are also two annexes to the seventh chapter. Annex B (paragraph 8) provides clarifications on the status of NATO members in Kosovo and Metohija: 'NATO personnel, with vehicles, ships, planes and equipment, will have the right to free and unconditional movement throughout the territory of the FR Yugoslavia, its airspace and territorial waters, it will have the right to set up camps and barracks, the right to use all areas or services necessary for support, training or operations. NATO personnel will enjoy the immunity from any form of arrest, investigation and detention by the authorities of the FR Yugoslavia, and the arrested or detained NATO members must immediately be handed over to the competent NATO bodies'³. Paragraph 9 explicitly says that NATO members on the territory of the FRY will not be submitted to any inspections and customs regulations and will not pay duties, taxes, or any other charges. Further on, paragraph 15 specifies that the FR Yugoslavia will enable free of charge and unrestricted use of the telecommunications network by NATO, including the broadcasting rights⁴. And that is not the end, since paragraph 21 says: 'NATO is authorized to detain individuals and, as quickly as possible, turn them over to appropriate officials'⁵. It is not even indicated whether the detained persons would be handed over to the judicial or investigative organs of the FR Yugoslavia, but only to 'appropriate officials', which is subject to all kinds of interpretations.

Paragraph 22 states that in the conduct of the operations, NATO forces are allowed to make alterations to the infrastructure network (roads, tunnels, bridges, buildings, and the energy network). This paragraph does not mention any request for any consent from the competent federal, republic, or local authorities. In the eighth chapter, which is the shortest one, with only five points divided into two articles and conceived as part of the transitional and final provisions, the following controversial formulation (Item 3 of Article I) was subsequently inserted: 'Three years after the entry into force of the Agreement, an international conference will be convened to determine the mechanism of Kosovo's final decision based on the will of the people, the opinions of the competent authorities, the commitment of both parties to implement this agreement and the Helsinki Final Act'⁶. The Albanians showed that this was unacceptable for them, insisting on the term 'referendum'. However, 'during a three-day break between the first and second parts of the conference, the head of the Albanian delegation and KLA leader Hashim Thaçi was summoned to the United States for consultations after which he announced that the Albanian side was ready to sign the agreement' [13].

¹ United Nations. Interim Agreement for Peace and Self-Government in Kosovo.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

‘Madeleine Albright instructs the Albanian delegation to sign the Agreement and to open the way for the bombing of Yugoslavia. Her advice is publicly joined by her British colleague Robin Cook who advises Albanians – if you sign, we will be able to bomb the Serbs. But, at that time the only controversial provision for the Albanians is whether the exact term referendum will be used. They request that the term referendum be entered into the text of the Agreement. Their Western friends are persuading them that they will get a referendum even if that term is not used. A euphemism can be used, which will later be proclaimed by the Anglo-American interpretation as a referendum. Albanians seek this clarification in writing and in advance. And they got it, with the signature of Madeleine Albright’ [9, p. 160].

It turned out that one signature of Madeleine Albright ultimately meant more than the UN Charter and the Helsinki Final Act. Albanians did not have any reason for dissatisfaction. The FR Yugoslavia was offered ‘terrible conditions’, humiliating solutions that would greatly suspend the constitutional order on the entire territory of the country, and in the end, after three years, a referendum on the ‘final solution’ would be organized in Kosovo and Metohija. The Yugoslav delegation refused to sign the offered agreement. The bombing followed. That is, the NATO aggression against the FR Yugoslavia.

United Nations Security Council Resolution 1244 and the Establishment of the UNMIK

The NATO aggression was terminated on June 12, 1999 by the withdrawal of all armed formations of Yugoslavia from the territory of Kosovo, which happened after UN Resolution 1244 was adopted on June 10. In the introductory part, explaining the principles under which its further text should be interpreted, Resolution 1244 states: ‘Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2’ and ‘Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo’. In paragraph 4, the document confirms that after the withdrawal, the agreed number of Yugoslav and Serbian military and police personnel will be allowed to return to Kosovo in order to carry out their duties in accordance with Annex 2’. In paragraph 11, which explains the main responsibilities of civilian presence, it is stated in section (a): ‘the promotion of the establishment, until the final solution, of essential autonomy and self-government in Kosovo, taking fully into account Annex 2 and Rambouillet agreements (S/1999/648)’; in section (e): ‘Facilitating a political process aimed at defining the future status of Kosovo,

taking into account the Rambouillet Agreements (S/1999/648)’¹.

In Annex 1 it is further clarified: ‘The political process towards establishing an agreement on a provisional political framework that will provide essential self-government in Kosovo, taking fully into account Rambouillet agreements and the principles of the sovereignty and territorial integrity of the FR Yugoslavia and of other countries in the region’. Annex 2 further elaborates: ‘After withdrawal, the agreed number of Yugoslav and Serbian personnel will be allowed to return and perform the following functions: the relationship with the international civil mission and the international security presence; marking/cleaning of minefields; maintaining presence in the places of Serbian cultural heritage; maintaining presence at the main border crossings’².

Bearing in mind that the Agreement of Rambouillet (S/1999/648) is mentioned in two places in paragraph 11 of Resolution 1244 (1999) of the UN Security Council, it is important to recall that this Agreement was never signed by the delegation of the FR Yugoslavia and the Republic of Serbia, nor by the Special Representative of the President of the Russian Federation – Ambassador Boris Maiorski, and thus could not enter into force and produce legal consequences. At the same time, it can be concluded that representatives of two delegations, with the mediation of the ‘Troika’ (Christopher Hill, Boris Maiorski, Wolfgang Petritsch), achieved a great level of consensus on the issues outlined in Chapters 1 to 6, but not in the controversial chapters 7-8 that posed an obstacle to the signing of the peace agreement. Thus, when the Rambouillet Agreement is mentioned in Resolution 1244 (1999), this can only apply to Chapters 1 to 6.

Resolution 1244 also establishes the UNMIK (United Nations Interim Administration Mission in Kosovo) tasked with providing conditions for a peaceful and normal life for all Kosovo residents and promoting regional stability in the Western Balkans. According to Resolution 1244, the UNMIK’s duties are: reform of basic civil administrative functions; promoting the establishment of substantial autonomy and the rule of Kosovo; enabling a political process to determine the future status of Kosovo; coordinating the delivery of humanitarian aid to all international agencies; support for reconstruction of the main infrastructure; maintaining law and order; promotion of human rights; and ensuring the safe and undisturbed return of all refugees and displaced persons to their homes in Kosovo.

However, it turns out that all these processes are less important than the Issue of status. Although the UNMIK was doing its job relatively well, and the Kosovo Albanian self-governing institutions began to be established, the key aspiration of Albanian political representatives in Kosovo, as well as of the USA and the

¹ United Nations Security Council. Resolution 1244 (1999). 10 June 1999.

² Ibid.

EU, is reflected in the continuing insistence on urgent resolving of the Issue of status, that is, legalization of secession from Serbia. That is why, in the second half of 2006, negotiations were organized again between Belgrade and Prishtina, which became a widely accepted euphemism for meetings between representatives of the Republic of Serbia and Kosovo Albanians, now the authorities of self-government in Prishtina. Martti Ahtisaari was appointed as a Special Representative of the UN Secretary-General for Negotiations, so the later plan was named after him.

In his report on the negotiating process dated March 26, 2007, Ahtisaari informed the UN Secretary General that 'reintegration into Serbia is not a viable option'¹. Therefore, he put forward a Comprehensive Proposal for the Kosovo Status Settlement (called the Ahtisaari Plan). Further in the paper it will be clarified why the leadership of the Republic of Serbia refused to sign the Ahtisaari Plan. Kosovo Albanians accepted this plan and it even represents the highest legal act of the so-called 'Republic of Kosovo'. Analyzing the internal structure of the complicated system of overlapping authorities, it is difficult to precisely define what Kosovo is today. Perhaps the best description could be given using Brezhnev's 'limited sovereignty' formulation. Although the Constitution of the so-called Republic of Kosovo, in its Article 1, paragraph 1, defines that 'the Republic of Kosovo is an independent, sovereign, democratic, unified and indivisible state', essentially this does not mean anything, since whenever the decisions of the Constitution or any other legal acts of Kosovo are not in accordance with the Comprehensive Proposal, the latter has priority.

Annex IX – International Civilian Representative, in Article 2, lists the responsibilities of an international civilian representative: 'a) be the final authority in Kosovo regarding interpretation of the civilian aspects of this Settlement; b) ensure effective implementation of this Settlement through the execution of specific tasks accorded to the ICR in other parts of this Settlement; c) take corrective measures to remedy, as necessary, any actions taken by the Kosovo authorities /.../; d) in cases of serious or repeated failures to comply with the letter or spirit of this Settlement /.../ the ICR shall have the authority to sanction or remove from office any public official or take other measures, as necessary, to ensure full respect of this Settlement and its implementation'². Annex XI explains the position of the International Military Presence (IMP), for which NATO is in charge. In paragraph 1.8. it is established that 'the IMP will operate under the authority and be subject to the direction and political control of the North Atlantic Council through

the NATO Chain of Command', and in paragraph 2.1. it is explained that 'the Head of the IMP is the final authority in theatre regarding interpretation of those aspects of the Settlement that refer to the IMP'³.

The IMP in Kosovo has the right 'to carry out its responsibilities as it deems appropriate, including the use of all necessary force', has the right to 'unimpeded freedom of movement throughout Kosovo, by any means', can 're-establish immediate and full military control of the airspace', has the right to 'conduct inspections of premises and facilities in connection with the fulfilment of its tasks', and has the right to 'take action as it deems appropriate in support of its mandate in accordance with this Settlement'⁴. According to all of this and in compliance with paragraph 2.3, Kosovo 'shall grant the IMP the status, privileges and immunities currently provided to KFOR'⁵.

In the essence, the Ahtisaari plan was a road map for the transition of Kosovo from the territory under the UNMIK's administration to an independent state. The plan does not mention Resolution 1244 at all because the Comprehensive Proposal was intended to replace Resolution 1244. This was supposed to legalize the secession of Kosovo Albanians, though still leaving them 'supervised'.

However, the question that arises before all these explanations is related to Ahtisaari's assessment that reintegration into Serbia is not a *viable option*. Who authorized Ahtisaari to make this assessment? On what basis did he formulate such a conclusion? What methodology did he use to make such an assessment? Ahtisaari's arbitrary interpretation of the then-current circumstances became the basis for writing a new political framework that was supposed to replace the UN Security Council Resolution.

Declaration of Independence, Advisory Opinion from the International Court of Justice, and the Status of Kosovo in International Relations

Kosovo Albanians declared independence on February 17, 2008. They did so without organizing a referendum, even without a formal vote in the Kosovo Assembly. Simply, all Albanian members of the Kosovo Assembly signed below the text of the Declaration of Independence, which was proclaimed a sufficient legal basis. They did this because Resolution 1244 was still valid, and the UNMIK had executive powers, and it was obliged to prevent the referendum and annul the vote in the Assembly. The declaration of independence was immediately followed by recognition of the 'Republic of Kosovo' by numerous members of the UN, which 'created a new reality'.

¹ United Nations Security Council. Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council.

² Comprehensive Proposal for the Kosovo Status Settlement. 2007. 2 February. 58 p. Available at: <http://old.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>

³ Ibid.

⁴ Ibid.

⁵ Ibid.

The establishment of the 'new reality' was again based on creative interpretation. Two weeks before the formal declaration of independence by Albanians, the EU, focusing its efforts on the implementation of the Ahtisaari Plan, decided that instead of the UNMIK, a new international EU mission – EULEX – would take over most of the responsibilities in Kosovo in the areas of internal affairs and justice.

In its document titled Council joint action 2008/124/CFSP dated February 4, 2008, which concerned the establishment of the EULEX and its deployment in Kosovo, the EU Council referred in Item (1) to Article 19 of Resolution 1244, which 'decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise', and in Item (3) – to Article 17 of Resolution 1244, where the UN Security Council 'welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region', which should have been a sufficient legal basis for the EU to unilaterally deploy its mission in Kosovo, without Serbia's consent and without seeking any interpretation of the Resolution by the UN Security Council¹. In paragraph 5 of his Report to the Security Council on the situation in Kosovo, under the official number S/2008/211, dated March 28, 2008, the UN Secretary-General stated that he had received a letter from Javier Solana, the EU High Representative for Foreign Affairs and Security Policy, informing him 'that the EU has decided to establish a rule of law mission within the framework established by UN Security Council Resolution 1244', thereby tacitly accepting the new factual situation in Kosovo, according to which the responsibility for the work of the international civilian mission is assumed by the EU instead of the UN². However, in paragraph (1), the EU Council also referred to Article 10 of Resolution 1244, quoting that the UN Security Council 'authorizes the Secretary-General to establish, with the assistance of appropriate international organizations, an international civilian presence in Kosovo...' – thus ending the quote. Meanwhile, Article 10 of the Resolution continues with the words '...in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic selfgoverning institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.

The EU's activity (the formation of the EULEX mission) could only have been carried out to ensure substantial autonomy for the inhabitants of Kosovo (i.e., Kosovo Albanians) within the Federal Republic of Yugoslavia (i.e., Serbia) and the UN Secretary-General could have given his consent to this. In this case, the creative interpretation is based on a gross falsification, or rather, 'cutting out' of part of the Resolution.

However, 'the process of recognizing the so-called Republic of Kosovo and the establishment of bilateral diplomatic relations between the official Prishtina and the UN member states that have decided to take such a step, has drawn an interesting picture of influence on the geographical map of the world. It turned out that the diplomatic-political influence of Western countries led by the United States is reduced to a very limited number of UN member states and geographically concentrated in several regions of the world' [11, p. 309].

From the day of unilateral declaration of independence on February 17, 2008 until December 31, 2008, the so-called 'Republic of Kosovo' was recognized by a total of 54 members of the UN. 'Among these 54 UN members, there are 12 micro countries, small island states or states that have modest or no diplomatic capacities, which mainly make them objects of international relations: Monaco, Liechtenstein, Marshall Islands, Nauru, Burkina Faso, San Marino, Sierra Leone, Belize, Samoa, Liberia, Micronesia and Costa Rica (Costa Rica is classified in this category, although this is a debatable point; Luxembourg and Malta would certainly belong to this category, but due to Malta's membership in the EU, and Luxembourg's membership in the EU and NATO, their diplomatic capacity and political position are significantly different). Another country representing a specific example is Afghanistan, which was *de facto* under the complete military occupation of NATO. Of the remaining 40 countries, only 11 were not members of NATO or the EU at the time they made the decision to recognize Kosovo, although 4 of these 11 – Albania, FYR Macedonia, Montenegro, and Croatia – had a series of legal and formal arrangements with the EU and NATO and expressed a clear political aspiration for joining both. Thus, excluding countries that, in essence, represent predominantly or exclusively objects of international relations and states that are members of the EU and NATO or strive to become full members of these two international organizations, the Western bloc has succeeded in gaining support from only 8 countries in the world with significant political, economic, geopolitical or military capacity, namely: Australia, Peru, Korea, Colombia, UAE, Malaysia, Senegal, and Japan' [11, Pp. 309–310].

¹ European Union. Council Joint Action 2008/124/CFSP. *Official Journal of the European Union*, L42, 16 February 2008.

² United Nations Security Council. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211. 28 March 2008.

In order to better describe how modest this result is and to demonstrate that it represents a complete failure of the Western countries, it should be noted that the process of lobbying started in the summer of 2007, so that was the result of a one and a half year of joint work of: USA, Great Britain, France, Germany, and Turkey. 'The new wave of recognition of the so-called Republic of Kosovo comes only after Saudi Arabia recognized it and subsequently started to be actively involved in the process of lobbying among Muslim countries. This example has shown that Western countries are no longer diplomatically dominant, and that if they want support for their decisions from the majority of countries, they have to pact with other regional players in the world. The entry of Saudi Arabia into this diplomatic game was such a significant contribution that by 2011, the number of countries that recognized the unilaterally declared independence of Kosovo Albanians climbed to 76, although among the states that did so, there are two bizarre cases' – Somaliland and Puntland, which have declared their independence from Somalia in one-sided manner, like Kosovo Albanians [11, p. 311].

Up to 2012, the process of establishing diplomatic relations with Prishtina was continued by other states, but two things were visible. Firstly, the pressure of the United States and other interested actors to do so was decreasing. Worried about other, more important issues, official Washington started to pay less attention to the 'Kosovo case'. Secondly, Kosovo Albanians often 'celebrated' recognitions and duly recorded them in their 'list' although they were officially not coming. At one point, in 2015, on the internet page that shows record of countries that have recognized independence of Kosovo (*Kosovo Thanks You*), there was a list of 116 countries. The problem is that 'most often the number of states that have recognized Kosovo is stated in accordance with the announcements coming from Prishtina. But it is not a reliable source at all because, according to *Koha Ditore*, the government in Prishtina does not know how many states have recognized them. For example, in 2013, President of São Tomé and Príncipe 'annulled the recognition of Kosovo', but later it turned out that there was actually no recognition at all. The decision to recognize Kosovo was made by the previous government in 2011, but it was never confirmed in the assembly. Therefore, it was not valid. Or, President of Guinea Bissau sent a letter of 'acknowledging' to the then-president of Kosovo, but it is unclear on what basis this decision was made or whether any competent

authority confirmed it. We heard the fact that Haiti had recognized independence of Kosovo at a joint press conference of foreign affairs ministers in 2012, but an official decision on this cannot be found. By December 2018, even the authorities in Prishtina began to produce more moderate assessments and 'data', claiming that they were 'surely acknowledged' by 102 countries. And this should be taken with great hesitations too, bearing in mind, for example, that the deputy foreign minister of Egypt, during his visit to Belgrade, stated that in Cairo they 'could not find a decision to establish bilateral relations with Prishtina, and that is why it is questionable how can they annul it' [12, Pp. 151-152].

Hence 'Republic of Kosovo' was recognized by 90-100 UN members, thus changing political circumstances. Serbia turned to the UN General Assembly with a resolution asking advisory opinion from the International Court of Justice concerning the question: 'Is the unilateral declaration of independence of Kosovo's provisional institutions of self-government consistent with international law?'¹.

On 22 July 2010, the Court decided: 'As general international law does not contain an applicable ban on the declaration of independence, the Declaration of Independence of 17 February 2008 does not violate general international law' and 'this Declaration of Independence does not violate Security Council Resolution 1244 (1999) nor does it violate the Constitutional Framework prescribed by the Special Representative of the UN Secretary-General'² [2]. For Kosovo Albanians, this advisory opinion has become the most important argument that their decision is not contrary to international law, and that is why the case of Kosovo is *sui generis*. However, Hans Köchler gave a thorough analysis of the decision and reasoning provided by the International Court of Justice: 'Security Council resolution 1244, adopted in 1999 on the basis of Chapter VII of the UN Charter, was used by interested parties to 'legalize', *post festum*, the results of an intrinsically illegal act, namely an aggressive war against a sovereign member state of the United Nations. Similar to the Chapter VII resolution adopted after the illegal use of force against Iraq in 2003, the Council arrogated to itself the right to effectively create a new constitutional order – putting itself above the law and overstretching its coercive powers under the collective security provisions of Chapter VII. The setting up of the United Nations Interim Administration in Kosovo (UNMIK), provided for in this resolution, meant a kind of trusteeship régime by the UN that was intended to facilitate a

¹ United Nations General Assembly. 77-6-74 A/63/L.2 - Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law A/RES/63/2 Plen. 52 (b) A/63/PV.19 General AssemblyGA/10764. 08 October 2008; United Nations. Backing request by Serbia, General Assembly decides to seek International Court of Justice ruling on legality of Kosovo's independence. 10 August 2008. Available at: <https://press.un.org/en/2008/ga10764.doc.htm>.

² International Court of Justice. Accordance with international law of the unilateral declaration of independence in respect of Kosovo. Advisory opinion of 22 July 2010

domestic 'political process designed to determine Kosovo's future status' (Art. 11[e]). It is to be recalled that both, the so-called 'Rambouillet Accords' (never signed by the FRY) and resolution 1244 (1999), repeatedly affirmed a commitment to the 'sovereignty and territorial integrity of the Federal Republic of Yugoslavia', and that the 'interim administration', established by the Security Council, was meant to assist the people of Kosovo so that it 'can enjoy substantial autonomy [sic!] within the Federal Republic of Yugoslavia' [6, p. 130]. 'The Advisory Opinion of the International Court of Justice (ICJ) of 22 July 2010 does nothing to clarify the situation in legal terms. In essential points, it is evasive, and in some basic issues it borders on mere sophistry: Stating that the question whether the declaration of independence of Kosovo violates international law does not require it to take a position on whether international law 'generally confers an entitlement on entities situated within a State unilaterally to break away from it', the Court avoids to address the basic legal issue. It further declares that the 'authors' of the declaration were not the members of the 'Assembly of Kosovo' as part of the UN-established 'Constitutional Framework', but those very members acting in some other, undefined capacity, not bound by the constitutional provisions promulgated on the basis of the mandate of UNMIK. For that reason, so the ICJ argues, they could not, with their Declaration, violate the Constitutional Framework established by resolution 1244 – which included the principle of sovereignty and territorial integrity of the FRY/Serbia. This argument makes the Advisory Opinion *irrelevant* (in terms of the material question of international law) and amounts to plain sophistry – as, in actual fact, those 'authors' were the members of that very 'Assembly' (Parliament), acting in the framework established by and under the control of the United Nations. This is also evident in the fact that the Declaration was signed by the Speaker of the 'Assembly', Jakup Krasniqi, as well as by Prime Minister Hashim Thaci' [6, Pp. 131–132].

In addition, it should be recalled that the advisory opinion is of non-binding character, just as it should be remembered that, even after this opinion was published, Resolution 1244 remained valid, that the UNMIK still exists, and that about a half of the members of the UN did not establish bilateral relations with Prishtina, nor do they recognize 'Republic of Kosovo'. Thus, despite the conscious disregard of the UN Security Council Resolution, which can be assessed as its creative interpretation, despite the 'equilibristic act' of the International Court of Justice, which is another way to creatively interpret the legal heritage, despite strong political pressure from the US and the activities of the EU – the status of Kosovo remains unresolved, that is the unilaterally declared independence is not recognized by the overwhelming majority of non-Western actors in international relations.

Conclusion: Different History, the Same Story

The history of Kosovo is unique. Numerous events have affected the escalation of the Kosovo crisis, its internationalization, and finally the proclamation by Kosovo Albanians of the Declaration of Independence. It is in the interest of the United States and the Western countries to constantly repeat that Kosovo is 'a unique case'. It is also in their interest to repeat this in order to preserve the influence in the Balkan region.

But in practice, what seems to represent a unique case is the result of creative interpretation of international law precisely by the U.S. and the EU. Instead of abiding by the resolutions of the UN Security Council, based on the UN Charter, they constantly interpreted certain parts of various documents as they saw fit, exerted political pressure in order to implement some new solutions, or even grossly falsified certain provisions of the relevant documents. Such practice neither brought a solution for Kosovo, for the Balkans, nor did it prove successful for international relations in general.

The decision to recognize the right of Kosovo Albanians to self-determination led to the opening of the question, first in the regional context, and then in a much broader scope, extending to the international scale, whether such a right must also be recognized if some other people declare themselves in such a way. For if it is widely accepted that Kosovo Albanians have the right to self-determination, why is not the same right recognized, for example, for Serbs in Bosnia or Albanians in FYR Macedonia? If changing internationally recognized borders, in the way it has been done in the case of Serbia, is legitimate, why is this not the case with other countries in the region? This Issue is highly topical across the European continent: in Crimea, in Kurdistan, Catalonia; and the first situation after the 'Kosovo solution' where this Issue came to the foreground occurred only a few months from the Kosovo events – in South Ossetia and Abkhazia.

The inconsistent position of Western countries, led by the United States, in relation to the application of international law norms, as well as their inconsistency reflected in the periodic relying on the UN in the 'attempts' to resolve the Kosovo problem, confirm their intention of weakening and taking control over this international organization. And unfortunately, it opens the door for any case of separatism in the future to be considered a unique case if that suits the interests of the great powers. This is a challenge for international order and global security. However, as Hans Köchler underlines, in the era of the United Nations Organization, a set of illegal acts must never constitute a legal precedent. The right of self-determination – as a collective human right under Article 1 of the International Covenant on Civil and Political Rights, and as the Purpose of the United Nations – must be exercised in conformity with other basic norms of international law. In this context, the attempt undertaken by Kosovo Albanians is not a unique case, and creative interpretations of international law are not helpful since they do not solve existing problems, but make them more complicated.

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