

## The ICJ's Advisory Opinion on Kosovo as a Tool of Costly Counter-Secession

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### Keywords:

International  
Court of Justice,  
Kosovo,  
secession,  
recognition,  
derecognition

**Abstract:** Secessions are costly. That does not mean that counter-secessions more generally, and international judicial opinions as tools of counter-secession specifically, are costless. The trajectory of the International Court of Justice's 2010 Advisory Opinion (Opinion) on Kosovo's declaration of independence is a case in point. Initially deemed as not unfavorable to Kosovo's independence from Serbia, over time, the Opinion proved a useful counter-secession tool for the opponents of Kosovo's independence. The current structure of the international legal system and the dynamics of power politics facilitated leveraging the Opinion as a mechanism of counter-secession efforts. It is shown that not even the sponsorship of a secessionist state such as Kosovo by an individual dominant power like the United States can override the structural impediment to recognizing new states: the absence of coherent norms on state recognition in international law. Moreover, the support of powers such as Russia and China has meant that Serbia, as a counter-secessionist state, could use the Opinion to sustain the lack of international consensus on Kosovo's independence, engage in a campaign for Kosovo's derecognition, and extract concessions from Kosovo's main independence sponsors. Serbia's use of the Opinion as a tool for counter-secession has proven costly, however, as its sovereignty has become beholden to the whims of great power politics in a similar way to which Kosovo is indebted to the main sponsors of its independence.

## 1. Introduction

Secessions are controversial. Unless secessionist states can secure the wider consensus of the international community and alignment of interests, they have trouble overcoming the final hurdle to becoming members of the club of states: recognition of peer states, particularly great powers.<sup>1</sup> In this respect, counter-secessionists have an advantage over secessionists: they can block international recognition of secessionists by playing on peer states' self-interests in protecting their own territorial integrity from future secessions.<sup>2</sup> However, counter-secessions have received far less academic attention than secessionist movements and their strategies.<sup>3</sup> In the sparse literature dealing with counter-secessions, classical tools of counter-secession, such as maintaining a claim to the territory, undermining the legitimacy of secessionists, or preventing bilateral recognition and acceptance in international organizations, have received more attention than decisions of international judicial bodies, which are rarely used as tools of counter-secession.<sup>4</sup>

The lack of attention to decisions of international courts as tools of counter-secession makes the International Court of Justice (ICJ) 2010 Advisory Opinion (Opinion) on Kosovo's 2008 Declaration of Independence (KDI) worth revisiting, for two reasons. Firstly, although the Opinion – a rare case in which all five permanent members of the UN Security Council (UNSC) presented their opinions on the question of secession<sup>5</sup> – has

<sup>1</sup> Ryan D. Griffiths and Louis M. Wasser, "Does Violent Secessionism Work?," *Journal of Conflict Resolution* 63, no. 5 (2019): 1310–36, <https://doi.org/10.1177/0022002718783032>; Bridget Coggins, "Friends in High Places: International Politics and the Emergence of States from Secessionism," *International Organization* 65, no. 3 (2011): 433–67, <https://doi.org/10.1017/S0020818311000105>.

<sup>2</sup> Peter Krause, "The Strategies of Counter-Secession: How States Prevent Independence," in *The Routledge Handbook of Self-Determination and Secession*, eds. Ryan D. Griffiths, Aleksandar Pavković, and Peter Radan (Routledge, 2023), 425–6.

<sup>3</sup> *Ibid.*, 425.

<sup>4</sup> James Ker-Lindsay, "The Counter-Diplomacy of State Recognition," in *Routledge Handbook of State Recognition*, eds. Visoka, Gëzim, John Doyle, and Edward Newman (Routledge, 2020), 295–305.

<sup>5</sup> International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010 (International Court of Justice July 22, 2010; hereinafter: the Opinion).

been analyzed and criticized in detail,<sup>6</sup> its later trajectory and use by opponents of Kosovo's independence and recognition is rarely discussed. Secondly, while the costs and the rationales for and against Kosovo's secession have been well-discussed,<sup>7</sup> the costs of counter-secession have to date attracted little attention.<sup>8</sup>

This paper shows that the Opinion, initially deemed (at the very least) not unfavorable to Kosovo's independence from Serbia, ultimately proved to be a more helpful tool for its opponents' counter-secession strategy. The current structure of the international legal system and the dynamics of power politics facilitated a leveraging of the Opinion as a mechanism of counter-secession efforts. It is shown that not even the sponsorship of a secessionist state such as Kosovo by an individual dominant power like the United States can override the structural impediment to recognizing new states: the absence of coherent norms on state recognition in international law. Moreover, the support of powers such as Russia and China has meant that Serbia, as a counter-secessionist state, could use the Opinion to sustain the lack of international consensus on Kosovo's independence, engage in a campaign for Kosovo's derecognition, and extract concessions from Kosovo's main independence sponsors. However, while using the Opinion as a tool for counter-secession was partially successful, it has also proven costly. In using the Opinion as a counter-secessionist tool to sustain its formal sovereignty over Kosovo, Serbia has made its remaining sovereignty ambiguous and beholden to whims of power politics in a way similar to that by which Kosovo is beholden to its main independence sponsors.

Part Two of the paper briefly discusses the NATO intervention that preceded the KDI, the process that led to the Opinion, and state reactions to the KDI and the Opinion. It shows that the ICJ, in its Opinion, reframed

<sup>6</sup> See: Marko Milanovic and Michael Wood, eds., *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: Oxford University Press, 2015).

<sup>7</sup> Ryan D. Griffiths, *Secession and the Sovereignty Game: Strategy and Tactics for Aspiring Nations* (Cornell University Press, 2021); Shpend Kursani, "Costs of International Recognition: Palestine's and Kosovo's Struggle with Negotiated Statehood," *Geopolitics* 29, no. 1 (2024): 174–202, <https://doi.org/10.1080/14650045.2022.2151903>.

<sup>8</sup> Scott Pegg, "How Parent States Prevent Recognition," in *The Routledge Handbook of Self-Determination and Secession*, eds. Ryan D. Griffiths, Aleksandar Pavković, and Peter Radan (Routledge, 2023), 429–42.

Serbia's question to respond to it by reiterating the uncontroversial opinion that international law is largely neutral or silent on declarations of independence, and did so in a way that initially seemed at least not unfavorable – if not partially favorable – to Kosovo's independence.<sup>9</sup> Part Three of the paper shows that the initial reactions to and impressions of the Opinion were misleading: Serbia and its leading backer, Russia, successfully used the Opinion as one of the arguments to prevent Kosovo's inclusion in international organizations, extract concessions from the main sponsors of Kosovo's independence, and campaign for the derecognition of Kosovo. In Part Four, it is argued that using the Opinion as a tool of counter-secession was possible because, firstly, the Opinion left the question of Kosovo's status in the murky waters of state recognition and, secondly, because Serbia was able to rely on the support of Russia and China as dominant powers, but ultimately paid the price for this support by becoming an object of power politics.

## 2. Kosovo's Independence and the ICJ Advisory Opinion

### 2.1. The NATO Intervention and the 2008 Kosovo Declaration of Independence

The 2008 Kosovo Declaration of Independence (KDI) is best described as a final chapter in Serbia's abuse of extreme counter-secession measures that ranged from suppression of the population in a secessionist province, through denial of territorial autonomy, to ethnic expulsion of Kosovo's Albanian majority.<sup>10</sup> During the 1980s, Serbia subjected Kosovo's majority Albanians to widescale repression and, in 1989, abolished Kosovo's constitutional autonomy within Serbia. In 1999, Serbia, then part of the Federal Republic of Yugoslavia (alongside Montenegro), launched a large-scale military action in Kosovo, committing widespread atrocities and expelling some 800,000 Kosovo Albanians. These atrocities prompted NATO's legally disputed military intervention in Kosovo and the bombing of Serbia in early 1999, an act that NATO described as a humanitarian action.<sup>11</sup>

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<sup>9</sup> The Opinion. For a comprehensive review of various aspects of the Opinion, see: Milanović and Wood, *The Law and Politics of the Kosovo Advisory Opinion*.

<sup>10</sup> For a general overview of counter-secession strategies, see: Krause, "The Strategies of Counter-Secession."

<sup>11</sup> Anthea Roberts, "Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?," in *Human Rights, Intervention, and the Use of Force*, eds. Philip Alston and Euan Macdonald

Following the NATO intervention, in June 1999, the UNSC adopted Resolution 1244 (UNSC 1244), guaranteeing the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, and placing Kosovo under interim UN administration until the settlement of Kosovo's final status. The hope was that NATO's intervention and departure of Serbia's strongman Slobodan Milošević in 2000 would re-orient the country away from extreme nationalistic policies and toward the recognition of Kosovo's independence. As Serbia's post-Milošević governments refused to recognize Kosovo's independence, and both Serbia and Kosovo rejected the compromise Ahtisaari plan in 2007,<sup>12</sup> NATO powers – primarily the US, the UK, and major EU states – decided to support the KDI in February 2008. The rationale for supporting the KDI was that the failure of the parties to reach an agreement and Serbia's past atrocities against Kosovo Albanians made Kosovo a unique case for remedial secession from Serbia as a host state, even if the host state does not consent secession.<sup>13</sup> Immediately prior to the KDI, Russia, China and several EU member states (Spain, Slovakia, Romania, Greece and Cyprus), among others, strongly opposed Kosovo's independence unless Serbia consented to it. Opposition notwithstanding, in the period following the KDI, some 70 states led by the US, the UK, France, Germany, and many other EU states, recognized Kosovo's independence.<sup>14</sup>

## 2.2. The ICJ's Advisory Opinion on Kosovo

Serbia's government decided to approach the ICJ to soften the internal and external impact of post-KDI recognitions of Kosovo, and to signal its

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(Oxford University Press, 2008), 179–214; Bart M.J. Szewczyk, "Lawfulness of Kosovo's Declaration of Independence," *American Society of International Law Insights*, August 2010, note 2, accessed August 10, 2023, <https://www.asil.org/insights/volume/14/issue/27/lawfulness-kosovos-declaration-independence>.

<sup>12</sup> United Nations, "Kosovo Status Talks Failed to Produce Agreement, Says Report to Security Council," December 13, 2007, accessed March 11, 2025, <https://news.un.org/en/story/2007/12/243502>.

<sup>13</sup> Mirza Ljubovic and Asim Jusic, "Kosovo's Membership of International Organisations," *Business Law International* 25, no. 2 (2024): 173.

<sup>14</sup> *Ibid.*, 175.

disapproval of Kosovo's secession.<sup>15</sup> Despite the risks, requesting the ICJ's advisory opinion seemed like a good option for both internal and external signaling and mobilization: an opinion of the ICJ favorable to Serbia would be proof of the legality of Serbia's claim to Kosovo both domestically and internationally, whereas an unfavorable opinion would perpetuate narratives of collective victimization already embedded in Serbian society.<sup>16</sup> To avoid opposition from the US, the UK and France in the UN Security Council, Serbia sponsored a UN General Assembly resolution requesting the ICJ's advisory opinion on the KDI. The UN General Assembly adopted Resolution 63/3, with 77 states, including Russia, China and five EU members (Spain, Slovakia, Romania, Greece and Cyprus) voting in favor of the resolution, while most states abstained. Serbia's government interpreted the adoption of Resolution 63/3 as a sign that a majority of states supported its stance on the KDI, and that the ICJ's opinion would further confirm this.<sup>17</sup>

Serbia framed the question for the ICJ as: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"<sup>18</sup> In written comments before the ICJ, Serbia explicitly stated that its question solely pertained to the issue of unilateral declaration of independence and not questions such as recognition, but stressed that the ICJ should analyze the entire issue comprehensively and opine as to whether the KDI created a new state.<sup>19</sup> The crux of Serbia's argument was straightforward: the KDI violates the territorial integrity and sovereignty of Serbia, as well as the legal regime

<sup>15</sup> James Ker-Lindsay, "Explaining Serbia's Decision to Go to the ICJ," in *The Law and Politics of the Kosovo Advisory Opinion*, eds. Marko Milanović and Michael Wood (Oxford University Press, 2015), 12.

<sup>16</sup> Asim Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities: Another Republika Srpska?," Atlantic Initiative, 2024, 7, accessed August 28, 2024, <https://atlantiskainicijativa.org/wp-content/uploads/2024/04/Policy-Paper-Kosovo.pdf>.

<sup>17</sup> Ker-Lindsay, "Explaining Serbia's Decision to Go to the ICJ," 17.

<sup>18</sup> United Nations General Assembly, "Request for the Advisory Opinion," October 10, 2008, accessed January 9, 2025, <https://www.icj-cij.org/case/141/request-advisory-opinion>.

<sup>19</sup> See: Government of the Republic of Serbia, "Written Comments of Government of the Republic of Serbia," International Court of Justice, July 17, 2009, para. 45, accessed January 9, 2025, <https://www.icj-cij.org/node/104818>; and Dragan Gajin and Asim Jusic, "International Court of Justice on the Legality of Kosovo's Declaration of Independence: Analysis and Legal and Political Implications," *Democracy and Security in Southeastern Europe* 2, no. 6/7 (2011): 117.

created by UNSC 1244, whose provisions validated the territorial integrity of the FRY. Irrespective of the KDI, so Serbia argued, UNSC 1244 remains in force pending future action of the UNSC.<sup>20</sup>

The ICJ used its discretion to reformulate Serbia's question and disregarded the part that refers to the Provisional Institutions of Self-Government of Kosovo (PISG) as the author of the KDI. The rationale behind this was that the identity of the authors of the KDI is an unsettled issue relevant to the question of the legality of the KDI.<sup>21</sup> The ICJ agreed with Serbia that UNSC 1244 established an administrative regime for Kosovo that possesses an international legal character<sup>22</sup> and remains in force until such date as the final status of Kosovo is settled, a matter on which UNSC 1244, according to the ICJ, is silent.<sup>23</sup> The ICJ determined, however, that the creators of the KDI acted outside of the framework of UNSC 1244, and therefore UNSC 1244 remains valid but does not invalidate the KDI and vice versa. The two deal with different issues: UNSC 1244 is of an international legal character and establishes an interim administrative regime, while the authors of the KDI acted outside of UNSC 1244 and dealt with the final status of Kosovo.<sup>24</sup>

Because the portion of the question referring to the PISG of Kosovo was removed, the ICJ determined that the real issue behind Serbia's question required it to opine whether or not the declaration of independence was adopted in violation of international law,<sup>25</sup> determining that it was not. Critics consider that the ICJ's reformulation altered the nature of Serbia's question and turned it into a rhetorical question-and-answer of little relevance for the development of international law.<sup>26</sup> The Opinion focused

<sup>20</sup> Government of the Republic of Serbia, "Written Statement of the Government of the Republic of Serbia," April 17, 2009, paras. 655–694, 907–908, accessed January 9, 2025, <https://www.icj-cij.org/sites/default/files/case-related/141/15642.pdf>.

<sup>21</sup> The Opinion, paras. 50–2.

<sup>22</sup> Ibid., para. 88.

<sup>23</sup> Ibid., paras. 99–100, 114.

<sup>24</sup> Ibid., paras. 109, 114.

<sup>25</sup> Ibid., para. 56.

<sup>26</sup> See: Peter Hilpold, "The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question," *Austrian Review of International and European Law Online* 14, no. 1 (2013): 289, <https://dx.doi.org/10.2139/ssrn.1734443>. For an argument that this reformulation was necessary for the ICJ to correctly examine the actual legal issue at hand,

on the legality of the KDI, and not the questions, rights, and entitlements that did or did not precede and follow on from it, i.e. self-determination, remedial secession, or the question of whether a new state was created.<sup>27</sup> Ultimately, the Opinion was uneventful: to state that declarations of independence as such are not contrary to international law because they do not fall under its purview is inconsequential, as it is largely uncontroversial among scholars and practitioners.<sup>28</sup>

The immediate impact of the Opinion on a wider audience, and reactions of the governments of Kosovo and Serbia, scholars, and states, depended on their interests and prior perspectives. For a wider lay audience that was unlikely to scrutinize the Opinion's details, a statement that the KDI does not violate international law seemed most likely favorable to Kosovo, as it appears indistinguishable from stating that the KDI is in accordance with international law. Kosovo politicians hailed the Opinion as confirming Kosovo's status as an independent state that would soon be widely recognized by most states (including Serbia) and become a member of various international organizations, first and foremost the UN.<sup>29</sup> States that had already recognized Kosovo in the wake of the KDI welcomed the Opinion as a post festum confirmation that the recognition of Kosovo was legal and irreversible.<sup>30</sup> Scholars were skeptical that the Opinion would impact Kosovo's status or quest for broader recognition in any way.<sup>31</sup> And

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see: Alexander Orakhelashvili, "The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the 'Foam on the Tide of Time,'" in *Max Planck Yearbook on United Nations Law*, 15th ed., eds. Armin von Bogdandy and Rüdiger Wolfrum (Brill, 2011), 72–4.

<sup>27</sup> The Opinion, para. 123.

<sup>28</sup> Michael Bothe, "Kosovo – So What? The Holding of the International Court of Justice Is Not the Last Word on Kosovo's Independence," *German Law Journal* 11, no. 7–8 (2010): 837–39, <https://doi.org/10.1017/S207183220001885X>.

<sup>29</sup> "K. Albanians hail ICJ decision as big victory," B92.net, July 22, 2010, accessed January 9, 2025, [https://www.b92.net/o/eng/news/politicsarticle?yyyy=2010&mm=07&dd=22&nav\\_id=68621](https://www.b92.net/o/eng/news/politicsarticle?yyyy=2010&mm=07&dd=22&nav_id=68621).

<sup>30</sup> Tatjana Papić, "The Political Aftermath of the ICJ's Kosovo Opinion," in *The Law and Politics of the Kosovo Advisory Opinion*, eds. Marko Milanovic and Michael Wood (Oxford University Press, 2015), 243–6.

<sup>31</sup> John Cerone, "The World Court's Non-Opinion," *Opinio Juris* (blog), July 26, 2010, accessed January 9, 2025, <https://opiniojuris.org/2010/07/25/the-world-court%E2%80%99s-non-opinion/>.



Serbia expressed dissatisfaction with the Opinion but pledged not to recognize Kosovo.<sup>32</sup> States that did not recognize Kosovo in the wake of the KDI did not change their attitude as a result of the Opinion: two permanent members of the UNSC, Russia and China, five EU member states (Slovakia, Romania, Spain, Greece and Cyprus), and many others continued to oppose Kosovo's independence, just as they did in the time immediately prior to the KDI.<sup>33</sup>

### 3. Use of the Opinion by Opponents of Kosovo's Independence

It was not to be expected that the primary opponents of Kosovo's independence would change their stance on the basis of the formally non-binding ICJ Opinion. However, even scholars who were skeptical of the impact of the Opinion on Kosovo's quest for broader recognition did not anticipate the extent to which the opponents of Kosovo's independence would use it as legal grounds for active opposition to Kosovo's further recognition.

In the wake of the Opinion, Russia stressed that the Opinion confirms that UNSC 1244's validation of Serbia's territorial integrity and sovereignty over Kosovo remains the universally recognized basis for continued negotiations. China's claim was similar: settlement between Kosovo and Serbia must be reached within the UN. Romania, one of five EU member states that do not recognize Kosovo, asserted that negotiations should determine the final status of Kosovo because, in its Opinion, the ICJ deliberated only on the legality of the KDI and not the question of Kosovo's recognition as a new state.<sup>34</sup>

Serbia leveraged the divisiveness of Kosovo's independence and the Opinion's express recognition of the continued validity of UNSC 1244 in several ways. Firstly, power rivalries among UNSC members meant that Serbia could lobby against Kosovo's membership in international organizations. Secondly, Serbia insisted that Kosovo, when participating in regional and EU-sponsored regional talks, should be represented as "Kosovo with

<sup>32</sup> Tatjana Papic, "De-Recognition of States: The Case of Kosovo," *Cornell International Law Journal* 2, (2020): 690.

<sup>33</sup> Papic, "The Political Aftermath of the ICJ's Kosovo Opinion," 243–6.

<sup>34</sup> Bojana Barlovac and Sabina Arslanagic, "World Reacts to ICJ Advisory Ruling on Kosovo," *Balkan Insight* (blog), July 23, 2010, accessed January 9, 2025, <https://balkaninsight.com/2010/07/23/world-reacts-to-icj-advisory-ruling-on-kosovo/>.

a footnote” Finally, in alliance with Russia, Serbia campaigned for Kosovo’s derecognition among states that had already recognized it.

Leveraging opposition among and between UNSC members – the US on one side, and Russia and China on the other – as well as the opposition of smaller states to the KDI, Serbia successfully prevented Kosovo from entering the UN and its bodies, as well as Interpol.<sup>35</sup> Due to the influence of Kosovo’s main sponsors, the US and major EU states, Serbia was less successful in preventing Kosovo from becoming a member of “Western” international organizations like the World Bank and the IMF in 2009 and opening membership talks with the Council of Europe in 2023. Nevertheless, Kosovo’s continued limited acceptance in “global” international organizations, such as the UN, prevented Kosovo from utilizing UN membership as a symbol of full statehood and heightened international legitimacy.<sup>36</sup>

In 2012, the EU brokered a “footnote agreement” between Kosovo and Serbia, for which Serbia was immediately rewarded with EU candidate status. According to the “footnote agreement,” when participating in regional and EU-sponsored talks where Serbia is present, and also when negotiating with Serbia, Kosovo should represent itself as “Kosovo\*.” The asterisk refers to the footnote that reads, “This designation is without prejudice to positions on status and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.” Kosovo grudgingly accepted the footnote as a means of escaping diplomatic isolation and a step toward self-representation in EU-sponsored negotiations. For Serbia, however, the footnote symbolizes Kosovo’s unsettled legal status and confirms that Serbia’s claim to Kosovo’s territory is grounded in the UNSC decisions and Opinion.<sup>37</sup> In 2012, negotiators hinted that the “footnote agreement” was a temporary and transitional solution. The transitional solution turned out to be a durable solution, however. To date, in regional and EU negotiations,

<sup>35</sup> Ljubovic and Jusic, “Kosovo’s Membership of International Organisations,” 177–81.

<sup>36</sup> Ardian Emimi and Alfred Marleku, “The Prospects of Membership in International Organizations: The Case of Kosovo,” *Acta Universitatis Danubius. Relationes Internationales* 9, no. 2 (2016), accessed October 20, 2024, <https://journals.univ-danubius.ro/index.php/internationalis/article/view/3382>.

<sup>37</sup> James Ker-Lindsay, “The Significance of Kosovo\*,” *E-International Relations* (blog), March 3, 2012, accessed January 9, 2025, <https://www.e-ir.info/2012/03/03/the-significance-of-kosovo/>.

Kosovo still operates using an asterisk and footnote, as opposed to its official name, the Republic of Kosovo.<sup>38</sup>

The Opinion arguably played the role of an additional element in Serbia's campaign for the derecognition of Kosovo among states that had already recognized it. Since 2013, Serbia, with Russia's support and sponsorship, has influenced and incentivized some 15 to 20 states, including Suriname, Burundi, Papua New Guinea, Lesotho, Comoros, Dominica, Grenada, Solomon Islands, Madagascar, Palau, Togo, Central African Republic, Ghana, and Nauru, to derecognize Kosovo, in an instance of what appears to have been "derecognitions for sale."<sup>39</sup> The derecognition of states is controversial and rare, but not an entirely unprecedented practice: owing to China's pressure and incentives, in the period 1963–2018, nearly 50 states derecognized Taiwan.<sup>40</sup> For semi-recognized states such as Kosovo, which strive to join the UN and other global bodies, however, even a relatively small number of derecognitions by smaller states reduces the number of UN members recognizing it. Even derecognitions obtained by controversial means communicate delegitimization, having the effect of undermining Kosovo's attempts to gain wider international recognition and secure entry to the UN.<sup>41</sup>

In the post-Opinion period, the main sponsors of Kosovo's independence, the US and the EU states, pressured Kosovo into negotiating its status with Serbia. This can be viewed as a tacit acknowledgment that the Opinion did not significantly alter Kosovo's international status. From 2013 to 2023, following on from the 2012 "footnote agreement," the US and EU managed to broker several significant agreements between Kosovo and Serbia. In these agreements, the major demand upon Serbia was that

<sup>38</sup> Doruntina Baftiu, "Kosovo\*: Its Footnote Is Both A Blessing And A Curse," *Radio Free Europe/Radio Liberty*, April 21, 2024, sec. Kosovo, accessed January 9, 2025, <https://www.rferl.org/a/kosovo-independence-asterisk-serbia-recognition/32912630.html>.

<sup>39</sup> Victor S. Mariottini de Oliveira, "Statehood for Sale: Derecognition, 'Rental Recognition,' and the Open Flanks of International Law," *Jus Cogens* 5, no. 2 (2023): 277–95, <https://doi.org/10.1007/s42439-023-00075-y>; Eugen Cakolli, "Kosovo: Between Universal Non-Recognition and 'Derecognitions,'" Kosovo Democratic Institute, 2020, 18–22, accessed August 18, 2024, [https://www.kas.de/documents/286052/0/Policy+brief+20-09-13+Kosovo+Between+universal+non-recognition+and+derecognitions+\(Eng\).pdf](https://www.kas.de/documents/286052/0/Policy+brief+20-09-13+Kosovo+Between+universal+non-recognition+and+derecognitions+(Eng).pdf).

<sup>40</sup> Theodor Tudoroiu, "Taiwan in the Caribbean: A Case Study in State de-Recognition," *Asian Journal of Political Science* 25, no. 2 (2017): 209, <https://doi.org/10.1080/02185377.2017.1334146>.

<sup>41</sup> Papic, "De-Recognition of States," 703–22, 730.

it would cease obstruction of Kosovo's further recognition and inclusion in international organizations. At the same time, the US and EU negotiators demanded that Kosovo create the Community of Serb Municipalities, an autonomous region of four majority-Serb municipalities in northern Kosovo.<sup>42</sup> However, neither of these demands has been realized. For internal political reasons (and in alliance with Russia), to date, Serbia continues to lobby against the recognition of Kosovo and opposes Kosovo's membership in international organizations. Kosovo continues to stall on the creation of the Community of Serb Municipalities, arguing that such an entity would resemble Republika Srpska, a Serb-dominated entity established by the US-sponsored Dayton Peace Agreement in Bosnia and Herzegovina, and would essentially act as an extension of Serbia and obstruct the functioning of Kosovo's institutions.

As the stalemate continued, the situation became further complicated in 2023, when ethnic Serbs and international peacekeeping forces clashed after the Kosovo government appointed ethnic Albanian mayors in four Serb-majority municipalities in northern Kosovo following the Serb population's boycott of municipal elections. The appointment of ethnic Albanian mayors in northern Kosovo was seen as an obstacle to the implementation of agreements between Kosovo and Serbia brokered by the EU and the US between 2013 and 2023. In reaction, the EU imposed financial sanctions on Kosovo's government, while the US, the main sponsor of the KDI, announced it would cease advocacy of Kosovo's recognition and the process of its integration into international organizations.<sup>43</sup> The ultimate threat of stopping the advocacy for Kosovo's international recognition by the main sponsor of its independence demonstrates that secessionists are unlikely to gain broader recognition without great power support sponsorship,<sup>44</sup> and are also beholden to their sponsors.

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<sup>42</sup> Berta López Domènech, "The Association of Serb Majority Municipalities: The Crux of Tensions," European Policy Center, June 14, 2023, accessed August 11, 2024, <https://www.epc.eu/en/Publications/The-Association-of-Serb-Majority-Municipalities-The-crux-of-tensions~517b60>.

<sup>43</sup> Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities," 11–2.

<sup>44</sup> Coggins, "Friends in High Places."

#### 4. The Opinion as a Tool of Counter-Secession

Overall, the Opinion's trajectory seems paradoxical. The Opinion initially appeared – or was interpreted as – at a minimum not unfavorable to Kosovo and unfavorable to Serbia. However, together with Russia, Serbia coordinated a comprehensive counter-secessionist strategy. It relied on the Opinion as an additional legal argument against further recognition of Kosovo outside of the EU, and also as a bargaining chip in negotiations with the EU, with some success. In the period between the KDI in February 2008 and the Opinion in July 2010, about 70 states recognized Kosovo as an independent state.<sup>45</sup> Though exact figures are difficult to establish with certainty, available data suggests that, by 2023, thirteen years after the issuance of the Opinion, Kosovo was recognized by around 100 to 115 out of 193 UN member states; a lower number of recognitions than semi-recognized countries and territories such as Palestine.<sup>46</sup>

As scholars had anticipated, the Opinion did not significantly accelerate Kosovo's international recognition. However, the trajectory of the Opinion from being at least not unfavorable to Kosovo to becoming a tool of counter-secession was possible for two reasons. The first was that the ICJ's treatment of Serbia's question effectively made Kosovo's status a question of state recognition, while the second was that Serbia was only able to utilize the Opinion due to the support of Russia and China as dominant and rising powers. The price of this second reason, however, was that these dominant powers' support put Serbia in the unenviable position of being beholden to power politics and rivalries in a similar way to which Kosovo is indebted to its main sponsors of independence.

<sup>45</sup> Jusic, "The (Uncertain) Future of Kosovo's Community of Serb Municipalities," 8; "Kosovo Thanks You – Thank You from the Kosovar People!," February 17, 2024, accessed January 9, 2025, <https://www.kosovothanksyou.com/>.

<sup>46</sup> Katharina Buchholz, "Kosovo & Beyond: Where The UN Disagrees On Recognition," *Forbes*, 2023, accessed January 9, 2025, <https://www.forbes.com/sites/katharinabuchholz/2023/02/17/kosovo--beyond-where-the-un-disagrees-on-recognition-infographic/>. Kosovo's Ministry of Foreign Affairs states that the number of states that recognize Kosovo's independence is 115, see: Republic of Kosovo Ministry of Foreign Affairs, "List of Acknowledgments," MPJD | MFAD, accessed August 8, 2024, <https://mfa-ks.net/lista-e-njohjeve/>.

#### 4.1. State (De)Recognition Conundrum

The ICJ's rephrasing of Serbia's question set the stage for its ambiguous opinion that the KDI is not contrary to international law and does not challenge the validity of UNSC 1244. Such a response from the ICJ was perhaps inevitable. Like other international courts with limited effective influence, the ICJ seeks to protect its status by satisfying – or at least not challenging – the majority of states' interests and already-made decisions.<sup>47</sup> Consequently, the Opinion was sufficiently ambiguous to be acceptable to nearly everyone. With its ambiguous response, the ICJ returned the decision on Kosovo's status to states themselves and their own views on recognition, essentially murky waters from both theoretical and practical perspectives.<sup>48</sup>

Theoretically, constitutive and declaratory theory are the two traditional main approaches to state recognition in international law scholarship. Constitutive theory holds that a state is not a state unless and until other states recognize it. The declaratory theory posits that the existence of a state is a factual issue that does not depend on the recognition of other states. Neither of the two theories can fully explain the past or present practice of state recognition. Contrary to constitutive theory, practice shows that states can function without the full recognition of other states. Declaratory theory also concedes that states do not exist in a vacuum. Recognition by other states is often vital for the international status, rights, and obligations of a (non-)recognized state.<sup>49</sup>

The derecognition of states is a far less theoretically debated question, largely because such derecognition is a rare practice. The theoretical divides regarding the derecognition of states are roughly similar to those on state recognition. Constitutive theory holds that – just as states are free to recognize other states and recognition of a state by others is necessary for it be accepted – states have the freedom to derecognize other states and, in

<sup>47</sup> Asim Jusic, "Damned If It Doesn't and Damned If It Does: The European Court's Margin of Appreciation and the Mobilizations Around Religious Symbols," *University of Pennsylvania Journal of International Law* 39, no. 3 (2018): 578.

<sup>48</sup> James Ker-Lindsay, "Not Such a 'Sui Generis' Case after All: Assessing the ICJ Opinion on Kosovo," *Nationalities Papers* 39, no. 1 (2011): 1–11, <https://doi.org/10.1080/00905992.2010.532778>.

<sup>49</sup> William Thomas Worster, "Law, Politics, and the Conception of the State in State Recognition Theory," *Boston University International Law Journal* 27, (2009): 118–21.

doing so, presumably make the unrecognized ones “lesser” or pariah states. The declaratory theory considers that, because the recognition of a state is a recognition of a fact, it cannot be undone. This stance is further reliant on Article 6 of the Convention on the Rights and Duties of States (Montevideo Convention), which prescribes that recognition is irrevocable.<sup>50</sup>

Both constitutive and declaratory theory approaches to derecognition of states are theoretically problematic. On the one hand, if, as the constitutive theory holds, derecognition makes the derecognized state less of a state, the sovereignty of the derecognized state is an oxymoron to begin with, because it depends on the will of others. On the other, contrary to declaratory theorists’ view of derecognition, states cannot be permanently forbidden from revoking the recognition of other states, for that would limit the sovereign choice of states as to whom to recognize as an equal partner and enter into relations with.

Practically, there is yet to be a universally accepted coherent method for determining the criteria for international recognition, a mandate to recognize new states, or derecognition.<sup>51</sup> Whereas the first three criteria of statehood laid out in Article 1 of the Montevideo Convention, i.e. requirements of a permanent population, a defined territory, and a government, are largely factual and relatively uncontroversial, the fourth criterion – the “capacity to enter into relations with the other states,” which in practice means recognition of a state by its peers – depends on the sheer will of other states. The United Nations, for example, has no formal criteria for statehood other than recognition by other states. In other words, the process of achieving “full” statehood through recognition by other states and entry into the UN is a political process.<sup>52</sup>

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<sup>50</sup> Montevideo Convention on Rights and Duties of States, 1933, accessed January 9, 2025, <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef>; Gëzim Visoka, “The Derecognition of States,” in *Routledge Handbook of State Recognition*, eds. Gëzim Visoka, John Doyle, and Edward Newman (Routledge, 2020), 318–21.

<sup>51</sup> Stephen Tierney, “Legal Issues Surrounding the Referendum on Independence for Scotland,” *European Constitutional Law Review* 9, no. 3 (2013): 359–90, <https://doi.org/10.1017/S1574019612001216>.

<sup>52</sup> Nicolas Lemay-Hébert, “State Fragility and International Recognition,” in *Routledge Handbook of State Recognition*, eds. Visoka, Gëzim, John Doyle, and Edward Newman (Routledge, 2020), 306–15.

The absence of consistently applied discernable criteria for recognizing states makes state recognition uncertain and erratic. It is a process governed not solely or even predominantly by international law but by the interests of the recognizing states and the rivalries of great powers, as demonstrated by the process of (non-)recognition of Kosovo.<sup>53</sup> Consider Kosovo's aspiration for membership in the UN, which is meant to be the sole signal that Kosovo is "truly" recognized: membership in the UN requires consent from all permanent members of the UNSC and two-thirds of the votes of all members of the UN General Assembly.<sup>54</sup> Under the present system, the support of the US as a dominant power is insufficient to secure Kosovo's membership in the UN. Ongoing non-recognition of Kosovo by Russia and China, as permanent UNSC members, blocks Kosovo's admission to the UN, having at the same time the secondary effect of showcasing the influence of Russia and China, and reinforcing their status as dominant powers. Aspiring powers and smaller states can also assert themselves by not recognizing Kosovo and voting against its membership in the UN General Assembly if for no other reason than to align with powers challenging the US- and Western-dominated international order.<sup>55</sup>

#### 4.2. Power Politics and Costs of Counter-Secession

Serbia's partially successful use of the Opinion as a counter-secession tool has not come without costs. It has fostered a dependency on Russia and created a stalemate in relations with the US and the EU, thereby limiting Serbia's maneuvering space and its ability to resolve the dispute with Kosovo independently.

Russia's use of its veto power in the UNSC and its diplomatic influence in support of Serbia's opposition to Kosovo's independence has made Russia a close ally of Serbia and increased its popularity as a friendly "brotherly"

<sup>53</sup> Cedric Ryngaert and Sven Sobrie, "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia," *Leiden Journal of International Law* 24, no. 2 (2011): 467, 490, <https://doi.org/10.1017/S0922156511000100>.

<sup>54</sup> "About UN Membership," United Nations, accessed August 23, 2024, <https://www.un.org/en/about-us/about-un-membership>.

<sup>55</sup> Edward Newman and Gëzim Visoka, "The Geopolitics of State Recognition in a Transitional International Order," *Geopolitics* 28, no. 1 (2023): 372, <https://doi.org/10.1080/14650045.2021.1912018>.



power and protector among the wider Serbian public. At the same time, Russia “charged” for its sponsorship of Serbia’s counter-secession activities by extorting economic privileges, such as control of Serbia’s oil and gas industry, and increasing its influence within and over the Serbian government. Consequently, Serbia became increasingly politically, economically, and socially beholden to Russia. It is precisely for this reason that Russia is motivated to ignite and sustain a conflict between Serbia and Kosovo. Resolving the Kosovo-Serbia dispute would diminish Russia’s influence in Serbia and the Western Balkans; in contrast, continued conflict provides Russia with an additional chip for bargaining with the US and the West more generally.<sup>56</sup>

Serbia’s relations with the US and the EU also reached a stalemate. Conceding that the Opinion did not – and could not – bring about sufficient widespread recognition of Kosovo worldwide, or even throughout the EU, the US and the EU-pressured Serbia and Kosovo into further negotiations. The main idea was to avoid a “frozen conflict” scenario by normalizing Kosovo-Serbia relations using the Cold War “two Germanies” model, through which West Germany and East Germany coexisted without formal mutual recognition. Ultimately, the hope is that Kosovo and Serbia will eventually join the EU, which would diminish the likelihood of renewed conflict, while the US and EU would concurrently promote their own economic interests in Serbia and Kosovo.<sup>57</sup>

However, the Cold War “two Germanies” model does not fully apply to Kosovo and Serbia, and the prospect of EU membership is turning out to be an insufficient panacea.

The post-WWII partition of Germany, as well as the two states’ simultaneous entry into the UN in 1973, happened with the consent of all

<sup>56</sup> Maksim Samorukov, “A Spoiler in the Balkans? Russia and the Final Resolution of the Kosovo Conflict,” Carnegie Endowment for International Peace, 2019, accessed October 8, 2024, <https://carnegieendowment.org/research/2019/11/a-spoiler-in-the-balkans-russia-and-the-final-resolution-of-the-kosovo-conflict?lang=en>; Dimitar Bechev, “Russia’s Strategic Interests and Tools of Influence in the Western Balkans,” 2019, accessed October 8, 2024, [https://stratcomcoe.org/cuploads/pfiles/russias\\_strategic\\_interests\\_in\\_balkans\\_11dec.pdf](https://stratcomcoe.org/cuploads/pfiles/russias_strategic_interests_in_balkans_11dec.pdf).

<sup>57</sup> Jusic, “The (Uncertain) Future of Kosovo’s Community of Serb Municipalities: Another Republika Srpska?,” 11.

members of the UNSC.<sup>58</sup> In the case of Kosovo and Serbia, no such consent exists between the permanent UNSC members, primarily the US, Russia, and China. Thus, even in an improbable scenario whereby Serbia as a “host” or “parent” state explicitly recognizes Kosovo, such recognition would not automatically lead to recognition by other states. Russia could continue opposing Kosovo’s acceptance into the UN, arguing, for example, that Serbia’s recognition of Kosovo was coerced and therefore illegitimate, and use its veto power to obstruct what it perceives as a US interest and NATO influence in the Western Balkans.<sup>59</sup> In that scenario, Kosovo would be in a position akin to that of Palestine, which, despite the recognition of some 145 UN members, is still not a full UN member because of the US veto.<sup>60</sup> Such a situation, while highly unusual, would not contravene international law: Serbia’s recognition of Kosovo does not necessarily oblige other countries to do the same, as recognition of other states is a sovereign political choice. Hence, under present circumstances, the “two Germanies” model for Kosovo and Serbia in the UN is unlikely to work.

Theoretically, the “two Germanies” model could work for Kosovo and Serbia within the confines of the EU: Kosovo and Serbia could be members of the EU without formal mutual recognition and with the consent of those EU members who do not presently recognize Kosovo. However, the prospect of EU membership remains distant and has proven to be an insufficient incentive to propel necessary reforms in either country that would place them both on a fast track towards the EU for two reasons.

Firstly, notwithstanding Kosovo’s strong desire to become a member of both NATO and the EU, Kosovo continues to suffer from economic issues, weak rule of law, corruption, and, as of late, frequent tensions between the Kosovo government and US and EU representatives on modalities of

<sup>58</sup> Centre for European Studies, “The End of WWII and the Division of Europe,” UNC-Chapell Hill Centre for European Studies, 2024, accessed August 15, 2024, <https://europe.unc.edu/the-end-of-wwii-and-the-division-of-europe/>; Auswärtiges Amt, “50 Years Germany in the United Nations – Article by Foreign Minister Annalena Baerbock,” German Federal Foreign Office, 2023, accessed August 15, 2024, <https://www.auswaertiges-amt.de/en/newsroom/news/-/2616204>.

<sup>59</sup> Jusic, “The (Uncertain) Future of Kosovo’s Community of Serb Municipalities,” 14.

<sup>60</sup> “Mapping Which Countries Recognise Palestine in 2024,” Al Jazeera, 2024, accessed August 15, 2024, <https://www.aljazeera.com/news/2024/5/22/mapping-which-countries-recognise-palestine-in-2024>.

engagement with Serbia.<sup>61</sup> Such recent tensions suggest that Kosovo's leadership understands that further compromises in the US–EU-brokered agreements with Serbia will not bring Kosovo closer to its goal of being a member of the UN because neither the US nor the EU, or even Serbia, is able to deliver that.

Secondly, Serbia, despite having been an EU candidate country since 2012, continues to be ruled by the nationalistic elites that governed it during the era of Slobodan Milošević and the wars of the 1990s. Over the past decade, the EU has observed an increase in democratic backsliding in Serbia but has tolerated it, supposedly to encourage Serbia to shift away from strategic alignment with Russia and China regarding Kosovo, but also to further its own economic interests.<sup>62</sup> Given the absence of any real progress in Serbia's EU integration over an extended period of time, it can be concluded that Serbia has no true interest in joining the EU in the long run. Rather, it should be said that Serbia is interested in prolonging the benefits of its EU candidate status, enjoying concessions from the EU in the process of endless rounds of negotiations with Kosovo.

In sum, somewhat ironically, while attempting to sustain its formal sovereignty over the aspiring state of Kosovo, Serbia has made its remaining sovereignty ambiguous by embroiling itself in the question of state recognition, an arena of great power rivalries.<sup>63</sup> Kosovo's status and its entry into the UN does not appear to be a matter that Serbia could resolve on its own without the consent of its counter-secessionist sponsor, Russia. The implication is that, for the foreseeable future, Serbia will bear the political and economic costs of having a semi-recognized Kosovo at its borders without being able to independently resolve the conflict, change facts on the ground, or decisively influence the trajectory of dispute resolution.

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<sup>61</sup> EU Directorate-General for Neighbourhood and Enlargement Negotiations, "Kosovo Report 2023 – European Commission," November 2023, accessed August 16, 2024, [https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2023\\_en](https://neighbourhood-enlargement.ec.europa.eu/kosovo-report-2023_en).

<sup>62</sup> Tony Barber, "Why Is the EU Soft on Serbia?," January 13, 2024, accessed August 16, 2024, <https://www.ft.com/content/77900656-0a52-4e1f-8d88-8ed2d7ab7264>.

<sup>63</sup> Newman and Visoka, "The Geopolitics of State Recognition in a Transitional International Order," 383.

## 5. Conclusion

The trajectory of the Opinion underscores the complexities and costs of using international judicial opinions as tools of counter-secession. Because the ICJ, in its Opinion, deliberated solely on the legality of the KDI, Serbia, backed by its main sponsor Russia, was able to leverage the lack of coherent international norms governing state recognition, and used the Opinion as a tool of counter-secession, with some success. The use of the Opinion as a counter-secession tool has not been costless, however. Much like Kosovo is indebted to its independence sponsors, Serbia has become beholden to the whims of great power politics. Though the Opinion is the rare case in which the ICJ has discussed the issue of secession, its aftermath points to a need for in-depth research in several understudied areas of international law. The conditions underlying – and second-order effects of – the use of international judicial opinions as one of the tools of counter-secession merit closer examination. Furthermore, the underestimated phenomenon of state derecognition, more generally, and as a tool of counter-secession, deserves further scholarly exploration.

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