

# **„Nothing but a road towards secession“?- The International Court of Justice’s Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo**

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## Abstract

On 22 July the International Court of Justice (ICJ) delivered its Advisory Opinion on Accordance with international law of the unilateral declaration of independence (UDI) in respect of Kosovo. There is a wide range of legal questions related to Kosovo's UDI. However, the ICJ decided by way of a narrow interpretation of the General Assembly's request to focus only on prohibitive rules. The Court came to the conclusion that the UDI did not violate international law. While this result is defensible, the way the Court got there is problematic. The Court missed its opportunity to provide legal guidance in fields of secession and self-determination. This article shall give a first overview of the Court's reasoning.

## A. Introduction

On 10 June 1999, after NATO's military intervention in the Federal Republic of Yugoslavia between March 24 and June 10, the Security Council passed Resolution 1244 which placed Kosovo under the auspices of the United Nations Interim Administration Mission (UNMIK). The mandate of the UNMIK was to "facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiated process".<sup>1</sup> However, the political negotiations failed to determine Kosovo's final status and Kosovo unilaterally declared independence on 17 February 2008. This was rejected by Serbia while some 69 States recognized Kosovo's independence. On initiative of Serbia, the General Assembly requested on 8 October 2008 an Advisory Opinion by the International Court of Justice (ICJ) on the question of compatibility of Kosovo's declaration of independence with international law. The resolution in which this request is set forth<sup>2</sup> was adopted by the General Assembly on 8 October 2008 with 77 votes in favor, 6 votes against and 74 abstentions.<sup>3</sup> The ICJ held oral proceedings between 1-11 December and issued its Opinion on 22

<sup>1</sup> *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, [Kosovo-Opinion] available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 5. August 2010) [Kosovo-Opinion], at 99.

<sup>2</sup> GA Res. 63/3, 8 October 2008.

<sup>3</sup> General Assembly 63<sup>rd</sup> session, 22<sup>nd</sup> Plenary Meeting, 8 October 2008, UN Doc A/63/PV.22, 10.

July 2010 stating that Kosovo's declaration of independence is not in violation of international law. Newspapers and politicians celebrating the Advisory Opinion as confirming the existence of the State of Kosovo, especially in the early days after the Court delivered its Opinion, was a predominant view.

There is a wide range of legal questions related to Kosovo's declaration of independence. This article shall give a first overview of what the Court decided with regard to the Unilateral Declaration of Independence (UDI)<sup>4</sup> and in particular what it did not decide, considering also the statements of the States participating in the oral proceedings.

## B. Jurisdiction

The jurisdiction of the International Court of Justice for giving Advisory Opinions on any legal question is based on Article 96 UNC<sup>5</sup>. The Court has discretion in accepting requests for Advisory Opinions<sup>6</sup> and can refuse to do so if there are "compelling reasons"<sup>7</sup>. During the hearing in December 2009, States expressed their views on the question of jurisdiction. One point under discussion was the political nature of the dispute.<sup>8</sup>

According to Article 65 para 1 ICJ-Statute<sup>9</sup>, the Court's jurisdiction is confined to legal disputes. However, the argument which challenges the Court's jurisdiction on account of political considerations cannot be seen as a convincing one with good prospects of success. In the literature, the phrase of Article 65 ICJ-Statute is regarded to be without substantive

<sup>4</sup> UDI, available at <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last visited 26 August 2010).

<sup>5</sup> *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. 16 [UNC].

<sup>6</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, 136, 144, para. 13 [Wall].

<sup>7</sup> *Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco*, ICJ Reports 1956, 77, 86; Kosovo-Opinion, *supra* note 1, 14.

<sup>8</sup> France argued that the matter of secessions or universal declarations of independence (UDI) is not a genuine legal question: Written Comments of France, para. 9, available at <http://www.icj-cij.org/docket/files/141/15607.pdf> (last visited 5 August 2010). Serbia pointed out that the question as to what extent international law regulates a certain matter, is in its core a legal question, Serbia, CR 2009/24, 36 (*Djerić*).

<sup>9</sup> *Statute of the International Court of Justice*, 26 June, 1945, 33 U.N.T.S. 993.

meaning anymore.<sup>10</sup> If one takes a look at the Court's jurisprudence, the ICJ itself rejected on various occasions challenges against its jurisdiction on the basis of political considerations.<sup>11</sup> Hence, unsurprisingly, the ICJ did not refuse to entertain the legal examination only because of the political nature of the dispute under discussion<sup>12</sup>.

Another objection raised during proceedings was the question of how different legal spheres can be evaluated. According to some States, the ICJ should have declined the request because the declaration of independence remains within the constitutional or rather domestic sphere<sup>13</sup>; the Court would have to act like a Constitutional Court when deciding whether the UDI was in contravention of the Provisional Settlement and *ultra vires*.<sup>14</sup> In addition, Kosovo argued that a finding of the Court may lack practical purpose: the UDI can be seen as manifestation of the *pouvoir constituant* which might be regulated neither by international law nor, by its very nature, by constitutional law.<sup>15</sup> The Court concluded that it had jurisdiction

<sup>10</sup> J. Frowein/K. Oellers-Frahm, 'Article 65', in: A. Zimmermann *et al.*, *The Statute of the International Court of Justice- A Commentary* (2006), 1408-1410, paras 21-27; E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), 164; C. Tomuschat, 'Article 36', in: A. Zimmermann *et al.*, 1406 para. 12.

<sup>11</sup> *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166, 172; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, ICJ Reports 1979, 7, 15; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3, 20; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, ICJ Reports 1984, 392, 435; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, 234; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 6, 155; see also *Western Sahara, Advisory Opinion*, ICJ Reports 1975, 12, 18; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 156; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16, 23.

<sup>12</sup> Kosovo-Opinion, *supra* note 1, 13, para. 27.

<sup>13</sup> See Written Comments of the United States, at 39-42, available at <http://www.icj-cij.org/docket/files/141/15640.pdf> (last visited 26 August 2010); Written Comments of the United Kingdom, para. 32, available at <http://www.icj-cij.org/docket/files/141/15638.pdf> (last visited 26 August 2010); Written Comments of the Netherlands, para. 2.3, available at <http://www.icj-cij.org/docket/files/141/15652.pdf> (last visited 26 August 2010).

<sup>14</sup> Albania, CR 2009/26, 11 (*Frowein*).

<sup>15</sup> *Id.*; Kosovo, CR 2009/25, 63 (*Murphy*).

without addressing these concerns at this point of proceedings.<sup>16</sup> However, in a further elaboration on the matter, the Court stated that the UNMIK-system derives its binding force from Resolution 1244 and thus from international law.<sup>17</sup>

Notwithstanding, the involvement of the Security Council may offer compelling reasons, which could have led the Court to decline the request for its Advisory Opinion. In the end, the Court came to the conclusion that it should not use its discretion to reject the request,<sup>18</sup> but this was not beyond question. The statements of several States<sup>19</sup>, four judges<sup>20</sup> and the Advisory Opinion itself with its twenty paragraphs on the matter<sup>21</sup> show that the Court and the States participating in the proceedings took this issue seriously.

Again, the Court denied<sup>22</sup> the Article-12-argument<sup>23</sup>, according to which the General Assembly may be hindered in requesting an Advisory Opinion when the Security Council is seized of the matter.<sup>24</sup> To prove the

<sup>16</sup> Kosovo-Opinion, *supra* note 1, 13, para. 28.

<sup>17</sup> *Id.*, 32-34, paras 88-93.

<sup>18</sup> *Id.*, 19, para. 48.

<sup>19</sup> For the position that the Court has no jurisdiction or at least there are compelling reasons to decline the request: Albania written statement, 25-37, available at <http://www.icj-cij.org/docket/files/141/15618.pdf> (last visited 5 August 2010); Czech Republic, Written Statement, 6, available at <http://www.icj-cij.org/docket/files/141/15605.pdf> (last visited 26 August 2010); France, Written Statement, 15-27, available at <http://www.icj-cij.org/docket/files/141/15607.pdf> (last visited 5 August 2010); Ireland, Written Statement, 2-3, available at <http://www.icj-cij.org/docket/files/141/15662.pdf> (last visited 26 August 2010); Maldives, Written Statement, available at <http://www.icj-cij.org/docket/files/141/15670.pdf> (last visited 5 August 2010); the USA submitted that there are good reasons why the Court should decline the request, Written Statement, 45, available at <http://www.icj-cij.org/docket/files/141/15640.pdf> (last visited 26 August 2010).

<sup>20</sup> See Kosovo-Opinion, *supra* note 1, Declaration of Judge Tomka, 1-2, paras 2-9, available at <http://www.icj-cij.org/docket/files/141/15989.pdf> (last visited 26 August 2010); *id.*, Separate Opinion of Judge Keith, 2, para. 6, available at <http://www.icj-cij.org/docket/files/141/15995.pdf> (last visited 26 August 2010); *Id.*, Dissenting Opinion of Judge Bennouna, 1, para. 3, available at <http://www.icj-cij.org/docket/files/141/15999.pdf> (last visited 5 August 2010); *Id.*, Dissenting Opinion of Judge Skotnikov, paras 4-7, available at <http://www.icj-cij.org/docket/files/141/16001.pdf> (last visited 26 August 2010).

<sup>21</sup> Kosovo-Opinion, *supra* note 1, 13-19, paras 29-48.

<sup>22</sup> The Court came to the same conclusion in its Wall-Opinion, *supra* note 6, 150, para. 28.

<sup>23</sup> Kosovo-Opinion, *supra* note 1, at 12-13, paras 24-28.

<sup>24</sup> Wall-Opinion, *supra* note 6, 148, paras 24-26.

General Assembly's interest, the Court simply stated that, prior to 1999, the General Assembly issued numerous resolutions with regard to Kosovo<sup>25</sup>.

Nevertheless, it seems questionable whether one can compare the Kosovo-situation with the circumstances in the Wall-Opinion, bearing in mind that the Security Council was not only seized or involved in some way but also did set up the constitutional framework and ultimately administered the territory. The Court's refusal to exercise its discretion to reject the request evoked much criticism among the judges.<sup>26</sup> According to Judge Tomka and Judge Keith, under the given circumstances, only the Security Council should have requested the Advisory Opinion.<sup>27</sup> Judge Bennouna pointed out that the Security Council established, by virtue of Resolution 1244, an interim administration in Kosovo and had initiated "a process for bringing it to the end"<sup>28</sup>. He concluded that an assessment of the UDI fell alone within the competence of the Security Council.<sup>29</sup> Judge Keith emphasized that the Security Council set up the Constitutional Framework and should therefore be considered as a central actor, whereas the General Assembly would have no sufficient interest in the legal question put before the Court.<sup>30</sup> These objections are based on the concern about the structure of the United Nations, in particular about the system of collective security which is regarded as primarily falling within the competence of the Security Council.<sup>31</sup> The Court's reasoning described above did not live up to these objections. On account of the strong involvement of the Security Council under Chapter VII UNC, it may indeed be doubtful whether the ICJ should have interfered.

The relationship between the Security Council and the ICJ is, due to the lack of an explicit provision similar to Article 12, open to discussion.<sup>32</sup>

<sup>25</sup> Kosovo-Opinion, *supra* note 1, 18, paras 45-46.

<sup>26</sup> See also Judge Tomka, Separate Opinion Judge Keith, Judge Bennouna, Dissenting Judge Skotnikov (all *supra* note 20).

<sup>27</sup> See Tomka, *supra* note 20.

<sup>28</sup> Bennouna, *supra* note 20, 3, para. 12.

<sup>29</sup> *Id.*, para. 13.

<sup>30</sup> See Keith, *supra* note 20.

<sup>31</sup> Geiger, 'Art. 23' in: Simma (ed.): *The Charter of the United Nations - A Commentary*, 2nd ed. (2002), 437, para. 1.

<sup>32</sup> For an overview: D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *International & Comparative Law Quarterly* (1997) 2, 309-343 ; J. Alvarez, 'Judging the Security Council', 90 *American Journal of International Law* (1996), 1-39; T. Franck, 'The "Powers of Appreciation": Who is the ultimate Guardian of UN-Legality?', 86 *American Journal of International Law* (1992), 519-

The Security Council has the primary responsibility for the maintenance of peace and security, but this competence is not exclusive and does not preclude the International Court of Justice, as principal judicial body of the United Nations, from exercising its judicial function: “Both organs can [...] perform their separate but complementary functions with respect to the same events”.<sup>32</sup> Furthermore, the case at hand is not one comparable to the Lockerbie-situation<sup>33</sup> in which a judicial review of an act by the Security Council appeared necessary. The Court was only requested to deliver a legal assessment of the UDI, which undoubtedly falls within its competence as primary judicial organ of the United Nations. A further point is also of relevance: the powers of the Security Council derive from its conception as an organ which was supposed to act quickly in case of imminent danger.<sup>34</sup> It is doubtful whether the drafters of the UN Charter envisioned the Security Council to take long-range actions such as the administration of a whole territory.<sup>35</sup> It can be argued that in such cases, other organs of the United Nations should not be excluded.<sup>36</sup>

523; B. Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie’, 10 *The European Journal of International Law* (1999) 3, 517-547.

<sup>32</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392, 433-434, para. 93.

<sup>33</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident in Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 1998, 9.

<sup>34</sup> N. Krisch, *Selbstverteidigung und kollektive Sicherheit* (2001), 45, cites a statement of the United States of America during the San Francisco Conference: “It is our view that the people of the world wish to establish a Security Council, that is, a policeman who will say, when anyone starts to fight, ‘stop fighting’. Period. And then it will say, when anyone is already to begin to fight, ‘you must not fight’. Period. That is the function of a police man, and it must be just that short and that abrupt”, UNCIO VI, 29.

<sup>35</sup> However, after the end of the Gulf War, the Security Council has been increasingly involved in the administration of territories, cf. A. Paulus, ‘Article 29’, in: Simma, *supra* note 30, 539, 553; cf. also J. Frowein & N. Krisch, ‘Introduction’, *id.*, 701, 709.

<sup>36</sup> Some scholars tend to restrict the Security Council’s powers due to its broader operation range, see N. Krisch, *supra* note 34, 255-261; C. Tomuschat, ‘Die Europäische Union und ihre völkerrechtliche Bindung’, 34 *Europäische Grundrechtezeitschrift* (2007), 1 (2); A. Bianchi, ‘Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion’, 17 *The European Journal of International Law* (2007), 881, 887.

Against this background, the Court correctly found no compelling reasons to decline the request.<sup>38</sup> The reasoning of the Court however is less convincing. It would have been preferable for the Court to go more in depth with regard to the objections to the exercise of jurisdiction.

### C. Scope of the Question

The question which was put before the Court reads: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”<sup>39</sup>

Among the States which appeared before the Court there was disagreement whether the question has to be widely interpreted<sup>40</sup> (including questions of statehood of Kosovo) or rather narrowly<sup>41</sup>, focusing on the UDI. Kosovo finally succeeded in providing the key argument to the Court: “No rule of general international law prohibits the declaration of independence of 17 February 2008 made on behalf of the people of Kosovo by their democratically elected representatives. The declaration is therefore ‘in accordance with international law’”.<sup>42</sup>

The ICJ set up a decisive framework for its course of action by its interpretation of the question. According to the ICJ, the question was sufficiently clear and did not need to be re-formulated; possible legal consequences of the UDI fell outside the scope of the General Assembly’s request. However, the Court did not consider the wording of the General Assembly as a final determination.<sup>43</sup> The Court emphasized that it must be free to decide for itself whether the UDI was promulgated by Provisional Institutions of the Self-Government or by other actors. This was criticized in

<sup>38</sup> Kosovo-Opinion, *supra* note 1, 19, para. 48.

<sup>39</sup> GA Res. 63/3, 8 October 2008.

<sup>40</sup> For instance: Spain CR 2009/30 (translation), 4-5 (*Escobar Hernández*).

<sup>41</sup> For instance: USA, CR 2009/30, 38 (*Koh*); Austria, CR 2009/27, 6 (*Tichy*); Croatia, CR 2009/29, 52 (*Metelko-Zgombić*); Jordan, CR 2009/31, 27 (*Zeid Raad Zeid Al Hussein*); Burundi, CR 2009/28 (translation), 26 (*d’Aspremont*); Germany, Written Statement, available at <http://www.icj-cij.org/docket/files/141/15624.pdf> (last visited 5 August 2010), 6; Netherlands, Written statement, available at <http://www.icj-cij.org/docket/files/141/15652.pdf> (last visited 5 August 2010), para. 2.1.

<sup>42</sup> Kosovo, CR 2009/25 (translation), 28 (*Müller*); the Court’s wording reads: “[T]he Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law”, Kosovo-Opinion, *supra* note 1, 32, para. 84.

<sup>43</sup> *Id.*, 20, para. 52.

strong terms by Judge Koroma in his dissenting opinion. According to Koroma, the Court does not have the power to reformulate the question implicitly or explicitly to such an extent that it would answer a question about an entity other than the Provisional Institutions of Self-Government of Kosovo. He emphasized that the General Assembly clearly views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo.<sup>44</sup>

It is interesting to note in this context that the initial request of Serbia enshrined in the draft resolution asked “whether the 17 February 2008 unilateral declaration of independence of Kosovo is in accordance with international law”. The final wording of the request referred to the “Provisional institutions of Self-Government of Kosovo”. This would reinforce Koroma’s argument that the General Assembly referred in its request to the Self-Government of Kosovo and not to Kosovo’s “democratically elected representatives” without the auspices of their official capacity.

Paragraph 56 of the judgment is essential for the Court’s reasoning and for the legal framework applicable. The ICJ concluded that the General Assembly consciously decided not to ask for the existence of a right to secession.

“It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.”<sup>45</sup>

The Court took a very narrow view of the question which allowed it not to get involved with highly disputed legal questions, such as the

<sup>44</sup> Koroma, *supra* note 20, 2, para. 3.

<sup>45</sup> Kosovo-Opinion, *supra* note 1, 21, para. 56.

statehood of Kosovo, the right of self-determination, and in particular with the issue of so-called remedial secession. Judge Simma issued a separate declaration expressing his “concerns about [the opinion’s] unnecessarily limited — and potentially misleading — analysis”.<sup>46</sup> By deciding that everything is allowed unless it is prohibited, the Court reverted, according to Simma, to the Lotus-Principle<sup>47</sup>, falling back to “nineteenth-century positivism”<sup>48</sup>, adapting an “anachronistic, extremely consensualist vision of international law”<sup>49</sup> while the ideas of the contemporary international legal order render “the Court’s reasoning on this point [...] obsolete”<sup>50</sup>.

As to Lotus, of course, a distinction can be made between “legal” and “not illegal”, as Judge Simma emphasized, but how much internal differentiation does international law really admit? If the Court had said that the declaration of independence is tolerated, this would have led to the same outcome. If the Court had argued that the non-prohibition of the declaration of independence is “desirable”<sup>51</sup> under international law, this would beg further questions: what is a desirable non-prohibition? Desirable from which standpoint? Why is the non-prohibition desirable? Because it lacks normative value? How much value judgment has to be involved in identifying a desirable non-prohibition? Thus, the only added normative value would have been to state the circumstances under which international law warrants the secession of certain territories as a consequence of self-determination.

Simma does not follow the Court’s majority in regard of the question’s scope. The request, he argues, does not ask for the identification of the existence of a prohibitive or permissive rule under international law, but the term “in accordance with” indicates a broader scope.<sup>52</sup> This objection shows that the wording of the question does not provide a sufficient argument only in favor of a limited interpretation. On the contrary, “in accordance with” rather asks for the relationship of the UDI to international law which includes also the application of permissive rules. Against this background, the narrow view in the Court’s opinion is

<sup>46</sup> See Kosovo-Opinion, *supra* note 1, Declaration of Judge Simma, available at <http://www.icj-cij.org/docket/files/141/15993.pdf> (last visited 5 August 2010).

<sup>47</sup> *Lotus Case (France v Turkey)*, Judgment 1927, PCIJ (Ser A) No 10.

<sup>48</sup> Simma, *supra* note 46, para. 8.

<sup>49</sup> *Id.*, para. 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, para. 8.

<sup>52</sup> *Id.*, para. 4.

regrettable, since the Court misses the opportunity to address relevant questions that had been raised by the States in the written and oral proceedings, and to use the Advisory Opinion for defining its view of the state of the law. However, many States argued to read the question in a narrow way or adopted the view that the UDI is not open to legal assessment<sup>53</sup>. Moreover, the question found the support of less than 40 per cent of the General Assembly.<sup>54</sup> In the light of these circumstances, one may at least assume that the way the Court proceeded found support of many States or that a question directed at legal consequences of the UDI would possibly have failed to be adopted by the General Assembly.<sup>55</sup>

#### D. Legal Assessment

Some States expressed the view that a UDI is a fact which cannot be legally assessed and which therefore cannot be valid or invalid.<sup>56</sup> The Court however scrutinized whether the UDI violated principles of general

<sup>53</sup> See e.g. Burundi, CR 2009/28 (translation), 27 (*d'Aspremont*).

<sup>54</sup> See Jordan, CR 2009/31, 27 (*Zeid Raad Zeid Al Hussein*).

<sup>55</sup> In the words of Norway: "In the vote 74 Member States abstained, 35 refrained from participating, and six voted against the draft resolution. In other words, 115 Member States of the United Nations did not support the resolution", CR 2009/31 44 (*Fife*).

<sup>56</sup> For the fact-thesis: United Kingdom argued that "[a] declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community." CR 2009/32, 47, 54 (*Crawford*); USA, CR 2009/30, 29 (*Koh*); Finland, CR 2009/30, 54 (*Kaukoranta*) and 57 (*Koskenniemi*); Croatia, CR 2009/29, 65 (*Metelko-Zgombić*); Denmark, CR 2009/29, 67 (*Winkler*); France, CR 2009/31 (translation), 6, 9 (*Belliard*); Jordan, CR 2009/31, 38 (*Al Hussein*); Norway, CR 2009/31, 46 (*Fife*); Albania, CR 2009/32, 12 (*Frowein*); Germany, CR 2009/26, 27 (*Wasum-Rainer*); Bulgaria, CR 2009/28, 24 (*Dimitroff*): "Only in rare circumstances has the Security Council or the General Assembly expressed a negative view of declarations of independence, namely, where such declarations were part of an overall scheme that violated fundamental norms of international law", at 68. Following States denied this fact-thesis and argued that UDIs are legally accessible: Spain: „from the legal point of view it is impossible to accept that international law can remain 'neutral' in respect of an act", CR 2009/30, 15 (*Escobar Hernández*); Russia, CR 2009/30, 41 (*Gevorgian*); Bolivia did not comment directly on the issue but stressed the importance of the principle of territorial integrity, CR 2009/28, 12 (*Calzadilla Sarmiento*); China, CR 2009/29, 34 (*Xu*); Cyprus, CR 2009/29, 38 (*Lowe*); Venezuela, CR 2009/33, 9 (*Fleming*); Vietnam, CR 2009/33, 18 (*Nguyen Anh*); Romania, CR 2009/32, 20, 22 (*Aurescu*).

international law (I) or Security Council Resolution 1244 (II) and therefore did not agree with the argument that UDIs are not legally accessible at all.<sup>57</sup>

## I. General International Law

### 1. Application of Prohibitive Rules

While discussing the applicability of prohibitive rules, the majority of the bench took note that the Security Council condemned declarations of independence which are connected to “unlawful use of force or egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”<sup>58</sup>. In addition to that, some States argued that the declaration of independence violated the principle of territorial integrity. According to Serbia, the only interpretation which lives up to the development of international law is to consider not only States to be bound by the principle of territorial integrity but non-State actors as well.<sup>59</sup> In the proceedings no consensus emerged about the question whether the principle of territorial integrity is binding upon non-State-actors.<sup>60</sup> According to

<sup>57</sup> Kosovo-Opinion, *supra* note 1, 29, para. 78.

<sup>58</sup> *Id.*, 30, para. 81.

<sup>59</sup> Serbia, CR 2009/24, 65 (*Shaw*).

<sup>60</sup> The principle of territorial integrity binds non-State-Actors: Argentina, CR 2009/26, 38 (*Escobar Hernández*); Brazil: “The Unilateral Declaration of Independence of Kosovo sets aside two of the most precious imperatives of the current international order: the authority of the Security Council of the United Nations, according to the Charter of the United Nations, and the principle of territorial integrity.” CR 2009/28, 17 (*Medeiros*); China CR 2009/29, 33 (*Xu*); Spain CR 2009/30, 15 (translation) (*Escobar Hernández*); Serbia: “international practice now clearly regards non-State entities as direct subjects of international law”, CR 2009/24, 66 (*Shaw*); Romania, CR 2009/32, 20 (*Aurescu*); Venezuela, CR 2009/33, 6 (*Fleming*); Vietnam, CR 2009/33, 20 (*Nguyen Anh*). Cyprus did only state that Kosovo is not entitled to secession by way of self-determination, but did not comment on the question of non-state actors in international law, CR 2009/29, 47 (*Lowe*); Azerbaijan did not make a statement whether non-state actors are bound by the principle of territorial integrity, but stressed that this principle is of fundamental value for the states and that consequently secession has to be considered illegal under international law, CR 2009/27, 20 (*Mehdiyev*); Bolivia: “the principle of territorial integrity is the protection of an essential element of a State”, but did not address the question to what extent non-state-actors are bound, CR 2009/28, 11 (*Calzadilla Sarmiento*); following States argued that the principle of territorial integrity binds only states: Austria, CR 2009/27 (*Tichy*), 9); Bulgaria, CR 2009/28 25 (*Dimitroff*); USA, CR 2009/30, 30 (*Koh*); Finland: non-state-actors are only bound in fields of “human rights, economic relations and the

Serbia territorial changes are only valid when conducted in a peaceful way and with the consent of the State concerned.<sup>60</sup> Concerns were expressed that the opposite would entail “extremely severe consequences for the international legal order. It would mean that any province, district, county, or even the smallest hamlet from any corner of any State, is allowed by international law to declare independence and to obtain secession”.<sup>61</sup>

The Court took the view of Kosovo *et altera* and concluded that the principle of territorial integrity applies only to States.<sup>62</sup> Although the Court adopted a standpoint shared by the majority of the States participating in the proceedings, it remains regrettable that the Court offers no further line of argumentation. If one considers the growing importance of non-State-actors in international relations, it could be asked whether non-State-actors, which have a certain degree of structure or organization, are bound by the principle of territorial integrity. By adopting such a view one would be in a position to differentiate between non-State-actors. For example, the non-State-actors who are partially subject of international law (the PLO and national liberation movements<sup>63</sup>) and internationally recognized *de-facto* regimes<sup>64</sup>

environment”, but not with regard to territorial integrity, CR 2009/30, 59 (*Koskenniemi*), whereas Finland conceded that territorial integrity may be considered as general value, however “it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination including by way of independence” CR 2009/30, 60 (*Koskenniemi*); Albania, CR 2009/26, 15, 28 (*Frowein*): “[t]he inclusion of such an obligation in a Security Council resolution can also be seen – and this is our position – as establishing an obligation which otherwise would not exist”; France, CR 2009/31, 12 (*Belliard*); Jordan, CR 2009/31, 35 (*Al Hussein*); Norway, CR 2009/31, 48 (*Fife*); UK, CR 2009/32, 53 (*Crawford*); see also Randelzhofer, ‘Article 2(4)’ in Simma, *supra* note 30: the scope of Article 2 (4) includes only states (and *de facto*-regimes); E. Milano, ‘The Independence of Kosovo under International Law’ in: Wittich *et al.* (eds) *Kosovo-Staatsschulden-Notstand-EU-Reformvertrag-Humanitätsrecht* (2009), 21, 24: “The right to territorial integrity [...] is opposable, externally, to third states against actions aimed at changing the territorial configuration of the state, as well as, internally, to international subjects, such as peoples, insurgents, *de facto* independent entities that may acquire international legal personality due to effective control or international recognition in binding instruments (that being the case for Kosovo’s provisional authorities) and may seek to disrupt the territorial unity of a state”.

<sup>60</sup> Serbia, CR 2009/24, 71 (*Shaw*); see also Koroma, *supra* note 20, 2.

<sup>61</sup> Romania, CR 2009/32, 20 (*Aurescu*).

<sup>62</sup> Kosovo-Opinion, *supra* note 1, 30, para. 80.

<sup>63</sup> On this issue see M. Shaw, ‘The International Status of National Liberation Movements’, 5 *Liverpool Law Review* (1983) 1, 19-34.

can be regarded as addressees of the principle of territorial integrity. As the ICJ already stated in the *Reparation's Case*, the concept of international legal personality does not necessarily encompass the same range of rights and duties for all subjects of law.<sup>65</sup> Accordingly, in the present authors' view, the general question whether international law binds non-State actors lacks the necessary specificity. "Non-State-actors" is a too broad concept.<sup>66</sup> It is necessary to differentiate between non-State-entities and also within the category of "international law".<sup>67</sup>

The principle of territorial integrity could indeed be applicable if the UDI can be attributed to States.<sup>68</sup> However, neither the participation of a State in the self-governing administration of Kosovo, the exercise of effective control over the territory during the provisional administration, nor the recognition by then 63 States of Kosovo's independence suffice for attributing the Declaration of Independence to them.<sup>69</sup>

In the case under review, the Court largely left it to the political process to solve the Kosovo question. This may lead to the result that future secession movements are not regulated by law in the first place, but rather

<sup>64</sup> See J. Frowein, *Das de facto-Regime im Völkerrecht* (1968), 69, arguing that effective de facto-Regimes take an internationalized position and are consequently bound by certain provisions such as the prohibition on the use of force.

<sup>65</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: ICJ Reports 1949, 174, 178: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." This argument would fit well into the "Constitutional" approach which conceives of international law as a hierarchical legal system and does not exclude the non-state actors from its scope, see D. Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in: R. Hofmann (ed.), *Non State Actors as New Subjects of International Law* (1999), 37, 51.

<sup>66</sup> A discussion of a wide range of issues related to the status of non-state actors in international law see in A. Bianchi (ed.), *Non-State Actors and International Law* (2009).

<sup>67</sup> It makes a difference whether one is examining international criminal law, general international law or international economic law. The question, under which circumstances which non-state-entities, as subjects of international law or simply entities participating in international life without recognition as full-fledged subjects of international law, are bound by which part or rules of international law, cannot be solved here but is subject to discussions without a completely satisfying solution in sight.

<sup>68</sup> See Burundi, CR 2009/28 (translation), 31 (*d'Aspremont*).

<sup>69</sup> *Id.*

are evaluated only on a factual basis.<sup>71</sup> It may be asked whether this state of affairs serves the purpose of strengthening the rule of law in international relations or whether it contravenes such a purpose.

## 2. Discussion of Permissive Rules by the States

Due to the narrow reading of the question, the Court did not need to address the issue whether the right to self-determination or a so-called right to remedial secession confers a right to Kosovo to secede from Serbia.<sup>72</sup> It is a missed opportunity to shed some light on self-determination which sometimes is called a “lex lata, lex obscura”<sup>73</sup>.

The idea of the so-called remedial secession is that an organized segment of a population may be entitled to secede if it is persistently and systematically oppressed by a central government<sup>74</sup>. Some scholars admit the existence of such a right<sup>75</sup>, whereupon even advocates of remedial secession concede that the empirical basis for such an assertion is very thin.<sup>76</sup> Observers argue that, since 1945, the international community has been reluctant to accept unilateral secession of parts of independent States in situations where the secession is opposed by the government of that State.<sup>77</sup> A very brief overview of international practice reinforces this proposition.

The Albanian leadership of Kosovo declared independence already in October 1991, which was only recognized by Albania.<sup>78</sup>

On 2 November 1991, Chechnya declared its independence from the Russian Federation. A military attempt in 1994 to suppress the secessionist

<sup>71</sup> Judge Cançado Trindade criticized such approach, stressing that one has to distinguish between *Sein* and *Sollen*. Kosovo, *supra* note 1, Separate Opinion of Judge Cançado Trindade, para. 137, available at <http://www.icj-cij.org/docket/files/141/16003.pdf> (last visited 5 August 2010).

<sup>72</sup> Kosovo, *supra* note 1, 32, para. 84.

<sup>73</sup> J. Crawford, ‘Right of Self-Determination’, in P. Alston: *People’s rights* (2001), 10.

<sup>74</sup> M. Weller, *Escaping the Self-Determination Trap* (2008), 59; see also Y. Dinstein, ‘Is there a right to secede?’, 90 *American Society of International Law Proceedings* (1996), 299.

<sup>75</sup> See e.g. K. Doehring, ‘Self Determination’, in Simma (ed.), *supra* note 31, para. 40.

<sup>76</sup> C. Tomuschat, ‘Secession and Self-Determination’, in M. Kohen (ed.): *Secession: International Law Perspectives* (2006), 42; see also J. Crawford, *The Creation of States in International Law* (2006), 417.

<sup>77</sup> J. Crawford, ‘State Practice in International Law in Relation to Secession’, 69 *British Yearbook of International Law* (1998), 92. A case of successful secession may be found in the separation of Bangladesh from Pakistan in 1971, Crawford, 95-96.

<sup>78</sup> J. Crawford, *supra* note 76, 408; M. Weller, *Contested Statehood* (2009), 268.

movement was defeated and finally ended in a cease-fire agreement in 1996. Chechnya was not accepted as a State by the international community thereafter. After Russia started a second major operation in 1999, States expressed the view that the conflict is of internal nature and reaffirmed the sovereignty and territorial integrity of Russia.<sup>79</sup>

In the case of the Republika Srpska, the EU arbitration Commission stated that

“it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise”.<sup>80</sup>

The “Independent International Fact-Finding Mission on the Conflict in Georgia” stated that

“international law does not recognise a right to unilaterally create a new state based on the principle of self-determination outside the colonial context and apartheid. An extraordinary acceptance to secede under extreme conditions such as genocide has so far not found general acceptance.”<sup>81</sup>

According to the African Commission on Human and People Rights, in the absence of concrete evidence of violations of human rights or of violations of democratic participation, the right to self-determination shall be exercised in a way compatible with the territorial integrity and sovereignty of the State.<sup>82</sup>

The Canadian Supreme Court accepted in the Quebec Reference that remedial self-determination may exist in certain circumstances, namely “possibly where a ‘people’ is denied any meaningful exercise of its right to

<sup>79</sup> The British Government stated that the exercise of a right of self-determination has to respect the principle of territorial integrity, see J. Crawford, *id.*, 410.

<sup>80</sup> Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 11 January 1992, 92 *International Law Reports* (1992), 167, 168.

<sup>81</sup> Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. I, 17, available at [http://www.ceiig.ch/pdf/IIFMCG\\_Volume\\_I.pdf](http://www.ceiig.ch/pdf/IIFMCG_Volume_I.pdf) (last visited 5 August 2010).

<sup>82</sup> Katangese Peoples’ Congress v. Zaire, African Comm. On Human and Peoples’ Rights, Comm. No 75/92 (1995), para. 6.

self-determination within the State of which it forms part”<sup>83</sup>. At the same time, the Court emphasized that “it remains unclear whether [...] this proposition [on remedial secession] reflects an established international law standard”<sup>84</sup>.

The ICJ could have used the Advisory Proceeding in order to provide for clarification. The States involved in the proceedings took different positions. Some denied both, the application of the right of self-determination<sup>85</sup> outside the colonial context, and the existence of remedial secession; some States recognized remedial secession in the present case, whereas others accepted the existence of remedial secession but declined that this right grants the population of Kosovo a right to secede under the given circumstances.<sup>86</sup> However, the States which appeared before the Court

<sup>83</sup> Reference Re Secession of Quebec 2 S.C.R. (1998) 217, printed in 115 *International Law Reports* (1999), 536.

<sup>84</sup> *Id.*, 587.

<sup>85</sup> Bolivia: “The principle of self-determination is restricted solely to the circumstances only to peoples under colonial rule and foreign occupation”, CR 2009/28, 11 (*Calzadilla Sarmiento*); China CR 2009/29, 34 (*Xu*); see also Burundi, CR 2009, 35 (translation) (*d’Aspremont*).

<sup>86</sup> In favor of such a right Finland: “In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State”, CR 2009/30, 64 (*Koskenniemi*); Jordan, CR 2009/31, 37 (*Al Hussein*); UK CR 2009/32, 54 (*Crawford*); Albania: “In essence, this argument says that even if the policies and events of the period from 1989 through 1999 were a violation of equal rights and self-determination, that all this should be set aside and that the present Serbian Government is ready to reinstate the autonomous status of the province within Serbia and that therefore there is no right for Kosovo to determine its future as an independent State [...] is an absurd and totally misconstrued reading of the right of self-determination”, CR 2009/26, 22 (*Frowein*); Germany, CR 2009/26, 30 (*Wasum-Rainer*); Netherlands: “The resort to external self-determination is a last resort and it is subject to conditions. [...] A right to external self-determination only arises in the event of a serious breach of either: the obligation to respect and promote the right to self-determination due to the absence of a government representing the whole people belonging to the territory, or the denial of fundamental human rights to a people; or – the obligation to refrain from any forcible action which deprives people of this right. [...]. [T]hese violations are at the root of our view that the people of Kosovo are, as a people, entitled to external self-determination”, CR 2009/32, 9, 14 (*Lijnzaad*). Following States argued that Kosovo - in case that a right of remedial secession exists - cannot invoke such a right: Russia: “For Kosovo to be able to rely on ‘remedial secession’ in 2008, it has to demonstrate that the situation had aggravated as compared to 1999”, CR 2009/30, 44 (*Gevorgian*); Romania, CR 2009/32, 26 (*Aurescu*): “In our

failed to establish consistent criteria for exercising remedial secession. Among those who in principle considered remedial secession lawful, it was unclear at which point in time human rights violations, which may entitle an entity to remedial secession, must exist. Is there a right to remedial secession only when the entity is subject to gross human rights violations at the time? Or would it be sufficient that these violations lie in the past and render it impossible for an entity to remain part of the oppressive State? If we accept the latter solution, we will have to prove that the process of reintegration really failed. In the case that 20 years or more pass between human rights violations and the secession and the violator State undertakes serious efforts in terms of providing meaningful political solutions while taking into account the interests of the victims, it does not seem very plausible to explain the fact of remedial secession only by relying on those past violations. However, such an assessment would be highly circumstance-dependent. In addition, it should also be asked whether it is necessary for the respective entity to be placed under international auspices, like Kosovo, to be in a position to successfully resort to remedial secession as the last possible means towards survival. Or is it sufficient to establish the fact of gross human rights violations and the fact of consistent and organized resistance taking place within a relatively short period of time, like it happened in Chechnya, to conclude that the non-State entity which is a victim of the State's oppressive machine has no other remedy to survive than the secession?

The case of Georgia indicates that secession is disfavored by the international community when there is no real international framework within which the conflicting parties undertake serious attempts to find a political solution respecting the territorial integrity of the State from which secession is sought.<sup>86</sup> It must be emphasized in this context that an

opinion, an analysis based solely on facts which occurred almost a decade before the critical date, in fundamentally different circumstances, represents a completely artificial construction which is not acceptable. Such a construction would contravene the general legal principle of *tempus regit actum*”, at 23, 25; Venezuela, CR 2009/33, 8 (*Fleming*).

Against such a right: Azerbaijan, CR 2009/27, 18, 40 (*Mehdiyev*); China, CR 2009/29, 35 (*Xu*); Cyprus, CR 2009/29, 47 (*Lowe*); Argentina, CR 2009/26, 41 (*Escobar Hernández*); According to Spain, even if on recognize such right, it would not be applicable since the human rights violations lie in the past before 1999, CR 2009/30 (translation), 12 (*Escobar Hernández*); Vietnam, CR 2009/33, 20 (*Nguyen Anh*).

<sup>86</sup> “It was principally Russia that had precluded the establishment of an agreement providing for the full inclusion of Abkhazia and South Ossetia within the Georgian political system. Georgia had offered detailed provisions on representation for both

international framework may confer some legitimacy but does not constitute sufficient criteria for triggering remedial secession.

As has been argued before the Court, an explicit recognition of secession as a remedy of last resort could deter States from violating human rights, and peoples from too readily seeking to avail themselves of this remedy.<sup>87</sup> Taking into account the controversies surrounding the concept of remedial secession, it would have been a difficult task for the Court to identify a proper threshold for triggering the application of remedial secession in international law.

## II. Security Council Resolution 1244 (1999)

The Court then addressed the question whether the UDI is in conformity with Security Council Resolution 1244, and whether there is a violation of the constitutional framework based on it. In this regard, the following questions are most relevant: Is the Constitutional framework promulgated under Resolution 1244 to be considered as domestic law (which means: not in reach of the ICJ) or as international law? Does Resolution 1244 determine Kosovo's final status? Who are the authors of the UDI and are they bound by Resolution 1244? Does the UDI violate Resolution 1244? Does Resolution 1244 prohibit a secession of Kosovo?

### 1. Who are the Authors? Testing the *ultra vires* Argument

Serbia argued that the authors of the UDI acted in their capacity as part of the Provisional Self-Government of Kosovo and were therefore bound by Resolution 1244. This would also mean that they were not allowed to issue the UDI, since Resolution 1244 stressed that the territorial integrity of the Federal Republic of Yugoslavia must be respected.

The Legal office of UNMIK claimed, in a memorandum on the exercise of powers by the provisional authorities within the framework of Resolution 1244 in 2001, that it was not in the competence of the Assembly of Kosovo to adopt acts determinative of the province's final status. Accordingly, in such situation the Special Representative of the Secretary General (SRSG) would be obliged to block such an initiative.<sup>88</sup> Considering

territories by way of wide-ranging autonomy", M. Weller, *Contested Statehood*, (2009), 274.

<sup>87</sup> CR 2009/32, 16 (*Lijnzaad*).

<sup>88</sup> UNMIK Legal Office 25 May 2001, UNMIK/FR/0040/01, available at [www.unmikonline.org/pub/features/fr040.html](http://www.unmikonline.org/pub/features/fr040.html) (last visited 5 August 2010).

this position, it becomes obvious why the question of the identity of the authors can be of decisive character. The statement of the year 2001 at least implies that Resolution 1244 excludes any unilateral attempt of the Assembly or other organs of the Provisional Institutions to issue a UDI.

The Court followed the argumentation of Kosovo that the authors did not see themselves as part of the provisional government and act therefore in a private capacity or respectively as “democratically-elected leaders”.<sup>90</sup>

The question in which capacity the authors acted has been one of the most debated issues in the proceedings. Therefore one may have doubts whether the Court’s meager reasoning is fully convincing. It appears strange, or, as Judge Tomka calls it, as “a *post hoc* intellectual construct”<sup>91</sup> that the representatives of the Self-Government Institutions and the authors of the UDI are partially the same persons, meeting in the official building of the Self-Government, but acting in a different capacity.<sup>92</sup> As Serbia and other States pointed out, many of the States had considered (and welcomed) the UDI as a declaration issued by the Self-Government of Kosovo.<sup>93</sup> The impression prevails that this “intellectual construct” is a balancing act, which only serves the proceedings before the ICJ.

<sup>90</sup> Kosovo-Opinion, *supra* note 1, 37-38, paras 105-107.

<sup>91</sup> See Tomka, *supra* note 20, para. 12.

<sup>92</sup> Due to the concept of role-splitting (*dédoulement fonctionnel*) it is conceivable that actors act in different capacities. However, it may be doubtful whether this concept is applicable to actors whose role on the international level is in question. For the concept, see G Scelle, *Précis de droit des gens – Principes et systématique, Tome I: Introduction – Le milieu intersocial* (1932), 43; A. Cassese, ‘Remark’s on Scelle’s Theory of “Role Splitting” (*Dédoulement Fonctionnel*) in International Law’, 1 *European Journal of International Law* (1990), 210; on different aspects of the applicability, see P. De Sena & M. Vitucci, ‘The European Courts and the Security Council: Between *Dédoulement Fonctionnel* and Balancing of Values’, 20 *European Journal of International Law* (2009) 1, 193; G. Nolte & H. Aust, ‘Equivocal Helpers—Complicit States, Mixed Messages and International Law’, 58 *International and Comparative Law Quarterly* (2009) 1, 1, 28.

<sup>93</sup> See the Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (28 March 2008) para. 3; Council of the European Union, Council Conclusions on Kosovo, 2851<sup>st</sup> External Relations Council Meeting, Brussels, 18 February 2008, available at: <http://www.auswaertigesamt.de/diplo/de/Europa/Suedosteuropa/Downloads-und-Dokumente/080218-Ratsschlussfolgerungen-Kosovo.pdf> (last visited 5 August 2010); for further references in regard to States which considered the Assembly of Kosovo as author of the UDI see Written Comments received within the time-limits fixed by the Court (17 July 2009) of Serbia, at 25, available at <http://www.icj-cij.org/docket/files/141/15686.pdf> (last visited 5 August 2010).

However, the question arises of whether this “construct” was really necessary. What would have happened if the Court found that the authors of the UDI acted *ultra vires* when issuing their declaration of independence? “The Declaration of Independence would have been *ultra vires* only in the same way that most declarations of independence are — as a contravention of the constitutional or other domestic law”, as Sean Murphy for Kosovo put it.<sup>94</sup> Furthermore, even if the Court would have reached the conclusion that the declaration has to be considered *ultra vires*, and that – contrary to Murphy – the constitutional framework is not only domestic law, it is highly questionable what the practical consequence would have been. The legal consequences of *ultra vires* acts are much debated<sup>95</sup>; from the ICJ jurisprudence one may refer to the IMCO-Advisory Opinion,<sup>96</sup> where the Court concluded that the Committee of the Inter-Governmental Maritime Consultative Organization (IMCO) was elected and composed incorrectly,<sup>97</sup> without drawing a conclusion with regard to legal consequences.<sup>98</sup> After the ICJ issued its IMCO-Opinion, the Assembly of the IMCO adopted and confirmed the measures that had been taken by the incorrectly constituted

<sup>94</sup> Kosovo, CR 2009/25, 63 (*Murphy*).

<sup>95</sup> Some writers argue that an act in international law is either valid or null (see *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Separate Opinion Judge Morelli, 222, who refers to acts of international organizations). A possible alternative consist in a clear-error-doctrine, according to which only clear errors would lead to nullity, Separate Opinion Fitzmaurice, 205). Others want to break the strong dichotomy between valid and void by introducing a third category (see Jennings, who differentiates between “absolute nullity”, “nullity in the sense of voidability” and “validity”, R. Y. Jennings, ‘Nullity and Effectiveness in International Law’, in: *Cambridge Essays in International Law: Essay in Honour of Lord McNair* (1965), 64-68; with regard to legal consequences of *ultra vires*, see also A. Paulus, ‘Kompetenzüberschreitende Akte von Organen der Europäischen Union- die Sicht des Völkerrechts’, in: B. Simma/C. Schulte (eds) *Völker- und Europarecht in der aktuellen Diskussion* (1999), 49.

<sup>96</sup> *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960, 150

<sup>97</sup> *Id.*, 170.

<sup>98</sup> The differentiation drawn by Osieke between procedural and substantive *ultra-vires* acts makes no difference in our case, E. Osieke, ‘The Legal Validity of Ultra Vires Decisions of International Organizations’, 77 *American Journal of International Law* (1983), 239, 244; see also B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates* (1996), 121-122.

Committee before its dissolution.<sup>99</sup> Among scholars it is disputed whether the IMCO Assembly considered the Committee's decisions null and therefore made the same decisions, or whether the former decisions remained legally binding and therefore had to be confirmed by the Assembly.<sup>100</sup> In the case of Kosovo, this would mean that it is doubtful whether a conclusion according to which the authors of the UDI acted *ultra vires* would lead to nullity of the declaration of independence.<sup>101</sup> It would be up to the actors to decide what the consequences of such *ultra vires* act are. In the present case the actors are the SRSG<sup>102</sup>, the Security Council, and the UN member States in general. They would have to act if they considered a possible *ultra vires* act null.<sup>103</sup> The silence of the SRSG after February 2008 allows two conclusions: either he did not consider the UDI issued by the Assembly as designed to take effect within the legal order for the supervision of which he was responsible,<sup>104</sup> or he did not want to declare the UDI null because of the changed factual circumstances on the ground. At any rate, this could hardly be seen as a *legal* justification for the SRSG's inaction.<sup>105</sup>

## 2. Compatibility of the UDI With Security Council Resolution 1244?

The ICJ argued that Resolution 1244 did not envision a specific solution. The Court noted that by virtue of Resolution 1244 the Security Council established a temporary legal regime, which aimed at the

<sup>99</sup> IMCO Res. A.21 II (April 1961), see also E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in *Cambridge Essays in international law: Essay in Honour of Lord McNair* (1965), 88, 102.

<sup>100</sup> Cf. M. Reisman & D. Pulkowski, 'Nullity in international law', *Max Planck Encyclopedia of Public International Law*, available at <http://www.mpepil.com> (last visited 5 August 2010), para. 21.

<sup>101</sup> See E. Osieke, *supra* note 97, 255, speaking of a general rule according to which invalidated acts are voidable rather than void *ab initio*.

<sup>102</sup> By virtue of paras 6, 19 of SC Res. 1244, 10 June 1999.

<sup>103</sup> Cf. the legal opinion of the UNMIK Legal office, *supra* note 88.

<sup>104</sup> Kosovo-Opinion, *supra* note 1, 39, para. 108.

<sup>105</sup> See the critique of Judge Tomka: "But the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions [...] remained the same in February 2008 as they were in 2005", *supra* note 20, 10.

stabilization of Kosovo.<sup>106</sup> Resolution 1244 was designed to create an interim régime for Kosovo<sup>107</sup> without “dealing with the final status of Kosovo or with the conditions for its achievement”<sup>108</sup>.

After having scrutinized Security Council Resolution 1244, the Court found that the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine the status of Kosovo.<sup>109</sup>

This passage contains two important assertions that are relevant to the question of compatibility of the UDI with Resolution 1244.

First, the Court elaborates on the role of the Security Council in the process of determining Kosovo’s final status, a specific view of which the Council did not present. It emphasized that the territorial integrity of the Federal Republic of Yugoslavia must be respected but the Council’s language was not as explicit and unambiguous as, for example, in its Cyprus Resolution 1251 where the Security Council left no doubt that a final solution should be a State of Cyprus.<sup>110</sup>

Serbia asserted that a UDI without endorsement of the Security Council contradicts its central role with regard to the maintenance of peace and security. Accepting the declaration’s legality would “fundamentally challenge the very foundations of the system of collective security set up by the Charter”.<sup>111</sup> The ICJ, however, rejected this argument and came to the

<sup>106</sup> Kosovo-Opinion, *supra* note 1, 36, para. 100.

<sup>107</sup> *Id.*, 40, para. 114.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*, 40, para. 114.

<sup>110</sup> SC Res. 1251, 29 June 1999, para. 11: “Reaffirms its position that a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation”.

<sup>111</sup> See Serbia, CR 2009/24, 62 (*Zimmermann*). This view was not shared by all States that found the UDI incompatible with Resolution 1244. Cyprus for instance explicitly stated, that the Security Council “does not have the power to amputate parts of the territory of a State without its consent” (see Cyprus, CR 2009/29, 38 (and 44) (*Lowe*)). A unilateral declaration would therefore under no circumstances - even under endorsement of the Security Council - be lawful. Consequently, from the perspective

conclusion that the participation or blessing of the Security Council was not mandatory with regard to the determination of the political status of Kosovo. It is open to question as to how far this proposition deviates from the initial logic of the Security Council itself. Resolution 1244 envisaged 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”<sup>111</sup>. Thus, the Security Council would have to endorse a solution in order to end the 1244-System. Some actors on the international level, for instance the European Union, gave the impression that they shared Serbia’s interpretation of the Security Council’s role. After the release of the Ahtisaari-proposal on Kosovo’s ‘conditional independence’, a Statement of the EU-Presidency was published on 26.3.2007, expressing aspirations “that the Security Council will live up to its responsibility and [...] endorse the proposal in a timely manner.”<sup>112</sup> This Statement may prove that the EU considered an endorsement by the Security Council necessary, at least in 2007. Russia furthermore pointed at the so-called “Guiding Principles of the Contact Group for a settlement of the status of Kosovo”, according to which the Security Council is supposed to have the last word.<sup>113</sup> The Guiding Principles may perhaps also serve as a documentation of a changed atmosphere, even before the Ahtisaari-Plan. Resolution 1244 only envisioned “substantial autonomy and meaningful self-determination of Kosovo“, whereas the Guiding Principles envision that the settlement of Kosovo’s status should “contribute to realize the European Perspective of Kosovo, in particular, Kosovo’s progress in the stabilization and association process, as well as the integration of the entire region in Euro-Atlantic institutions”<sup>114</sup>. This seems to be more than just “substantial

endorsement of the Security Council - be lawful. Consequently, from the perspective of Cyprus, the Security Council’s silence is irrelevant. According to Spain, the silence at least cannot be interpreted as acquiescence (see CR 2009/29, 46 (*Escobar Hernández*)). Russia stressed that the final settlement is to be negotiated between the parties and endorsed by the Security Council, CR 2009/30, 48 (*Gevorgian*), referring to the “Guiding principles of the Contact Group for a settlement of the status of Kosovo” in a “Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General” (S/2005/709) at page 2.

<sup>111</sup> SC Res. 1244, 10 June 1999, para. 19.

<sup>112</sup> [http://www.eu2007.de/en/News/CFSP\\_Statements/March/0326Kosovo.html](http://www.eu2007.de/en/News/CFSP_Statements/March/0326Kosovo.html) (last visited 5 August 2010).

<sup>113</sup> “Guiding principles of the Contact Group for a settlement of the status of Kosovo” in a “Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General” (S/2005/709) at page 2.

<sup>114</sup> Para. 2 of S/2005/709.

autonomy”<sup>116</sup> since it includes an international perspective for Kosovo. However, the Guiding Principles also state that “[a] negotiated solution should be an international priority [...] and the parties have to refrain from unilateral steps.”

Resolution 1244’s referral to the Rambouillet-Accords, which state that a solution of the status of Kosovo should also be based on the will of the people of Kosovo,<sup>117</sup> may indicate that the ongoing political process should be open to a wide range of solutions.

Second, the Court made a statement regarding whether a UDI violates the resolution. States offered various arguments that might lead to such a conclusion. First, Resolution 1244 calls for “a political settlement” or “a political solution”. These formulations may imply that both parties to the conflict are supposed to act together, finding a solution at terms on which both can agree, instead of trying to set up a final status unilaterally.

This argument asserted that Resolution 1244 excludes a possible secession of Kosovo by emphasizing the territorial integrity of the Federal Republic of Yugoslavia. Otherwise, the Security Council would have stated the possibility of secession explicitly as it did in Resolution 1246 on the situation in East Timor.<sup>118</sup> As convincing as this argument appears at first sight, one can also rely on Security Council Resolution 787 on Bosnia and Herzegovina<sup>119</sup> and argue on the other hand, that the Security Council would have explicitly stated so if it wanted to exclude the possibility of a

<sup>116</sup> C. Pippan, ‘Die Herausforderungen der ‘Kosovo-Frage’ für die Europäische Union vor dem Hintergrund des Statusprozesses’, in: Nolte/Hilpold (eds): *Auslandsinvestitionen- Entwicklung großer Kodifikationen- Fragmentierung des Völkerrechts-Status des Kosovos* (2009), 231, 244-246.

<sup>117</sup> [http://www.state.gov/www/regions/eur/ksvo\\_ambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html) (last visited 10 August 2010)

<sup>118</sup> SC Res. 1246, 11 June 1999, para. 1: “Decides to establish until 31 August 1999 the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation, scheduled for 8 August 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, *leading to East Timor’s separation from Indonesia*, in accordance with the General Agreement and to enable the Secretary-General to discharge his responsibility under paragraph 3 of the Security Agreement” (emphasis added).

<sup>119</sup> SC Res. 787, 16 November 1992, para. 3: “Strongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted”.

unilateral declaration of independence. It is therefore difficult to interpret the Council's silence in Resolution 1244 in the one or the other way.

### 3. Who is Addressed by the Legal Regime Based on Resolution 1244?

Even if Resolution 1244 does not preclude a declaration of independence, one could argue that the notion of a “political settlement” is binding also upon those “private individuals” who declared independence of Kosovo. This would mean that Resolution 1244 hinders them to act unilaterally without Serbia's consent. Serbia claimed that Resolution 1244 created a legal regime, which has to be considered as generally binding on all actors. Non-State-entities therefore must be bound; otherwise it would contravene object and purpose of Resolution 1244 if only States but not the actual parties to the conflict are addressed. If the UN administers a territory, everybody should be regarded as being addressed by Security Council resolutions. For Serbia, the resolution does not need to explicitly announce whether non-State-actors are bound. The 1244 Resolution's referral to Resolution 1203<sup>120</sup>, which includes non-State-entities, is sufficient to assume that the Security Council intended to address not only States.<sup>121</sup>

The ICJ found that “[t]he language of Security Council resolution 1244 (1999) is at best ambiguous in this regard”,<sup>122</sup> and concluded that it “did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence”.<sup>123</sup> Unfortunately, the Court did not address the argument put forward by Serbia, according to which Resolution 1244 recalls Resolution 1203<sup>124</sup> that addressed the Kosovo Albanian leadership. Serbia's argument appears convincing at least at first sight. However, to defend the Court's position one can invoke the Security Council's Resolutions 1203 and 1160. Resolution 1203 recalls in the beginning the Resolution 1160<sup>125</sup> which calls upon the Kosovo Albanian Leadership to

<sup>120</sup> Para. 4: “Demands also that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998)”.

<sup>121</sup> Serbia, CR 2009/24 45 (*Djerić*).

<sup>122</sup> Kosovo-Opinion, *supra* note 1, 42, para. 118.

<sup>123</sup> *Id.*, para. 119.

<sup>124</sup> SC Res. 1203, 24 October 1998.

<sup>125</sup> SC Res. 1160, 31 March 1998.

condemn terrorism,<sup>126</sup> and Resolution 1199 which also refers to Kosovo Albanian leadership<sup>127</sup>. Can we draw some conclusions from this practice of the Security Council? It must be emphasized that the Security Council first recalls Resolution 1160 in the beginning and then explicitly refers to it in the passage in which the Kosovo Albanian leadership is addressed. Does this mean that mere recalling of previous resolutions in the beginning of the respective document is not sufficient, and the Council has to address non-State-actors explicitly in the text of respective resolutions, together with recalling the previous ones? Against this background, Serbia's argument does not seem that convincing as on first sight.<sup>128</sup>

## E. Conclusion

The ICJ did not determine whether Kosovo is a State, whether the population in Kosovo is a people entitled to the right of self-determination, whether there is a right of remedial secession in contemporary international law, and what the relationship between territorial integrity and self-determination is. The Court only stated that the declaration was not in violation of international law. The Court leaves it to the States to decide the question of the recognition of unilateral declarations of independence (among other criteria, according to their policy interests).

The existing political realities do not relieve the Court of its primary responsibility to clarify the state of the law in its advisory opinion and to render an opinion which is of real assistance to the respective organs of the United Nations. It may be doubted whether the Court lived up to this task in the present case. The Court had the opportunity to comment broadly on contemporary questions central to international law which could serve as legal guidance in comparable situations. By remaining silent on these

<sup>126</sup> Para. 2: "Calls also upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only".

<sup>127</sup> SC Res. 1199, 23 September 1998, para. 1: "Demands that all parties, groups and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe".

<sup>128</sup> J. Frowein & N. Krisch, 'An introduction', in Simma, *supra* note 31, 701, 715-716, state that addressing non-state-actors can pose difficulties since "obligations are created for entities whose international legal personality is in doubt".

questions the Court implicitly showed how far away international law today is from a consensus with regard to secession and self-determination.

One may regret that the Court missed its chance to comment on the status of contemporary law. But on the other hand, it can also be argued that the narrow scope of the question did not allow the Court to go any further. We conclude that the question did not necessarily limit the Court's range of action. Although the conclusion of the Court is defensible, the way the Court got to it seems problematic. It would be too easy to lay blame on the question or on those who phrased it. With regard to the authors of the UDI, the General Assembly was, as shown above, very explicit. It was of no use though, since the Court went beyond the question's wording. At the same time, however, the Court unnecessarily limited the scope of the question by focusing only on prohibitive rules of international law.

Time will tell what the future implications of the ICJ's Kosovo Advisory Opinion will be. Counsel for Serbia, Zimmermann raised the concern that future UN-administration will be seen as "nothing but a road towards secession" in case that the Court would not declare the UDI illegal.<sup>129</sup> The authors of this article do not share these concerns. It is true that the ICJ's Opinion does not provide legal certainty in fields of secession or self-determination, especially in situations of international administrations where, under certain circumstances, these issues may become subject to discussions. Hence the Opinion lacks practical value. Secessionist movements may interpret the Court's Advisory Opinion as favorable to their aspirations; however, the Court's Opinion does not give them a legal tool to realize those aspirations. By narrowing its focus as described above, the Opinion itself remains unique and limited to the circumstances of the concrete case.

<sup>129</sup> "Indeed, one might wonder whether both, the relevant members of the Security Council, as well as the individual States concerned, would in the future accept such solutions, were the Court to tolerate that such United Nations-led administration is nothing but a road towards secession", CR 2009/24, 60 (Zimmermann).