

# The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question

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## I. Abstract

On 22 July 2010, the International Court of Justice (ICJ) issued the much-awaited opinion on Kosovo's declaration of independence. The general reaction to the opinion was mostly disappointment.

In fact, in 2008, the question referred by the United Nations General Assembly (UN GA) to the ICJ had the ingredients to pave the way for some of the most controversial questions of modern international law, *inter alia*, on the meaning of self-determination in the 21st century. Some hoped that the ICJ would decline jurisdiction for this case; others hoped to receive all-encompassing guidance on the many thorny subjects the question touched upon. The ICJ sought for a compromise, declaring that it had jurisdiction, but shied away from addressing the substance of the question. Acting in this manner, it appears doubtful as to whether the ICJ has measured up to its 'duty to cooperate' within the UN system. In fact, the line of arguments the ICJ presented is too shaky and as a consequence, status and function of the ICJ end up damaged from this proceeding. On the other hand, the ICJ deserves praise for having handled a thoroughly political issue with a great sense of responsibility. It is argued here, that notwithstanding all the ambiguities surrounding the distinction between the legal and the political, this distinction still matters – judges should not be asked to do the undone jobs of politicians.

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## II. Introduction

From the time the UN GA asked the ICJ for an opinion on the ‘Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo’<sup>1</sup> it was clear that the final outcome would be of lasting importance.<sup>2</sup> While the first reaction to the Opinion published on 22 July 2010 was mostly characterized by disappointment, a more nuanced sight seems to prevail. This advisory procedure took place amidst highly politically sensitive surroundings<sup>3</sup> and it was to be expected that the ICJ would try hard to mediate between all the interests here at stake and look for a solution that would correspond best to the main aim of the United Nations as a whole, the preservation of peace. It was equally to be expected that the collective wisdom of the ICJ judges would succeed in this pursuit, at least with regard to the formal outcome. Reading the final product, one cannot help but feel that the substance of the outcome was clear at a very

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<sup>1</sup> See GA Res. 63/3 of 8 October 2008; For very thoughtful comprehensive commentaries to this case see also K. Oellers-Frahm, ‘Problematic Question or Problematic Answer? Observations on the International Court of Justice’s Advisory Opinion Concerning Kosovo’s Unilateral Declaration of Independence’, 53 *GYIL* (2010) 793-830 and A. Tancredi, ‘Il parere della Corte internazionale di giustizia sulla dichiarazione d’indipendenza del Kosovo’, 93 *Rivista di Diritto Internazionale* (2010) 994-1052.

See also P. Hilpold (ed.), *Das Kosovo-Gutachten des IGH vom 22. Juli 2010* (to be published 2012).

<sup>2</sup> The importance of this proceeding has been underscored by the fact that this was the first Advisory Opinion proceeding in which all the permanent members of the Security Council participated in both the written and oral proceeding. See S. Yee, ‘Note on the International Court of Justice (Part 4): The Kosovo Advisory Opinion’, 9 *Chinese JIL* (2010) 763-782, at 763.

<sup>3</sup> It would, of course, be naive to neatly distinguish between legal or technical issues, suitable for judicial clarification, on the one hand and political questions on the other. As has been shown by modern ‘critical’, ‘deconstructivist’ international law theory, the divide between the ‘legal’ and the ‘political’ may not be so neat as traditionally portrayed. What may seem to be ‘expert’ language and technical concepts at first sight, in reality often constitutes an ideological programme in disguise. See M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 *EJIL* (2009) 7-19. Nonetheless, this insight does not require to abandon the respective distinction altogether. In fact, in international politics there are many conflicts as to which there is either no consensual solution whatsoever in sight or in relation to which some concepts have devised which are simply covering the lack of consensus. With regard to the Kosovo conflict, such a situation is given in a very pronounced form, in particular, as we will see, concerning the right to self-determination.

early stage while the main endeavour of the majority had been to find a solid argumentation to justify this result. The majority to reach this end was achieved, but for many on the bench the price for this was high, perhaps even too high. A rather high number of declarations, separate opinions and dissenting opinions gave voice to their objections.<sup>4</sup>

We have to ask whether the distinction between technical or strictly legal disputes on the one hand, and political ones, on the other hand, has really become obsolete, and whether the ICJ should become the deputy arbiter of all conflicts the political organs, though responsible for the respective subject in the first place, are unable to solve.

Does the ICJ really serve the interests of the UN when it tries to give an answer to every question, even at the cost of having to re-qualify established legal concepts and taking recourse to a line of argumentation that is by no means convincing? Does it thereby enhance its legitimacy<sup>5</sup> and ultimately its effectiveness?<sup>6</sup>

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<sup>4</sup> The Court was of the opinion that the declaration of independence of Kosovo did not violate international law by a majority of ten votes to four. Dissenting opinions were given by Abdul G. Koroma, Mohamed Bennouna and Leonid Skotikov; separate opinions were given by Sir Kenneth Keith, Bernardo Sepúlveda Amor, Antônio Augusto Cançado Trindade and Adulqawi Yusuf and declarations were released by Vice-President Peter Tomka and Bruno Simma.

<sup>5</sup> It has been said that  
[a]n institution is legitimate in the *normative* sense if it has the right to rule - where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to non-compliance and/or benefits to compliance. An institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule.

See A. Buchanan/R.O. Keohane, 'The legitimacy of Global Governance Institutions', in L.H. Meyer (ed.), *Legitimacy, Justice and Public International Law* (2009) 29-57, at 29. See also J.L. Claude, 'Collective Legitimacy as a Political Function of the United Nations', 20 *International Organisation* (1966) 367-379 and S. Wittich, 'The Judicial Functions of the International Court of Justice', in I. Buffard *et al.* (eds.), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (2008) 981-1001. Wittich refers to the legitimizing function of proceedings with reference, *i.a.*, to N. Luhmann, *Legitimität durch Verfahren* (1978).

<sup>6</sup> The quest for legitimacy for international norms is, ultimately, an attempt to provide efficacy to these norms. See the Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004) para. 204:

The effectiveness of the global security system, as with any other legal order, depends ultimately not only on the legality of decisions but also

It will be tried to determine whether the lasting achievements brought about by this Opinion can be found in the substance of what it actually says concerning the practical problems it was confronted with or rather in the role of the advisory function and the many uncertainties associated with it.

### III. The Lead-Up to the Opinion

#### A. From the Break-Up of Yugoslavia to Resolution 1244/1999

While the intricate history of Kosovo has already been examined in great detail in literature,<sup>7</sup> some salient developments leading to the ICJ's Kosovo Opinion shall nevertheless be mentioned here. This is even of more importance as history (or, respectively, the different historic tales of the various competing groups)<sup>8</sup> is of pivotal importance for understanding the conflict.

It is historical irony that for a long time, Yugoslavia was hailed as a success model for the integration of a large number of nationalities and minorities, often at conflict with each other in the past, in a federal multi-ethnic state. This internal policy was not only coherent with, but further strengthened by Yugoslavia's acting on the international scene. In fact, for many years Yugoslavia was a leading sponsor for the development and further diffusion of minority rights and standards.<sup>9</sup>

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on the common perception of their legitimacy - their being made on solid evidentiary grounds, and for the right reason, morally as well as legally.

<sup>7</sup> See, in particular, R.D. Kaplan, *Balkan Ghosts: A Journey Through History* (1993), N. Malcolm, *A Short History of Kosovo* (1998) and, most recently, M. Weller, *Contested Statehood* (2009). P. Hilpold, 'Das Kosovo-Problem - ein Testfall für das Völkerrecht', 68 *ZaöRV* (2008) 779-801.

<sup>8</sup> On the subjectivity of these tales and on the problems they can generate on the practical level for the solution of actual problems see E. Marko-Stöckl, 'My Truth, Your Truth - Our Truth?: The Role of History Teaching and Truth Commissions for Reconciliation in the Former Yugoslavia', 7 *European Yearbook of Minority Issues* (2010) 327-352. See also C. Warbrick, 'Kosovo: The Declaration of Independence', 57 *ICLQ* (2008) 675-690, at 675, who aptly remarked that '[i]t is true for many international disputes that where one stands today depends from where one starts'.

<sup>9</sup> In this context it shall be remembered, *i.a.*, that the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992, at present one of the most important international documents for the definition of minority standards, was mainly sponsored,

In the complex system of power-sharing and balancing of interests that made up the Yugoslav constitutional system, a compromise was found also for Kosovo, a territory considered by Serbs to be the primary source of their origin as a nation even though in the meantime its population had become Albanian in its majority. In 1974, it became – alongside of Vojvodina – an autonomous province; enough to provide extensive protection to the Albanian majority, but less than the status of a republic that could have fueled secessionist tendencies.

At the time of Yugoslavia's break-up, both on the international level and the national level, this compromise was all but forgotten. In 1991, the Badinter Commission provided guidance to the European Community as to how to handle the unexpected and extremely dangerous situation. The Balkans adopted an innovative approach when recourse was taken to the *uti possidetis* principle<sup>10</sup> in handling a process of state dismemberment in Europe. It proved, however, to be very restrictive and conservative when it held only former republics eligible for autonomous statehood while totally ignoring the fate of the former provinces which were part of the same constitutional compromise. Neither could it be expected that Serbia-Montenegro step in to fulfill these obligations. In fact, this state was not only denied the quality of a successor to Yugoslavia on the level of international law,<sup>11</sup> but it behaved also on the political level in a completely

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at least in the earlier phase of its elaboration, by the Yugoslav government. See F. Ermacora, 'Späte Einsichten – Der Entwurf der UN-Erklärung zum Minderheitenschutz', 40 Vereinte Nationen (1992) 149-153 and P. Hilpold, 'Minderheitenschutz im Rahmen der Vereinten Nationen – Die Deklaration vom 18. Dezember 1992', 4 Schweizerische Zeitschrift für internationales und europäisches Recht (1994) 31-54.

<sup>10</sup> For a critical analysis of this approach see, *i.a.*, P. Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission', 24 Melbourne University Law Review (2000) 50-76 and S. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', 90 AJIL (1996) 590-624, at 613 *et seq.*

<sup>11</sup> The legal qualification of rump Yugoslavia (or, respectively, of Serbia and Montenegro) has been contested for a rather long period. While this entity first claimed to be the sole legal successor to the Socialist Federal Republic of Yugoslavia, this aspiration was contested both by the other former republics as by a great part of the State Community. Considering the break-up of Yugoslavia as a dismemberment, the Badinter Commission qualified the resulting new states as partially identical with the Socialist Federal Republic of Yugoslavia (SFRY). As a consequence, the FRY could not automatically continue the SFRY's UN membership. The FRY was constituted in 1992 but was admitted to the UN and generally recognized under this name only in 2000, while in the past several states continued to address this entity as 'Serbia and Montenegro'. In 2003, a new

different manner compared to Tito's consociationalist approach. Serbia's president, Slobodan Milošević, did not look for reconciliation but played the nationalist card, pitting each group against each other. In this policy of ethnic entrepreneurship the Albanian majority in Kosovo became the scapegoat for the failed attempt to create an ethnically homogenous Greater Serbia or a Serb-dominated rump Yugoslavia. The autonomous status had already been withdrawn in 1989. Soon after the dissolution of Yugoslavia, a harsh repression policy set in, with the international community standing at the sidelines in the first years. At the London Conference on Yugoslavia in August 1992, the Kosovo question was treated as a minority problem, while the sovereignty of Serbia over this territory remained undisputed. In the end, Belgrade was not even prepared to grant minority rights but the international community remained mostly inactive as its attention was fully caught by the ongoing bloodshed in neighbouring Bosnia. The Bosnian conflict could only be stopped with the Dayton Peace Conference of 1995 where the hopes of the Albanian Kosovars for a substantial autonomy were, however, disregarded. As a consequence, the conflict in Kosovo, after 1995, radicalized with the Kosovar Liberation Army (KLA) now opposing armed resistance to repression by the Serb armed forces. The escalating violence drew ever more international attention to Kosovo. Diplomatic interventions were undertaken by states, groups of states<sup>12</sup> and International Organizations.<sup>13</sup>

The results of these endeavours were first the Holbrooke-Milošević Agreement of 13 October 1998, and finally the Rambouillet Agreement of 6 February 1999, a last minute attempt to avoid the use of international force in a situation that was characterized by rampant violence provoked – at least in the prevailing perception in Western countries – primarily by Serb forces.<sup>14</sup> These agreements, and in particular the latter, should have led to

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constitutional reform took place, according to which the FRY was transformed into a State Union between Serbia and Montenegro. In 2006, this union finally split up and both states became sovereign. As the single steps of this process were not qualified uniformly on the international level the terms 'FRY' and 'Serbia and Montenegro' shall be used interchangeably for this period.

<sup>12</sup> In this context, the so-called Contact Group consisting of the US, Russia, France, Great Britain, Germany and Italy has to be mentioned first.

<sup>13</sup> The UN, the OSCE and the EU were simultaneously active in the region.

<sup>14</sup> The commitment of crimes against humanity, violations of the laws or customs of war, deportation, forcible transfer and persecution on ethnic grounds by the Yugoslav army and Serbian MUP forces between 1 January and 20 June 1999 in Kosovo was later confirmed in the Milutinović judgment by the ICTY's Trial Chamber. See *Prosecutor v. Milan Milutinović and others*, Judgment, Case No.

a far-reaching compromise: On the one hand, Kosovo was to be granted extensive autonomy, on the other hand, Serbia was to maintain sovereignty over this province. Beyond this formal title, the remaining Serb competences for this province were to remain rather limited, circumscribed as they were to the subjects of defense, currency, taxation and economic policy. Extensive provisions on human rights and minority protection were to provide the basis for a politically stable society. Internal security was to be guaranteed by communal police forces and by KFOR, an international unit led by NATO forces. This restriction of sovereignty was too extensive for Serbia. While also the Albanian side was not satisfied with the Rambouillet Agreement, as their objective was to obtain sovereign control over this province, in the end it was the Serb side that provoked the failure of the negotiations.<sup>15</sup>

The patience of Western countries was exhausted and on 24 March 1999, NATO launched an air campaign against the Former Republic of Yugoslavia. This 78 day attack ended with the total defeat of the Serb troops and their retreat on 10 June 1999. This intervention posed a challenge to international law practice and thinking that is still largely unresolved. Although rarely addressed under this perspective, this problem also looms large behind any present attempts to assess the Kosovo question in a comprehensive way. While the prevailing opinion in international law sees NATO intervention of 1999 as illegal,<sup>16</sup> the part of those considering these military measures

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IT-05-87-T, Trial Chamber, 26 February 2009, paras. 475, 788, 930, 1138, to which both the Austrian Statement in the Kosovo proceeding of 16 April 2009 as well as the UK Statement of 17 April 2009 refer.

<sup>15</sup> This seems at least to be the prevailing view among political and legal analysts in Western countries. See, for example, M. Weller, *Contested Statehood* (2009) 150 *et seq.* At the same time it has, however, to be warned against an all-too easy final judgment on these highly intricate events. There are many elements that justify the qualification of Serbia as the main culprit for the failure of these negotiations, firstly, Slobodan Milošević's record as an unreliable negotiator, his nationalist propaganda and his clear policy to discriminate the Albanian population of Kosovo and to drive them out of the country. The massacre committed by Serb troops on Albanian civilians in the town of Racak on 15 January 1999 was another incident that seemed to leave no other option than the recourse to force. On the other hand, it is also true that the Rambouillet Agreement was extremely onerous for Serbia and it is open to discussion whether more moderate obligations could have also done the job to provide for an effective autonomy while paying more deference to Serbia's sovereignty.

<sup>16</sup> Whether this attack was permitted by international law, was (and is) hotly debated in literature. For an analysis stating that this attack was committed in violation of international law see P. Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001) 437-467. For a critical

morally justified, if not outright a humanitarian necessity, is also very large. We are confronted here with the awkward situation where a violation of international law is considered to be useful and necessary while at the same time no need, and actually no possibility, is seen to change positive law.<sup>17</sup> It is striking that under those states that assert the illegality of NATO intervention the Former Republic of Yugoslavia or, respectively, Serbia, stands in the forefront. This state has gone to great lengths to have the responsibility of the intervening NATO countries be officially recognized. The first initiative to this end was an action brought against ten NATO countries (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain and the USA) on 29 April 1999, and therefore still during the ongoing NATO air raid, asserting the violation of an array of international obligations (use of force, prohibition of intervention, the fundamental principles of humanitarian law as well as the Genocide Convention).

The ICJ was however able, on formal grounds, to avoid a pronouncement on the merits. In fact, the Former Republic of Yugoslavia (FRY) was denied the status of a successor to the former Socialist Federal Republic of Yugoslavia and therefore this newly created state, not yet being a member of the United Nations and neither being a party to the ICJ statute, had no legitimacy to act.<sup>18</sup>

It can only be speculated what the content and the consequences of a judgment could have been. In any case the ICJ would have been faced with

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stance towards this intervention see also B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 EJIL (1999) 1-22.

<sup>17</sup> It shall not go unmentioned that there have been various attempts to argue in the sense that the 1999 intervention could be the first step towards the formation of a customary law permission of humanitarian interventions. See in this sense A. Cassese, 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 EJIL (1999) 23-30; *contra*: P. Hilpold, 'Humanitarian Intervention: Is there a Need for a Legal. Reappraisal?', 12 EJIL (2001) 437-467. Neither does the newborn concept of 'R2P' (responsibility to protect) bring about significant change in this respect. See in this regard P. Hilpold, 'The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?', 10 Max Planck Yearbook of United Nations Law (2006) 35-69; *id.*, 'From Humanitarian Intervention to R2P: Making Utopia True?', in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma* (2011) 462-476 and C. Focarelli, *La dottrina della « responsabilità di proteggere » e l'intervento umanitario*, 91 *Rivista di Diritto Internazionale* (2008) 317-346.

<sup>18</sup> See *Legality of Use of Force*, Judgment of 15 December 2004, 2004 ICJ Rep., para. 91.

a formidable challenge as, whatever stance taken, the consequences could have been disruptive: It neither seemed feasible to hold three permanent members of the Security Council liable for such serious violations as spelled out in the action by the FRY nor did it seem desirable to officially recognize the only possible cause of justification available at the abstract level: the legitimacy of humanitarian intervention.

The next step was the request for the Advisory Opinion in 2008. However, as argued here, the content of the Opinion finally delivered by the ICJ has to again be read against this background.

Depending on how far the ICJ was prepared to go in unearthing the root causes of the legal questions asked, it could not be ruled out that the Court would have to address the 1999 intervention as well. For the same reasons as in the judgment on the *Legality of the Use of Force* of 2004, the ICJ had, however, every reason to avoid this discussion and, if possible, already at a very early stage.

As to the way the UN institutions addressed the Kosovo question, the period between March 1999 and July 2010 seems to be a subsequence of bouts of remembrance and amnesia, of a strong commitment to address the challenging events, and of the desire to overcome them by ignoring their basic traits. Already Security Council (SC) Resolution 1244 of 1999 bears witness to this attitude by the UN.

With this resolution a new period began. The SC, confronted with a situation that was extremely complicated both in political and in legal terms, and internally deeply divided, took a very pragmatic stance. It ignored the past that brought about the situation and concentrated instead on the present need to restore peace and a working administration, intended to lay the basis for an agreed solution on the final status of Kosovo.<sup>19</sup> The result was a complicated framework, subjecting Kosovo to international control and administration via a military (KFOR) and a civil (UNMIK) unit. This framework constitutes a unique endeavour, possible only because all parties agreed that a final solution would be a consensual one.

## B. Security Council Resolution 1244/1999 and the Resulting *sui generis* Status of Kosovo

For the immediate situation, the status created by SC Resolution 1244/1999 for Kosovo was the most appropriate and probably the only workable solution. It seemed to cater to all interests: On the one hand, the foundations for

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<sup>19</sup> See SC Res. 1244/1999, Ann. 2, n. 5.

a complex autonomy regime restoring the rule of law was laid, on the other hand, the FRY's sovereign right over this territory was clearly confirmed.<sup>20</sup>

At the same time, this solution was static; it contained no real option for future changes. Any hope that the postponement of a decision on the final status through the adoption of a vague 'formula compromise'<sup>21</sup> would bring about a legal solution in due time by the factual course of the events<sup>22</sup> was finally disappointed.

In fact, every time it was tried to address the question of Kosovo's final status, the unresolved questions of 1999 resurfaced.

With the positions between the various international stakeholders deeply entrenched, no consensual solution and no solution respecting all the parameters of 1999 could be brought about.

Over the years the suspicion grew that the Kosovo status process would become a road to nowhere. First, the formula 'standards before status' was coined, thereby meaning that priority should be given to the imposition of the rule of law. Afterward, a mature and self-sustaining Kosovar society could, so it was hoped, take over the status process autonomously. While the final decision was still up to the Security Council, it seemed reasonable to expect that this body would not oppose a solution based on an agreement by the involved communities. As known, this process did not take place. The administrative institutions created by UNMIK, their activities as well as their exemption from local legal control were subject to intense criticism.<sup>23</sup> KFOR proved not to be able to protect the most vulnerable groups such as the so-called RAE minorities (Roma, Ashkali and the 'Egyptians').

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<sup>20</sup> See, for example, the preambular provision '[r]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2'; para. 5 where reference is made to an agreement with Yugoslavia allowing for international civil and security presences in Kosovo (and thereby confirming Yugoslavia's title for this territory); para. 10 where it is confirmed that Kosovo's autonomy shall be established within the FRY and Ann. 1 where the political process leading towards the establishment of an autonomous interim political framework agreement is set under the condition that 'the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia' has to be respected.

<sup>21</sup> This is to refer to Carl Schmidt's concept of the 'dilatorischer Formelkompromiss'.

<sup>22</sup> This is to refer to Georg Jellinek's theory of the 'normative Kraft des Faktischen'.

<sup>23</sup> See R. Everly, 'Reviewing Governmental Acts of the United Nations in Kosovo', 8 German Law Journal (2007) 21-38, at 22 and P. Hilpold, *Das Kosovo-Problem – Ein Testfall für das Völkerrecht* (2008) 789 *et seq.*

If 'standards before status' should have led to an 'earned sovereignty',<sup>24</sup> the implementation process of these standards did not demonstrate that Kosovo deserved sovereignty or could make use of it in a responsible way. In a comprehensive review,<sup>25</sup> UN Special Envoy Kai Eide came to mixed results as to the political process underway in Kosovo: There were both positive and negative signals but on a whole he came to the conclusion that the status process should no longer be halted.<sup>26</sup> The slogan advanced to 'standards and status'. The idea behind this new approach was that the concrete perspective of sovereignty would responsabilize the stakeholders and take pressure from international institutions present in Kosovo which had so far shouldered administrative and financial burdens not manageable on the long run. While the 'standards before status' approach was fully deferential to the philosophy of SC Resolution 1244/1999 and in particular to Serbia's sovereignty claims over Kosovo, 'standards and status' introduced a note of uncertainty in this regard as it hinted, at least indirectly, at the paramount importance of a definite status solution. The language of the report made it clear that the state community had to go ahead even if no unanimous solution could be found. The SC decided promptly to heed the Special Envoy's advice and proceeded further.<sup>27</sup> On 10 November 2005, Martti Ahtisaari was nominated as the Special Envoy for the future status of Kosovo. Still in November 2005 the Contact Group issued a set of 'Guiding Principles' for the settlement of the status of Kosovo. These principles clearly set out that the status process had to be brought to a conclusion. At the same time, the ambiguities characterizing the handling of the Kosovo case since 1999 were fully reflected in this resolution. On the one hand, the Contact Group vowed to ensure 'that Kosovo does not return to the pre-March 1999 situation'.<sup>28</sup> At the same time, '[a]ny solution that is unilateral or results from the use of force would be unacceptable'.<sup>29</sup>

<sup>24</sup> See B. Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate', 16 EJIL (2005) 637-660, at 640.

<sup>25</sup> See 'A Comprehensive Review of the Situation in Kosovo', Annex to the letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635 (7 October 2005).

<sup>26</sup> 'There will not be any good moment for addressing Kosovo's future status. It will continue to be a highly sensitive political issue. Nevertheless, an overall assessment leads to the conclusion that the time has come to commence this process.' *Ibid.*, at 4.

<sup>27</sup> See UN Doc.S/PRST/2005/51 (24 October 2005).

<sup>28</sup> See principle no. 6.

<sup>29</sup> *Ibid.*

This meant that neither would Kosovo be handed back to Serbia nor was the 1999 NATO intervention to impinge on Serbia's territorial title over Kosovo. On the basis of these conditions, a solution for the final status of Kosovo, if possible at all, could not follow any traditional pattern known by international law. In the following months, Martti Ahtisaari conducted a series of talks, but in his final report on 15 March 2007 to the UN Secretary General,<sup>30</sup> he had come to the conclusion that a consensual solution was not achievable. In substance, he saw independence as the only possible way forward for Kosovo even though he did not dare to call the resulting entity a state.

In hindsight, it had become clear that the 'standards before status' approach, as promising it had appeared in the past, had failed and Martti Ahtisaari voiced open criticism in this regard:

Almost eight years have passed since the Security Council adopted resolution 1244 (1999) and Kosovo's current state of limbo cannot continue. Uncertainty over its future status have become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.<sup>31</sup>

As the conflict between the preservation of Serbia's sovereignty over Kosovo and the aim to guarantee this region a peaceful and prosperous future seemed to be irreconcilable, the Special Envoy decided to end ambiguous talk and to give preference to the latter goal. For Ahtisaari, reintegration of Kosovo into Serbia was not a viable option:

For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of

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<sup>30</sup> See UN Doc. S/2007/168 (26 March 2007).

<sup>31</sup> *Ibid.*, para. 4.

Kosovo within the borders of Serbia - however notional such autonomy may be - is simply not tenable.<sup>32</sup>

At the same time, the Special Envoy did not believe that a continuation of UNMIK administration would be sustainable. While initially this administration was a necessity, in the meantime it had become a liability as it blocked the development of a self-sustaining economy able to enter into international business relations.<sup>33</sup> For Ahtisaari, clarity and stability were essential preconditions for economic development and these elements could only be reached through independence.<sup>34</sup> Independence, in his opinion, was also a necessary precondition for the establishment of the rule of law:

Only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities. With continued political ambiguity, the peace and stability of Kosovo and the region remains at risk. Independence is the best safeguard against this risk. It is also the best chance for a sustainable long-term partnership between Kosovo and Serbia.<sup>35</sup>

He continued that the time had come to create an international legal entity that would be a state for anything but the name. At the same time, this entity would be subject to numerous restrictions and obligations (*i.a.*, extensive provisions on minority protection and power-sharing, prohibition to enter into a state union with neighbouring countries, continued international presence and engagement for the foreseeable future).

Ahtisaari tried hard to portray this status process and the entity that should result from it as *sui generis*: 'Kosovo is a unique case that demands a unique solution.'<sup>36</sup> It was not to give rise to precedential consequences, much feared in particular by multi-ethnic states. However, at the same time, the uniqueness of this case constituted a considerable drawback. Absent any international precedent that could be used as a yardstick for moral, if not political, coercion and absent also any consent by the decisive parties to the proposed solution (the Serb minority in Kosovo, Serbia in the immediate neighbourhood, and Russia in the Security Council), it was unclear how

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<sup>32</sup> *Ibid.*, para. 7.

<sup>33</sup> *Ibid.*, para. 8 *et seq.*

<sup>34</sup> *Ibid.*, para. 9.

<sup>35</sup> *Ibid.*, para. 10.

<sup>36</sup> *Ibid.*, para. 15.

Ahtisaari's plan could be made a reality. The justifications given by the Special Envoy for the proposed solution were rather of a pragmatic nature, even though Ahtisaari also tried to give them somewhat of a legal touch: the rather long time of international administration of Kosovo during which Serbia 'has not exercised any governing authority over Kosovo', the unacceptability of Kosovo's return to Serbia for 'the overwhelming majority of the people of Kosovo'<sup>37</sup> and the lack of other options such as the continuing international administration by UNMIK.<sup>38</sup>

In stricter legal terms, these arguments taken each for themselves and interpreted from a traditional international law perspective, provide no valid justification for a change of the sovereign title over Kosovo. It could be tried to argue that such a change has taken place through extinctive prescription. It is, however, not only doubtful whether such an institute exists at all in international law but the conditions generally required for its applicability most certainly do not apply in this case. In fact, it is usually held that prescription is closely interwoven with concepts like *estoppel* or *acquiescence*, thereby emphasizing *bona fides* and the consensual element.<sup>39</sup> Should the existence of such a concept be admitted at all, it is hard to see how it should apply with regard to Kosovo. Hence, in the present case, the sovereign title of Serbia (or respectively, the FRY) over Kosovo was explicitly recognized by the Security Council in 1999 and confirmed several times afterwards. Without such an assurance, Resolution 1244/1999 would not have been possible and the illegality of the NATO intervention would have laid bare to the eyes of the observer. It is open to discussion whether it would have been up to the Security Council to bring about such a change in title.<sup>40</sup> In any case, the Security Council did not approve the proposal and therefore it remained what it was: the recommendation of an expert,

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<sup>37</sup> *Ibid.*, para. 7.

<sup>38</sup> *Ibid.*, para. 8.

<sup>39</sup> On the concept of prescription see, *i.a.*, C.-A. Fleischhauer, 'Prescription', in EPIL, vol. III (1997) 1105-1108; I. Brownlie, *Principles of Public International Law* (2008) 146 *et seq.*; M. Shaw, *International Law* (2008) 504 *et seq.*

<sup>40</sup> Is the SC allowed to decide over larger border changes, to reappportion sovereign rights over whole regions and to create new states on the basis of its powers in the field of collective security? This is open to doubts and any such development, which has no explicit foundation in the UN Charter, would be tantamount to a further development of UN law bringing this organ close to the role of a world government with both legislative and executive powers.

On the limits of the Security Council's powers see, *i.a.*, K. Zemanek, 'Is the Security Council the Sole Judge of Own Legality?: A Re-Examination', in A. Reinisch *et al.* (eds.), *Liber Amicorum Hanspeter Neuhold* (2007) 483-505.

subject to further consideration. Furthermore, the behaviour of Serbia also does not permit to take recourse to this concept. In fact, Serbia has never shown any form of acquiescence toward proposals to change the territorial title over Kosovo, either directly or indirectly.

Next, it could be tried to justify the loss of Kosovo for Serbia as a sanction but it is hard to see how such a sanction can be reconciled with the rules on state responsibility as they can be found in the draft articles on state responsibility for internationally wrongful acts of 2001.<sup>41</sup> On a whole, it appears to be very difficult to justify the loss of Kosovo for Serbia on the basis of general international law as it is in force at present. Nor would it be possible to justify the loss of Kosovo as a sanction following Milošević's repressive policy. In fact, the law of state responsibility does not foresee similar sanctions.

The reference to the Kosovar people's will is highly interesting as well. Implicitly, the Special Envoy has thereby attributed extreme importance to the democratic legitimacy of any decision taken by the UN. Again, no basis can be found for such role of the people's will in SC Resolution 1244/1999. What Thomas Franck has prudently (and, for many, still much

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<sup>41</sup> See the Annex to UNGA Res. 56/83 (12 December 2001); Art. 31 of this draft requires, as a principle, full reparation for the injury caused. The PCIJ has interpreted this obligation in the *Factory at Chorzow* case (*Factory at Chorzów*, 1927 PCIJ (Ser. A) No. 9, at 47) in the sense that the responsible state must endeavour to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'. It is obvious that a change in the sovereign title over a territory where human rights abuses have been committed would neither constitute 'restitution' (Art. 35 of the Draft Articles 2001), nor 'compensation' (Art. 36), nor 'satisfaction' (Art. 37). It could also not be qualified as a preventive measure as such a change in title is generally considered to be definite. The law of state responsibility would need to be radically changed in order to accommodate such a rule. In particular, it would be necessary to strengthen the punitive element and furthermore it would be necessary to differentiate the sanctions according to the seriousness of the offence. The draft articles on state responsibility no longer foresee 'international crimes', a concept famously introduced by Roberto Ago in his draft of 1976. For the rest, it could be argued that the draft articles on state responsibility did not allow for such punitive measures and even when they refer to 'international crimes' as the additional consequences of 'serious breaches of community obligations' they did not go very much beyond those foreseen for 'delicts'. See J. Crawford/P. Bodeau/J. Peel, 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading', 94 AJIL (2000) 660-674. Crawford *et al.* refer in particular to former Art. 52 of the first-reading text which, in substance, made restitution in cases of serious breaches of community obligations compulsory, regardless of the consequences for the responsible state.

too euphorically) qualified as an 'emerging right to democratic governance'<sup>42</sup> here becomes a dominant rule, pre-conditioning the legitimacy of any final status decision. Arguably, this stance taken by the Special Envoy will further reinvigorate the position of those asserting the existence of a right to internal self-determination.<sup>43</sup> While there can be no doubt that the discussion about the right to self-determination will remain controversial,<sup>44</sup> Martti Ahtisaari is correct when he emphasizes the importance of consulting the people when transient societies are looking for a definite constitutional setting. In such cases, the right to internal self-determination has a strong basis in international law.<sup>45</sup> In the present context it was, however, rather difficult for the Special Envoy to assert this right if, as an explicit legal basis, he only had SC Resolution 1244/1999.

The rejection of the Ahtisaari plan by the SC demonstrates that this body intended to insist on the legal basis created in 1999, notwithstanding all its ambiguities.

As a consequence, the international community was faced with an extraordinary challenge. It took over a mission it could neither terminate nor continue. The birth defect of the SC, *i.e.*, its inability to act in any matter dividing East and West, has again come to bear, this time, however, in the exceptional situation when it was already seized with the matter. After the European Union, Russia and the USA admitted, on 10 December 2007, the failure of their negotiating attempts,<sup>46</sup> the only way to overcome this quagmire was through unilateral action. The basis for such an action had been prepared shortly before, by the election of an Kosovar Assembly on 17 November 2007, which held its inaugural session on 4 and 9 January 2008, a measure, as such, fully in line with the autonomous order created by SC Resolution 1244/1999. One of the first measures taken by this Assembly, or, as it was portrayed afterwards, by the members of this body in their

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<sup>42</sup> See T. Franck, 'The Emerging Right to Democratic Governance', 86 AJIL (1992) 46-91.

<sup>43</sup> See the masterly exposition by G.H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', 16 Michigan Journal of International Law (1995) 733-781.

<sup>44</sup> See P. Hilpold, 'Self-Determination in the 21st Century – Modern Perspectives for an Old Concept', 36 Israel Yearbook of Human Rights (2006) 247-288.

<sup>45</sup> See also P. Hilpold, 'Neue Perspektiven der Selbstbestimmung? Möglichkeiten und Grenzen der völkerrechtlichen Verselbständigung von Territorien in Europa', in P. Hilpold *et al.* (eds.), *Rechtsvergleichung an der Sprachgrenze* (2011) 157-196.

<sup>46</sup> This was the so-called 'Troika' which undertook negotiations from 9 August to 3 December 2007.

individual capacity, was the declaration of independence on 18 February 2008. For the Serb government, and for several other governments too, this measure was in violation of international law, the seriousness of this violation being further aggravated by a series of acts of recognition coming from different states.

The Serb government declared very swiftly that it would look to obtain an opinion by the ICJ on the issue.<sup>47</sup> An intense process of political bargaining on the UN level began. In view of the extremely sensitive interests at stake in regard to which a large number of states had a divided soul and where the traditional dividing lines between East and West and North and South had largely lost their importance, it was not clear on which side the majority would stand. Therefore, Serbia could not adopt an excessively offensive approach when drafting the question the GA was expected to present to the ICJ. Much of the blame casted later on Serbia is actually due to a misunderstanding of this particular challenge Serbia was faced with, namely to draft a text that would gather the largest possible support among UN member states and at the same time be the least possible offensive to their specific interests, prompting the ICJ to pronounce itself on a question that was of pivotal importance for a majority of them.

The respective text was filed by Serbia on 15 August 2008 in the GA and the relevant question was the following:

‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’<sup>48</sup>

<sup>47</sup> This plan was announced already on 26 March 2008.

<sup>48</sup> The whole text of Resolution went as follows:

*The General Assembly,*

*Mindful* of the purposes and principles of the United Nations,

*Bearing in mind* its functions and powers under the Charter of the United Nations,

*Recalling* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo decided independence from Serbia,

*Aware* that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,

*Decides*, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court to render an advisory opinion on the following question:

‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

The outcome of the voting of 8 October 2008 reveals that the reasoning by the Serb government had been, so far, not unsound. In fact, there was a relative majority of states (77 votes) in favour of this prudently formulated text, only a small number voted against (6 votes) and a consistent number of states (74 votes) abstained showing thereby their reservation even to this restrained wording.

As will be shown and analysed below, the ICJ found that the adoption of the declaration of independence on 17 February 2008 'did not violate any applicable rule of international law'.<sup>49</sup>

We will never know whether a more explicit wording would have resulted in a more favourable outcome for Serbia. There are many elements suggesting that this question has to be answered in the negative. First, a request formulated in a way that left less leeway to the ICJ would, as already hinted at above, have had difficulties to pass the voting in the GA. For the abstaining states it might have been a question of respect to the spirit of the UN treaty not to hinder an organ to seek legal advice. On the other hand, nobody could expect them to tolerate an initiative that would be tantamount to a pre-condemnation of them or their allies. Even if a more aggressively formulated resolution had been adopted by the GA, it is far from clear that the ICJ would have come to a substantially different result. In fact, there can be no doubt that the real meaning of the question, as formulated by Serbia and as adopted by the GA, was clear also to the ICJ. As will be shown, the whole drafting of the Opinion reveals strong evidence that the ICJ intended to pilot the outcome to a specific goal.

This already becomes apparent from the way the account is made of the historical facts leading up to the declaration of independence. The elements in the process that could be used as a (legal or political) justification for the declaration of independence are conspicuously highlighted. Thus, we can read that:

- In the wake of the Comprehensive Report presented by Special Envoy Kai Eide there was consensus within the Security Council that the final status process should be commenced.<sup>50</sup>

- The 'Terms of Reference' attached to the General-Secretary's Letter of Appointment of Special Envoy Martti Ahtisaari state that '[t]he pace and duration of the future status process will be determined by the Special

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<sup>49</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, 2010 ICJ Rep., para. 122.

<sup>50</sup> See para. 64 of the Opinion.

Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground'.<sup>51</sup>

'The Security Council did not comment on these Terms of Reference.'<sup>52</sup>

- The negotiations undertaken between 20 February 2006 and 8 September 2006 did not really bring the parties together.<sup>53</sup>

- The Special Envoy has stated the following: 'It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted', as well as 'I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community'.<sup>54</sup>

- Ahtisaari's conclusions were accompanied by a 'Comprehensive Proposal for the Kosovo Status Settlement' which called for a constitutional process leading to a Constitution for an independent Kosovo.<sup>55</sup> The respective recommendations were fully supported by the Secretary General.<sup>56</sup>

- The 'Troika' (representatives of the EU, the Russian Federation and the United States) holding further negotiations on the future status of Kosovo between 9 August and 3 December 2007 was unable to reach an agreement on Kosovo's status.<sup>57</sup>

It appears that the declaration of independence was portrayed as the inevitable consequence of a process that was to lead, according to the will of prominent international institutions, organs and individual subjects, to Kosovo becoming an independent state. Although this may be a plausible interpretation of the events, it smacks nonetheless of political side-taking and it seems striking that such a high-standing judicial organ adopts such an approach. This becomes even more evident if one considers that later on in the text the declaration of independence is interpreted as a mere factual event. The impression is created that the finding is further corroborated by

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<sup>51</sup> *Ibid.*, para. 65.

<sup>52</sup> *Ibid.*, para. 66.

<sup>53</sup> *Ibid.*, para. 67.

<sup>54</sup> *Ibid.*, para. 69, referring to the Ahtisaari Report, UN Doc. S/2007/168 (26 March 2007), paras. 3 and 5.

<sup>55</sup> *Ibid.*, para. 70.

<sup>56</sup> *Ibid.*, para. 71.

<sup>57</sup> *Ibid.*, para. 72.

qualifying it – at least indirectly – as a politically compelling conclusion as well.

Similar criticism can be voiced against the description of the events of 17 February 2008 and thereafter.<sup>58</sup> As will be shown below, the way some factual elements, in particular with regard to the identity of the authors of the declaration of independence, were highlighted while others remained disregarded resembles an advocatorial stance and less an impartial and comprehensive description of the situation one might legitimately expect from an institution like the ICJ. It will also be mentioned that some components of the ICJ were very outspoken in their criticism as to this circumstance.

While one might agree with the final outcome of the procedure, at least with regard to its essential substance and its political appropriateness, the way the ICJ tried to justify this result was partly overzealous, and partly too agnostic, raising serious doubts about the legal soundness of the respective legal argumentation.

#### IV. The Question of Jurisdiction

Did the Court have jurisdiction in this proceeding and, if the answer to this question is affirmative, should it have been exercised? The question of jurisdiction in ICJ advisory proceedings has been disputed several times in the past, and also in the present case doubts arise, with some new particularities. It seems ironic that some countries which were among the strongest opponents to ICJ jurisdiction in the case turned out to be part of the victorious side.<sup>59</sup>

According to Article 65 of the ICJ Statute '[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'. Pursuant to Article 96 of the UN Charter such a request may be presented by the GA or the SC as well as by other organs and specialized agencies which are so authorized by the GA.

On the basis of these provisions there appear to be several limits to this function:

- it pertains essentially to the two main UN organs, the GA and the SC and not to states;

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<sup>58</sup> See paras. 74 *et seq.*

<sup>59</sup> See, for example, the US Statement of 17 July 2009, at 10 *et seq.* and the Albanian Statement of 14 April 2009.

- the purposiveness of the request has to be examined from the perspective of these organs;
- it is a discretionary function;
- it has as its object a legal question.

The practice of the Court's jurisprudence seems to suggest that these conditions have not been attributed much weight. What in theory should be a logical process composed of several steps, in practice becomes a composite act confirming regularly that jurisdiction is given and that it should be exercised.<sup>60</sup> The ICJ has, since its establishment, only once declined jurisdiction<sup>61</sup> and it has never used its discretion to decline a request once it stated that jurisdiction was given. From the very beginning it has made clear that normally it felt obliged to respond. In the *Peace Treaties* case, the Court stated the following:

'[T]he reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.'<sup>62</sup>

In the *Nuclear Weapons* case, the jurisprudence of the following years was summarized in the following way:

Article 65, paragraph 1, of the Statute provides: 'The Court *may* give an advisory opinion...' (Emphasis added.) This is more than an enabling

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<sup>60</sup> In theory the question whether jurisdiction is given on the one hand and whether it should be exercised on the other should be kept apart: 'The Court *may* give an advisory opinion [...] [emphasis added], should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisprudence are met.' (*Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Rep., para. 44 and *Kosovo Opinion*, 2010 ICJ Rep., para. 29). Viewed from the outcome, these two steps, in practice, often seem to intermingle.

<sup>61</sup> This was the case in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep., when it stated, with regard to the request by the World Health Organization (WHO) to give an opinion on the legality of the use by a state of nuclear weapons in armed conflict that this question was not within the competence of the WHO. See J.A. Frowein/K. Oellers-Frahm, 'Article 96', in A. Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice – A Commentary* (2006) 1401-1426, at para. 15 *et seq.*

<sup>62</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, 1950 ICJ Rep., at 10.

provision. As the Court has repeatedly emphasized, the Statute leaves it at its discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. [...]

The Court has constantly evidenced its responsibilities as ‘the principal juridical organ of the United Nations’ (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only ‘compelling reasons’ could lead it to such a refusal [...].<sup>63</sup>

The often cited principle set out in *Status of Eastern Carelia*, decided by the PCIJ on 23 July 1923,<sup>64</sup> which seemingly introduced a situation where the lack of consent between the parties of the underlying conflict requires the World Court to decline jurisdiction has remained exceptional and as of yet not applicable to other cases.<sup>65</sup>

The prevailing opinion seems to be that the ‘discretionary power of the Court’ with regard to the decision whether it has jurisdiction is a very limited one.<sup>66</sup> In practice, the ICJ has to deny jurisdiction when answering to a request for an advisory opinion would be incompatible with its judicial function.<sup>67</sup> The so-called ‘discretionary power’ to decline such a request is limited to the very exceptional situation when it has to safeguard its integrity.<sup>68</sup>

<sup>63</sup> *Nuclear Weapons*, *supra* note 61, at para. 14.

<sup>64</sup> *Status of Eastern Carelia*, 1923 PCIJ (Ser. B) No. 5, at 27.

<sup>65</sup> This case was characterized by a conflict between Russia and Finland, the former not being, at that time, a Member of the League and not having ever before accepted the pacific settlement of disputes by this institution. As has been aptly analyzed by Prof. Michla Pomerance, the sphere of application of Eastern Carelia is presently a very limited one (even though not totally inexistent): ‘It remains applicable to a case which involves a nonconsenting nonmember state and which the Court is willing to view as “quasicontentious”.’ See M. Pomerance, *The Advisory Function of the International Court in the League and U.N.* Eras (1973) at 296, note 61.

<sup>66</sup> See the observations by G. Abi-Saab, *Affaire relative à la Licéité de l’utilisation des armes nucléaires par un Etat dans un conflit armé (OMS)* - Audience publique du 1.11.1995, *Compte-rendu*, CR 95/23, at 29 and R. Kolb, ‘De La Prétendue Discretion de La Cour Internationale de Justice de Refuser de Donner un Avis Consultatif’, in I. Boisson de Chazournes/V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab* (2001) 609-627.

<sup>67</sup> In this sense Abi-Saab and Kolb, *supra* note 66.

<sup>68</sup> See G. Schwarzenberger, *International Law – As Applied by International Courts and Tribunals* (1986) 205 *et seq.*

It is true that 'discretion' in this case should not be interpreted as an 'Entschließungsermessen', *i.e.*, as a free decision whether to accept the advisory request or not,<sup>69</sup> as otherwise the ICJ would assume itself a purely political function, disregarding its primary responsibility of intra-institutional cooperation. However, it is also clear that the propriety to exercise this advisory function has to be evaluated taking into consideration all the circumstances of the respective case. There is no general formula that could define *ex post* all situations where a response to a request would encroach upon the Court's statutory responsibilities in an unacceptable way. The 'compelling reasons',<sup>70</sup> the 'judicial propriety' and, in general, the existence of jurisdiction have to be judged on a case-by-case basis, taking into consideration that the much-emphasized 'duty to cooperate' by the Court is not an absolute value in a situation of complex political interactions. In the present case several elements were present that could have justified a refusal to respond to the advisory request.

For one, the way the decision had come about in the GA to ask the ICJ for an advisory opinion should have commanded utmost prudence. In fact, as shown above, the decision to ask the ICJ for an advisory opinion was taken in the GA with a relative majority; there was no absolute majority of UN member states deeming it either necessary or appropriate to make such a request.<sup>71</sup>

This reservation and disinterest finds its origin also in the fact that the GA had up to that date left this matter primarily to the SC. As a result, GA Resolution 63/3, containing the request for an advisory opinion, could not indicate in what way this opinion would relate to any concrete or planned future activity by this organ.<sup>72</sup>

It is true that in the past the Court had not looked at how a request for an advisory opinion had come about and in particular, whether the majority was in fact only one of relative nature and whether it constituted, in terms of UN members, only a minority. There are, however, strong voices in literature suggesting that more attention should be paid to this circumstance as it threatens in a worrying way the consensual basis of ICJ jurisdiction.<sup>73</sup>

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<sup>69</sup> See Kolb, *supra* note 66, at 621.

<sup>70</sup> *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, 1962 ICJ Rep., para. 155.

<sup>71</sup> See in this sense also the Albanian Statement of 14 April 2009, para. 68.

<sup>72</sup> See the US Statement of 17 July 2009, at 11.

<sup>73</sup> See S. Rosenne, *The Law and Practice of International Court 1920-1996*, vol. II (1996) 1056 *et seq.*

This specific problem would not have arisen had the SC taken the initiative. In fact, it was the SC that had introduced the special administration for Kosovo by SC Resolution 1244/1999 that covered almost all legal aspects of Kosovo's reality. This resolution conditioned considerably the – limited – activities by the GA with regard to Kosovo. This circumstance was very well analyzed by Judge Kenneth Keith in his separate opinion. As has been stated by the ICJ in the *Wall* Opinion, 'advisory opinions have the purpose of furnishing to the requesting organ the elements of law necessary for them in their action'.<sup>74</sup>

In this context, it could be argued that the competence by the SC, although prevailing, may not be exclusive, as Article 24 of the Charter attributes to the SC the 'primary responsibility for the maintenance of international peace and security' but not necessarily the exclusive one. However, the UN Charter seeks to exclude any conflict between the activities of SC and those of the GA when it attributes, in Article 12 of the Charter, preference to the former organ.<sup>75</sup>

However, as the Court has pointed out in the *Wall* Opinion,<sup>76</sup> with regard to the interpretation of Article 12 an evolution has taken place according to which the prerogatives of the SC, while initially interpreted strictly, were subsequently reduced: '[T]here has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security', with the SC focusing on international peace and security and the GA taking a broader view, considering also the humanitarian, social and economic aspects of the case.<sup>77</sup>

The Court has interpreted this approach as a special expression of the development originating back to the Uniting for Peace Resolution of 1950.<sup>78</sup>

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<sup>74</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Rep., para. 60; see also the Separate Opinion by Kenneth Keith, para. 15.

<sup>75</sup> 'While the Security Council is exercising in respect of any dispute or situation the functions to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'

<sup>76</sup> *Wall* Opinion, *supra* note 74, at para. 27.

<sup>77</sup> *Ibid.*

<sup>78</sup> UNGA Res. 377 (V), Uniting for Peace, UN Doc A/1775 (3 November 1950) at 10. In the *Wall* Opinion reference is made to this Resolution in para. 29.

In the *Kosovo* Opinion, this approach finds full confirmation and again the Uniting for Peace Resolution is cited.<sup>79</sup> On closer scrutiny, however, both with regard to the *Wall* Opinion as well as in respect to the *Kosovo* Opinion, considerable doubts remain whether the conditions set out in GA Resolution 377 (V) are really given. From a different perspective, it could be said that these two cases add further doubts as to the inherent consistency and functional propriety of the Uniting for Peace Resolution. In fact, in both cases, which are characterized by the presence of highly complicated political circumstances and intricacies, it is debatable whether the SC really failed to exercise its primary responsibility for the maintenance of international peace and security. With regard to Kosovo in particular, the GA neither tried to arrogate the substantive debate previously held in the SC<sup>80</sup> nor can it be argued that the SC had remained inactive. There can be no doubt that any decision on the final status of Kosovo, taken within the SC, would necessarily have been a highly complicated one if it were to draw an acceptable compromise between all the interests on the table. The inability of the SC to come to such a solution in time was deplorable but at the same time it was also questionable whether the SC could force a territorial status upon the parties.<sup>81</sup> In any case, the stalling of the status process, for which no precise time-table was given, could hardly be used as justification to disown this organ from the functions assigned to it by the Charter. GA Resolution 377 (V) was conceived to tackle quite different challenges and threats. The Resolution was passed in view of an extraordinary and imminent threat to international peace and security, in regard to which the SC had remained totally incapable to act. Its purpose was not to allow for an easy surrogacy in competence in case the Security Council, faced with a difficult situation and deeply divided as to the way in which the conflicting interests were to be reconciled, could not come to a comprehensive conclusion. In the Kosovo case there seems to be even less space for recourse to GA Resolution 377 (V) than in any case before as it is hard to imagine to find an international

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<sup>79</sup> See para. 42 of the *Kosovo* Opinion.

<sup>80</sup> This point was rightly made by Judge Mohamed Bennouna in his dissenting opinion, para. 17.

<sup>81</sup> The demarcation of the Iraq-Kuwait boundary by SC Res. 687 (SCOR (XLV) Iraq-Kuwait, UN Doc. S/INF/47 (3 April 1991), §§ 2-4 ILM 847 (1991) is often cited as a possible precedent to such a measure. It is apparent, however, that the re-determination of state boundaries between neighbouring states which have co-existed as sovereign entities for a long time and where furthermore broad consensual elements have in the meantime been achieved between these international subjects is quite a different situation than that in Kosovo where the status decision could possibly imply the creation of a new state.

situation regulated in more detail by the Security Council than that of Kosovo. Never before the Security Council has established a comparable administration for a disputed territory and this organ has continued to maintain international peace and security even though it was not able to reach a definite solution.<sup>82</sup> To apply the Uniting for Peace Resolution in such a situation expands its scope and even changes its very meaning. The functions of the General Assembly and of the Security Council become, to a vast extent, interchangeable, a development that was surely not intended by the drafters of the UN Charter and which is hardly reconcilable with the structure of their constitutional order.

Of course, it cannot be overlooked that much of the relevant discourse is conducted less in legal than in political and pragmatic terms. Thus, the argument could go as follows: The finding by the Court as to the competence by the General Assembly to ask for an opinion might not have been very convincing under a legal perspective but it was dictated by considerations of pragmatism. It put an end to an unbearable situation and it freed the Security Council from a burden it was not prepared to shoulder any longer. However, also a different scenario seems plausible, in particular, if a long-term perspective is adopted. In fact, if the Security Council has to fear that it will be substituted by the General Assembly any time it finds no consensus on how to proceed further in a specific status situation, it will hardly assume complex status functions on contested territories. In view of the fact that with regard to Kosovo a provisional status settlement had been found that, albeit not being perfect, had nonetheless improved considerably the overall situation in this region, this would be a great setback.

At the end of these considerations, the problems with jurisdiction the ICJ is faced with when a request for an advisory opinion is presented, becomes very clear. They bring us back to the discussion of sense and sensibility of the advisory function of a World Court, a discussion already led when the Statute of the PCIJ was drafted.<sup>83</sup> It might be a very useful tool in order for

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<sup>82</sup> Therefore, it can hardly be said that the conditions for a recourse to the Uniting for Peace Resolution were given. In fact, according to Part A of this resolution the General Assembly can take recourse to this instrument 'if the Security Council, because of unanimity of the permanent member, fails to exercise its primary responsibility for the maintenance of international peace and security [...]'. For comments on this resolution see B. Nolte, 'Uniting for Peace', in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice* (1995) 1341-1348 and C. Binder, 'Uniting for Peace (1950)', in *Max Planck Encyclopedia of Public International Law*, online edition.

<sup>83</sup> See in great detail M. Pomerance, *The Advisory Function of the International Court in the League and U.N.* Eras (1973) 5 *et seq.*

UN organs to obtain authoritative advice, but it should not interfere with basic constitutional functions of the UN (as seems to be occurring presently), to safeguard in particular the principle of consent as well as its judicial function. The Court's duty to cooperate by giving such advice ends when there are 'compelling reasons', *i.e.*, when considerations of 'propriety' make it advisable to abstain from this function. As has been shown, these concepts introduced to provide clarification are not of definite help. It might be said that everything revolves around the question what constitutes 'political'. It is clear that the judicial function of the ICJ would be afflicted, *i.e.*, that its action would become 'improper', as soon as it assumed political functions in the stricter sense or buttressed initiatives by the General Assembly to take over political functions and decisions attributed by the UN Charter to the Security Council.<sup>84</sup> As happens very often in interpretation, the grey area in this field is very large and therefore it might be difficult to criticize an international court eager to give advice in whatever situation. Nonetheless, the Kosovo Opinion deserves particularly critical scrutiny with regard to the question of jurisdiction as the respective problem is compounded by the presence of several factors. As will be shown, in this case the ICJ has made use of its power to specify the question posed. Despite this fact as such not having been criticized, the way this specification happened reveals that the Court was fully aware of the prevailingly political nature of the question. While it is true that excluding international law questions with political aspects from the advisory function of the ICJ would bring this function to a complete halt,<sup>85</sup> the adjective 'legal' in Article 65 of the ICJ Statute should not be voided of any meaning. Its purpose can only be seen in the intent to keep the ICJ from assuming actively a political role beyond that which is inevitably associated with interpreting and applying international law.<sup>86</sup> A situation similar to the Kosovo case where political aspects are not considered by force or accident but by will and purpose should be avoided.

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<sup>84</sup> Exactly this had happened according to the accusations by Judge Bennouna: 'La Cour a été confrontée dans l'affaire du Kosovo à une situation inédite puisqu'il est demandé finalement de s'ériger en décideur politique, au lieu et place du Conseil de sécurité.' (*ibid.*, para. 7). See, in the same vein, the Dissenting Opinion of Judge Skotnikov, para. 9.

<sup>85</sup> This was, in substance, the position taken by the ICJ both in the *Nuclear Weapons* Opinion (para. 13) and in the *Wall* Opinion (para. 41).

<sup>86</sup> See also the considerations in the concluding part of this contribution.

## V. The Question Posed and the Question Addressed

The question whether jurisdiction is given in this case is closely associated with the task to know its real content. As has been mentioned, the ICJ has the power to modify a request for an advisory opinion in order to determine the real intent of the request.<sup>87</sup> While this power makes surely sense in cases where the Court uses its supreme legal knowledge to frame a question, otherwise unclear and contradictory, in appropriate legal terms, care must be taken that the underlying will detected in the question is not in reality the will of the Court.

The Court indicated three cases when it departed, in the past, from the language of the question put to it:

- ‘where the question was not adequately formulated’;
- ‘where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue” and
- ‘where the question asked was unclear or vague’.<sup>88</sup>

In the present case, we are confronted with the somewhat puzzling situation that the ICJ attests on the one hand to the General Assembly that the question posed is clearly formulated.<sup>89</sup> On the other hand, the question is formally rewritten and narrowed down so as to become more or less meaningless.

With regard to the first aspect, the Court read the question whether the declaration was ‘in accordance with international law’ as whether this declaration ‘was adopted in violation of international law’, without even admitting that a reformulation of the question has taken place.<sup>90</sup>

As has been rightly stated by Judge Bruno Simma, the original, authentic formulation had a far larger purview and was far better attuned to the struc-

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<sup>87</sup> Neither the PCIJ nor the ICJ have made use of this power very often. According to a recent survey by Jörg Kammerhofer ‘of the 27 opinions rendered by the PCIJ, only three could be described as changing the question’, while, with regard to the ICJ, ‘up to 22 July 2010, a case can be made that five answers were not given in complete accordance with the question’; see J. Kammerhofer, *Begging the Question? The Kosovo Opinion and the Reformulation of Advisory Requests*, available at <http://ssrn.com/abstract=1684539> (last visited on 22 December 2010).

<sup>88</sup> *Kosovo Opinion*, para. 50.

<sup>89</sup> *Ibid.* para. 51.

<sup>90</sup> *Ibid.*, para. 56.

ture of modern international law which is no longer characterized by the absolute dominance of the Lotus principle according to which the existence of restrictive rules cannot be presumed.<sup>91</sup> Unlike the situation prevailing a century ago, international law is now far more dense and no longer regulates state behaviour primarily by prohibitive rules. State interaction is far too complex for such an approach to be sufficient.

Of course, the task to look whether the declaration of independence was 'in accordance with international law' was not a self-explaining one.

We are faced here with a particularly complicated problem of interpretation as it regards a GA resolution. In international law, rules and procedures for interpretation have been developed mainly in the field of treaty law.<sup>92</sup> Outside this area, with regard to unilateral acts and even more so in relation to resolutions by the GA and the Security Council there is little authority<sup>93</sup> and this problem is touched upon only sporadically in academic writings.<sup>94</sup>

Nonetheless, some general rules can be discerned which have gained broader approval. With regard to Security Council resolutions, the ICJ has devised a set of rules that could apply arguably also to GA resolutions:

- the interpretative process has to take into consideration the specifics of the case;
- the terms of the resolution to be interpreted;
- the discussion leading to it;
- the Charter provisions invoked and, in general,

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<sup>91</sup> See para. 1 *et seq.* of the Declaration of Judge Bruno Simma in the *Kosovo* case. For a critical stance on this point see also A. Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?', 24 *Leiden Journal of International Law* (2011) 95-108.

<sup>92</sup> In this area, mainly the Vienna Convention on the Law of Treaties of 1969 has to be mentioned. See, in this regard, the recent commentaries by O. Corten/P. Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités* (2006) and M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009).

<sup>93</sup> This fact is bemoaned by M.C. Wood, 'The Interpretation of Security Council Resolutions', in 2 *Max Planck Yearbook of United Nations Law* (1998) 73-95.

<sup>94</sup> See generally on the interpretation of (primary and secondary) UN law L.B. Sohn, 'The UN System as Authoritative Interpreter of its Law', in O. Schachter/C.J. Joyner (eds.), *United Nations Legal Order*, vol. I (1995) 73-95 and G. Ress, 'Interpretation of the Charter', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002) 13-32.

- all circumstances that might assist in determining the legal consequences of the resolution.<sup>95</sup>

While in literature doubts have been voiced as to the extent to which the interpretative rules of the Vienna Convention on the Law of Treaties can be applied also to resolutions or decisions of international organizations,<sup>96</sup> in the end interpreters regularly turn to these guideline for advice as these rules offer such a rich menu of options which, after some adaptations, can usually provide some assistance also outside the area of treaties and furnish a result that appears to be reasonable.<sup>97</sup>

Hence, while these considerations might not provide a fully comprehensive set of interpretative rules, they can nonetheless give certain guidance.

From this perspective, it becomes clear that the wording of GA Resolution 63/3 itself is of paramount importance. The preambular text provides information regarding the motives that guided the GA to adopt the resolution. In this regard, the circumstance that the declaration of independence 'has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order' deserves special attention. Thereby, reference was made to the ongoing uncertainty and dispute dividing the state community. The elements of this discussion are commonly known and they were surely also known to the ICJ.

Even on this basis, the interpretative task the ICJ was to assume was still to be defined. In fact, it would have been possible to interpret the task both in a broad, all-encompassing sense just as it would have been possible to adopt a more narrow approach. According to the first approach the ramifications of such an inquiry would have been enormously vast as the coming into being of a new legal subject in an international society, characterized by reciprocal relations regulated in great detail, certainly has far-reaching repercussions. Arguably, this was not the objective meaning of GA Resolution 63/3, most probably requiring the adoption of a more restrictive perspective which would concentrate on the more immediate consequences of the act. However, even this more restrictive approach would have required to look beyond the unilateral act by which Kosovo had gained independence. It stood to reason to expect an in-depth analysis of the meaning of the right to self-determination in the particular context as well as of the legality of the acts of recognition. The Court chose, however,

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<sup>95</sup> *Namibia*, Advisory Opinion of 21 June 1971, 1971 ICJ Rep., 53.

<sup>96</sup> See H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989', 67 BYIL (1996) 1-73, at 29.

<sup>97</sup> This approach was chosen, *i.a.*, also by Wood, *supra* note 93.

to avoid all these highly sensitive and potentially disruptive investigations by changing the question, seemingly only in a linguistic sense, but in fact deeply modifying its meaning. Thereby the Court has gone to the outer limits of what appears to be permissible in an interpretative process.

As has been confirmed by the ICJ itself, the Court is bound to the question submitted to it in the request.<sup>98</sup>

On the other hand, the ICJ, in exercise of its functions, 'must ascertain what are the legal questions really in issue in questions formulated in a request'.<sup>99</sup>

At first sight this approach might appear truly sensible, but when looked at more thoroughly, it opens enormous leeway for the Court. It has generally been said that whoever 'applies a rule in the first instance will also interpret it' and consequently, he will also 'execute it in the way he thinks it should be understood'.<sup>100</sup> But when reading the Kosovo Opinion, one might slightly modify this sentence and say the Court will sometimes interpret the question in the way it *wants* it should be understood.

On a whole, the *Kosovo* Opinion reveals all the pitfalls associated with the ICJ advisory role when faced with questions of a pronounced political character and with dubious credentials as to the way and by whom the question has been formulated and deliberated. While it might be said that the role of the ICJ is and can only be of a mere technical nature and that it should therefore disregard the political process leading up to the request, that it should concentrate on the legal aspects of the question and that it should not, as far as possible, reject a request for advice in view of its inter-institutional duty to cooperate, it should, at the same time, be well aware of the limits of this function. In the *Kosovo* case, the problems associated with jurisdiction as they were known from the ICJ's advisory practice since its inception were present in remarkable concentration. Thus, the ICJ would have had convincing justifications to reject the request for advice. Instead, it chose to accept it and to adopt a pronounced political stance. In view of its intent to find a way out of a difficult political situation this might have

<sup>98</sup> See H. Mosler/K. Oeller-Frahm, 'Commentary to Art. 96', in B. Simma (ed.), *The Charter of the United Nations* (2002) 1180-1190, para. 32 (with reference to *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, 1999 ICJ Rep., 62).

<sup>99</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, 1980 ICJ Rep., para. 46 *et seq.*

<sup>100</sup> See H.G. Schermers, *International Institutional Law* (1980) 658.

been a good choice. The advisory role of the ICJ as such and the integrity of the judicial function, however, have suffered further reputational damage.

## VI. The Declaration of Independence and Its Author

For the outcome of the proceedings two questions were of pivotal importance:

- How far should the examination of the consequences of the declaration of independence go and
- who was the author of this declaration?

With regard to the first question, the ICJ chose a very narrow view. Declarations of independence were portrayed as mere facts which are, as such and as a general rule, neither permitted nor prohibited:<sup>101</sup>

- According to state practice of the 18th, 19th and early 20th century such declarations were not considered as prohibited by international law.
- During the 20th century, a right to self-determination of peoples of non-self-governing territories and of peoples subject to alien subjugation, domination and exploitation came about.
- Only in thoroughly exceptional situations, declarations of independence were considered to be in violation of international law. In those cases (they concerned Southern Rhodesia,<sup>102</sup> Cyprus<sup>103</sup> and the Republika Srpska<sup>104</sup>) the Security Council unequivocally condemned the respective declarations of independence. The ICJ correctly stated that those declarations of independence were, however, associated with 'the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'. In general, it can be said that the United Nations have denied a claim for self-determination if this claim has violated another right to self-determination of a higher rank or where recourse to self-determination has been made in an abusive manner.

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<sup>101</sup> See para. 79 *et seq.* of the *Kosovo* Opinion.

<sup>102</sup> SC Res. 216 (1965) and 217 (1965).

<sup>103</sup> SC Res. 541 (1983).

<sup>104</sup> SC Res. 787 (1992).

This assessment was, as such, correct but it was not the analysis and answer the GA sought for. Here we can refer to the considerations made above with regard to interpretation. Even though it is not possible to discern a specific set of interpretative rules that could be made recourse to, the basic assumption should be that interpretation has to be made in good faith – a principle enshrined also in the VCLT<sup>105</sup> – and paying due regard to the principle of effectivity. While the principle of good faith prevents, first and foremost, an excessively literal interpretation,<sup>106</sup> together with the principle of effectivity it leads us to the principle *ut res magis valeat quam pereat*, meaning that the maximum of effectiveness should be given to the respective provision – consistent with the intention resulting from the document.<sup>107</sup>

Even without looking at the specifics of GA Resolution 63/3, it is obvious that the GA did not want to ask the ICJ a question to which the response would be a banality, an affirmation which can be found in every introductory manual on international law. As was pointed out by Judge Koroma, the question posed to the ICJ was not of a hypothetical nature, but a question about a declaration which took place in specific factual and legal context.<sup>108</sup> In this context, the following statement by Judge Lauterpacht in his separate opinion in South West Africa (Petitioners) comes to mind:

It cannot be reasonably assumed that in framing its request the General Assembly intended no more than to obtain the confirmation of a proposition which has not been disputed [...] [it] could not have intended to confine the task of the Court to an academic exercise not requiring any notable display of judicial effort.<sup>109</sup>

With the text of GA Resolution 63/3 at hand it becomes even more clear – notwithstanding the diplomatic language and the political restraint exercised in the GA – that the intent of the GA was to obtain elucidation

<sup>105</sup> Art. 31 para. 1 VCLT.

<sup>106</sup> See M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) 426.

<sup>107</sup> See the pivotal contribution in this field by H. Lauterpacht, *The Development of International Law by the International Court* (1982) 229. See also J.-M. Sorel, 'Article 31', in O. Corten/P. Klein, *Les Conventions de Vienne sur le Droit des Traités* (2006) 1326 who points out that the ICJ regularly refers to this principle in guise of the concept of the *effet utile*.

<sup>108</sup> Para. 20 of the Dissenting Opinion by Judge Abdul G. Koroma.

<sup>109</sup> *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion of 1 June 1956, 1956 ICJ Rep., at 36 (Hersch Lauterpacht, Separate Opinion).

about a complex legal situation created by a declaration of independence in a setting for which a different, albeit somewhat dysfunctional, process of conflict administration by the international community was foreseen. From a strictly technical, not to say legalistic perspective, the ICJ, once it found that it had jurisdiction, should have embarked on a thorough analysis of the question presented, together with its immediate ramifications.

Consequently, it would have been necessary, first, to address the question of self-determination, and this under several perspectives (*e.g.*, the meaning of self-determination, its external and internal dimension, its addressees, and whether there is a right to remedial self-determination in cases of widespread human rights abuses). Furthermore, also the question of recognition would have been of interest. In fact, the question whether or not Kosovo should be recognized was hotly disputed on the international scene and gave rise to considerable controversy, *i.a.*, within the European Union. GA Resolution 63/3 refers – at least indirectly and notwithstanding its diplomatic restraint – also to this controversy when mentioning the fact that the declaration of independence ‘has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order’. To ignore all these circumstances could be interpreted, again from a legalistic perspective, as a denial of justice.

The real background for the attitude of the majority of the ICJ’s judges needs no further explanation: All these questions were far too controversial and too politically charged to be decided by a technical organ like the ICJ which, for its activity to be effective, also needs the political support of the state community.<sup>110</sup> By ignoring all these aspects and reducing the meaning of the question posed nearly to nothing, the ICJ circumnavigated these perils. However, one challenge remained: Even though a very narrow view of the meaning and relevance of declarations of independence was adopted, the ICJ could not ignore that SC Resolution 1244/1999 had established a

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<sup>110</sup> Another experience with political issues which severely undermined the ICJ’s international reputation and acceptance is still very much present in the minds of international lawyers. In the *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)* (Second Phase), the ICJ refused on procedural grounds to pronounce on the highly delicate question whether South Africa had violated her obligation from the mandate over South West Africa due to apartheid practiced there. This pronouncement provoked an outcry on a world-wide level and seemed to delegitimize the Court, in particular in the Third World. See B. Simma, ‘Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?’ in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993) 125-146, at 127.

special regime for Kosovo. How was it possible that this regime, created by the Security Council under its powers according to Chapter VII of the Charter, was simply set aside?

The argumentative strategy by the ICJ was the same as before: The respective developments were considered as mere facts of no legal relevance. To come to this conclusion, the events in Kosovo had to be re-interpreted, however, in a very questionable fashion. In this context the subject of the declaration's authorship was of central importance. In fact, even if declarations of independence should not be further considered and regulated in international law, it is quite obvious that bodies and institutions introduced by or in any case falling under the purview of SC Resolution 1244/1999 were not free to issue such unilateral declarations absent any specific authorization. The declaration was clearly intended to bring forth legal effects. In the legal setting created by SC Resolution 1244/1999, which was based on the principle of consent and hostile to any unilateral change of the rules, such an act must be openly illegal in case it cannot be justified, in particular, through recourse to the principle of self-determination. Such a conclusion presupposes, however, that the declaration is attributable to a subject addressed by SC Resolution 1244/1999, as otherwise it would again become irrelevant. The attribution of this act to the Kosovar Assembly was widely uncontested during the proceedings,<sup>111</sup> and it was taken as a given also by UN member states during the respective discussion in the GA, thus standing at the basis of the results of that discussion, *i.e.*, GA Resolution 63/3. The ICJ, however, disregarded all these facts and assumed instead that the declaration was not attributable to the Kosovar Assembly but to its members, as representatives of the people of Kosovo. The consequences of this assumption are twofold and both designed to corroborate the stance taken by the ICJ:

- No violation of SC Resolution 1244/1999 is given.
- The declaration is relevant as it stems from the people of Kosovo.

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<sup>111</sup> In fact, this view was widely uncontested also in the first academic comments about the declaration of independence. See, *i.a.*, C. Warbrick, 'Kosovo: The Declaration of Independence', 57 ICLQ (2008) 675-690 (see at 679: 'On 17 February 2008, the Assembly of Kosovo issued its "Declaration of Independence" [...]'). See also P. Sevastik, 'Secession, Self-determination of "Peoples" and Recognition – The Case of Kosovo's Declaration of Independence and International Law', in O. Engdahl/P. Wrange (eds.), *Law at War* (2008) 231-244; G. Wilson, 'Self-Determination, Recognition and the Problem of Kosovo', 56 NILR 2009 (455-481); B.B. Jia, 'The Independence of Kosovo: A Unique

These assumptions do not withstand closer scrutiny. First, the way the ICJ describes the respective factual events must arouse suspicion. It was even criticized by some of the judges,<sup>112</sup> however remaining in the minority, that the facts were somewhat different than how the ICJ described them.

For a majority of the Court, the declaration of independence of 17 February 2008 was not an act of the 'Assembly of Kosovo' and therefore an official act falling under the legal regime created by SC Resolution 1244/1999, but an act adopted by the members of this Assembly in their individual capacity and therefore outside the purview of SC Resolution 1244/1999. As a consequence, for the ICJ no violation of the special regime created by the Security Council could arise.

This conclusion comes as a surprise since all the main actors had a different view of the situation. During the proceedings, the attribution of the declaration of independence to the Assembly of Kosovo was not a major issue. Even the UN Secretary-General as well as the Prime Minister of Kosovo did not question the authorship by the Kosovo Assembly.<sup>113</sup> The majority of the Court tried to justify their different standpoint with a linguistic analysis of GA Resolution 63/3 as well as an investigation as to the intent the authors of this declaration presumably had. None of these arguments are truly convincing. Thus, the Court was plainly wrong when it stated that '[n]owhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo'.<sup>114</sup> As the ICJ's Vice-President Peter Tomka demonstrated, all the members of the Kosovo Assembly signed this declaration in their official function.<sup>115</sup> The fact, that this declaration

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Case of Secession?', 8 Chinese JIL (2009) 27-46; Z. Oklopčić, 'Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood', 22 Leiden JIL 2009 677-702.

<sup>112</sup> The most outspoken critics in this regard were the Judges Peter Tomka and Abdul K. Koroma.

<sup>113</sup> For detailed references to the relevant documents see the Declaration of Peter Tomka, para. 16 *et seq.* With regard to the declaration by UN Secretary General by which he informed the GA of the declaration of independence issued by the Kosovo Assembly see UN Doc. S/PV/5829 (18 February 2008). It is interesting to note that also in the first major monographic account of the events leading up to and following the declaration of independence of 17 February 2008 by Prof. Marc Weller, who was also a long-time consultant of the Albanian group in Kosovo, no reference is to be found to the circumstances afterwards described as important by the ICJ. It is simply stated that 'Kosovo declared independence'. See M. Weller, *Contested Statehood* (2009) 230.

<sup>114</sup> See para. 107 of the Opinion.

<sup>115</sup> See para. 20 of the Declaration of Vice-President Tomka.

was somewhat different in style in its first paragraph (it commences with 'we, the democratically-elected leaders of our people', whereas acts of the Assembly of Kosovo employ the third person singular)<sup>116</sup> is hardly significant as it can be explained with the intent to adopt a particularly solemn language for a particularly solemn situation. To refer, as the Court did, to the special circumstances under which this declaration was adopted, and to assume a specific intent by its authors not to act as members of the Assembly, appears to be far-fetched to say the least. It would not only be absolutely extraordinary in international law to attribute such an importance to intent,<sup>117</sup> it would also be extremely difficult to prove and render its content incontestable. But there are further methodological doubts concerning the position taken by the majority in this regard:

- The line of argument adopted by the ICJ is circular and tautological: Those who violated the law (the members of the Kosovo Assembly) set themselves outside the law and as a consequence, no further violation occurred (as SC Resolution 1244/1999 did not cover this situation).<sup>118</sup>
- Is it really true that SC Resolution 1244/1999 did not take into consideration the acts of non-state subjects (as the members of the Kosovo Assembly had become according to the ICJ)? With Resolution 1244/1999 the Security Council had tried to create a comprehensive framework regulating, as far as necessary, the acts of all relevant subjects, including,

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<sup>116</sup> See para. 107 of the Opinion.

<sup>117</sup> Intent is difficult to objectivize also in more evolved and sophisticated national legal orders. In international law it finds scant appreciation. This is even true for the VCLT, an instrument that comes closer to private law rules than most other sets of rules in international law. Attempts to change this situation have ended up in sounding failure as is evidenced by the Genocide Convention of 1948. There the necessity to demonstrate the 'intent to destroy the group' (Art. II) has contributed to rendering this Convention largely inapplicable for a long time. In the area of international responsibility, fault also has a rather limited role when it comes to determining the wrongfulness of an act. The importance of this element increases, however, when the gravity of an internationally wrongful act has to be assessed. In the area of criminal responsibility, willful intent becomes, of course, of paramount importance. With the exception of this latter field (which regards individual responsibility), it can generally be said that intent, as far as it is taken into account, is a strongly objectivized one, closely associated as it is with the acts of a state and not an internal category of the subject. See G. Palmisano, 'Fault', in Max Planck Encyclopedia of Public International Law, online edition.

<sup>118</sup> See the Dissenting Opinion by Judge Skotnikov, at 5

*i.a.*, also the Albanian led Kosovo Liberation Army (KLA).<sup>119</sup> A development as took place on 17 February 2008 was simply not foreseeable. It would, however, be illogical to assume that this resolution would open up avenues for unilateral declarations of independence while reaffirming the sovereignty and territorial integrity of the FRY as well as of other states and emphasizing the role of the SC.

- The reference to ‘settlement’ in para. 11 lit. a) of SC Resolution 1244/1999 can only be understood as a consensual solution to be reached or at least accepted by the Security Council.<sup>120</sup>

- It can hardly be assumed that this resolution allowed for the evolution of a situation in which the institutions created by the SC would take over the reins and at the same time would not be acting illegally simply because they had acted *ultra vires*.<sup>121</sup>

To explain the developments since 19 March 1999, and in particular since 17 February 2008, in such a manner is tantamount to ridiculing Serbia (and its friends and allies) for having believed in the solemn and peremptory language of SC Resolution 1244/1999.

## VII. The Acceptance of Jurisdiction and How the ICJ Perceives Its Own Role

As already stated, at least at first look, the outcome of the advisory proceeding in the *Kosovo* case seems to be rather disappointing and in this vein were most of the first academic comments.<sup>122</sup> As demonstrated above, the ICJ circumnavigated the questions that were of most interest to the participants of the proceeding and to the broader public. It is striking to

<sup>119</sup> See para. 9 lit. b) and para. 15.

<sup>120</sup> Also according to Judge Abdul G. Koroma, “‘settlement’ in this context contemplates a resolution brought about by negotiation’. See his Dissenting Opinion, para. 16.

<sup>121</sup> See in this sense also Judge Mohamed Bennouna, para. 44 of his Dissenting Opinion.

<sup>122</sup> See, for example, A. Peters, ‘Das Kosovogutachten und die Kunst des Nichtssagens’, 25 Jusletter (2010) 1 *et seq.*; C. Pippan, ‘The International Court of Justice’s Advisory Opinion on Kosovo’s Declaration of Independence: An Exercise in the Art of Silence’, 3 Europäisches Journal für Minderheitenfragen (2010) 145-166 and T. Burri, ‘The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links’, 11 German Law Journal (2010) 881-890.

see the difference between the written statements presented by many states to the ICJ and the actual content of the Opinion. While several statements contained a sophisticated analysis of the relevant legal situation, the ICJ managed to not take position with regard to most of them. As will be shown in the following, it is not the factual outcome of this Advisory Opinion that must provoke dissent but rather the way the ICJ reached it. While the ICJ deserves praise, in principle, for not having adopted a too daring approach with regard to hotly disputed questions of international law and with regard to a situation, such as the Kosovar one, which is highly explosive, its considerations with regard to the authorship of the declaration of independence are simply not convincing. At this point one has to ask what would have been the alternatives.

The ICJ could have declined jurisdiction for this case. As shown above, there would have been solid legal grounds for such a stance. As long as the Security Council is seized of the matter and fulfills the ensuing functions, there is neither the necessity nor space for the General Assembly to deal with the Kosovo question in parallel. Of course, this option would have had its drawbacks as well. The ICJ could have been accused of indeterminateness, of excessive legal formalism and of failing to contribute actively to the solution of practical problems the UN is faced with. It is very likely that the ICJ saw itself compelled to respond to an overriding duty to cooperate and that it held its own contribution to the solution of the complex Kosovo question as decisive. In substance, with its Opinion, the ICJ, in its 'Delphic'<sup>123</sup> language, cleared the way for the factual application of the Ahtisaari plan for Kosovo to which the declaration of independence also explicitly refers<sup>124</sup> and which has been met with broad appreciation, at least in most Western countries.<sup>125</sup>

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<sup>123</sup> See R. O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary', 37 *Revue Belge de Droit Int* (2004) 92 *et seq.*, at 126.

<sup>124</sup> See para. 3 of the Declaration:

We accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adoption of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

<sup>125</sup> Also in literature, the reception of the Ahtisaari plan is overall positive. See, for example, International Crisis Group, *Kosovo: No Good Alternatives to the Ahtisaari Plan* (2007); B. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (2008); M. Weller, *Contested Statehood* (2009) and H.H. Perritt, *The Road to Independence for Kosovo* (2010).

In the constitution drafting process ensuing the declaration of independence, the Ahtisaari plan was again a central blueprint.

The recommendation accompanying Mr Ahtisaari's plan, according to which the only viable option for Kosovo was independence,<sup>126</sup> might have caused the plan to be rejected by the Security Council but at the same time the Special Envoy thereby gave voice to the alternative that was generally regarded to be the legitimate one. By doing so, the ICJ was probably not only inspired by the intent to 'assist the General Assembly in the future exercise of its function'<sup>127</sup> but reconnected its function directly with the primary aims and goals of the UN Charter and acted thereby directly on the political level. The question of legitimacy permeates all international law and receives continuously more weight also as to the way international justice is administered.<sup>128</sup> With the Kosovo Opinion the ICJ has tried to give a further contribution to this process. In view of the extraordinary character of this challenge, the results of this endeavour could only be mixed.

Had the ICJ declined jurisdiction it would have safeguarded its integrity, at the price, however, of renouncing the chance of contributing to the solution of a serious international problem and strengthening international legitimacy.

### VIII. The Question of Self-Determination

The ICJ could also have chosen, as many had expected, to actively deal with the issue of self-determination. In fact, reading the various governmental statements presented during this proceeding, one gets the impression that self-determination was the central question to be answered by the ICJ. Instead, as shown, the ICJ skilfully avoided entering these uncharted waters, not without paying tribute, however, to the concept as such, even though this happened in a bland and trivial way.<sup>129</sup>

Should the ICJ have acted differently in this case? In their first comments to this Opinion many writers answered this question in the affirmative.

This author is skeptical in this regard. The contentious language in which the whole proceeding took place, in particular as far as the issue of

<sup>126</sup> Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/168 (26 March 2007) para. 5.

<sup>127</sup> See para. 44 of the Opinion.

<sup>128</sup> See T. Franck, 'The Relations of Justice to Legitimacy in the International System', in R.-J. Dupuy (ed.), *Humanité et droit international* (1991) 159-170.

<sup>129</sup> See paras. 55 *et seq.* and 79 *et seq.* of the *Kosovo* Opinion.

self-determination was addressed, was already an alarm as to what were to come had the Court addressed this problem in the merits. The fact that for many parties the Kosovo question ranked visibly far behind the more general question how to define the right to self-determination and the many explicit statements that any finding about the content of this right would directly be applied also in other situations, urged for the utmost prudence in this case.

While the concept of self-determination has been aptly used to steer the overdue emancipation process of the former colonies, in particular in the 1960s,<sup>130</sup> self-determination outside the remaining cases of decolonization and foreign domination is, as far as it is understood as a right to secession, filled with dynamite.<sup>131</sup> As has been discussed elsewhere in detail, the concept of self-determination is an important argumentative tool to justify changes in territorial regimes and to foster human rights protection in general and participatory rights in particular.<sup>132</sup> In the past, the ICJ has given repeated recognition to this concept, most prominently in the *East-Timor* case.<sup>133</sup> This has happened, however, only on a very abstract level and without giving the concept much detail and without a closer discussion of any controversial aspects in this field.

Was it time for further elucidation and/or a comprehensive definition of this concept by the ICJ? Without doubt, academics (in particular of international law and political sciences) would cheer about this prospect as would those politicians and groups that would find in such a theory further

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<sup>130</sup> Jörg Fisch has described this process as an attempt to domesticate the right to self-determination. See J. Fisch, 'Die Geschichte des Selbstbestimmungsrechts der Völker, oder der Versuch, einem Menschenrecht die Zähne zu ziehen', in P. Hilpold (ed.), *Das Selbstbestimmungsrecht der Völker – Vom umstrittenen Prinzip zum vieldeutigen Recht?* (2009) 45-74.

<sup>131</sup> This is to use the much-cited image introduced by Robert Lansing when commenting upon Wilson's self-determination initiative at the end for World War I.

<sup>132</sup> See P. Hilpold, 'Self-Determination in the 21th Century – Modern Perspectives for an Old Concept', 36 *Israel Yearbook of Human Rights* (2006) 247-288; P. Hilpold, 'Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens', 63 *Zeitschrift für Öffentliches Recht* (2008) 117-141 and P. Hilpold, 'The Right of Self-Determination: Approaching an Elusive Concept through a Historic Iconography', 11 *ARIEL* (2006) 23-48.

<sup>133</sup> *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, 1995 ICJ Rep. 90; see, in particular, para. 29 of the judgment where it is stated that the right to self-determination 'is one of the essential principles of contemporary international law' and that it has 'erga omnes character'. See P. Hilpold, *Der Osttimor-Fall – Eine Standortbestimmung zum Selbstbestimmungsrecht der Völker* (1996).

comfort for their claims. On a whole, however, international stability would not gain from such a development. It is no coincidence that this concept has found, on the one hand, broad confirmation in international law, especially in solemn declarations and instruments of universal reach,<sup>134</sup> while it has remained, as to its content, imprecise and vague.<sup>135</sup> It would be ingenuous to believe that states, though being still by far the most important subjects in the process of the creation of international law, have been hindered to become more explicit about self-determination only due to technical reasons and that they would have, therefore, very much appreciated a weighty technical contribution by the ICJ.

Instead, the state community has played very aptly with this concept. Self-determination has been loaded with ambiguity providing appeasing hopes, even if these hopes can never be fulfilled. Concurring claims are equally addressed, while it is left open which one will have preference. In the end, either a stalemate results or one claim prevails. Both cases can be sold as a victory of self-determination and as proof of the fact that international law is open for change. In reality, however, the principle of effectivity has been dominant. The positive side of this development lies in the fact that a discourse took place that considered the most varied ideas, currents of thoughts and forces on the ground. Absolute immobility does not imply stability. International law has to provide channels for change and change will meet broad approval if it is clothed in robes of legitimacy.

The international law of self-determination essentially has a steering function, guiding potentially disruptive forces in a way that they can interact peacefully and ensuring that change enhances stability. It may be true that such an approach deprives the concept of self-determination of much of its substantive content but this does not imply that it would become an empty box. It is rather the case that self-determination becomes a sophisticated argumentative tool to be employed in a rights-based discourse that takes into account a broad spectrum of values and goals characterizing present-day international law. By devising an external and an internal side of this right it has been possible to cater both to the need to protect state sovereignty, and therefore the external integrity of the main international law subject,

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<sup>134</sup> It is not here the place to give a full account of all relevant provisions in this area. See, for example, Art. 1, para. 2 and Art. 55 of the UN Charter; Art. 1 of the two UN Human Rights Covenants of 1966 and paras. 5 and 77 of the Outcome Document 2005.

<sup>135</sup> An excellent and still valuable portrayal of the weakness of self-determination as a legal concept created by UN practice can be found in M. Pomerance, *Self-determination in law and practice* (1982).

as well as to the interests of the individual, endowing it with consistent participatory rights. The approach to grant individuals who are subject to gross discrimination a right to self-determination has been fallacious from the very beginning as it misinterprets the very nature of self-determination. Creating a direct relationship between the protection for human rights and respect for sovereignty extremely oversimplifies its nature and misjudges its reach. The de-colonization experience is not suited to be extended to a general right to secession. It has already been arbitrary to qualify decolonization as secession.<sup>136</sup> Rather, decolonization was a *sui generis* phenomenon of history intended to correct a historic aberration which should hopefully never find repetition in time. This consideration is further supported by the fact that the newly created states were delimited not along ethnic lines but according to the borders resulting from the colonization process. Once created as sovereign states, this sovereignty should enjoy strong protection.

If we transfer these considerations to the case of Kosovo, we can note that in this framework the concept of self-determination has mostly been used in an inappropriate way. In fact, this term was systematically employed in its most restrictive sense, namely as external self-determination or as a right to secession. This was the case for most of the government statements presented, for the declarations and for most of the separate and dissenting opinions<sup>137</sup> as well as – entirely – for the ICJ Opinion itself.

The meaning of self-determination is, however, much broader and the whole process from the outbreak of the crisis up to the declaration of independence can be interpreted from the perspective of self-determination.

While the abolition of the Kosovo autonomy regime in 1989 can be seen as a denial of internal self-determination, autonomy (and, consequently, internal self-determination) was restored on a factual level with SC Resolution 1244/1999 and it should have become permanent with the Rambouillet Agreement. Internal self-determination provided for in the Rambouillet Agreement differed considerably from the concept as it is traditionally understood as it resembled, under various aspects, external

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<sup>136</sup> In fact, colonies, as a rule, neither historically nor legally formed a unity with the municipal state. These territories, and in particular their original inhabitants, did not enjoy the same factual and legal position. The respective relationship was rather characterized by subjugation and exploitation.

<sup>137</sup> A notable exception is the separate opinion presented by Antônio Augusto Cançado Trindade where reference is made also to internal self-determination, at least with regard to the developments leading up to NATO intervention of 1999.

self-determination.<sup>138</sup> The divide between internal and external self-determination became definitely blurred with the Ahtisaari plan according to which an entity should be created with all the attributes of a state but the name. The declaration of independence was intended to subsume this whole development under traditional international law categories. Kosovo was to become a state in the traditional sense while the Serb minority should be entitled to autonomy or internal self-determination.

The complexity of this issue neither received satisfactory testimony throughout the course of the advisory proceedings nor in the opinion itself. But was the ICJ called upon to do so? This is rather doubtful. With the persistence of much confusion about the meaning of self-determination even at the academic level, it would probably not have been advisable for the ICJ to join this debate with a further contribution running the risk of being either too simplistic or too academic. In both cases, the pronouncements by the ICJ would have entailed the risk of misinterpretation and abuse and the further development of this concept could have assumed a dynamic on its own.

The ICJ chose a much more astute way to deal pragmatically with the question of self-determination: The Court recognized the end-result of the process of self-determination without recognizing the concept as such. It was generally lost that the ICJ indirectly confirmed the right to (external) self-determination by the Kosovar people (or at least by the overwhelming majority of this people) when it stated that the

authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.<sup>139</sup>

The act described here by the ICJ represents a process of self-determination in its purest form. It constitutes a factual event that engendered legal consequences as a final result. There can be no doubt that the representatives in the Kosovar Assembly were legitimized to speak for great part of the Kosovar population. Had the ICJ called these events by their name, it would have been necessary to add several caveats to explain the *sui generis* situation and to exclude, as far as possible, any applicability of the resulting principle by analogy. The ICJ would furthermore have had to differentiate this form

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<sup>138</sup> It is generally recognized that the Rambouillet Agreement upheld Serb sovereignty over Kosovo mainly in formal terms.

<sup>139</sup> See para. 109 of the *Kosovo* Opinion.

of self-determination from the concept of remedial self-determination and to examine whether this right to self-determination should prevail over status rules created by SC Resolution 1244/1999. The ICJ decided to cut its analysis short and to avoid this discussion altogether.

## IX. The Rights-Based Approach to Sovereignty and Secession

Serbia and several other states opined that the protection of territorial integrity in international law would make unilateral declarations of independence illegal.<sup>140</sup> This position can be traced far back in history to the 'legitist school' which required a seceding unit to be released by the mother state if it wanted to acquire independence.<sup>141</sup> To this day, this school seems to have a consistent number of followers. Even Judge Abdul G. Koroma in his dissenting opinion seems to subscribe to this thesis when he states that '[n]ot even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent' and suggests that even the 1970 Friendly Relations Declaration 'leaves no doubt that the principles of the sovereignty and territorial integrity of States prevail over the principle of self-determination'.<sup>142</sup>

This position confounds, however, the absence of a permissive rule for secession with a prohibition of such an act. A rule of this kind may have existed in the era of the Holy Alliance but it is surely not reconcilable with a universal international community where no such consensus can be found and even less the means to implement it. Furthermore, protection of territorial integrity by international law creates obligations for international

<sup>140</sup> See the Written Statement by Serbia of 17 April 2009, para. 414 *et seq.* See, for a statement to the contrary C. Pippan/W. Karl, 'Selbstbestimmung, Sezession und Anerkennung: Völkerrechtliche Aspekte der Unabhängigkeit des Kosovo (I)', 3 *Europäisches Journal für Minderheitenfragen* (2008) 149-164, at 153 *et seq.*

<sup>141</sup> See, with further references, P. Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories', 8 *Chinese JIL* (2009) 47-61 (58). There, reference is also made to the following famous saying by Johann Christian Wilhelm von Steck (1783): 'One can hardly think of a more serious offence than that of declaring a people which abandons its mother State and tear itself away from it as absolved of its obligations and of recognising such a people free and independent.'

<sup>142</sup> See the Dissenting Opinion by Abdul G. Koroma, para. 22.

subjects and surely not for peoples aspiring to create such a subject.<sup>143</sup> This approach also proceeds from the erroneous assumption that international law regulates every detail of the international subjects' destiny.

In reality, however, there have always been elements of international life that international law, by will or by force, has left unregulated.<sup>144</sup> One of these fields is that of secession.<sup>145</sup>

At the same time, fears (and, to some extent, hopes) that the ICJ would sustain a right to 'remedial self-determination' were illusory.

The existence of such a right was forcefully maintained during the proceedings, in particular by Germany – simultaneously trying to restrict the extent of such a right. Two conditions were mentioned for groups having a right to remedial self-determination:

- 'an exceptionally severe and long-lasting refusal of internal self-determination by the State in which a group is living' and
- 'that no other avenue exists for resolving the resulting conflict'.<sup>146</sup>

According to Germany's written submissions, such a right does not exist 'for a limitless future'. Once the situation improves, the prospect for a peaceful and harmonious life of the group within the boundaries of the respective state must be judged 'on the merits of each case'.<sup>147</sup>

Germany failed, however, to furnish a convincing basis in positive international law for such an assumption. In fact, no such basis exists.<sup>148</sup>

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<sup>143</sup> In the present case, this principle has to be applied, however, with prudence. In fact, as stated above, it can be argued that SC Res. 1244/1999 created a general territorial regime for Kosovo which was binding on all subjects. A prohibition to resort to a unilateral declaration of independence would in this case result, however, not from the principle of territorial integrity in general but from this specific resolution.

<sup>144</sup> See P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', 237 *Recueil des cours* (1992) 65.

<sup>145</sup> See T. Christakis, 'The State as a "Primary Fact": Some Thoughts on the Principle of Effectiveness', in M. Kohen (ed.), *Secession – International Law Perspectives* (2006) 138-170, at 155, who writes, with reference to Prosper Weil the following: 'La sécession ne fait partie que de l'un de ces morceaux de la vie sociale qu'il est prémature ou peu souhaitable de normativiser.'

<sup>146</sup> Written Statement of Germany of 15 April 2009, at 35.

<sup>147</sup> *Ibid.*, 35 *et seq.*

<sup>148</sup> See, extensively, P. Hilpold, 'Self-Determination in the 21st Century – Modern Perspectives for an Old Concept', 36 *Israel Yearbook of Human Rights* (2006)

The respective report deserves praise for having tried to carefully draft the conditions and to circumscribe the reach of this right to remedial self-determination to very specific situations of outrageous discrimination and to furthermore make sure that it truly remains a last resort measure. In the end, however, also this attempt brought no convincing results. Absent specific international law rules in this field, the impression is created that an *ad hoc* theory is devised around a specific case. An act of secession should be legalized on the basis of conditions and elements that were present only in this case. At the same time, also an extension of this principle was not to be ruled out but such an extension could happen only on a case-by-case basis. Again, it remained unclear how to exclude the element of arbitrariness from the assessment.

The ICJ wisely avoided this discussion and looked for an alternative way to come to a solution that would further peace on a factual level.

## X. The Limits of Advisory Proceedings

The *Kosovo* Opinion has been met with harsh criticism. Both the high-flying hopes as well as the fears associated with this proceeding were, of course, exaggerated.

The state community could again confide in the ICJ's prudence and its foresight. It would therefore be surely unjust to condemn the Opinion of 22 July 2010 lock, stock and barrel. The question must rather be, whether the ICJ could or should have adopted a somewhat different approach in order to accommodate the many conflicting goals and interests in this field in a more satisfactory way. In fact, if we look at the final outcome, the result is mixed. On the one hand, we surely have an Opinion that avoids any brinkmanship, that confirms the ICJ's reputation as a responsible interlocutor in the process of norm interpretation and that invites the parties, at least indirectly, to continue their negotiations. On the other hand, also the weaknesses of this Opinion should not be overlooked:

- It is, as demonstrated, technically not convincing, thereby also undermining the authority of ICJ jurisprudence.

In fact, the ICJ is expected not only to find pragmatic solutions that further the overall goals of the UN but the argumentative process leading to this result should also be dogmatically compelling, as between law

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247-288 and P. Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories', 8 Chinese JIL (2009) 47-61.

and politics the former element should clearly prevail in the day-to-day work of this Court.

- Under political aspects, Serbia ends up to be the great loser of this proceeding. This country has trusted the assurances given by SC Resolution 1244/1999 and this trust has been betrayed. This situation, characterized by the impression that Serbia is victim of international wrongs without being able to retort, is deleterious both to Serbia's image as to that of international law. In fact, at least at first sight, Serbia can claim to be a victim of a series of torts by other states, among which the intervention of 1999 by NATO forces and the acts of recognition of Kosovo, formally still part of Serbia, stand out. This responsibility can be inferred from general international law protecting territorial integrity, from the special regime created by SC Resolution 1244/1999 or from the estoppel principle.<sup>149</sup>

Of course, such a formalistic perspective does not really do justice to the complexity of the situation in Kosovo nor to the characteristics and the potential of international law. It is true that the contrast of the 1999 NATO intervention in Kosovo with international law is striking, but the specifics of the case have made sure that no sanction applied.<sup>150</sup>

Damage to international law could result from this Opinion also in a further sense. In fact, the decade-long international administration of Kosovo

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<sup>149</sup> See the famous definition of estoppel developed by Judge Spender in the *Temple of Preah Vihear* case:

[T]he principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.

See *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, 1962 ICJ Rep. 101, para. 143, 144 (Judge Sir Percy Spender, Dissenting Opinion).

<sup>150</sup> For measures of this kind, usually the term 'humanitarian intervention' finds application. As has been explained elsewhere (see P. Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 48 EJIL (2001) 437-467, no such right exists in international law but there may be situations in which no sanctions by the state community find application. The reason for this may be found in factual situations (in particular because of a blockade in the Security Council), in considerations of political expediency or in considerations of humanitarian necessity. All these considerations leave the inviolability of Art. 2 para. 4 of the UN Charter intact and cannot heal the respective breach of international law.

has been a unique experiment in the history of international law that could have become an important precedent for the international community when faced with an extraordinary challenge. This action, that avoided a further deterioration of the situation in the region, was based on trust and associated with legitimate expectations not only on the side of Serbia but also on that of many other allied nations. It could be the case that similar experiments, regardless how necessary they may be from a humanitarian perspective, will have a hard time to find the necessary approval as the legitimate expectations were, in the end, totally ignored.<sup>151</sup>

The issue of recognition remains unsolved as well. According to the prevailing view in modern international law, state recognition only has declaratory effects and it does not constitute a pre-requisite for a state in *statu nascendi* being attributed international legal subjectivity.<sup>152</sup> As a consequence, acts of recognition should not be of any legal relevance. Reality, however, is more complex. Recognition plays an important role for a seceding entity asserting itself on the international level. An act of recognition referring to such an entity therefore also entails constitutive elements<sup>153</sup> and this explains why so-called premature acts of recognition<sup>154</sup> are usually considered, in international law theory, to be in violation of international law. At the same time, to define when a government becomes effective is not always easy and on the factual level the illegality inside

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<sup>151</sup> In a similar vein S. Yee, 'Note on the International Court of Justice (Part 4): The Kosovo Advisory Opinion', 9 Chinese JIL (2010) 763-782, at 775.

<sup>152</sup> See P. Hilpold, 'Die Anerkennung der Neustaaten auf dem Balkan: Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzfordernissen', 31 Archiv des Völkerrechts (1993) 387-408, at 407 *et seq.* See also P.K. Menon, *The Law of Recognition in International Law* (1994).

<sup>153</sup> See P. Hilpold, 'Die Anerkennung der Neustaaten auf dem Balkan: Konstitutive Theorie, deklaratorische Theorie und anerkennungsrelevante Implikationen von Minderheitenschutzfordernissen', 31 Archiv des Völkerrechts (1993) 387-408. In a similar vein A. Gioia, 'Kosovo's Statehood and the Role of Recognition', 18 Italian Yearbook of International Law 2008 (2009) 3-35, at 18 *et seq.* On the importance of recognition for Kosovo to assert its position on the international scene see also S. Oeter, 'The Dismemberment of Yugoslavia: An Update on Bosnia and Herzegovina, Kosovo and Montenegro', 50 German Yearbook of International Law (2007) 457-521, at 510.

<sup>154</sup> These are acts of recognition expressed before a seceding entity has become fully effective.

a premature act of recognition will probably be healed if the respective government manages afterwards to exercise effective power.<sup>155</sup>

All these ambiguities and uncertainties could have been overcome by formally referring to the concept of self-determination. As has been explained above, for good reasons this has not been considered. The resulting abortive discussion fails to provide a satisfactory explanation to the Serb government and to the Serb people why it had to lose the province of Kosovo.

Even if we leave aside all these legal technicalities and if we concentrate on the factual situation purely and simply, we have to take notice of the fact that the ICJ Opinion did not bring about a decisive improvement of the situation in Kosovo. Since the Kosovo Opinion has been issued only twelve more states have recognised Kosovo.<sup>156</sup>

It is true that there are prospects of an overall solution of the problems in the context of Kosovo's rapprochement process to the EU where acceptance of Kosovo's independence could become a bargain token. The impression will, however, persist that the ICJ, although having accepted jurisdiction in full over this case, has failed to provide a meaningful contribution to its solution.

In this procedure, the ICJ was confronted with all the pitfalls of its advisory role in a way as it had happened never before, not even in the *Nuclear Weapons* or in the *Wall* procedure. It has become evident that the advisory role of the ICJ is no panacea for the solution of the great controversies that unsettle the state community both on a political level, like the Kosovo conflict, as well as of concepts such as self-determination that are inimical to final and static definitions as they harbor conflicting goals of states, peoples and individuals and can be usefully implemented only in a dynamic, process-oriented way.<sup>157</sup>

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<sup>155</sup> This is in particular true as effectivity does not require complete control over the whole territory. The limited possibilities in international law of an evidence based examination of such a question will further enhance this problem.

<sup>156</sup> Honduras on 3 September 2010, Kiribati on 21 October 2010, Tuvalu on 18 November 2010, Qatar on 7 January 2011, Oman on 4 February 2011, Andorra on 8 June 2011, the Central African Republic on 22 July 2011, Guinea on 12 August 2011, Niger on 16 August 2011, Benin on 18 August 2011 and Saint-Lucia on 19 August 2011.

<sup>157</sup> Self-determination is not an instrument that can provide immediate solutions or which divides those contending over status issues in those who are right and those who are not but it is rather a means to open a discourse that should provide answers generally accepted as legitimate against the background of previously agreed values. See in more detail P. Hilpold, 'The Right of Self-Determination: Approaching an Elusive Concept Through a Historic Iconography', in 11 ARIEL (2006) 23.

## XI. Conclusion

In the end, we must therefore come to the conclusion that it would have been more appropriate for the Court to decline jurisdiction in this case. This choice would have been technically more convincing and also on the factual level more appropriate.

Of course, not all the blame for the outcome is deserved by the ICJ. It is too obvious that the request for an Advisory Opinion had a strong political overtone.<sup>158</sup> The ICJ was asked to solve a political problem for which even the UN organs responsible for these tasks in the first place could not find an answer.<sup>159</sup> Even if one has to bear in mind all the uncertainties characterizing the distinction between legal and political issues,<sup>160</sup> in the present case there was no need to pierce a veil of formal technicality or to unearth a hidden political nature of the conflict. This conflict was rather openly visible and manifest to any observer.

The Opinion appears, however, to be unpersuasive even if it is judged alone on the basis of the legal reasoning on which it builds and it is therefore not able to create even the appearance of ideological neutrality. The Opinion can therefore be judged directly on its immediate nature as a political document.

Unfortunately, we see here that the ICJ, as a legislator and as a political actor, is faced with similar limits and constraints as the political institutions

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<sup>158</sup> See also in this context P. Daillier, 'Commentary to Art. 96 of the UN Charter', in J.-P. Cot/A. Pellet (eds.), *La Charte des Nations Unies. Commentaire article par article* (2005) 2016 who writes the following:

La pratique de la dernière décennie semble marquée par l'intention d'instrumentaliser la procédure consultative à des fins stratégiques et idéologiques sans rapport direct avec le fonctionnement des organisations internationales (avis de 1996 et de 2004), plutôt que de tenter d'en faire l'outil d'un contrôle de légalité interne. D'où la réticence de la Cour à s'engager dans les démonstrations qui lui sont proposées (quasi non liquet dans l'avis de 1996 sur la licéité des armes nucléaires).

<sup>159</sup> For Robert Howse and Ruti Teitel the ICJ, as a state-centred Court, was ill-suited to address a problem that related to individuals and groups. See R. Howse/R. Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?', 11 *German Law Journal* (2010) 841-846. However, it could be argued that the state-centred perspective might still be the appropriate one to address also questions of this kind. It depends on the obligations states are required to fulfill. For critical comments on the role of the Security Council in this case see P. Sturma, 'The Case of Kosovo and International Law' 19 *Polish Yearbook of International Law* 2009 (2010) 51-63, at 62.

<sup>160</sup> See *supra* note 3.

responsible in the first place. It comes therefore as no surprise that the *Kosovo* Opinion has not really changed the situation on the ground.<sup>161</sup> However, it was perhaps inhuman to pretend a '*non liquet*' finding by the ICJ when it was confronted with a question in respect to which so many thrilling questions could be addressed. But when it came to the drafting of the Opinion, the ICJ re-detected the political responsibility associated with role and status of the Court. The ICJ might have gone farer than it should, but it has said less than it could.

This Delphic silence should be a reminder to the political organs in the UN and the political forces on the ground that the primary responsibility for the solution of this problem is, first and foremost, theirs.

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<sup>161</sup> For the rest, this has happened also with other question the ICJ was seized with in advisory proceedings. See P. Dallier, 'Commentary to Art. 96', in J.-P. Cot/A. Pellet (eds.), *La Charte des Nations Unies. Commentaire article par article* (2005) 2016:

La procédure consultative de l'article 96 n'a pas toujours contribué au règlement des différends qui justifiaient sa mise en œuvre: l'admission des Etats dans l'ONU, le Sud-Ouest africain (Namibie), le droit des traités (réserves de paix), les problèmes financiers des Nations Unies font partie des affaires dont le règlement - lorsque règlement il y a eu - n'a guère suivi les directives fournies par la Cour.