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KOSOVO SYMPOSIUM

Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo

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Abstract
The *Kosovo* Advisory Opinion gave rise to responses that suggest that the Court went too far, or not far enough, depending on one's perspective. In this article, the authors argue that the Court should either have done nothing or gone all the way. By accepting an inadequately drafted question, the Court was necessarily going to give an inadequate answer. This article adopts a strict approach to the legal nature of the question and considers that the ICJ should have declined its competence, not as an exercise of its discretion, but as a preservation of its core judicial function, which does not include primarily the conduct of non-state entities. Going further, the authors suggest that the Court could have rephrased the question and sought to establish the international responsibility of the United Nations, and, ultimately, of Kosovo, which, it is argued, is in fact implicitly recognized by the Court, both politically and legally.

Key words
attribution; discretion; International Court of Justice; international responsibility; Kosovo

But that is not the question.
Why are we here, that is the question.
And we are blessed in this, that we happen to know the answer.
Yes, in this immense confusion one thing alone is clear.
We are waiting for Godot to come.

Samuel Beckett, *Waiting for Godot*

1. Introduction

Nearly two years after the United Nations General Assembly (hereafter UNGA) submitted a request to the International Court of justice, the Advisory Opinion rendered on 22 July 2010 on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo[1] certainly did not live up to

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1 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep., not yet published (hereafter *Kosovo* Advisory Opinion).

the expectations that it had (unreasonably?) created. In effect, it seems to have disappointed almost all observers. Those considering that the request was purely political felt that the Court should have declined to answer it altogether. Others, depending on their personal scholarly interest, felt that the Court should have delved more deeply into certain aspects of international law applicable to (remedial) secession, state recognition, minority rights, or human rights. This being said, on the face of it, one could describe the Court's conclusion as being fairly uncontroversial. Indeed, having established that the authors of the declaration were a group of random individuals, it found, in essence, that international law had nothing to say about it, thus drawing the natural consequence that the declaration, as an act of a private entity, was not in violation of international law.

And yet, there is a sense of unease and confusion when reading the opinion, similar to Vladimir and Estragon's never-ending wait for Godot in Samuel Beckett's play, where a fake sense of normalcy clouds the absurdity of the situation. This article argues that the real source of the unease that is created by the Advisory Opinion lies not so much in the answer, but in the question. Indeed, by accepting to give effect to the UNGA's request, the ICJ has lost sight of its core *rationae personae* jurisdiction, namely states and international organizations. More importantly, such an oversight is the result of the Court's failure to fully exercise its judicial function – a failure that reinforces the puzzling effect of the Opinion.

In order to demonstrate this, this article will first show that the ICJ should have been guided by the protection of its judicial integrity, which should have led it to either decline to exercise jurisdiction given the inadequate phrasing of the question or, alternatively, exercise full discretion in reformulating the request so as to make it relevant in the international legal order (section 2). Answering the question as it stands leads to inadequate consequences, which will be illustrated in this article by reference to the legal nature of the constitutional framework (section 3). To avoid this, the Court should have gone beyond the acts of the authors of the declaration, in search of the responsibility of the United Nations and of Kosovo (section 4).

2. The question of jurisdiction: the problem of selective trust in the requesting organ

Before considering the merits, the Court has to establish whether it has jurisdiction and whether it should exercise it. Contrary to when it is acting in contentious cases, there is far more flexibility in the scope of the Court's exercise of jurisdiction in its advisory function. Indeed, the wording of the provisions applicable to this issue does not lay down specific jurisdictional criteria. The UN Charter provides that '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question'.[2] From this provision, two requirements appear: that the request be made by a body authorized to do so under the UN Charter and that the question be legal in nature. Moreover, the Statute of

2 Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereafter UN Charter), Art. 96(1).

the ICJ provides that 'the 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'.[3] The use of the term 'may' rather than 'shall' has led the Court to consider that it has discretion to refuse to issue an advisory opinion, even if it formally has jurisdiction.

Despite being in line with the established case law of the ICJ, the reasoning of the Court in the advisory opinion under consideration shows the limits of the current interpretation and framework. In this section, after briefly presenting the Court's reasoning (section 2.1), we will highlight its difficulties and ambiguities and suggest some guidelines so as to provide greater clarity in its determination of jurisdiction (section 2.2).

2.1. The Court's reasoning: ascertaining jurisdiction and exercising it

2.1.1. Determining jurisdiction

In relation to the requesting organ, the ICJ recalls that the UN Charter gives competence to the UNGA to request an advisory opinion.[4] Given the wording of the Charter on the powers of the UNGA, it should be sufficient to ascertain that this body did indeed request the Advisory Opinion to satisfy this jurisdictional requirement. Indeed, contrary to the following paragraph of Article 96, requiring for requests emanating from other organs of the United Nations and specialized agencies that the question arise 'within the scope of their activities',[5] no such limitation exists for the first paragraph. However, observing that it has '*sometimes* in the past given certain indications as to the relationship between the question . . . and the activities of the General Assembly',[6] the Court explains how the question falls within the competence given to the UNGA to discuss issues of peace and security, in accordance with the UN Charter.[7] Moreover, the judges consider whether Article 12(1) of the Charter, which prohibits the issuance of recommendations by the UNGA in situations under consideration by the UNSC, limits the power to request an advisory opinion. Establishing that Article 12 only concerns actions that could be taken after the receipt of the opinion, the Court finds that it is not an obstacle to the request of the opinion itself.[8]

In relation to the legal nature of the question, the Court, referring to its own case law, succinctly considers that 'a question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question'.[9] In addition, once again in line with previous case law, the fact that the question has political aspects is not considered by the ICJ as an obstacle to its legal nature.[10]

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3 Statute of the International Court of Justice, 24 October 1945, Art. 65(1) (emphasis added).
4 UN Charter, Art. 96(1).
5 UN Charter, Art. 96(2).
6 *Kosovo* Advisory Opinion, *supra* note 1, para. 21 (emphasis added).
7 Ibid., para. 22.
8 Ibid., para. 24.
9 Ibid., para. 25.
10 Ibid., para. 27.

2.1.2. Non-exercise of discretion

Having established that it had jurisdiction, the Court moves on to consider whether it should make use of its discretion not to exercise its jurisdiction. The ICJ considers several questions that might compel it not to exercise jurisdiction, which we will briefly present here. The objections put forward can be put into two distinct categories: the first one relating to extra-legal considerations, the second one to an evaluation of the internal distribution of competences within the United Nations.

2.1.2.1. Extra-legal considerations. The first category of objections relates to the motives behind the request. Some participants in the proceedings put forward the idea that the debates leading to the adoption of the resolution requiring the Court's opinion show that it was not sought in order to assist the UNGA, but rather to serve the interests of Serbia as the sole sponsor of the resolution. The ICJ, however, considers that 'the opinion is not given to States but to the organ which has requested it' and that 'precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion, are not relevant to the Court's exercise of its discretion whether or not to respond'.[11] This is perfectly in line with previous case law of the Court, which has only in the past looked into the history of the resolution in order to assess that the adequate procedure for its adoption was respected.[12]

Linked to the previous aspect, the Court also rejects the contention that it should decline to exercise jurisdiction because the UNGA has not indicated the purpose for its request. According to the majority opinion, 'it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions'.[13] In other words, the usefulness of the opinion should be assessed by the UNGA, not by the ICJ itself.

Finally, the third extra-legal consideration is that of possible adverse political consequences of rendering the opinion. The ICJ finds this argument equally unpersuasive, considering that it is not for the Court to assess whether the opinion might have adverse effects. The Court also points out that the argument can usually be made both ways, and that there are no evident criteria by which it could favour one outcome over another.[14] This rejection of political considerations is once again in line with previous case law where the Court has systematically maintained its capacity to exercise jurisdiction despite possible political aspects or consequences of the request, which has invited the following comment: '[T]he ICJ has embraced a legal question doctrine and has habitually demonstrated a "legal question mentality".'[15]

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11 Ibid., para. 33.

12 P. Daillier, 'Article 96', in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article* (2005), 2003, at 2007.

13 *Kosovo* Advisory Opinion, *supra* note 1, para. 34.

14 Ibid., para. 35.

15 M. Pomerance, 'The Advisory Role of the International Court of Justice and Its "Judicial" Character', in A. S. Muller et al. (eds.), *The International Court of Justice* (1997), 271, at 318.

2.1.2.2. The internal distribution of competences within the United Nations. The argument put forward in this respect is that the situation in Kosovo has been primarily dealt with by the UNSC in the past in its function to maintain international peace and security and that, accordingly, the UNSC should have been the requesting organ, rather than the UNGA. This would be all the more justified given that the answer to the question will depend on the interpretation and application of a UNSC Resolution. It is beyond the scope of this article to consider the details of the Court's evaluation of the internal distribution of powers within the UN Charter, especially as we consider that this is an ultimately irrelevant consideration.[16]

In a nutshell, the ICJ finds that the Charter only confers primary, rather than exclusive, competence to the UNSC in matters of international peace and security[17] and that the UNGA is not barred from dealing with other aspects of a situation, such as its humanitarian, social, and economical ones.[18] In addition, the Court recalls that, in any case, it 'cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps'.[19]

Finally, in relation to having to interpret and apply UNSC Resolutions, the Court finds that it has frequently had to do so in the past, in both contentious cases and advisory opinions,[20] even when the requesting organ was not the UNSC. In conclusion:

> where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.[21]

2.2. A critical analysis of the Court's reasoning

The opinion creates some confusion that we would argue could be dispelled by a clear guiding principle: that of the respect of the Court's exercise of its judicial function. In effect, this could have led the Court to decline the exercise of jurisdiction or to rephrase the question entirely.

2.2.1. Procedural confusion

What is striking when reading this first part of the opinion is the scarce justification of why the Court decides to discuss certain issues rather than others. This can be highlighted in both the determination of jurisdiction and the decision not to exercise discretion.

In relation to the determination of jurisdiction, as mentioned previously, the Court's only justification for considering the substantial attributions of the UNGA, despite the general competence to request given to it by the UN Charter, is that it

16 See sub-subsection 2.2.3.2 *infra.*
17 *Kosovo* Advisory Opinion, *supra* note 1, paras. 40 and 42.
18 Ibid., para. 41.
19 Ibid., para. 44.
20 Ibid., para. 46.
21 Ibid., para. 47.

has 'sometimes' done so in the past. Of course, the Court could very well adopt a restrictive reading of Article 96(1), requiring that it be determined that the question falls within the activities of the requesting organ, as has been advocated in the past.[22] But, in that case, it should mention it explicitly.[23]

In relation to the exercise of the Court's discretion, the confusion is even more notable. First of all, it is unclear why the Court feels compelled to explain its reasons for not making use of its discretion here. There is certainly a pedagogical dimension to the lengthy developments of the ICJ on this point, as well as a certain procedural logic in light of the elements expressly put forward on this point by the participants in the proceedings. It remains that one cannot fail to express some doubt as to their legal utility. Indeed, the compulsory preliminary question to be answered by any court of law is whether it has jurisdiction on a case. That is sufficient for it to proceed on the merits. If it does possess a discretionary power not to proceed, it is only the exercise of that power that would require motivation, rather than the contrary. This approach finds justification in the opinion itself. As the ICJ recalls, 'its answer to a request for an advisory opinion represents its participation in the activities of the Organization and, in principle, should not be refused' and, accordingly, that 'only "compelling reasons" should lead the Court to refuse its opinion in response to a request falling within its jurisdiction'.[24] It is only in the presence of these compelling reasons that the Court would be under an obligation to lay them down.

Second, there is scarce justification why the Court believes that the issues at stake are potentially susceptible of justifying the exercise of its discretion not to exercise jurisdiction. According to the ICJ, 'the discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations'.[25] Beyond this general statement, there is no explanation as to how its judicial function might be affected by the specific issues it develops.

It therefore appears that the general framework provided for by the ICJ at the present time for the determination and exercise of jurisdiction creates a considerable degree of uncertainty on a fundamental issue: what exactly is the scope of control of the ICJ when evaluating a request? Indeed, it appears from the reasoning of the Court as explained previously that, sometimes, it trusts the requesting organ (e.g. in relation to the legal nature of the question or the refusal to consider the motives behind the request or its usefulness for the requesting organ) and, at other times, it does not (e.g. when it delves into the competence of the UNGA in relation to peace and security and in relation to the UNSC or when it rephrases the question). It is

22 See, e.g., S. Rosenne, *The Law and Practice of the International Court of Justice* (1985), 660: '[N]o organ, including the General Assembly and the Security Council, can decide to request an advisory opinion except within the scope of its activities.'

23 On this point, see R. Van Steenberghe, 'The General Assembly Resolution Requestioning the *Kosovo* Opinion and the *Ultra Vires* Issue', *The Hague Justice Portal*, 15 October 2010, at 5, available at www.haguejusticeportal.net/Docs/Commentaries%20PDF/Hague%20Justice%20Prize/van%20Steenberghe_Kosovo_EN.pdf.

24 *Kosovo* Advisory Opinion, *supra* note 1, para. 30.

25 Ibid., para. 29.

difficult to draw a clear rationale as to what path the ICJ chooses at any given point in its reasoning.

2.2.2. A proposed guiding principle: refocus on the judicial function of the Court

Therefore, clear procedural guidelines would be welcome in order to determine the Court's jurisdiction. As a guiding principle, the Court should give full effect to its affirmation that it must maintain its 'judicial integrity'.

This would lead the ICJ to clearly indicate that only legal considerations that might affect its judicial function are relevant for determining both its jurisdiction and the exercise of discretion. As expressed by Abi Saab:

> the 'discretionary power' of the Court comes down to no more than a wider margin of appreciation of the general considerations of admissibility of requests for advisory opinions, considerations whose default would mean that answering the question would be incompatible with the judicial function and not merely 'inopportune' or 'inconvenient' for the Court.[26]

On this point, it is interesting to note the reservations of Judge Cançado Trindade in his separate opinion. According to him, the Court 'has confused discretion with judicial propriety'.[27] For the judge, in an age of expansion of 'international jurisdiction' and advancement of the rule of law, 'to invoke and to insist on "discretion" – rather discretionally – seems ... to overlook, if not try to obstruct, the course of evolution of the judicial function in contemporary international law',[28] which is, in effect, a plea to remove any considerations of discretion from the Court's exercise of jurisdiction.[29]

In other words, the advisory nature of the proceedings, as opposed to contentious cases, does not affect the judicial function of the Court and is no justification for a broader discretion in relation to the exercise of jurisdiction. If the question is legally appropriate, it should be answered, irrespective of other considerations, as will now be explained.

2.2.3. The practical impact of the exercise of the Court's full judicial powers

Such a clear focus on the Court's judicial function means that the ICJ would exercise its judicial powers fully on issues related to its judicial function, while removing *fully* from its analysis unrelated considerations. The consequences of this will now be

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26 G. Abi Saab, 'On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 36, at 45.

27 *Kosovo* Advisory Opinion, *supra* note 1, para. 26 (Judge Cançado Trindade, Separate Opinion).

28 Ibid., para. 28.

29 A similar, if more circumscribed, position can be found in Judge Sepulveda-Amor's separate opinion, who considers that 'the Court, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, has a duty to exercise its advisory function in respect to legal questions which, like the present one, relate to Chapter VII situations'; see *Kosovo* Advisory Opinion, *supra* note 1, para. 2 (Judge Sepulveda-Amor, Separate Opinion). In support of this position, see A. Pellet, 'Le glaive et la balance: Remarques sur le rôle de la CIJ en matière de maintien de la paix et de la sécurité internationales', in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989), 539.

illustrated in both steps of the preliminary evaluation of jurisdiction and, ultimately, on the separate but fundamental issue of the rephrasing of the question itself.

2.2.3.1. Determining jurisdiction: a broader evaluation of the 'legal question'. In the current analysis, it seems that the legal language of the request creates a presumption of its legal nature without any additional enquiry at this stage of the proceedings as to its substance. Moreover, the legal nature of the question seems to be considered solely in relation to the applicable law. We would argue that this is far too narrow a scope of evaluation in light of the nature and functions of the ICJ. Indeed, the current test means that the ICJ would have jurisdiction to give an advisory opinion, if the UNGA so requested, on the legality under international law of the conduct of any random individual, which is surely not what the drafters of the UN Charter had in mind when providing for the ICJ's advisory function. The Court is not only a court of international law; it is also a court that deals essentially with issues of international law in relation to certain specific entities of international law, namely states and international organizations. This would mean that not only must the question be 'susceptible of a reply based on law',[30] but it must ultimately concern the conduct of a state or an international organization. Although not explicitly provided for, such a jurisdictional criterion is perfectly in line with the ICJ's place in the UN framework. In fact, the current advisory opinion is the first one not to consider international law as applicable to states or an evaluation of the law applicable to and by organs or subsidiary bodies of the United Nations.

In the present case, the Court would have been allowed to decline jurisdiction because the question dealt with the conduct of an internal organ or even private actors, depending on the factual interpretation of the situation.[31]

2.2.3.2. The exercise of discretion: an evaluation of legal utility. In light of the Court's judicial function, both sets of issues discussed in deciding whether to exercise discretion or not seem beside the point. Indeed, the extra-legal considerations are in no way related to the exercise of judicial authority by the Court. Moreover, the lengthy developments on the respective competences of the UNSC and the UNGA are equally irrelevant because the function of the Court is not to arbitrate between the two organs, except if explicitly invited to do so by one of them.

What should have been a relevant issue for the Court to consider as a judicial institution is the legal usefulness of the question. This is different from the general usefulness of the opinion for the UNGA that the ICJ rightly considers to be irrelevant for its exercise of discretion. The legal utility should be assessed in relation both to the requesting organ and to the question itself.

In relation to the requesting organ, one consequence could be to argue that there is never any usefulness for the UNGA to require an advisory opinion in relation to an issue other than the interpretation of the provisions of the UN Charter applicable to it. Indeed, as a purely political organ not granted powers to issue

30 *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 18.

31 Alternatively, it could have reformulated the question so as to consider the issue of the responsibility of the United Nations or Kosovo, as shall be developed in section 4 *infra*.

binding resolutions, there is technically no requirement that its actions be guided by reference to positive international law. It would be perfectly possible for the UNGA to approve the declaration of independence, even if it were deemed to be in violation of international law by the ICJ, because such an approval would not be of a legal nature. In comparison, the situation is different for the UNSC, which, when it is acting under Chapter VII powers, issues legally binding resolutions, thus making it useful to be informed of the legality of their content. This approach would vastly limit the scope of the UNGA's ability to require advisory opinions and is politically unlikely ever to be accepted.

Even without accepting the radical solution of stripping the UNGA of its requesting powers almost entirely, the Court should acknowledge that it is within its powers to exercise full discretion as to the evaluation of the legal utility of the question itself in relation to the requesting organ and the state of international law. After all, the whole advisory mechanism is premised on the assumption that the requesting organ is not sufficiently knowledgeable in law to answer it. Why should it be trusted in relation to the content of the question? In the current opinion, such exercise of its judicial function by the Court could have led it to determine that the answer to the question as it was phrased could not be of any utility to the UNGA because it did not touch upon central issues of international law relating to statehood, territorial sovereignty, or self-determination and that the legality of the conduct of what is essentially an internal organ could not be relevant for the UNGA, and, more importantly, not relevant for the clarification of the content of the general rules of international law.

2.2.3.3. Focusing on the question. What emerges from the previous considerations is that a key issue for the Court should be the phrasing of the question. Both in determining its jurisdiction and deciding whether to exercise it, the Court must be satisfied, in the exercise of its judicial function, that the request is adequately termed. Ultimately, as a more nuanced alternative to the outright decision not to exercise jurisdiction, it begs the question of the Court's discretion in rephrasing the request.

On this point, the opinion is equally unsatisfactory and confirms the trend of the unclear line between trust and un-trust in the requesting body. Indeed, affirming that 'the question posed by the General Assembly is clearly formulated',[32] the ICJ sees no reason to reformulate the scope of the question, to include, for example, the legal consequences of the act under consideration. Having said that, the Court then rewrites the question, which clearly seems to concede that the declaration of independence was made by the 'Provisional Institutions of Self-Government', by considering that it must be free to 'decide for itself whether the declaration was promulgated by the Provisional Institutions of Self-Government or some other entity'.[33]

We would suggest that the Court choose one of two paths: either give itself full discretion to reject entirely a request inadequately phrased, as it could have done in

32 *Kosovo* Advisory Opinion, *supra* note 1, para. 51.
33 Ibid., para. 54.

the present opinion, or exercise full discretion in giving the question its full legal meaning. In the current opinion, this would entail that the Court look beyond the acts of the Assembly and consider the implications of those acts in relation to both the United Nations and Kosovo.

Before considering these issues, as they should have been ideally dealt with by the ICJ, in a later section, we will first illustrate the consequence of answering the request as it was framed with the example of the evaluation of the legal nature of the Constitutional Framework.

3. The applicable law: the specific issue of the Constitutional Framework

Having shown the inadequacies of the ICJ's legal reasoning in the preliminary phase of the opinion, we will now illustrate one of its consequences in relation to the applicable law and, more specifically, that of the legal nature of the Constitutional Framework. In its discussion on the relevant provisions of international law applicable to the question, the ICJ, having presented the general rules of international law, had to identify what *lex specialis* applied to the opinion.[34] In that respect, it was unproblematic (and uncontested)[35] that Security Council Resolution 1244 (1999) was to be considered. Not as obvious, however, was the question of the Constitutional Framework. Having briefly related the reasoning of the Court (subsection 3.1), we will show how its consequences should have compelled the Court to adopt a different one (subsection 3.2).

3.1. Establishing the Constitutional Framework as international law

The argument to be answered by the Court was that 'the Constitutional Framework is an act of an internal law, rather than international law character' and would therefore 'not be part of the international law applicable in the present instance and question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request'.[36]

In order to challenge that assertion, the ICJ starts by recalling that the Framework was adopted by a regulation of the United Nations Interim Administration Mission in Kosovo (UNMIK) in 2001.[37] UNMIK Regulations, as pointed out by the ICJ,[38] are executive decisions adopted by the Special Representative of the Secretary-General, who draws his authority from Resolution 1244 (1999). This leads the Court to the following conclusion: 'The Constitutional Framework derives its binding force from the binding character of resolution 1244(1999) and thus from international law. In that sense it therefore possesses an international legal character'.[39]

34 In the language of the Court itself; ibid., paras. 83–84.
35 Ibid., para. 85.
36 Ibid., para. 88.
37 UNMIK Reg. 2001/9, 15 May 2001.
38 *Kosovo* Advisory Opinion, *supra* note 1, para. 88.
39 Ibid.

Having said that, the ICJ, for reasons not explicated, then goes on to describe the legal order in which the Framework is to take effect. It describes a:

> *specific* legal order, created pursuant to resolution 1244(1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by Resolution 1244(1999), matters which would *ordinarily be the subject of internal, rather than international, law.*[40]

The Court therefore seems to describe a legal order that is not national, but internationally created and where international law applies, thus making it a *sui generis* international legal order, even if the judges do not use the expression.

Finally, the Court notes that 'neither Security Council resolution 1244(1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008'.[41]

From the preceding steps of the reasoning, the Court finally concludes that the Constitutional Framework forms 'part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for an advisory opinion'.[42]

3.2. Unforeseen consequences and alternative reasoning

The reasoning of the Court, when combined with the question as it was accepted, has consequences (sub-subsection 3.2.1) that should have compelled the Court to adopt a different conclusion (sub-subsection 3.2.2).

3.2.1. Consequences of the Court's reasoning

As established in the previous section, the Court has erroneously accepted to issue an advisory opinion in relation to the conduct of entities not primarily within its jurisdiction, namely the authors of the declaration taken outside any context of state or international-organization responsibility. With this in mind, it appears that the main consequence of the Advisory Opinion's finding that the Constitutional Framework is relevant international law is that the ICJ becomes, in effect, a constitutional court for the identified legal order. Pushing this logic even further, if the Constitutional Framework is relevant international law, it follows that all UNMIK regulations are equally relevant international law. The ICJ could therefore be theoretically competent as a criminal court in the event of the violation of a substantive criminal-law norm contained in an UNMIK Resolution, or a civil court, should the violation concern tort law. Indeed, there is nothing in the jurisdictional requirements as laid down by the ICJ that would seem to prevent it from exercising its jurisdiction if such a question were put to it by an authorized requesting organ. Having lost sight of its specific judicial function in the UN framework and, more generally, within the international legal order, the Court is led to make findings

40 Ibid., para. 89 (emphasis added).
41 Ibid., para. 91.
42 Ibid., para. 93.

that substantially change its function in a direction that it would itself certainly not accept had the question been explicitly raised.

3.2.2. An alternate reasoning: the internal nature of the Constitutional Framework

Moving back a step from the functional consequences of the Court's finding, one cannot fail to question it. Indeed, the Court's arguments are not entirely persuasive and its conclusions actually seem partly at odds with its own evaluation of the situation. It clearly accepts the existence of a specific legal order that the Constitutional Framework seeks to regulate, through the acts of both the Special Representative and the self-governing institutions, under his overriding authority. 'In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law *within that legal order*'.[43] This would suggest the conclusion that the Constitutional Framework is not international law, in the sense that it was not meant to take effect in the international legal order. This point is made very clearly by Judge Yusuf in his separate opinion and is worth quoting *in extenso*. According to him:

> This statement [that the Constitutional Framework possesses an international-law character] confuses the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves. International administrations have to act in a dual capacity when exercising regulatory authority. Although they act under the authority of international institutions such as the United Nations, the regulations they adopt belong to the domestic legal order of the territory under international administration. The legislative powers vested in the SRSG in Kosovo under resolution 1244 are not for the enactment of international legal rules and principles, but to legislate for Kosovo and establish laws and regulations which are exclusively applicable at the domestic level. The fact that the exercise of legislative functions by the SRSG may be subject to the control of international law, or that they may have been derived from the authority conferred upon him by a resolution of the Security Council does not qualify these regulations as rules of international law for the purposes of the question put to the Court by the General Assembly.[44]

On this point, it is surprising that the Court did not refer to a similar situation dealt with by the Permanent Court of International Justice (PCIJ) in 1932, that of the treatment of Polish Nationals in the Danzig Territory.[45] In a nutshell, according to the Treaty of Versailles, 'the Principal Allied and Associated Powers undertake to establish the town of Danzig . . . as a Free City. It will be placed under the protection of the League of Nations'.[46] Moreover:

> [a] constitution for the Free City of Danzig shall be drawn up by the duly appointed representatives of the Free City in agreement with a High Commissioner to be appointed by the League of Nations. This constitution shall be placed under the guarantee of the League of Nations.[47]

43 Ibid., para. 89 (emphasis added).
44 *Kosovo* Advisory Opinion, *supra* note 1, para. 18 (Judge Yussuf, Separate Opinion).
45 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, (1932) PCIJ Series A/B No. 44, at 4.
46 Treaty of Versailles, 1919, Part III, Section XI, Art. 102.
47 Ibid., Art. 103.

This Constitution had to be approved by League of the Nations and could not be changed without its permission.[48] The similarities to the situation in Kosovo are striking. However, when Poland claimed that the Constitution was relevant international law for the purposes of establishing Danzig's discriminatory practices against Polish nationals, the PCIJ followed an entirely different reasoning. It recognized the Constitution's 'peculiarities which are not to be found in the constitutions of other countries',[49] but later adopted the following conclusion:

> The peculiar character of the Danzig Constitution . . . affects only the relations between Danzig and the League. A violation or an erroneous application of the Constitution by Danzig is, therefore, as far as international relations are concerned, a matter solely between the League, as guarantor, and Danzig. With regards to Poland, the Danzig Constitution, despite its peculiarities is and remains the Constitution of a foreign State.[50]

This approach should also apply to Kosovo. Irrespective of the international origin of the Constitutional Framework in international law, its purpose, as recalled by the ICJ itself, was to regulate the *specific* legal order of Kosovo, and 'the institutions which it created were empowered . . . to take decisions which took effect within that body of law'.[51] The conclusion should therefore have been that, notwithstanding the international character of the Constitutional Framework, it did not, however, give rise to international obligations to be regulated in international proceedings. From an external point of view, to paraphrase the PCIJ, the Constitutional Framework remains a domestic regulatory instrument and is, as such, not invocable (or opposable) in international proceedings. Its violation can only indirectly be relevant in an international legal context if it leads to the entity's violation of a norm that is meant to take effect in the international legal order.

In fact, this reasoning could apply *mutatis mutandis* to UNSC Resolution 1244 (1999). Indeed, the resolution has a dual nature. It is a resolution that, because it is adopted under Chapter VII, is meant to take effect in the international legal order in relation to all member states of the United Nations. However, in the specific case of territorial administration, it is also the founding document of the internal order of the administered territory and therefore meant to take effect within that territory. It ultimately depends on whose conduct is being considered. Once again, we see the consequences of the ICJ's accepting to issue an advisory opinion in relation to actors that are not primary subjects of international law. Indeed, from the point of view of the persons living in Kosovo, including the authors of the declaration (whether acting as the self-governing institutions or not), Resolution 1244 (1999) must be seen as internal legislation. It is only when considering the conduct of international-law recipients of the resolution that its effects in the international legal order become relevant.

It therefore becomes apparent from the previous developments, beyond the various internal difficulties in the Court's reasoning that have been brought to the fore,

48 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion of 4 February 1932, (1932) PCIJ Series A/B No. 44, at 21.
49 Ibid.
50 Ibid., at 24.
51 *Kosovo* Advisory Opinion, *supra* note 1, para. 89.

that the key issue that explains most of the unease with the opinion stems from the Court's failure to reaffirm its core *rationae personae* jurisdiction, namely states and international organizations.

In light of this, in the next and final section, we will argue that the Court should have pushed its legal reasoning towards its natural territory of the responsibility either of the United Nations or even, hypothetically, of a new Kosovar entity that is implicitly recognized by the Court itself.

4. Responsibility of the United Nations and Kosovo

Reading the opinion, one is puzzled by what exactly is the objective that the ICJ is pursuing when addressing the issue of the accordance of the declaration with international law. As already noted by some commentators,[52] such feelings are partly due to the fact that the Court deals with two issues.[53] First of all, it considers the question of the legality of the declaration itself, which begs a question of validity. Second, it analyses the question of legality in relation to the behaviour of the authors of the declaration, which raises a question of international responsibility. It is here argued that the Court should have clearly investigated the issue of responsibility that 'haunts' its reasoning. This section draws the consequences of the relevant statements of the opinion in relation to the entities the responsibility of which could be established. Thus, the Court's reasoning leads us to address, first, the responsibility of the United Nations (subsection 4.1) and, second, the responsibility of Kosovo (subsection 4.2).

4.1. The responsibility of the United Nations

Following a classical responsibility reasoning, for an act to entail the responsibility of an international organization, it has (i) to be attributable to that organization under international law and (ii) to constitute a breach of one of its international obligations.[54] Based on the ICJ Advisory Opinion, this part analyses these two issues in relation to the adoption of the declaration of independence. First of all, it considers that this act is attributable to the United Nations through the UNSC. Second, it argues that it is mainly in breach of the UN Charter.

4.1.1. The attribution of the Declaration of Independence to the United Nations

In the commentary of Article 2 of the International Law Commission Draft Articles on the responsibility of international organizations (IO) (hereafter ILC Draft Articles on IO responsibility),[55] the Special Rapporteur highlights the fact that:

52 See J. d'Aspremont, 'The Creation of States before the International Court of Justice: Which (Il)Legality?', *The Hague Justice Portal*, 1 October 2010, at 5, available at www.haguejusticeportal.net/Docs/Commentaries%20PDF/DAspremont_Kosovo_EN.pdf.

53 While these two issues may intellectually be distinguished, they remain connected from a procedural standpoint.

54 See Art. 4 of the International Law Commission Draft Articles on the Responsibility of International Organizations, 2009 ILC Draft Articles on the Responsibility of International Organizations, at 20 (not yet published), available at http://untreaty.un.org/ilc/reports/2009/2009report.htm (hereafter ILC Draft Articles on IO Responsibility).

55 See ILC Draft Articles on IO Responsibility, Art. 2, 'Use of Terms'.

> [F]or the purpose of attribution, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization.[56]

Commenting on Article 5, 'General Rule on Attribution of Conduct to an International Organization',[57] it contends that:

> The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization. When persons or entities are characterized as organs or agents by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization.[58]

The Assembly of Kosovo is one of the Provisional Institutions of Self-Government established under Chapter VII of UNSC Resolution 1244 (1999) and Regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government.[59] Therefore, the Assembly of Kosovo appears to be an organ indirectly created by the UNSC. Beyond the question of the competence of the UNSC to set up such an organ,[60] it appears that the acts of this Assembly are first attributable to the UNSC and then, given that the UNSC is an organ of the United Nations, to the United Nations itself.

Furthermore, for an act to be attributed to an international organization, it is required that the organ concerned acted in its capacity.[61]

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56 Commentary of Art. 2 of the ILC Draft Articles on IO Responsibility, at 49–50.

57 ILC Draft Articles on IO Responsibility, ibid., Art. 5(1): 'The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization. 2. Rules of the organization shall apply to the determination of the functions of its organs and agents.'

58 Commentary of Art. 5 of the ILC Draft Articles on IO Responsibility, at 60.

59 Under the terms of Res. 1244 (1999), para. 11, the UNSC '[d]ecides that the main responsibilities of the international civil presence will include: (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo'.

60 In relation to this issue, the ILC Special Rapporteur on IO Responsibility, commenting on the definition of 'rules of the organization', highlights the weight of the practice in reference to the ICJ Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations: 'One important feature of the definition of "rules of the organization" in subparagraph (b) is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations: 'Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'; Commentary of Article 5 of the ILC Draft Articles on IO Responsibility, *supra* note 54, at 51; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 180.

61 D'Aspremont, *supra* note 52, at 6: 'It is an uncontested principle of attribution in international law (and rules about attribution happened to be codified within the framework of the rules on responsibility) that being the organ of a given international legal subject is not sufficient for that subject to incur responsibility for violations of its obligations by that organ. That organ must also be acting in that capacity.'

This question of capacity is at the core of the reasoning of the Court,[62] despite addressing it not in terms of capacity, but in terms of identity.[63] In relation to this question:

> [t]he Court . . . arrives at the conclusion that, taking all factors together, 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.[64]

Among these factors, the ICJ relies mainly on what it considers to be the intention of the authors.[65] Such an approach is puzzling, for two reasons. First of all, the facts relating to the adoption of the declaration do not support such an interpretation of the authors' intention.[66] Second, even if their intention was to act outside this capacity, it remains that intention is not a relevant criterion in international law and that it would lead to adverse results, in relation to both statehood[67] and responsibility. In that sense, pushing the reasoning, Judge Benounna argued that 'Si on suivait jusqu'au bout un tel raisonnement, il suffirait, en quelque sorte, de se mettre hors la

62 *Kosovo* Advisory Opinion, *supra* note 1, para. 52: 'The identity of the authors of the declaration of independence, as is demonstrated below . . ., is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law.'

63 It is so because the Court does not address the question of the legality of the declaration under the *spectrum* of responsibility.

64 *Kosovo* Advisory Opinion, *supra* note 1, para. 109. The Court considers that 'The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be ultra vires', ibid., para. 108. As suggested by the Court, considering its obligation of supervision under Res. 1244 (1999), one could rather argue that the omission of the special representative, agent of the United Nations, is in breach of the resolution, omission of which entails the responsibility of the United Nations.

65 Ibid., para. 105: '[T]he Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [the legal order created for the interim phase].'

66 As noted by Vice-President Tomka: 'The majority had, at the end of the day, to concede that the President of the Kosovo Assembly and the Prime Minister of Kosovo "made reference to the Assembly of Kosovo and the Constitutional Framework" (Advisory Opinion, paragraph 104), while maintaining its intellectual construct that the authors of the declaration "acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (*ibid.*, paragraph 109). The Members of the Assembly, are they not "representatives of the people of Kosovo"? The President of Kosovo, is he not the representative of the people of Kosovo? They met, as the Prime Minister stated, "in accordance with the Kosovo Constitutional Framework"; they thus wished to act in accordance with that framework and not outside of it, as the majority asserts. Although the majority engaged itself in the search for "the identity of the authors of the declaration of independence", finally "having established [their] identity" (Advisory Opinion, paragraph 110), no such search was needed, as their "identity" is well known and documented in the procès-verbal of the special plenary session of the Assembly of Kosovo. Nor was there any need to search for "the capacity" in which those who adopted the declaration acted (Advisory Opinion, paragraph 109)', *Kosovo* Advisory Opinion, *supra* note 1, paras. 19–20 (Vice-President Tomka, Declaration, references in original).

67 In that sense, Judge Koroma contends that 'Relying on such intent leads to absurd results, as any given group, secessionists, insurgents, could circumvent international norms specifically targeting them by claiming to have reorganized themselves under another name. Under an intent-oriented approach, such groups merely have to show that they intended to be someone else when carrying out a given act, and that act would no longer be subject to international law specifically developed to prevent it', *Kosovo* Advisory Opinion, *supra* note 1 (Judge Koroma, Dissenting Opinion).

loi pour ne plus avoir à respecter la loi'.[68] At the end of the day, the Court's conclusion appears to be 'nothing more than a post hoc intellectual construct'.[69]

While adopting the declaration of independence, the Assembly of Kosovo acted in its capacity as a Provisional Institution of Self-Government in the frame of UNSC Resolution 1244 (1999) and the Constitutional Framework. Considering that the Assembly acted in the aforementioned capacity, it can be noted in relation to the responsibility issue here at stake that the question of the ultra vires dimension of the declaration is irrelevant. Indeed, acts of IO organs or agents acting in their capacity are attributable to the IO, irrespective of the ultra vires nature of these acts.[70]

At this stage of the reasoning, it can be argued that the declaration of independence is attributable to the United Nations through the UNSC. For the responsibility of the United Nations to be entailed, it remains to find out whether such a declaration is in breach of international law.

4.1.2. The violation of international law by the declaration of independence

It is important to indicate that the issue at stake at this stage of the development is whether the declaration of independence attributed to the United Nations is in breach of international law. In other words, the striking question is whether the United Nations and, more specifically, the UNSC could, under international law, declare the independence of Kosovo. While this question may be asked in relation to Resolution 1244 (1999),[71] it is mainly relevant in relation to the principle of territorial integrity enshrined in the UN Charter.[72]

In relation to this question, Judge Koroma argued in is dissenting opinion that:

> Neither the Security Council nor the Provisional Institutions of Self-Government of Kosovo, which are creations of the Council, are entitled to dismember the Federal Republic of Yugoslavia (Serbia) or impair totally or in part its territorial integrity or political unity without its consent.[73]

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68 *Kosovo* Advisory Opinion, *supra* note 1, para. 44 (Judge Benounna, Dissenting Opinion).

69 Ibid., para. 12 (Vice-President Tomka, Declaration).

70 See Art. 7 of the ILC Draft on IO Responsibility, 'Excess of Authority or Contravention of Instructions': 'The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions', ILC Draft Articles on IO Responsibility, *supra* note 54, at 60.

71 As far as Res. 1244 (1999) is concerned, a preliminary requirement would be to determine whether the UNSC can violate its own resolution and, beyond, whether the UNSC is bound by its resolutions. While one can answer that it is not, one could suggest that, under the principle of *équivalences des procédures*, a UNSC resolution can only be modified by an equivalent UNSC resolution.

72 The guarantee of territorial integrity is incorporated through Arts. 2(1) and 2(4) of the UN Charter. Under Art. 2(1), 'The Organization is based on the principle of the sovereign equality of all its Members'. Art. 2(4) states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', UN Charter, *supra* note 2.

73 *Kosovo* Advisory Opinion, *supra* note 1, para. 24 (Judge Koroma, Dissenting Opinion). From a similar perspective, Stahn argues that 'Unlike Article 2(7), this guarantee [territorial integrity] is not expressly subject to "the application of enforcement measures under Chapter VII". This implies that it serves as a limit on UN action in the field of peace and security . . . [I]nternational administrators do not hold the powers of a legitimate sovereign, and therefore precluded from making unilateral determinations concerning the permanent status of the administered territories. They may not cede the whole or part of the administered territory against the will of the territorial sovereign or the official representatives of the administered territory; nor are they

Beyond the sole case of Kosovo, this point of view is widespread. Fitzmaurice declared, for instance, that:

> Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration . . . This is a principle of international law that is as well established as any there can be, – and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are. The Security Council might, after making the necessary determinations under Article 39 . . . order the occupation of a country or piece of territory in order to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights . . .. It was to keep the peace, not change the world order that the Security Council was set up.[74]

While it appears clearly that the declaration is, in the current state of international law, in breach of the UN Charter and that the responsibility of the United Nations may therefore be sought, the increased 'human rightism'[75] dimension of international law could be put forward to legitimize such a declaration of independence by the UNSC. Arguments in support of such an approach can be found in the separate opinion of Judge Cançado Trindade:

> In our times, the State's territorial integrity goes hand in hand with the State's respect of, and guarantee of respect for, the human integrity of all those human beings under its jurisdiction .... States exist for human beings and not vice-versa. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State .... States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population. Thrown into lawlessness, their victims sought refuge and survival elsewhere, in the *jus gentium*, in the law of nations, and, in our times, in the Law of the United Nations.[76]

Thus, considering the alleged primacy both of population in relation to statehood and of human integrity over territorial integrity in international law, this approach would actually mean that not only would the declaration of independence of Kosovo by the UNSC be in conformity with this *de lege ferenda* reading of the UN Charter, but it might actually entail an obligation for the UNSC to do so.

Beyond such an approach, under which the United Nations would not be considered as having violated the UN Charter, its responsibility being, as a consequence, not sought, one could, based on the reasoning of the Court in the Advisory

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entitled to determine the final political status of the administered entity . . .. The only international organ which might, under exceptional circumstances, be authorised to certain acts affecting the territorial integrity of a state is the Security Council . . . [I]t is beyond the authority of the Council to decree permanent territorial changes or losses of territory as part of a peace settlement', C. Stahn, *The Law and Practice of International Territorial Administration – Versailles to Iraq and Beyond* (2008), 464–5.

74 *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 294, para. 115 (Judge Fitzmaurice, Dissenting Opinion).

75 This expression is borrowed from Pellet. See A. Pellet '"Human Rightism" and International Law', (2000) X *Italian Yearbook of International Law*, 3.

76 *Kosovo* Advisory Opinion, *supra* note 1, paras. 217 and 239–240 (Judge Cançado Trindade, Separate Opinion).

Opinion, put forward that the declaration of independence entails the responsibility of Kosovo as a state.

4.2. The responsibility of Kosovo

One of the major enigmas raised by the ICJ Advisory Opinion is the legal order wherein the Court considers that the authors of the declaration acted. This section suggests that the only conclusion that can be inferred from the reasoning of the Court is the implied recognition of a Kosovar legal order. In relation to this recognition, it then investigates the question of the responsibility of Kosovo in relation to the declaration.

4.2.1. The implied recognition of Kosovo by the ICJ

While not clearly defining its exact nature,[77] the Court contends that Resolution 1244 (1999) created a *sui generis* legal order, superseding while preserving the Serbian legal order.[78] In relation to the declaration of independence:

> the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, *set out to adopt a measure the significance and effects of which would lie outside that order*.[79]

Reaffirming this statement in paragraph 109, the Court considers that 'the authors of the declaration of independence of 17 February 2008 . . . acted together in their capacity as representatives of the people of Kosovo *outside the framework of the interim administration*'.[80] Insisting on this statement in paragraph 121, the ICJ holds one more time:

> that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or *actually taking effect, within the legal order in which those Provisional Institutions operated*.[81]

These statements beg a basic question: where does the ICJ consider that the declaration of independence actually took effect? Judge Bennouna raised the issue in his dissenting opinion but considered that it could, in any case, not be a new sovereign state, without explaining why.[82] However, we would contend that the only conclusion that can be inferred from the language of the Advisory Opinion is that

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77 See subsection 3.1 *supra*.

78 *Kosovo* Advisory Opinion, *supra* note 1, para. 100: 'The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.'

79 Ibid., para. 105 (emphasis added).

80 Ibid., para. 109 (emphasis added).

81 Ibid., para. 121 (emphasis added).

82 In this respect, see the Dissenting Opinion of Judge Benounna: 'A cela, la Cour se contente d'affirmer que, lors de l'adoption de la déclaration d'indépendance, ses auteurs n'étaient pas liés par le cadre constitutionnel et que cette déclaration n'était pas un acte destiné à prendre effet dans l'ordre juridique mis en place par les Nations Unies (avis, paragraphe 121). Mais alors de quel ordre juridique relevaient les auteurs et la déclaration elle-même? Ce n'est en tout cas ni l'ordre juridique serbe ni celui d'un nouvel état souverain', *Kosovo* Advisory Opinion, *supra* note 1, para. 64 (Judge Benounna, Dissenting Opinion).

the declaration took effect in the new Kosovar legal order it was creating and that therefore the ICJ implicitly recognized Kosovo as a state. Indeed, from a logical point of view, the declaration of independence cannot exist in a legal vacuum. If it was not meant to take effect within the *sui generis* legal order set up by the UNSC, then it can only have such an effect within another legal order, that is, Kosovo. This legal consequence even seems to be supported by the Court's following political evaluation, which is a striking statement emanating from a judicial organ and is notable in its implications: 'The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached.'[83] In other words, the Court seems to implicitly accept that the authors of the declaration had no other choice but to proceed unilaterally.

Within this framework, which is therefore a necessary (if maybe undesired) consequence of the ICJ's reasoning, one can wonder whether this declaration may entail the responsibility of Kosovo as a state.

4.2.2. The potential responsibility of Kosovo

As has already been addressed in relation to international organizations, the conduct of a state entails its responsibility if (i) it is attributable to the state under international law and (ii) it is in breach of an international obligation of the state.[84]

As far as the attribution of the declaration is concerned, one can consider that its authors acting 'together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration' are an organ of Kosovo as understood under Article 4 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter ILC Draft Articles on State Responsibility).[85]

In addition to this primary ground for attribution, one can wonder whether the UN administration of the territory might be an obstacle. In relation to states, Article 10(2) of the ILC Draft Articles on State Responsibility provides that:

> The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.[86]

There is no equivalent provision in the ILC Draft Articles on IO Responsibility. As pointed out by the Rapporteur, such a case is:

> unlikely to arise with regard to international organizations, because [it] presupposes that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory, the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant the presence of a specific provision.[87]

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83 Ibid., para. 105.

84 See Art. 2 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter ILC Draft Articles on State Responsibility), 2001 YILC, Vol. II (Part Two), at 26.

85 See Art. 4 of the ILC Draft Articles on State Responsibility, ibid.

86 See Art. 10, 'Conduct of an Insurrectional or Other Movement', ILC Draft Articles on State Responsibility.

87 ILC Draft Articles on IO Responsibility, *supra* note 54, at 57.

Interestingly, however, the commentary then continues to note that:

> it is however understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply the pertinent rule which is applicable to States by analogy to that organization, either article 9 or article 10 of the articles on responsibility of States for internationally wrongful acts.[88]

In addition, in relation to the analogous application of Article 10(2), the Special Rapporteur on the Draft Articles on State Responsibility notices that:

> No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international 'legitimacy' or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts. From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin. Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.[89]

On the basis of these elements and keeping in mind the framework laid down by the ICJ and wherein this reasoning takes place, one could argue that the authors of the declaration succeeded in establishing a new state in the territory under UN administration, the declaration of independence having to be considered as an act of the new Kosovar state, irrespective of its alleged illegality.

The declaration being attributable to Kosovo, either under Article 4 or by analogy with Article 10(2) of the ILC Draft Articles on State Responsibility, it remains to determine whether Kosovo as a state could declare its independence under international law, more specifically in relation to Resolution 1244 (1999), to the UN Charter, and to general international law. In relation to the UNSC resolution, it seems difficult to affirm that it is binding. Indeed, Kosovo is not generally bound because it is not a member state of the United Nations and is not an explicit addressee of the resolution.[90] Concerning the UN Charter, it can be noted that the declaration of independence provides for the respect of, among other things, the principles of the UN Charter[91] and the treaties and other obligations of the former Socialist Federal Republic of Yugoslavia.[92] In light of these elements, one may consider that Kosovo is bound by the UN Charter. As a consequence, the declaration of independence appears to be in conflict with the principle of territorial integrity as enshrined by

88 Ibid.

89 ILC Draft Articles on State Responsibility, *supra* note 84, at 51.

90 It would only be binding if one considered, *de lege ferenda*, the *erga omnes* dimension of the UNSC resolution adopted under Chapter VII.

91 'With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the international legal obligations and principles of international comity that mark the relations among states', Kosovo declaration of independence adopted 2 February 2007, para. 8, available at www.assembly-kosova.org.

92 Ibid., para. 9: 'We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations.'

the Charter.[93] Does this necessarily mean that it violates the UN Charter, or can the principle of territorial integrity suffer legitimate alteration? In the past, the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' seemed to consider that the principle of self-determination could, as an exception, prevail over the territorial-integrity principle in case a state does not comply with the principle of equal rights and self-determination.[94] Drawing an analogy with this declaration, one could argue, following the aforementioned 'human rightism' approach, that the *new* law of the United Nations makes it legal to alter territorial integrity for the sake of a persecuted population.

5. Conclusion

The present analysis of the *Kosovo* Advisory Opinion has illustrated how the Court, by failing to exercise fully its judicial function, produced a result itself at odds with that judicial function. For example, by focusing exclusively on the direct authors of the declaration, the Court has established itself as the final constitutional court of the UNMIK framework. More importantly, we have argued that if the Court did choose to exercise jurisdiction, one of the core issues it should have considered is the ultimate responsibility of the United Nations, through the actions of the Security Council.

It could appear as an extremely academic and politically unrealistic exercise to consider the United Nations' unilateral declaration of independence of Kosovo, but it is in fact a natural consequence of the ever-increasing role of the United Nations and most notably the Security Council in issues that were traditionally dealt with locally, such as human rights violations and even state-creation, as the case of Timor Leste showed. Future developments will certainly confirm this trend. Indeed, it appears, for example, that the Palestinian Authority is moving closer to requesting that the UNSC, or, alternatively, the UNGA, recognize a new Palestinian state as an alternative to a negotiated solution with Israel.[95]

This accepted outsourcing of sovereign powers on a regular basis in the regulation of not only international issues, but also internal ones to the point of unilateral recognition of states, creates the corollary need for a regulatory framework for the new entity exercising these powers. The current advisory opinion is a lost

93 See sub-subsection 4.1.2 *supra*.

94 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour', Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970.

95 E. Bronner, 'Palestinians Shift Focus in Strategy for Statehood', *New York Times*, 20 October 2010, available at www.nytimes.com/2010/10/21/world/middleeast/21mideast.html.

opportunity for the ICJ to contribute to the identification and the development of this framework, the existence of which will, by subjecting the UNSC to the rule of law, ultimately be the condition of the legitimacy of the United Nations in promoting the rule of law for others. Because it is unlikely that the Court will have another chance to rule on these fundamental issues in the near future, given the scarcity of requests for advisory opinions, one cannot fail to wonder whether it has not pushed back the limits of the absurdity of waiting for Godot. Indeed, when waiting for someone who never comes, it is advisable not to miss him if he does.