

# Leiden Journal of International Law

<http://journals.cambridge.org/LJL>

Additional services for *Leiden Journal of International Law*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



---

## The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of 'Independence from International Law'?

MARCELO G. KOHEN and KATHERINE DEL MAR

Leiden Journal of International Law / Volume 24 / Issue 01 / March 2011, pp 109 - 126

DOI: 10.1017/S0922156510000634, Published online: 11 February 2011

Link to this article: [http://journals.cambridge.org/abstract\\_S0922156510000634](http://journals.cambridge.org/abstract_S0922156510000634)

### How to cite this article:

MARCELO G. KOHEN and KATHERINE DEL MAR (2011). The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of 'Independence from International Law'?. *Leiden Journal of International Law*, 24, pp 109-126 doi:10.1017/S0922156510000634

Request Permissions : [Click here](#)

# The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of ‘Independence from International Law’?

MARCELO G. KOHEN AND KATHERINE DEL MAR\*

## Abstract

This article focuses on the reasoning employed by the International Court of Justice in its Advisory Opinion rendered on 22 July 2010 with respect to the most formidable legal impasse of the accordance with international law of the unilateral declaration of independence: the *lex specialis* that applied at the critical date, and which the Court affirmed continues to apply to Kosovo, as established by the United Nations Security Council in its Resolution 1244 (1999). The Court’s analysis of the applicable *lex specialis* is questionable. Its analysis was coloured by the narrow approach it took to answering the question it was asked to address. It queried an unambiguous factual qualification made by the General Assembly, and it disregarded factual qualifications made by the Secretary-General, his Special Representative, and indeed all relevant actors. It failed to uphold the legally binding provisions of Security Council Resolution 1244, and it did not qualify as unlawful or invalid an act of a subsidiary body of the Security Council that was undertaken in excess of authority and contrary to the fundamental provisions of that Resolution. The resolute conclusion of the majority of the Court that the unilateral declaration of independence did not violate international law seems to read as a declaration of ‘independence from international law’.

## Key words

advisory opinion; International Court of Justice; Kosovo; *lex specialis*; United Nations Security Council Resolution 1244 (1999)

The conclusion reached by a majority of ten to four judges of the International Court of Justice (the Court) in a concise Advisory Opinion (*Kosovo AO*) rendered on 22 July 2010, ‘that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law’,<sup>1</sup> could simply be read as a pronouncement that the unilateral declaration of independence (UDI) amounts to nothing more than ink on parchment: a sheet of paper, signed by a group of people, and about which international law could not care less. As James Crawford argued during the oral

\* Marcelo G. Kohén is Professor of International Law at the Graduate Institute of International and Development Studies, Geneva [marcelo.kohen@graduateinstitute.ch]. Katherine Del Mar is a PhD candidate at the Graduate Institute [katherine.delmar@unige.ch]. They were respectively Counsel, and Adviser, to the Republic of Serbia in the advisory proceedings before the International Court of Justice on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. The views expressed in this article are their personal views.

<sup>1</sup> *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Kosovo AO)*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep., para. 123(3).

hearings on behalf of the United Kingdom, the UDI could be viewed as a mere utterance made by ‘devoted but disgruntled’ citizens of a country that produces no legal effects,<sup>2</sup> for ‘[a] declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping’.<sup>3</sup>

Such a conclusion can only plausibly be drawn in relation to Kosovo if the UDI is viewed abstractly, completely removed from the legal context in which it was issued. James Crawford’s argument holds water for the illustration he invoked before the Court, namely himself, an Australian citizen, declaring the independence of South Australia in early December 2009. However, the situation is dramatically different if the collective of persons issuing a UDI constitutes a subsidiary body of the United Nations Security Council (UNSC), and where the actions of these persons were governed at the critical date not only by general international law, but by *lex specialis*, established in the legally binding provisions of a UNSC resolution. The ‘devoted and disgruntled’ authors of the UDI in the case of Kosovo cannot express their intention to secede territory from a member state of the United Nations in an international legal vacuum, in contrast to the lone albeit distinguished South Australian.

The *Kosovo* AO rendered by the principal judicial organ of the United Nations is unsettling. The reasoning employed by the Court raises concerns about fundamental aspects of international law, the UN collective security system, the exercise of the Court’s advisory jurisdiction, and the good administration of justice in general. This *Kosovo* AO stands in sharp contrast to the stalwart voice of international law vocalized by the Court in the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the *Wall* AO),<sup>4</sup> and it echoes back to the feeble murmur of international law in the unsatisfactory conclusion reached by the Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons* AO),<sup>5</sup> which was decided on a knife’s edge by the casting vote of the President. It is open to conjecture why, on the one hand, the Court strictly applied international law in the *Wall* AO, and why, on the other hand, it failed to do the same in both the preceding *Nuclear Weapons* AO and the subsequent *Kosovo* AO. This article will not speculate about the reasons underlying these differences.

This article focuses on the reasoning employed by the Court with respect to most formidable legal impasse of the accordance with international law of the UDI: the applicable *lex specialis* that applied, and which continues to apply to Kosovo,<sup>6</sup> as established in UNSC Resolution 1244 (1999) (UNSCR 1244), and developed in a detailed legal framework. The Court’s analysis of the *lex specialis* occurs in the last ten pages of the *Kosovo* AO, and it cannot be understood in isolation from two preliminary issues: the scope of the question that the Court was asked to address and the identity of the authors of the UDI.

2 *Kosovo* AO, Verbatim Record, 10 December 2009, [2009] CR 2009/32, at 47, para. 5.

3 *Ibid.*, para. 6.

4 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136.

5 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 266, para. 105(2)(E).

6 As the Court affirmed: see *Kosovo* AO, *supra* note 1, para. 91.

Section 1 addresses the narrow approach adopted by the Court in answering the General Assembly's (UNGA) question. The Court's decision only to address whether or not the UDI *violated* international law means that the UNGA's question on the '*accordance with international law*' of the UDI has partly been left unanswered. Section 2 examines the basis upon which the Court grounded its finding that the authors of the UDI were not the Provisional Institutions of Self-Government (PISG), but rather were persons acting outside the legal framework of the interim administration. Section 3 examines the interpretative approach taken by the Court with respect to UNSCR 1244. The Court went to great lengths to provide some general guidance on the interpretation of UNSC resolutions in the *Kosovo* AO.<sup>7</sup> However, an analysis of the Court's interpretative approach vis-à-vis UNSCR 1244 and, in particular, its disregard for the guarantees of respect of the territory integrity of Serbia contained therein reveal that the Court does not follow its own guidance in practice.

## I. SCOPE OF THE QUESTION THE COURT WAS ASKED TO ADDRESS

The 'clearly formulated', 'narrow and specific' question<sup>8</sup> that the Court was asked to address by the UNGA in Resolution 63/3 was the following: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'<sup>9</sup> The Court narrowed the scope of this question on the '*accordance with international law* of the UDI', and it confined its analysis to only addressing whether, in its view, the UDI *violated* international law. The Court thus read the UNGA's question on whether 'the UDI was in accordance with international law?' as 'was the UDI unlawful?'. It considered that it only needed to determine 'whether the declaration of independence violated either general international law or the *lex specialis* created by resolution 1244 (1999)'.<sup>10</sup> These are very narrow avenues of inquiry to pursue in light of the question that the Court was asked to address. Non-accordance with international law encompasses the question of illegality, and the Court did not err in deciding to address the illegality of the UDI. However, 'accordance' or 'non-accordance' also encompasses an examination of whether the issuance of a UDI had an international legal basis.

It was open to the Court to examine the possible legal grounds under international law that may be argued to have authorized the UDI. In contemporary international law, practice reveals that the creation of states is the result of the exercise of the right to self-determination and – outside the cases of dissolution and unification – the separation of part of an existing state with its consent.<sup>11</sup> Serbia has not consented to the separation of the province of Kosovo from its territory; thus, the most pertinent legal ground for the Court to discuss vis-à-vis the 'lawfulness' of the UDI was a

<sup>7</sup> *Ibid.*, paras. 94 and 117.

<sup>8</sup> To use the words of the Court: *ibid.*, para. 51.

<sup>9</sup> Request for an advisory opinion of the ICJ on whether the unilateral declaration of independence of Kosovo is in accordance with international law, UN Doc. A/Res/63/3 (2008).

<sup>10</sup> *Kosovo* AO, supra note 1, para. 83.

<sup>11</sup> This was notably the case for Singapore, Bangladesh, the Baltic States and Eritrea: J. Crawford, *The Creation of States in International Law* (2006), 392–5 and 402–3.

purported right of independence exercisable by a so-called ‘Kosovar people’. Indeed, most of the participants in the advisory proceedings discussed the issue of self-determination at great length.<sup>12</sup> Instead, the Court considered that an examination of the right of self-determination was beyond the scope of the UNGA’s question as it had framed it, because it encompassed a consideration of the ‘right to separate from a State’.<sup>13</sup> Another legal ground that the Court also could have examined in order to determine the ‘lawfulness’ of the UDI was whether the existence of the constitutive elements of a state allowed the authors of the UDI to proclaim their existence as an independent state. However, the Court chose not to address any legal grounds that could have been argued to have authorized the UDI. It considered that it was ‘not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it’.<sup>14</sup>

Even with respect to the narrow avenue of inquiry that the Court decided to pursue, namely the ‘illegality’ of the UDI, the Court adopted a very limited approach by searching for express prohibitions of declarations of independence, both under general international law<sup>15</sup> and with respect to the applicable *lex specialis*.<sup>16</sup> In relation to general international law, the Court concluded that ‘general international law contains no applicable prohibitions of declarations of independence’.<sup>17</sup> This is tantamount to stating the obvious: that there is no explicit rule prohibiting declarations of independence. Not a single participant in the advisory proceedings claimed otherwise. Such an approach allowed the Court to avoid any analysis of the concrete rules that the UDI had infringed, and which were invoked by a number of participants. The Court only addressed – in a few lines – whether the principle of territorial integrity could be applicable to the authors, and it concluded that it could not, since it considered that the principle only applies to inter-state relations.<sup>18</sup> The Court also failed to examine whether one party to a mediation or negotiation process can unilaterally bring to an end the settlement-of-dispute procedure and attempt to impose its desired solution on the other party.<sup>19</sup> Moreover, the Court did not examine whether the support of certain states to the authors in the issuance of the UDI would constitute an infringement of the obligation not to interfere in the domestic affairs of another state, and the obligation to respect the territorial integrity of states.<sup>20</sup>

12 *Kosovo AO*, *supra* note 1, Written Statements of: Albania, para. 84; Argentina, para. 85; Cyprus, para. 136; Denmark, at 12; Estonia, at 4 ff.; France, para. 2.18; Germany, at 33; Ireland, para. 30; the Netherlands, para. 3.3; Romania, para. 131; Russian Federation, paras. 91 and 97; Slovakia, paras. 15–16; Serbia, para. 584; Switzerland, paras. 75 and 77.

13 *Kosovo AO*, *supra* note 1, para. 83.

14 *Ibid.*, para. 56.

15 *Ibid.*, para. 79.

16 *Ibid.*, para. 101.

17 *Ibid.*, para. 84.

18 *Ibid.*, para. 80. See the contribution by Olivier Corten in this issue.

19 See the contribution by Ralph Wilde in this issue.

20 Sir John Sawers (UK) recounted the circumstances in which the UDI was issued: ‘in coordination with many of the countries most closely involved in stabilizing the Balkans, Kosovo’s Assembly declared Kosovo

Similarly, with respect to the ‘illegality’ of the UDI in relation to the applicable *lex specialis* – which, as Judge Bennouna has pointed out, the Court regrettably addresses after, rather than before, an examination of general international law<sup>21</sup> – the Court again went in search of an express prohibition from declaring independence contained in UNSCR 1244 and the legal framework developed in line with this resolution, and – unsurprisingly – did not find one. The Court did not address whether the UDI was prohibited because it violated guarantees of respect for the territorial integrity of Serbia contained in UNSCR 1244. Instead, it determined that the authors of the UDI were not acting in their ‘capacity’ as the PISG when they issued the UDI. This concretely meant that although UNSCR 1244 applied to Kosovo at the critical date, the Court reasoned that it was not applicable to the authors of the UDI at the moment that they issued the UDI ‘because the two instruments operate on a different level’.<sup>22</sup> The Court did not elaborate on the meaning of this passage in the *Kosovo* AO. Contrary to what the Court seems to be implying, the question of whether Kosovo can or cannot be declared independent falls within the purview of UNSCR 1244, since such a change in the status of Kosovo requires a political process involving Serbia in order to determine the future status of the Serbian province. Moreover, if the ‘instruments operate at a different level’, this means that they co-exist. As a matter of course, this is not legally possible, as is reflected in practice. The PISG – the organs exercising self-government as envisaged by UNSCR 1244 – have ceased to act in this ‘capacity’ immediately following the issuance of the UDI, and they now purport to act as the organs of an independent state rather than an interim administration. The Court simply concluded that ‘Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the [UDI] did not violate Security Council resolution 1244 (1999)’.<sup>23</sup>

Furthermore, the scope of the question that the Court was asked to address went beyond an examination of both the ‘illegality’ and the ‘lawfulness’ of the UDI. The question put to the Court encompassed – more broadly – the validity/invalidity (in French the *efficacité*) of the issuance of the UDI by the PISG. A finding that an act was, or was not, ‘in accordance’ with international law does not necessarily imply that an act was lawful or wrongful. Together with the dichotomy of lawfulness/wrongfulness, there is room in any legal system for analysis of the validity or invalidity of acts. An act may be legally ineffectual because it is invalid: null and void *ab initio*, or voidable. This may be the case for treaties, resolutions of organs of an international organization, arbitral awards, or any other kind of act. A declaration issued by an organ, a plurality of organs, or simply a group of people can be legally analysed through the prism of its validity. However, the Court failed to examine whether the

---

independent on 17 February 2008’ (UN Doc. A/63/PV.22 (2008), at 3). As Argentina noted during the oral round of the advisory proceedings, this statement evidenced a co-ordinated effort on the part of some states to support a secessionist movement in Serbia, arguably in violation of the obligation not to interfere in the domestic affairs of another state (*Kosovo* AO, Verbatim Record, 2 December 2009, CR 2009/26 (Ruiz Cerutti), at 39).

21 *Kosovo* AO (Judge Bennouna), *supra* note 1, para. 38.

22 *Kosovo* AO, *ibid.*, para. 114.

23 *Ibid.*, para. 119.

issuance of the UDI was a valid or an invalid act, and thus whether or not it was in accordance with international law.

The Court correctly noted that the question before it ‘does not ask about the legal consequences of that declaration’,<sup>24</sup> unlike the questions the Court was asked to address in the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,<sup>25</sup> and the *Wall* AO.<sup>26</sup> Therefore, the Court was not called upon to address ‘the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State’.<sup>27</sup>

However, it is striking that the Court did not distinguish between the question that was put to it in UNGA Resolution 63/3 and the question that it was asked to address with respect to the *Nuclear Weapons* AO: ‘Is the threat or use of nuclear weapons in any circumstance *permitted* under international law?’,<sup>28</sup> which the majority of the Court in the *Nuclear Weapons* AO read as requiring a determination of ‘the legality or the illegality of the threat or use of nuclear weapons’.<sup>29</sup> The UNGA clearly phrased the two questions in the *Nuclear* AO and the *Kosovo* AO very differently. However, the Court read both in the same manner.

The very restrictive approach taken by the majority of the Court in defining the parameters of the UNGA’s question means that the question has largely been left unanswered. The majority’s approach was criticized by different members of the Court for amounting to an ‘adjustment’ and for being ‘outcome-determinative’ by Vice-President Tomka,<sup>30</sup> as a reformulation ‘against the intent of the body asking it’ by Judge Koroma,<sup>31</sup> and as ‘overly restrictive and narrow’ by Judge Yusuf,<sup>32</sup> and it led Judge Simma to conclude that ‘the Court has not answered the question put before it in a satisfactory manner’.<sup>33</sup> The self-imposed requirement of the Court to find a ‘specific prohibition’ to the UDI in the applicable *lex specialis* has resulted in its problematic interpretation of UNSCR 1244. The Court’s interpretation of UNSCR 1244 was premised on the identity of the authors of the UDI, discussed in the next section.

## 2. IDENTITY OF THE AUTHORS OF THE UDI: A FINDING BASED ON CONTRADICTIONARY CLAIMS AND UNSUBSTANTIATED INFERENCES

An analysis of the identity of the authors of the UDI is addressed in detail in the *Kosovo* AO, and the conclusion reached by the majority of the Court on this point – as

24 Ibid., para. 51.

25 The situation in Namibia, UN Doc. S/RES/284 (1970).

26 Illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian territory, UN Doc. A/RES/ES-10/14 (2003).

27 *Kosovo* AO, *supra* note 1, para. 51.

28 Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons, UN Doc. A/RES/49/75K (1994) (emphasis added).

29 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 225, para. 20.

30 *Kosovo* AO (Vice-President Tomka), *supra* note 1, para. 1.

31 Ibid. (Judge Koroma), para. 3.

32 Ibid. (Judge Yusuf), para. 2.

33 Ibid. (Judge Simma), para. 3; *ibid.* (Judge Bennouna), paras. 27–35.

Judge Koroma remarked – forms the presumptive basis of the entire *Kosovo AO*.<sup>34</sup> The majority of the Court went to great lengths to reason that the authors of the UDI were not acting in the ‘capacity’ of the PISG when they issued the UDI. The basis on which the Court stood when making this finding is analysed below. However, it is important to note from the outset that it is immaterial whether or not the authors were the PISG, as all the actors taking part in the political process in Kosovo were, and remain, bound by UNSCR 1244. Indeed, this resolution sits at the top of the pyramid that forms the international legal structure of the exercise of UN authority over Kosovo. As such, all individuals subject to this legal regime are obligated to respect it. As the British representative stated in the UNSC in 1999, ‘[t]his resolution applies also in full to the Kosovo Albanians’.<sup>35</sup>

In UNSCR 1244, the UNSC decided to create the PISG,<sup>36</sup> whose task it is to locally govern the territory of Kosovo in a democratic and autonomous manner ‘pending a political settlement’,<sup>37</sup> in accordance with UNSCR 1244 and the Constitutional Framework.<sup>38</sup> The PISG must operate within the legal framework established by the UNSC, and its competences – specified in Part V of the Constitutional Framework – must be exercised under the authority of the Special Representative of the UN Secretary-General.<sup>39</sup> The issuance of a UDI by the PISG – an attempt to alter the international legal status of Kosovo – is unquestionably contrary to UNSCR 1244. It constitutes an *ultra vires* act defying the entire legal regime established by this resolution because it purports to modify the administration of the territory established by the UNSC, it attempts to bring to an end to the political process established by the UNSC, and it aims at disrupting the territorial integrity of Serbia, which was explicitly guaranteed by the UNSC. The Court simply acknowledged in the *Kosovo AO* that the UDI was not ‘capable’ of ‘tak[ing] effect within the legal order created for the interim phase’.<sup>40</sup> This arguably amounts to an attempt to disguise illegality and invalidity as the mere incapacity of an illegal act to produce legal effects ‘within the legal order created for the interim phase’.

In other exercises of its advisory jurisdiction, the Court has clearly delimited the competences of international organizations in situations in which the organization in question did much less than attempt to operate completely outside the legal framework governing its activities. For example, with respect to the World Health Assembly, an organ of the World Health Organization (WHO), the Court held that the Assembly did not have the competence to address the legality of the use of nuclear weapons and therefore it did not have the competence to address a question

34 Ibid. (Judge Koroma), para. 3.

35 Statement by the Permanent Representative of the UK, UN Doc. S/PV.4011 (1999), at 18. See also *Kosovo AO* (Judge Bennouna), *supra* note 1, para. 63.

36 The situation in Kosovo, UN Doc. S/RES/1244 (1999).

37 Ibid.

38 UNMIK Reg. 2001/9, 15 May 2001 (Constitutional Framework for Provisional Self-Government).

39 The situation in Kosovo, UN Doc. S/RES/1244 (1999); Report of the Secretary-General pursuant to para. 10 of UNSCR 1244 (1999), UN Doc. S/1999/672 (1999); UNMIK Reg. 1999/1, 25 July 1999; UNMIK Reg. 2001/9, 15 May 2001 (Constitutional Framework for Provisional Self-Government); Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, UN Doc. S/2001/565 (2001). See also *Kosovo AO*, *supra* note 1, para. 90.

40 *Kosovo AO*, *supra* note 1, para. 105.

on this issue to the Court, because ‘the competence of the WHO to deal with [the effects of the use of nuclear weapons on health] is not dependant on the legality of the acts that caused them’.<sup>41</sup> That the authors of the UDI were the PISG constituted an insurmountable challenge to the accordance with international law of the UDI because the issuance of such a statement by the PISG was an *ultra vires* act contrary to the legal framework established by UNSCR 1244.

There was an abundance of conclusive evidence that the PISG had issued the UDI. Indeed, the very question put to the Court by the UNGA was: ‘Is the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo* in accordance with international law?’<sup>42</sup> In the third preambular paragraph of the same resolution, UNGA Resolution 63/3, the UNGA recalled that ‘on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia’. Despite the unambiguous wording of UNGA Resolution 63/3, the Court considered the question of whether or not it was the PISG that had declared the independence of Kosovo not to have been ‘determined’ by the UNGA.<sup>43</sup> This finding raises concerns about the evidentiary value of factual qualifications made by the UNGA, in both preambular and operative provisions of its resolutions.

Of course, the Court can depart from the wording of the question it has been asked to address, if ‘the question was not adequately formulated’,<sup>44</sup> if ‘the request did not reflect the “legal questions really in issue”’,<sup>45</sup> or ‘where the question asked was unclear or vague’.<sup>46</sup> However, to reformulate a vague or poorly drafted question is one thing. To challenge a clearly formulated qualification of events by the UNGA, contained both in the question the Court was asked to address and in a preambular paragraph in the same resolution, is quite another. As Judge Koroma stated in his Dissenting Opinion, ‘the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo’.<sup>47</sup> Similarly, Judge Bennouna noted in his Dissenting Opinion that ‘Never . . . has the Court amended the question posed in a manner contrary to its object and purpose, which in this case are to determine whether the declaration of independence of 17 February 2008 did or did not fall within the competence of the Provisional Institutions of Self-Government of Kosovo’.<sup>48</sup>

Certainly, a political organ of the United Nations could make a legal or a factual assessment that could be considered erroneous by the principal judicial organ of the United Nations. However, this would be rather an exceptional circumstance that would require a thorough legal analysis grounded on strong evidence that

41 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 66, para. 21.

42 Request for an advisory opinion of the ICJ on whether the unilateral declaration of independence of Kosovo is in accordance with international law, UN Doc. A/RES/63/3 (2008) (emphasis added).

43 *Kosovo AO*, *supra* note 1, para. 52.

44 *Ibid.*, para. 50; *Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, PCIJ, Rep. Series B No. 16.

45 *Kosovo AO*, *supra* note 1, para. 50; *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep. 73, para. 35.

46 *Kosovo AO*, *supra* note 1, para. 50; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, [1982] ICJ Rep. 325, para. 46.

47 *Kosovo AO* (Judge Koroma), *supra* note 1, para. 3.

48 *Ibid.* (Judge Bennouna), para. 34.

meets a high standard of proof. This was not the case in the *Kosovo* AO. No state during the debate that took place at the UNGA on whether to refer the question to the Court ever raised the possibility that an entity other than the PISG had issued the UDI. On the contrary, states that recognized the independence of Kosovo indicated that in their view, it was the Assembly of Kosovo that had issued the UDI. The Permanent Representative of the UK stated that 'Kosovo's Assembly declared Kosovo independent'.<sup>49</sup> The Permanent Representative of France said that '[o]n 17 February 2008, the Assembly of Kosovo declared the independence of the Republic of Kosovo'.<sup>50</sup> Similarly, the United States, which did not vote in favour of referring the question to the Court and which recognized Kosovo as an independent state, made reference to 'the declaration of independence of Kosovo Provisional Institutions of Self-Governance'.<sup>51</sup> States that recognized Kosovo as an independent state also acknowledged that it was the Assembly of Kosovo that had issued the UDI, in their instruments of recognition.<sup>52</sup> That the authors of the UDI may not have been the PISG was only an issue that emerged during the written phase of the advisory proceedings.<sup>53</sup> Consequently, an argument of last resort made by some states only during the advisory proceedings and which challenged a qualification of the events concerning the issuance of the UDI adopted in a clear and unambiguous manner by the UNGA<sup>54</sup> led the Court to conclude 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>55</sup>

49 Sir John Sawers (UK), UNGA, sixty-third session, 22nd plenary meeting, UN Doc. A/63/PV.22 (2008), at 3.

50 Mr Ripert (France), *ibid.*, at 8.

51 Ms DiCarlo (USA), *ibid.*, at 5.

52 See, e.g., letter dated 18 February 2008 from the President of France, Mr Nicolas Sarkozy, addressed to Mr Fatmir Sejdiu, President of Kosovo, available on the website of the French Government at [www.diplomatie.gouv.fr/fr/pays-zones-geo\\_833/balkans\\_1056/kosovo\\_650/france-kosovo\\_4601/proclamation-independance-du-kosovo-18.02.08\\_59650.html](http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/balkans_1056/kosovo_650/france-kosovo_4601/proclamation-independance-du-kosovo-18.02.08_59650.html); Statement of 18 February 2008 by the Prime Minister of Albania, Mr Sali Berisha, on the Recognition of Independence of Kosovo, available on the website of the Albanian Government at [www.keshilliministrave.al/index.php?fq=brenda&m=news&lid=7323&gj=gj2](http://www.keshilliministrave.al/index.php?fq=brenda&m=news&lid=7323&gj=gj2); press release from the Republic of Estonia, 21 February 2008, available on the website of the Estonian Ministry of Foreign Affairs at [www.vm.ee/?q=en/node/682](http://www.vm.ee/?q=en/node/682); Media release, 'Statement by the President of the Swiss Confederation, Pascal Couchepin', 27 February 2008, available on the website of the Swiss Federal Department of Foreign Affairs at [www.eda.admin.ch/eda/en/home/recent/media/single.html?id=17497](http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=17497); press release, 'Minister of Foreign Affairs Dermot Adhern TD Announces Ireland's Recognition of the Republic of Kosovo', 29 February 2008, available on the website of the Department of Foreign Affairs of Ireland at [www.foreignaffairs.gov.ie/home/index.aspx?id=42938](http://www.foreignaffairs.gov.ie/home/index.aspx?id=42938); press release, 'Sweden Recognises the Republic of Kosovo', 4 March 2008, available on the website of the Government Offices of Sweden at [www.sweden.gov.se/sb/d/10358/a/99714](http://www.sweden.gov.se/sb/d/10358/a/99714).

53 The following states argued for the first time in their Written Statements submitted during the advisory proceedings that it was not the PISG that had issued the UDI: Austria, para. 16; Estonia, at 3; Germany, at 6; Luxembourg, para. 13; Norway, para. 13; and the United Kingdom, para. 1.12. This was also the position taken by the authors of the UDI in their Written Contribution (para. 6.01). Other states claimed in their Written Statements that the UDI simply had been issued by the elected representatives of 'Kosovo': Albania, paras. 40 and 43; Slovenia, at 1; and the United States, at 32. It is to be noted that even states having recognized Kosovo as an independent state acknowledged in their Written Statements that the authors were the PISG: Czech Republic, at 2 and 6; France, paras. 10 and 2.64; Switzerland, para. 8; Finland, para. 17; and Poland, para. 3.40.

54 Judge Hersch Lauterpacht remarked that UN member states are bound to give due consideration to UNGA resolutions in good faith: *South-West African Voting Procedure, Advisory Opinion of June 7th, [1955] ICJ Rep. (Judge Lauterpacht)*, at 119.

55 *Kosovo* AO, *supra* note 1, para. 109.

This extraordinary finding was premised on two even more extraordinary grounds, which are each discussed in turn below.

### 2.1. Contradictory wording of the UDI and procedural irregularities in its adoption

It has been explained above that the UNGA as a body, and states that had recognized Kosovo as a sovereign state, made it clear that the authors of the UDI were the PISG. This was also the position taken by the United Nations, as discussed below in subsection 2.2. However, the Court's selective interpretation of the UDI and the procedural irregularities that occurred during its adoption constituted the first basis on which the Court grounded its conclusion that 'the authors of the declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within [the] legal order [of the interim self-administration of Kosovo] but, rather, set out to adopt a measure the significance and effects of which would lie outside that order'.<sup>56</sup> In short, instead of calling a spade a spade, the Court called the spade by a different name in order for its actions to fall outside the scope of any legal constraints.<sup>57</sup>

First, with respect to the wording of the UDI, the Court placed great emphasis on selected parts of the UDI in which its authors claimed that the status of Kosovo had been 'resolved' and that the aim of the UDI was to establish Kosovo as 'an independent and sovereign state'.<sup>58</sup> The Court considered that '[t]his language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo'.<sup>59</sup> Thus, the very evidence that demonstrated the *ultra vires* nature of the UDI – that it was intended to operate outside the legal framework established by the UNSC – led the Court to reach the reverse conclusion that one would have expected. Instead of declaring the act to have been exercised *ultra vires*, the Court considered that the act was so far outside the realm of the competences of the PISG that it was not governed by the legal framework established by UNSCR 1244 to apply to the PISG. However, as Judge Bennouna noted:

In law, it is not merely because an institution has adopted an act exceeding its powers (*ultra vires*) that the legal bond between the institution and the act is broken. In such a case, the institution must be considered to be in breach of the legal framework that justifies and legitimizes it.<sup>60</sup>

Furthermore, it is to be expected in those cases in which the relevant domestic legal system does not recognize a right to separate from the state in question that persons issuing a UDI would claim that the act is not governed by the applicable legal regime because they are performing a revolutionary act of a *pouvoir constituant*.

<sup>56</sup> Ibid., para. 105.

<sup>57</sup> As Judge Bennouna noted, 'If such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law'; *ibid.* (Judge Bennouna), para. 46.

<sup>58</sup> Ibid., para. 105.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid. (Judge Bennouna), para. 44. Judge Skotnikov noted that '[t]he majority [of the Court], unfortunately, does not explain the difference between acting outside the legal order and violating it'; *ibid.* (Judge Skotnikov), para. 15.

Such a claim is nothing more than the unilateral perception of those issuing a UDI. In contemporary international law, newly independent states were created contrary to the constitutional order of some colonial powers, but their creation was lawful under international law because the principle of self-determination applied. The problem with the UDI of 17 February 2008 is that such a *coup d'état* not only was issued contrary to the constitutional order of the state concerned, but it was also a '*coup des Nations Unies*', namely issued contrary to the legal order of the United Nations, which is responsible for administering the territory.

Contradictions in the wording of the UDI appear to undermine the Court's analysis and make clear that the authors of the UDI themselves acknowledged their status as the PISG. The first preambular paragraph of the UDI describes the context in which the declaration was issued, by the 'Assembly of Kosovo, Convened in an extraordinary meeting on February 17, 2008, in Pristine, the capital of Kosovo', and that the Assembly of Kosovo 'approves' the 'Kosova Declaration of Independence [*sic*]'.<sup>61</sup> The Court was aware of these, and other, contradictions: the majority of the Court omitted the words 'Assembly of Kosovo' in its summary of the facts when it noted that it was the 'authors' who had been '[c]onvened in an extraordinary meeting';<sup>62</sup> it acknowledged that the UDI was adopted by 109 of the 120 members of the Assembly of Kosovo;<sup>63</sup> and it noted that 'when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework'.<sup>64</sup> However, the majority of the Court simply stated that the UDI 'must be seen in its larger context'.<sup>65</sup>

Second, with respect to the procedural irregularities, these were twofold. The issuance of the UDI violated both the procedure for determining the final status of Kosovo, set out in UNSCR 1244, and it also violated the procedure for the adoption of legislation by the Assembly of Kosovo. These two types of procedural irregularity were not only condoned by the Court, but they were used as evidence by the Court that by issuing the UDI in this irregular fashion, the legal framework of the interim administration in Kosovo did not apply to this act.

In relation to the peaceful settlement of disputes, it is profoundly disquieting that the Court implicitly condoned a unilateral measure taken by one party to the dispute that attempted to bring to an end a political process on the future status of Kosovo – a process that was clearly governed by binding provisions contained in UNSCR 1244. The Court stated that the UDI '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'.<sup>66</sup> It should be recalled that Mr Ahtisaari's recommendation that Kosovo's final status be independence under the supervision of the international

61 Unilateral Declaration of Independence of Kosovo, available on the website of the so-called 'Republic of Kosovo' at [www.assembly-kosova.org/?cid=2,128,1635](http://www.assembly-kosova.org/?cid=2,128,1635).

62 *Kosovo AO*, *supra* note 1, para. 74.

63 *Ibid.*, para. 76.

64 *Ibid.*, para. 104.

65 *Ibid.*

66 *Ibid.*, para. 105.

community<sup>67</sup> was not accepted by the UNSC,<sup>68</sup> nor was any outcome reached in the negotiations held under the auspices of the European Union/United States/Russian Federation Troika.<sup>69</sup> The negotiations between the two sides thus should have continued in good faith. As Judge Bennouna noted, '[a] stalemate in the Security Council does not release either of the parties to a dispute from their obligations'.<sup>70</sup> A party to a settlement of dispute procedure cannot unilaterally modify the situation, as the UK ambassador noted in 2003 with respect to Kosovo.<sup>71</sup> The approach taken by the Court in implicitly condoning the unilateral imposition of an outcome by one party in a settlement-of-dispute procedure has serious implications for the mechanisms of mediation and negotiation. The Court seems to suggest that if one party to a dispute considers that the negotiations have gone on for too long, then it may unilaterally impose its desired outcome on the other party. If this were indeed the case – which it is not – then, as Judge Bennouna noted, 'the other Party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory'.<sup>72</sup> This approach raises serious concerns if it is to be generally applied in international relations.

Concerning the violations of the procedural rules governing the adoption of legislation by the Assembly of Kosovo, instead of these posing a problem for the accordance with international law of the UDI, the Court treated them as factors that lent support to its conclusion that the UDI was not issued by the PISG.<sup>73</sup> The Court noted that at least in two respects, the issuance of the UDI was not carried out in conformity with the procedural requirements. It noted that 'the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette',<sup>74</sup> and that 'the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation' because the president of Kosovo – who, the Court noted, was not a member of the Assembly of Kosovo – attached his signature to the UDI.<sup>75</sup> Even if the UDI was adopted by the Assembly, the president, and the prime minister of Kosovo, they all constituted organs of the PISG. All the individuals who issued the UDI were acting in that capacity, since they considered themselves to be the 'democratically elected representatives'. As a matter of course, they were elected within the framework

67 Report of the Special Envoy of the Secretary-General on Kosovo's future status, annexed to letter dated 26 March 2007 from the Secretary-General addressed to the President of the UNSC, 26 March 2007, UN Doc. S/2007/168 (2007).

68 Draft Res. S/2007/437 (2007) was withdrawn after it became clear that it would not be adopted by the UNSC.

69 Report of the European Union/US/Russian Federation Troika on Kosovo, 4 December 2007, annexed to letter dated 10 December 2007 from the Secretary-General to the President of the UNSC, 10 December 2007, UN Doc. S/2007/723 (2007).

70 *Kosovo AO* (Judge Bennouna), *supra* note 1, para. 56.

71 'The United Kingdom condemns unilateral statements on Kosovo's final status from either side. We will not recognize any move to establish political arrangements for the whole or part of Kosovo, either unilaterally or in any arrangement that does not have the backing of the international community'; Mr Harrison (UK), UN Doc. S/PV.4742 (2003), at 16.

72 *Kosovo AO* (Judge Bennouna), *supra* note 1, para. 56.

73 *Ibid.*, para. 109.

74 *Ibid.*, para. 107; see also para. 76.

75 *Ibid.*

of UNSCR 1244 and as organs constituting the PISG. As the ILC's commentary to Article 7 of the Articles on State Responsibility affirms:

Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it would be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been 'carried out by persons cloaked with governmental authority'.<sup>76</sup>

As a result of the Court's finding in relation to both the material competence of the PISG and the applicable procedural rules that the UDI was not an act *ultra vires* because the authors of the UDI were not acting as the PISG, but in a different 'capacity', the Court effectively absolved the United Nations of international responsibility for the issuance of the UDI. Draft Article 7 of the ILC's draft articles on the Responsibility of International Organizations reads '[t]he 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'.<sup>77</sup> On the basis of the reasoning in the *Kosovo* AO, an organ or agent of an international organization (or, by extension, a state) that wishes to act in a way that would either fall outside its material competence or violate applicable procedural rules may claim simply not to be acting in the capacity of the organization in question and call itself by a different name, in order to argue that its actions should not to be considered *ultra vires*.

## 2.2. The 'silence' of the Special Representative of the Secretary-General

The second ground on which the Court based its finding that the authors of the UDI were not the PISG was an inference drawn by the Court concerning the conduct of the Special Representative of the UN Secretary-General. After noting that on previous occasions, the Special Representative had qualified certain acts of the PISG as being *ultra vires*, the Court went on to note 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*.<sup>78</sup>

The inference drawn by the Court vis-à-vis the 'silence' of the Special Representative of the Secretary-General is extraordinary. The Special Representative's inaction was not a case of what Sherlock Holmes described as the curious incident of the dog not barking in the night,<sup>79</sup> when, in the ordinary course of events, something that should

76 ILC, Report of the International Law Commission on the work of its fifty-third session, 46, para. (7). Quotation from: *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. CTR, Vol. 27 (1991), at 92.

77 Report of the International Law Commission, 61st Session, A/61/40, 2009, at 21 (emphasis added).

78 *Kosovo* AO, *supra* note 1, para. 108 (emphasis added).

79 A. C. Doyle, *Memoirs of Sherlock Holmes* (1930), 345.

have taken place does not occur, leading one to draw certain inferences. Indeed, the ‘silence’ of the Special Representative of the Secretary-General vis-à-vis the UDI was entirely unrelated to his views on whether or not the UDI was issued by the PISG in whatever ‘capacity’ and whether or not the UDI constituted an *ultra vires* act of the PISG. It is common knowledge that the silence of the Special Representative was due to the ‘neutral-status’ policy adopted by the Secretary-General with regard to the issuance of the UDI, as a result of what he considered to be his position in light of the lack of consensus within the UNSC, and pending further guidance from this organ.<sup>80</sup>

It is evident that a neutral position, like the one adopted by the Secretary-General and his Special Representative, cannot be read as either favouring or condemning the UDI. In a letter to the president of Serbia on 12 June 2008, the Secretary-General stated that ‘[t]he position of the United Nations on the question of the status of Kosovo has been one of strict status neutrality’.<sup>81</sup> The Special Representative of the Secretary-General reiterated this position in a statement to the UNSC, soon after the rendering of the *Kosovo* AO by the Court.<sup>82</sup> The Special Representative thus neither condoned nor condemned the issuance of the UDI. He simply remained silent, not because he considered that an entity other than the PISG had issued the UDI or that they acted in another capacity, nor because he considered that the UDI was not an *ultra vires* act, but because of the status-neutral policy adopted by the Secretary-General.

The inference drawn by the Court concerning the reasons for the Special Representative’s ‘silence’ also evidences a presumption held by the Court that the Special Representative’s acts and omissions (his ‘sounds’ and his ‘silences’) are always in conformity with his mandate. To turn the Court’s reasoning on its head, it is equally plausible to question whether the Special Representative was in breach of his mandate for having failed to act, because he did not take the action he was mandated to take with regard to the UDI issued by the PISG, which constituted an act in excess of authority.

The fact is that there was incontrovertible, explicit evidence that the Special Representative and the Secretary-General did indeed consider that the UDI had been issued by the PISG. During a meeting of the UNSC, the day immediately after the UDI was issued, the Secretary-General relayed to the UNSC the qualification made by his Special Representative that the UDI was issued by the PISG: ‘Yesterday, my Special Representative for Kosovo informed me that the Assembly of Kosovo’s Provisional Institutions of Self-Government held a session during which it adopted a declaration of independence, which declares Kosovo an independent and sovereign State.’<sup>83</sup>

The majority of the Court did not address this statement by the Secretary-General. The majority, instead, referred to a Report of the Secretary-General submitted to the

80 UNSC, sixty-third year, 5839th meeting, 18 February 2008, UN Doc. S/PV.5839 (2008), at 3.

81 Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr Boris Tadić, UN Doc. S/2008/354 (2008).

82 ‘The United Nations Preliminary Assessment Is that the [*Kosovo* AO] Does Not Affect the Status of UNMIK or a Status-Neutral Policy’, UNSC, 6367th meeting, 3 August 2010, UN Doc. S/PV.6367 (2010), at 3.

83 *Ibid.*, at 2. See also *Kosovo* AO (Judge Bennouna), *supra* note 1, para. 48.

UNSC in March 2008, in which the Secretary-General stated that '[o]n 17 February, the Assembly of Kosovo held a session during which it adopted a "declaration of independence", declaring Kosovo an independent and sovereign State'.<sup>84</sup> This statement by the Secretary-General lends further support to the fact that according to the United Nations, it was the PISG who issued the UDI. However, the Court did not attribute any legal weight to this statement. The Court considered that the Report merely constituted 'the normal periodic report on the UNMIK activities, the purpose of which was to inform the UNSC about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted'.<sup>85</sup>

In light of the irrefutable evidence outlined above that the United Nations considered the PISG to be the authors of the UDI, there was no basis for the Court to infer that the 'silence' of the Special Representative of the Secretary-General 'suggested' that he considered the UDI not to constitute an act of the PISG, or that this act was not *ultra vires*. The Special Representative and the Secretary-General were not 'silent' in making clear in publicly available official documents of the United Nations that the position of the United Nations was that the UDI was issued by the PISG. The result is very disquieting: when there is silence, the Court can quite clearly hear the sound of a factual qualification being made, and when a factual qualification is made, the Court is hard of hearing.

### 3. THE COURT'S INTERPRETATION OF UNSC RESOLUTION 1244

An important contribution to general international law made by the *Kosovo* AO is the guidance that the Court provided on the interpretation of UNSC resolutions,<sup>86</sup> which for considerable time have been subsumed under the rules of interpretation of treaties as contained in customary international law and consecrated in the 1969 Vienna Convention on the Law of Treaties.<sup>87</sup> The Court also recalled the guidance for interpreting the legally binding force of UNSC resolutions, set out by the Court in the *Namibia* AO.<sup>88</sup> However, in the concrete task of interpreting UNSCR 1244, the interpretative approach adopted by the Court does not conform to its own guidance. This is most apparent with regard to the absence of any analysis of the principle of territorial integrity vis-à-vis UNSCR 1244.

This resolution contained important guarantees of respect for the territorial integrity of the state in question: the Federal Republic of Yugoslavia (FRY) and, later, Serbia. Guarantees of respect for the territorial integrity of Serbia were clearly set out in (i) preambular paragraph 2 of UNSCR 1244, which recalls previous UNSC resolutions confirming the territorial integrity of the FRY; (ii) preambular

84 Report of the Secretary-General on the UN Interim Administration Mission in Kosovo, UN Doc. S/2008/211 (2008), para. 3.

85 *Kosovo* AO, *supra* note 1, para. 108.

86 *Ibid.*, para. 94.

87 Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

88 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16, para. 114.

paragraph 4 of UNSCR 1244, which refers to ‘Kosovo, Federal Republic of Yugoslavia’; (iii) preambular paragraph 10 of UNSCR 1244, in which the Council referred to the Helsinki Final Act, and Annex 2; (iv) Annex 1 to UNSCR 1244; and (v) operative paragraph 1 of UNSCR 1244, which refers to Annexes 1 and 2. Thus, a straightforward textual interpretation of UNSCR 1244 required an analysis of the guarantees of territorial integrity contained therein. Furthermore, according to the Court’s own interpretative guidance, the Court should have interpreted UNSCR 1244 in light of ‘statements by representatives of members of the Security Council made at the time of their adoption’.<sup>89</sup> The guarantees of respect of the territorial integrity of Serbia were expressly mentioned by members of the UNSC, both immediately preceding and following the adoption of UNSCR 1244.<sup>90</sup> Indeed, a guarantee of the respect for the territorial integrity of Serbia was a *conditio sine qua non* for China to allow UNSCR 1244 to be adopted by abstaining during the voting process.<sup>91</sup>

However, the Court did not address the guarantees of Serbia’s territorial integrity contained in UNSCR 1244 when interpreting this resolution<sup>92</sup> – an approach that led it to consider that the issuance of the UDI did not violate UNSCR 1244. The Court only addressed the principle of territorial integrity in very general terms in the part of its *Kosovo AO* that dealt with general international law.<sup>93</sup> Consequently, the Court’s interpretation of UNSCR 1244 is unconvincing. Furthermore, by not addressing the very legal guarantee on which the presence of the UN interim administration in Kosovo is premised, the Court has set an alarming precedent. States in the future may express unwillingness to consent to a UN presence on their respective territories, for fear that such a situation could lead to a loss of part of their territory, regardless of whether or not there are ‘guarantees’ of respect for their territorial integrity in place. Instead of encouraging co-operation with the United Nations, the Court unwittingly is placing the UN collective security framework in jeopardy.

#### 4. CONCLUDING REMARKS

This article should not be read as simply advancing a ‘formalist’ approach that disregards human rights. If human rights were at the core of the question, then coherence also demands an examination of the conduct of all sides with regard to human rights and the protection of minorities after 1999 until today, both in Kosovo and in the rest of Serbia. This is an exercise that those advocating for ‘remedial secession’ obstinately refuse to make. What this article has attempted to show is that the Court’s decision not to examine the issuance of the UDI as a legal act raises concerns about fundamental aspects of international law and, in particular, the law of the United Nations. Consequently, the Court has not fulfilled its role as ‘the guardian of legality for the international community as a whole, both within

89 *Kosovo AO*, *supra* note 1, para. 94.

90 UN extracts from the debates of the UNSC concerning UNSCR 1244, UN Doc. S/PV.4011 (1999): Mr Lavrov (Russian Federation), at 7; Mr Shen Guofang (China), at 8; Mr Petrella (Argentina), at 19.

91 *Ibid.*, at 9.

92 *Kosovo AO*, *supra* note 1, paras. 110–119.

93 *Ibid.*, para. 80; see the contribution by Olivier Corten in this issue.

and without the United Nations'.<sup>94</sup> By striving to ground its legal analysis on the 'realities on the ground',<sup>95</sup> the Court has inscribed itself in the rather long list of UN acts of resignation with regard to Kosovo. The *Kosovo* AO reduces the role played by law in international relations.

The *Kosovo* AO marks the first time that an organ of the United Nations has lent tacit support to a secessionist attempt carried out on the territory of a member state. There has thus been a noticeable shift in the position of the United Nations from the stance taken by Secretary-General U Thant, who considered that

[a]s far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocal [*sic*]. As an international organization, the United Nations has never accepted and does not accept and I do believe will ever accept the principle of secession of a part of its Member State'.<sup>96</sup>

The Court did not pronounce upon whether a right to unilaterally secede territory exists.<sup>97</sup> However, its refusal to examine this question, and to treat the UDI as a mere sheet of paper, as an '*attempt to determine finally the status of Kosovo*',<sup>98</sup> has left the Peace Palace's walls resonating with its silence.

The legal situation has not been clarified since the *Kosovo* AO was rendered on 22 July 2010. The Court whittled down the scope of the question it was asked to address to a question of 'illegality' and a search for express prohibitions of declarations of independence, and thus it failed to answer the most pressing legal issues raised in the UNGA's question. The Court did not pronounce upon the statehood of Kosovo, nor did the Court articulate any legal criteria for the creation of states under international law outside self-determination when applicable to non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation.<sup>99</sup> The political situation remains at an impasse. The positions adopted by states after the *Kosovo* AO was rendered are a split mirror image of the positions they held prior to the advisory proceedings, as evidenced by recent debates within the UNSC and UNGA.<sup>100</sup> With no political consensus within the UNSC, and no legal guidance provided by the Court, it is unclear how the question of Kosovo will progress from here. This is the outcome of a deliberate policy adopted by some states that resorted to force in 1999 and decided to impose what they considered to be the best solution for Kosovo, bypassing a UNSC resolution, and irrespective of the position taken by the territorial state concerned. As a result, this group of states has divided the international community and created a situation in which the United Nations Mission of Interim Administration in Kosovo

94 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992 (Judge Lachs), at 26; (*Libyan Jamahiriya v. United States of America*), Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992 (Judge Lachs), at 138.

95 See *Kosovo AO* (Vice-President Tomka), *supra* note 1, para. 1.

96 Transcript of press conference held by UN Secretary-General U Thant, Dakar, Senegal, 4 January 1970, reproduced in (1970) *UN Monthly Chronicle* 7, at 36.

97 *Kosovo AO*, *supra* note 1, para. 56.

98 *Ibid.*, para. 114 (emphasis added).

99 *Kosovo AO*, *supra* note 1, para. 82.

100 UNSC, 6367th meeting, 3 August 2010, UN Doc. S/PV.6367 (2010); UNGA, 120th meeting, 9 September 2010, UN Doc. A/64/PV.120.

still fulfils its mandate in accordance with UNSCR 1244 and the PISG act as though they were organs of a sovereign state.

What the Court did make clear is that the *lex specialis* governing Kosovo, established by UNSCR 1244, remains in force. It can only be changed by the subsequent adoption of another UNSC resolution.<sup>101</sup> This is even recognized by Mr Skender Hyseni, who requested the UNSC ‘to replace resolution 1244 (1999) with a new resolution’.<sup>102</sup> That the *lex specialis* established by the UNSC continues to apply to Kosovo means that the ultimate conclusion to be drawn from the *Kosovo* AO is that the attempt to determine finally the status of Kosovo by the authors of the UDI and its supporters on 17 February 2008 has not succeeded. The *Kosovo* AO can be read as a contribution by the Court to the legal imbroglio created by the claim of the existence of a parallel framework of governance emanating from the UDI that operates ‘at a different level’ from the international legal rules established by the UNSC. The difficult task now falls to creative and patient minds to find a stable, peaceful solution on the ground in line with the *lex specialis* created by UNSCR 1244. Promoters of Kosovo’s secession are confident of their strength and influence. For them, it will simply be a matter of time until a *fait accompli* is imposed on the international community of states. It remains to be seen whether this will in fact occur. In the meantime, the very foundations of international law, including the collective security system set out in the Charter of the United Nations, have suffered. And the world today is less certain than the one that existed before the rendering of the *Kosovo* AO by the Court.

101 The situation in Kosovo, UN Doc. S/RES/1244 (1999).

102 Ibid.