

The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the "Foam on the Tide of Time"

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* This article is a follow-up to my previous article on the UDI in Kosovo "Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo", published in *Max Planck UNYB* 12 (2008), 1 et seq. For that reason, the present article does not examine background issues of fact and law relating to Kosovo's attempted secession, and instead focuses on points raised, or contingent upon the reasoning, in the International Court's Opinion.

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I. Introduction

The International Court's Advisory Opinion on the legality of the Unilateral Declaration of Independence (UDI) in respect of Kosovo¹ has not only been awaited with great interest, but also with widely diverging expectations. It was requested, argued and delivered against a background that incorporates all politically contentious elements that a case before an international tribunal could ever involve.

The Court's principal finding was that the UDI of 17 February 2008 in Kosovo did not violate international law. Having construed narrowly the question as to the lawfulness of the UDI in respect of Kosovo, put to it by the UN General Assembly, the Court fell short of pronouncing on substantive legal issues underlying the Kosovo controversy, such as secession, statehood, self-determination and recognition. The Court's narrow interpretation of the General Assembly's question has aroused not only criticism but also substantial misunderstanding as to what the Court actually pronounced, or even whether the Court actually pronounced on anything related to Kosovo's claim to statehood.

It is obvious that, in all relevant political quarters, attempts would be made to portray the Opinion as reflecting political expectations held in those quarters. Legal reasoning is, however, more complex, nuanced and specialised than common sense intuition and political expectation. As *Vaughan Lowe* has most pertinently observed, "Legal categories are not the categories of ordinary perception; they are superimposed upon the categories of ordinary perception;" because "legal argument narrows down the issue, and excludes as irrelevant a host of surrounding circumstances."²

This simple distinction becomes even more compelling if one considers that the importance of the Advisory Opinion on Kosovo is not just its focus on one of the greatest international legal controversies of our time, but also the connection of its reasoning with foundational legal concepts on which the international legal system rests, such as the overall domain of international law, legal standing of non-state actors,

¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, General List No. 141, Advisory Opinion of 22 July 2010 (hereinafter Opinion).

² A.V. Lowe, "The Role of Equity", *Austr. Yb. Int'l L.* 12 (1992), 57 et seq. (72).

interpretation, validity and opposability of international legal acts and transactions. These foundational concepts and categories are not systematically spelt out in the Opinion, yet every single finding of the Court is contingent upon them, and obscuring them almost inevitably risks misunderstanding the actual content and scope of the Opinion, i.e. taking it for what it is not.

II. The Court's Competence to Deliver the Advisory Opinion

1. Questions of Jurisdiction

The Court's advisory jurisdiction is premised on Article 65 of its Statute, according to which "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." This must be read in context with Article 96 para. 1 of the UN Charter, according to which "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." The implications are crystal clear: the legality of Kosovo's UDI is a legal question;³ the General Assembly had put that question to the Court; the Court was therefore expected to respond favourably. The General Assembly's standing in this area is different to that of specialised agencies. Unlike specialised agencies, the Assembly does not have to demonstrate its special interest in the subject-matter of the question it requests the Court's Opinion on; the request can be on "any legal question."⁴ All pertinent provisions of the Charter and the Statute thus required from the Court to answer this question without any further analysis of jurisdiction.

However, presumably to respond to submissions raised by a number of states during written and oral proceedings, the Court specified that it "has sometimes in the past given certain indications as to the re-

³ Legal questions are the ones that are "framed in terms of law and raise problems of international law", and "are by their very nature susceptible of a reply based on law", see *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 et seq. (18 et seq.).

⁴ Which is different from the arrangement of jurisdiction of specialised agencies under Article 96 para. 2 of the UN Charter which requires that the question asked must fall within the requesting agencies' competence.

lationship between the question which is the subject of a request for an Advisory Opinion and the activities of the General Assembly.”⁵ Legal reasons as to why the Court had to follow that route are not completely unclear. While the Court adopted the right approach to assert its jurisdiction, its engagement with questions not crucially impacting its jurisdiction over the General Assembly’s request does not constitute a good exercise in judicial economy. By engaging with questions not essential to its jurisdiction, the Court unnecessarily exposed itself to criticisms of its handling of the constitutional role of the General Assembly and Security Council. It was further at odds with the requirements of judicial economy that the Court engaged with the same question of the role of principal organs of the United Nations in two different contexts: that of jurisdiction and that of discretion.

Nevertheless, for those who would criticise the Court for its handling of this constitutional matter, it should be emphasised that the Court had actually decided this point in line with its previous jurisdiction regarding the relationship between the General Assembly and Security Council, as was most prominently specified in the *Certain Expenses Case*.⁶ The matter was rightly reduced to the interpretation of Arts 10, 11 and 12 of the Charter, the cumulative effect of which is that the General Assembly remains competent to deal with any question of international peace and security unless the Security Council is exercising its Chapter VII functions in relation to that situation. While the Council was still seized of the Kosovo question, and therefore,

“while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court’s opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1.”

However, the question whether the delimitation of the respective powers between the Security Council and the General Assembly required from the Court to decline to exercise its jurisdiction to render an Advisory Opinion was arguably another matter relating to its discre-

⁵ Opinion, see note 1, para. 21.

⁶ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151 et seq. (The principal relevant point of this case was that the Assembly can act in all areas that are not within the Security Council’s exclusive zone of responsibility, e.g. Chapter VII enforcement measures.).

tion to render Advisory Opinions.⁷ The Court also faced submissions as to potential political motives underlying the request for the Advisory Opinion and political repercussions it might produce. In line with its long-standing and consistent jurisprudence, the Court thus dismissed the relevance of the “political questions” doctrine, by observing that,

“the fact that a question has political aspects does not suffice to deprive it of its character as a legal question Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court ... is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have ... ”⁸

The Court’s past jurisprudence on the matter has been so clear and consistent that it would not have allowed the Court to reach any different outcome in this case.⁹

2. Discretion to Deliver Advisory Opinions

The Court’s treatment of its discretion to render Advisory Opinions is premised on the statutory basis for that discretion as expressed in Article 65 of the Statute, specifying that the Court may render Advisory Opinions.¹⁰ Furthermore, this discretion is not a matter of whim and free exercise; it is functional, as the Court put it, “to protect the integ-

⁷ Opinion, see note 1, para. 24; more specifically, the Court observed that the General Assembly had sufficient interest in the Kosovo matter which it for years kept on its agenda and approved the UNMIK budget, paras 40-46.

⁸ Opinion, see note 1, para. 27.

⁹ For an overview and analysis of this past jurisprudence see A. Orakhelashvili, *Interpretation of Acts and Rules in Public International Law*, 2008, 29 et seq.

¹⁰ Opinion, see note 1, para. 29. This reflects the approach of Judge *ad hoc* Sir Robert Jennings in the *Lockerbie* Case, that “all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.” *Lockerbie* (Libya v. UK), Judgment, Dissenting Opinion of Judge *ad hoc* Sir Robert Jennings, ICJ Reports 1998, 99 et seq. (110).

riety of the Court's judicial function and its nature as the principal judicial organ of the United Nations." This functional nature of discretion then generates a presumption in favour of rendering an Advisory Opinion whenever the Court is properly requested to do so. This presumption is expressed in, and strengthened by, the Court's long-standing position that the Court's answer to a request for an Advisory Opinion represents its participation in the activities of the United Nations, and, "in principle, should not be refused." There must be "compelling reasons for it to refuse to respond to the request from the General Assembly."¹¹

As part of its task to maintain the integrity of its judicial function which consists in the careful application of law to facts as far as the available scope of judicial jurisdiction allows for this, the Court here again, in relation to the discretion argument, was unwilling to decline rendering the Advisory Opinion because it could have unpredictable political consequences. Therefore, the Court did not,

"consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot – in particular where there is no basis on which to make such an assessment – substitute its own view as to whether an opinion would be likely to have an adverse effect."¹²

It is submitted that this was the only choice available to the Court. Quite apart from principles affirmed in its previous jurisprudence, the Court, had it refused to render the Opinion, would have substantially compromised its judicial function; for *any* Advisory Opinion it renders is likely to have serious political repercussions. Allowing such factors any relevance in its decision-making, the Court would have contradicted the clearly established standard that the grounds for declining to render an Advisory Opinion have to be so exceptional that they can reverse the strong presumption in favour of rendering the Opinion. In its previous cases the Court had never found such exceptional reasons whenever asked by a principal organ to deliver an Opinion, and it was from the outset obvious that the Kosovo UDI situation had no such characteristics to become the first case with the opposite effect.

¹¹ Opinion, see note 1, paras 28-31.

¹² Opinion, *ibid.*, para. 35.

These considerations no doubt guided the Court's rejection of the argument that the Security Council's pre-eminent role in the Kosovo matter justified the use of the Court's discretion to decline rendering the Opinion. As the Court put it,

“the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. ... 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.”¹³

III. The Court's Construction of the Question put by the General Assembly

1. The Scope of the Question

The Court addressed the legality of the UDI in respect of Kosovo by adopting what was widely seen as a narrow interpretation of the question put to the Court by the General Assembly, as to whether the UDI of 17 February 2008 in respect of Kosovo was in accordance with international law. At the outset, the Court underlined the range of choices it has in relation to construing questions put to it by other principal organs, as confirmed in its previous jurisprudence: to depart from the language of the question where it was not adequately formulated; to determine, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue”; or where the question asked is unclear or vague, to clarify the question before giving its Opinion.¹⁴ In the past, the Court had modified the scope of questions put to it because answering them on literal terms would be “actually misleading as to the legal rules applicable to the matter under consideration.” The Court would not discharge its obligation if it “did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.”¹⁵ In

¹³ Opinion, *ibid.*, paras 46-47.

¹⁴ Opinion, *ibid.*, para. 50.

¹⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73 et seq. (88-89).

another case, the Court stated that “it might be possible to give a reply to the question on its own terms, but the reply would not appear to resolve the questions really in issue.”¹⁶

In the case at hand, factors militating in favour of a broader construction of the General Assembly's question did not go as far as to let the factors involved in previous cases materialise. The Court's response to the question as to the legality of the UDI specifically would not be misleading as to the broader legal context; nor would the Court's response fail to resolve “the questions really at issue.” For these questions “at issue” are those that the General Assembly specified in its request and the Court would not be justified in re-inventing the terms of these questions. The requesting organ has the right to identify the scope of the question in the way it prefers it to be answered. According to the Court, this “narrow” way of putting the question clearly specified the limits and scope of the task the Court had to embark upon, for,

“it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.”¹⁷

In other words, the Court would be justified in re-formulating questions put to it if answering them in literal terms would misrepresent the applicable legal position; it would not be justified in re-formulating questions if answering them in their literal terms would not expressly clarify the entire legal position across the board, but would focus on some parts of it. While principal organs and specialised agencies have no right to ask the Court to misrepresent the legal position in question (as this would contradict Article 38 of the Court's Statute), it is fully within their legal rights to request the Court to pronounce on some aspects of that legal position as opposed to addressing it in its entirety. While there is no one-size solution to fit all requests for Advisory Opinions, the Court's treatment of the General Assembly's question did not exceed the margin the Court allowed itself in other similar instances. The outcome may have been surprising in some, indeed most, quarters, but it is certainly not outlandish if the Court's past jurisprudence is considered.

¹⁶ *Application for Review of Judgment No. 273 of the UN Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, 325 et seq. (326 et seq.).

¹⁷ Opinion, see note 1, para. 56.

The Court had to examine the General Assembly's question against the background of general international law, and of the interim regime of governance established in relation to Kosovo by the Security Council in its resolution S/RES/1244 (1999) of 10 June 1999. It is important to see whether the legality of Kosovo's UDI under general international law and under the legal regime created by and pursuant to S/RES/1244 are separate questions. Empirically it is possible to examine these questions separately. Nevertheless, these two issues are conceptually and normatively related. The reason why the Security Council preserved, under S/RES/1244, territorial integrity of the Federal Republic of Yugoslavia (FRY), and imposed an interim regime as opposed to a final status settlement, is that this decision has reflected the legal position under general international law, that a part of territory of the state cannot secede without the consent of that state. S/RES/1244 constitutes a *lex specialis* in relation to general international law, as the Court has confirmed; but it does so not by modifying the applicable *lex generalis*, but by preserving the legal position under it and complementing it by interim arrangements regarding the administration of Kosovo until the final settlement is achieved, which point was also confirmed in the Advisory Opinion. It is therefore inevitable that the assessment of lawfulness of Kosovo's UDI under general international law is going to be the same as its assessment under the legal regime established under and pursuant to S/RES/1244. This also explains the Court's approach to shift the focus from substantive legality of the UDI to the identity of its authors in relation to both the above areas.

2. The Court's Semantics

The Court's semantics while dealing with the question of legality of the UDI in respect of Kosovo illustrate that the Court was unwilling to extend its reasoning beyond the "narrow" question put to it, and wishes to prevent its own Opinion from being presented as having generated or approved the legal consequences on which the Court could not pronounce. It is noteworthy that the Opinion's title refers to a UDI "*in respect of Kosovo*" not *by* or *of* Kosovo, which manifests the Court's careful position to regard this UDI as a fact, without prejudice to whether the entity that has issued the UDI was entitled to do so, due to its being a valid representative of the people of Kosovo; or even if that were the case, the UDI thus issued could be validly regarded as the one issued by

the entity that is entitled to do so under international law, for instance by virtue of being a self-determination unit.

The Court was asked by the General Assembly whether the Kosovo UDI was “*in accordance with*” international law, while the relevant operative paragraph in the Court’s Opinion specifies that the declaration of independence “*did not violate*” international law. This may seem a matter purely of semantics and a mere difference in words. But it also has practical significance for understanding the Opinion’s actual rationale and impact, how it was received by states and how it should have been understood by them. In the Security Council debate after the Opinion was rendered, the Representative of the United Kingdom,

“welcome[d] the recent advisory opinion of the International Court of Justice, which, in response to the question put to it by the General Assembly, confirmed that Kosovo’s declaration of independence was *in accordance with* international law.”¹⁸

However, as the General Assembly’s question was about the “*accordance with*” international law of the Kosovo UDI, it is difficult to see why the Court did not use the same wording in the relevant operative paragraph of its Opinion, unless some compelling considerations induced it to use a different wording. The entire context of the Advisory Opinion militates in favour of assuming that this allegedly technical change of words may be due to far broader systemic legal considerations.¹⁹

The key factor is that, whether or not one subscribes to the *Lotus* style presumption of sovereign freedom of states to act unless international law imposes a prohibition,²⁰ it is not really disputable that, most of the time, *not violating* international law is the same as being *in accordance* with it. In the *Lotus* Case there was found no prohibitive rule on Turkey’s jurisdiction contradicting which would put that state in breach of international law, and hence its exercise of jurisdiction was deemed to be in accordance with international law.²¹ Along similar lines, if a

¹⁸ Doc. S/PV.6367, 16 (emphasis added); Kosovo’s representative claimed that the Court found the UDI to be *in full compliance* with S/RES/1244, *ibid.*, 24.

¹⁹ This change of words has to be understood in line with what the Court said in para. 56 of the Opinion, see note 1.

²⁰ This author does subscribe to this presumption, for details see Orakhelashvili, see note 9, Chapter 2; but at the same time, there is a significant body of opinion that does not.

²¹ *Lotus* Case, PCIJ (1927), Series A, No. 10, 18 et seq.

warship carries out its innocent passage in foreign territorial waters *in accordance* with the restrictions imposed by the 1982 UN Convention on the Law of the Sea, then it can be said that this passage *does not violate* international law.

But the above model is most suitable to situations where the relevant act, decision or conduct is produced and implemented within the inter-state realm of the international legal system. There can be multiple acts and actions carried out within the domestic jurisdiction of states – raising taxes, changing the electoral system, or introducing national service – which *do not violate* international law because they do not enter its realm; it cannot, however, be said, that these acts are *in accordance with* international law, because international law is simply not concerned with them. Some initially domestic acts and decisions, such as conferral of nationality or delimitation of territorial waters, can be said to be *in accordance with* international law, because eventually they do touch upon the realm of inter-state legal relations.²² They transcend the domestic legal realm to which they initially owe their existence, and impact the legal position internationally.

It is precisely this difference that explains the Court's use of particular words. As the Court's reasoning indicated, and as shown below in greater detail, the UDI was not seen as having effect within the international legal system; it was neither meant to take effect within the relevant frameworks of international law, nor had actually done so. Therefore it was simply not an act that could or could not be *in accordance with* international law; it was, however, an act that *did not violate* international law, simply because it had no effect within or implications for the relevant frameworks of this legal system. Furthermore, the UDI being *in accordance with* international law would mean that the authors of the UDI acted in accordance with international law when declaring the independence; the UDI *not violating* international law is more neutral and focuses more on the outcome than on assessing substantive terms of the legality and propriety of the conduct of the authors of the UDI, which question the Court has excluded from its consideration.

²² As was discussed by the International Court in the *Fisheries* and *Nottebohm* Cases, on the limits of territorial sea and conferral of nationality, respectively; see *Fisheries* (UK v. Norway), Judgment, ICJ Reports 1951, 116 et seq.; *Nottebohm* (Liechtenstein v. Guatemala), Judgment, ICJ Reports, 1955, 4 et seq. (22 et seq.).

3. The *Lotus* Principle and the Court's Reasoning

Judge *Simma* has, in particular, criticised the Court's approach that the UDI did not breach general international law by suggesting that this approach was based on the extensive understanding of the *Lotus* principle that anything which is not expressly prohibited is permitted.²³ There are, however, two points to be made in relation to this criticism. In the first place, the Court's approach cannot be seen to apply the *Lotus* approach to Kosovo, given that the *Lotus* approach applies to the actions of states, as opposed to actions of an entity that is not a state and attempts either to claim being a state or to become a state. In the second place, the Court specified that the Kosovo UDI did not *ratione personae* conflict with general international law; it did not say that the terms of the UDI, and the ends it purported to achieve, were *ratione materiae* compatible with international law just because it was not specifically outlawed;²⁴ the Court was not judging the compliance of the *substance of the declaration* with general international law, and it was not concerned with the substantive legality of the terms of the UDI. The legality of actions and positions of third states taken within the realm of the international legal system – at the inter-state level – and premised on the UDI made by Kosovo authorities was, quite simply, beyond the Court's judicial focus in this case. The Court cannot thus be seen as applying the *Lotus* approach to Kosovo in this respect either.

IV. The UDI in Respect of Kosovo and General International Law

1. The UDI, Territorial Integrity and Claims of “Non-regulation” of Secession

The Court's conclusion was that the UDI in respect of Kosovo did not violate general international law. The Court's reasoning conveys an impression of incompleteness, given that it assesses the legality of a UDI without focusing on antecedent questions of territorial integrity, self-determination and secession. The Court indeed stated its intention to

²³ Cf. Declaration of Judge *Simma*, see note 1, para. 2.

²⁴ In this respect the Court's reasoning differs from the way some governments argued the matter before it, see e.g. Austrian Written Statement, see note 1, para. 34.

avoid pronouncing on these, but then fell short of specifying an alternative basis for the UDI under general international law. Precisely this factor has been responsible for misunderstandings regarding the Court's position on the legality of the UDI in the light of general international law. The only substantive legal question the Court engaged is the principle of the territorial integrity of states, which the Court concluded did not directly apply to, and prohibit, the UDI made in Kosovo. According to the Court's Opinion, "the scope of the principle of the territorial integrity is confined to the sphere of relations between States."²⁵

To illustrate, Judge *Bennouna's* Dissent understood the Court's stance on general international law in that "according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order."²⁶ But the Court did not say that there is no general international law applicable to situations where UDIs are made; it merely said that general international law, quite separately from the substantive lawfulness or permissibility of a unilateral secession, has simply nothing to say specifically in relation to the conduct of actors such as the Kosovo Albanian leadership, including their declaration of independence.

This is no doubt confusing not least because, in the absence of specification of alternative criteria of the legality of UDIs, the Court's approach may seem to uphold the idea that there is a gap in this area of the international legal system. But this would be an illusory impression, for the Court merely addresses part of the legal position. Moreover, if one has a careful look at the Advisory Opinion, the awkwardness of the Court's silence on the pertinent questions of general international law can presumably be mitigated by its treatment of S/RES/1244 as *lex specialis*, in relation to which *who* as opposed to *what* provided the key for the Court's approach. On a more general plane, the Court's narrow treatment of the General Assembly's question means that the Court has lent its support to views that secession and response to it is, as such, unregulated under international law.

Similarly, Judge *Skotnikov's* concerns with the majority's wording that general international law "contains no prohibition" on UDIs are understandable; for, if misunderstood, this statement can indeed have "inflammatory effect."²⁷ But the Court's approach can be explained by

²⁵ Opinion, see note 1, para. 80.

²⁶ Dissenting Opinion of Judge *Bennouna*, *ibid.*, para. 68.

²⁷ Dissenting Opinion of Judge *Skotnikov*, *ibid.*, para. 17.

considerations stressed in Norway's submission that declarations of independence are "not, as such, the object of regulation by public international law."²⁸ A UDI does not create a state, it is not among the criteria of statehood as specified in the *Montevideo* Convention; instead, its legal existence and validity is consequential upon the attainment of the requirements of statehood by the entity in question. If an entity clears factual and legal requirements of statehood including the entitlement to a valid secession, it can validly declare independence; if not, then not. The UDI will not on its own constitute an entity as a state or otherwise add to its status. It may therefore be understandable that international law contains no prohibition on UDIs, for there can be little reason for prohibiting an act that on its own can produce no legal effect.

In terms of the relevance of the principle of territorial integrity, as France has most pertinently submitted to the Court,

"the principle of territorial integrity, as conceived by the United Nations Charter, excludes any *foreign* intervention designed to break up a State, including by providing armed support to a secessionist movement; but that certainly does not imply that international law condemns (or, indeed, encourages) secession *per se*."²⁹

A similar approach has been voiced by *Michael Bothe*, observing that "Declarations of independence are not prohibited. But states may not recognise a secession before it is effectively established. A premature recognition constitutes a forbidden intervention into the internal affairs of another State."³⁰ Therefore, the principle of territorial integrity does not as such prohibit UDIs; what it does prohibit, however, is the action by a state to procure, foster or support, within the territory of another state, such UDIs and entities that consequently claim statehood through secession.

According to *Crawford*, for international law to prohibit secession, it would have to address the seceding entity, which it does not.³¹ Furthermore, secession is "a legally neutral act the consequences of which

²⁸ Norway's Written Statement, *ibid.*, 5 (para. 10) (Norway's position was actually referred to by Judge *Skotnikov*, see above).

²⁹ French Written Statement, *ibid.*, 27 (para. 2.6) (emphasis original).

³⁰ M. Bothe, "Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence", *German Law Journal* 11 (2010), 837 et seq. (839).

³¹ Report by J. Crawford, in: A.F. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned*, 2000, 153 et seq. (160-161).

are regulated internationally.”³² This observation offers a correct starting-point, and it does not go as far as the thesis that secession is neutral as has been advocated by *Franck*, among others, to the effect that by virtue of its “neutrality” and of not being prohibited, secession is permitted under international law.³³

However, the “neutrality” of secession cannot be used to generate or modify rights and obligations on the international plane the way *Franck* advocates it, for in that case secession would no longer be neutral. While it may be right that international law is silent on secession because it does not address the seceding entity, taking the “neutrality” thesis any further would require taking another – unsubstantiated – step of reasoning that by virtue of attempting or effecting such “neutral” secession the seceding entity, so far unaddressed by and unrecognisable within the international legal system, has, now that it has seceded, acquired the standing within that very same legal system. This version of “neutral” secession essentially projects the right to secede for every potential seceding entity even before it secedes.

The difference between *Crawford’s* and *Franck’s* treatments of the problem of secession is that *Franck*, unlike *Crawford*, takes matters unjustifiably far by attempting to translate the “neutrality” of secession into a potential statehood, international legal status of the seceding entity, and entitlements of third states to recognise the seceding entity and

³² J. Crawford, *Creation of States in International Law*, 2006, 390.

³³ *Franck* argues that international law permits and does not prohibit unilateral secession, Report by T. Franck, in: Bayefsky, see note 31, 75 et seq. (82-83); elsewhere, in his Hague Lectures, *Franck* has advocated a view of secession with conclusions that are mutually exclusive and cannot enable us to reach any consistent conclusion on this matter, see T. Franck, “Fairness in the International Legal and Institutional System (General Course on Public International Law)”, *RdC* 240 (1993), 13 et seq. In one place, *Franck* argued, focusing on the ICCPR, among others, that “a cultural, ethnic or racial group may secede, but there is no *right* in law to do so. The law is essentially silent on secession, neither mandating nor prohibiting it, *per se*”, *ibid.*, 106 (emphasis original), and 141. Later on it is argued that “nothing in [the ICCPR] or any other international text *prohibits* secession”, *ibid.*, 135 (emphasis original). Then it is suggested that “the law will neither prohibit nor authorize secession, except in the context of any lingering decolonization,” *ibid.*, 137. *Franck* then proceeds to suggest that “the international system does not prohibit secession. It will extend recognition to a secessionist territory and government if (a) that Government has demonstrated effective continuous control over its territory ...”, *ibid.*, 146.

take up legal relations with it. This doctrinal distinction can conceptually, even if indirectly, be instructive to understand how the International Court was able to isolate the question of the UDI from other substantive questions of law.

In actual terms, the gist of the international legal position on this matter, also underlying the International Court's approach, is that while there is no reason for international law to prohibit secession and an UDI before it happens, after it happens, the reality created by it becomes a matter regulated by international law, an inter-state matter, exemplified above all by the duty of states not to disrupt each others' territorial integrity and consequently not to take up legal relations with the seceding entity. The inter-state character of the problem is illustrated by the question whether third states can, without the parent state's consent, recognise the seceding entity, conclude treaties, establish diplomatic relations or trade with it. All international law is concerned with is the relations between the parent state and third states. Unless and until an attempt at secession crosses the threshold to interfere with those inter-state relations, international law has no reason to be concerned with it, for the background position remains that domestic rebellion or irredentism is an internal matter. In other words, international law's non-regulation of secession does not equate to its approval, still less to its approval of legal relations between the seceding entity and third states, but merely signifies its abstention from regulating an event which has not yet been raised to the level of producing an impact within the international legal system.

To illustrate further, if Scotland or the Basque country declare independence from the United Kingdom and Spain, respectively, these declarations of independence will not, in themselves, violate international law, if only because they would not be displayed in the sphere to which international law applies. However, if third states decide to recognise Scotland or the Basque country and establish diplomatic relations or conclude agreements with them, it is at this point that the assessment of the legality of these actions in the light of territorial integrity of parent states would become relevant. Unless and until the actions and positions of third states come into play, international law is neither affected nor involved, and hence there can be no question of its violation. But it would be another additional and qualitatively different step too far to argue that once the actions and positions of third states in relation to the secessionist entity come into play, international law still provides no guidance of assessing the legality of those actions and positions and of

dealing with them.³⁴ The Court's Opinion indicates nothing of that kind.

2. Legal Interests affected by Secession

In substantive terms, legal consequences of a unilateral secession under international law have to be differentiated according to the legal context of particular instances of secession. Ordinary cases of secession are a matter between the parent state and third states that attempt to enter into relations with the secessionist entity. Any compromise solution is possible in such cases, up to the point of independence, if the parent state validates it by its consent. The other type of cases involves public order illegalities consisting in breach of peremptory norms (*jus cogens*), which are subject to the duty of non-recognition. If secession has been effected through the use of force, genocide, ethnic cleansing, racial discrimination, or a breach of the principle of self-determination, it shall have no validity. Any recognition granted to the entity thus established would be invalid as well, and subject to a duty to revoke it.³⁵

It is pertinent to see within which of the two above categories the Kosovo UDI falls. As the Court has pointed out, the Security Council has kept silent in response to the UDI in Kosovo, unlike in other cases such as that of Northern Cyprus where the independence was declared subsequent to a breach of a *jus cogens* rule.³⁶ It is arguable that the Kosovo secession attempt and the UDI was not procured by a breach of *jus cogens*. The NATO attack against the FRY in 1999 was certainly a breach of *jus cogens*, having been overwhelmingly disapproved by the international community as action violating the prohibition of the use of force.³⁷ But the intention behind and effect of that breach was not to

³⁴ In that sense, and after crossing that line, secession is indeed governed by international law. For a similar reasoning developed earlier see Orakhelashvili, *Max Planck UNYB* 12 (2008), 12-14.

³⁵ See in general A. Orakhelashvili, *Peremptory Norms*, 2006, Chapter 11.

³⁶ Opinion, see note 1, para. 81.

³⁷ Cf. Ministerial Declaration of the Ministers for Foreign Affairs of the Group of 77 of 24 September 1999 and a Declaration by the Heads of State and Government of the Non-Aligned States (115 states), dated February 2003, rejecting the so-called humanitarian intervention; cf. also I. Brownlie, *Principles of Public International Law*, 2008, 744; Statement by the Rio Group, Letter dated 26 March 1999 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General, Doc.

procure a further breach to forcibly disrupt Yugoslavia's territorial integrity, nor was the secession attempt and the UDI a consequence that NATO's attack against the FRY should have inherently entailed. Apart from the collective act of disclaiming such intention and effect through the adoption of S/RES/1244 in 1999, the consistent view of states and the United Nations, up to the point of drawing up the *Ahtisaari* Plan in 2007, had been that the solution to the Kosovo crisis should be consensual and no unilateral attempt to effect status determination would be acceptable.³⁸

Consequently, experience has proved that the UDI in 2008 has not been an inherent consequence of the 1999 NATO armed attack – the way the Turkish invasion in Cyprus eventually procured the UDI in the Turkish Republic of Northern Cyprus – because for years after the NATO armed attack no claim was made that Kosovo constituted an independent state; instead a provisional administration regime was maintained for almost a decade afterwards, on the condition of preserving the fall-back sovereignty of the FRY/Serbia.

The Court in its Opinion alluded to a number of cases where a breach of *jus cogens* was involved, such as the UDI by the white unrepresentative and racist regime in Southern Rhodesia, to which the Security Council reacted in strongest possible terms, denoting the UDI as null and void. In the first place, there was in that case an obvious connection between the breach of the non-discrimination principle as a rule of *jus cogens* and the UDI; in the second place, none of the permanent members of the Security Council were keen to perpetuate the *Smith* regime. Had one or more permanent members blocked the relevant resolution on the Rhodesian UDI – as would certainly have been the case had a similar resolution been tabled in the Council regarding the Kosovo UDI – hardly anyone would seriously argue that, due to that contemplated or actual veto, the legal landscape regarding the Rhodesian UDI has been altered and it can now be recognised as lawful. Indeed the legality or opposability of secession and UDI is not contingent on the position that the Security Council takes in relation to it³⁹ – it is not the Council's role to make and amend legal positions. Its role is to take

A/53/884, S/1999/347, 2; see also Doc. S/PV.3988 of 23 March 1999, for the positions of India and China.

³⁸ See below Part VI.

³⁹ See for greater detail, Orakhelashvili, see note 35, Chapter 14.

effective measures in relation to threats to and breaches of peace as and when they arise.⁴⁰

V. Substantive Legal Questions raised before the Court but unaddressed in its Opinion

1. The Alleged *Sui Generis* Nature of Kosovo's Secession and Statehood

The question as to whether the Kosovo case is special and should not set a precedent for future cases of secession is broader than could be covered by examining the General Assembly's question as the Court has construed it.⁴¹ Addressing the *sui generis* question would have led the Court to examine the complex questions of statehood, self-determination and secession, apply these concepts to the situation in Kosovo and then see if its situation was special in any way. The disparity of this approach from the Court's own approach is illustrated in the submission of the United Kingdom that,

“the United Kingdom considers that it will be important that the Court state clearly that developments concerning Kosovo are *sui generis*, that Kosovo's independence [not just the UDI] is fundamentally contingent on its facts, and that these developments do not create a precedent for any other situation.”⁴²

⁴⁰ Arts 1 and 24 of the UN Charter.

⁴¹ During the General Assembly debates regarding the request for the Court's Advisory Opinion, the Singapore Representative has specified that “Singapore has not, to date, supported Kosovo's unilateral declaration of independence, as we are concerned about the precedent that it could set in other parts of the world,” Doc. A/63/PV.22, 15; Albania argued that “Kosovo in and of itself is not a precedent,” *ibid.*, 4; France argued that “the independence of Kosovo is thus a *sui generis* case that does not call into question the issues of sovereignty and territorial integrity that lie at the very core of international relations,” *ibid.*, 8 (emphasis original).

⁴² Written Statement of the United Kingdom, see note 1, 16 (para. 0.27) (emphasis original); see also the German Written Statement, *ibid.*, 26, 32-37 (linking this question with the internal self-determination thesis related to the oppression of a minority by the government). This actually undermines the *sui generis* thesis, because any minority that gets oppressed would become a *sui generis* case of secession. This is essentially an assertion of a pu-

Such conclusion was going to be impossible if the Court was to isolate, as it did, the question of the UDI from other substantive legal questions arising from the Kosovo situation. The Opinion thus suggests nothing indicative of the *sui generis* nature of Kosovo; its correct understanding instead is that UDIs, made wherever and by whomever, do not on their own violate international law.

The fundamental idea behind any legal system is that rules and principles it generates should consistently apply to facts that fall within the scope of those rules and principles, unless the legal system itself admits an exception for a particular situation. The thesis of Kosovo as a *sui generis* entity and situation is inevitably premised on the understanding that, on a general plane, international law regards unilateral secession as unacceptable and intolerable. Admitting exceptions from a generally recognised legal position needs to conform to the modes and procedures admitted by the legal system in question; in some legal systems legislature can adopt a private statute and exempt a particular situation from the regular legal framework. For a consensual legal system which international law inevitably is, any exception from the underlying general legal position has to be established either by a general principle that will exempt situations of a particular kind from that general legal position and create a *lex specialis*; or by the general agreement among states that the relevant situation such as Kosovo constitutes, *in casu*, a special situation and is exempted from the underlying general legal position that regards unilateral secession as unacceptable. The condition of a state and United Nations practice over the past two decades does not allow for either a general principle or an *in casu* agreement to regard Kosovo as a special case to be identified. It is precisely for this reason that the argument that Kosovo is a *sui generis* entity or situation has, from the outset, been unsustainable and unpersuasive.

The fact of the matter is that pro-Kosovo governments, by their persistent emphasis on the *sui generis* nature of the Kosovo situation, have undermined the basis on which Kosovo's independence could be justified under the regular criteria of statehood and secession. Claiming that an entity is *sui generis* is premised on disclaiming that entity's legal standing under the regular legal framework.

tative general principle relating to secession entitlements, as opposed to justifying a *sui generis* nature of a particular situation.

2. Self-Determination: Internal and Remedial Theories

Had the Court engaged with the claims that Kosovo is entitled to self-determination, it would have had to clarify beforehand how, if Kosovo is a self-determination unit entitled to independence, was this very position over years, almost right up to the point of making submissions to the International Court, not argued or emphasised by the Security Council, the Contact Group, or even by the governments that now support Kosovo's independence. The self-determination claim is anyway foreclosed by the legal position that is stated in the so-called Friendly Relations Declaration (A/RES/2625 (XXV) of 24 October 1970), which does not admit the legality of unilateral secession on the basis of the so-called internal or remedial theories of secession and self-determination. The Court wisely avoided engaging those theories, for basing the outcome of the case on these theories would inevitably have required the Court to perform an undoable task, namely explain and give reasons for the legal position stated in the Friendly Relations Declaration.

3. Recognition of Kosovo

By now about 70 states have recognised Kosovo as an independent state. But the validity and legality of these recognitions is questionable, for they fail to clear two important obstacles. In the first place, recognition does not constitute a state, nor is it among the criteria of statehood. Unless the aspirant entity is established in full compliance with factual and legal criteria of statehood, recognition cannot confer a valid statehood to it. In addition, the legal value of recognitions by several states, above all those which are deemed to be of high political importance, is doubtful. Several recognising states had earlier confirmed consistently that no unilateral secession of Kosovo was permissible; they did so when voting for Security Council S/RES/1244, and when adopting the Contact Group statements. The position of the United Kingdom clearly expressed at the Security Council's session in 2003 was that,

“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, ei-

ther unilaterally or in any arrangement that does not have the backing of the international community.”⁴³

States which have held this position consistently and over years, namely France, Germany, the United States and the United Kingdom, have thereby been estopped from upholding the UDI subsequently made in Kosovo. They were thus not entitled to unilaterally reverse their position by recognising Kosovo as an independent state.

To summarise, there may be no obviously straightforward ground for considering that the statehood claim of Kosovo is subject to the duty of non-recognition as per ILC's arts 40 and 41 on State Responsibility. But recognitions granted to Kosovo are nevertheless without effect on the ground of being premature in relation to the entity that has not validly established statehood, of pre-empting the agreed decision of the parties and the Security Council as to Kosovo's final status, and of contradicting the position to which the recognising states were previously committed.

VI. The UDI in Respect of Kosovo and S/RES/1244

1. The Court's Principal Findings

The Court's principal conclusions regarding the legality of the UDI in Kosovo in the light of S/RES/1244 are the following:

⁴³ Doc. S/PV.4742, 16; for similar statements of France and Germany see paras 27-28 of Vice-President *Tomka's* Declaration, see note 1. Furthermore, the German statement in question specified that “only the Security Council has the power to assess the implementation of resolution 1244 (1999), and it has the final word in settling the status issue. No unilateral move or arrangement intended to predetermine Kosovo's status – either for the whole or for parts of Kosovo – can be accepted.”, Doc. S/PV.4770, 13-14. Similarly, the Contact Group – a body that includes the United States, the United Kingdom, France and Germany – had clearly specified that “the final decision on the status of Kosovo should be endorsed by the Security Council.” The *Ahtisaari* Plan upholding Kosovo's independence was not, as Judge *Tomka* emphasised, endorsed by the Security Council. Therefore, recognition of Kosovo's statehood and independence by France, Germany, the United States and the United Kingdom in fact accepts and purports to validate that very same unilateral decision which those states had earlier considered to be unacceptable and one not to be recognised.

- Arrangements under S/RES/1244 are interim and operate pending the final settlement of Kosovo’s status;⁴⁴
- S/RES/1244 did not impose a prohibition on the Kosovo Albanian leadership to declare independence unilaterally;
- The process of the declaration of independence was not conducted so as to engage the interim regime of governance under S/RES/1244, but the UDI was instead proclaimed outside the 1244 arrangements framework;
- Consequently, the UDI did not violate S/RES/1244;
- However, arrangements under S/RES/1244 retain their consequent validity even after, and regardless of the making of, the UDI.⁴⁵

Legal consequences of the UDI in Kosovo, and the validity of Kosovo’s secession attempt, can only be ascertained if all the Court’s above conclusions are duly borne in mind. Even if the Advisory Opinion remains silent on broader questions of substantive law applicable to secession attempts, the above conclusions, even though presenting an incomplete legal picture as to Kosovo’s legal status, are hardly disputable as a matter of law. Once these conclusions are acknowledged, they can point to other elements of the legal picture as to Kosovo’s legal status – that part on which the Court had, or chose, to remain silent.

⁴⁴ The Court’s position has also negated *Abtisaari*’s position that the situation created by S/RES/1244 was irreversible, cf. Doc. S/2007/168, 3. Anything that is interim is, by definition, reversible.

⁴⁵ Opinion, see note 1, paras 91-93; the position of the UN Secretary-General has been similar, even though the Secretary-General can only declare the existing legal position. In his report, it was pointed out that “on 17 February, the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence’, declaring Kosovo an independent and sovereign State. ... I immediately drew this development to the attention of the Security Council, so that it could consider the matter. In doing so, I reaffirmed that, pending guidance from the Security Council, the United Nations would continue to operate on the understanding that resolution 1244 (1999) remains in force and constitutes the legal framework for the mandate of UNMIK, and that UNMIK would continue to implement its mandate in the light of the evolving circumstances.” See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 28 March 2008, Doc. S/2008/211, paras 3 and 4. This confirms also that S/RES/1244 arrangements remain in place unless and until the Council adopts a collective decision to alter them.

2. The Nature and Interpretation of the Arrangements under S/RES/1244

The International Court followed the interpretation prevailingly made in the Security Council at the time of adoption of S/RES/1244 that,

“The interim administration in Kosovo was designed to suspend temporarily Serbia’s exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo.”⁴⁶

This wording is very careful. It refers not to a change of sovereignty or territorial title, but to the temporary suspension of the *exercise* of the authority that Serbia has over Kosovo due to its sovereignty that remains intact. This temporary suspension of the exercise of Serbian authority over Kosovo is accompanied by the establishment of the Constitutional Framework with UNMIK having central position in it, and can be brought, by the decision of the Council, to an end once parties agree as to what the final settlement should be: independence or reintegration on whatever terms (whether autonomy, federation or anything else).

The S/RES/1244 arrangements including the 2001 Constitutional Framework determining the status of provisional organs of Kosovo are part of international law,⁴⁷ because the only source of the establishment of provisional organs is provided by UNMIK decisions adopted on the basis of S/RES/1244 which in its turn is adopted on the basis of the UN Charter as a measure to uphold international peace and security under Chapter VII of the UN Charter. The Court’s Opinion is clear on this point, which has been contested by Judge *Yusuf*, arguing that the Constitutional Framework constitutes domestic law.⁴⁸ But whose domestic law, it is worth asking, Kosovo’s or Serbia’s? If it is Kosovo’s domestic law, then the Security Council must be deemed to have conferred international standing to Kosovo’s domestic law – a step that could suggest an act of implied or conclusive recognition of Kosovo as a free-standing international entity if not a sovereign state. Such conclusion would constitute a counter-factual inference, if the overall framework established under S/RES/1244 is considered. Therefore, the Court’s treatment of the Constitutional Framework as part of international law has been categorically inevitable; in practical terms it precluded the validity of in-

⁴⁶ Opinion, see note 1, para. 98.

⁴⁷ Opinion, *ibid.*, para. 88.

⁴⁸ Separate Opinion of Judge *Yusuf*, *ibid.*, para. 18.

ferences that Kosovo can legislate without international supervision and control. For the essence of the Constitutional Framework is that it enables the functioning of local authorities in Kosovo, but is at the same time imposed on that territory internationally and without the consent of Kosovar authorities. The standing of those authorities thus depends, both internationally and domestically, on the international decision to which the will of those authorities is not a constituent element. In other words, local authorities in Kosovo exist and operate solely because the United Nations has, externally and unilaterally, enabled them to do so, as opposed to being inherently derived from any distinct legitimacy that the will of the people of Kosovo could have at the international level.

The Court was more than clear in its Opinion that the interim S/RES/1244 arrangements established along the above lines continue despite the fact of the UDI having been proclaimed in Kosovo. Conceptually and normatively, S/RES/1244 constitutes a collective Chapter VII decision of the Security Council to specify the conditions on which the interim governance of Kosovo should be conducted, for how long these arrangements should be continued, and when these arrangements should be brought to an end. The position expressed by some Council members – including three permanent members: United States, United Kingdom and France – that final outcomes such as Kosovo's independence can be projected and sustained even without the Council's decision to that effect, essentially constitute the attempt by those Council members to substitute the Council's judgment as to the ways and means of reaching the final settlement on the Kosovo issue by their own judgment to the same effect. Policies of this kind are not only doomed to failure in legal terms, but they also constitute an instance of unilateral interpretation of Security Council resolutions, and create an unfortunate precedent to weaken the overall relevance of the Council's Chapter VII mandate to maintain international peace and security. If a unilateral exit from S/RES/1244 arrangements is possible through unilateral interpretations placed upon S/RES/1244, then it should also be possible for states to exempt themselves from arrangements under other Chapter VII resolutions, for instance those relating to arms embargoes or economic sanctions, if states unilaterally form a conclusion that the relevant Chapter VII regime no longer serves its original rationale, or has become too burdensome and unreasonable.

As for the chances of such unilateral interpretations succeeding in relation to the S/RES/1244 arrangements in Kosovo, the Court's overall approach to interpretation of Security Council resolutions, stated as

part of its analysis regarding the competence to deliver an Advisory Opinion, is instructive. The Court stated that,

“While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions.”⁴⁹

Therefore, in this particular case it was up to the Council in the first place to interpret S/RES/1244. But this was unlikely, as the adoption of the respective decision in the Council would require a degree of consensus that did not, and still does not, exist. Therefore, the Court's important and in these circumstances conclusive role to interpret S/RES/1244 was inevitable, for only this option could prevent the chaos generated by multiple, including unilateral, interpretations placed upon this resolution by a number of states.

Neither the political nature of Security Council resolutions, nor any special nature of the Security Council's role in the area of international peace and security under Chapter VII of the Charter were to upset the Court's ultimate role in interpreting Security Council resolutions.⁵⁰ The Court's approach has demonstrated its positive attitude towards judicial review of Security Council resolutions, thus adding to the established jurisprudence that such judicial review is both possible and feasible, and, in some circumstances, even necessary.⁵¹

⁴⁹ Opinion, see note 1, para. 46.

⁵⁰ That the Court had to reach its conclusions on this point over the objections in para. 9 of Judge *Skotnikov's* dissent is a clear illustration of this conclusion. Judge *Skotnikov* has submitted, in no uncertain terms, that “it must be borne in mind that Security Council resolutions are political decisions. Therefore, determining the accordancy of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244 – a determination central to the régime established for Kosovo by the Security Council – without a request from the Council, it substitutes itself for the Security Council.”

⁵¹ For detail on this, *Orakhelashvili*, see note 34; *id.*, *Collective Security*, 2011, Chapter 8.

3. Interpretation by States and Interpretation by the Court

The Court's reasoning draws on the outcomes envisaged under S/RES/1244 bearing its mind and its nature as an interim yet collective decision of the Security Council. This reasoning also clarifies the correlation between the Court's view of the interim nature of S/RES/1244 arrangements and the views expressed by several states.

The first option of interpreting S/RES/1244 is that arrangements under this resolution are interim, with residual sovereignty of the FRY/Serbia being preserved. As Vice-President *Tomka* specified,

“The notion of a ‘final settlement’ [under and pursuant to S/RES/1244] cannot mean anything else than the resolution of the dispute between the parties (i.e., the Belgrade authorities and the Pristina authorities), either by an agreement reached between them or by a decision of an organ having competence to do so. But the notion of a settlement is clearly incompatible with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other.”⁵²

This approach is in line with the textual interpretation of S/RES/1244, which does not point to any alteration of Serbia's territorial sovereignty over Kosovo and instead preserves it expressly.

If S/RES/1244 allows for an eventual secession through a UDI, then the Security Council must be deemed to have, from the outset, decided to allow for such secession and UDI, which position is systemically impossible, given that the Council has no competence to impose permanent territorial settlements.⁵³ This position is also counter-factual, given that S/RES/1244 has been supported by the Council members on the condition that no unilateral disruption of territorial integrity of the FRY/Serbia would be envisaged or tolerated.⁵⁴

However, a number of states before the Court insisted on a different outcome. For example, Austria argued that S/RES/1244 has not from the outset excluded the independence of Kosovo as an option for its fu-

⁵² Declaration of Vice-President *Tomka*, see note 1, para. 28.

⁵³ On the relevant issues regarding the scope of Security Council's powers, see Orakhelashvili, *Collective Security*, see note 51, Chapter 2.

⁵⁴ Cf. Doc. S/PV.4011 of 10 June 1999, 7-9, 19; this position has been consistently confirmed in the statements made in the Security Council and by the Contact Group quoted above.

ture status.⁵⁵ In a somewhat different way, the position of the United Kingdom before the Court was, by reference to the UN Secretary-General's view, that "the situation established under S/RES/1244 was, however, unsustainable in the long term."⁵⁶ According to the United Kingdom,

"The purpose of setting up local provisional institutions was to transfer authority from the international civil presence over time, until all authority was vested in local institutions, whose character at that point would – unless otherwise agreed – no longer be provisional."⁵⁷

This is inevitably premised on the thesis that there would be a unilateral determination as to when and whether provisional institutions should cease to be provisional; and on the claim – inherent in the phrase "unless otherwise agreed" – that the relevant states and entities have the standing to determine when the S/RES/1244 arrangements should be modified or terminated without waiting for the Security Council to decide on this point. It goes without saying that both British as well as the American positions before the Court regarding the interim nature and temporal validity of S/RES/1244 arrangements directly contradicted the positions both these states were committed to through their positions stated in the Security Council or through the statements of the Contact Group that they had supported with regard to the impermissibility of any unilateral decision as to the status of Kosovo.

There is no temporal limit imposed by the Security Council on the continuous validity of S/RES/1244 arrangements. There is thus no war-

⁵⁵ Austrian Written Statement, see note 1, para. 29.

⁵⁶ Written Statement of the United Kingdom, see note 1, 111 (para. 6.28); the Written Submission of the United States, *ibid.*, 68, similarly maintained that S/RES/1244 (1999) allowed for the future status of Kosovo without Belgrade's consent, mainly because this resolution contained references to the abortive Rambouillet Accords which, had they been signed by the FRY, would indeed have provided for such possibility.

⁵⁷ Written Statement of the United Kingdom, see note 1, 111 (para. 6.29), also referring to the periodic review requirements (*ibid.*, 111, para. 6.30), which, however, do nothing to reverse the requirement that the actual continuation of S/RES/1244 arrangements depend on the collective decision of the Security Council. Even if UNMIK faced difficulties in administering the entire territory of Kosovo (*ibid.*, 116 et seq., para. 6.47), it still does not follow that its mandate or any other aspect of S/RES/1244 arrangements could be modified unilaterally, that is without the Security Council's collective decision.

rant to assume, as the pro-Kosovo governments did from 2007 onwards, that a point of time can arrive when one can suggest that the consensual settlement has not been achieved and a unilateral solution such as the UDI is the available option. The Security Council has from the outset been aware, as has been everyone to some extent familiar with the nature of the Kosovo crisis, that S/RES/1244 arrangements were imposed on parties that were bitterly divided on status issues, and it could not realistically be expected that an agreed status solution was to be obtained anytime in the foreseeable future, nor even within several years. In short, the Council's decision was that the status decision had to be awaited, and UNMIK and KFOR were to remain in Kosovo, for as long as needed. The Council has not suggested that this process, or the mandate of UNMIK and KFOR, was time-limited, while the position of pro-Kosovo governments is inevitably premised on their unilateral and *ex post facto* projection of such time-limit on S/RES/1244 arrangements. The Court's conclusion that, despite the UDI having been proclaimed, S/RES/1244 arrangements continue on terms originally designed back in 1999, confirms just that.

The unilateral independence option is therefore substantively incompatible with S/RES/1244 arrangements, as far as states which are bound by and committed to S/RES/1244 insist on that option or act the way that is premised on it. S/RES/1244 addresses and binds states, as Article 25 of the UN Charter makes clear; it does not divulge any intention of the Council to impose any obligations or restrictions upon the Kosovo Albanian faction specifically.⁵⁸ The impermissibility of a UDI under S/RES/1244 does not therefore inherently mean that the Kosovo Albanian leadership, acting outside the Constitutional Framework, cannot produce a UDI; it instead means that Member States of the United Nations are not permitted to procure, support or recognise such UDI. For the Kosovo Albanian leadership is not, and has not been – as of 1999 when S/RES/1244 was adopted, 2007 when the *Ahtisaari* Plan signalled the increase of political support for the Kosovo UDI, or even in the post-UDI period – an entity with the recognised standing under international law. It is therefore a logical outcome that the requirements of international law do not address the Kosovo Albanian leadership which has authored the UDI.

⁵⁸ Opinion, see note 1, para. 118.

4. The Identity of Authors of the UDI and the Basis for the Legitimacy of Provisional Institutions

The Court's approach to base its conclusions on the identity of the authors of the Kosovo UDI, and consequently also on the aim and designation of that declaration, can be seen as a way to evade the consideration of substantive legal issues of statehood and secession that have dominated legal and political discourse on this subject. Yet, the Court's crucial emphasis that the authors of the UDI did not act as part of the Provisional Institutions under the Constitutional Framework inevitably leads to the consideration of more substantive issues as to the legal basis on which the powers of Provisional Institutions are based, and ultimately to the assessment of claims that Kosovo has achieved statehood, even though the Court did not expressly address these substantive issues.

The Court expressly confirmed that S/RES/1244 arrangements are interim, while the UDI is an attempt to produce a permanent legal position. Judge *Skotnikov* pertinently specifies that the majority did not properly explain the difference between acting outside the legal order and violating it.⁵⁹ On the other hand, the Court's restrained language may be due to the fact that it has given a narrow interpretation to the question posed to it by the General Assembly. The finding that the UDI was not part of the S/RES/1244 legal framework leads to the conclusion that it is not based on it, *a fortiori* is not a step authorised under it, and therefore has no effect on it. This conclusion is reinforced by the Court's repeated affirmation that, the UDI notwithstanding, the interim arrangements under S/RES/1244 including UNMIK continue as before and the UDI has no effect on the allocation of rights and powers under that resolution. Given its narrow interpretation of the question posed by the General Assembly, and the Court's own prevailing focus on the *ratione personae* aspect of this problem, the Court did not go as far as expressly determining that the UDI contradicted the S/RES/1244 arrangements, but its indirect pronouncement that it was "outside" those arrangements should be enough to make one realise that the UDI had no desired effect. Or perhaps the word "violation" would have been too strong in this context: the Court's measured language implies more than that, namely that the UDI was immaterial and ineffectual as far as the S/RES/1244 arrangements and their continuous relevance are concerned.

⁵⁹ Dissenting Opinion of Judge *Skotnikov*, *ibid.*, para. 15.

The UDI that could *violate* international law or not be *in accordance* with it could only be the one produced by an organ that is internationally considered to represent the population of Kosovo. Given that Kosovo was, and remains, under an international protectorate specified in and pursuant to S/RES/1244, only those decision-making organs within that protectorate system can determine how the representation of the people of Kosovo should be arranged, what decisions the representative organ can make and in what way. These decision-making organs had done so through the Constitutional Framework adopted in 2001. Any other way of arranging for the expression of the will of the people of Kosovo must be deemed to be internationally ineffectual, because being placed under interim international protectorate is as far as Kosovo's international legal standing ever got past the point of being a province of Serbia. Provisional Institutions of Kosovo obtained their powers against the background of Kosovo having been, and legally remaining under S/RES/1244, a part of Serbia. The only international intervention to elevate their status from a province within the state to an interim international protectorate has been the one by the Security Council. Consequently, only the organs established by the Security Council could validly determine what kind of decisions Provisional Institutions could adopt, subject to the principles to which S/RES/1244 adheres, including the principle of respect for Serbia's territorial integrity which, by definition, rules out the international validity of a unilateral secession.

It is here that the Court's conclusion that the authors of the UDI acted not as part of Provisional Institutions of the Constitutional Framework and outside the S/RES/1244 arrangements crucially matters. It is worth following what precisely the Court observed,

"The Preamble of the declaration refers to the 'years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status' and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that 'no mutually-acceptable status outcome was possible' (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to 'resolve' the status of Kosovo and to give the people of Kosovo 'clarity about their future' (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo 'as an independent and sovereign state' (para. 1). The declaration of independence, therefore, was not intended by those who

adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, 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.”⁶⁰

The Court thereby demonstrates that the authors of the UDI clearly intended to achieve the status solution that would not be the agreed solution. As the Court clearly affirmed that S/RES/1244 admits only the agreed status solution, it was led to conclude that the authors of the UDI acted outside the S/RES/1244 arrangements.

The Court's analysis confirmed that the aspects of the UDI whereby Kosovo authorities try to assume powers reserved under S/RES/1244 for UNMIK, especially the conduct of foreign relations for Kosovo, constitute attempts by Kosovo authorities to unilaterally break out of S/RES/1244 arrangements.⁶¹ The authors of the UDI thus attempt to arrogate to themselves the powers that S/RES/1244 exclusively preserves for UNMIK. Even if the Court does not expressly use the word “violation”, it is difficult to ascribe any other meaning to its acknowledgment of the UDI having been made *outside* the S/RES/1244 arrangements, had it been produced by an organ that is part of Provisional Institutions.

But the authors were not part of Provisional Institutions and did not purport acting as such. As the Court noted,

“Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words ‘Assembly of Kosovo’ appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase ‘We, the democratically-elected leaders of our people ...’, whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adop-

⁶⁰ Opinion, see note 1, para. 105.

⁶¹ Opinion, *ibid.*, para. 106.

tion of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as ‘the democratically-elected leaders of our people’ immediately precedes the actual declaration of independence within the text (‘hereby declare Kosovo to be an independent and sovereign state’; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.”⁶²

There were thus more than enough indications that the organ that adopted the UDI in Pristina on 17 February 2008 did not legally constitute the Assembly of Kosovo, and the UDI was therefore not a decision made as part of the Constitutional Framework. Deficiencies as to the required form and procedure were so obvious and recurring that the Court simply had no way of disregarding them.

What would have been the position had the UDI been produced by organs validly acting as part of the Constitutional Framework? As a starting point, it has to be emphasised that S/RES/1244 and the Constitutional Framework establish a carefully arranged constitutional balance meant to give Kosovo Albanians a reasonable degree of autonomy, and to prevent them from taking unilateral decisions that will undermine the interim nature of these arrangements. The overarching status of UNMIK is meant precisely to guarantee that this balance will be observed. Had the UDI been enacted by Provisional Institutions acting as such, the Special Representative of the Secretary-General and UNMIK would have been duty-bound to react and censure, as such actions would have amounted to the use of powers conferred by the Constitutional Framework to Provisional Institutions for purposes other than those for which these powers had been conferred, and that would have encroached upon the constitutional balance under the Constitutional Framework.⁶³ This would have amounted to an excess or abuse of pow-

⁶² Opinion, *ibid.*, para. 107.

⁶³ Vice-President *Tomka* has made a parallel with a previous instance, where “in November 2005, the Assembly of Kosovo contemplated a declaration of independence, but the Special Representative of the Secretary-General indicated that such a declaration ‘would be in contravention to the UN Security Council resolution [1244] ... and it therefore will not be with any legal effect’”, Declaration of Vice-President *Tomka*, see note 1, para. 32; see also, to the same effect, para. 108 of the Court’s Opinion, *ibid.*

ers (*ultra vires*) conferred to Provisional Institutions, and the Special Representative of the Secretary-General would have been bound to declare accordingly.

Given that the UDI, and subsequently the constitution of Kosovo, was actually adopted outside the framework of the international protectorate under S/RES/1244, it did not legally amount to the use of powers conferred to Provisional Institutions under the Constitutional Framework; therefore, the UDI was not based on such valid representation of the population of Kosovo that can internationally be taken note of. Consequently the UDI could have no international effect. As the Court specified, the UDI was neither intended to exempt Kosovo from the S/RES/1244 arrangements nor actually had such effect, even though effecting such exemption would have been the only way to make Kosovo a state on a permanent basis, that is achieve the very result pursued by the UDI. As no change in the legal landscape dominated by the interim governance regime under S/RES/1244 was initiated, no reaction from the Special Representative of the Secretary-General was legally called for.

The underlying rationale of the Court's reasoning has been illustrated by a question pertinently posed by *Michael Bothe*,

“has the ICJ, by its reasoning, not done a disservice to the cause of the Albanian Kosovars? The ICJ emphasizes that the authors did not act in the function for which they were elected. What, then, is the basis of their legitimacy? The ICJ's opinion seems to drive them into a shadowy, non-official area. What is it that distinguishes them from any market assembly? The ICJ was not asked and did not answer this question.”⁶⁴

The Court remained silent on that broader question for jurisdictional and procedural reasons. But as a matter of substantive law, the answer still has to be identified against the entire context of the Kosovo situation, including the framework of S/RES/1244 arrangements. Laws and decisions adopted by the Kosovo Assembly have to be countersigned and confirmed by UNMIK to become valid law; they are enacted on official notepaper that includes the symbol of UNMIK. For instance, the Law on Arbitration adopted by the Kosovo Assembly clarifies in its preamble⁶⁵ that it is being adopted pursuant to the powers

⁶⁴ Bothe, see note 30, 838.

⁶⁵ Law No. 02/L-75.

that the Constitutional Framework has conferred to the Assembly.⁶⁶ There are cases where UNMIK has promulgated the Assembly's laws with some amendments required so that all claims or indications that Kosovo may be an independent state are avoided. The UNMIK Regulation promulgating the law on dwelling and emplacement amends, throughout the law, the word "Kosova" by "Kosovo", the word "citizen" by the words "habitual resident", the words "Ministry of Defence and Kosovo Security Force" by the words "other governmental institutions", and the words "defence forces" by the words "Kosovo Protection Corps."⁶⁷ Similarly, the UNMIK Regulation promulgating the law on prevention of infectious diseases amends, throughout the law, the words "country" and "citizens" by "Kosovo" and "habitual residents."⁶⁸ The implication of all that is that, even in the post-UDI period, Kosovo is not regarded as an independent state within the UN framework of S/RES/1244 arrangements, nor is Serbia's fallback sovereignty prejudiced in any way. As *Bothe* again has remarked,

"The ICJ's holding that the authors of the declaration of independence did not violate Resolution 1244 does not mean that Serbia is not entitled to rely on the Resolution regarding its claims of territorial integrity."⁶⁹

The Court is not only a judicial organ but also the principal judicial organ of the United Nations, thereby responsible for the maintenance of integrity of the UN legal framework, above all arrangements relating to the maintenance of international peace and security. It must be seen as a kind of public policy relating to the Court's advisory function that it should not say anything that would undermine the nature and viability of the arrangements validly put in place by the Security Council – in this case of the interim administration of Kosovo – in favour of actions and positions taken by some of the Council's Member States. In both

⁶⁶ UNMIK Regulation No. 2001/9 of 15 May 2001 (providing for various options of control of the Assembly's act, up to the point of dissolving the Assembly if it acts contrary to S/RES/1244 arrangements), UNMIK/REG/2001/9.

⁶⁷ UNMIK Regulation No. 2008/14 of 17 March 2008, on the Promulgation of the Law on Dwelling and Emplacement adopted by the Assembly of Kosovo, UNMIK/REG/2008/14.

⁶⁸ UNMIK Regulation No. 2008/23 of 15 May 2008, on the Promulgation of the Law on Prevention and Fighting of Infectious Diseases adopted by the Assembly of Kosovo, UNMIK/REG/2008/23.

⁶⁹ *Bothe*, see note 30, 839.

its above capacities, the Court was expected and obliged to confirm that the UDI in respect of Kosovo had no effect in the UN legal framework in Kosovo that had collectively been approved by the Security Council, and that this legal framework continued being in force without being impacted upon by the UDI.

It is difficult to dissociate from this the outcome that the interim UN arrangements, premised on the lack of statehood of Kosovo, continue and the UDI simply has no effect of making Kosovo an independent state. For if the interim arrangements continue, a UDI attempting to provide for a final status determination of Kosovo cannot validly form part of the legal landscape.

VII. Legal Consequences of the UDI in Respect of Kosovo

The Court's reasoning has been clear in that the UDI in respect of Kosovo has actually no effect on arrangements under the Constitutional Framework.⁷⁰ The question that has to be clarified in this context is how the UDI shall be located in the law relating to international acts and transactions, and what the legal consequences are. Due to the narrow framing of the General Assembly's question, the Court was unable to discuss these legal consequences.

According to Judge *Koroma*, the UDI in respect of Kosovo is a nullity.⁷¹ However, it cannot be a nullity in the strict sense that international law attaches to this concept, because this would mean that Serbia cannot validate it; it would, however, certainly constitute a nullity if an argument were to succeed that the proclamation of the UDI by itself constitutes, or is contingent upon, a breach of a *jus cogens* rule.⁷² This has to be the position unless the UDI itself were to be viewed as an immediate consequence produced by the 1999 use of force by NATO against Serbia. It is similarly difficult to see human rights violations in Kosovo, including the ethnic cleansing of Serbs, as an immediate cause that led to the adoption of the UDI and without which the conditions of adoption of the UDI would not have materialised.

⁷⁰ Opinion, see note 1, para. 121.

⁷¹ Dissenting Opinion of Judge *Koroma*, *ibid.*, para. 14.

⁷² See on questions of validity *Orakhelashvili*, see note 35, Chapters 6 and 7.

From this perspective, the UDI in respect of Kosovo presumably falls short of constituting a nullity. But it *could, in relations between Serbia and third States*, still constitute a relative invalidity, in which case it would generate no legal consequences and no entitlements unless and until Serbia were to consent to, and thus validate, Kosovo's independence and secession. In practical terms, the distinction between the implications of nullity and of relative invalidity in this case would be practically irrelevant, for Serbia's refusal to validate Kosovo's secession achieves the same legal result as would automatically, and regardless of Serbia's position, be present in the case of nullity.

But all the above is merely a normative option, as opposed to being a definitive legal position. A more accurate description of legal consequences of the UDI in Kosovo first has to clarify the question as to whether this UDI, before it engages the law of invalidity on the international plane, is by its nature an act or transaction of the kind that could engage the international legal system and impact legal positions under that legal system. As is clear from the Court's reasoning, this question has to be answered in the negative.

The outcome that obtains therefore is that the UDI in respect of Kosovo is not even a nullity but, to follow the established terminology, an in-existent act. Nullity can accrue only to acts that are produced by entities with proper standing within the legal system in which they attempt to generate the relevant legal consequences. In international legal terms, there is no such free-standing organ as the Assembly of Kosovo (apart from within the framework of powers conferred to it as part of the interim Constitutional Framework). Such free-standing organ simply does not legally exist; therefore it cannot produce a UDI internationally opposable to anyone, nor act in accordance with or violate international law. The UDI made in Pristina on 17 February 2008 is, therefore, as far as international law is concerned, an in-existent act.⁷³

The essence of in-existent (or non-existent) acts is clear. According to *Sir Robert Jennings*, "any purported international act by an entity whose lack of capacity in this regard was total would be non-existent in international law."⁷⁴ *Paul Guggenheim* expressed the identical position and also specified that in-existent acts are those that simply do not raise

⁷³ Although the law of invalidity certainly applies to recognitions granted by third states to Kosovo, above all to recognitions by states that were previously committed not to recognise any UDI, see above Section V.

⁷⁴ R.Y. Jennings, "Nullity and Effectiveness in International Law", in: A.D. McNair, *Cambridge Essays in International Law*, 1965, 64 et seq. (66).

to the level where valid acts or invalid, whether void or voidable, acts can be produced.⁷⁵ According to *Nicoloudis*, a non-existent act cannot deploy legal effects because it lacks elements that are essential for the formation of acts that can affect legal position in the international legal system.⁷⁶

VIII. Conclusion

The complexities and confusions of the International Court's Advisory Opinion on Kosovo can be best addressed if it is borne in mind that legal reasoning, not common sense, provides the primary aid for understanding the opinion and the legal merit of the Kosovo situation as a whole.

The narrow construction of the General Assembly's question does not imply the Court's acknowledgment of the lack of ways international law can deal with lawful or unlawful secessions, let alone any projection of gaps in this area of law; it only means that the Court expressly addresses *this* particular UDI produced by *that* particular actor and no more, which literally fits within the parameters of the General Assembly's request. The Court's Opinion, seen in context with the relevant state and UN practice, means not that Kosovo's UDI is lawful, but that due to the inherent deficiency in standing of the entity proclaiming the UDI, it does not even get to the point where the compliance of the substance of the UDI with international law has to be assessed.

⁷⁵ "On affirme, par exemple, qu'un acte est inexistant lorsqu'il est établi par un sujet incapable de créer des actes en droit international. ... Toutefois, à côté de l'acte inexistant créé par des individus au nom d'une entité n'ayant pas la qualité d'un sujet de droit, il y a d'autres situations — plus intéressantes et plus importantes — où le problème de l'acte inexistant se pose," P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", *RdC* 74 (1949), 195 et seq. (203-204). *Guggenheim* also gives an example in line with the contemporary law in force: "Tel est le cas quand les organes d'un ex-Etat annexé, comme le Monténégro, délivrent des passeports à leurs anciens ressortissants. La situation juridique n'est pas modifiée par un tel acte."

⁷⁶ E. Nicoloudis, *La nullité de jus cogens et le développement contemporain de droit international public*, 1974, 54, also pointing out that the 1969 Vienna Convention only concerns void and voidable treaties, and does not mention inexistent treaties, (57).

There can be no defence of the Court's failure to address the underlying substantive issues of statehood, self-determination, and secession. An occasional recourse to judicial pragmatism can be useful, but the very circumstances inducing the Court to resort to pragmatism can also be unfortunate. That no majority could be gathered in support of a broader treatment of the General Assembly's request, more specifically to properly pronounce on the legality of acts and transactions performed by third states internationally, can only be a statement of the problem, not its justification. The Court's isolated treatment of the question of the UDI has indeed generated significant misunderstanding as to what the Court's real conclusion was, and has created expectations as to the legal position that it has not quite obtained. Nevertheless, this misunderstanding can be eliminated through a careful reading of the Opinion, which still has to be done in some quarters. Although this has significantly diminished the advisory quality of the Opinion,⁷⁷ this quality has not been destroyed or eliminated.

The Court would certainly have done better if it had expressly specified whether Kosovo meets the legal criteria for statehood. But implications to that effect obtain from the Court's Opinion anyway. A careful and contextual reading of the Opinion can shed light on a number of important questions, most importantly demonstrating that Kosovo cannot be considered to be an independent state or a case of successful secession. There is nothing in the Opinion, in its findings or in its context that could aid the legal argument favouring Kosovo's independence or that regarding the UDI as actually impacting the legal landscape, either as a matter of general international law or of S/RES/1244 arrangements. The Court has said or done nothing to suggest that the UDI of 17 February 2008 has given rise to Kosovo's statehood and independence which that very same UDI purports to obtain in defiance of legal restrictions to which both states supporting the UDI and the UN organs are clearly committed. The Court's complex, even though fragmented, treatment of the UDI in respect of Kosovo leaves us therefore with little else than to recognise that,

“Such declarations are no more than foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.”⁷⁸

⁷⁷ See on this point the Opinion of Judge *Simma*, see note 1.

⁷⁸ Dissenting Opinion of Judge *Bennouna*, *ibid.*, para. 69.