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***Reflections on the ICJ Advisory Opinion on Kosovo:
Interpreting Security Council Resolution 1244 (1999)***

Forthcoming in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION*
(Michael Wood & Marko Milanovic eds., Oxford University Press)

Sean D. Murphy¹

1. Introduction

A key aspect of the substantive legal arguments in the advisory opinion proceedings, and the focus of paragraphs 85-121 of the Court's opinion, was the meaning and effects of Security Council Resolution 1244 (1999) of 10 June 1999.² Adopted immediately after the cessation of NATO's bombing campaign against the Federal Republic of Yugoslavia (FRY), which had forced the FRY to agree to withdraw its military and police forces from Kosovo, the resolution served several purposes. First, it brought the United Nations back into play as the central institution for authorizing measures to maintain peace and security in the Balkans. Having been sidelined during the NATO intervention, the Council and the Secretary-General resumed their roles as key decision-makers charged with stabilizing the situation in Kosovo.

Second, the resolution set forth the central elements for achieving that objective, notably the deployment of both a military component (NATO's international security force in Kosovo or KFOR) to Kosovo and a civilian component (the UN Mission in Kosovo or UNMIK). The dominant concern of the Council at the time was to establish the role of the international community during the interim period, meaning the period before Kosovo's final status was resolved. In paragraph 1 of Resolution 1244, the Council stated that a

¹ The author represented Kosovo in the proceedings before the Court, but the views expressed herein are his own. The author expresses his thanks to Anthony Kuhn, G.W. J.D./M.A. '15, who provided outstanding research assistance for this chapter.

² SC Res. 1244 (1999).

political solution to the 1999 Kosovo crisis would be based on the general principles expressed in Annexes 1 and 2 to the resolution, which were the principles on which NATO's military campaign were brought to a close. Those principles spoke to ending violence in Kosovo, withdrawal of FRY and Serbian military and police forces from Kosovo, the deployment of UNMIK and KFOR to Kosovo, the safe return of refugees, the establishment of an interim political framework for the self-government of Kosovo, and efforts toward economic development of Kosovo. Paragraphs 2 through 4 of the resolution then indicated the various steps for withdrawal of FRY and Serbian forces, while paragraphs 5 through 11 elaborated on the deployment of the international military and civilian presences to Kosovo. In short, most of the resolution was devoted to the immediate post-conflict phase, detailing the basic elements for the foreign military and civilian presence that would deploy to Kosovo, thereby filling the vacuum brought about by the withdrawal of FRY and Serbian governmental authority.

Third, the resolution briefly addressed the process for determining Kosovo's long-term fate, but this portion of the resolution was vague and under-developed. The only operative part of the resolution relating to final status appears in paragraph 11, which set forth the responsibilities of the international civilian presence. Though most of the paragraph 11 is concerned with the interim period, subparagraphs 11(e) and (f) provide that the international civilian presence's responsibilities include:

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

Hence, a key problem for both sides in the Kosovo proceedings was that most of Resolution 1244 simply was not directed at the issue of Kosovo's final status, and the few provisions that were so directed provided little detail.

Even so, in the aftermath of Kosovo's declaration of independence on 18 February 2008, Resolution 1244 emerged as a lightning rod for legal arguments on both sides. The

resolution was adopted under Chapter VII of the UN Charter and the decisions contained therein were directly binding on all UN Member States. Yet because its language with respect to the final status of Kosovo was vague and incomplete, neither side had had an obvious claim that Resolution 1244 supported its position.

Further, while both sides sought to use the resolution to their advantage, they were fully aware that the Court would approach its interpretation from a perspective that transcended the confines of the case. Neither side could craft its position in a way that impugned the power or authority of the Security Council or of the Secretary-General, for doing so risked an adverse decision from a Court that, in all likelihood, would be disposed to protect the prerogatives of its collateral UN organs. Neither side could advance interpretations of the resolution that were seen as promoting secessionist movements in other contexts, such as Northern Cyprus or Republika Srpska. Further, both sides were aware that finding a Council prohibition on Kosovo's declaration would likely necessitate the Court's consideration of whether Kosovo had a right to 'remedial secession,' an issue the Court might prefer to avoid. Indeed, addressing that issue might require the Court to opine on whether a Security Council decision under Chapter VII is invalid if it infringes upon a right of self-determination, often viewed as a norm that has acquired the status of *jus cogens*. Finally, both sides had to grapple with the unusual circumstance of applying the resolution to the conduct of a non-state actor; while Security Council resolutions may clearly bind UN Member States, whether they can and do bind persons or groups of persons is far less clear.

This chapter addresses the arguments of both sides and the advisory opinion's substantive ruling on the consistency of Kosovo's declaration with Security Council Resolution 1244. Part 2 addresses the five legal core arguments regarding the legality of the declaration in relation to Resolution 1244. Part 3 then examines several ramifications of this portion of the advisory opinion for future interpretation of Security Council resolutions.

2. Core Legal Arguments Concerning the Consistency of the Declaration of Independence with Resolution 1244

Although there were many variations in the arguments that were made to the Court regarding the interpretation of Resolution 1244, there were five core arguments around which those variations revolved. First, did Resolution 1244 contain a prohibition, express or implied, on Kosovo's declaration, at least in the absence of Serbia's consent? Second, given that Resolution 1244 provided that the final status process must take into account the March 1999 Rambouillet accords, did those accords require Serbian consent to the determination of Kosovo's final status? Third, did the final status process envisaged by Resolution 1244, which commenced in 2005 under the auspices of the Special Envoy of the UN Secretary-General (former Finnish President Martti Ahtisaari), conclude prior to the issuance of the declaration, or was it not yet completed such that the declaration was an unlawful interference in that process? Fourth, even if the declaration did not directly violate Resolution 1244, was it nevertheless a violation of the legal régime set up in Kosovo under the resolution (e.g., an *ultra vires* act of the Provisional Institutions of Self-Government (PISG) or a contravention of Kosovo's Constitutional Framework for Provisional Self-Government promulgated by the Secretary-General's Special Representative in Kosovo (SRSG) in May 2001)? Finally, what implication, if any, might be drawn from the fact that UN officials – who were authorized to set aside inconsistent measures by authorities in Kosovo – did not set aside the declaration? Did this support the proposition that the issuance of the declaration did not violate Resolution 1244 or was it irrelevant to the declaration's legality?

A. *Did Resolution 1244 Directly Prohibit the Declaration?*

Serbia and those states supporting Serbia's position asserted that Resolution 1244 directly prohibited Kosovo's declaration of independence. In advancing this position, Serbia and its supporters emphasized three points.

First, the resolution's preamble reaffirmed 'the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.'³ That affirmation was an express recognition by the Security Council that the territorial arrangements in existence as of 1999 would remain intact, at least in the absence of some agreement by the FRY regarding Kosovo's secession. Although the FRY would over time

³ SC Res. 1244, pmb. and para. 10.

change, renaming itself ‘Serbia and Montenegro’ in 2003 and consenting to the independence of Montenegro in 2006, the same general principle remained concerning the territorial integrity of Serbia in 2008. As such, the resolution expressly precluded the issuance of Kosovo’s declaration of independence.⁴ Other aspects of the resolution were also stressed, such as the reference to resolving the humanitarian situation in ‘Kosovo, Federal Republic of Yugoslavia’ in the fourth paragraph of Resolution 1244’s preamble,⁵ the reference to Kosovo enjoying substantial autonomy ‘within the Federal Republic of Yugoslavia’ in the tenth operative paragraph,⁶ and the provisions allowing for small numbers of Yugoslav and Serbian military and police personnel to return to Kosovo and perform tasks clearly linked with sovereignty.⁷

Second, Serbia and its supporters made extensive reference to the background to Resolution 1244, noting that prior UN Security Council resolutions addressing the conflict in Kosovo—such as resolutions 1160 (1998), 1190 (1998), 1203 (1998), and 1239 (1999)—had also expressed a commitment to the sovereignty and territorial integrity of the FRY.⁸ Similarly, they pointed to statements made by the Contact Group,⁹ the President of the Security Council,¹⁰ the chairman of the meeting of G-8 foreign ministers,¹¹ and the

⁴ See First Written Statement of the Government of the Republic of Serbia (17 April 2009), 249, paras. 675–76, *available at* <http://www.icj-cij.org/docket/files/141/15642.pdf> (Serbia First Written Statement); see also First Written Statement of the Republic of Cyprus (17 April 2009), 23, para. 92, *available at* <http://www.icj-cij.org/docket/files/141/15609.pdf> (Cyprus First Written Statement) (stating the ‘sovereignty and territorial integrity of Serbia is unambiguously confirmed’ in the preamble to Resolution 1244 and ‘provides the lens through which all other provisions should be interpreted’).

⁵ See, e.g., First Written Statement of the Kingdom of Spain (14 April 2009), 25, para. 37, *available at* <http://www.icj-cij.org/docket/files/141/15644.pdf> (Spain First Written Statement).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ See, e.g., Spain First Written Statement (n 5), 24, para. 35; Verbatim Record of the Oral Argument of the Government of Serbia (1 December 2009) CR 2009/24, 68, paras. 15–16, *available at* <http://www.icj-cij.org/docket/files/141/15710.pdf> (Serbia Oral Argument).

⁹ Serbia First Written Statement (n 4), 244, para. 658 (noting the Contact Group—comprising France, Germany, Italy, Russia, the United Kingdom, and the United States—issued a statement supporting an enhanced status for Kosovo within the Federal Republic of Yugoslavia).

¹⁰ *Ibid.*, 244–45, para. 659.

¹¹ *Ibid.*, 247, para. 667.

Military Technical Agreement at the end of NATO's bombing campaign between the KFOR and the FRY¹² as confirming the latter's sovereignty and territorial integrity.

Third, Serbia and its supporters drew a distinction between Resolution 1244 and a Security Council resolution adopted the following day,¹³ Resolution 1246 on the international legal status of East Timor.¹⁴ Resolution 1246 established a UN Mission in East Timor (UNAMET) 'to organize and conduct a popular consultation . . . on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia.'¹⁵ According to Serbia, the fact 'no such provision had been inserted in resolution 1244' showed a lack of support in the Security Council to allow for the unilateral separation of Kosovo.¹⁶ Moreover, Serbia argued that the lack of any such provision, when coupled with the formal reaffirmation of its territorial integrity in Resolution 1244, necessarily 'precluded the possibility of Kosovo unilaterally seceding.'¹⁷

By contrast, Kosovo and those states supporting its position argued that no such prohibition existed in Resolution 1244. They noted that there was no reference of any kind in Resolution 1244 to a declaration or statement by Kosovo leaders, let alone a reference that prohibited such a declaration. With respect to the preambular language on 'territorial integrity,' Kosovo and its supporters argued that such language referred to territorial integrity 'as set out in Annex 2' of the resolution. In Annex 2, the issue of 'territorial integrity' related solely to the 'interim political framework,' not to the point of achieving a final status. As such, the preambular language was relevant to the establishment by the SRSG in 2001 Constitutional Framework for 'Provisional Self-Government' in Kosovo,¹⁸

¹² Ibid., para. 668.

¹³ See Serbia Oral Argument (n 8), 51, para. 9.

¹⁴ SC Res. 1246 (1999).

¹⁵ Ibid., para. 1.

¹⁶ Serbia Oral Argument (n 8), 51, para. 10.

¹⁷ Ibid., para. 11.

¹⁸ Constitutional Framework for Provisional Self-Government in Kosovo, UNMIK Regulation No. 2001/9, 15 May 2001, in Dossier Submitted on Behalf of the Secretary-General pursuant to Article 65, paragraph 2, of the Statute of the International Court of Justice (Dossier), at No. 156.

which did respect the concept of Kosovo being a part of the FRY during the interim period. Yet, according to Kosovo and its supporters, neither this Constitutional Framework, nor the references to ‘territorial integrity’ in Resolution 1244, purported to address the issue of Kosovo’s *final* status. Other arguments were also deployed regarding the preambular language, such as its reference to ‘Federal Republic of Yugoslavia’ and not ‘Serbia,’ and that the principle of territorial integrity related to inter-state relations, not the conduct within a state of a non-state entity.¹⁹

Kosovo and its supporters also drew contrasts between Resolution 1244 and other Security Council resolutions, focusing on resolutions where the Council adopted language that appeared to preclude or at least disfavor the emergence of a new state. Thus, contrast was made with Security Council Resolution 787, which was adopted in 1992.²⁰ In paragraph 3 of that resolution, the Council considered the possibility of a declaration of independence by the leaders of Republika Srpska within Bosnia-Herzegovina. Apparently concerned that such a declaration might be issued, the Security Council expressly affirmed that it would not accept ‘any entities unilaterally declared’. According to Kosovo and its supporters, the lack of any such language in Resolution 1244 made clear that the Council did not preclude the possible issuance of a declaration of independence by the representatives of the people of Kosovo. Further, the Council’s approach in Resolution 787 (stating that it would not *accept* the declaration rather than forbidding the declaration) was consistent with the contention of Kosovo and its supporters that generally the Security Council does not seek to regulate entities other than states.²¹

To similar effect, contrast was made with Resolution 1251 (1999), which was adopted in the same month as Resolution 1244. In Resolution 1251, the Council considered the situation of northern Cyprus and stated, in paragraph 11, that:

‘a Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded, and comprising two politically equal communities as described

¹⁹ First Written Contribution of the Republic of Kosovo (17 April 2009), paras. 9.29–9.36, *available at* <http://www.icj-cij.org/docket/files/141/15678.pdf> (KWC).

²⁰ SC Res. 787, para. 3 (1992); see *infra* section 3(D).

²¹ Second Written Contribution of the Republic of Kosovo (17 July 2009), paras. 5.67–5.74, *available at* <http://www.icj-cij.org/docket/files/141/15708.pdf> (KWC (Second)).

in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation, and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession.’²²

In Resolution 1244, by contrast, there was no language indicating that a political settlement on Kosovo had to be based on Serbia or the FRY with a ‘single sovereignty and international personality,’ or that the political settlement must ‘exclude secession’.

A third contrast was made with respect the situation that unfolded in Georgia in 1999. In Resolution 1225 of January 1999 and in Resolution 1255 of July 1999, the Council expressly called for a ‘settlement on the political status of Abkhazia *within the State of Georgia*.’²³ In other words, the Council expressly stated that the settlement must be one that involved Abkhazia remaining within the sovereign state of Georgia. Yet no similar language existed in Resolution 1244.

The problem faced by Kosovo and its supporters was that Resolution 1244 did not expressly envisage a determination of Kosovo’s final status based solely upon a referendum or other measure taken by the people of Kosovo. Yet the problem faced by Serbia and its supporters was that Resolution 1244 did not expressly preclude any such outcome. While many states in 1999 probably expected that Kosovo would ultimately remain within Serbia as a (perhaps highly) autonomous province, a different final status of independence was also possible. Hence, Kosovo and its supporters made ample use of statements by relevant actors that Resolution 1244 did not, by itself, determine Kosovo’s final status.²⁴ Indeed, many of the key participants in the process, including the Secretary-

²² SC Res. 1251, para. 11 (1999).

²³ SC Res. 1225, para. 3 (1999); SC Res. 1255, para. 5 (1999) (emphasis added).

²⁴ For example, the Legal Counsel of the United Nations at the time, Hans Corell, later opined (in his private capacity) that Resolution 1244 *per se* ‘does not guarantee that Serbia would have maintained Kosovo within its border’ and ‘that the resolution does not foresee that Kosovo should remain within the borders of Serbia.’ Corell, ‘Remarks’, *Proc. Am. Soc. Int’l L.* (2008) 134.

General,²⁵ the SRS,²⁶ Members of the Security Council,²⁷ and even Serbia itself, referred to Resolution 1244 as establishing a ‘status-neutral’ framework.²⁸

Ultimately, the Court accepted the position advanced by Kosovo and its supporters that the resolution did not forbid a declaration of independence. First, the Court agreed that the resolution’s preamble did not, by its terms, forbid a declaration of independence. While Resolution 1244 ‘was essentially designed to create an interim régime’ for governing Kosovo with a view to settling Kosovo’s final status through a political process, it ‘did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.’²⁹ Second, citing Resolution 1251 on the situation in Cyprus as an example, the Court held that the contemporaneous practice of the Security Council had shown that when it decided to set restrictive conditions on the permanent status of a territory, it specified those conditions in the relevant resolution.³⁰ Unlike Resolution 1251, the Court reasoned that the terms of Resolution 1244 ‘did not reserve for [the Security Council] the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.’³¹ Third, the Court concluded that Resolution 1244 was primarily concerned with creating obligations for UN Member States and UN organs, with two exceptions not relevant to the declaration of independence.³² Thus, Resolution 1244 did not intend to impose ‘a specific obligation to act or a prohibition from acting’³³ that would apply to the authors of Kosovo’s declaration of independence.³⁴

²⁵ See, e.g., S/2009/300, para. 6.

²⁶ See, e.g., S/PV.6144, at 4.

²⁷ See, e.g., *ibid.*, at 10 (Vietnam); *ibid.*, at 15 (China); *ibid.*, at 19 (Uganda); S/PV.6202, at 20 (China).

²⁸ See, e.g., S/PV.6202, at 7 (statement of Serbian Foreign Minister Jeremić).

²⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 449, para. 114 (Kosovo Advisory Opinion); but see Dissenting Op. Judge Koroma, [2010] ICJ Rep. 467, 470, para. 11 (finding that ‘the declaration of independence violates the provision of that resolution calling for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia and the autonomy of Kosovo’); *ibid.*, 471, para. 13.

³⁰ Kosovo Advisory Opinion, 449, para. 114.

³¹ *Ibid.*

³² *Ibid.*, 449–50, para. 115

³³ *Ibid.*, 450, para. 115.

³⁴ *Ibid.*, 451, para. 118.

Given that Resolution 1244 did not expressly forbid a declaration of independence, Serbia and its supporters also advanced a variation of this argument. Since Resolution 1244 contemplated a final status process, conclusion of that process necessarily entailed consent by Serbia (the state in whose territory Kosovo existed) or at least acceptance by the Security Council. Specifically, the terms ‘political process’ in subparagraph 11(e) and ‘political settlement’ in subparagraph 11(f) of the resolution had to envisage Serbian consent to Kosovo’s final status because the establishment of a political process ‘implies that all parties . . . have to find a mutually agreeable solution through negotiation.’³⁵ The fact that Resolution 1244 only provided for power to transfer from Kosovo’s provisional institutions to institutions established under a ‘political settlement’ necessarily meant there must be an ‘agreement, not a unilateral measure taken by one of the parties.’³⁶ Moreover, Serbia and its supporters argued respect for state sovereignty and territorial integrity is a rule of *jus cogens*, which cannot be undermined by a Security Council resolution without the consent of the state.³⁷

In the alternative, they maintained that the interim status of Kosovo under UN administration within Serbia remained in force until the Security Council decided otherwise.³⁸ Otherwise, Serbia asked the Court, why would the Security Council have contemplated negotiations in the first place if one side could unilaterally terminate them at will, and why did Resolution 1244 provide for the interim régime to stay in place until the Security Council terminated it?³⁹ This argument maintained that it is not the declaration of independence *per se* that violated Resolution 1244 but, instead, the issuance of such a declaration without Serbia’s consent or prior to a Security Council decision to end the final status settlement process.

In response, Kosovo and its supporters maintained that Resolution 1244 nowhere provided for approval by Serbia of Kosovo’s final status. Had the Security Council decided

³⁵ Serbia First Written Statement (n 4), 269, para. 753.

³⁶ *Ibid.*, para. 754; see also Second Written Statement of the Government of the Republic of Serbia (14 July 2009), 177, para. 437, available at <http://www.icj-cij.org/docket/files/141/15686.pdf> (Serbia Second Written Statement) (noting the term ‘settlement’ used in Resolution 1244 is the same used in the UN Charter, where it precludes unilateral methods).

³⁷ Serbia Second Written Statement (n 366), 122, paras. 288–89.

³⁸ Serbia First Written Statement (n 4), 282–88, paras. 800–23.

³⁹ Serbia Oral Argument (n 8), 54, para. 26.

that such consent must exist prior to resolution of Kosovo's status, they argued that the Council could have said so, but did not. Among other things, they noted that Council resolutions pre-dating Resolution 1244 had gone so far as to call for negotiations between Belgrade and Pristina,⁴⁰ but that in Resolution 1244 even that language was dropped. Rather, when the time came – as contemplated by Resolution 1244 – the United Nations facilitated the final status talks that were launched in 2005 and concluded then in 2007, without any resistance or interference from Kosovo authorities.

The Court did not view Resolution 1244 as requiring Serbia's consent to Kosovo's independence. Rather, it decided that 'resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.'⁴¹ Although it may have been expected that the final status of Kosovo would be developed with the framework established by Resolution 1244, the Court appears to have agreed with Kosovo that the resolution only required that UNMIK facilitate a political process and oversee a final transition, while leaving open the contours and outcome of the final settlement process.

B. Did Resolution 1244 Indirectly Prohibit the Declaration through its Reference to the Rambouillet Accords?

As noted above, paragraph 11(e) of Resolution 1244 referred to 'a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords.' The Rambouillet accords were a key backdrop to the intervention by NATO in Kosovo. In 1998, as the crisis began unfolding in Kosovo, the 'Contact Group' (consisting of France, Germany, Italy, Russia, the United Kingdom, and the United States) tasked U.S. Ambassador Christopher Hill with achieving an agreement that would stabilize the unfolding Kosovo crisis. Hill's efforts led to a draft agreement commonly referred to as the

⁴⁰ KWC (n 19), para. 5.32.

⁴¹ Kosovo Advisory Opinion (n 29), 444, para. 99; but see Dissenting Op. Judge Koroma, [2010] ICJ Rep. 467, 473, para. 16 (finding that 'reference to a future 'settlement' of the conflict, in my view, excludes the making of the unilateral declaration of independence. By definition, 'settlement' in this context contemplates a resolution brought about by negotiation.').

Rambouillet accords, after the château where the negotiations were conducted. Like Resolution 1244, the Rambouillet accords envisaged an interim period of substantial Kosovo autonomy followed by a final settlement; indeed, the formal title of the accords was ‘Interim Agreement for Peace and Self-Government in Kosovo’. Though never signed by Serbia, and therefore never brought into force, the accords were known to the members of the Security Council in 1999 when they adopted Resolution 1244 and hence the reference in paragraph 11(e). Both sides appearing before the Court sought to use those accords to their advantage.

Serbia and its supporters approached the Rambouillet accords by noting that they recalled ‘the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,’⁴² thus supporting the idea that Kosovo would remain a unit within the FRY (or later Serbia). Additionally, they noted that the Rambouillet accords incorporated the Helsinki Final Act as a legal parameter for determining the final status of Kosovo, which *inter alia* provided that ‘the frontiers of all States in Europe shall be inviolable,’⁴³ again signaling a desire not to infringe upon the territorial integrity of the FRY. Thus, when Resolution 1244 provided for the Rambouillet accords to be taken into account in the political process to determine Kosovo’s status, it meant that the Security Council envisaged Kosovo remaining within the sovereignty of the FRY.⁴⁴

For their part, Kosovo and its supporters parsed closely the relevant texts of the four drafts considered during the so-called ‘Hill Process’ that presaged the Rambouillet accords, in an effort to show that the idea of a Belgrade-Pristina mutual agreement on final status was rejected and replaced with the idea of a final status settlement based on various factors, the first of which was the ‘will of the people’ of Kosovo.⁴⁵ Like Resolution 1244 itself, they noted that all four drafts were principally focused on establishing an interim

⁴² Serbia First Written Statement (n 4), 277, para. 782 (quoting the Interim Agreement for Peace and Self-Government in Kosovo, pmb. and para. 4 (Rambouillet accords)); Cyprus First Written Statement (n 4), 23, para. 93.

⁴³ *Ibid.*, para. 783.

⁴⁴ *Ibid.*, para. 784; see also Serbia Oral Argument (n 8), 71–72, para. 25 (arguing the lack of a prohibition on Kosovo declaring independence in the Rambouillet accords was not significant because the territorial integrity of the Federal Republic of Yugoslavia had been repeatedly reaffirmed and it ‘would in reality have been redundant to prohibit expressly any attempt at unilateral independence’).

⁴⁵ KWC (Second) (n 21), paras. 5.05–5.18.

solution, one designed to create the immediate conditions for the return to a peaceful and normal life for the inhabitants of Kosovo. Near the end of the Hill drafts, however, a single clause briefly addressed the process for Kosovo's final status. The first Hill proposal included an express requirement that the final status determination would require 'mutual agreement' of both Belgrade and Pristina.⁴⁶ The second⁴⁷ and third⁴⁸ Hill proposals repeated this final provision almost verbatim. The fourth and final Hill proposal of 27 January 1999, however, was different. Though placed in brackets, it read:

'In three years, there shall be a comprehensive assessment of this Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps, by a procedure to be determined taking into account the Parties' roles in and compliance with this Agreement.'⁴⁹

Kosovo and its supporters noted that in this last version of the Hill proposals, reference to the 'mutual agreement' was dropped, replaced by an approach to Kosovo's final status that would involve a 'comprehensive assessment' under 'international auspices' by a 'procedure' that would 'take into account' the two sides' roles and compliance with the agreement.

Two days later, the Contact Group called upon the parties to meet at Rambouillet for further negotiations. Kosovo and its supporters noted that, like the final Hill proposal, the initial draft of the Rambouillet Interim Agreement did not assert that Kosovo's final status should be determined by 'mutual agreement' between Kosovo and Serbia, or otherwise required Serbia's consent; rather, it drew upon the relevant clause from the final Hill

⁴⁶ In the first Hill proposal of 1 October 1998, the relevant clause stated: 'In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, *which will require mutual agreement for adoption.*' Ibid., para. 5.07 (emphasis added).

⁴⁷ In the second Hill proposal of 1 November 1998, the relevant clause stated: 'In three years, the sides will undertake a comprehensive assessment of the Agreement, with the aim of improving the implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.' Ibid.

⁴⁸ In the third Hill proposal of 2 December 1998, the relevant clause stated: 'In three years, the Parties will undertake a comprehensive assessment of the Agreement, with the aim of improving its implementation and considering proposals by either side for additional steps, which will require mutual agreement for adoption.' Ibid.

⁴⁹ Ibid., para. 5.08 (emphasis added).

proposal.⁵⁰ For the final version of the Rambouillet accords, the clause was further amended to read:

‘Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, *on the basis of the will of the people*, opinions of relevant authorities, each Party’s efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.’⁵¹

For Kosovo and its supporters, the progression of text from the first Hill proposal of October 1998 to the final version of the Rambouillet accords of March 1999 demonstrated that the concept of a Belgrade-Pristina mutual agreement on final status had been dropped, and replaced with the idea of a final status settlement based on various factors, the first of which was the ‘will of the people’ of Kosovo.⁵² That interpretation, they contended, was confirmed by Serbia’s failed effort to revise the clause noted above so as to read as follows:

‘After three years, the signatories shall comprehensively review this Agreement with a view to improving its implementation and shall consider the proposals of any signatory for additional measures, *whose adoption shall require the consent of all signatories*.’⁵³

Since that proposal was rejected at Rambouillet, in part prompting Serbia to reject the Rambouillet accords, Kosovo and its supporters maintained that the accords contemplated a final status process in which the ‘the will of the people’ was assigned a pivotal role, and in which there was no requirement of Serbian consent.

⁵⁰ The first draft of the Rambouillet Interim Agreement, dated 6 February 1999, stated: ‘In three years, there shall be a comprehensive assessment of the Agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps.’ *Ibid.*, para. 5.12.

⁵¹ Interim Agreement for Peace and Self-Government in Kosovo, 23 Feb. 1999, Chapter 8, Article I(3), in Dossier (n 18) at No. 30 (emphasis added).

⁵² Judge Skotnikov, after reviewing this language of the Rambouillet accords, found that by ‘no stretch of the imagination can a “unilateral statement” be read into this clear policy statement endorsed by the Security Council in its resolution 1244.’ Dissenting Op. Judge Skotnikov, [2010] ICJ Rep. 515, 520, para. 14.

⁵³ KWC, para. 5.13; FRY Revised Draft Agreement, 15 March 1999, Chapter 8, Article 1 (4), *reprinted in M. Weller, The Crisis in Kosovo 1989-1999* (1999), at 489–90 (emphasis added).

Part of the difficulty for Serbia and its supporters in trying to use the Rambouillet accords to their advantage before the Court was Serbia's rejection of those accords. Indeed, Serbia had stated to the Security Council shortly after the Rambouillet meeting that the 'solution' proposed constituted an 'ultimatum' in which Belgrade was being asked to voluntarily give up Kosovo.⁵⁴ Further, in explaining to the Council its rejection of the Rambouillet accords, Belgrade asserted that it 'cannot agree to the secession of Kosovo and Metohija, either immediately or after the interim period of three years'.⁵⁵ Kosovo and its supporters pointed to such statements as admissions by Serbia that the Rambouillet accords could not be interpreted as requiring Serbian consent to independence.

The Court seemingly accepted the position advanced by Kosovo and its supporters that the reference to the Rambouillet accords in Resolution 1244 did not signal a requirement that Serbia consent to the resolution of Kosovo's final status. After noting that the references to the Rambouillet accords could support the view that Resolution 1244 contemplated the possibility of a declaration of independence,⁵⁶ the Court avoided discussing the issue in detail by simply deciding that the Security Council did not intend by such a reference to create legal obligations prohibiting the authors of the declaration from proclaiming independence.⁵⁷

C. Was the Declaration Inconsistent with the Political Process for Final Status Envisaged by Resolution 1244?

If Resolution 1244 did not itself directly or indirectly prohibit the issuance of the declaration, might it be said that the resolution nevertheless envisaged the unfolding of a political process for the resolution of Kosovo's final status, a process that was never fulfilled and was even aborted by Kosovo's declaration? If so, then it might be said that the declaration was not 'in accordance' with Resolution 1244.

⁵⁴ S/PV.3989, at 11.

⁵⁵ S/PV.3988, at 14.

⁵⁶ Kosovo Advisory Opinion (n 29), 448, para. 112; but see Dissenting Op. Judge Koroma, [2010] ICJ Rep. 467, 471, para. 13 (finding that the Rambouillet accords 'also affirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia').

⁵⁷ Kosovo Advisory Opinion (n 29), 450–51.

The basic process that occurred was as follows. The Secretary-General's Special Envoy in Kosovo, Ambassador Kai Eide, in October 2005 reported that the interim situation in Kosovo was no longer sustainable and that the final status process should commence, an assessment shared by the Secretary-General.⁵⁸ After reviewing Eide's report, the Security Council agreed with that assessment and stated that it supported 'the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)' and that it welcomed 'the Secretary-General's readiness to appoint a Special Envoy to lead the Future Status process.'⁵⁹

The Secretary-General proposed the appointment of Ahtisaari as his Special Envoy for supervising the process,⁶⁰ an appointment welcomed by the President of the Security Council.⁶¹ In addition, the Security Council provided to the Secretary-General for his 'reference' certain 'guiding principles' for the final status talks that had been developed by the Contact Group. Those principles called for the 'launch' of a 'process to determine the future status of Kosovo in accordance with Security Council resolution 1244' and made clear that this was a process that the Special Envoy would 'lead'.⁶² The principles asserted that any 'solution that is unilateral or results from the use of force would be unacceptable,' and that the 'final decision on the status of Kosovo 'should' be endorsed by the Security Council,' but also stated that '[o]nce the process has started, it cannot be blocked and must be brought to a conclusion'.⁶³ Ahtisaari's terms of reference provided that it was he who would determine the 'duration' of the process.⁶⁴

⁵⁸ Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635 (2005), in Dossier (n 18) at No. 193.

⁵⁹ Statement by the President of the Security Council, UN Doc. S/PRST/2005/51 (24 Oct. 2005), in Dossier (n 18) at No. 195.

⁶⁰ Letter dated 31 October from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/708 (10 Nov. 2005), in Dossier (n 18) at No. 196.

⁶¹ Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2005/709 (10 Nov. 2005), in Dossier (n 18) at No. 197.

⁶² Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, *ibid.*, Annex.

⁶³ *Ibid.*

⁶⁴ Letter of Appointment dated 14 November 2005 from the Secretary-General to Martti Ahtisaari with attached Terms of Reference, in Dossier (n 18) at No. 198.

After receiving his instructions, Ahtisaari set to work and, over the course of fifteen months, conducted extensive negotiations with all the relevant parties, including authorities in Belgrade and Pristina. Most of these meetings took place in Vienna, and while Kosovo and Serbia were clearly central to them, the meetings also involved a wide array of experts from the European Union, NATO, the Council of Europe, the OSCE, international financial institutions, and others. Progress was made on certain issues that needed to be dealt with relating to final status, such as on protection of religious heritage, community rights, decentralization, and economic issues. But on the issue of autonomy versus independence, the two sides' positions remained thoroughly entrenched and diametrically opposed. The government in Belgrade insisted that Kosovo remain a part of Serbia, while the Kosovo authorities, reflecting the long-standing desire of the people of Kosovo, would accept nothing less than independence.

President Ahtisaari determined in March 2007 that nothing more could be accomplished through negotiations. The potential for 'any mutually agreeable outcome' was 'exhausted'. No 'additional talks, whatever the format could overcome the 'impasse'.⁶⁵ Rather, Ahtisaari concluded that 'the only viable option' for Kosovo was independence.⁶⁶ Consequently, he advanced a 'Comprehensive Proposal for the Kosovo Status Settlement' and recommended independence – a proposal and recommendation supported by the Secretary-General.⁶⁷ Efforts to secure Serbian cooperation with that proposal (through a Security Council mission to the region and through efforts of the Troika) failed. In September 2007, the Secretary-General indicated that there was a 'real risk of progress beginning to unravel and of instability in Kosovo and the region.'⁶⁸ In February 2008, Kosovo's leaders declared independence.

Serbia and its supporters argued forcefully that this process clearly was not the one envisaged in Resolution 1244. For them, the Contact Group had issued principles for the final status negotiations that did not pre-determine independence for Kosovo; indeed, they

⁶⁵ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, attachment, UN Doc. S/2007/168 (26 Mar. 2007), in Dossier (n 18) at No. 203.

⁶⁶ Ibid.

⁶⁷ Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168/Add.1 (26 Mar. 2007), in Dossier (n 18) at No. 204.

⁶⁸ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2007/582, para. 29 (28 Sept. 2007), in Dossier (n 18) at No. 82.

stressed key language in those principles to the effect that '[a]ny solution that is unilateral or results from the use of force would be unacceptable' and that the 'Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council.'⁶⁹ Moreover, they maintained that, from the very beginning of the process, Ahtisaari took the view that independence was the only viable option and thus approached the negotiations in a biased and unfair manner.⁷⁰ Hence, the actions of Ahtisaari and certain members of the Contact Group created a setting where Kosovo 'did not have any incentive to consider any compromise solution to the future status but stuck to its position that independence was the only option'.⁷¹ In fact, Serbia and its supporters asserted that the process had not been exhausted; Serbia expressed its continued willingness to negotiate with Kosovo on a wide range of options for the latter's autonomy and self-governance.⁷² Finally, despite Ahtisaari's assertions, the Security Council – which had assumed the central role with respect to Kosovo's fate – had not yet determined that negotiations were exhausted,⁷³ and the refusal of many states to recognize Kosovo as a sovereign state demonstrated that such a determination was necessary. If a stalemate could be said to exist at the Security Council, that alone could not justify unilateral action by one side to resolve Kosovo's status. Thus, the declaration of independence and its unilateral termination of the political process were not in accordance with Resolution 1244.

By contrast, Kosovo and its supporters maintained that the political process outlined above was fully in accordance with Resolution 1244. Based on the language of the 'Guiding Principles,' they argued that the Security Council fully understood in 2005, even

⁶⁹ Serbia Second Written Statement (n 36), 54–55, paras. 103–05.

⁷⁰ *Ibid.*, 55–57, paras. 106–09.

⁷¹ *Ibid.*, 58, para. 112; see also Serbia Oral Argument (n 8), 57, para. 44 (stating 'negotiations must not only be based on international law, but must also be facilitated in an unbiased manner').

⁷² Serbia Second Written Statement (n 36), 186, para. 467.

⁷³ *Ibid.*, 189–91, paras. 477–83; Serbia Oral Argument (n 8), 58–59, paras. 48–53 ('[I]t was the Security Council that reinstated its primacy for the maintenance of international peace and security after the unilateral use of military force against the [Federal Republic of Yugoslavia] by adopting resolution 1244. It was the Security Council which, acting under Chapter VII, adopted resolution 1244 and created the current legal status of Kosovo. It was the Security Council that decided that resolution 1244 will continue to be in force until the Council decides otherwise. It was the Security Council that decided to remain actively seized of the matter. It was the Security Council that started the political process for the settlement of the future status of Kosovo. And it is also for the Security Council to decide when this process has come to an end and to then endorse the outcome of the process.') (internal citations and paragraph numbering omitted).

in the face of strongly held and quite possibly irreconcilable positions in Belgrade and Pristina, that the Council was launching a political process that could not be blocked and that would have to reach a conclusion at the end of the process. Further, based on the terms of reference given to Ahtisaari, Kosovo and its supporters maintained there was no doubt that it was thrown to Ahtisaari to decide when and whether the process had run its course.

Moreover, they emphasized that nowhere in the Secretary-General's recommendation and appointment in 2005 of the Special Envoy, nor in his terms of reference, was it stated that Kosovo's status could only be determined with the approval of Serbia or by a Belgrade-Pristina agreement, nor that final status could only be determined by a further decision of the Security Council. The Council had on many occasions, of course, included in its resolutions a decision that before a particular step could be taken, the matter must come back to the Council for approval. Yet, Kosovo and its supporters noted, no such decision was contained in Resolution 1244. Further, they stressed that the conclusion by Ahtisaari about the futility of further negotiations was consistent with the Court's recognition in the *South West Africa* cases that there comes a time in negotiations when 'a deadlock' is reached – when 'both sides remain adamant' in their positions – in which case 'there is no reason to think that the dispute can be settled by further negotiations between the Parties'.⁷⁴ Under such circumstances, it could not be said that the declaration contravened paragraph 11 of Resolution 1244. Rather, the declaration was an obvious and necessary next step for achieving a final settlement of Kosovo's status, one that flowed directly from the conclusions by the very authorities charged by the Security Council with leading the final status process.

Kosovo's position, however, raised an important question. By issuing the declaration, did Kosovo violate Resolution 1244 by terminating, in essence, the functions of UNMIK, a step presumably only the Security Council could take?⁷⁵ Kosovo and its

⁷⁴ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment*, [1962] ICJ Rep 319, 346; see *Mavrommatis Palestine Concessions*, [1924] PCIJ Ser. A, No. 2, 6, 13 (the same); see also R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th ed. 1992), vol. 1, 1182–83 (States 'are under no legal obligation to reach an agreement; nor does any obligation to negotiate necessarily involve an obligation to pursue lengthy negotiations if the circumstances show that such negotiations would be superfluous.').

⁷⁵ See Dissenting Op. Judge Koroma, [2010] ICJ Rep 467, 470, para. 11 (finding that 'the unilateral declaration of independence is an attempt to bring to an end the international presence in Kosovo established by Security Council resolution 1244 (1999), a result which could only be effected by the

supporters noted that the declaration did not in fact terminate or purport to terminate UNMIK's functions, and further stressed that Resolution 1244 contemplated a role for UNMIK in the post-interim period, which UNMIK continued to fulfil even after issuance of the declaration. Further, Kosovo pointed out that Serbia itself had accepted that the declaration did not set aside the mandate of UNMIK and that UNMIK continued to perform certain functions after its adoption.⁷⁶

The Court basically accepted the position advanced by Kosovo and its supporters that the issuance of the declaration of independence did not contravene the 'facilitation' of a political process as envisaged in Resolution 1244.⁷⁷ In the background section of the advisory opinion, the Court found *inter alia* that after Ambassador Eide had submitted his report on Kosovo in 2005, the Security Council had reached consensus that the final status process should begin;⁷⁸ that the Secretary-General had then appointed Ahtisaari as his Special Envoy for the process;⁷⁹ that several rounds of negotiation between delegates from Serbia and Kosovo were held over the course of 2006 and 2007;⁸⁰ that Ahtisaari had determined in March 2007 that no amount of talks between the parties would result in an agreement on Kosovo's future status; and that he recommended independence for Kosovo.⁸¹ With this history in mind, the Court held the declaration of independence did not contravene Resolution 1244 because 'the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244,' and thus the

Security Council itself'). Judge Koroma pressed the point even further, asserting that 'Kosovo cannot be declared independent while the international civil presence continues to exist and operate in the province. The resolution does not grant the international civil presence the right to alter or terminate the Federal Republic of Yugoslavia's sovereignty over its territory of Kosovo....'. *Ibid.*, 472, para. 14.

⁷⁶ Serbia First Written Statement (n 4), paras. 827 and 834.

⁷⁷ But see Decl. Vice-President Tomka, [2010] ICJ Rep. 454, 462, para. 28 ('The notion of a 'final settlement' 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. '); Dissenting Op. Judge Bennouna, [2010] ICJ Rep 500, 513, para. 62 (finding the resolution unlawful because it 'is unilateral, whereas Kosovo's final status must be approved by the Security Council'); Dissenting Op. Judge Koroma, [2010] ICJ Rep 467, 470, para. 11 (stating the 'resolution calls for a negotiated settlement, meaning the agreement of all the parties concerned with regard to the status of Kosovo, which the authors of the declaration of independence have circumvented').

⁷⁸ Kosovo Advisory Opinion (n 29), 430, para. 64.

⁷⁹ *Ibid.*, para. 65.

⁸⁰ *Ibid.*, 431, paras. 67–68.

⁸¹ *Ibid.*, 431–32, paras. 68–69.

declaration was not prohibited even though ‘it was expected that the final status of Kosovo would flow from . . . the framework set up by the resolution’.⁸² Judge Skotnikov disagreed: ‘[T]he Security Council, in the view of the majority, has created a giant loophole in the régime it established under resolution 1244 by allowing for a unilateral “political settlement” of the final status issue.’⁸³

D. Was the Declaration Inconsistent with the Legal Régime in Kosovo?

If Resolution 1244 itself did not prohibit the declaration of independence, then a further possibility was that the declaration was not ‘in accordance with’ international law because it was inconsistent with the legal régime in Kosovo, perhaps as an *ultra vires* act of the PISG or a contravention of the regulations adopted by the SRSB on behalf of UNMIK, including the 2001 Constitutional Framework.⁸⁴ This line of argument principally entailed two issues: first, was a violation of the legal régime set up in Kosovo after 1999 a violation of *international* law (as referred to in the question put forward by the General Assembly) or was more akin to a violation of national law?; and, if the former, (2) were the authors of the declaration actors bound by that régime?

1. Kosovo’s Legal Régime as International Law

Kosovo and its supporters claimed that, even if *arguendo* the declaration constituted an *ultra vires* act by the PISG or violated the 2001 Constitutional Framework, such action was not a violation of *international* law, but was a violation of the *national* law applicable in Kosovo (that is local law established for the interim administration of Kosovo). In this respect, the declaration would have been *ultra vires* only in the same way that most declarations of independence are—as a contravention of the constitutional or other national law of the state concerned, but not as a contravention of international law.⁸⁵

⁸² *Ibid.*, 445, para. 104.

⁸³ Dissenting Op. Judge Skotnikov, [2010] ICJ Rep 515, 520, para. 14.

⁸⁴ Constitutional Framework, in Dossier (n 18) at No. 156.

⁸⁵ Second Written Contribution of the Republic of Kosovo (17 July 2009), paras. 5.66, 5.73, and 6.34, available at <http://www.icj-cij.org/docket/files/141/15708.pdf>.

By contrast, Serbia and its supporters argued that UNMIK regulations, including the Constitutional Framework, were international law. Resolution 1244 established UNMIK as the international civilian presence in Kosovo and empowered the SRSG to issue regulations on behalf of UNMIK. Among other things, UNMIK established the PISG and placed the SRSG in a position of overseeing compliance of the PISG with the interim arrangements, including the protection of international human rights. UNMIK, therefore, was a subsidiary body of the United Nations and its regulations had an international nature to them.⁸⁶ Such regulations were clearly pursuant to UN legal authority, not pursuant to any national or local authority, and hence the nature of the legal régime was international.

Here the Court accepted the position advanced by Serbia and its supporters, finding that:

‘UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. This Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it possesses an international legal character.’⁸⁷

The Court went on to state that Resolution 1244 and the Constitutional Framework ‘constituted the international law application to the situation prevailing in Kosovo on 17 February 2008.’⁸⁸

At the same time, in the course of this part of its analysis, the Court indicated that the ‘Constitutional Framework functions as part of a specific legal order ... which is applicable only in Kosovo and the purpose of which is to regulate, *during the interim phase* established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international law.’⁸⁹ The Court’s emphasis on the limited scope of such ‘international law’ – geographically limited to Kosovo and temporally limited to just

⁸⁶ Serbia Oral Argument (n 4), 47–48, para. 39.

⁸⁷ Kosovo Advisory Opinion (n 29), 440, para. 88.

⁸⁸ *Ibid.*, 441, para. 91.

⁸⁹ *Ibid.*, 440, para. 89 (emphasis added).

the interim period – was consistent with its characterization of Resolution 1244 itself as establishing ‘a temporary, exceptional régime,’ and appears to have played an important part when considering the specific actor that declared independence, as discussed in the next sub-section. In short, the Court appears to have viewed such law as a *sui generis* international legal order.⁹⁰

In his separate opinion, Judge Yusuf disagreed with the Court’s analysis; he felt the Constitutional Framework was not a part of international law. In his view, the Court was conflating ‘the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves.’⁹¹ International administrators of territory have a ‘dual capacity,’ such that while ‘they act under the authority of international institutions such as the United Nations, the regulations they adopt belong to the domestic legal order of the territory under international administration.’⁹² Among other things, he noted that UNMIK’s regulations operated in tandem with the local law in force in Kosovo as of March 1989;⁹³ the regulations were simply a ‘part of a territorially-based legislation which was enacted solely and exclusively for the administration of that territory.’⁹⁴ As such, for Judge Yusuf, there was no need to reach the issue of whether the authors of the declaration were part of the PISG; even if they were, there was no violation of international law.

2. *Applicability of Kosovo’s Legal Régime to the Authors of the Declaration*

Having determined that Kosovo’s legal régime was a form of international law, the Court then addressed whether that régime precluded the authors of the declaration from acting as they did. This issue turned principally on whether the authors were acting as the PISG or whether the authors instead were simply a group of democratically-elected leaders of Kosovo undertaking an act that was not an exercise of PISG authority. In addressing that

⁹⁰ See Jacobs and Radi, ‘Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo’, 24 *Leiden J. Int’l L.* (2011) 331, 341.

⁹¹ Judge Yusuf Sep. Op., [2010] ICJ Rep 618, 625, para. 18.

⁹² *Ibid.*

⁹³ Section 1 of UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59, provided that, in addition to UNMIK regulations, the law applicable in Kosovo would be the law in force prior to the abrogation of Kosovo’s autonomous status by the FRY in March 1989.

⁹⁴ Judge Yusuf Sep. Op., [2010] ICJ Rep 618, 625–26, para. 19.

issue, two elements ultimately proved important: what was the entity trying to do and how did it do it?

According to Serbia and its supporters, there was no question the declaration had been adopted by the PISG. The PISG's Assembly met in its chamber and adopted the declaration on 17 February 2008. Subsequent practice in the form of statements by a variety of relevant actors, including governments, the SRSG, and the Secretary-General, all confirmed the view that it was the PISG Assembly that declared independence. Even the UN General Assembly, when it posed its question to the Court, saw no difficulty in regarding the relevant actor as the PISG.⁹⁵ Since Resolution 1244 had detailed the scope of the powers to be exercised by the PISG and had conferred on it 'substantial autonomy' and 'self-governance,' but not a power to declare independence, then the declaration violated the resolution.⁹⁶ Likewise, the Constitutional Framework adopted by the SRSG limited the extent of the external powers to be exercised by the PISG,⁹⁷ limitations the declaration flagrantly violated.⁹⁸ Finally, Serbia and its supporters also maintained that even if the authors of the declaration were not the PISG, they were still bound by the international legal régime that had been established for Kosovo.⁹⁹

By contrast, Kosovo and its supporters maintained that the declaration was not adopted by the PISG. They noted that the PISG were a series of institutions that did not act as a collective, even in their normal functioning. Moreover, even if the Court was to focus on a portion of the PISG (such as the Assembly), Kosovo and its supporters argued that – given the form and content of the declaration and the procedure for adopting it – the declaration differed from the legislative acts normally adopted by the PISG Assembly. Rather, this particular action was of a special and extraordinary nature that simply could not be judged as the act of a body established under the SRSG's provisional Constitutional

⁹⁵ Serbia Second Written Statement (n 36), 22–26, paras. 32–41.

⁹⁶ Serbia First Written Statement (n 4), 306, para. 874.

⁹⁷ *Ibid.*, 307, para. 878.

⁹⁸ *Ibid.*, 306, paras. 876–77.

⁹⁹ *Ibid.*, 26, para. 42; see also Kohen and Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of "Independence from International Law"?' 24 *Leiden J. Int'l L.* (2011) 109, 115.

Framework and charged with day-to-day governing responsibilities in Kosovo during the interim period.¹⁰⁰

In addition to focusing on the process for adopting the declaration, Kosovo and its supporters emphasized the objective of the declaration. Even if this action of the representatives of Kosovo, meeting as a constituent body, were to be regarded as an action of the PISG Assembly, Kosovo and its supporters maintained that the legality of that action could not be judged against standards set forth in either Resolution 1244 or UNMIK regulations for governance during the *interim* period. Since the final status settlement process had concluded, issuance of the declaration was not an act of an interim institution transgressing its limited authority; rather, it was an act of a constituent body declaring in the name of the people its readiness to exercise governing authority on a permanent basis, as contemplated by the political process that unfolded pursuant to Resolution 1244.¹⁰¹

The Court agreed with Kosovo and its supporters on this point. Interestingly, the Court paid somewhat less attention to the form and procedure for adopting the declaration, and more to the content and purpose of the declaration. The Court agreed that there were some indications that the issuance of the declaration was an act of the PISG Assembly and President of Kosovo, but the Court asserted that the ‘larger context’ was that the final status negotiations relating to Kosovo had run their course, leaving a situation where resolution of that status was at hand.¹⁰² Resolution 1244 set forth no ‘specific contours’ for the resolution of that status¹⁰³ nor did the Constitutional Framework which, by definition, was concerned with the interim period. By contrast, the declaration, in content and purpose, concerned Kosovo’s *final* status, as the Court explained in a key passage:

‘The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. 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

¹⁰⁰ KWC (n 19), paras. 6.03–6.20.

¹⁰¹ *Ibid.*, paras. 6.21–6.33.

¹⁰² Kosovo Advisory Opinion (n 29), 445, para. 104.

¹⁰³ *Ibid.*

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.’¹⁰⁴

The Court went on to note certain aspects of the form and procedure for adopting the resolution, which also suggested that it was not the work of the PISG Assembly as such.¹⁰⁵ Ultimately, the Court concluded that, ‘taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.’¹⁰⁶ Given that fact, it followed ‘that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct’ of the PISG and that the declaration ‘did not violate the Constitutional Framework.’¹⁰⁷ Consequently, there was no need to reach the issue of whether such an act by the PISG would violate Kosovo’s legal régime.

This portion of the Court’s opinion elicited the greatest and sharpest substantive disagreement among the judges, and also appears to have elicited the greatest criticism from commentators. Vice-President Tomka felt that the Court’s conclusion had ‘no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct.’¹⁰⁸ Judge Koroma chastised the Court for its reliance on the ‘perceived intent’ of the authors; relying ‘on such intent leads to absurd results, as any given group – secessionists, insurgents – could circumvent international legal norms

¹⁰⁴ Ibid., 445–46, para. 105.

¹⁰⁵ Ibid., pp. 446–47, para. 107.

¹⁰⁶ Ibid., 447–48, para. 109.

¹⁰⁷ Ibid., 452, para. 121.

¹⁰⁸ Decl. Vice-President Tomka, [2010] ICJ Rep 454, 456, para. 12

specifically targeting them by claiming to have reorganized themselves under another name.’¹⁰⁹ For him, such reasoning was ‘a kind of judicial sleight-of-hand,’¹¹⁰ Similarly, Judge Bennouna dryly observed that if the Court’s ‘reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.’¹¹¹ Judge Skotnikov agreed, lamenting that the Court did ‘not explain the difference between acting outside the legal order and violating it.’¹¹² Judge Sepúlveda-Amor, who supported the outcome, felt that a more plausible reading of the record, despite the linguistic and procedural peculiarities of the declaration, was that the PISG Assembly *did* adopt the declaration, and therefore the Court should have proceeded to assess the legality of the declaration under Kosovo’s legal régime.¹¹³

Two further aspects of this part of the Court’s opinion merit mention. First, the Court did not see itself as bound to the factual assertion of the General Assembly contained in the resolution that asked for the Court’s advice. The Assembly’s resolution recalled that ‘on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia’ and then asked the Court whether the declaration ‘by the Provisional Institutions of Self-Government’ was in accordance with international law.¹¹⁴ Judges Bennouna and Koroma regarded the General Assembly’s resolution as evidence that it was the PISG that issued the declaration.¹¹⁵ The Court, however, stated that it ‘would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly,’¹¹⁶ and that it must ‘examine the entire record and decide for itself.’¹¹⁷ The Court did not indicate, however, whether such statements were limited to this particular context (a request for advice from the General Assembly regarding conduct of an institution established under Security Council authority) or were equally applicable in other contexts (such as a request for

¹⁰⁹ Dissenting Op. Judge Koroma, [2010] ICJ Rep 467, 469, para. 5.

¹¹⁰ *Ibid.*, 474, para. 19.

¹¹¹ *Ibid.*, 510, para. 46.

¹¹² Dissenting Op. Judge Skotnikov, [2010] ICJ Rep 515, 521, para. 15.

¹¹³ See, e.g., Sep. Op. Judge Sepúlveda-Amor, 2010 I.C.J. 491, 498, para. 32.

¹¹⁴ GA Res. 63/3 (2008).

¹¹⁵ Dissenting Op. Judge Bennouna, [2010] ICJ Rep 500, 506, para. 29; Dissenting Op. Judge Koroma, [2010] ICJ Rep 467, 468, para. 3.

¹¹⁶ Kosovo Advisory Opinion (n 29), 424, para. 52.

¹¹⁷ *Ibid.*, 425, para. 54.

advice from the Security Council that implicated a factual determination in a Chapter VII resolution).

Second, although the Court did not say as much, its conclusion that the authors of the declaration ‘acted together in their capacity as representatives of the people of Kosovo’¹¹⁸ may have been necessary so as to distinguish the situation in Kosovo from other situations where a minority regime is declaring a new state for the purpose of minority rule, as occurred in 1965 in Southern Rhodesia.¹¹⁹ Yet, as one critic notes, while ‘pointing out that the authors of the declaration had the capacity to act as representatives of the people of Kosovo, the Court ignored the crucial question, namely from where this capacity derives. It derives from the institutions of self-government.’¹²⁰

E. What Significance Should Be Accorded to the Reactions of UN Officials Charged with Overseeing Implementation of Resolution 1244?

Resolution 1244 charged the international civilian presence in Kosovo with ‘overseeing the development of provisional democratic self-governing institutions in Kosovo’.¹²¹ Further, the Constitutional Framework adopted by the SRSG stated that he would take ‘appropriate measures whenever [PISG] actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework’.¹²² Prior to the 2008 declaration of independence, the SRSG on several occasions had taken steps to prevent or set aside actions or declarations by Kosovo authorities that constituted a move toward independence.¹²³ Yet neither the SRSG nor the Secretary-General himself set aside the 2008 declaration or declared it null and void. Thus, the two sides in the Kosovo proceedings were confronted with an important issue: what significance should be accorded to such inaction?

¹¹⁸ Supra note 109.

¹¹⁹ See infra section 3(D).

¹²⁰ Vidmar, ‘The Kosovo Advisory Opinion Scrutinized’, 24 *Leiden J. Int’l L.* (2011) 355, 361.

¹²¹ SC Res. 1244, para. 11 (c) (1999).

¹²² Constitutional Framework, Chapter 12, in Dossier (n 18) at No. 156.

¹²³ KWC (n 19), paras. 9.24–9.26.

Serbia and its supporters argued that such inaction was simply not relevant when assessing the legality of the declaration. For them, the Secretary-General and the SRSG were acting—or rather not acting—in Kosovo under the overall authority of the Security Council, and it was common knowledge that its members disagreed on the question of whether the declaration was legal or illegal.¹²⁴ As such, the Secretary-General and the SRSG were simply acting neutrally and nothing could be surmised from that posture. Furthermore, Resolution 1244 did not oblige the Security Council to act to identify a breach of that resolution; when coupled with the inability to act due to the divergent views of its members, the Security Council’s inaction could not be interpreted as tacit recognition of the legality of the declaration.¹²⁵ They also asserted that, after the declaration, the SRSG had continued to amend draft laws of the PISG, which demonstrated that the SRSG did not accept Kosovo as now independent,¹²⁶ and that the Secretary-General and the SRSG were waiting for a legal opinion on Kosovo’s declaration from the Undersecretary-General for Legal Affairs of the United Nations, which could explain their inaction.¹²⁷

By contrast, Kosovo and its supporters argued that the failure by the ‘supreme administrative authority’¹²⁸ in Kosovo to set aside the declaration had to weigh heavily against Serbia’s claim that the declaration violated Resolution 1244. They noted that the SRSG and other UN officials were fully aware of the declaration and the possibility that it violated the UN civilian presence in Kosovo. Indeed, after issuance of the declaration, Serbia formally demanded that the Secretary-General take steps to have the declaration set aside by instructing the SRSG to that effect. The Secretary-General did not do so. Nor did the Security Council, either by resolution or through a statement of its President, take any steps to instruct the Secretary-General or his representatives to set aside the declaration. As such, according to Kosovo and its supporters, such inaction supported the proposition that the issuance of the declaration did not violate Resolution 1244.¹²⁹

¹²⁴ Serbia Second Written Statement (n 36), 192–93, para. 488.

¹²⁵ *Ibid.*, 195, paras. 493–94.

¹²⁶ *Ibid.*, 192, para. 487.

¹²⁷ *Ibid.*, 194, para. 490.

¹²⁸ Serbia First Written Statement (n 4), paras. 895–96.

¹²⁹ KWC (n 19), paras. 9.20–9.28.

The Court found that the silence of the SRSG in the face of the declaration of independence was of ‘some significance’ because it suggested the SRSG did not consider the declaration to be an act of the PISG designed to take effect under Resolution 1244’s legal order.¹³⁰ Had the SRSG thought otherwise, the Court reasoned, practice had shown the SRSG would have found the act to be incompatible with the Constitutional Framework.¹³¹ Judge Bennouna, however, was not convinced, finding that:

‘the deadlock in the United Nations bodies during the process to determine Kosovo’s future status does not justify the conclusion that a unilateral declaration of independence hitherto not in accordance with international law is suddenly deserving of an imprimatur of compliance. In fact, the reason why the Special Representative of the Secretary-General took no action was not that he considered the declaration to be in accordance with international law, but simply that the political body to which he was answerable was unable to reach a decision on advancing in the process under way to determine the future status of Kosovo.’¹³²

Likewise, in his declaration, Vice-President Tomka highlighted what he saw as a conundrum with the Court’s position: ‘why acts which were considered as going beyond the competences of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.’¹³³

3. Broader Ramifications of the Advisory Opinion for Interpretation and Application of Security Council Resolutions

Having recounted in some detail the five core arguments regarding the legality of the declaration in relation to Resolution 1244, this part turns to several especially important ramifications of the Court’s analysis for future interpretation and application of Security Council resolutions.

¹³⁰ Kosovo Advisory Opinion (n 29), 447, para. 108.

¹³¹ *Ibid.*; but see Vidmar (n 120), at 330 (suggesting an alternative possibility: the SRSG did not think the declaration violated the existing legal régime whether or not it was issued by the PISG).

¹³² Dissenting Op. Judge Bennouna, [2010] ICJ Rep 500, 512–13, para. 60.

¹³³ Decl. Vice-President Tomka, [2010] ICJ Rep 454, 466, para. 34.

A. *Security Council Resolutions as Lex Specialis*

While this chapter is not focused on the Court's treatment of general international law, the Court's approach to that law in relation to Resolution 1244 bears mention. Arguably Resolution 1244 constituted a form of *lex specialis* that should have largely or wholly displaced general international law. Even if Resolution 1244 left open resolution of Kosovo's final status, the Security Council had 'entered the field' sufficiently – in its displacement of FRY military and police authority in Kosovo, its establishment of an internationally-administered interim regime, and its assigning to the SRSG the task of promoting the final status negotiations – such that whatever rules of general international law that normally exist had now been overtaken.

The Court, however, did not view Resolution 1244 as a *lex specialis* that displaced all other norms of international law. Rather, the Court turned first¹³⁴ to 'certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied.'¹³⁵ This approach suggests that, when construing a Security Council resolution, it may be important to consider the baseline of international law within which the Council is operating, as it may provide insights into the assumed premises upon which the resolution was predicated. The Council adopted Resolution 1244 in 1999 against a background where 'general international law contains no applicable prohibition of declarations of independence,'¹³⁶ which made it even more plausible to assert that any such prohibition, if intended, should have been expressly stated in the resolution. Such an approach is well-considered; in circumstances where the Council's resolution is ambiguous or open-textured, it seems likely that the special rules of the resolution are meant to be applying general international law rather than modifying, overruling or setting aside that law.¹³⁷

¹³⁴ Kosovo Advisory Opinion (n 29), 436–39, paras. 79–84.

¹³⁵ *Ibid.*, 436, para. 78.

¹³⁶ *Ibid.*, 438, para. 84.

¹³⁷ See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law*

B. Methodology When Interpreting Security Council Resolutions

The Court's advisory opinion provides some guidance on the proper methodology for interpreting Security Council resolutions.¹³⁸ First, the Court viewed Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)¹³⁹ as capable of providing 'guidance' for the interpretation Security Council resolutions,¹⁴⁰ an approach consistent with the Court's prior jurisprudence and that of some other international tribunals.¹⁴¹ As such, the Court appears to favor a good faith interpretation of the ordinary meaning of the terms of a Security Council resolution; to that end, the Court asserted that it was engaging in 'a careful reading' of Resolution 1244¹⁴² and parsed the specific wording of several provisions of the resolution, both for what they said¹⁴³ and what they did not say.¹⁴⁴

Further, the Court's reference to the Vienna Convention suggests that the terms of the resolution should be considered in context (e.g., with regard to the preamble and annexes) and in light of the resolution's object and purpose. In fact, the Court read the provisions of Resolution 1244 in conjunction with its annexes 1 and 2,¹⁴⁵ and identified 'three distinct features of that resolution [that] are relevant for discerning its object and purpose,'¹⁴⁶ which the Court concluded 'was to establish a temporary, exceptional régime

Commission, UN Doc. A/CN.4/L.682, paras. 88–107 (13 Apr. 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi).

¹³⁸ For a general analysis of this issue, see M. Wood, 'The Interpretation of Security Council Resolutions', 2 *Max Planck Y.B. of UN Law* (1998) 73.

¹³⁹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (VCLT).

¹⁴⁰ Kosovo Advisory Opinion (n 29), 442, para. 94; see Yee, 'Note on the International Court of Justice (Part 4): the Kosovo Advisory Opinion', 9 *Chinese J. Int'l L.* (2010) 763, 774 ('this paragraph is destined to be cited frequently in the future'). The Court did not indicate whether VCLT Article 33 (regarding interpretation of treaties authenticated in two or more languages) also provided guidance.

¹⁴¹ See, e.g., *Prosecutor v. Tadic* (Protective Measures for Victims and Witnesses), 105 I.L.R. 599, 607–08, para.18 (Int'l Crim. Trib. for former Yugoslavia 1998); UN Compensation Commission, Report and Recommendation Made by the Panel of Commissioners concerning the First Installment of 'E2' Claims, UN Doc. S/AC. 26/1998/7, para. 54 (1998).

¹⁴² Kosovo Advisory Opinion (n 29), 449, para. 113.

¹⁴³ See, e.g., 449–450, para. 115 (finding that the resolution 'is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations' not for other actors).

¹⁴⁴ See, e.g., *ibid.*, 449, para. 114 (finding that 'under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo').

¹⁴⁵ *Ibid.*, 442–43, para. 95.

¹⁴⁶ *Ibid.*, 443–44, paras. 96–98.

which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.¹⁴⁷ This view of the object and purpose of the resolution proved important to the Court's determination that the resolution operated 'on a different level' than the declaration; the former focused on the interim period and the latter focused on Kosovo's final status.¹⁴⁸

Finally, the Court's assessment of general international law (as noted in the prior section) might reflect an interpretive approach that takes into account 'relevant rules of international law applicable'¹⁴⁹ to those affected by the resolution, though the Court did not characterize its analysis in those terms.

Second, the Court also indicated 'other factors to be taken into account' that are specific to the interpretation of a Security Council resolution, by stating that such interpretation 'may require the Court to analyse statements made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of the relevant United Nations organs and of States affected by those given resolutions.'¹⁵⁰ As previously noted, the Court compared the language of Resolution 1244 with the Council's contemporaneous adoption of Resolution 1251 (1999) relating to Cyprus,¹⁵¹ compared it with prior resolutions relating to Kosovo,¹⁵² and took into account for interpretive purposes the actions of the Secretary-General and the SRSG to implement the resolution.¹⁵³ The Court did not, however, refer to any statements made by the members of the Council at the time Resolution 1244 was adopted.

¹⁴⁷ Ibid., 444, para. 99.

¹⁴⁸ Ibid., 449, para. 114; see also *ibid.*, 451, para. 118.

¹⁴⁹ VCLT art. 31.3(c).

¹⁵⁰ Ibid., 442, para. 94.

¹⁵¹ Ibid., 449, para. 114.

¹⁵² Ibid., 450, para. 116.

¹⁵³ Ibid., 443, para. 97; *ibid.*, 447, para. 108.

Third, the Court listed with apparent approval the methodology it used in prior cases for interpreting and applying Security Council resolutions.¹⁵⁴ In particular, the Court confirmed its view in the *South West Africa* advisory opinion that the interpretation of a resolution must be undertaken ‘on a case-by-case basis, considering all relevant circumstances,’ not just when determining whether the Council intended to create a binding legal obligation, but for other interpretive purposes as well.¹⁵⁵

C. Judicial Deference When Reviewing Security Council Resolutions

There is little doubt that the Court is properly engaged in the exercise of its judicial function when interpreting a Security Council resolution, if necessary for deciding a case or issuing an advisory opinion. Even so, an important question arises as to whether there should be special deference or caution exercised by the Court, given the Council’s status as a collateral UN organ, one that is often engaged in politically difficult and sensitive issues of peace and security. The Court is no doubt wary of misinterpreting a Council resolution or ascribing to the Council or its Members that they did not in fact hold, especially if doing so might have serious and adverse consequences. Such deference might implicitly be seen in two aspects of the *Kosovo* advisory opinion.

First, given that a central aspect of the advisory opinion was the interpretation of a Security Council resolution, a plausible basis for the Court to decline to answer the question was the fact that the request came from the General Assembly. Indeed, Vice-President Tomka in his declaration, Judge Keith in his separate opinion, and Judges Bennouna and Skotnikov in their dissenting opinions all asserted that for this reason the Court should have declined to answer the question.¹⁵⁶ The only prior advisory opinion

¹⁵⁴ *Kosovo Advisory Opinion* (n 29), 439, para. 85 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] ICJ Rep 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Provisional Measures, [1992] ICJ Rep 15, paras. 39–41; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States)*, Provisional Measures, [1992] ICJ Rep 126–27, paras. 42–44)).

¹⁵⁵ *Kosovo Advisory Opinion* (n 29), 451, para. 117 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 154), 53, para. 114).

¹⁵⁶ Decl. Vice-President Tomka, [2010] ICJ Rep 454, 455, paras. 5–6 (‘Through the question put to it by the General Assembly, the Court has become immersed in the disagreements prevailing in the Security Council on this issue, the Council having been still actively seized of the matter but not requesting any

where the interpretation of a Security Council resolution was central to disposition of the issue – the *South West Africa* advisory opinion – involved a request from the Council, not the Assembly.¹⁵⁷

In *Kosovo*, the Court did not decline to answer the question; indeed, some judges thought that interpretation of *any* Council resolution related to peace and security was an appropriate basis for the Court to engage in its advisory function, regardless of who asked the question.¹⁵⁸ As Richard Falk notes, the decision ‘seemed partly to reflect a sense of institutional responsibility, namely, that the Court should always do its best not to rely on its discretion to decline to respond whenever a major UN organ poses an international law question to it.’¹⁵⁹ Nevertheless, the Court took this issue seriously, spending several paragraphs of the opinion explaining why the question could be answered notwithstanding that the request emanated from the Assembly.¹⁶⁰ As such, the posture of the case may have led the Court to be especially cautious in reaching a decision that ascribed views to the Council that were not readily apparent from the resolution, such as a view that any unilateral declaration was prohibited, that the Council had to approve Kosovo’s independence, or that the Council expected Serbia’s consent prior to independence.

Second, as noted above, Kosovo and its supporters argued that it fell to the SRSB to determine whether the declaration was an *ultra vires* act or an act that violated the Constitutional Framework. Since the SRSB took no such action, they maintained that the declaration was not such an act. As noted above,¹⁶¹ the Court accepted that position, finding that the SRSB was ‘under a duty to take action with regard to the acts of the

advice from the Court.’); Sep. Op. Judge Keith, [2010] ICJ Rep 482, 483–84, para. 6 (noting ‘the appropriateness of an organ requesting an opinion of the request is essentially concerned with the actual exercise of special powers by another organ under the Charter, in relation to the matter which is the subject of the request.’); Dissenting Op. Judge Bennouna, [2010] ICJ Rep 500, 502–03, paras. 13–14; Dissenting Op. Judge Skotnikov, [2010] ICJ Rep 515, 515–19, paras. 1–12.

¹⁵⁷ *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 154).

¹⁵⁸ See, e.g., Sep. Op. Judge Sepúlveda-Amor, [2010] ICJ Rep 491, 491–92, para. 2, 496, para. 22; Sep. Op. Judge Cançado Trindade, [2010] ICJ Rep 523, 527, paras. 6–7.

¹⁵⁹ Falk, ‘The Kosovo Advisory Opinion: Conflict Resolution and Precedent’ 105 *Am. J. Int’l L.* (2011) 50, 55.

¹⁶⁰ *Kosovo Advisory Opinion* (n 29), 418–23, paras. 36–48.

¹⁶¹ *Supra* Section 2(E).

Assembly of Kosovo which he considered to be *ultra vires*.¹⁶² Since the SRSG did not take action, the Court concluded that the actor at issue was not the Assembly or the PISG as a whole.

In reaching that conclusion, the Court may have been influenced by the fact that the Security Council had delegated authority to the Secretary-General and his Special Representative and, in so doing, provided those officials with authority to interpret the Council's resolution as the need arose in theatre. While inaction by the Council itself might readily be viewed as purely a product of a political deadlock, the Court may have seen it as necessary to regard the conduct of the Secretary-General and his representatives as different—as more apolitical in nature. In other words, perhaps the Court felt it necessary to preserve the idea that international civil servants are charged with implementing UN institutional law to the best of their abilities, without regard to the political consequences. As such, in considering whether there was a transgression in theatre of the rules adopted by the SRSG to regulate local matters (such as the provisional Constitutional Framework), considerable weight should be accorded to that representative to interpret whether a transgression has occurred and, if so, to correct it. In this instance, the Court may have viewed the SRSG's decision not to declare null or set aside the declaration as an *ultra vires* act of the PISG, or as a violation of the Constitutional Framework, as an authoritative or highly persuasive interpretation of Resolution 1244 to which the Court should defer, at least in the absence of strong reasons to the contrary. One might argue that the SRSG's failure to act was 'a breach of his mandate,'¹⁶³ but that leads to the question of why the Secretary-General did not act to correct the SRSG, which in turn leads to a question of whether the Secretary-General violated his mandate.¹⁶⁴ Presumably the Court would only reluctantly go down such a path.

D. Ability of the Security Council to Bind Non-State Actors

¹⁶² Kosovo Advisory Opinion (n 29), 447, para. 108.

¹⁶³ Kohen and Del Mar (n 99), 122.

¹⁶⁴ Jacobs and Radi (n 90), 344–49.

Chapter VII of the UN Charter empowers the Security Council to decide upon measures that shall be taken to maintain or restore international peace and security.¹⁶⁵ Notably in this context, it ‘may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.’¹⁶⁶ UN Member States agree to accept and carry out those decisions.¹⁶⁷ While such provisions clearly empower the Council to order or authorize states to take action, they do not expressly address whether the Council can order or authorize other actors, including non-Member States,¹⁶⁸ international organizations, non-governmental organizations, or persons to take action.

Even so, the Council at times addresses its resolutions to non-state actors and the failure of those actors to abide by the resolution might be regarded as a violation of international law. In Resolution 1244, the Council demanded ‘that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization as laid down by the head of the international security presence,’¹⁶⁹ just as it demanded that ‘that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo’.¹⁷⁰ Perhaps a failure of the KLA to end offensive actions would violate Resolution 1244 in the same way that a failure of the FRY to end violence and repression in Kosovo would violate Resolution 1244.

Yet given that the Court normally regulates states and not non-state actors, it is appropriate to scrutinize carefully any given resolution to see whether it binds a non-state actor and, if so, in what way. Interestingly, in situations involving a declaration of independence, the Council (or the General Assembly) typically does not demand that the

¹⁶⁵ UN Charter, arts. 39, 41–42.

¹⁶⁶ *Ibid.*, art. 41.

¹⁶⁷ *Ibid.*, art. 25.

¹⁶⁸ UN Charter art. 2.5 provides that the United Nations ‘shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.’ Nevertheless, it has been argued that Council resolutions do not have a direct binding effect on non-Member States since treaties cannot bind non-parties. See Widdows, ‘Security Council Resolutions and non-members of the United Nations’ 27 *Int’l and Comp. L.Q.* (1978) 459, 461–62.

¹⁶⁹ SC Res 1244, para. 15 (1999).

¹⁷⁰ *Ibid.*, para. 3.

relevant actor refrain from issuing a declaration or withdraw a declaration that has been issued, nor decide that the declaration as such violates international law.¹⁷¹ Rather, the Council condemns the issuance of a declaration and decides that it should not be given legal effect by the United Nations or Member States.¹⁷² In other words, the approach taken is not to impose an obligation on the non-state actor but, rather, to make a determination as to the legal effect of that actor's conduct.¹⁷³

For example, in 1965, the Security Council (without invoking Chapter VII) condemned 'the unilateral declaration of independence made by a racist minority in Southern Rhodesia,' decided to call upon 'all States not to recognize this illegal racist minority régime,'¹⁷⁴ and regarded 'the declaration of independence by it as having no legal validity'.¹⁷⁵ No part of the relevant resolutions ordered the minority regime to undertake any specific acts. The reference to 'illegal' regime and an 'invalid' declaration might be interpreted as recognition that the action violated national law,¹⁷⁶ but the Court in the *Kosovo* case saw it as arising from the actor's connection to egregious human rights violations.¹⁷⁷ After Southern Rhodesia proclaimed itself a republic, the Council invoked Chapter VII, condemned the 'illegal proclamation of republican status,' and called upon states to refrain from recognition,¹⁷⁸ but again issued no decision or demand directed at the minority regime.

¹⁷¹ The Council, of course, can react to various facts that are not themselves a violation of international law, but that do threaten peace and security See J. Alvarez, *International Organizations as Law-makers* (2005), 187 ('The Charter leaves its enforcement arm with considerable discretion to act whenever the 'international peace' is threatened, regardless of whether the threatening act violates international law ...').

¹⁷² See, e.g., GA Res. 2024 (1965), SC Res. 216 (1965), and SC Res. 217 (1965) (with respect to Southern Rhodesia); GA Res. 31/6 (A) (1976) and SC Res. 402 (1976) (with respect to South Africa bantustans).

¹⁷³ On this general distinction, see Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', 16 *EJIL* (2005) 879, 881–82.

¹⁷⁴ SC Res. 216, paras. 1–2 (1965).

¹⁷⁵ SC Res. 217, para. 3 (1965).

¹⁷⁶ *Ibid.*, pmb. (1965) ('Considering that the illegal authorities in Southern Rhodesia have proclaimed independence and that the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, looks upon this as an act of rebellion').

¹⁷⁷ *Kosovo Advisory Opinion* (n 29), 437, para. 81.

¹⁷⁸ SC Res. 277, pmb., paras. 1–2 (1970).

Similarly, in 1983, the Council considered the declaration of independence by Turkish Cypriot authorities as incompatible with certain treaty commitments and, for that reason, the attempt to create a new state was ‘legally invalid;’ the Council further called upon ‘all States not to recognize any Cypriot State other than the Republic of Cyprus’.¹⁷⁹ Again, the resolution did not order the Turkish Cypriot authorities to undertake any specific acts. More recently, the Security Council adopted a resolution relating to Bosnia and Herzegovina in which it addressed the possibility of the issuance of a declaration of independence for the establishment of a new State of Republika Srpska. Resolution 787 provided that the Security Council ‘[st]rongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted.’¹⁸⁰ Again, the Security Council did not directly address the relevant non-state actor or address the legality of a potential declaration but, rather, simply indicated that the Council would not accept such an act.

In the *Kosovo* advisory opinion, the Court apparently accepted that the Council had the power to ‘make demands’ upon non-state actors, but concluded that, in Resolution 1244, the Council in fact did not issue any demand directed at the Kosovo Albanian leadership with respect to a declaration of independence. As such, the Court could not ‘accept the argument’ that the resolution contained ‘a prohibition, binding on the authors of the declaration of independence, against declaring independence....’¹⁸¹ Moreover, the Court may have been influenced by the fact that the declaration – rather than the work of a non-state actor advancing egregious human rights violations – sought to incorporate the human rights and other provisions proposed by Ahtisaari for the final settlement.¹⁸² In so deciding, the Court did not reach the issue of whether Security Council demands in fact

¹⁷⁹ SC Res. 541, pmb. and paras. 2, 7 (1983).

¹⁸⁰ SC Res. 787, para. 3 (1992); see supra section 2(A).

¹⁸¹ Kosovo Advisory Opinion (n 29), 451, para. 118.

¹⁸² See Weller, ‘Modesty Can Be a Virtue: Judicial Economy in the ICJ Kosovo Opinion’, 24 *Leiden J. Int’l L.* (2011) 127, 142-143.

establish binding legal obligations for those non-state actors and, if so, whether the contravention of those demands violates international law.¹⁸³

Judge Bennouna asserted that Resolution 1244 was binding upon ‘non-State actors in Kosovo,’ but indicated that it was binding ‘as a result of the territory [of Kosovo] having been placed under United Nations administration.’¹⁸⁴ Even if the declaration was issued by a group of individuals representing the people of Kosovo (and not the PISG), he asked ‘how is it possible for them to have been able to violate the legal order established by UNMIK under the Constitutional Framework, *which all inhabitants of Kosovo are supposed to respect?*’¹⁸⁵ Judge Skotnikov also appears to have viewed the resolution as directly binding upon non-state actors in Kosovo; he cited to a statement made by the U.K. government, when Resolution 1244 was adopted, to the effect that the resolution ‘applies also in full to the Kosovo Albanians’ and that the ‘Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution....’¹⁸⁶

E. International Territorial Administration

International administration of territory is not a new phenomenon in the history of international law,¹⁸⁷ but recent interventions in places such as Kosovo, East Timor, Eastern Slavonia, and elsewhere have given new significance to the phenomenon.¹⁸⁸ Moreover, the assumption of direct administrative authority by the United Nations appears to be a new development; prior practice, such as under the trusteeship system, did not involve the

¹⁸³ See Öberg, ‘The Legal Effects of United Nations Resolutions in the *Kosovo* Advisory Opinion’, 105 *Am. J. Int’l L.* (2011) 81, 86 (contending ‘one cannot conclude that [the Court] has found that the Security Council can bind nonstate actors’).

¹⁸⁴ Dissenting Op. Judge Bennouna, [2010] ICJ Rep 500, 513, para. 62.

¹⁸⁵ *Ibid.*, 513, para. 63 (emphasis added).

¹⁸⁶ Dissenting Op. Judge Skotnikov, [2010] ICJ Rep 515, 520, para. 13.

¹⁸⁷ D. Smyrek, *Internationally Administered Territories – International Protectorates?* (2006), at 57–117 (surveying examples such as the Free City of Danzig, the Saar Territory, Leticia, the Free Territory of Trieste, Jerusalem, West Irian, and Namibia).

¹⁸⁸ See generally G. Fox, *Humanitarian Occupation* (2008).

United Nations itself as an administering authority.¹⁸⁹ Three aspects of the Court's opinion seem especially important for this issue.

First, in the immediate aftermath of the deployment of UNMIK (and comparable deployments elsewhere), questions were raised as to whether the Security Council had the power to establish such an international administration, given its considerable intrusiveness into national sovereignty.¹⁹⁰ Although the issue was not directly raised in the proceedings, the Court's opinion implicitly accepts that the United Nations, at least through a Chapter VII decision of the Security Council, is empowered to engage in such administration of territory – a dramatic and perhaps revolutionary assumption of sovereign power – notwithstanding a lack of express authority in the UN Charter. To what extent that acceptance is based on a theory of maintaining peace and security under Chapter VII, or upon a theory of trusteeship,¹⁹¹ cannot be discerned from the opinion. Nevertheless, such acceptance, in conjunction with the tacit acceptance by states generally, suggests a 'new normal' for UN territorial administration. At the same time, the Court did not reach the more difficult issue of whether the Council may order the final political status of a territory in the absence of the agreement of the relevant parties.¹⁹²

Second, the Court's approach also accepted the ability of the Security Council to delegate to the Secretary-General the power of creating the international civilian presence (UNMIK). Previously the Court had implicitly accepted the power of the Council itself to create a freestanding body such as the International Criminal Tribunal for the former Yugoslavia;¹⁹³ here, the Council implicitly accepted – albeit for an interim period – the

¹⁸⁹ See Matheson, 'United Nations Governance in Postconflict Societies', 95 *Am. J. Int'l L.* (2001) 76, 76 ('Prior to the end of the Cold War, the United Nations ... had relatively little experience in the actual governance of territories'); Yannis, 'The UN as Government in Kosovo', 10 *Global Governance* (2004) 67, 67 ('In terms of scope and substance, UNMIK's mandate was almost unprecedented by the standards of UN field operations'); Tomuschat, 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in G. Kreijen (ed), *State Sovereignty, and International Governance* (2002) 323, 338 ('It is truly an innovation in the practice of the Security Council to prohibit a government from exercising its authority in part of the country').

¹⁹⁰ See, e.g., Ruffert, 'The Administration of Kosovo and East-Timor by the International Community', 50 *Int'l and Comp. L.Q.* (2001) 613, 614–22.

¹⁹¹ See von Carlowitz, 'UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination', 41 *Archiv des Völkerrechts* (2003) 336, 362–74.

¹⁹² For a discussion, see Matheson (n 190), 85.

¹⁹³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] ICJ Rep paras. 444–45.

ability of the Secretary-General under the authority of the Council to create and establish the responsibilities of an entity that exercised core sovereign functions within the administered territory, with cascading effects that flowed to the SRSB and PISG.¹⁹⁴

Third, the Court's conclusion that the legal régime associated with UNMIK's presence in Kosovo was a form of international law¹⁹⁵ provides some guidance for how to view such deployments, and appears consistent with the views that were expressed in the academic community prior to issuance of the opinion. Writing in 2001, Carsten Stahn characterized UNMIK regulations as 'a specific source of law, placing Kosovo ... provisionally under the legal order of the United Nations.'¹⁹⁶ Although such regulations also constitute 'internal acts of the administered 'internationalized' territories,' the ultimate result was arguably a fusion of municipal and UN law so as to create a 'law of the internationalized territory which constitutes a legal entity of its own, separate from the United Nations.'¹⁹⁷ Similarly, Erika de Wet asserted in 2004 that such regulations, though possessing a 'dual character,' nevertheless 'belong to the legal order of the United Nations as they are enacted by subsidiary organs of the Security Council within the meaning of Article 29 of the Charter.'¹⁹⁸ As such, while the law may possess a dual character, the Court's assessment that violation of that law *could* be 'not in accordance with international law' seems entirely plausible.

In the aftermath of the opinion, some commentators have asserted that the Court's approach meant that, in essence, the Court assumed the role of the 'Constitutional Court' of Kosovo;¹⁹⁹ however, such a position seems overdrawn. Most issues concerning laws

¹⁹⁴ See Öberg (note 185), 87–90.

¹⁹⁵ See *infra* section 2(D)(1).

¹⁹⁶ Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor; A First Analysis', 5 *Max Planck Y.B. of UN Law* (2001) 105, 146; see also C. Stahn, *The Law and Practice of International Territorial Administration* (2008)

¹⁹⁷ *Ibid.*, 147–48.

¹⁹⁸ De Wet, 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law', 8 *Max Planck Y.B. of UN Law* (2004) 291, 331; see also Bothe & Maruhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security', in C. Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (2002), 217, 228–29; Ruffert (n 191), 622–27.

¹⁹⁹ See, e.g., Jacobs and Radi (n 90), 341; Jacobs, 'International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010', 60 *Int'l and Comp. L.Q.* (2011) 799, 806.

operative in internationally-administered territory will be resolved by the institutions operating within that territory, where the characterization of the law as “international” or not has no real significance. In rare circumstances where the Court has jurisdiction and an issue is presented that requires passing upon an aspect of such law, then the Court may well regard the law as having an international character. Even so, it remains possible that particular types of regulations – due to their origin or nature – might be seen as possessing such a dominantly local character (e.g., a rule barring trucks on certain roads) that they do not truly implicate international law; such circumstances simply were not at issue in the *Kosovo* case, and the opinion provides no guidance in that respect.

4. Conclusion

The Court’s findings in the *Kosovo* case with respect to Resolution 1244 provide a rich mosaic of issues, some of which were specific to the situation of Kosovo and others that have ramifications for the interpretation and application of Security Council resolutions more generally. While doubts and disagreements with the Court’s decision can be fairly expressed, the Court rather systematically addressed the principal legal arguments placed before it, and there is nothing about the opinion that operates outside the realm of plausible judicial reasoning. Though the Court was faced with the difficult situation of an ambiguous resolution and a divided Council, as well as blocs of states with diametrically opposed views, the Court assumed its responsibility of answering the question and answered it clearly, without unleashing any apparent adverse consequences for the United Nations, for the Balkans, or for the international rule of law more generally.