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The *Kosovo* Advisory Opinion Scrutinized

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Abstract

In the *Kosovo* Advisory Opinion, the International Court of Justice took the position that Kosovo's unilateral declaration of independence did not violate any applicable rules of international law. This article does not dispute the final finding, but rather critically examines the Court's somewhat controversial reasoning and considers the added value of the opinion for the clarification of legal doctrine in relation to unilateral declarations of independence. An argument is made that the Court's interpretation of the question and the identification of the authors of the declaration had significant implications for the Court's final finding. Yet, the Court cannot be criticized for not answering the question of whether or not Kosovo is a state, whether Kosovo Albanians are beneficiaries of the right of self-determination, or even whether the 'right to remedial secession' is applicable. However, the Court may well have implicitly answered that recognition of Kosovo is not illegal.

Key words

International Court of Justice; Kosovo; recognition; territorial integrity; unilateral declaration of independence

1. Introduction

'The adoption of ... [Kosovo's] declaration [of independence] did not violate any applicable rule of international law,'[1] held the International Court of Justice (ICJ) in its advisory opinion of 22 July 2010. One may agree or disagree with this finding but, if read in isolation from the reasoning of the Court, one could hardly label it as controversial. Some may find the Court's interpretation of the question too narrow,[2] as it does not answer whether Kosovo is a state, whether recognition of Kosovo is lawful, whether the right of self-determination is applicable to Kosovo Albanians, or perhaps even whether Kosovo could be a case of 'remedial secession'. The Court pointed out that it would not deal with these issues.[3] Indeed, the question referred to it by the General Assembly did not ask about these matters. The question reads: 'Is the unilateral declaration of independence by the Provisional Institutions of

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1 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. (hereinafter the *Kosovo* Opinion], para. 122.

2 See, e.g., J. Cerone, 'The World Court's Non-Opinion', *Opinio Juris*, 25 July 2010, available at www.opiniojuris.org/2010/07/25/the-world-court%e2%80%99s-non-opinion.

3 See the *Kosovo* Opinion, *supra* note 1, para. 51.

Self-Government of Kosovo in accordance with international law?'[4] This question is very narrow. And, although the Court has previously reinterpreted questions posed to it in requests for advisory opinions,[5] it can hardly be criticized for avoiding pronouncements on questions on which it was not asked.[6]

The controversy in the Court's reasoning lies elsewhere. A comparison of the Court's final finding with the question posed to it reveals that the question contains the formulation 'in accordance with international law', while the answer established that there was *no violation* of 'any applicable rule of international law'. As pointed out by Judge Simma in his declaration, the formulation 'in accordance with international law' might imply a question broader than whether or not there was a violation of any applicable norm.[7] Moreover, the reference to 'the Provisional Institutions of Self-Government of Kosovo' in the question posed to the Court does not appear in the final finding and neither does it appear in the title of the advisory opinion.[8] It is argued in this article that this omission is not accidental; there exist substantive reasons for it that may be rather controversial.

This article does not dispute the Court's final finding, but rather critically examines the Court's reasoning in the *Kosovo* Advisory Opinion and considers the added value of the opinion for the clarification of the legal doctrine in relation to unilateral declarations of independence. In so doing, the article also refers to some of the issues in the law of statehood that were not discussed in the advisory opinion[9] and argues that the Court may well have addressed them implicitly. In particular, the Court's reasoning suggests that the obligation to withhold recognition is not applicable in this situation.

Initially, the article considers the Court's interpretation and reformulation of the question posed to it. It shows that the Court's interpretation of the question and the identification of the authors of the declaration had significant implications for the Court's finding that the declaration of independence 'did not violate any applicable rule of international law'.[10] According to the Court, the rules that could potentially prohibit the declaration of independence apply under: (i) general international law, (ii) Security Council Resolution 1244, and (iii) the Constitutional Framework for Kosovo.[11] In turn, subsequent sections consider the Court's reasoning with respect to potential legal constraints on Kosovo's declaration of independence under these sources of applicable law.

4 Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, UN Doc. A/RES/63/3 (2008).
5 For an explanation, see the *Kosovo* Opinion, *supra* note 1, para. 50.
6 See, e.g., C. Tams, 'The Kosovo Opinion', *EJIL Talk*, 6 August 2010, available at www.ejiltalk.org/the-kosovo-opinion.
7 Kosovo *Opinion, supra* note 1, para. 4 (Judge Simma, Declaration).
8 As argued by Judge Tomka in his declaration, the Court subsequently modified the title of the opinion, as the original title included a reference to the provisional institutions of self-government. See ibid., para. 21 (Judge Tomka, Declaration).
9 See note 3, *supra*.
10 *Kosovo* Opinion, *supra* note 1, para. 122.
11 Ibid., para. 78.

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2. Interpreting the question and confining the scope of the opinion

In its interpretation of the question posed by the General Assembly, the Court avoided pronouncements on the questions of recognition, self-determination, and statehood. If the drafters of the question wanted the Court to take a position on these issues, the question should have been phrased differently.

The Court thus dealt with the issues of whether the unilateral declaration of independence was itself 'in accordance with international law'. However, in answering the question, the Court, arguably, made two questionable manoeuvres. First, it interpreted the formulation 'in accordance with international law' as being only a question of the absence of prohibition. Second, for the purpose of examination of (il)legality under Resolution 1244, the Court departed from its literal understanding of the question and, effectively, dropped the 'Provisional Institutions of Self-Government' from the question. These two manoeuvres are now considered. Moreover, this section also discusses the Court's position on the identity of the authors of the declaration, which is linked to the Court's rephrasing of the question. It will be argued that the Court's pronouncement on the identity of the authors of the declaration may well be problematic from the aspect of the support of the will of the people for the alteration of the legal status of the territory.

2.1. Where is the absence of a right?

The Court drew a distinction between the question posed by the General Assembly and the question that was dealt with by the Supreme Court of Canada in the *Quebec* case.[12] While the question in the *Quebec* case specifically asked whether the organs of Quebec had 'the right to effect the secession of Quebec from Canada unilaterally',[13] the ICJ noted that the question referred to it did not ask whether or not there existed a specific right vested in Kosovo in general, or in the institutions of its self-government in particular, to declare independence.[14] However, the question also did not ask specifically whether or not there was a prohibition of such a declaration. Yet, this is how the question was interpreted by the Court: '[W]hether or not the applicable international law prohibited the declaration of independence.'[15] But this interpretation is rather narrow.

It is arguable that if drafters of the question meant to ask whether the unilateral declaration of independence was illegal under international law, they would phrase the question accordingly and would not use the formulation 'in accordance'. Indeed, as Judge Simma argued in his declaration, the formulation 'in accordance with international law' is broad enough that it should not only be interpreted as a question of whether or not there was a prohibition.[16]

12 Ibid., para. 55.
13 Ibid.
14 Ibid., para. 56.
15 Ibid.
16 Ibid., para. 4 (Judge Simma, Declaration).

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In addressing the issue of legality, the Court obviously adopted the view that the law was neutral on the matter of the unilateral declaration of independence by holding: '[I]t is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.'[17] However, the Court made this argument to explain why it was not going to deal with the non-existence of a specific right. But it may well be that the argument actually suggests the opposite, that is, the necessity also to consider the absence of a specific right.

The narrow interpretation of the question – in terms of the absence of a prohibition – did not allow an adequate accommodation of neutrality of the applicable general international law. One can try asking the question from the other direction: did the provisional institutions of self-government of Kosovo have the right to issue a unilateral declaration of independence? Arguably, this question could also be accommodated within the formulation 'in accordance with international law'. And, if the Court considered this question, the answer would be that such a right did not exist.[18]

The neutrality of law can thus lead to a positive or to a negative answer, depending on how the question is phrased. While this does not have implications for Kosovo's legal status, the difference between a positive and a negative answer can have a very significant political impact. Kosovo is commonly proclaimed to be the political winner, not because of what it got in the advisory opinion, but because of what Serbia did not get.[19] Indeed, with the way in which the question was interpreted, Serbia needed the Court to find the declaration of independence to be in violation of international law. On the other hand, Kosovo came out as a perceived political winner because the law is neutral. In other words, the interpretation of the question made the neutrality of law work for Kosovo.

Although the declaration of independence was not prohibited, this does not (even implicitly) answer the question of whether or not Kosovo is a state. And it does not mean that Serbia or any other state has a duty to recognize Kosovo as a state. Nevertheless, the pronouncement that the declaration of independence did not violate any applicable norm of international law is not without any significance for the law of statehood. These issues will be discussed later.

2.2. Examining Resolution 1244 and reformulating the question

In relation to the question of the status of the unilateral declaration of independence in general international law, the Court was unwilling to address the question

17 Ibid., para. 56.

18 Compare *Reference re Secession of Québec* [1998] 2 SCR 217 (Canada) (hereinafter the *Quebec* case), at 126, where the Supreme Court of Canada clearly established that 'right to independence' does not exist under international law.

19 In one of the earliest academic commentaries to the *Kosovo* Opinion, the following view was expressed: 'Kosovo Albanians might have been (well) advised not to make a big fuss out of self-determination in their constitutive documents precisely to avoid attracting judicial scrutiny to this issue which would have raised the question of boundaries, and the right's legitimate bearer. In contrast to such a scenario, the Court's minimalist judgment brought them an important political victory.' See Z. Oklopcic, 'Preliminary Thoughts on the Kosovo Opinion', *EJIL Talk*, 26 July 2010, available at www.ejiltalk.org/preliminary-thoughts-on-the-kosovo-opinion/#more-2505.

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from a broader perspective or to reformulate it. Yet, it was willing to reformulate the question in relation to the legality of the unilateral declaration of independence under Resolution 1244. The 'original sin' that led to the necessity to do so was the Court's finding that the unilateral declaration of independence was not issued by the provisional institutions of self-government.[20] The consequence of this position, which is problematic in itself,[21] was that the question referred to the Court by the General Assembly became wrongly formulated. If the Court were loyal to its previously adopted narrow approach,[22] it would need to decide that since the provisional institutions of self-government did not declare independence, this question had become irrelevant.

But the Court did not do that. Instead, it dropped the reference to 'provisional institutions of self-government' that appeared in the original question. In this regard, the Court made the following argument:

> The identity of the authors of the declaration of independence . . . is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. 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.[23]

In principle, the Court cannot be criticized for not rigidly sticking to language formalism. However, the Court interpreted the question of the issuing of a unilateral declaration of independence narrowly, so that it avoided pronouncements not only on statehood and recognition, but also on the absence of a specific right to declare independence. Yet, it was willing to expand and rephrase the question on the identity of those who declared independence. The Court did that despite its express pronouncement that 'the question posed by the General Assembly is clearly formulated. The question is narrow and specific'.[24] It is arguable that the Court's approach towards the interpretation of the question posed to it by the General Assembly was inconsistent.

2.3. The identity of the authors of the unilateral declaration of independence

The Court accepted that independence of Kosovo was declared unilaterally.[25] But the Court also considered the identity of the authors of the declaration, that is, the question as to by whom independence was declared. The question referred to the Court by the General Assembly assumed that independence was declared by the provisional institutions of self-government of Kosovo. However, the Court was of the opinion that the identity of the authors could be different.[26] Ultimately, the

20 *Kosovo* Opinion, *supra* note 1, para. 109.
21 See subsection 1.3, *infra.*
22 See subsection 1.1, *supra.*
23 *Kosovo* Opinion, *supra* note 1, para. 52.
24 Ibid., para. 51.
25 See ibid., paras. 49–57, where the Court discussed the scope and meaning of the question and did not express any doubts that the declaration of independence was unilateral.
26 Ibid., paras. 52 and 53.

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Court concluded that:

> the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.[27]

Initially, it needs to be considered who, in general, has the authority to issue a unilateral declaration of independence. The term 'unilateral declaration of independence' describes the situation in which an entity tries to emerge as an independent state without the consent of its parent state. Although a unilateral declaration of independence does not, by itself, change the legal status of a territory, it needs to be regarded as being creative of specific legal and political circumstances. As identified by the Supreme Court of Canada in the *Quebec* case, after a unilateral declaration of independence is issued, states decide whether or not they will grant recognition.[28] A unilateral declaration of independence can potentially lead to a new state creation and therefore it cannot be issued by just anyone.

No rule of international law prevents me from issuing a declaration of independence of Scotland. Although I would issue the declaration without the consent of the United Kingdom, my declaration would not be regarded as an attempt by Scotland to unilaterally secede from the United Kingdom. The reason is that I am not entitled to speak on behalf of the people of Scotland and I cannot create the legal and political circumstances of Scotland's attempt at unilateral secession.

Even if independence of Scotland were proclaimed by a random group of Scottish people, their declaration of independence would not have the status of a unilateral declaration of independence by Scotland. But a declaration of independence issued by the Scottish Parliament, if issued without the approval of the United Kingdom's central government, would indicate Scotland's attempt at unilateral secession and would be considered a unilateral declaration of independence under international law.

The difference is that the self-governing organs of the independence-seeking entity have the capacity to speak and act on behalf of the people of the entity in question. This capacity is linked to the will of the people[29] and also to effectiveness presumed under the Montevideo criteria for statehood.[30] It may be said that by issuing a *unilateral* declaration of independence, an entity shows that it has a government that has the capacity to speak on behalf of the population living in the territory in question. And, if the declaration of independence is (nearly) universally accepted by the international community of states, the entity also has the capacity to enter into relations with other states.

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27 Ibid., para. 109.

28 *Quebec* case, *supra* note 18, para. 155.

29 See sub-subsection 1.4.2, *infra*.

30 The traditional statehood criteria stem from the Montevideo Convention on Rights and Duties of States, 1933 Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 165 LNTS 19 (1933). Art. 1 of this Convention provides: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.' It is commonly accepted that these criteria reflect customary international law. See, e.g., D. Raič, *Statehood and the Law of Self-Determination* (2002), 24.

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Thus, the concept of a unilateral declaration of independence presupposes that independence is not declared by a random group of people. It needs to be declared by those who derive their capacity to act from the will of the people and who act on behalf of the effective institutions of the entity whose independence they are declaring.

In principle, the *Kosovo* Opinion seems to confirm that. The Court held that those who declared independence 'acted together in their capacity as representatives of the people of Kosovo'.[31] So, they were not just a random group of people. However, the Court also argued that when declaring independence, they acted 'outside the framework of the interim administration'.[32] The Court's position is thus that while these people acted in their personal capacity, they were not just a random group, but rather a group of people with the capacity to speak and act on behalf of Kosovo and its population. It is questionable whether the two parts of the Court's position can be reconciled.

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. The authors of the declaration occupy posts within these institutions and were elected to their posts according to the prescribed procedures. The institutions that they represent, and not their personal integrity, give them the capacity to act. For example, Mr Sejdiu does not have the capacity to act on behalf of Kosovo and its people because he is Mr Sejdiu, but because he is the president of Kosovo. And the institution of the president of Kosovo is rooted in the legal framework of the interim administration.[33]

The Court's finding that the authors of the declaration had the capacity to act on behalf of the people of Kosovo is thus inherently linked to the institutions of self-government and it is not possible to separate the capacity to act from the institutions that give the individuals this capacity. But this is exactly what the Court did. It established that the individuals had the capacity to act and, in so doing, it silently derived this capacity from the institutions of self-government.[34] But, in the next step, the Court separated the representatives from their institutions and treated them as individuals.[35] The Court's argument is thus not persuasive and falls between the two stools on which it tries to sit. If the individuals acted outside the framework of these institutions, they did not have the capacity to act. If they had the capacity to act, they acted within the framework of these institutions.

2.4. The declaration of independence, the right of self-determination, and the will of the people

The Court held that the question posed by the General Assembly:

> does not ask about the legal consequences of [the declaration of independence]. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does

31 *Kosovo* Opinion, *supra* note 1, para. 109.
32 Ibid.
33 See Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001, Chapter 9, Section 2 (regulating the post of the president of Kosovo).
34 See note 31, *supra*.
35 See note 32, *supra*.

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> it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.[36]

The approach taken by the Court might be narrow, but it is defensible: a declaration of independence is one thing, while its acceptance by the international community is another. The formulation of the question referred to the Court covers the former but does not extend to the latter.[37] This section, however, argues that the Court's decision not to deal with the question of self-determination is problematic, even more so in light of the Court's position that the unilateral declaration of independence was not issued by the institutions of self-government, but by a group of individuals. It is argued that international law requires for a declaration of independence to be issued with the support of the will of the people. Although there is little doubt that independence is the wish of the majority of Kosovo's population, the Court's reasoning makes the declaration of independence formally questionable from the perspective of the will of the people.

2.4.1. Declaration of independence as a potentially illegal act under international law

The Court argued that:

> [T]he illegality attached to [some other] declarations of independence . . . stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*.[38]

While the Court thus held that a unilateral character as such does not render a declaration of independence illegal, it also implicitly pronounced that a declaration of independence, although not, by itself, creative of a new state, can violate (general) international law.

This interpretation seems to have support in the practice of the Security Council. A good example is Southern Rhodesia. In this situation, the violation of the right of self-determination not only triggered the obligation to withhold recognition, but also rendered the declaration of independence illegal under international law. Notably, Security Council Resolution 216 condemned 'the unilateral declaration of independence made by a racist minority in Southern Rhodesia'[39] and, only after condemning the declaration of independence itself, the resolution went on to call for non-recognition of Southern Rhodesia.[40]

Further, after Southern Rhodesia proclaimed itself a republic, Security Council Resolution 277, adopted under Chapter VII of the UN Charter, condemned 'the illegal proclamation of republican status of the Territory by the illegal regime in Southern

36 *Kosovo* Opinion, *supra* note 1, para. 51.
37 Compare ICJ, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, public sitting held on Thursday 10 December 2009, CR 2009/32, at 47, para. 6 (argument of James Crawford on behalf of the United Kingdom).
38 *Kosovo* Opinion, *supra* note 1, para. 81.
39 UN Doc. S/RES/216 (1965), para. 1.
40 Ibid., para. 2.

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Rhodesia'.[41] The resolution then also called for non-recognition.[42] But it is not only significant that it saw a potential act of recognition to be illegal; it was also the proclamation of republican status by Rhodesian authorities that was considered to be illegal under international law. As noted by one author:

> [It] is clear from the United Nations decisions [that] the [unilateral declaration of independence] was illegal because it violated a substantive rule of international law, namely the right of self-determination of the population of Southern Rhodesia . . . [the Declaration] also lacked legal validity, that is, it could not produce the intended legal consequence of changing the international status of the colonial territory, because it was issued by an entity which was *(a)* not the subject of the right of self-determination and *(b)* not representative of the subject of that right. Therefore it did not possess *the competence* under international law to exercise the right of self-determination.[43]

It needs to be noted that the Court pointed out that in the case of Kosovo, the illegality of the declaration of independence was never proclaimed by the Security Council.[44] Yet, this does not mean that there can be no illegality unless the Security Council says so. It will be argued at a later point that illegality may stem directly from general international law.[45] For example, while Resolution 277 was adopted under Chapter VII of the UN Charter, the preceding Resolution 216 was not legally binding, yet Southern Rhodesia's declaration of independence was nevertheless universally perceived to be illegal.[46]

Although the Court made a specific reference to the unlawful use of force, this was only used as an example and the wording of the relevant paragraph clearly suggests that other norms are also capable of rendering a declaration of independence illegal. Whether or not one agrees that the right of self-determination has become a part of *jus cogens*,[47] the practice of states and UN organs affirms that a declaration of independence in its violation will be considered illegal under international law.[48] Now, it will be argued that a declaration of independence violates the right of self-determination and, more broadly, international law when it is not issued in accordance with the will of the people.

2.4.2. Declaration of independence and the will of the people

In the *Western Sahara* Advisory Opinion, the Court established a link between self-determination and popular support for the alteration of the legal status of a territory by arguing that 'the application of the right of self-determination requires

41 UN Doc. S/RES/277 (1970), para. 1.
42 Ibid., para. 2.
43 Raič, *supra* note 30, at 134 (emphasis in original).
44 *Kosovo* Opinion, *supra* note 1, para. 81.
45 See subsection 3.1, *infra.*
46 See Raič, *supra* note 30, at 134.
47 Compare note 95, *infra.*
48 See collective responses to the situations of Southern Rhodesia and the South African Homelands. For Southern Rhodesia, see: UN Doc. A/RES/1747 (1962); UN Doc. S/RES/202 (1965); UN Doc. A/RES/2022 (1965); UN Doc. A/RES/2024 (1965); UN Doc. S/RES/216 (1965); UN Doc. S/RES/217; and UN Doc. S/RES/277 (1970). For the South African Homelands see: UN Doc. A/RES/2671F (1970); UN Doc. A/RES/2775 (1971); UN Doc. S/RES/402 (1976); UN Doc. S/RES/407 (1977); UN Doc. A/RES/37/43 (1982); UN Doc. A/RES/37/69A (1982); and UN Doc. S/RES/417 (1977).

a free and genuine expression of the will of the peoples concerned'.[49] From this pronouncement, it follows that the right of self-determination requires 'that all people within a territory must be consulted before any change in sovereignty over that territory can occur'.[50] This is not to say that an expression of the will of the people in favour of a new state creation necessarily creates a state, but rather that a state creation without the support of the will of the people would be illegal.

In the situation of Kosovo, it is unclear whether or not the right of self-determination is applicable to Kosovo Albanians, unless one is prepared to take the territorial approach and apply the right to the territory of Kosovo.[51] But this approach is problematic, as, according to its elaboration, the right of self-determination applies to peoples and not territories,[52] although the internal boundary arrangement may well be very important for determination of the new international borders.[53]

If one adopts the 'peoples approach' to self-determination, is it then correct to conclude that a declaration of independence *only* requires the support of the will of the people if it is issued on behalf of peoples, that is, the beneficiaries of the right of self-determination? Is the will of the people of Kosovo only important if Kosovo Albanians constitute a separate people?

This article makes an argument that the requirement to respect the will of the people should not be associated too narrowly with the right of self-determination and with the question of whether the population of a certain territory qualifies as a people for the purpose of this right. Although there exist some guidelines on how a separate people can be identified,[54] there exist no firm legal criteria for this purpose. Moreover, the guidelines for identification of a separate people are similar to the guidelines for identification of minorities.[55] In many situations, it is thus not possible

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49 *Western Sahara Advisory Opinion*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, para. 55.

50 R. McCorquodale, 'Self-Determination: A Human Rights Approach', (1994) 43 ICLQ 857, at 864.

51 See M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009), 17.

52 ICCPR and ICESCR, Art. 1. 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 and 1071 UNTS 407; 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

53 See J. Vidmar, 'Confining New International Borders in the Practice of Post-1990 State Creations', (2010) 70 *Heidelberg Journal of International Law* 319, at 355.

54 Consider the following definition of peoples: 'If we look at the human communities recognized as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be [historical, racial or ethnic, cultural or linguistic, religious or ideological, geographical or territorial, economic, quantitative]. This list . . . is far from exhaustive . . . [A]ll the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous group of persons, having less in common, may nevertheless constitute a people. To explain this apparent contradiction, we have to realize that our composite portrait lacks one essential and indeed indispensable characteristic – a characteristic which is not physical but rather ideological and historical: a people begin to exist only when it becomes conscious of its own identity and asserts its will to exist . . . the fact of constituting a people is political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.' International Commission of Jurists, *Events in East Pakistan* (International Commission of Jurists Secretariat, 1972), at 49. Similar criteria and caveats accompanying these criteria were invoked in the UNESCO context. The following criteria were specifically invoked: (i) a common historical tradition, (ii) racial or ethnic identity, (iii) cultural homogeneity, (iv) linguistic unity, (v) religious or ideological affinity, (vi) territorial connection, (vii) common economic life. UNESCO, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations, SHS-89/CONF.602/7 (1990), para. 22.

55 Consider the following definition of minorities: 'A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic,

objectively to identify the beneficiaries of the right of self-determination – that is, peoples – and separate them from minorities. The well-known pronouncement of Ivor Jennings thus still holds true: 'On the surface [the idea of self-determination] seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who the people are.'[56]

Does this mean that in relation to Kosovo, the Court should have decided whether or not Kosovo Albanians constitute a separate people for the purpose of the right of self-determination and, in the next phase, considered whether the declaration of independence is supported by the will of the people?

This article takes the position that a determination of whether Kosovo Albanians constitute a separate people was not necessary for this purpose. It is indeed questionable what legal tools the Court could have used in order to answer this inherently anthropological or sociological question.[57] The Court would be required to make a pronouncement on the self-perception of a group of people and any such determination made by the Court would seem to be flawed with arbitrariness. Rather, the requirement for popular support of an attempt at a new state creation should not be exclusively wedded to the right of self-determination and thus made dependent on the identification of a separate people.

If the population of a territory seeks to create a new state, the fact that it qualifies as a people for the purpose of the right of self-determination may make its claim to statehood stronger. But this is not to say that, in order to (attempt to) create a new state, the population of a territory must first prove that the right of self-determination is applicable.[58] Indeed, a new state creation can either create or crystallize identities relevant for the existence of a separate people and it is often difficult to tell which existed first: an independent state or its population's identity as a separate people.[59]

In essence, a new state may emerge even if it is not clear whether its population constitutes a separate people for the purpose of the right of self-determination. In this vein, the applicability of the right of self-determination is not a precondition for a new state creation. But does this mean that when a new state is not created as a result of the exercise of the right of self-determination, the will of the people can be disregarded? If this were accepted – and taken to the extreme – two states could conclude a treaty by way of which they would cede parts of their respective territories and create a new state in the so-merged territory. Even if the population

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religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.' F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), at 96.

56 I. Jennings, *The Approach to Self-Government* (1956), at 55.

57 Compare the following observation made by the ICJ in the *South West Africa* case: '[The ICJ] is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.' *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, para. 49.

58 Compare notes 59–63, *infra*.

59 In Germany and Austria, for example, historical and political developments led to the creation of two distinct peoples who are not only allowed to have separate states but are actually precluded from unification. See State Treaty for the Re-Establishment of an Independent and Democratic Austria, Art. 4 (27 July 1955).

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of this territory disagreed with the new state creation, their disagreement would not be relevant from the aspect of international law, provided that the territory were not populated by a separate people. In this case, the right of self-determination would not be violated and the population would be forced to run its own state – contrary to its wishes. But could contemporary international law really allow such situations?

It is more plausible to argue that a change in the legal status of a territory requires the support of the people populating that territory, regardless of whether or not the population of the territory constitutes a separate people for the purpose of the right of self-determination. If international law does not take the 'peoplehood' and the right of self-determination as a precondition for a state creation – and it clearly does not[60] – then the requirement for the support of the will of the people for alteration of the legal status of a territory needs to be applied more broadly and not only in the context of the exercise of the right of self-determination.

There may also be examples in which more than one group qualifies as a people in the territory that tries to emerge as a new state. In such situations, the requirement for popular support for the alteration of the legal status of a territory refers to the population of the territory as a whole and not to the specific beneficiaries of the right of self-determination. The example of Bosnia–Herzegovina is particularly instructive in this context.

The Badinter Commission did not see the population of Bosnia–Herzegovina as having a common identity of a separate people that would result in a joint right of self-determination.[61] But, after Bosnia–Herzegovina declared independence, the Badinter Commission held that the will of the people (i.e. of the population of Bosnia–Herzegovina) was unclear.[62] The Commission then suggested a referendum[63] and, ultimately, decided that Bosnia–Herzegovina became an independent state on the day on which the results of the referendum in favour of independence were published.[64] It was thus perceived that the central government of Bosnia–Herzegovina did not have the authority to declare independence before it became clear that the latter was supported by the will of the people. In this regard, it is significant that the will of the people was considered to be the majority of the entire population of Bosnia–Herzegovina, which did not have a common identity of a unitary people and thus a common right of self-determination was not applicable.

60 This implicitly follows even from the *Kosovo* Opinion. Indeed, the Court concluded that the unilateral declaration of independence was not prohibited under international law without clarifying whether or not the right of self-determination is applicable to Kosovo Albanians. The Court thus accepted that the question of whether the population of a territory constitutes a separate people for the purpose of the right of self-determination does not influence the question of legality of unilateral declarations of independence.

61 See the Badinter Commission, Opinion 2 (11 January 1992), para. 4, reprinted in S. Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (1994), 474. The Commission established, inter alia, that the Serbian population of Bosnia–Herzegovina had the right of self-determination. This implies that in Bosnia–Herzegovina, the right of self-determination is not applicable to the entire people of Bosnia–Herzegovina, but rather that each one of the three constitutive ethnic groups of that state holds the right of self-determination in its own right.

62 Ibid., at 486.

63 Ibid.

64 Ibid., at 1017.

It follows that the Badinter Commission's Opinion on Bosnia–Herzegovina affirmed the importance of the support of the will of the people in the context of attempts at new state creations, even when the state creation does not result from the exercise of the right of self-determination. Thus, the right of self-determination requires that a change in the legal status of a territory must occur in accordance with the will of the people. However, this requirement should not depend on the question of whether the population of a territory actually constitutes a separate people. If a declaration of independence is issued by (effective) authorities who are non-representative of the people of the territory in question, then the declaration of independence needs to be considered illegal under international law, regardless of whether or not the population of the territory constitutes a separate people for the purpose of the right of self-determination.

2.4.3. Self-determination, the will of the people, and Kosovo

In principle, there is little doubt that independence is the choice of the vast majority of Kosovo's population,[65] although it may well be questionable whether the wishes of the Albanian majority can simply prevail over the wishes of the Serb minority. The absence of a referendum in Kosovo is thus not problematic per se and the situation could fall in the category of situations in which the will of the people is obvious and referenda are not necessary.[66]

Nevertheless, from the perspective of the reasoning in the advisory opinion, two observations need to be made. First, violation of the right of self-determination can doubtlessly be a source of illegality that may render a declaration of independence illegal under international law.[67] Although it is very likely that there was no violation of this kind, as a possible source of illegality, it should have been at least mentioned by the Court. But this does not mean that the Court should necessarily have answered the question of whether or not Kosovo Albanians constitute a separate people for the purpose of the right of self-determination. This is not determinative for the answer as to whether or not the declaration of independence is in accordance with international law. It is rather that the Court should have considered whether the declaration of independence stems from the will of the people. If it does not, the declaration may well be illegal.[68]

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65 For a more detailed argument, see J. Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', (2009) 42 Vand. JTL 779, at 825–7. That there was no doubt regarding the will of Kosovo Albanians (and thus roughly 90 per cent of Kosovo's population) with respect to the future legal status of Kosovo was, inter alia, established in the Ahtisaari Plan. Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168 (2007).

66 In *Western Sahara*, supra note 49, para. 55, the ICJ held that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'. The Court, however, continued: 'The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances', ibid., para. 59.

67 See sub-subsection 1.4.1, *supra*.

68 See sub-subsection 1.4.2, *supra*.

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Second, it was argued above that the legitimate authority with the capacity to act on behalf of the people of Kosovo was the self-governing institutions of Kosovo and not a group of private individuals.[69] If independence were declared by a group of private individuals, as maintained by the Court, this would make Kosovo's declaration of independence, at least formally, questionable from the perspective of the support of the will of the people. It would also make the absence of a referendum on independence much more difficult to justify. Indeed, it is unclear how a group of private individuals, acting outside the institutional framework, can act on behalf of the people of the territory in question if their action is not in some other way rooted in the will of the people (e.g. expressed at an independence referendum).

3. No illegality under general international law: some implications for the law of statehood

In combination with the Court's choice only to deal with a possible *illegality* of the unilateral declaration of independence,[70] the question in the part of the opinion dealing with general international law was whether the principle of territorial integrity of states prohibits unilateral declarations of independence. The Court's position was that it does not,[71] yet the Court's reasoning was broader and may well have implications even for the question of the legality of recognitions.

This section considers the importance of the *Kosovo* Opinion for the clarification of the status of unilateral secession in general international law and discusses the Court's position that the principle of territorial integrity only applies in relations between states. In this context, the Court's reference to *jus cogens* is also considered. This section further argues that the Court's reasoning implicitly suggests that states were under no legal obligation to withhold recognition of Kosovo.

3.1. Unilateral declaration of independence in general international law: no illegality

It has been argued that the *Kosovo* Opinion adopts the understanding that international law is neutral on the question of unilateral declarations of independence.[72] This reflects the prevailing doctrinal interpretation that a unilateral declaration of independence is 'a legally neutral act the consequences of which are regulated internationally'.[73] But the Court made a broader argument that the principle of territorial integrity of states does not operate in situations in which an entity is trying to break away from its parent state. In the Court's words: '[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States.'[74] Thus, only a state can violate the territorial integrity of another state. But this argument is questionable.

69 Compare subsection 1.3, *supra*.
70 See note 15, *supra*.
71 *Kosovo* Opinion, *supra* note 1, para. 81.
72 See note 17, *supra*.
73 J. Crawford, *The Creation of States in International Law* (2006), at 390.
74 *Kosovo* Opinion, *supra* note 1, para. 80.

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The Court evidently based this argument on the relationship between the principle of territorial integrity of states and the prohibition of the use of force.[75] However, while Article 2(4) of the UN Charter indeed specifically refers to 'international relations', this does not necessarily mean that in all other contexts, the principle of territorial integrity of states likewise only applies in international relations. The Declaration on Principles of International Law is a good example of that. In the context of the right of self-determination, which applies to peoples and not states, the Declaration on Principles of International Law provides, inter alia:

> Nothing in the foregoing paragraphs [referring to the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[76]

This formulation expresses the commitment of the international legal order to the territorial integrity of states, yet it obviously does not confine territorial integrity to the sphere of states. The addressees are obviously the beneficiaries of the right of self-determination, that is, peoples within states. Such a conclusion is supported not only by the language of the above-elaborated principle, but also by the fact that the duty of states to observe the territorial integrity of other states is elaborated separately, in the subsequent paragraph of Principle 5 of the annex to the Declaration on Principles of International Law: 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.'[77] If the first elaboration of the principle of territorial integrity applied only to states, it is not clear why the principle would need to be elaborated twice, in two consecutive paragraphs and in different formulations. What is interesting is that when pronouncing that the principle of territorial integrity of states only applies in relations between states, the Court only chose to make a reference to the second elaboration, but not to the first one.[78] In light of this, the position of the Court that the principle of territorial integrity of states does not preclude unilateral declarations of independence simply because such declarations are, by definition, issued by entities that are not (yet) states seems to be questionable.

Moreover, confinement of the operation of the principle of territorial integrity of states to relations between states seems to be incompatible not only with the Declaration on Principles of International Law, but also with the Court's own reasoning. Above, it was argued that the Court held that under certain circumstances, a declaration of independence can itself violate international law.[79] In light of this reasoning, it is conceptually unclear why an independence-seeking entity, as a non-state actor,

75 Ibid.
76 UN Doc. A/RES/2625 (1970), Annex, Principle 5. According to the Court, this declaration reflects customary international law. *Kosovo* Opinion, *supra* note 1, para. 80.
77 Ibid.
78 Ibid.
79 See note 38, *supra*.

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cannot offend against the territorial integrity of states but, at the same time, can be responsible for 'egregious violations of [certain] norms of international law, in particular those of a peremptory character'.[80] Why can a unilateral declaration of independence offend against some international legal obligations but not against others? It is important to note that, here, we are not dealing with the prohibition of recognition (an obligation *erga omnes*)[81] of an effective situation created by a breach of *jus cogens*,[82] but rather with the interpretation that a declaration of independence may be, under certain circumstances, itself an illegal act under international law.

However, even if the principle of territorial integrity does not apply exclusively in relations between states, this does not mean that unilateral declarations of independence are prohibited. Here, we are not dealing with a specific norm, but with a *principle* of territorial integrity. This principle is capable of generating certain norms and obligations, but is not itself a norm prohibitory of unilateral declarations of independence.

For example, in relation to the use of force, the principle of territorial integrity generates a prohibitory norm, albeit with exceptions.[83] But it seems that it generates no prohibitory norms in relation to unilateral declarations of independence. Indeed, the elaboration in the Declaration on Principles of International Law reflects the neutrality of general international law. It says that a disruption of territorial integrity is not authorized or encouraged, but it does not say it is absolutely prohibited,[84] that is, there is no specific right but neither is there a specific prohibition. The absence of a prohibitory norm also follows from state practice, which was referred to by the Court.[85] In this context, the Court recalled several instances in which new states emerged upon an initial unilateral declaration of independence.[86]

It remains questionable whether the territorial integrity of another state can be violated only by an illegal use of force or, for example, also by recognition of an entity that is trying to secede unilaterally from its parent state. This issue fell beyond the scope of the question posed to the Court by the General Assembly. Some guidelines, however, follow from the *Quebec* case, in which the Supreme Court of Canada argued: 'The ultimate success of . . . [unilateral] secession would be dependent on

80 *Kosovo* Opinion, *supra* note 1, para. 81.

81 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (2001), UN Doc. A/RES/56/83 (2002) (hereinafter the ILC Articles on State Responsibility), Art. 41(2), 2001 YILC, Vol. II (Part Two), at 26. See also the Commentary to Article 41: Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (hereinafter the ILC Articles on State Responsibility, with Commentaries), 2001 YILC, Vol. II (Part Two), at 26, Commentary to Article 41, paras. 10 and 11.

82 See note 93, *infra*.

83 UN Charter, Art. 2(4) provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' The exceptions are regulated in Art. 42 (use of force authorized by the Security Council) and Art. 51 (use of force in self-defence). 1945 Charter of the United Nations, 1 UNTS 15.

84 See note 76, *supra*.

85 *Kosovo* Opinion, *supra* note 1, para. 79.

86 Ibid.

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recognition by the international community, which is likely to consider the legality and legitimacy of secession.'[87]

This position suggests, inter alia, that states are not under an absolute obligation to withhold recognition when independence is declared unilaterally. In other words, the observance of the territorial integrity of other states does not absolutely prohibit recognition of an entity that tries to emerge as an independent state by way of a unilateral secession. The Kosovo Advisory Opinion was not concerned with recognition, yet the position of the Court on illegality of declarations of independence also has implications for this question. These will now be considered.

3.2. Territorial illegality and *jus cogens*: the link to non-recognition

When the Court made the pronouncement that the unilateral character of the declaration of independence does not lead to any illegality under international law, it continued to argue that illegality with respect to declarations of independence has been 'connected with the unlawful use of force or other egregious violations of general international law, in particular those of a peremptory character (*jus cogens*)'.[88] The reference to *jus cogens* is very significant, not only because the Court only recently unequivocally endorsed the concept of peremptory norms,[89] but also because the role of *jus cogens* in the context of territorial illegality has long been the subject of academic scrutiny and criticism.[90] Furthermore, this pronouncement has implications for the question of legality of recognition.

The practice of states and UN organs suggests that a state creation is illegal when an entity attempts to emerge as a result of the use of force, in violation of the right of self-determination or in pursuance of racist policies.[91] The character of the norms involved suggests that it might be possible to say that the obligation to withhold recognition applies when a new state attempts to emerge in violation of a peremptory norm. This line of thought is reflected not only in some academic writings,[92] but even in the International Law Commission (ILC) Articles on State Responsibility.[93]

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87 *Quebec* case, *supra* note 18, para. 155.

88 *Kosovo* Opinion, *supra* note 1, para. 81.

89 See, e.g., *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, para. 56.

90 For an argument in favour of the role of *jus cogens* in the creation and recognition of states, see J. Dugard, *Recognition and the United Nations* (1987), especially at 102. See also Crawford, *supra* note 73, at 102–5. For a counterargument, see S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?', in C. Tomuschat, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006), 101, at 103.

91 See Crawford, *supra* note 73, at 107–57. See also *supra* note 48 for resolutions on Southern Rhodesia, South African Homelands, and Northern Cyprus.

92 See note 90, *supra*.

93 ILC Articles on State Responsibility, *supra* note 81, Arts. 40 and 41. The doctrine of withholding recognition as an obligation *erga omnes* has been affirmed even in the ICJ's *Israeli Wall Advisory Opinion*, where the Court held: 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its

Yet, this explanation has also attracted notable criticism.[94] For example, it is unclear whether the right of self-determination really belongs to the norms of peremptory character. Significantly, not even the Commentary to Article 40 makes a clear pronouncement on this question. Indeed, the commentary enumerates a number of generally accepted *jus cogens* norms, but, in relation to the right of self-determination, it uses much more ambiguous wording: 'Finally, the obligation to respect the right of self-determination *deserves to be mentioned*.'[95] The commentary further makes a reference to the *East Timor* case before the ICJ, in which only an *erga omnes*, but not *jus cogens*, character of the right of self-determination was mentioned.[96]

Moreover, it is commonly accepted that prohibition of illegal (or unlawful) use of force, sometimes also referred to as prohibition of aggression, has a *jus cogens* character.[97] However, it might be more correct to say that an attempt at state creation is illegal if it results from the use of force in general, no matter whether lawful or unlawful. Indeed, a new state cannot result from the use of force in self-defence, albeit the use of force in such circumstances may well be lawful.[98]

Such conceptual problems make it possible to dispute the relevance of the concept of *jus cogens* for the legality of attempts at new state creation. The Court was, however, careful not to ascribe illegality of this kind to breaches of *jus cogens* explicitly. The opinion left some ambiguity and did not pronounce that *jus cogens* norms exclusively could render a declaration of independence illegal or that all norms with this potential are necessarily of *jus cogens* character. Indeed, the formulation 'in particular those of a peremptory character (*jus cogens*)'[99] is phrased carefully enough that it would not necessarily imply either option. It is nevertheless significant that the Court felt it had to mention the role of *jus cogens* in this context and, from now on, this reference will need to be considered by those who use the breach of *jus cogens* to explain the illegality of declarations of independence and also by those who oppose this explanation.

In the situation of Kosovo, it is particularly significant that the type of illegality of declarations of independence, which was discussed by the Court in paragraph 81, creates an obligation on all states to withhold recognition. While states are never under an obligation to grant recognition and are always free to withhold it for

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right to self-determination is brought to an end.' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, para. 159. It needs to be noted, however, that, here, the Court did not base its argument on the *jus cogens* character of the violated norm (in this instance, the right of self-determination) but rather on its *erga omnes* nature. Ibid., paras. 155 and 156. Yet, the terms *jus cogens* and *erga omnes* should not be used interchangeably. While all *jus cogens* norms have an *erga omnes* effect, not all obligations *erga omnes* 'constitute peremptory norms of international law'. E. de Wet, 'The International Constitutional Order', (2006) 55 ICLQ 51, at 61.

94 See, e.g., Talmon, *supra* note 90, at 103.

95 ILC Articles on State Responsibility with Commentaries, *supra* note 81, Commentary to Article 40, para. 5 (emphasis added).

96 Ibid.

97 ILC Articles on State Responsibility, *supra* note 81, Commentary to Article 26, para. 5, and Commentary to Article 40, para. 4.

98 See Crawford, *supra* note 73, at 146.

99 *Kosovo* Opinion, *supra* note 1, para. 81.

political reasons,[100] under certain circumstances, they are under a legal obligation to withhold it.[101] This also follows from Article 41 of ILC Articles on State Responsibility and from the Commentary to that Article – when a norm of *jus cogens* is breached, an obligation to withhold recognition is owed *erga omnes*.[102]

Although the Court avoided the question of whether or not the obligation to withhold recognition applies in the situation of Kosovo, the opinion may have implicitly answered this question. Paragraph 81 of the opinion states, inter alia, that only 'egregious violations of norms of general international law, in particular those of a peremptory character',[103] can render a declaration of independence illegal. By the subsequent pronouncement that the declaration of independence was not illegal under general international law,[104] the Court confirmed that in the situation of Kosovo, no such violation existed. And, if no such violation existed, the obligation to withhold recognition is not triggered under general international law. The Court thus implicitly pronounced that the obligation not to recognize Kosovo is not owed *erga omnes*. At the same time, there is nothing in the Court's reasoning that would, even implicitly, clarify Kosovo's legal status.

Moreover, the Court thus also implicitly rejected the view that Kosovo's independence was declared in violation of a peremptory norm, although the NATO use of force against the Federal Republic of Yugoslavia (FRY) in 1999 is widely regarded as unlawful.[105] This confirms the view that Kosovo's declaration of independence did not stem from the use of force, but from the legal regime created by Resolution 1244.[106] In one such argument:

> [I]n the particular situation of Kosovo, the bombardment of Yugoslavia did not lead directly to the independence of Kosovo, neither was it aimed at ensuring it. The illegal bombardment by NATO blazed the trail for the transitional administration of its territory, which, in itself, was not directed at the independence of Kosovo either.[107]

This view appears to have been silently adopted also by the Court.

4. No illegality under Resolution 1244: inadequacy of the arguments

The Court identified Resolution 1244 as the *lex specialis* that could, potentially, prohibit issuing of the declaration of independence.[108] Although the Court looked at

100 See, e.g., K. Marek, Identity and Continuity of States in Public International Law (1968), 137, rejecting Lauterpacht's view that when an entity meets the statehood criteria, other states are under a legal obligation to grant recognition. See H. Lauterpacht, Recognition in International Law (1947), 12–24.

101 See, e.g., Dugard, *supra* note 90, at 135.

102 ILC Articles on State Responsibility, *supra* note 81, Commentary to Article 41, paras. 4–10.

103 *Kosovo* Opinion, *supra* note 1, para. 81.

104 Ibid., para. 84.

105 See, e.g., B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 EJIL 1, at 10; A. Cassese, '*Ex Iniuria Ius Oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 EJIL 23, at 24; C. Chinkin, 'Kosovo: A "Good" or "Bad" War?', (1999) 93 AJIL 841, at 844; D. Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia', (2000) 49 ICLQ 330, at 340.

106 For a more thorough analysis, see Vidmar, *supra* note 65, at 826–7.

107 J. d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', (2007) 20 LJIL 649, at 663.

108 *Kosovo* Opinion, *supra* note 1, para. 83.

the question of a potential prohibition of the unilateral declaration of independence under Resolution 1244 more broadly, the previous determination of the identity of the authors of the declaration was nevertheless very important for the Court's reasoning.

The Court noted that while, in some other situations, Security Council resolutions specifically prohibited new state creations,[109] the language of Resolution 1244 is ambiguous and does not contain an explicit prohibition.[110] The Court noted that Resolution 1244:

> was essentially designed to create an interim régime for Kosovo, with a view to establishing the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.[111]

In the Court's view, the object and purpose of Resolution 1244 were thus to create the interim legal regime governing the territory of Kosovo and not to settle its final legal status.[112]

This section considers the Court's arguments on the legal relevance of the absence of a specific prohibition of declaring independence in Resolution 1244, the impact of the Court's controversial identification of the authors of the declaration, and the argument that the only object and purpose of Resolution 1244 was the creation of the interim international civil administration. The section does not intend to challenge the Court's conclusion that the unilateral declaration of independence was not illegal under Resolution 1244. Rather, it will be argued that the Court's argumentation is not always persuasive.

4.1. The absence of a specific prohibition

The Court paid special attention to the fact that Resolution 1244 did not expressly declare a potential declaration of independence with respect to Kosovo illegal. In this context, it made the following argument: '[C]ontemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution.'[113] The Court then referred to Resolution 1251 on Cyprus, which was adopted only 19 days after the adoption of Resolution 1244.[114] But it is questionable whether the two resolutions are comparable. In this vein, it is also questionable whether it is possible to compare Resolution 1244

109 Ibid., para. 114. In this regard, the Court at an earlier stage referred to Security Council resolutions on Southern Rhodesia, Northern Cyprus, and Republika Srpska, which were invoked in some of the pleadings before the Court. See ibid., para. 81.

110 Ibid., para. 118.

111 Ibid., para. 114.

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

113 Ibid., para. 114.

114 Ibid.

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and earlier resolutions on, for example, Northern Cyprus,[115] Southern Rhodesia,[116] or the South African Homelands.[117]

Initially, it needs to be noted that Resolution 1244 was adopted under Chapter VII of the UN Charter, while most other resolutions referred to by the Court were not.[118] Yet, in light of the *Namibia* Advisory Opinion, this difference does not seem to be crucial.[119] What is more important is that in the situation of Northern Cyprus (and other situations the Court might have had in mind),[120] the illegality stemmed from general international law and not from the *lex specialis* regime created by a previous Security Council resolution. Resolution 1244, on the other hand, was not a reaction to a declaration of independence, illegal under general international law. Rather, it was a complex *lex specialis* creative of a special legal regime governing the territory of Kosovo. Notably, Resolution 1244 did not explicitly declare that a unilateral declaration of independence would be illegal. Yet, the absence of a direct prohibition of a unilateral declaration of independence in Resolution 1244 is not significant in itself. It may be that the prohibition actually follows more broadly from the legal regime created by this resolution.

4.2. Broader perspective: Resolution 1244 and territorial integrity of Serbia

Resolution 1244 did not predetermine the final settlement of the territorial status of Kosovo or opt for a particular solution. But one of its objectives was to initiate the political process leading to the final settlement of the territorial status.[121] It follows from the resolution that this was to be an open-ended process and there is no indication that independence would be explicitly excluded. But this does not necessarily mean that a *unilateral* path to independence was not excluded.

In Resolution 1244, the Security Council stated that:

> [T]he main responsibilities of the international civil presence include:
>
> (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the *Rambouillet accords*
>
> . . .
>
> (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the *Rambouillet accords*.[122]

What is notable from these pronouncements is that Resolution 1244 specifically underscored the Rambouillet Accords and the political process leading to the final

115 UN Doc. S/RES/353 (1974); UN Doc. S/RES/541 (1983); UN Doc. S/RES/1251 (1999).
116 See note 48, *supra*.
117 See note 48, *supra*.
118 See note 48, *supra*.
119 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 115, where the Court argued that even if a Security Council resolution was not adopted under Chapter VII of the UN Charter, it may nevertheless be 'binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out'.
120 See notes 48 and 109, *supra*.
121 UN Doc. S/RES/1244 (1999), para. 11(e).
122 Ibid., paras. 11(a) and 11(e) (emphasis added).

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settlement. A reference is also made to Annex 2 of Resolution 1244, where the Rambouillet Accords and the territorial integrity of the FRY (now Serbia) are also mentioned. Annex 2 invokes the following principle 'to move towards a resolution of the Kosovo crisis':[123]

> A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the *Rambouillet accords* and *the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia* and the other countries of the region, and the demilitarization of the KLA.[124]

Resolution 1244 thus made direct references to territorial integrity of the FRY (Serbia) and indirect ones by invoking the Rambouillet Accords.

The Rambouillet Accords were proposed in 1999 as a solution to the Kosovo crisis,[125] but they were never signed by the FRY and Serbia. Although not legally binding per se, the document may be said to have acquired legal validity through Resolution 1244, which was adopted under Chapter VII of the UN Charter. Its provisions therefore cannot be disregarded.

The document foresaw, inter alia, meaningful self-government of Kosovo in separation from the FRY and Serbia,[126] yet it also affirmed the territorial integrity of the FRY both in the preamble and in the operative part. In the preamble, the document recalled 'the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia'.[127] Chapter I of the Rambouillet Accords also included a constitution, the preamble to which, inter alia, expressed a desire:

> through this interim Constitution to establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which the authorities of governance set forth herein originate.[128]

Furthermore, in Article 1 of Chapter VII, the Rambouillet Accords provided: 'They [the Parties to the Agreement] also reaffirm the *sovereignty and territorial integrity* of the Federal Republic of Yugoslavia (FRY).'[129]

The Rambouillet Accords thus meant to subscribe the parties to the agreement to territorial integrity of the FRY. In other words, Kosovo's autonomy was to be achieved within the territorial framework of the FRY and Serbia.

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123 Ibid., Annex 2.

124 Ibid., Annex 2, Principle 8 (emphasis added).

125 See Interim Agreement for Peace and Self-Government in Kosovo (23 February 1999) (hereinafter the Rambouillet Accords), available at www.ess.uwe.ac.uk/kosovo/Rambouillet%20Index.htm. For more on the Rambouillet Accords, see E. Herring, 'From Rambouillet to the Kosovo Accords: NATO's War against Serbia and Its Aftermath', (2000) 4 *International Journal of Human Rights* 225.

126 Art. 1(4) of the Framework of the Rambouillet Accords provides: 'Citizens in Kosovo shall have the right to democratic self-government through legislative, executive, judicial, and other institutions established in accordance with this Agreement. They shall have the opportunity to be represented in all institutions in Kosovo. The right to democratic self-government shall include the right to participate in free and fair elections.'

127 Rambouillet Accords, *supra* note 125, Preamble, para. 4.

128 Ibid., Chapter I, Constitution, Preamble, para. 4.

129 Ibid., Chapter VII, Article 1 (emphasis added).

While, in relation to general international law, the Court, rather controversially, made an argument that the principle of territorial integrity only applies between states,[130] it seems that this argument was excluded in the context of the *lex specialis* regime. Indeed, the Court argued that Security Council resolutions can create legal obligations for non-state actors and recalled that several Security Council resolutions on Kosovo identified duty-bearers among the leadership of Kosovo Albanians.[131] As a consequence, unlike in the context of general international law, in the context of Resolution 1244, the Court could not limit the obligation to observe the territorial integrity of states only to state actors. If the obligations under the resolution extend to certain non-state actors, then these non-state actors are also under an obligation to respect the territorial integrity of Serbia.

Thus, it may well be that under the *lex specialis* regime, Kosovo was prohibited from declaring independence unilaterally. But this leads to the question of to whom such a prohibition applied.

4.3. Obligations under Resolution 1244 and the identity of the authors of the declaration

Would Resolution 1244 prohibit a declaration of Kosovo's independence if it were issued by me? It would not, since I am not the duty-bearer under the relevant resolution. And neither did Resolution 1244 personally prohibit Mr Sejdiu and individual members of the Kosovo parliament from issuing a declaration of independence. But it is arguable that Resolution 1244 did prohibit a declaration of independence by the institutions of self-government, established pursuant to Resolution 1244, which were identified as the duty-bearers.[132]

At this point, the Court's conclusion on the identity of the authors of the unilateral declaration of independence becomes relevant.[133] The Court treated the post-holders in the institutions of self-government who issued the unilateral declaration of independence as a group of private individuals. As such, they are not the duty-bearers under Resolution 1244. For the Court, their declaration thus had the same status as if it were issued by me. In this context, the following finding of the Court is very instructive: '[T]he Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, *binding on the authors of the declaration of independence*, against declaring independence.'[134] Ultimately, the Court concluded that 'Security Council resolution 1244 (1999) cannot be construed to include a prohibition, *addressed in particular to the authors of the declaration of 17 February 2008*, against declaring independence'.[135] The Court then concluded that Resolution 1244 'did not bar *the authors of the declaration* . . . from issuing a declaration of independence from the Republic of Serbia'.[136]

130 See note 74, *supra*.
131 *Kosovo* Opinion, *supra* note 1, para. 116.
132 See note 131, *supra*.
133 See note 27, *supra*.
134 *Kosovo* Opinion, *supra* note 1, para. 118 (emphasis added).
135 Ibid., para. 118 (emphasis added).
136 Ibid., para. 119 (emphasis added).

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In this part, the Court obviously did not exclude a possibility that there was a prohibition addressed to those whom the Court did not consider to be the authors of the unilateral declaration of independence, such as, perhaps, the institutions of provisional self-government in Kosovo.

4.4. The object and purpose of Resolution 1244

In light of the Court's pronouncement on the identity of the authors of the unilateral declaration of independence, the Court's reasoning could end with the pronouncement that Resolution 1244 did not create legal obligations for the group of individuals who declared independence of Kosovo. But the Court nevertheless felt it had to consider whether prohibition more broadly followed from the language of the resolution, that is, regardless of the identity of the authors of the declaration. The Court, perhaps, did not entirely want to hide behind its controversial identification of the authors.

In this context, the Court argued that a prohibition of a declaration of independence cannot 'be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard'.[137] The Court held that the object and purpose of the resolution were the creation of the interim administration and not the final settlement of the territorial status.[138] If this view were accepted, the final settlement of the territorial status of Kosovo would fall outside of the purview of Resolution 1244 and therefore the unilateral declaration of independence could not be prohibited, no matter who were the authors of the declaration. But this view is debatable.

When Resolution 1244 specifies the main responsibilities of the international civil presence, it mentions Kosovo's self-government in combination with the final settlement of the territorial status: 'Promoting the establishment, *pending a final settlement*, of substantial autonomy and self-government in Kosovo.'[139] Among the main responsibilities, the resolution further enumerates facilitation of 'a political process designed to determine Kosovo's future status'[140] and 'overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement'.[141]

While it is true that Resolution 1244 did not define Kosovo's territorial status, it clearly follows from its wording that the resolution was concerned with its settlement.[142] It is thus arguable that the object and purpose of Resolution 1244 were not only the creation of the interim administration, but also the initiation of the process leading towards the final settlement of Kosovo's territorial status, albeit without providing for one specific solution.

137 Ibid., para. 118.
138 See note 112, *supra*.
139 UN Doc. S/RES/1244, para. 11(a) (emphasis added).
140 Ibid., para. 11(e).
141 Ibid., para. 11(f).
142 For more, see Vidmar, *supra* note 65, at 800.

What is then questionable is whether unilateral actions for the change of the legal status of Kosovo – that is, actions outside the political process leading to the final settlement of the territorial status – were allowed under the legal regime created by Resolution 1244. Since the resolution did not exclude any possible outcomes of the final settlement, it would be possible to interpret it as a legal instrument that would not prohibit Kosovo's secession with the consent of Serbia.[143] But, at the same time, it could be seen as a legal instrument that precludes unilateral solutions and thus also unilateral declarations of independence. Indeed, a fait accompli in the form of a unilateral declaration of independence does not seem to be compatible with the political process leading to the settlement of the territorial status.

This is even more so if one takes into account the direct and indirect references to territorial integrity of the FRY (now Serbia) in Resolution 1244 and in the Rambouillet Accords, to which the resolution refers. If these references did not prohibit a unilateral declaration of independence, it seems to be questionable what the legal relevance is of the references to territorial integrity of states in Security Council resolutions. The Court showed that it was aware of these references but failed to explain why it did not see them as a relevant factor for determining whether or not the declaration of independence was in accordance with Resolution 1244.[144] Moreover, the Court mentioned the Rambouillet Accords in other contexts,[145] yet it chose to ignore the references to territorial integrity of the FRY and Serbia in this document.

5. Possible illegality under the Constitutional Framework

Generally speaking, international law is not concerned with the question of whether a declaration of independence is prohibited under the applicable domestic constitutional order. This, inter alia, follows from the *Quebec* case, in which the Supreme Court of Canada held that an independence-seeking entity may declare independence unconstitutionally, yet states are nevertheless free to consider whether or not they will grant recognition.[146]

However, in the situation of Kosovo, the Constitutional Framework was adopted under the *lex specialis* regime of Resolution 1244.[147] The applicable domestic constitutional law was thus internationalized and the Court rightly identified the Constitutional Framework as a possible source of illegality under international law.[148] This section argues that the Court's previous finding that independence

143 It is indeed possible that a Chapter VII resolution would prohibit secession of a certain entity, even if consent to its emergence was given by its parent state.

144 *Kosovo* Opinion, *supra* note 1, para. 95.

145 Ibid., para. 59 (in the context of principal responsibilities of international civil presence); para. 104 (in the context of the identity of the authors of the Declaration); para. 112 (in the context of the will of the people).

146 *Quebec* case, *supra* note 18, para. 155.

147 The Constitutional Framework makes the following perambulatory reference: 'Pursuant to the authority given to him under United Nations Security Council Resolution 1244(1999) of 10 June 1999', Constitutional Framework, Preamble, para. 1. UNMIK/REG/2001/9 (2001).

148 See note 11, *supra*.

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was not declared by the provisional institutions of self-government was crucially important for its argument in this part of the opinion. What is more, the Court's reasoning may indeed imply that the Constitutional Framework would preclude the issuing of a declaration of independence if it were issued by the institutions of self-government.

After recalling the instances in which the Special Representative of the Secretary-General annulled the acts of the parliament,[149] the Court held:

> The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.[150]

It is notable that, here, the Court was not interpreting the reasons why the Special Representative did not annul the declaration of independence, but was rather using his abstention to prove that the unilateral declaration of independence cannot be attributed to the provisional institutions of self-government of Kosovo.[151]

The Special Representative did not annul the declaration of independence.[152] This is a fact. Three interpretations are thus possible. First, he did not think the declaration of independence, *issued by the institutions of self-government*, violated Kosovo's (internationalized) legal order; second, he did not think the declaration was issued by the institutions of self-government, so he had no competence to annul it; and, third, he did not think that the declaration of independence violated Kosovo's (internationalized) legal order, regardless of who were the authors of the declaration.

The Court chose to follow the second explanation. Yet, the Court's argument only works if the second option applies exclusively and the first and the third explanations are rejected. Indeed, if all three explanations are equally plausible, the Special Representative's abstention does not necessarily prove that the declaration was not issued by the institutions of self-government.

The logic of the Court's argument is thus the following: the Special Representative did not annul the declaration because he did not think it was issued by the institutions of self-government. If he had thought it was issued by these institutions, he would have annulled it because the Constitutional Framework precluded the institutions of self-government from declaring independence unilaterally. As a consequence, such a declaration would be ultra vires. If this were not the Court's

149 *Kosovo* Opinion, *supra* note 1, para. 108.

150 Ibid.

151 Ibid.

152 It is notable that immediately upon the declaration of Kosovo's independence, in his address to the Security Council, the president of Serbia, Boris Tadić stated, inter alia, 'We request the Secretary-General, Mr. Ban Ki-moon, to issue, in pursuance of the previous decisions of the Security Council, including resolution 1244 (1999), a clear and unequivocal instruction to his Special Representative for Kosovo, Joachim Rücker, to use his powers within the shortest possible period of time and declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void. We also request that Special Representative Rücker dissolve the Kosovo Assembly, because it declared independence contrary to Security Council resolution 1244 (1999). The Special Representative has binding powers, and they have been used before. I request that he use them again', UN Doc. S/PV.5839 (2008), at 5.

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line of thought, the Special Representative's abstention could be equally plausibly interpreted as proving that the declaration of independence, *issued by the institutions of provisional self-government*, did not violate Kosovo's (internationalized) legal order or that the declaration was not prohibited, regardless of who issued it.

The Court thus built its argument solely on its controversial finding on the identity of the authors of the declaration. This is also reflected in the final pronouncement with regard to compatibility of the declaration of independence with the Constitutional Framework:

> The Court has already held . . . that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows 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 Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.[153]

Unlike in relation to Resolution 1244, the Court did not try to make an additional argument to prove that the declaration of independence was not incompatible with the Constitutional Framework. The reasoning is even more problematic because the logic of the reasoning implies that, under the Constitutional Framework, the provisional institutions of self-government were precluded from issuing a unilateral declaration of independence.

6. Conclusion

Given the Court's opinion, the question should have been: is the unilateral declaration of independence of Kosovo illegal under international law? But the original question was: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[154] The Court thus interpreted the formulation 'in accordance with international law' as if it were only a question of prohibition. This article made an argument that the Court should have drawn the full picture and also discussed the absence of a right to issue a unilateral declaration of independence. Only then would the neutrality of law have been properly accommodated within the Court's reasoning.

Although one of the characteristics of this advisory opinion is a strict linguistic interpretation of the question referred to the Court, it also highlights the Court's reluctance to look at the question of statehood, recognition, and the right of self-determination, as well as the fact that the Court was unwilling to address the absence of the right to declare independence. The Court, however, abandoned its language formalism with regard to the authors of the declaration of independence and

153 *Kosovo* Opinion, *supra* note 1, para. 121.
154 UN Doc. A/RES/63/3 (2008).

reformulated the question, so that its identification of the authors of the declaration could still fall within it.[155]

The Court's finding that the authors of Kosovo's unilateral declaration of independence acted as a group of individuals outside the framework of provisional institutions of self-government is controversial, yet, in some parts, it appears to be crucial for the final finding that the applicable law did not prohibit issuing such a declaration. The controversy relates to the fact that the authors of the declaration only had the capacity to act as representatives of the people of Kosovo if they acted in their capacity of (elected) post-holders in the institutions of self-government.[156] If they acted as individuals, they did not have the power to create the legal circumstances in which Kosovo would be unilaterally seeking independence from Serbia.[157] Moreover, their informal identity makes the declaration of independence formally questionable from the aspect of the support of the will of the people in favour of the change in the legal status of the territory.[158]

The informal identity of the authors of the declaration of independence was determinant for the Court's finding that the declaration was not prohibited under the Constitutional Framework. The Court's reasoning indeed implies that it would have been illegal had it been declared by the provisional institutions of self-government. Moreover, in relation to Resolution 1244, the Court carefully stated that the resolution 'did not bar *the authors of the declaration* . . . from issuing a declaration of independence from the Republic of Serbia'.[159] While this formulation makes it possible to argue that the institutions of self-government might have been barred from issuing the declaration of independence, the Court seems to have tried to pre-empt such an interpretation.

Indeed, Resolution 1244 was looked at more broadly and the Court argued that its object and purpose were the creation of an interim administration but not the final settlement of the territorial status.[160] But, in light of the language of the resolution, this interpretation is at least debatable. As the Court put it, 'the language of Security Council resolution 1244 (1999) is at best ambiguous in this regard'.[161] This article does not make an argument that the Court's interpretation of the object and purpose of Resolution 1244 is necessarily wrong, but rather that it does not adequately clarify the ambiguity stemming from the language of the resolution.

Furthermore, the Court obviously tried to downplay the references to territorial integrity that appear in Resolution 1244 both directly[162] and indirectly via the Rambouillet Accords.[163] This is not to say that Resolution 1244 necessarily prohibited unilateral secession, but, by ignoring the references to territorial integrity, the Court certainly did not make its reasoning more persuasive.

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155 See subsection 1.2, *supra.*
156 See subsection 1.3, *supra.*
157 See subsection 1.3, *supra.*
158 See subsection 1.3, *supra.*
159 *Kosovo* Opinion, *supra* note 1, para. 119 (emphasis added).
160 See note 112, *supra.*
161 *Kosovo* Opinion, *supra* note 1, para. 118.
162 See subsection 3.2, *supra.*
163 See subsection 3.2, *supra.*

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With regard to general international law, the advisory opinion confirms that international law is neutral on the question of unilateral declarations of independence. However, the Court confirmed some of the previous practice of the Security Council suggesting that a declaration of independence can be issued in violation of general international law,[164] yet such a violation is not determined by the unilateral character of such a declaration. It is notable that the Court chose to make a reference to *jus cogens* in this context. But the Court was careful enough not to associate a violation of this kind too strongly with *jus cogens*. The article also makes an argument that the Court's reasoning in paragraph 81, in combination with practice of states, UN organs, and Article 41 of ILC Articles on State Responsibility, implies that the obligation to withhold recognition of Kosovo does not apply *erga omnes*.[165] Although this does not necessarily mean that Kosovo is a state, it follows that recognition of Kosovo is not illegal under general international law.

This article did not scrutinize the Court's conclusions, but rather the reasoning that led to the conclusions. It showed that the Court's arguments were often inadequate and unpersuasive. But, although the Court's interpretation of the question posed to it was narrow, the advisory opinion nevertheless has some broader implications for general international legal doctrine and also for the situation of Kosovo. The advisory opinion provides for a strong legal authority in favour of the view that general international law does not prohibit unilateral declarations of independence. It is also significant that the Court made a reference to *jus cogens* in the context of illegal declarations of independence. This is a strong pronouncement that illegality of declarations of independence may be closely associated with a breach of *jus cogens*, and it also implicitly clarifies that an *erga omnes*-owed obligation to withhold recognition of Kosovo is not applicable.

164 See sub-subsection 1.4.1, *supra*.
165 See notes 102–4, *supra*.

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