



EUI Working Papers

LAW 2011/07

DEPARTMENT OF LAW

KOSOVO'S DECLARATION OF INDEPENDENCE AND
THE CREATION OF A NEW LEGAL ORDER:

CAN A REVOLUTION
AGAINST INTERNATIONAL LAW BE LEGAL?

Michael Ioannidis

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
DEPARTMENT OF LAW

*Kosovo's Declaration of Independence and the Creation of a New Legal Order:
Can a Revolution against International Law Be Legal?*

MICHAEL IOANNIDIS

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© 2011 Michael Ioannidis

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Author Contact Details*

Michael Ioannidis

LLM (Cambridge), LLM (Heidelberg)

PhD candidate, University Frankfurt/Main

Max Planck Institute of Comparative Public Law and International Law, Heidelberg

E-mail: mioannidis@cantab.net

* The author would like to thank Professor Marise Cremona and Professor Francesco Francioni for their comments on earlier versions of this paper. This working paper has not simply benefited from discussions with Martina Spornbauer, but would not have been possible without them.

Abstract

This paper discusses the recent Advisory Opinion of the ICJ regarding the accordance with international law of the Unilateral Declaration of Independence in respect of Kosovo. Addressing the Declaration as an attempt to introduce in Kosovo a legal order different from the one that was established for this territory by UNSCR 1244, this paper argues that the Declaration infringes UNSCR 1244 and thus international law.

This argument is based on a conceptualization of UNSCR 1244, and the legal acts adopted by the Special Representative of the Secretary-General on its basis, as having a dual legal nature. On the one hand, they derive their validity directly from the UN Charter. On the other hand, they also function as the foundations of Kosovo's interim constitutional order. Against this background, the Declaration is here addressed as an attempt to overturn this international law-based constitutional order and to establish a new one in its place.

Such an attempt cannot be normatively indifferent to the old constitutional regime, as the Advisory Opinion seems to imply. The ICJ, being an organ of the international law-based order, should rather address as illegal any effort to overturn the territorial administration that the Security Council established in Kosovo. In short, the ICJ has here a role comparable to that of a constitutional court, called to uphold the validity of an international law-based territorial legal order against any attempt to overturn it (revolution in the legal, Kelsenian sense).

Keywords

Kosovo, Declaration of Independence, Revolution, Creation of Legal Order, Kelsen

Introduction

The territory of Kosovo has been subject not only to a comprehensive international territorial administration but also to an intensive international process for determining its final political status. Despite these efforts, the parties concerned were ‘unable to reach agreement’¹ and on 17 February 2008 a unilateral declaration of independence was proclaimed on behalf of Kosovo (Declaration).

This development caused a rift in the international community regarding the recognition of the new entity,² but it did not bring forth a formal response by the United Nations Security Council (Security Council). Regarding the General Assembly of the United Nations (General Assembly), it decided to submit to the ICJ the question of whether the Declaration was in accordance with international law.³ Rendering its Opinion on this question on 22 July 2010, the International Court of Justice (ICJ) concluded that the adoption of this Declaration did not ‘violate any applicable rule of international law.’⁴ In contrast to this finding, this article argues that the Declaration was an effort to overturn the legal order established in Kosovo by United Nations Security Council Resolution 1244 (1999) (Resolution 1244)⁵ and as such violated international law.

This argument is based on the conceptualization of Resolution 1244 as having a dual legal nature. It is international law because it derives its force directly from the UN Charter, but it also functions as the basis of Kosovo’s constitutional order. In this latter sense, together with UNMIK Regulation 1999/1⁶ and the so-called ‘Constitutional Framework’,⁷ Resolution 1244 introduced in Kosovo an international law-based constitution. Under this function, Resolution 1244 established the ultimate standards of legality for all public authority exercised in Kosovo and it legally constituted this territory.

This legal order was sought to be replaced by the Declaration.⁸ The authors of this act intended to introduce a different source of law-making and a different set of ultimate norms for the exercise of public authority in the territory of Kosovo. These norms were new in the sense that their enactment was not authorized by the law valid at the time of their promulgation, namely Resolution 1244. From this perspective, the intention to introduce such new norms expressed an attempt to change the basis of the legal order established for Kosovo by the Security Council.⁹

¹ Report of the EU, USA, Russian Federation Troika on Kosovo, 4 December 2007, annexed to UN Doc. S/2007/723.

² On the issue of Kosovo’s recognition, see in general A. Gioia, ‘Kosovo’s Statehood and the Role of Recognition’ (2008) XVIII Italian Yearbook of International Law 3.

³ UNGA Res. 63/3 (8 October 2008) UN Doc. A/RES/63/3.

⁴ Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, Judgement of 22 July 2010, available at www.icj-cij.org, last accessed September 2010 (hereinafter Kosovo Advisory Opinion), at para. 122.

⁵ UNSC Res. 1244 (10 June 1999) UN Doc. S/RES/1244.

⁶ UNMIK Reg. 1999/1 of 25 July 1999 ‘On the Authority of the Interim Administration in Kosovo’, available at www.unmikonline.org, last accessed September 2010. This Regulation was promulgated by the SRSG on 25 July 1999 but it is deemed to have entered into force as of 10 June 1999 (hereinafter UNMIK/REG/1999/1).

⁷ UNMIK Reg. 2001/9 of 15 May 2001 ‘On a Constitutional Framework for Provisional Self-Government in Kosovo’, slightly amended by UNMIK Reg. UNMIK/REG/2002/9 and UNMIK/REG/2007/29, available at www.unmikonline.org, last accessed in September 2010 (hereinafter UNMIK/REG/2001/9).

⁸ See Kosovo Advisory Opinion, *supra* note 4, at para. 106.

⁹ On this point in general, see H. Kelsen, *Pure Theory of Law* (1967, translation from the second German edition by M. Knight), at 46.

However, as it will be further explained in the following, any attempt to overturn a constitutional order is in normative contradiction with the respective ‘old regime’ it contests. Any attempt to reconstruct a legal order in a way that is not provided by a rule of this order (in which case it would qualify as an amendment) violates it. In the exceptional case of Kosovo, where the old constitutional order is based on a Security Council Resolution, the Declaration, it will be argued, infringes the particular norms of international law establishing the constitutional order of Kosovo. This, it should be noted here, does not address the issue of whether Kosovo can effectively become an independent state; Kosovo’s statehood is a different question that will not be investigated here.

Although the international nature of the relevant norms has been clearly affirmed by the ICJ, their constitutional nature is only implied in the Court’s argument¹⁰ and the consequences of this dual character are left largely ignored. Yet, the implications of the constitutional dimension of Resolution 1244 cannot be overlooked. They are in fact central for the assessment of the legality of the Declaration.

This argument will be developed in the following steps. Firstly, the legal nature of Resolution 1244 and the Constitutional Framework will be investigated. Secondly, the argument will be presented that the Declaration expresses the intent to establish a new legal order in Kosovo. It will be concluded that such an effort is by definition in breach of the legal order it seeks to replace, which in the case of Kosovo is directly based on international law. Before that, a short reference will be made to the way in which the Court demarcated the question before it.

Defining the Question

The Legality of the Declaration as the Only Object of Inquiry

The first issue investigated by the ICJ was the limits of the question posed by the General Assembly. Qualifying the legal question as ‘narrow and specific’,¹¹ the ICJ addressed it as merely concerning the relationship of the Declaration with international law. From this perspective, the question at issue was whether or not international rules exist that address acts declaring an entity to be an independent state.

The Court crucially refrained from rendering an opinion on whether international law confers an entitlement on entities situated within a State to declare their independence. Referring to the principle of self-determination,¹² the Court confined itself to noting the evolution of the right of self-determination during the second half of the twentieth century¹³ and the fact that it has been a ‘subject on which radically different views were expressed.’¹⁴ Regarding, however, the relevance of the discussions on self-determination and remedial succession to the case of Kosovo, the Court held ‘that it is not necessary to resolve these questions.’¹⁵ Thus, the Court avoided rendering an opinion as to how a balance could be found between the principles of territorial integrity and self-determination. This would have required an elaboration on the conditions under which a distinctive group (people)

¹⁰ ‘[T]he purpose of [UNSC Res. 1244 (1999)] is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law.’ Kosovo Advisory Opinion, *supra* note 4, at para. 89.

¹¹ Kosovo Advisory Opinion, *supra* note 4, at para. 51. Judge Simma, issuing a separate Declaration, voices concerns about the ‘unnecessarily limited – and potentially misleading – analysis’ of the Court, see Judge Simma, Declaration, available at www.icj-cij.org, last accessed September 2010, at para. 1.

¹² On this notion see Ch. Tomuschat, ‘Secession and self-determination’, in M. Kohen (ed.), *Secession* (2006); A. Cassesse, *Self-determination of Peoples. A Legal Appraisal* (1995).

¹³ Kosovo Advisory Opinion, *supra* note 4, at para. 82.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at para. 83.

has an international law-based right to secede from a state outside the de-colonisation context.¹⁶ That is, under which conditions such a group should not confine itself to internal autonomy or other forms of self-government within the borders of a 'parent state,' but can claim full sovereignty.¹⁷ In other words, the object of the ICJ's investigation was not the existence of an international-law based right to become an independent state. What the Court examined was the existence of rules regulating *the act of communicating the intention to become an independent state* – regardless of its substantive merits.

The second demarcation made by the Court refers to the potential subject of such an international rule. As accepted by the Court, the Declaration was an act adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo.¹⁸ The Assembly of Kosovo was in turn one of the Provisional Institutions of Self-Government established by the Constitutional Framework and as such an institution operating within the governance framework established for Kosovo by the Security Council. Considering, however, certain features of the text of the Declaration and the circumstances of its adoption,¹⁹ the Court concluded that the authors of the declaration did not act as one of the Provisional Institutions of Self-Government. Regarding their acts on the day of the Declaration, and for the purposes of this Declaration, they should be rather addressed, according to the Court, as individual persons who acted jointly in their capacity as representatives of the people of Kosovo. Thus, the Declaration should be addressed as an act of a group of individuals. That means in turn that any international rule regulating the promulgation of such a declaration would have to *address directly individuals* and not (solely) states.

The following will start from these two lines drawn by the Court, namely that the question refers only to the act of the Declaration, and that the latter should be understood as an act of persons in their individual capacities. Following the argument of the Court, this investigation will proceed from general international law. Nevertheless, the main focus will be on the role of the specific regime introduced for Kosovo by Resolution 1244. It is the latter that – as an international *lex specialis* – is here considered as the most plausible set of norms addressing the Declaration.

The (Non-) Existence of a General Prohibition in International Law

According to the Court, the investigation for an international rule prohibiting a group of persons from declaring independence should start from state practice. After a short reference to the state practice of the eighteenth, nineteenth, and early twentieth centuries, the Court concluded that no prohibition of declarations of independence could be derived by this source.²⁰

Denying state practice as a source for a general prohibition of unilateral declarations of independence, the Court went on to address whether such a rule is implicit in the principle of territorial integrity.²¹ After restating the importance of territorial integrity for international law, the Court considered it to be

¹⁶ On this issue, see Ch. Pippan and W. Karl, 'Selbstbestimmung, Sezession und Anerkennung: völkerrechtliche Aspekte der Unabhängigkeit des Kosovo' (2008) 3 *Europäisches Journal für Minderheitenfragen* 149, at 157 and 158; A. Tancredi, 'Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia' (2008) XVIII *Italian Yearbook of International Law* 37. In general, see also Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (1999), at 296 and 297.

¹⁷ See *Reference re Secession of Quebec* [1998] 2 SCR 217, at paras 126 to 139.

¹⁸ Kosovo Advisory Opinion, *supra* note 4, at para. 76.

¹⁹ *Ibid.*, at paras 102 to 109.

²⁰ *Ibid.*, at para. 79.

²¹ *Ibid.*, at para. 80.

relevant only ‘to the sphere of relations between States’,²² concluding consequently that other actors, such as a group of individual persons, were not capable of infringing it. The assessment of their conduct remains thus irrelevant from this perspective of international law. In essence, the Court argued here that the rule of international law prohibiting the violation of territorial integrity is only addressed to sovereign states. Individual persons organized in groups, like the one declaring independence in the case of Kosovo, are not subject to this rule.

The next step in the Court’s investigation was the importance of past cases where particular declarations have been condemned by the Security Council (like in the one of Cyprus).²³ As in these cases the illegality asserted by the Security Council was based on the violation of *specific norms* of international law, such as the prohibition of the unlawful use of force,²⁴ the ICJ addressed them as an *a contrario* confirmation of the absence of a general prohibition of declarations of independence. Since there was a special rule needed in order for an internationally unlawful act to be established in those cases (as it was), it could not be concluded, according to the Court, that it was the act of declaration as such that attracted the reaction of the Security Council.

In sum thus, the ICJ found that *general international law does not regulate the act of declaring independence*. This conclusion will not be further challenged here; this paper will now turn to the legal assessment of the Declaration from the perspective of the international *lex specialis* relevant in this case. This is considered already sufficient for establishing a violation of international law by the group of individuals declaring the independence of the territory of Kosovo.

The International Law Regime of Kosovo

In the present case, the international *lex specialis* consists of Resolution 1244 and its deriving legal acts. This Security Council Resolution, together with the most fundamental UNMIK regulations based on it, have their source in international law, but they are *also* the functional constitution of Kosovo. In the following, this dual legal nature of Resolution 1244 will be investigated before addressing the validity of this regime on the day of the Declaration.

Resolution 1244 as an International Law-based Functional Constitution

Adopted by the Security Council, Resolution 1244 is, on the one hand, international law. On the other hand, it provided, together with UNMIK regulation 1999/1 and the Constitutional Framework, for the functional constitution of Kosovo.

As to its international law nature, suffice to underline here that Resolution 1244 derives its validity directly from the UN Charter. The same applies to the legal acts adopted by the Special Representative of the Secretary-General (Special Representative) on its basis in the form of regulations.²⁵ These UNMIK regulations, among which are regulations 1999/1²⁶ and 2001/9 (Constitutional Framework),²⁷

²² Ibid.

²³ Ibid, at para. 81.

²⁴ Ibid.

²⁵ M. Ruffert, ‘The administration of Kosovo and East-Timor by the International Community’ (2001) 50 *International and Comparative Law Quarterly* 613, at 623 ([f]rom this perspective, the legal system as described is part of the UN legal system, but with reference to (sic) specific territory’). See also M. Bothe and T. Maruhn, ‘UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration’, in Ch. Tomuschat (ed.), *Kosovo and the International Community* (2002), at 228.

²⁶ UNMIK/REG/1999/1, *supra* note 6.

²⁷ UNMIK/REG/2001/9, *supra* note 7.

determine the rules, organs and procedures for the implementation of the 'main responsibilities of the international civil presence' in the territory of Kosovo.²⁸ Having their basis on Resolution 1244, they must be thus regarded as international law.²⁹ This is affirmed by the ICJ, which observed that

UNMIK regulations [...] are adopted [...] on the basis of the authority derived from Security Council resolution 1244 (1999) [...] and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.³⁰

Beyond that, however, Resolution 1244, together with UNMIK Regulation 1999/1 and the Constitutional Framework, are the bases of Kosovo's interim constitutional order. This is due to their function as containing the ultimate norms determining the law-making organs and procedures within that territory. This set of rules established the foundations of a 'territorial legal system stemming from an international legal source,'³¹ namely the United Nations Mission in Kosovo (UNMIK). The wording of UNMIK Regulation 1999/1 makes this point clear. According to Section 1:

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.
2. The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person.³²

UNMIK Regulation 1999/1 installed thus the Special Representative as the highest political, legislative and judicial authority in the territory of Kosovo. He was to be assisted by UNMIK, the structure and competences of which, alongside the Special Representative's own competences, were further clarified in the first of the regular reports of the Secretary General on the situation in Kosovo. According to this report, the Special Representative was 'empowered to regulate within the areas of his responsibilities' and in doing so he could 'change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws [were] incompatible with the mandate, aims and purposes of the interim civil administration.'³³ Furthermore, the Special Representative could 'issue legislative acts in the form of regulations.'³⁴

UNMIK Regulation 2001/9 (the so-proclaimed 'Constitutional Framework') refined further the allocation of competences in Kosovo by transferring some of the Special Representative's powers to the newly established so-called 'Provisional Institutions of Self-Government' (PISG). Thus, the Constitutional Framework supplemented Resolution 1244 in determining the law-making organs and procedures for the territory of Kosovo, but it *did not introduce another, distinctive source of authority*. The powers of the PISG were closely circumscribed, and they were not envisaged to 'affect or diminish the authority of the SRSG [i.e., the Special Representative] to ensure full implementation of UNSCR 1244 (1999).'³⁵ Accordingly, the Special Representative continued to '[oversee] the Provisional Institutions of Self-Government, its officials and its agencies, and [to take] appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional

²⁸ UNSC Res. 1244 (1999), *supra* note 5, at para.11.

²⁹ Kosovo Advisory Opinion, *supra* note 4, at para. 88.

³⁰ *Ibid.*

³¹ Ruffert, *supra* note 25, at 622; Bothe and Marauhn, *supra* note 25, at 228.

³² See UNMIK/REG/1999/1, *supra* note 6, Section 1.

³³ See Report of the UN Secretary-General, 'On the United Nations Interim Administration Mission in Kosovo' (12 July 1999) UN Doc. S/1999/779, at para. 39.

³⁴ *Ibid.*, at para. 41.

³⁵ See UNMIK/REG/2001/9, *supra* note 7, Chapter 12.

Framework.³⁶ In particular, he had the power to veto the legislation adopted by the newly established Assembly of Kosovo.³⁷ Furthermore, all legislation – whether adopted by the Assembly of Kosovo or enacted on the basis of the reserved powers of the Special Representative – continued to be formally promulgated by the Special Representative and published in the UNMIK Official Gazette.

Consequently, the Constitutional Framework functioned as ‘part and parcel of the specific legal order, created pursuant to resolution 1244 (1999) [...]’ and ‘took effect as part of the body of law adopted for the administration of Kosovo [...]’.³⁸ In other words, although the Constitutional Framework transferred certain competences to the PISG, it did not confer to them the ultimate source of authority in Kosovo.³⁹ The PISG exercised merely delegated powers⁴⁰ and enacted norms valid only to the extent that they were in conformity with the Resolution 1244 regime. That is to say that the ultimate source of validity remained Resolution 1244, while the Constitutional Framework simply rearranged the division of competences within the legal order already in force.

Thus, the international civil presence established by Resolution 1244 retained until the Declaration ‘full civil and political authority and sole responsibility for the governance of the territory of Kosovo.’⁴¹ The regime established on the basis of Resolution 1244 constituted a comprehensive legal order with the actual effect that only norms enacted in accordance with it could be regarded as valid law and basis for the exercise of public authority in Kosovo.

The Relationship between the Resolution 1244-Regime and the Legal Order of the FRY

This comprehensive legal order established on the basis of Resolution 1244 ‘had the effect of superseding the legal order in force at that time in the territory of Kosovo,’⁴² i.e., the constitutional order of the Federal Republic of Yugoslavia (FRY).⁴³ The operative part of Resolution 1244 leaves indeed no doubt as to the comprehensiveness of the international regime established in Kosovo – which was put into place without the authoritative acquiescence of the FRY.⁴⁴ Moreover, the actual measures taken by UNMIK, from the introduction of a new customs system and a new currency to the issuance of new identification documents and the promulgation of legislation on the electoral system,

³⁶ Ibid.

³⁷ See Report of the UN Secretary-General, ‘On the United Nations Interim Administration Mission in Kosovo’ (7 June 2001) UN Doc. S/2001/565. The ICJ in this respect underlines that ‘the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the SRSG’, Kosovo Advisory Opinion, *supra* note 4, at para. 89. To the PISG were conferred competences, *inter alia*, in economic and financial policy, domestic and foreign trade, education, health, environment, transport, as well as good governance, human rights and equal opportunity. See UNMIK/REG/2001/9, *supra* note 7, Chapter 5. For the Special Representative’s ‘reserved powers’, see *ibid*, Chapter 8.

³⁸ Kosovo Advisory Opinion, *supra* note 4, at para. 89.

³⁹ See J. Vidmar, ‘International Legal Responses to Kosovo’s Declaration of Independence’ (2009) 42 *Vanderbilt Journal of Transnational Law* 779, at 798; C. Stahn, ‘Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government’, (2001) 14 *Leiden Journal of International Law* 531, at 547 to 548.

⁴⁰ ‘*Pouvoir d’attribution*’, see O. Corten, ‘Déclarations unilatérales d’indépendance et reconnaissances prématurées: du Kosovo, à l’Ossétie du Sud et à l’Abkhazie’ (2008) 112 *Revue Générale de Droit International Public* 721, at 733.

⁴¹ Kosovo Advisory Opinion, *supra* note 4, at para. 97.

⁴² *Ibid*, at para. 97.

⁴³ The FRY has been replaced in 2003 by the Union of Serbia and Montenegro. Following a referendum in 2006, Montenegro has left the Union.

⁴⁴ As the acceptance by FRY of foreign presence at its territory exercising authoritative powers was the result of military pressure, see Ruffert, *supra* note 25, at 616. See also E. Milano, ‘Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status’ (2003) 14 *European Journal of International Law* 999. Contra C. Stahn, ‘United Nations Transitional Administration in Kosovo and East Timor: A First Analysis’ (2001) 5 *Max Planck Yearbook of United Nations Law* 105, at 146; Corten, *supra* note 40, at 732.

are indicative of the extent of the authority it exercised.⁴⁵ Resolution 1244 and the subsequent acts based on it introduced thus a comprehensive regulatory framework that went beyond any previous example of international territorial administration.⁴⁶

In this sense, Resolution 1244 reduced the FRY's sovereignty over Kosovo to a nominal title or *nudum ius*,⁴⁷ and resulted in the suspension of FRY's sovereign rights in this territory.⁴⁸ From this perspective, the reference in the preamble of Resolution 1244 to the 'sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY)' has to be understood as the maintenance of 'the fiction of Serbian territorial integrity.'⁴⁹ This observation, it must be made here clear, does not address the issue of whether the Serbian loss of jurisdiction over Kosovo had a lawful basis. Neither does it touch upon the question of whether all UNMIK acts were sufficiently covered by the mandate of Resolution 1244, particularly with regard to its reference to Serbian sovereignty. It only contends that, from a particular point on, the FRY did not exercise effective authority over the territory of Kosovo.

After being established, this fact has also legal consequences. As put by Kelsen, 'a constitution is effective if the norms produced in conformity with it are *by and large effective*'.⁵⁰ If as legal order is defined a set of norms that are 'by and large' effective,⁵¹ the actual *ineffectiveness* of FRY's laws in the territory of Kosovo means that this territory was not any more constituted by the FRY's legal order. Since the constitutional order of the FRY did not retain any importance for the validity of the law applied in Kosovo (a fact also clearly acknowledged in the Report of the Special Envoy of the United Nations Secretary-General on Kosovo's future status),⁵² it was effectively replaced by Resolution 1244 and the Constitutional Framework. From the point that 'by and large' effective in Kosovo were *only* the rules enacted on the basis of Resolution 1244, it was this international law-based regime that had the role of the effective constitution.

If certain legislative acts adopted by FRY authorities continued to be in force in Kosovo after the establishment of the Resolution 1244 legal order, they did so because the new highest legislative

⁴⁵ See Tancredi, *supra* note 16, at 44.

⁴⁶ Stahn, *supra* note 39, at 550.

⁴⁷ B. Knoll, 'United Nations *Imperium*: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in "Internationalised Territories"' (2002) 7 *Austrian Review of International and European Law* 3, at 33. See also A. Yannis, 'The Concept of Suspended Sovereignty in International Law' (2002) 13 *European Journal of International Law* 1037.

⁴⁸ See P. Weckel, 'Plaidoyer pour le processus d'indépendance du Kosovo' (2009) 113 *Revue Général de Droit International Public* 257, 263. Weckel questions the value of such a title of sovereignty, which he considers dissociated from its possession and emphasises that the dispossession occurred at the moment of the adoption of Resolution 1244. He compares the case of Kosovo to the unconditional transfer of competences for the administration of Bosnia Herzegovina to Austria-Hungary following the Congress of Berlin in 1878 and the Treaty of San Stefano. The Ottoman Empire merely kept a 'right without substance'. See also Yannis, *supra* note 47, at 1047; Stahn, *supra* note 39, at 540.

⁴⁹ Ratko Marković, Deputy Prime Minister of Serbia, cited by Knoll, *supra* note 47, at 33.

⁵⁰ Kelsen, *Pure Theory of Law*, *supra* note 9, at 210 (emphasis added).

⁵¹ H. Kelsen, *General Theory of Law and State* (1949, translation by A. Wedberg), at 120, 152, 170, and 173; *Pure Theory of Law*, *supra* note 9, at 46, 86, 210, and 290.

⁵² 'For the past eight years Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible.', Letter of the UN Secretary-General, 'Report of the Special Envoy of the Secretary-General on Kosovo's future status' (2007) UN Doc. S/2007/168, at para. 7. The United Kingdom has in this respect argued that '[i]n that resolution [1244 (1999)], the Council took an unprecedented step: it effectively deprived Belgrade of the exercise of authority in Kosovo', see Statement of the Representative of the United Kingdom at the Security Council Meeting on the 18th February 2008 (2008) UN Doc. S/PV.5839, at 12.

authority decided upon their remaining in force in order to avoid a legislative vacuum. Suffice to refer here to UNMIK Regulation 1999/24 '[o]n the applicable law in Kosovo.'⁵³ According to this regulation, Kosovo's legal order consisted of the law in force in Kosovo on 22 March 1989 as well as regulations promulgated by the Special Representative and 'subsidiary instruments issued thereunder' – with the latter taking precedence in case of conflict. The continuous validity of FRY legislation in force in Kosovo on 22 March 1989 was therefore based on the fact the new regime explicitly provided for their 'incorporation': even if the old rules continued to apply (as they did), this was due to a *different constitutional basis*.⁵⁴ In other words, Resolution 1244 expressed a decisive modification of the authority exercised in the territory of Kosovo and changed the reason of validity for the norms of the FRY that remained applicable in Kosovo.

In sum, by effectively introducing a different reason of validity for the norms applicable in the territory of Kosovo, Resolution 1244 introduced a new legal order. Moreover, *Resolution 1244 remained the ultimate basis of this legal order throughout the international administration of Kosovo*. Neither the introduction of the PISG nor the reference to the sovereignty of the FRY could be interpreted as putting into question the international law source of all authority exercised in Kosovo.

Resolution 1244 as Valid Law at the Moment of the Declaration

Moreover, this international law-based constitutional legal order was still in force when the Declaration was proclaimed. With the adoption of Resolution 1244, the Security Council created a legal regime 'by which it had reserved the final word on the Kosovo status for itself.'⁵⁵ Accordingly, the Security Council did not envisage a timeframe for the validity of Resolution 1244, but decided to 'remain actively seized of the matter.'⁵⁶ In the same way, 'the international civil and security presences [have been] established for an initial period of 12 months, to continue thereafter unless the Security Council decide[d] otherwise.'⁵⁷ Furthermore, none of the regulations adopted by UNMIK, including the Constitutional Framework, contained a clause providing for their termination at a particular date. Thus, only an *actus contrarius* of the Security Council could have repealed Resolution 1244. However, at no point had the Security Council taken the decision to amend or repeal Resolution 1244.

Under the international *lex specialis* regime created by the Security Council for the territory of Kosovo, the determination of its international status required the Security Council to endorse any

⁵³ UNMIK Reg. 1999/24 of 12 December 1999, available at www.unmikonline.org, last accessed September 2010 (hereinafter UNMIK/REG/1999/24), Section 1.1. UNMIK Reg. 1999/1 foresaw that the laws applicable in the territory of Kosovo prior to March 1999 were to continue to apply – to the extent that they did not conflict with internationally recognized human rights standards or any UNMIK Regulation, discriminate 'against any person on any ground', or impede UNMIK to fulfil its mandate under Resolution 1244, see UNMIK REG/1999/1, *supra* note 6, Section 3. Intensively criticised by the local legal community, this section was repealed by UNMIK Reg. 1999/25 of 12 December 1999 'Amending UNMIK Reg. 1999/1 on the Authority of the Interim Administration in Kosovo', available at www.unmikonline.org, last accessed September 2010.

⁵⁴ According to Kelsen, '[a] great part of the old legal order "remains" valid also within the frame of the new order. But the phrase "they remain valid," does not give another description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. [...] If laws which were introduced under the old constitution "continue to be valid" under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution.', Kelsen, *General Theory of Law and State*, *supra* note 51, at 117. According to Ruffert, UN-legislation and municipal legal provisions are complementing each other, Ruffert, *supra* note 25, at 623. What is here argued however is that the 'municipal provisions' owe their continuous validity to the new, UN-based legal order, forming thus a part of it.

⁵⁵ M. Bothe, 'Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence' (2010) 11 *German Law Journal* 837, at 839.

⁵⁶ UNSC Res. 1244 (1999), *supra* note 5, at para. 21.

⁵⁷ *Ibid.*, at para. 19.

political settlement. In other words, only a political settlement accepted by the Security Council could fulfil the respective condition set out in Resolution 1244 and lead 'in a final stage' to 'a [formal] transfer of authority from Kosovo's provisional institutions.'⁵⁸ Even under the hypothesis that the negotiations between Kosovo's and Serbia's leadership had led to an agreement on Kosovo's final status, Kosovo's Resolution 1244-based legal order could not have been thereby overturned. The deprivation of the Special Representative of his ultimate authority in all legislative, executive and judicial matters would need in all cases⁵⁹ the endorsement of the Security Council.⁶⁰

Consequently, as the Security Council had not adopted a new resolution or issued an *actus contrarius*, Resolution 1244 was in force on 17 February 2008 as the only basis of a comprehensive territorial legal order.⁶¹

The Emergence of a New Legal Order

The Declaration of Independence as an Attempt to Introduce a New Legal Order

Having addressed Resolution 1244, UNMIK Regulation 1999/1, and the Constitutional Framework as instruments containing the norms constituting the territorial administration of Kosovo, their relationship to the Declaration will be next investigated. The Declaration is understood here as an act aiming at the introduction of a new legal order in Kosovo. Together with the so-proclaimed 'Constitution of Kosovo', they were intended to form the new ultimate standards of legality in Kosovo and to establish a new reason of validity for the law applicable in this territory.

In addressing this dimension of the Declaration, the approach of *Hans Kelsen* regarding the concept of a legal order can offer a good starting point.⁶² According to this understanding, a legal order is the

⁵⁸ Ibid, at para. 11 (f). See also Report of the UN Secretary-General, 'On the United Nations Interim Administration Mission in Kosovo' (12 July 1999) UN Doc. S/1999/779, at para. 18, according to which there cannot be any changes in authority in such institutions without UNMIK's expressed approval. The reports of the UN Secretary-General have to be considered as an authoritative interpretation of the mandate by the Security Council, which can be challenged only in the Security Council itself. See D. Sarooshi, *The United Nations and the Development of Collective Security – the Delegation by the UN Security Council of its Chapter VII Powers* (1999), at 58.

⁵⁹ As Resolution 1244 does 'not contain [...] any provision dealing with the final status of Kosovo or with the conditions for its achievement,' Kosovo Advisory Opinion, *supra* note 4, at para. 114) it cannot even be excluded that the Security Council would decide to re-establish Serbia's authority over the territory of Kosovo (see Weckel, *supra* note 48, at 263) or that, in contrast, it put an end to Serbia's empty sovereignty – always on the basis of a Security Council resolution. This last possibility is contemplated by Corten, *supra* note 40 as well as by Pippin and Karl, *supra* note 16, at 160 and 161.

⁶⁰ See also B. Knoll, 'Fuzzy Statehood: An International Legal Perspective on Kosovo's Declaration of Independence' (2009) 34 *Review of Central and East European Law* 361, at 362. According to Knoll, the mediation efforts by the international community aimed at a 'plurilateral or limited multilateral treaty between the parties in a resolution based on Chapter VII of the UN Charter.' From a different perspective argues Gioia, *supra* note 2, at 27.

⁶¹ '[T]his resolution and [1999/1 as well as] the constitutional framework adopted on its basis 'constituted the [...] law applicable to the situation prevailing in Kosovo on 17 February 2008', Kosovo Advisory Opinion, *supra* note 4, at para. 91. See in this respect also a statement by the President of the UN Security Council, where the 'Security Council welcome[d] the cooperation between the UN and other international actors, within the framework of Security Council Resolution 1244 (1999) [...]' Statement by the President of the Security Council (26 November 2008) UN Doc. S/PRST/2008/44.

⁶² The theory of Kelsen has been frequently resorted to when addressing the question of continuity of a legal order. For a series of cases directly referred to the *Pure Theory of Law* and *The General Theory of Law and State* in order to decide on the legality of a new regime in Pakistan, Uganda, and Southern Rhodesia, see respectively *The State v Dosso* [1958] 2 Pakistan SCR 180, at paras 185 to 186 (Muhammad Munir C.J.), 195 (Shahabuddin J.); *Uganda v Commissioner of Prisons, ex p. Malovu* [1966] EA 514, at paras 535 to 536 (Sir Udo Udoma C.J.); *Madzimbamuto v Lardner-Burke N.O.* [1996] JD/CIV/23/66; *Government Printer* [1968] 2 SA 284 (Appellate Division), 315 (Beadle C.J.). The discussion opened with the legal assessment of the Unilateral Declaration of Independence proclaimed by the regime of Ian Smith in Southern Rhodesia

multitude of norms that share a common reason for their validity.⁶³ All norms that claim to be valid by virtue of their production in accordance with the *same* set of (superior) norms can be understood as belonging to the *same* legal order.⁶⁴

The question of validity is, however, more than merely a theoretical one. It is pivotal to all assessment of legality of an act of authority.⁶⁵ Under this perspective, the legality of an act of public authority resolves to the question of its belonging to a legal order. An act that does not even claim to have this constitutional-based pedigree is regarded as an illegal act of force from the perspective of the 'old' constitutional order.

This does not mean that a new constitutional order with its own, new system of legality cannot be established. What we are concerned with here, however, is *the legal assessment of the 'revolutionary acts' from the perspective of the old regime.*⁶⁶ A revolution, for example, claims to introduce a new reason of validity for legal norms.⁶⁷ By asserting that in future only norms that are in accordance with the revolutionary program should be binding, a revolution seeks to establish a new system of legality in a given territory.⁶⁸ By this assertion, however, a revolution is always in breach of a former constitution.⁶⁹ The fact that it might be eventually successful in establishing a new legal order is irrelevant for the legal assessment of the revolutionary acts from the perspective of the old regime. In other words, to the extent that a revolution takes place in a legally constituted territory, the intent to establish a new reason of validity is the intent to breach the constitution in force in that territory at the time of the revolution.

Taking a step back to the hierarchy of norms, any attempt to replace a valid legal order necessarily implies the rejection of the transcendental-logical presupposition⁷⁰ on which the old constitution is based and suggests the acceptance of a different one in its place.⁷¹ This presupposition – the so-called *Grundnorm* in Kelsenian terms – could be understood as having the form: 'one ought to obey the rules

(Contd.)

by the General Division of the Rhodesian High Court further elaborated on the relevance of the Kelsenian concept of *Grundnorm* for constitutional adjudication, see J.M. Eekelaar, 'Splitting the Grundnorm' (1967) 30 *The Modern Law Review* 156; R.W.M. Dias, 'Legal Politics: Norms behind the Grundnorm' (1968) 26 *The Cambridge Law Journal* 233; F.M. Brookfield, 'The Courts, Kelsen, and The Rhodesian Revolution' (1969) 19 *The University of Toronto Law Journal* 326; J.W. Harris, 'When and why does the Grundnorm Change?' (1971) 29 *The Cambridge Law Journal* 103.

⁶³ See Kelsen, *Pure Theory of Law*, *supra* note 9, at 195 and 201.

⁶⁴ For example, the German legal order is comprised by the norms that have as common ground of their validity their accordance with the *Grundgesetz* and the rule-making procedures provided by the *Grundgesetz*.

⁶⁵ The legality of an administrative executive order for instance, presupposes its conformity (procedural and substantive) with the respective general administrative decree, which in turn must be in accordance with statutory law, itself created according to the applicable constitutional provisions. See Kelsen, *Pure Theory of Law*, *supra* note 9, at 199 and 200.

⁶⁶ See the comparable case of Quebec where the Supreme Canada ruled that, '[a]lthough under the Constitution there is no right to pursue secession unilaterally [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession,' and '[...] a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place.' *Reference re Secession of Quebec*, *supra* note 17, at paras 106 and 146.

⁶⁷ Kelsen, *Pure Theory of Law*, *supra* note 9, at 200.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* According to Kelsen, success in establishing a new constitutional order requires a new, distinctive reason of validity to be shared by an effective number of coercive acts. The question, however, on as to whether or not a revolution is irrelevant for the legal assessment of the revolutionary act from the perspective of the old regime.

⁷⁰ *Ibid.*, at 201.

⁷¹ Namely, that one ought to obey the rules that are produced in accordance with a different constitution. See Kelsen, *General Theory of Law and State*, *supra* note 51, at 118. The *Grundnorm* being a legal-scientific hypothesis, it cannot be invalidated by a revolution in the strict sense of the meaning. The intent of the revolutionaries to establish a new legal order reflects however a change of *Grundnorm*.

that are produced in accordance with the constitution in effect in a particular moment.' As a revolution aims at establishing a new legal order, it asserts the change of this presupposition revealing the contradiction of the two regimes.⁷²

The Declaration of Independence in Relation to the Legal Order Established by Resolution 1244

As explained before, Resolution 1244 formed the basis for a new legal order for the territory of Kosovo.⁷³ Moreover, this legal order was in force on the day that the Declaration was promulgated.⁷⁴ Having in mind the approach of the Declaration as an effort to introduce a new constitutional order for Kosovo, the crucial question is the legal assessment of this effort from the perspective of the old regime.

The view of the ICJ: the Declaration as an act legally indifferent to the old regime

The ICJ seems to have taken here the view that the Declaration does not, and could not, fall within the ambit of the Resolution 1244-based legal order. According to the Court, the Declaration 'was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so.'⁷⁵ This understanding of the Declaration is supported by the Court with reference to the following elements: the identity and the intent of the authors, its wording, and the procedure followed for its promulgation.

Firstly, the Court examined the question whether the Declaration was an act of the Assembly of Kosovo, i.e., a Provisional Institution of Self-Government of the Resolution 1244 legal order, or of a body acting in a different capacity.⁷⁶ Here, the Court emphatically focused on the fact that the authors of the Declaration intended to act beyond the 'standard framework of interim self-administration' by adopting 'a measure the significance and effects of which would lie outside [the interim legal] order.'⁷⁷ This intent is moreover indicated by the fact that the authors of the Declaration 'undertook to fulfill the international obligations of Kosovo, notably those created for Kosovo by UNMIK.'⁷⁸ The Court argues that, since the authors no longer considered sufficient the creation of these obligations by UNMIK, they understood themselves as operating outside the framework of Resolution 1244.

Based on these characteristics of the Declaration, the Court held that 'the authors of that Declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that [Resolution 1244] legal order,'⁷⁹ but 'rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of interim self-administration of Kosovo.'⁸⁰

The Court finds textual support for this view in the absence of any reference to the 'Assembly of Kosovo' in the original version of the Declaration and the fact that it is introduced with the phrase

⁷² See Kelsen, *General Theory of Law and State*, *supra* note 51, at 118.

⁷³ See *supra*.

⁷⁴ See *supra*.

⁷⁵ Kosovo Advisory Opinion, *supra* note 4, at para. 105.

⁷⁶ *Ibid*, at para. 102.

⁷⁷ *Ibid*, at para. 105.

⁷⁸ *Ibid*, at para. 106.

⁷⁹ *Ibid*, at para. 105.

⁸⁰ *Ibid*, at para. 109.

‘[w]e, the democratically-elected leaders of our people [...]’⁸¹ Furthermore, the proclamation of the Declaration, which was improperly signed also by a non-member of the Assembly of Kosovo,⁸² did not follow the normal procedure provided for the adoption of legislation under the Constitutional Framework.

With regard to the Declaration’s content, which goes beyond the competences awarded to the Assembly of Kosovo by the Constitutional Framework, the procedure followed, and the intent expressed, the ICJ concludes that the Declaration was *an act outside the framework of the Resolution 1244-based interim legal order*.⁸³ According to the Court,

[r]esolution 1244 (1999) [...] does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.⁸⁴

The violation of the Resolution 1244-based legal order

This conclusion seems however unsatisfactory from the perspective adopted here, namely of Resolution 1244 and the Declaration *offering a competing approach to the constitutional organization of a given territory* and thereby operating *at the same level*.⁸⁵ According to this view, the authors of the Declaration sought to introduce a new constitutional order in a territory already legally constituted on the basis of a Security Council Resolution.⁸⁶ As Judge Koroma correctly points out in his dissenting opinion, ‘Kosovo was not a legal vacuum’ at the time of the Declaration.⁸⁷

Therefore, the Declaration cannot be outside the scope of the Resolution 1244;⁸⁸ it rather contests its ground of validity. It has, in other words, the purpose to overturn the Resolution 1244-based legal order and establish a new one in its place.⁸⁹ From the perspective of the old regime thus, the Declaration is in contradiction and in breach of it. Such a contradiction does not require a special prohibition. It comes as the necessary consequence of two normative sentences regulating the same content (the constitutional organization of a given territory) in ways incompatible with each other. In any case where a constitution does not provide for a process of succession,⁹⁰ ‘[a] new system is

⁸¹ Ibid, at para. 107, noting that the ‘acts of the Assembly of Kosovo employ the third person singular.’

⁸² Namely the President of Kosovo, *ibid*.

⁸³ Ibid, at para. 109.

⁸⁴ Ibid, at para. 114.

⁸⁵ This is different from a conflict of norms of the same hierarchical level. The peculiar in the present conflict is that the existence of the constitution in force denies the existence of any other constitution in the same territory.

⁸⁶ Since the latter was a regime which, although interim and provisional in nature, was still in force on 17 February 2008.

⁸⁷ Dissenting Opinion of Judge Koroma, available at www.icj-cij.org, last accessed September 2010, at para.7.

⁸⁸ See also the dissenting Opinion of Judge Skotnikov, available at www.icj-cij.org, last accessed September 2010, at para.15 (‘the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework’). See also P. Hilpold, ‘The ICJ Advisory Opinion on Kosovo: different perspectives of a delicate question’ (2011) available at SSRN: <http://ssrn.com/abstract=1734443>, at 31.

⁸⁹ This point is also raised by M. G. Kohen and K. del Mar, ‘The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of “Independence from International Law”?’ (2011) 24 *Leiden Journal of International Law* 109, at 119 (‘a “*coup des Nations Unies*”).

⁹⁰ According to the Supreme Court of Canada, ‘[a]ny attempt to effect the succession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order’, *Reference re Secession of Quebec*, *supra* note 17, at para. 104.

created only when the change of supreme legislators is unconstitutional'.⁹¹ In this sense, the attempt to create a new legal order in Kosovo is unconstitutional from the perspective of Resolution 1244 as it contradicts the normative premise of the latter, namely the presupposition 'one ought to behave as prescribed by the Resolution 1244 legal order.'

Furthermore, this conclusion is not affected by the question of the addressees of Resolution 1244 as approached by the Court. The ICJ did not consider the authors being among the addressees of the Resolution 1244 regime because they were not deemed to operate as an institution of the latter. The Constitutional Framework, however, sets the procedural and substantive conditions for the creation of all norms applicable in the territory of Kosovo. These norms are binding on all natural and juridical persons within the Kosovo jurisdiction.⁹² As the ultimate ground of all public authority in Kosovo, the Resolution 1244 regime has as its addressees all the potential subjects of this authority. If a prohibition of overturning this international law-based ground of validity can be read in Resolution 1244, it is addressed to *all persons* subject to Kosovo jurisdiction on 17 February 2008.

Moreover, the fact that the Special Representative did not exercise his powers of 'overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with Resolution 1244(1999) or [the] Constitutional Framework',⁹³ cannot be interpreted to mean that the Declaration fell outside the scope of the Resolution 1244-based regime.

This seems, however, to be the view of the ICJ. The Court addressed 'the silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008' as an indication that 'the declaration was [not] 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.'⁹⁴ Of course, since the authors of the Declaration did not constitute the Assembly of Kosovo as a PISG, the Special Representative could not proceed by annulling the Declaration.⁹⁵ He could, however, adopt measures of declaratory nature⁹⁶ or initiatives against the persons engaging in coercive acts (such as executive acts) on the basis of the new constitution. In any case, the abstention from any act against the authors of the Declaration cannot mean that the Declaration was irrelevant for

⁹¹ J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (1980), at 95 (discussing the view of Kelsen).

⁹² See also Kohen and del Mar, *supra* note 89, at 115.

⁹³ UNMIK/REG/2001/9, *supra* note 7, Chapter 12.

⁹⁴ Kosovo Advisory Opinion, *supra* note 4, at para. 108.

⁹⁵ A draft resolution of the Kosovo Assembly of 17 November 2005 that reconfirmed 'the political will of the people of Kosovo for an independent and sovereign state of Kosovo' was immediately declared null and void by the Special Representative. In the same way, he annulled a so-called resolution on the territorial integrity of Kosovo of 23 May 2002, which challenged the border agreement between the FRY and FYROM on the basis of its incompatibility with the Constitutional Framework, see Knoll, *supra* note 60, at 393.

⁹⁶ The Government of Serbia and the National Assembly of the Republic of Serbia have declared 'the decision of the Pristina authorities null and void', see the Statement by the Representative of Serbia in the Security Council (18 February 2008) UN Doc. S/PV.5839. The same was the reaction of Britain to the unilateral declaration of independence of Rhodesia. According to the Southern Rhodesia Constitution Order 1965, 'for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect.' Section 2 (1) Southern Rhodesia Constitution Order 1965, S.I. 1965, No. 1952. In the words of the Lord Chancellor (Lord Gardiner), '[t]his was necessary to establish, beyond doubt and at the earliest possible moment, that the purported new Constitution was, and always had been, invalid', Hansard, HL Deb., vol. 270, 25 November 1965, col. 1040. See also the speech of Lord Pearce (dissenting) in the decision of the Privy Council in *Madzimbamuto v Lardner Burke & Anor*, *supra* note 62, according to whom 'for the present argument it makes no difference if an Order in Council expressly made acts illegal and void, so that instead of being plainly illegal and void as contrary to the lawful Constitution and lawful Government of Rhodesia they also become illegal and void as contrary to an Order in Council.'

the Resolution 1244-based legal order or that the latter ceased to exist just because one of its organs refrained from taking measures against its violation.

The Court is right not to assume from this inaction the ineffectiveness and invalidity of the Resolution 1244-based legal order.⁹⁷ According to Kelsen, the validity of a legal order is based on its effectiveness as a whole. As already noted, valid under this perspective are the rules that belong to a legal order that is ‘by and large effective.’⁹⁸ Should a successful revolution completely and effectively substitute a legal order, the rules of the latter would not have anymore the quality of valid law in this territory.⁹⁹ On this ground, there have been indeed cases when the courts of an ‘old regime’ ultimately decided to recognize a revolution as valid source of law, basing this decision on the fact that the revolution succeeded in establishing itself as the only effective authority in a territory.

From the perspective of the ICJ however, the Resolution 1244-based legal order has a distinctive characteristic compared with other regimes eventually overturned by a revolution:¹⁰⁰ it has an international law basis. The Resolution 1244 regime is part of the set of norms that the ICJ is institutionally bound to apply and which, beyond that, remains ‘by and large’ effective. In short, the ICJ continues to be the supreme judicial organ of the legal order which produced the Resolution 1244-based regime. Firstly, there is no reason to believe that the ICJ does not continue to consider itself an organ of the international order that established Kosovo’s territorial administration. Secondly, such an argument could not be based on the fact that Resolution 1244 derives its validity from a legal order that was rendered ‘by and large ineffective’ by the Declaration and the Kosovo Constitution. Even if the new regime did succeed in establishing itself in Kosovo, it did not replace or substitute the legal order on which Resolution 1244 based its validity, namely international law.

From this perspective, the ICJ is *not* in a position similar to that of domestic courts ultimately accepting the legality of new regimes after successful revolutions.¹⁰¹ These courts became part of a new legal order, which, after having established itself, offered the only source from which courts could derive their authority. On the contrary, at the time it rendered its Advisory Opinion, the ICJ derived its authority from international law, where the rules constituting the interim administration of Kosovo also belong. To the extent that the ICJ traces its authority to the same order with Resolution 1244, it could not accept the Declaration as the source of an authority contesting the old, international law-based regime – regardless if the Declaration could ultimately result in creating an effective new order for Kosovo.¹⁰² If the ICJ continued to accept the Security Council as an organ of the same legal order on which it bases its own authority, the rules that established the Resolution 1244 regime could only become invalid by an act belonging to the same order.

In sum, the question of accepting the legality of the Declaration is crucially connected with the position of the ICJ with regard to the legal order that established the Resolution 1244-based regime. If the Court continues to understand itself as an organ of the same legal order that produced Kosovo’s international-law based regime, it could only adopt the constitutional view of that regime. From this

⁹⁷ Since it considers UNSC Res. 1244 (1999) applicable in the case before it.

⁹⁸ Kelsen, *General Theory of Law and State*, *supra* note 51, at 118, 119 and 437; Kelsen, *Pure Theory of Law*, *supra* note 9, at 46, 47, and 201.

⁹⁹ Kelsen, *General Theory of Law and State*, *supra* note 51, at 118.

¹⁰⁰ See the court decisions referred to above in the cases of Pakistan, Uganda, and Southern Rhodesia, *supra* note 62.

¹⁰¹ Like the courts in Pakistan, Uganda and Southern Rhodesia. If there is some parallel to be drawn here, that would be between the ICJ and the English courts, when assessing the legality of the Southern Rhodesian unilateral declaration of independence.’

¹⁰² See the decision of the Privy Council in *Madzimbamuto v Lardner Burke & Anor*, *supra* note 62, especially the speech of Lord Pearce (dissenting), according to whom ‘[t]he *de facto* status of sovereignty cannot be conceded to a rebel Government as against the true Sovereign in the latter’s Courts of Law. The judges under the 1961 Constitution therefore cannot acknowledge the validity of an illegal Government set up in defiance of it.’

perspective, the Declaration can only be seen as the communication of the intent to disregard the validity of a legal order established by international law – and as such it can only be contrary to international law.

The violation of the Resolution 1244-based legal order as necessary consequence of the Declaration

Beyond the contradiction of the Declaration with Resolution 1244 as the foundation of Kosovo's constitutional order, there is also a second argument that could support the view that the Declaration amounts to a violation of international law. This would require a broader understanding of the Declaration, encompassing not only this particular act and the Kosovo Constitution, but also the subsequent acts directed to their enforcement and the consolidation of the new regime.

In contrast with the narrow approach taken at this point by the Court,¹⁰³ a distinction between the Declaration, the Kosovo Constitution, and the acts adopted on their basis seems to be artificial. The Declaration and the Kosovo Constitution have exactly the meaning of authorizing future acts of authority within the territory of Kosovo.¹⁰⁴ The purpose of a declaration of independence is to culminate in acts enforcing the will of its authors, namely to regulate the affairs of a given territory. These subsequent acts of enforcement, however, would specifically violate the legal order in force at the time of the Declaration. For example, a police order to seize the suspect of a crime authorized by the organs of the new constitution is an illegal act of force from the perspective of the old regime, itself subject to criminal sanctions. In this sense, a declaration of independence is necessarily connected with the future commitment of acts that are illegal under the regime it attempts to overturn.

This means that an act of public authority exercised in the territory of Kosovo can derive its validity *either* from Resolution 1244, UNMIK Regulation 1999/1, and the Constitutional Framework *or* from the Kosovo Constitution and the Declaration. If it conforms to the latter, it necessarily contradicts the former. In this sense, future coercive acts based on the new legal order would be unauthorized and would constitute illegal acts of force from the point of view of the constitutional order established by Resolution 1244. From this perspective, the Declaration should be understood as an act having as its necessary consequences the violation of international law¹⁰⁵ rather than 'a measure the [...] effects of which would lie outside [the interim legal] order,' as the Court accepts.¹⁰⁶

The Declaration as violation of specific norms of the Resolution 1244-based legal order

The third level at which a violation of international law could be based, is that of the Declaration violating a specific prohibition of the legal order established in Kosovo by the Security Council. Such a specific provision, deriving its binding force from Resolution 1244 and therefore from international law, would also qualify as a norm applicable by the Court in the case at issue.

Explicit prohibitions of acts intending to undermine the respective constitutional regime are included in many legal orders.¹⁰⁷ In such cases, sanctions are imposed regardless of the violation of other, special rules by the subsequent acts that aim at the effective overturn of the old regime. Acts such as a

¹⁰³ Kosovo Advisory Opinion, *supra* note 4, at para. 51.

¹⁰⁴ See also Hilpold, *supra* note 88, at 33.

¹⁰⁵ See R. Howse and R. Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?' (2010) 11 *German Law Journal* 841.

¹⁰⁶ Kosovo Advisory Opinion, *supra* note 4, at para. 105.

¹⁰⁷ For a comparative survey of criminal offences against the state and the constitutional order, see F.C. Schröder, *Der Schutz von Staat und Verfassung im Strafrecht* (1970), at 227 et seq.

declaration of independence might constitute offences like sedition and high treason¹⁰⁸ or violate more specific provisions, like in the case that the perpetrator held a public office under the old regime.

Relevant in the case of Kosovo could be the provisions of the SFRY Criminal Code, still applicable in Kosovo at the time of the Declaration by virtue of UNMIK/REG/1999/24.¹⁰⁹ Article 114 of this Code, provides that '[w]hoever commits an act aimed at [...] overthrowing [...] representatives of the highest state authorities in contravention of the Constitution [...] shall be punished by imprisonment for not less than one year.'¹¹⁰ Furthermore, the Members of the Assembly of Kosovo, when assuming their duties as organs of the Resolution 1244 legal order, undertook the oath to 'respect of (sic) the constitutionality and lawfulness [...] and the [...] institutional integrity [of Kosovo].'¹¹¹ 103 persons of the group declaring the independence of Kosovo took this oath and assumed the above mentioned obligation being simultaneously members of the Assembly of Kosovo. For these persons, participation in an attempt to change the Resolution 1244-based legal order constitutes a violation of a specific duty. This duty, namely to respect the legal order of which they were organs, is connected to their public office and is not affected by the question of whether the declaring body was the Assembly of Kosovo acting *ultra vires* or not.¹¹²

Concluding Remarks

Resolution 1244, together with UNMIK Regulation 1999/1 and the Constitutional Framework, provided the foundation of an all-encompassing international administration for the territory of Kosovo, functioning as a comprehensive constitutional order. On 17 February 2008, Kosovo was thus not a legal vacuum but had an international law-based constitution.

The validity of this regime was contested by the Kosovo declaration of independence, which sought to introduce a new reason of validity for the rules applicable in Kosovo. In other words, this declaration was an effort to overturn the Resolution 1244-based legal order and establish a new one in its place.

Such an attempt cannot be legally indifferent to the old constitutional regime. The intention to create a new legal order is always directed to overturning an old one and is thus in breach of it. In other words, acts seeking to establish a new legal order are unconstitutional from the perspective of the old regime.

¹⁰⁸ See for example the US law on seditious conspiracy 1994, 18 U.S.C. § 2384, and the debate in House of Lords on whether the unilateral declaration of independence of Southern Rhodesia and the promulgation of a new constitution by Ian Smith amounted to an act of treason, see Hansard, HL Deb., vol. 270, 25 November 1965, col. 1039; S. Ad. Smith, 'Southern Rhodesia Act 1965' (1966) 29 *The Modern Law Review* 301, at 305.

¹⁰⁹ See *supra* note 53.

¹¹⁰ 'Whoever commits an act aimed at: restricting or overthrowing the authority of the working class and working people; undermining the constitutionally-established socio-economic system, socio-political system or the self-management system; overthrowing organs of social self management and authorities, their executive organs or representatives of the highest state authorities in contravention of the Constitution; undermining the economic basis of the country; destroying the brotherhood and unity or violating the equality of nations and nationalities; or changing the federal organization of the country in an unconstitutional way, shall be punished by imprisonment for not less than one year', article 114 of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia, published in the Official Gazette SFRY No. 44, 8 October 1976, available at www.eulex-kosovo.eu under 'Applicable Regulations and Laws in Criminal Matters', last accessed September 2010.

¹¹¹ The full text of the oath reads as follows: 'I, the deputy of the Assembly of Kosovo, elected through a free ballot, solemnly swear today that honestly and truly, with devotion and commitment, with all my being, with all my abilities, shall work in the interest of Kosovo and all its citizens protection and respect of the constitutionality and lawfulness, for the protection of the territorial and institutional integrity, for guaranteeing freedoms and human rights in accordance with the domestic laws and European standards', Rules of Procedure of the Assembly of Kosovo of 20 May 2005, available at www.assembly-kosovo.org, last accessed September 2010.

¹¹² Kosovo Advisory Opinion, *supra* note 4, at paras 102 to 109.

*Kosovo's Declaration of Independence and the Creation of a New Legal Order:
Can a Revolution against International Law Be Legal?*

To the extent that the Declaration expresses the intention to overturn the constitution established for the territory of Kosovo on the basis of the United Nations Charter, is in contradiction with international law. Furthermore, the acts that would necessarily be directed to the enforcement of the new regime would directly violate the legal order established by Resolution 1244. Finally, the Declaration could itself be understood as a violation of specific provisions applicable in Kosovo – and even as an infringement of the specific duty that some of its authors had assumed, namely to respect the Resolution 1244-based legal order.

This article argued that the Declaration cannot be indifferent to the Resolution 1244-based legal order. The ICJ had here to assess the Declaration from a perspective similar to that of a constitutional court in times of revolution. And that could only mean to address any effort to overturn Kosovo's international law-based constitution as contrary to international law.

