

# Documento de Trabajo

# Working Paper

## The Politics of Recognition, Kosovo and International Law

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## Summary

This working paper offers an international legal perspective on the diverse and conflicting international reactions in response to Kosovo's Declaration of Independence on 17 February 2008. Considering the failure of the UN Security Council in conjuring up a common position, whether a condemnation or approval of Kosovo's desire to become an independent and sovereign member of the international community, each State was left to decide, on its own terms, how to react. The Council's failure is the upshot to what may be defined as the 'politics of recognition', ie, a diversity of differing and conflicting reactions of third States in response to the Kosovo Declaration, which reproduce the main positions in the original dispute rather than settling it.

Against this background, the aim of this paper is three-fold. First, it seeks to explain the emergence of these politics. Secondly, it examines the complex nature of the disagreement that lies behind the diverse reactions, which includes a consideration of the reasons behind the different positions of recognising and objecting States as well as an interpretation of why so many States have chosen to remain silent. Thirdly, the paper reflects on the unfortunate implications of these politics. While by no means discarding the inherent international legal dimensions to the original dispute between Pristina and Belgrade, and a role for the International Court of Justice, the paper expresses hesitation about the capacity of international law and the Court to settle the disagreement about international law that is now developing. Furthermore, an exclusive focus on international law detracts attention from the need to continue to approach realities on the ground with a view to establishing a sustainable peace in the Balkan region.

## 1. Introduction

The decision on 17 February 2007 of the provisional authorities in Kosovo to declare independence from Serbia (hereafter the 'Kosovo Declaration' or the 'Declaration')<sup>1</sup> has created considerable turmoil in international affairs. At the heart of the trouble surging through the Peace Palace in the Hague as a result of this decision is the disagreement among third States of how each of them ought to react (or ought to have reacted) in relation to this decision.

The argument that 'the creation of States is a matter in principle governed by international law and not left to the discretion of individual States' may be widely accepted in international legal circles.<sup>2</sup>

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<sup>1</sup> The full text of the Declaration of Independence is available on the Kosovo assembly website: <http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en> (last accessed 15/III/2009).

<sup>2</sup> James Crawford (2006), *The Creation of States in International Law*, OUP, preface to the 2nd edition.

Even so, in the case of Kosovo at least, and until now, it may well be asserted that international law has failed, in a rather blunt way, to offer something like a common framework with the capacity of constraining the range of reactions of third States. The failure of international law to govern in difficult situations, such as Kosovo's, could be explained as the result of its 'incomplete' institutionalisation: in spite of the considerable growth and progressive codification of international law in the last 60 years, there is still no generally accepted international authority to ensure widespread compliance among States with its principles and rules. From this standpoint, the radical divergence of third States in terms of their reactions to the Kosovo Declaration would be explained as the result of a deliberate decision of a considerable number of States to simply ignore its principles and rules, without suffering any kind of sanction as a result. However, it is also possible that the governance failure of international law is the result of a deeper problem. From this perspective, while international law surely entails several principles and rules regarding the terms and conditions of separation and secession of parts of territories of States there might be no clarity as to whether these are applicable to the dispute between Pristina and Belgrade, or whether the Kosovo situation, in fact, represents a unique case that cannot be responded to on the basis of settled international law, but must be dealt with in an unprecedented or exceptional manner. Unlike the first explanation to the governance failure, which seems to point to an institutional problem, the second explanation points to an epistemic one: according to the latter, there is no settled or readily applicable international law to govern in the Kosovo situation.

Against this background, this paper seeks to offer some reflections on the most critical points of international law in disagreement as manifested, in the first instance, in the dispute between Pristina and Belgrade; then, in the ongoing politics of recognition that have ensued in the wake of the Kosovo Declaration; and, third, in the deliberations in the UN General Assembly preceding and following the adoption of the Resolution that requests the International Court of Justice for an advisory opinion on the legality of the unilateral decision of Kosovo to declare its independence from Serbia.<sup>3</sup> Of special interest is an examination of the way in which the politics of recognition and the deliberations in the UN General Assembly reproduce the opposing standpoints between the two parties in the original dispute. A second aim is to reflect on the challenges ahead in the light of my tentative conclusion about the limited capacities of international law and associated judicial institutions to settle the current disagreement.

The paper proceeds as follows: after a brief introduction to the arguments and positions of the two parties in the original dispute, the second section directs attention to the radical divergence of reactions of third States, and their respective positions, and arguments, if any, in their support. It also directs attention to the considerable number of States that until now have chosen to remain outside these politics, and reflects on the possible explanations for this notable silence. The third section centres on the deliberations of the UN General Assembly concerning the request for advisory opinion and on the transformation of the nature of the disagreement, as a result of this request, from a political one into a legal one.<sup>4</sup> The fourth and final section discusses some challenges ahead considering the (irreconcilable) nature of the current disagreement. While seeking to create a space for a reflexive discussion, the paper makes no attempt to offer a claim about how third States ought to react (or have reacted) to the Kosovo Declaration or on how the disagreement ought to be resolved. The aim is mainly exploratory.

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<sup>3</sup> UNGA resolution 63/3. 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, adopted on the 22<sup>nd</sup> plenary meeting on 8 October 2008. The Request for an Advisory Opinion was transmitted to the Court by the Secretary-General of the United Nations in a letter dated 9 October 2008 which was filed with the Registry on 10 October 2008.

<sup>4</sup> For an analysis of the distinction between a legal and a political dispute, see e.g. Vera Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the light of the Lockerbie Case', 84 *American Journal of International Law* 643-677 (1994), at 648 ff.

## 2. The Dispute<sup>5</sup>

### (a) Kosovo's Declaration of Independence

The first paragraph of the Kosovo declaration of independence, adopted by the provisional institutions of Kosovo on 17 February 2008, reads:

‘We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement’.<sup>6</sup>

The remainder of the Declaration consists of an announcement of what kind of State Kosovo is committed to be for its citizens and inhabitants –a secular, democratic and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law– and for the international community –an international law-abiding State that is committed to peace and stability in the region, that wishes to integrate itself into the European family of States and welcomes a continued international supervision of its democratic development by UNMIK and the EU Rule of Law mission as well as the military leadership provided by NATO–. In particular, it is fully committed to follow the recommendations of the UN Special Envoy, including the adoption of a Constitution that enshrines its ‘commitment to respect the human rights and fundamental freedoms of all [its] citizens, particularly as defined by the European Convention on Human Rights’.

The Preamble of the Declaration sheds light on some factors that seem to have prompted its decision which it understands as a way ‘to confront the painful legacy of the recent past in a spirit of reconciliation and forgiveness’. The following arguments may be of special importance:

- (1) Kosovo is a special case arising from Yugoslavia’s non-consensual break-up and is not a precedent for any other situation.
- (2) There have been years of strife and violence in Kosovo, that disturbed the conscience of all civilised people.<sup>7</sup>
- (3) There have been years of internationally-sponsored negotiations between Belgrade and Pristina over the question of its future political status, but no mutually-acceptable status outcome has been possible, in spite of the good-faith engagement of its leaders.
- (4) There are recommendations of UN Special Envoy Martti Ahtisaari that provide Kosovo with a comprehensive framework for its future development.
- (5) In 1999, the world intervened, thereby removing Belgrade’s governance over Kosovo and placing Kosovo under United Nations interim administration. Since then, Kosovo has developed functional, multi-ethnic institutions of democracy that express freely the will of its citizens.
- (6) It is important to resolve the question about the final status of Kosovo in order to give its people clarity about their future, move beyond the conflicts of the past and realize the full democratic potential of its society.

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<sup>5</sup> For a concise background to the dispute as described by international lawyers, see Christopher J. Borgen (2008), ‘Kosovo’s Declaration of Independence: Self-determination, Secession and Recognition’, *ASIL Insights*, vol. 12, nr 2, [www.asil.org/insights080229.cfm](http://www.asil.org/insights080229.cfm) (last accessed 31/1/2009); Colin Warbrick (2008), ‘Kosovo: The Declaration of Independence’, *International & Comparative Law Quarterly*, vol. 57, July, p. 675-679; and K. William Watson (2008), ‘When in the Course of Human Events: Kosovo’s Independence and the Law of Secession’, *Tulane Journal of International and Comparative Law*, vol. 17, Winter, p. 269-274.

<sup>6</sup> See footnote 1 above.

<sup>7</sup> This argument refers to the ethnic cleansing in Kosovo by Serbia in 1998. Individuals have been indicted and prosecuted for serious violations of international law by the International Criminal Tribunal for former Yugoslavia. Case No IT-99-37 PT *Milutinovic et al* (Third Indictment). Ex-President Milosevic was also facing charges relating to Kosovo prior to his death.

While each of these arguments may be contested, suffice it to note for the purpose of this study that these are the main arguments that the provisional institutions of Kosovo set forth in the official document in which they declare its independence in order to explain and defend their decision. The fact that the declaration is accompanied by so many reasons shows, if nothing else, Kosovo's painful knowledge of the contestable nature of the move it made, and could be seen as a general plea for understanding.

#### *(b) Serbia's Reaction*

In the Security Council meeting on the day following the declaration of independence,<sup>8</sup> Boris Tadić, President of Serbia, was given the opportunity to articulate the Serbian position. His speech began with an assertion of the illegality of Kosovo's decision and ended with a statement that Serbia would never recognise Kosovo.<sup>9</sup> In support of this position the following arguments were invoked:

- (1) Security Council Resolution 1244(1999) reaffirms the sovereignty and territorial integrity of the Republic of Serbia, including Kosovo and Metohija. The Security Council and all UN Members are bound by Chapter VII of the UN Charter to respect the sovereignty and territorial integrity of the Republic of Serbia.
- (2) The declaration of independence is contrary to the first principle of the UN Charter, the sovereign equality of all Member States.
- (3) A State cannot lawfully be deprived of its territory illegally and against its will. A historic injustice will have occurred because a legitimate democracy has never before been punished in such a way.
- (4) The mistakes of Slobodan Milosevic cannot be attributed to the current Government of Serbia. He is no longer there and in 1999, when he was in power in Serbia, Kosovo was not granted independence. The current Serbia is a democratic and peace-loving country.
- (5) Since 1999, 250,000 Serbs and other non-Albanians have been expelled from Kosovo. In mid-March 2004, militant and extremist members of the Albanian community in Kosovo burned 35 churches and monasteries and 800 houses in three days, while another 5,000 Serbs and other non-Albanians fled their homes.
- (6) Kosovo sets a precedent that might have catastrophic consequences, and will cause irreparable damage to the international order. It implies the danger of an escalation of many existing conflicts, the flaring up of frozen conflicts and the instigation of new ones.

In the same meeting, the President of Serbia expressed his continued commitment to negotiations and compromise solutions, and asserted that Serbia rejects the use of force as a means for finding a solution to the dispute.

### **3. The Politics of Recognition**

#### *(a) Background*

Had the permanent members of the UN Security Council been able to establish common ground on the final status of Kosovo, it is possible that the unfortunate unilateral decision of Kosovo to declare independence in the face of persistent and radical opposition from Serbia could have been avoided. Nevertheless, this is not to deny that no attempts were made by them to search for an authoritative solution: the initial negotiations were led by the UN Special Envoy Martti Ahtisaari who in 2007 presented a comprehensive proposal for the Kosovo status settlement to the parties involved.<sup>10</sup> Nevertheless, his proposal that Kosovo should be an independent State, and that the international community should assist its population in the furthering of a set of institutions that is incumbent upon that status, was deplored by Serbia and its allies. As a result, that Plan could not be adopted by

<sup>8</sup> Records of the 5839<sup>th</sup> meeting of the UN Security Council on 18 February 2008 (S/PV.5839), p. 4-6.

<sup>9</sup> The Serbian President adds 'For its citizens and institutions, it will forever remain a part of Serbia'.

<sup>10</sup> Letter dated 26 March 2007 from the Secretary General to the President of the Security Council. Addendum. Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1).

the Council.<sup>11</sup> From the standpoint of international law, that means that it remains a set of recommendations without legal effect (although it might certainly be argued that the Plan still carries significant political weight).

To this should be added that Security Council Resolution 1244, which established the international presence in Kosovo in 1999, a presence that also continues in spite of the Kosovo decision, sets forth a framework, including a number of constraints and requirements incumbent upon the parties in negotiating a final settlement. According to the terms of the Resolution, that framework must be a political process meant to establish an provisional agreement that secures substantial autonomous government for Kosovo while fully respecting the sovereignty and territorial integrity of Serbia. Although the Kosovo decision might evince a potential failure of this framework to yield any final results, and in this sense might possibly excuse Kosovo for acting in the way it did, it is also possible and, indeed, this is what several States insist on, that Kosovo's decision amounts to an infringement of this Resolution, which remains the main instrument in force to govern the process towards a final solution and the continued international presence.

Whatever importance we might attach to the role of the Security Council and its Resolution (and, from an international legal perspective, this is a critical question) in determining how the dispute must be settled, the fact that Kosovo declared independence in the way it did implies a significant change in the situation.<sup>12</sup> In international affairs, when a secessionist movement or an international protectorate declares independence for part of a territory of a State, some kind of reaction on the part of other subjects of international law –collective or unilateral– is expected. However, given the Security Council's failure to conjure up a common position –condemnation or approval– in response to the Kosovo decision, each State has been left to decide, on its own terms, how to react.<sup>13</sup>

#### *(b) The Legal Framework*

What factors explain (on the one hand) participation or non-participation of third States and (on the other) disagreement and opposition, on matters of recognition? What is the purported role of international law in this context?

In international legal circles the assertion that the formation of a new State is a matter of fact, and not of law, continues to have considerable weight.<sup>14</sup> From this standpoint, an act of recognition is not an instrument whose function it is to *create* a State, but only to demonstrate acceptance of a given claim to statehood based on a neutral assessment of whether or not a given entity meets the criteria that are incumbent on that title.<sup>15</sup> To put it differently, an act of recognition is not *constitutive* of a State, but rather *declaratory* in nature and effect: it is not capable of revising, but merely of affirming the facts of statehood. Nevertheless, while on this account, a State may exist in

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<sup>11</sup> As a matter of curiosity, however, Martti Ahtisaari was awarded the Nobel Prize for Peace in 2008.

<sup>12</sup> In this context, we might ask whether the Security Council has the mandate to adopt decisions to create a State as a means of responding to threats against international security or whether it would amount to an *ultra vires* act. Indeed, the creation of the International Criminal Tribunal for the former Yugoslavia has been challenged (although unsuccessfully) on similar grounds. See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995

<sup>13</sup> But note that some international law experts insist that “the Security Council must continue to bear the burden which it has deliberately shouldered by adopting resolution 1244”. See C Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’, in G Kreijen *et al.* (Eds.) (2002), *State, Sovereignty and International Governance*, p. 347; also cited in Warbrick (2008), *op. cit.*, p. 686.

<sup>14</sup> Crawford (2006), p. 4.

<sup>15</sup> Formally speaking, the act of recognition has been defined as: ‘l’acte libre par lequel un ou plusieurs Etats constatent l’existence sur un territoire déterminé d’une société humaine politiquement organisée, indépendante de tout autre Etat existant, capable d’observer les prescriptions du droit international et manifestent en conséquence leur volonté de la considérer comme membre de la Communauté internationale’. See art. 1 of *La reconnaissance des nouveaux Etats et de nouveaux gouvernements* (rapporteur: M. Philip Marshall Brown), L’Institut de Droit international (session de Bruxelles, 1936).

spite of negative reactions, including radical condemnations from third States, in practice, a widespread recognition appears to be of particular worth from the standpoint of those institutions claiming to meet the criteria of statehood.<sup>16</sup> In particular, recognition appears to be an essential condition for the new State to be able to *exercise*, in an effective manner, the international rights and obligations that correspond to the status of statehood, including entering into relations with other States, and in this way becoming a fully-fledged member of the international community.<sup>17</sup>

Furthermore, despite the non-decisive nature of recognition from an international legal perspective, it must be noted that recognition by other States can be used as evidence for the legal validity of the claims for statehood set forth by secessionist movements. As James Crawford explains:

‘Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or ‘recognize’ entities the status of which is doubtful: depending on the degree of unanimity and other factors this may be evidence of a compelling kind. Even individual acts of recognition may contribute towards the consolidation of status; in Charpentier’s terms, recognition may render the new situation opposable to the recognizing State’.<sup>18</sup>

Thus, even though universal and even partial recognition of other States is not constitutive of statehood, the number of recognitions received by the claim for the title of statehood is still of enormous practical significance from the standpoint of the claimant, once it is in the business of seeking to present evidence for its claims before an international tribunal or seeking to persuade hesitant or objecting third States in the politics of recognition.

A second relevant factor that explains the emergence of the politics of recognition in the wake of claims for statehood is the openly declared and widely accepted intimate relation between international law and politics in this domain of international affairs. While, formally speaking, the act of recognition purports to be based on neutral (or objective) criteria of statehood, State practice reveals that it tends to be coupled with a range of political considerations.<sup>19</sup> Indeed, when state creation processes –not least when they amount to secession– are violent or traumatic, instead of peaceful and based on agreement, it is reasonable to expect that third States will react on the basis of a range of political considerations. These States might have both personal (national interest-driven motivations) and impersonal (international human rights protection) stakes in these kinds of conflicts, and will decide how to react in line with their particular interests. Considering that the stakes are different depending on a State’s particular interests, including considerable investments, multinational make-up, etc., one group might be eager to lend considerable support to those who set forth the claims for statehood while, at the same time, a different group will oppose the same claims in the most radical terms. Furthermore, since in the case of secessionist movements, a State is facing the risk of losing part of its territory, the act of recognition in these kinds of conflicts tend to imply taking sides, and can even be perceived as intervention in a dispute that from the standpoint of the losing State is internal or domestic. This reality explains why some States choose to remain silent. In addition, the combination of the legal worth of acts of recognition (the first factor mentioned in the previous paragraph) and political stakes explains the temptation of third States to use the act of recognition in a premature way when a State, in all fairness, is still only ‘in the making’ rather than a *fait accompli*.<sup>20</sup>

<sup>16</sup> Statehood criteria include a specific territory, population, government, independence and effectiveness. See Crawford (2006), *op. cit.*, chapter 2; and Remiro Brotons *et al.* (2007), *Derecho internacional*, p. 97-101

<sup>17</sup> But note that in international practice ‘metropolitan recognition’ or recognition from the Parent State (and not simply third State recognition) constitutes an essential condition to become a member of the UN.

<sup>18</sup> Crawford (2006), *op. cit.*, p. 27.

<sup>19</sup> Remiro Brotons *et al.* (2007), *op. cit.*, p. 110.

<sup>20</sup> See Warbrick (2008), p. 690: ‘Nonetheless, international lawyers know all too well that the facts can make the law –



A third and related factor has to do with the scarce international regulation and, thus, the voluntarism associated with the act of recognition. For one thing, from the standpoint of international law, an act of recognition is a discretionary act and not a matter of international legal obligation. This means that a third State, as a general rule, is free to recognise or not, and is not obliged to give reasons for its position. In other words, whether a State wishes to accept or reject a given claim for the title of statehood or to remain passive, and whether or not it wishes to explain or defend its act or omission is a matter of preference. Thus, in controversial situations, a recognising State might deem it wise not to present reasons for its act; however, the reality of controversies might also be a State reason for coupling its act of recognition with a statement of reasons. In other words, while it is certainly possible to set forth political objections to the particular strategies adopted by different third States, international law does not confer any obligations on States to participate in the process of recognition or offer a comprehensive recognition or objection statement. Having said that, some prevailing international legal restrictions must be noted. The act of recognition is in principle not permitted if it constitutes intervention in the domestic affairs of a State, or if the state-creation process in any other way amounts to a serious infringement of international law (such as in the case of illegal annexation of a territory).<sup>21</sup> Nevertheless, even though an act of recognition in principle can be ‘illegal’, considering the incomplete institutionalisation of international law, such an act will have no judicial repercussions.

Each of these considerations –the legal worth of recognition, the political stakes, the scarce international regulation of the process of recognition, the lack of sanction, as well as the voluntarism associated with the act of recognition– explain and, in a sense, legitimise, what can be defined as the ‘politics of recognition’, ie, a diversity of differing and conflicting reactions of third States that could reproduce the main positions in the original dispute rather than settling it. The reactions to the Kosovo decision represent a paradigmatic case in point. While the Kosovo Declaration has been recognised by 56 third States, the majority of which are European, as well as the US,<sup>22</sup> it has provoked serious condemnations by some 40 others, including Russia, China and Spain. Meanwhile, the rest, about half of the members of the international community, remain silent or have communicated that the matter requires further consideration before a final decision is reached.

### *(c) Reasons Stated by Recognising States*

If and when the creation of a new State is uncontroversial, the specific contents of the different recognition statements seem uninteresting. However, if it is controversial, such texts warrant closer attention. Considering the prevailing doubts and disagreements as to whether Kosovo –because of the continued international supervision of basic functions of its institutions– in fact meets the statehood criteria, and whether, according to international law, it is entitled to secede from Serbia despite its refusal to accept such an outcome, most States that have recognised Kosovo have deemed it essential to explain the reasons for their action (although 15 of the recognising States have refrained from explaining it altogether).<sup>23</sup>

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*and the facts will eventually establish whether or not Serbian authority is to continue or a new State has conclusively emerged– but, at the moment, we are still waiting on the facts to be established’. See also Crawford (2006), p. 415-416, when commenting on the emergence of Bangladesh: ‘The indications are that the United Nations did not treat the emergence of Bangladesh as a case of self-determination despite good grounds for doing so, but rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances’.*

<sup>21</sup> Remiro Brotons *et al.* (2007), *Dop. cit.*, p. 111.

<sup>22</sup> According to the website [www.kosovothankyou.com](http://www.kosovothankyou.com) an additional 11 states have directly or indirectly announced that they will recognise Kosovo soon: Bangladesh, Egypt, Haiti, Jordan, Kuwait, Maldives, Oman, Pakistan, Qatar, Saudi Arabia, Timor-Leste and Yemen (15 March 2009). However, it must be noted that this source is not entirely reliable.

<sup>23</sup> Recognising States that give no reasons for their action: Australia, Denmark, Finland, Italy, Latvia, Lichtenstein, Malaysia, Micronesia, Monaco, Netherlands, Norway, Poland, Sierra Leone, Slovenia and Switzerland. Note also that Portugal only states that the ‘independence of Kosovo is irreversible’, as well as San Marino and Liberia, who explain their decision by pointing out that the majority of EU member states have recognised Kosovo.



Most of the States that give reasons for their decision have preferred to stress different political considerations without going into details about international law regarding the general terms and conditions of secession, including possible exceptions.<sup>24</sup> Indeed, one of the most prominent concerns expressed in the recognition statements is the prospect of peace and security in the Balkan region. Indeed, several assert that an independent Kosovo will strengthen those prospects.<sup>25</sup> In a similar spirit, some of the recognising States express concerns about the unsustainable nature of the status quo,<sup>26</sup> and that an independent Kosovo would put an end to Yugoslavia's disintegration.<sup>27</sup>

The recognising States that express a concern for international law do so in a rather superficial manner. For example, Burkina Faso states that its action 'is in accordance with international law'; Afghanistan, the United Arab Emirates and Taiwan (not a member of the UN), in contrast, refer expressly to 'the principle of self-determination'.<sup>28</sup> In addition, occasional references are made to the consistency between their recognition and Security Council Resolution 1244 (1999),<sup>29</sup> the Rambouillet Accords (1999)<sup>30</sup> and the conclusions of the Ahtisaari Plan (2007).<sup>31</sup> At the same time, while international law references are scarce, it is important to note that several States invoke an argument about 'failed negotiations' between Pristina and Serbia to explain their stance. Since from the standpoint of international law one general condition for lawful secession is agreement between the parties, the frequent references to failed negotiations could be seen as affirmations that sustained efforts have been made to conform to this rule and that the basis for their stance must be found in some exception to that rule.<sup>32</sup> Indeed, several States couple their statement about failed negotiations with the claim that Kosovo constitutes a *sui generis* case, ie, a class of its own. No less than eight States assert this understanding in their individual recognition texts.<sup>33</sup> The factors relevant to draw these conclusions were set forth in straightforward terms by Condoleezza Rice, at the time US Secretary of State, as follows: 'the unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's break-up, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case'. She then added that because of its uniqueness the independence of Kosovo cannot be seen as 'a precedent for any other situation in the world today'. The conclusions of EU Council show the same conviction.<sup>34</sup> Although the EU Foreign Ministers were unable to reach an agreement on how to react to the Kosovo decision and, thus, left it to each member State to decide on its own terms on the question of recognition, the common conclusions

<sup>24</sup> All the recognition texts are published on the following website: <http://www.kosovothanksyou.com/> (last accessed on 21 January 2009). Note in this context Senegal, which expresses solidarity with Kosovo because of its Islamic heritage.

<sup>25</sup> In particular Afghanistan, Albania, Bulgaria, Croatia, the Czech Republic, Germany, Japan, Hungary, Korea, Montenegro, Macedonia, Lithuania, France and Turkey.

<sup>26</sup> Austria, Hungary and Luxembourg.

<sup>27</sup> Albania, the UK ('closes a chapter') and Samoa ('closes a conflict').

<sup>28</sup> Albania states that its act of recognition respects 'the legitimate will of the people'.

<sup>29</sup> Costa Rica and Colombia.

<sup>30</sup> Costa Rica.

<sup>31</sup> Colombia, Costa Rica, Estonia, Ireland and the US.

<sup>32</sup> Belize, Costa Rica, Germany, Hungary, Ireland, Macedonia and Sweden. As Germany puts it: 'Although no stone was left unturned in attempts to negotiate a settlement between Kosovo Albanians and Serbians, all such efforts remained in vain. The German government is convinced that after so many years, further negotiations would not have resulted in a breakthrough'. Malta might be included in this group as it states that 'there was no alternative for the region following the events of the past ten years'.

<sup>33</sup> Canada, Colombia, France, Hungary, Latvia, Peru, Sweden and the US. Also, the Costa Rican recognition text alludes to the exceptional nature of the Kosovo case through its reference to 'crimes against humanity'. According to Peru: '*se ha producido una situación única que se deriva de la evolución política que determinó la desintegración de la ex Yugoslavia*'. According to Colombia: '*habiendo examinado, de conformidad con lo expuesto por el enviado de naciones unidas que Kosovo es un caso especial que requiere una solución especial y que no crea un precedente para otros conflictos por resolver*'. According to Canada: 'Kosovo is a unique case, as illustrated by its recent history characterized by war and ethnic cleansing, the role subsequently played by the United Nations and NATO in administering the territory and providing for its security, and the ongoing role that international organizations such as the European Union will play in assisting Kosovo with its transition to full independence'.

<sup>34</sup> EU Council Conclusions on Kosovo, 2851<sup>st</sup> External Relations Council Meeting, Brussels, 18/II/2008.

underline that:

‘In view of the conflict of the 1990s and the extended period of international administration under SCR Resolution 1244, Kosovo constitutes a *sui generis* case which does not call into question [the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council Resolutions]’.

However, while several States have resorted to the *sui generis* argument, it must be noted that it was not a novel one in the context of Kosovo, but had been articulated in the conclusions of the Ahtisaari Plan 2007 and, as already noted, also used by the Kosovo parliament itself. Indeed, the International Court of Justice has affirmed that the entire Yugoslav dissolution should be regarded a *sui generis* case from the standpoint of international law, at least between 1992 and 2000.<sup>35</sup>

The argument about the *sui generis* nature of the case has been coupled with an assertion that the question about the final status of Kosovo –and who is to decide about that– is a ‘grey area’ in international law. For example, in the press conferences following the Swedish recognition of Kosovo, its Prime Minister asserted this point, acknowledging that the Swedish decision (criticised by Left-wing parties as taking too long) had not been an easy one, and that the most important consideration for Sweden has been the fact that Kosovo has been under international supervision for nearly 10 years and that, during this period, it has not been a sovereign part of Serbia.<sup>36</sup> In relation to this point, it is also noteworthy that several recognising States afford special attention to the fact that Kosovo, in spite of its ‘new’ status, will remain under international supervision with no stated deadline. To this end, in its recognition text Afghanistan invokes the international trusteeship provisions in the UN Charter (art. 76(b));<sup>37</sup> Italy recognises the independence of Kosovo ‘within a framework of international supervision’; furthermore, Germany, Hungary and Sweden affirm that the ‘continued international presence’ has been a kind of condition for recognition, and mention specifically the establishment and support of the European-led EURLEX mission for an undefined time. Furthermore, in a similar fashion, Australia emphatically recognises that ‘much remains to be done’. Sweden’s recognition statement reveals the additional complexities:

‘[Sweden] recognizes the Republic of Kosovo as an independent State whose independence is supervised for the time being by the international community... A difficult and demanding process is now being stated to build a Kosovan State that meets international requirements’.<sup>38</sup>

In sum, what most of the recognising States have in common is a shared conviction about the need to assess the case in the light of political considerations (ie, peace and security concerns), and that there is no settled international law governing the case. Some even seem to argue that because of its exceptional character, international law is not ‘fit’ to deal with the case.

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<sup>35</sup> See also *Application for Revision of the Judgment of 11 July 1996 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, judgment of the International Court of Justice, on 3/II/2003, para. 71, in which the Court pronounces that the FRY found itself in a *sui generis* position vis-à-vis the United Nations in the period between 1992 and 2000. For an informative account of the *sui generis* argument, see Alexander Orakhelashvili (2008), ‘Statehood, Recognition and the UN System: A Unilateral Declaration of Independence in Kosovo’, in A. Bogdandy & R. Wolfrum (Eds.), *Max Planck Yearbook of United Nations Law*, 12, p. 1-44.

<sup>36</sup> ‘Sverige erkänner Kosovo’, *Svenska Dagbladet*, 4/III/2008.

<sup>37</sup> It must also be noted that several States refer to the fact that the basic conditions for recognition seem fulfilled, that is, that Kosovo will respect international law, human rights and minority protection (Albania, Belize, Canada, Croatia, Costa Rica, Denmark, Hungary, Iceland, Korea, Netherlands, Norway, Poland, Sweden and the UK). However, for the purpose of this section, this is irrelevant. The basic concern in this section is to sort out how the recognising States reason about the basis for recognising Kosovo as an independent state in spite of failed negotiations.

<sup>38</sup> ‘Sweden recognizes the Republic of Kosovo’, press release, 4/III/2008, <http://www.sweden.gov.se/sb/d/10358/a/99714> (last accessed 15/III/2009).

#### *(d) Reasons Stated by Objecting States*

In stark contrast with most of the recognising States, the great majority of objecting States base their opposition on international law, in particular the UN Charter (the principle of territorial integrity) as well as Security Council Resolution 1244 (1999). The exact number of states which, in fact, object to the Kosovo decision is difficult to establish (not least since there is no standard format for such objections, but also because it is not clear if some of the statements of non-recognising states can be understood as ‘objections’ rather than as an expression of a wish to remain outside the politics of recognition). Even so, a reasonable estimation is that at least 45 States have put forth objections, of which some are formulated in terms of serious accusations that the Kosovo decision amounts to a manifest abridgment of international law.<sup>39</sup>

To begin with, one group of States asserts that the declaration of independence is at odds with international law, ie, that the act is illegal.<sup>40</sup> Some of them emphasise the failure to respect the principle of territorial integrity and/or the sovereignty of States,<sup>41</sup> while others remain more general in their statements, simply referring to ‘international law’. It is important to note in this context the stress on the role of the Security Council and the UN on the settlement of the final status of Kosovo. Indeed, several States insist on the need to respect the decisions of the UN Security Council<sup>42</sup> and support the UN system,<sup>43</sup> and 11 States insist on the authoritative nature of Security Council Resolution 1244 (1999), that affirms the territorial integrity of Serbia and makes a call for mutual agreement between the parties to resolve the dispute.<sup>44</sup> A few more States join the general call for further negotiations, indicating that not all States affirm the failure or exhaustion of negotiations in the way that several recognising States have done.<sup>45</sup> Furthermore, Brazil asserts that ‘a peaceful solution of the issue of Kosovo must continue to be sought through dialogue and negotiation, under the auspices of the United Nations and the legal framework of Resolution 1244’ and that it will ‘await a UN Security Council decision before defining its official position on the matter of Kosovo’s independence’.<sup>46</sup> In a similar vein, the former Foreign Minister of Cyprus stated that: ‘Cyprus will never recognize a unilateral decision of independence outside the UN framework, and in particular by side-stepping the role of the Security Council’.<sup>47</sup> Furthermore, the President of Iran has expressed his concern over the weakening of international organisations.<sup>48</sup>

The main arguments about international law are asserted in the Joint Statement of the Foreign Ministers of India, Russia and China regarding Kosovo, as read by Russia’s Foreign Minister Sergey Lavrov:

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<sup>39</sup> In support for this contention the author of this paper relies upon the collection of objections and statements in Wikipedia ([http://en.wikipedia.org/wiki/International\\_reaction\\_to\\_the\\_2008\\_declaration\\_of\\_independence\\_by\\_Kosovo#cite\\_note-132](http://en.wikipedia.org/wiki/International_reaction_to_the_2008_declaration_of_independence_by_Kosovo#cite_note-132)). However, while Wikipedia affirms that 62 States do not recognise Kosovo as independent, a closer examination of the statement of the listed States reveal that some of them are in the process of recognition or are studying the situation. Thus, for the purpose of this paper, these States cannot be seen as objecting States and are excluded from consideration.

<sup>40</sup> Algeria, Azerbaijan, Belarus, Comoros, Ecuador, Indonesia, Libya, Mali, Russia, Slovakia, Spain, Sri Lanka and Tajikistan.

<sup>41</sup> Argentina, Belarus, Cyprus, Greece, India, Indonesia and Kazakhstan.

<sup>42</sup> Cyprus, Ghana, Iran, Libya and Thailand.

<sup>43</sup> Uzbekistan.

<sup>44</sup> Argentina, Brazil, Comoros, Chile, China, Georgia, India, Iran, Jordan, Laos and Vietnam.

<sup>45</sup> Kuwait, Mexico, Philippines, Singapore and South Africa.

<sup>46</sup> ‘Brasil não reconhece Kosovo sem acordo com Sérvia’, *Diário Catarinense*, 22/II/2008.

<sup>47</sup> ‘Cyprus will never recognize unilaterally declared independence of Kosovo’, *People’s Daily*, 12/II/2008.

<sup>48</sup> Yuri Plutenko (2008), ‘Golamreza Ansari, Iran’s Ambassador to Russia: We don’t have such missiles’, *Moscow News*, 13/III/2008.

‘We believe it must be solved solely on the basis of international law... In our statement we recorded our fundamental position that the unilateral declaration of independence by Kosovo contradicts Resolution 1244. Russia, India and China encourage Belgrade and Pristina to resume talks within the framework of international law and hope they reach an agreement on all problems of that territory’.<sup>49</sup>

While the international legal dimension of the objections is predominant, it is important to note that a closer examination of their statements reveals several different grounds for objection, not all of which are related to strictly international legal concerns, but rather to political ones, including political stakes in how the conflict is to be resolved. Indeed, a second line of argument of objecting States, though not necessarily a legal one, is that Kosovo creates a ‘dangerous precedent’.<sup>50</sup> Indeed, no less than 12 States officially refer to the risks of the Kosovo precedent in the Resolution of problems in their own or neighbouring countries.<sup>51</sup> Some insist that the unilateral act threatens peace and stability in the region and beyond.<sup>52</sup> A few depict the entire recognition process as nothing but an ideological move by the US and/or EU,<sup>53</sup> or their objection as an act of solidarity with Serbia.<sup>54</sup>

#### *(e) The Silent States*

It is by no means irrelevant to a study of the ongoing politics of recognition that have developed in the wake of the Kosovo decision that only about half of the members of the international community actually participate in these politics. While all members of the Security Council certainly are significant participants in the recognition process that has followed, so are all the European States and also some States from other regions that have come to be regarded in the international relations literature as emerging powers, such as Argentina, Brazil and Canada. Still, it is noteworthy that so many States have refrained from advancing any position whatsoever.

The passive States include several Latin American countries (such as Uruguay, Surinam, Dominican Republic, The Bahamas, Barbados, Grenada, Guyana, Honduras, Guatemala, Saint Lucia, and Saint Vincent), a not insignificant number of African States (including Botswana, Burundi, Cameroon, Congo, Ivory Coast, Djibouti, Ethiopia, Eritrea, Kenya, Liberia, Lesotho, Malawi, Namibia, Rwanda, Somalia, Swaziland, Tanzania, Chad, Togo, Tunisia and Zimbabwe) and a few Asian States (among them, Burma, Brunei, Cambodia and Mongolia). While most Islamic States have developed a position on Kosovo, no united front can be discerned (indicating that religious ties at least in this case have not been a determining factor in the development of positions in the politics of recognition) or functioned as an incentive to at least take part. Among Islamic States that remain silent are Morocco, Tunisia and Syria.

The different factors inducing this silence are a matter for speculation. One possible explanation is the simple fact that not all States can be said to have personal stakes in the outcome and settlement

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<sup>49</sup> Joint Statement of the Foreign Ministers of India, Russia and China, regarding Kosovo. Conference in Ekaterinburg, 15 May 2008.

<sup>50</sup> Warbrick (2008), *op. cit.*, p. 679, footnote 28. According to Warbrick it is not clear whether this is a legal or political concern. As he notes: ‘The concern [that Kosovo were to be a precedent may simply be political—that Kosovo would be cited by every potential separatist movement. In legal terms, the implication is that Kosovo is seen as the (mere) application of a general rule, capable of being applied to similar instances of claims to independence; or that it is the vindication of a general power, that somewhere in the international system is the power to deprive a State of its title (and create a new State on the territory of which it has been dispossessed)’.

<sup>51</sup> Argentina, Armenia, Bolivia, Bosnia and Herzegovina, Cuba, India, Israel, Kyrgyzstan, Mali, Russia, Singapore and Sri Lanka. The most protracted issue in this context refers to the implications on the recognition of Kosovo by the majority of the EU countries and on how the ‘frozen conflicts’ in the post-Soviet space are to be resolved, in particular the conflict between Georgia and the entities of Abkhazia and South Ossetia. Until now, these entities have only been recognised by Russia and Nicaragua. See Ivan Krastev (2007), ‘Balkan Deep Freeze. What the Right Kosovo Precedent Might Look Like’, *The Wall Street Journal*, 2/II/2007.

<sup>52</sup> China and Sri Lanka.

<sup>53</sup> Cuba and Venezuela.

<sup>54</sup> Angola.

of the dispute regarding the terms and conditions for secession. Additionally, some governments might prioritise more urgent problems at home and, thus, leave the problems facing other States to one side. A third possible explanation might be concern about the possible negative consequences of taking sides in what seems to be a disagreement of an especially unfortunate kind. A fourth and final explanation is preoccupation about the legality of the Kosovo decision. Indeed, as will be noted in the following section, thirty States that have remained silent voted in favour of the General Assembly Resolution requesting the International Court of Justice to issue an advisory opinion on the matter.<sup>55</sup>

#### 4. The Request for Advisory Opinion

On 8 October 2008, the UN General Assembly requested the International Court of Justice to give an advisory opinion on the following question:

‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’<sup>56</sup>

Since the time of the request the question has begun working its way through the Court machinery. Pursuant to Article 65.2 of the Statute of the Court, the UN Secretariat prepared a dossier containing all relevant documents pertaining to the matter, which has now been transmitted to the Court.<sup>57</sup> Furthermore, the Court has set the limit during which written statements can be presented to its Registrar at 27 April 2009<sup>58</sup> and the deadline by which States and organisations should present their written statements and comments on other written statements at 17 July 2009.<sup>59</sup> The Court’s final opinion can be expected at the very earliest in around a year’s time.<sup>60</sup>

From the standpoint of international jurists, the opinion will most likely be considered authoritative as regards such complex themes as the meaning and scope of self-determination, the terms and conditions for secession, the criteria for statehood and the nature and effects of acts of recognition, and whether the post-Cold War developments have implied any international legal reconsiderations.<sup>61</sup> Nevertheless, its practical implications could be limited since advisory opinions are not binding to parties in the dispute. In addition, given the disagreement between the members of the UN General Assembly, the Security Council and the EU, the Court might have a hard time to establish a common position among its members as to whether the question warrants an affirmative or negative answer and, what is even more challenging, agree on the reasoning backing up its position.<sup>62</sup> Looking back on the Court’s previous advisory opinions in response to controversial

<sup>55</sup> Among the States which, to the best of my knowledge, have remained silent so far are: Bolivia, Botswana, Brunei Darussalam, Cambodia, Congo, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Guatemala, Guinea, Guyana, Honduras, Jamaica, Lesotho, Madagascar, Mauritius, Myanmar, Niger, Nigeria, Panama, Papua New Guinea, Philippines, Saint Vincent and the Grenadines, Solomon Islands, Tanzania, Viet Nam, Zambia and Zimbabwe. In other words, this group composes a by no means insignificant portion of silent States.

<sup>56</sup> UNGA Resolution 63/3. 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, adopted on the 22<sup>nd</sup> plenary meeting on 8 October 2008. The Request for an Advisory Opinion was transmitted to the Court by the Secretary General of the United Nations in a letter dated 9 October 2008 which was filed with the Registry on 10 October 2008.

<sup>57</sup> The dossier is available on the website of the ICJ, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=0> (last accessed 15/III/2009).

<sup>58</sup> Article 66.2 of the Statute of the Court.

<sup>59</sup> Article 66.4 of the Statute of the Court.

<sup>60</sup> This depends on whether *inter alia* the Court will hold both written and oral proceedings or only written ones. It is empowered to hold oral proceedings, but not required to do so.

<sup>61</sup> For an early reflection on post-Cold-war developments, see T Franck (1993), ‘Postmodern Tribalism and the Right to Secession’, in C. Brölman, R. Lefeber & M. Zeick (Eds.), *Peoples and Minorities in International Law*, p. 3-27. For a more recent account, see K Knop (2002), *Diversity and Self-determination in International Law*.

<sup>62</sup> The Court’s advisory opinions have no binding effect. Unless otherwise agreed, the requesting organ, agency or organisation remains free to decide, by any means open to it, what effect to give to these opinions. Nevertheless, the



legal questions posed to it, a split decision is to be expected.<sup>63</sup>

The radical discord concerning international law was felt during the deliberations prior to the decision of the UN General Assembly to request the International Court of Justice on 8 October 2008 for an advisory opinion on the legality of the Kosovo declaration. While some of the States that have insisted on the political and unique nature of the solution for Kosovo argued that the matter is not apt for international judicial review,<sup>64</sup> the States that maintain that there has been an abridgement of international law felt that the decision to ask the Court for an opinion was a victory.

Indeed, the Resolution that authorises the request acknowledges the ‘varied reactions by the Members of the United Nations as to its compatibility with the existing international order’.<sup>65</sup> The Resolution, drafted by Serbia, was adopted by a recorded vote of 77 in favour<sup>66</sup> to six against,<sup>67</sup> with 74 abstentions<sup>68</sup> and 28 UN members absent.<sup>69</sup> The deliberations preceding and following the vote were telling of the diverse international reactions, not merely to Kosovo’s declaration of independence, the recognition (or non-recognition) of others in response to this declaration, but also to the Serbian initiative of turning to the Court in the first place.<sup>70</sup> Thus, some expressed their

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advisory opinions of the Court are generally seen as carrying great legal weight and moral authority, and may have peace-keeping implications. Nevertheless, if the General Assembly were to endorse the opinion that decision is understood as sanctioned by international law.

<sup>63</sup> The decision is adopted by a majority of the judges. On the reality of split decisions in the case of advisory opinions on complex matters and touching upon UN Security Council Resolutions, see, eg, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, 136; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions*, I.C.J. Reports, 1996, p. 226; *Western Sahara, Advisory Opinion*, I.C.J. Reports, p. 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, I.C.J. Reports 1971, p. 16. According to the Statute of the Court, individual judges are entitled to express their own opinions. These opinions can take various forms. A dissenting opinion states the reasons why a judge has voted against the judgment as a whole or what that judge sees as vital aspects of the decision. A separate opinion is written by a judge who has voted in favour of the Court’s decision, but finds him or herself in disagreement with the line of reasoning adopted by the Court. A declaration is usually a brief indication of concurrence and dissent (see Complete Guide to the Court, fifth edition, 2004, 73).

<sup>64</sup> For an analysis of the ‘political question’ and the limits to international judicial review of Security Council resolutions, see Gowlland-Debbas (1994), *op. cit.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Belarus, Bolivia, Botswana, Brazil, Brunei Darussalam, Cambodia, Chile, China, Congo, Costa Rica, Cuba, Cyprus, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Egypt, El Salvador, Equatorial Guinea, Eritrea, Fiji, Greece, Guatemala, Guinea, Guyana, Honduras, Iceland, India, Indonesia, Iran, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Liechtenstein, Madagascar, Mauritius, Mexico, Montenegro, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Philippines, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Syria, Timor-Leste, United Republic of Tanzania, Uruguay, Uzbekistan, Viet Nam, Zambia and Zimbabwe.

<sup>67</sup> Albania, Marshall Islands, Federated States of Micronesia, Nauru, Palau and the US.

<sup>68</sup> Afghanistan, Andorra, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bulgaria, Burkina Faso, Cameroon, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ghana, Grenada, Haiti, Hungary, Ireland, Israel, Italy, Japan, Jordan, Latvia, Lebanon, Lithuania, Luxembourg, Malaysia, Malta, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Oman, Pakistan, Peru, Poland, Portugal, Qatar, Republic of Korea, Moldova, Saint Lucia, Samoa, San Marino, Saudi Arabia, Senegal, Sierra Leone, Slovenia, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Uganda, Ukraine, United Arab Emirates, the UK, Vanuatu and Yemen.

<sup>69</sup> Bosnia and Herzegovina, Burundi, Cape Verde, Chad, Côte d’Ivoire, Ecuador, Ethiopia, Gabon, Gambia, Iraq, Kiribati, Kuwait, Lao People’s Democratic Republic, Libya, Malawi, Maldives, Mali, Mauritania, Mozambique, Rwanda, Saint Kitts and Nevis, Seychelles, Tonga, Tunisia, Turkey, Turkmenistan, Tuvalu and Venezuela.

<sup>70</sup> In the GA deliberations preceding the vote, the UK held that the Serbian request was motivated by political rather than legal reasons and ‘designed to slow Kosovo’s emergence as a widely recognized independent nation’. Albania ‘respectfully disagreed’ with the ‘attempt –logistically legal, but in essence, manipulative– to stall the process of Kosovo’s recognition, with the intention of causing detrimental effects on the ground’. The US argued that the Serbian request was unnecessary and unhelpful to shape the future of Kosovo and Serbia. While fully backing the Court, France

concern about the fact that the request did not muster univocal support: more members had felt the need to abstain rather than vote in favour of the Resolution.<sup>71</sup> Others raised their worries about the way in which the request might endanger the Court as ‘the case raises highly political matters for judicial review’,<sup>72</sup> and prejudice the future political stability and economic progress of the region.<sup>73</sup> Others again expressed their wholehearted support for the outcome.<sup>74</sup> The Serbian Foreign Minister, Mr Jeremic, concluded the 22<sup>nd</sup> session of the General Assembly by noting that ‘it was a great day for the Assembly and international law...’ and that he looked forward to working constructively on the process regarding the future status of ‘their province’.

The Kosovo authorities, in contrast, expressed regret over the adoption of the Resolution, stressing that the independence of Kosovo is irreversible and that the review by the ICJ of the legality of its declaration would not prevent other countries from appreciating the constant progress in Kosovo or recognising it as an independent State.<sup>75</sup> While the matter is working its way through the Court machinery, the provisional authorities continue to take steps that could strengthen their claims to statehood. To this end, they have adopted a Constitution (that entered into force on 15 June 2008), established a Ministry of Foreign Affairs and announced the opening of diplomatic missions and the appointment of mission heads to 10 countries. It has also applied for membership in the IMF and the World Bank, as well as established a Ministry for Security Forces. Furthermore, the Kosovo Assembly continues to adopt legislation although now without any reference to the executive powers of the UN Special Representative under Security Council Resolution 1244.<sup>76</sup> Its hope seems to be that by the time the ICJ has pronounced itself on the issue, statehood is a *fait accompli*, an irreversible fact that supersedes the quarrels about the legal basis for its unilateral decision.<sup>77</sup>

## 5. Challenges Ahead

The question of the final status of Kosovo has immediate practical ramifications for the international community not merely as a result of the failing authority or significance of international law, but also for the prospects of peace and security and, above all, because of the continued international presence. In the meeting held by the Security Council on 18 February 2008, the UN Secretary General, who is responsible for the actual administration of the international presence, warned that, pending guidance from the Security Council, ‘UNMIK will continue to consider Council Resolution 1244 as the legal framework for its mandate and will continue to implement its mandate in the light of evolving circumstances’. He furthermore stated that the overriding objective in Kosovo is to secure overall stability and the safety and security of its population.<sup>78</sup> On 12 June 2008, the UN Secretary General asserted that the UN has a status-neutral approach towards assertions of independence and statehood.<sup>79</sup> At the same time, in his report to the Security Council, he acknowledged that the UNMIK has had to reconfigure in order to attempt to

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did not consider the Serbian request useful for the recognition of Kosovo nor that it would contribute to appeasing tensions.

In the deliberations preceding the vote, Mexico upheld the Serbian request on the basis that the ‘Court, as the principal judicial organ on the international scene, made an invaluable contribution to the rule of law through its opinions’, as did Romania, Slovakia, Panama, Egypt, Greece, Cyprus, Indonesia, Cuba, Comoros, Costa Rica, Iran, Algeria. South Africa stated that ‘though 48 countries had recognized Kosovo, it was also important that 144 countries had not’. Spain asserted that its decision to vote in favour was ‘based on respect for international law, and the great importance Spain attached to the functioning of United Nations organs, including the General Assembly and the Court’.

<sup>71</sup> The UK.

<sup>72</sup> Canada.

<sup>73</sup> Finland, Germany, Canada, the UK, Australia and Switzerland.

<sup>74</sup> Peru, Argentina, Norway, El Salvador, Singapore and Iceland.

<sup>75</sup> Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo (S/2008/692) 24 November 2008, para. 3.

<sup>76</sup> *Ibid.* para. 4.

<sup>77</sup> On the notion of *fait accompli*, see footnote 19.

<sup>78</sup> See Records of the 5839<sup>th</sup> meeting of the UN Security Council on 18 February 2008 (S/PV.5839), p. 3.

<sup>79</sup> S/2008/354.



adapt to the divergent paths taken by the Belgrade and Kosovo authorities since the day independence was declared. In his report to the Security Council, the Secretary General acknowledges that the space in which UNMIK can operate has changed, and that the UN Special Representative is facing increasing difficulties in exercising his mandate due to the conflict between Resolution 1244 and the Kosovo Constitution, which does not take the Resolution into account.<sup>80</sup> Of particular concern is that while the Secretary General's Special Representative is still formally vested with executive authority under Resolution 1244 he is unable to enforce his authority. In fact, such authority can be exercised only if and when it is accepted as the basis for decisions by the Special Representative.<sup>81</sup> At the same time, the rule of law mission deployed by the Council of the EU is in the process of replacing the UNMIK.<sup>82</sup> It is expected to assume responsibilities in the areas of policing, justice and customs, under the overall authority of the UN, under a UN umbrella headed by the UN Special Representative, and in accordance with Resolution 1244.<sup>83</sup> Serbia and the Kosovo Serbs have indicated that they would find an enhanced role for the EU in the area of the rule of law acceptable, provided that such activities are undertaken under the overall status-neutral authority of the UN.<sup>84</sup> Following discussions, the Secretary General understands that both Pristina and Belgrade recognise the need to devise a solution that allows for the continuation of the international civil presence in Kosovo.<sup>85</sup>

Regardless of who is right, in the end, about the correct or least problematic standpoint in the dispute about the final status of Kosovo, and who is to decide on that question, a continued international presence is forced to adjust to changing realities on the ground. To what extent and for how long this can be done in an *ad hoc* fashion without any clear mandate on what the ultimate objective of that presence is, remains unclear. At the same time, it seems clear that it will be difficult for that international presence to avoid taking sides in the dispute and to be neutral, not least in the event of violence erupting again. Even so, the prospects for a new decision by the Security Council are limited. The statements presented in the meeting of the Security Council on 18 February 2009 are evidence of how difficult it is to agree on a new Resolution. Indeed, all further attempts to progress on this matter by the Council members since that day have been in vain. While the Council President recently presented a statement accepting the arrival of the EU Rule of Law mission to Kosovo in order to share the burdens of the continued international presence, no further decisions have been made or are foreseen. In practical terms, this means that Resolution 1244, adopted within the framework of Chapter VII of the UN Charter, remains in force, despite the fact that it does not foresee responding to changing realities on the ground.

Nevertheless, as already noted, it is likely that the advisory opinion of the International Court of Justice will not succeed in establishing a way forward, at least not in an authoritative manner (obliging the parties), but neither in a persuasive way. In the worst case scenario it will reproduce instead of overcome the disagreement it was meant to settle and furnish sophisticated arguments and lines of reasoning in favour of both sides. In the best of possible worlds its judges will be able to muster common positions on some of the most critical points of international law while not

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<sup>80</sup> Report of the Secretary General (S/2008/692), para. 21, and Report of Secretary General (S/2008/354), paras 7 and 9. The reaction of Kosovo could also be seen as the result of the fact that UNMIK failed to develop mechanisms of accountability. See 'I Kosovo star FN over lagen', *Dagens Nyheter*, 14/VI/2007, <http://www.dn.se/DNet/jsp/polopoly.jsp?d=1058&a=660904>.

<sup>81</sup> *Ibid.* para. 21.

<sup>82</sup> The Council of EU adopted a decision on 4 February 2008, 13 days before the declaration of independence, to deploy a rule of law mission to Kosovo, and to appoint an EU Special Representative for Kosovo who will, among other functions, coordinate the work of the EU in Kosovo. It is the largest civilian mission ever launched under the ESDP. See Council Joint Action (2008/124/CFSP) of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO). For further information about the EU rule of law mission to Kosovo see: <http://www.eulex-kosovo.eu/> (last accessed 31/I/2009).

<sup>83</sup> *Ibid.* para. 23.

<sup>84</sup> S/2008/354), para. 12.

<sup>85</sup> S/2008/354, para. 12.

agreeing upon what are the main considerations of law and fact that wield those positions.

However, this implies that the way the dispute is to be settled, if at all forthcoming, might not be determined by international law, as its capacities in this domain of international affairs to resolve conflicts of this kind seem limited, but must be sought through compromise and negotiation. Indeed, if the reflections of the Swedish Minister for Foreign Affairs about the challenges ahead are correct, Kosovo's decision to secede from Serbia followed by the recognition of some 60 states will certainly not bring the conflict in the Balkan region to an end; neither will it improve the prospects for peaceful relations between the US, Russia and China for years to come. As Carl Bildt reiterates, sustainable peace cannot be achieved by a tactic of avoidance but by approaching these realities and searching for agreement where it can be found.<sup>86</sup> For him, it is not about who is right, but about finding a way forward in a situation of protracted disagreement and discord. At the same time, while there might be disagreement about international law, including the roots of disagreement (wilful ignorance of its rules and principles, uncertainty or exceptionality), what might be agreed upon is that the current state of affairs constitutes a challenge, not only to the continued international presence, or peace and security, but also to international law as such. In particular, it constitutes a challenge to its authority and ability to govern in difficult situations where authority and governance seem to be most needed.

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<sup>86</sup> Carl Bildt, 'Därför Sveriges erkänner Sverige Kosovo', *Svenska Dagbladet*, March 2008.