“YOU SAY YOU’LL CHANGE THE CONSTITUTION” – THE ICJ AND NON-STATE ENTITIES IN THE KOSOVO ADVISORY OPINION

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I. INTRODUCTION

One can easily imagine on 22 July 2010 in the Great Hall of the International Court of Justice the ten judges of the majority congratulating themselves for the shrewdness they deployed in the Advisory Opinion on the Unilateral Declaration of Independence with respect to Kosovo. They had been able to solve apparently without the slightest effort a legally complex, politically overcharged, highly divisive and seemingly intractable question. But besides the understandable satisfaction at having overcome the hurdle, did the judges of the majority perform a service to international law (II), to UN law (III) and finally to the Court itself (IV)? The answer to each of these three questions is on balance rather negative.

II. THE OPINION AND GENERAL INTERNATIONAL LAW

The decision of the Court to reformulate the question put by the General Assembly, and to investigate the real authorship of the Unilateral Declaration of Independence (UDI), has been widely commented on, having been indeed, as Vice President Tomka put it in his declaration, “outcome-determinative”\(^1\). Less noticed has been the choice of the Court to start with an investigation of general international law, before coming to the \textit{lex specialis} of SC Res. 1244 (1999).\(^2\) The choice is not as innocent as it might at first sight appear. Serbia had presented its case for the illegality of the UDI by first and foremost stressing its violation of many aspects of

\(^1\) See Declaration Tomka, para.1.

\(^2\) See however Dissenting Opinion Bennouna, par. 38, who rightly pointed out that “Ordinarily, the Court should first look into the applicable \textit{lex specialis} (that is to say the law of the United Nations) before considering whether the declaration is in accordance with general international law”. In the literature see Cedric Ryngaert, “The ICJ’s Advisory
the legal regime established by Res. 1244, and only in a second step and for completeness’ sake by touching on its incompatibility with general international law, in particular with the principle of the territorial integrity of states. On the contrary, the authors of the UDI had first tried to demonstrate that the UDI was in accordance with general international law, and only subsequently that it did not contravene Res. 1244 (1999). It is remarkable, and telling, that the two different paths were consistently followed by almost all states intervening respectively in support of Serbia or in support of the authors of the UDI.

The reasons for the second option become clear when one carefully considers the Court’s construction. Disregarding the will of the General Assembly, which had intentionally chosen the ample formulation “accordance with international law”, the Court narrowed the purpose of the request to the issue whether the UDI had violated any rule of international law, which for the Court was equivalent to asking whether the UDI was prohibited by international law.

Having affirmed that general international law does not prohibit a UDI as such, which is per se an obviously incontrovertible statement but meaningless if taken in abstract terms, the Court went on to investigate whether – exceptionally – Res. 1244 provided for any such “specific prohibition”. As we will later see, through a debatable interpretation of Res. 1244 the Court reached the conclusion that that was not the case.

Opinion on Kosovo’s Declaration of Independence: A Missed Opportunity?”, in Netherlands International Law Review 57 (2010), 481, at 489, who finds the sequence illogical and “somewhat confusingly”.

3 See CR 2009/24, 43 ff. (per Djerić, Zimmermann), 63 ff. (per Shaw).
4 See CR 2009/25, 30 ff. (per Müller), 46 ff. (per Murphy).
5 See the written and/or oral statements by Argentina, Azerbaijan, Bolivia, Brazil, China, Cyprus, Egypt, Romania, Russian Federation, Spain, Venezuela, the exceptions being Belarus (which however mainly pointed at UN law), Iran (which by the way limited itself only to general international law without any mention of Res. 1244/1999), Slovakia and Vietnam.
6 See the written and/or oral statements by Albania, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Japan, Jordan, Latvia, Luxemburg, Netherlands, Norway, Poland, Switzerland, USA, the only two exceptions being Austria and Bulgaria.
7 Kosovo AO, para. 56.
8 Kosovo AO, para. 84.
9 See diss. op. Bennouna, para. 39: “It would … make no sense to assess the accordance with international law of a declaration of independence without regard to who the author(s) are or to the background against which it was adopted. Likewise, the Court’s conclusion in this respect is itself meaningless”.
10 Kosovo AO, para. 101.