

МЕЖДУНАРОДНОЕ ПРАВО; ЕВРОПЕЙСКОЕ ПРАВО

THE LAW APPLICABLE TO THE DECLARATION OF INDEPENDENCE OF KOSOVO: STILL A PUZZLING ISSUE

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The Advisory Opinion of the International Court of Justice on the declaration of independence of Kosovo has left some crucial questions open. The main steps of the Court's reasoning are re-examined in the article, the most delicate issue being the relationship between international law and domestic law. In particular, the exclusion of the possibility for international law to produce effects at the individual level - that was determinant to the conclusion reached in the Advisory Opinion - is questionable.

Key words: international law, domestic law, acts of the UN, domestic jurisdiction, direct effects of international law norms.

1. The question raised by the General Assembly of the United Nations

The opinion of the International Court of Justice «on the conformity of the unilateral declaration of independence in respect of Kosovo» has deserved great attention and much criticism [13]. Many commentators regret that the Court did not deal with some controversial issues, such as the extent of the right of peoples to self-determination, or the existence of a right to «remedial secession» [2; 3; 4; 5; 12; 24; 33].

A few years afterwards, this article will rather consider the logical structure of the complex reasoning of the Court, about which other reasons for perplexity might be raised, not concerning the content of the final answer to the question, but rather some logical steps and some theoretical assumption used to reach it.

The question put to the Court by the UN General Assembly (UNGA) was: «Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?» [32].

The Court understands the question as calling for an investigation into the existence, in international law, of a prohibition to declaring independence: the sources of international law are taken into consideration, from which a norm containing such a prohibition could be deduced.

First of all, general international law is considered and the Court observes that it does not include any provision setting such a prohibition, there are no difficulties to

such an assessment, given that there is no relevant practice of States, nor a consistent *opinio iuris*.

Then the Court, already dealing with a more delicate issue, declares that the prohibition cannot be deduced, as an implicit corollary, from the general rule protecting the territorial integrity of States [13. Para. 79]. In fact, several of the many intervening States had claimed the incompatibility of a declaration of independence — as a prelude or consequence of secession — with the manifold duties to abstain from any act that could compromise the territorial integrity of a State [26. P. 526]. However, the Court avoids deeper investigation, observing that «the scope of the principle of territorial integrity is confined to the sphere of relations between States» [13. Para. 80]. Since in the case in question the presumed violation of Serbian territorial integrity cannot be attributed to a State, the question of compatibility of a declaration of independence with the principle of territorial integrity can be left undecided.

This reasoning assumes that the behavior of the individuals that declared the independence of Kosovo cannot be located in the field where the norms ruling relations between States apply: that is, in the domain of international law. However, the Court points out that international law is the only law that it shall examine, thus literally limiting its task to the solution of the specific question laid before it. This approach, which implies assuming the coexistence of different and separate legal systems — each having its own subjects — is substantial in the framework of all the legal reasoning that the Court will follow, to reach its final response. In this way the Court will draw, in successive stages, a sort of «mosaic» of legal systems, the tiles of which do not always match-up. Beyond the metaphor, as will be seen, some points of the elaborate reasoning seem to lack consistency — from a strictly logical point of view — so that the answer finally given to the UNGA might indeed be questionable.

2. The Resolution 1244 (1999) and the establishment of the UN interim administration in Kosovo

Following the intervention of the NATO in Kosovo, acting under Chapter VII of the UN Charter [11], the UN Security Council (UNSC) adopted the resolution 1244 (1999), to normalize the situation in the region. The resolution provides for the establishment of an interim administration «to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo» [28]. The situation of Kosovo, as the Court of Justice recognizes, is in various ways exceptional, but the action of the UN is part of consolidated practice of territorial administration [21. P. 34].

A key element of the resolution is the lack of any indication concerning the final status of the region, that will be determined by means of negotiations to be held between the Federal Republic of Yugoslavia (FRY) and all the parties concerned (1): because this crucial point is left open, the resolution could be adopted with the acceptance of the FRY and without, the otherwise certain, veto of Russia. The negotiations are meant to lead to a political settlement, which shall determine whether Kosovo will have access to independence or remain under the sovereignty of the FRY, although with the concession of a broad autonomy.

According to resolution 1244, the FRY has to withdraw all its police and military forces from Kosovo, while a two-fold international presence is established to the

purpose both to enforce peace and security in the region, assuring safe and free return to refugees and displaced people (KFOR mission), and to provide an interim administration. For this second task, resolution 1244 entrusts a civil mission that will be called UNMIK (UN Interim Administration Mission in Kosovo). UNMIK is the authority in charge for providing the essential civil and administrative functions, including the maintenance of civil law and order.

Then, a Special Representative of the Secretary General of the UN (SRSG) is appointed, as the major authority in charge for the interim administration. As soon as he took office, the SRSG issued a regulation from which the fundamental features of the provisional system emerged.

As this regulation clearly states, «all legislative and executive authority with respect to Kosovo, including the administration of the judiciary» is the competence of UNMIK [29]. UNMIK has the power to issue legislative acts in the form of regulations, that are promulgated by the SRSG. The regulations issued by UNMIK — except for the case of revocation by the issuing institution itself — are meant to stay in force until they are replaced by legislative or administrative acts of the definitive institutions, which shall be identified at the conclusion of the political settlement on the final status of Kosovo.

Therefore, the interim administration system is not an independent but a derived legal system, since it draws its legitimacy, as well as its limits, from UNSC resolution 1244 and eventually, through this, from the UN Charter. Since resolution 1244 is part of international law, it is also part of the international *lex specialis* that the Court intends to examine to respond to the question laid before it.

3. The nature and limits of the interim administration and the Constitutional Framework

Because of its derived nature, the interim administration in Kosovo can operate only to fulfill the functions attributed to it by UNSC resolution 1244, respecting the principles and limits that the resolution imposes on it [25]. The crucial limit, which will be considered here, is the provisional character of the special legal order created, which corresponds to the provisional and temporary nature of the mandate of UNMIK. It is a sort of «genetic» limit, preventing the provisional institutions from taking any measure that could affect the final status of Kosovo, since resolution 1244 declares «the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia» [28]. The Court, indeed, states: «this resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process» [13. Para. 99]. After a political settlement is reached and before winding up its activities, UNMIK will have one last task: «at a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement» [28. Para. 11].

Being committed to respect the sovereignty of Serbia, UNSC resolution 1244 can not be interpreted as a valid legal grounds for any act by the provisional administration that could affect the decision on the final status of the area. Indeed, resolution 1244, pro-

vides not for the extinction, but merely for the suspension of the exercise of Serbian sovereignty in the territory of Kosovo, as long as UNMIK will be in charge (4).

Serbian law is to be replaced by UNMIK regulations: nevertheless, the very first of them mentions that law as a subsidiary source on matters not regulated by the provisional system (2). Serbian law can therefore still be applied, not because of its own effectiveness, but because of the reference made to it in the regulation 1/1999 and just within the limits indicated by it.

Subsequently, UNMIK regulation 59/2000 lays out a more detailed hierarchy of the sources of the provisional system, establishing that Serbian law — on the bottom rung — can be applied only if effects of its application are not in contrast with all of the superior sources (3).

The UNMIK regulation 2001/9 prepared the legal grounds for developing the self-government for the people of Kosovo, by providing for the holding of free elections and adopting a Constitutional Framework (CF), meant to rule the future local institutions [31].

Despite its name, the CF for self-government is not an act setting the fundamental norms of a new, independent legal system, whose powers lay in its own sovereignty [18; 27]. The legal system thus established can only have a derived character, taking its powers and legitimacy from UNSC resolution 1244, and the preamble of the CF declares that the activity of the provisional institutions shall not in anyway «affect or diminish the ultimate authority of the SRSG to ensure full implementation» of the resolution 1244». Art. 12 of the CF, then, is clear in establishing that the institutions of self-government shall exercise their functions in a manner consistent with the provisions of the resolution 1244: in cases of violation of the limits derived from the latter, the SRSG has the power to take «appropriate measures» (5).

Resolution 1244 (as already seen) is an act of international law and hence it is part of the *lex specialis* that — according to the Court — has to be considered to answer the question posed by the UNGA. Such international *lex specialis* does include also the CF, since it was adopted on the basis of resolution 1244. It is as much as saying that the international legal nature of the former is passed on to the latter (6): therefore, the question concerning the legality of the declaration of independence within international law, is examined by the Court in the light of both acts.

It was reasonable to expect, then, that the Court would deny the «accordance with international law» of the declaration of independence, because it was an act affecting the final status of Kosovo and, thus, in contrast with both the CF and UNSC resolution 1244 and, finally, with international law.

4. The declaration of independence of Kosovo and the identity of its authors

It was not so. As is well-known, the Court at this point enters into detailed analysis to qualify the authors of the declaration, holding that the identity of those subjects «is a matter which is capable of affecting the answer to the question whether the declaration was in accordance with international law» and, therefore, it feels itself «free to examine the entire record and decide whether that declaration was promulgated by the Provisional Institutions of Self-Government or by some other entity» [13. Para. 52–54]. The change of the text of the original question raised by the UN General As-

sembly — removing the reference to the Provisional Institutions of Self-Government of Kosovo — clearly reflects this assumption.

So, the Court notes that the authors of the declaration of independence, although meeting within the Provisional Assembly, had acted not in the name of this institution, but in another capacity. On the basis of this, the Court was able — as will be clarified in the next section — to conclude that the declaration of independence «did not violate any applicable rule of international law» [13. Para. 122].

The qualification of the legal identity of the authors of the declaration is, in itself, one of the aspects of the reasoning of the Court that can be criticized. Indeed, if it is true that the authors of the declaration did not act in the name of the Assembly, it is also true that they did not proclaim independence as private citizens.

Instead, they qualify themselves as «the democratically-elected leaders of our people»: therefore, they still declare to be acting in a role that derives from their taking part in the elections. And these elections — being based on the CF — could not lead to any result allowing those «democratically elected» to act beyond the fundamental limit of respect for UNSC resolution 1244. In other words, since the attribution of «democratically elected» was obtained on the basis of the CF, it is difficult to understand how those people who were elected could not be subject to the same CF, so that it should even be immaterial whether or not they qualify themselves as the «the Assembly».

Another reason why — according to the Court — the declaration of independence is not attributable to the Assembly, would be the atypical composition of the meeting in which it was issued. Indeed, the President of Kosovo also participated in it, qualifying himself as such and finally signing the declaration: but his presence is not foreseen for ordinary sessions of the Assembly [13. Para. 107]. Hence, the Court holds that the meeting cannot be qualified as a session of the representatives of the Kosovar people constituting the Assembly, so concluding that the paternity of the declaration of independence cannot be attributed to the Assembly.

The President of Kosovo, however, is himself one of the provisional authorities provided for in the CF: so, the conclusion to be drawn should have been — at least — that his participation in the proclamation of independence had occurred in violation of international law. Actually, Serbia's expectation that the SRSG would intervene, as the supervising authority, was not misconstrued.

5. The lack of direct effects of the *lex specialis* on the position of the authors of the declaration

The *lex specialis* of international law considered by the Court includes UNSC resolution 1244 and the CF, but none of them, according to the Court, can have direct effect on individuals.

UNSC resolution 1244, the Court observes, does not include individuals among its addressees: had its intention been different, the UNSC would have indicated it expressly. Therefore, the resolution does not have effects upon individuals and, being so, it does not prevent them from declaring their independence acting as private persons [13. Para. 114].

As for the CF, the Court holds that it also regulates only the activity of the provisional institutions, not the behavior of individuals. Thus, because the authors of the declaration had not acted as the provisional Assembly, «it follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government» [13. Para. 121].

Therefore neither of the two acts forming the international *lex specialis* was applicable to the behavior of Kosovar citizens who authored the declaration: the conclusion of the opinion, therefore, is that «the adoption of the declaration of independence did not violate any applicable rule of international law» [13. Para. 122].

An essential premise for upholding such a conclusion is the legal «placement» given by the Court to the acts of individuals, one on a level different from international law. Only by means of such an assumption can the conclusion be reached that acts of simple citizens do not «meet» the limit established by UNSC resolution 1244 (and confirmed by the CF), since this limit operates only on the level of international law, without producing direct «binding» effects on individuals.

This reasoning implies a strict dualistic view of the relationship between the international system and the domestic system: norms of the former would be directed exclusively to States and only the latter's ones would be capable of «binding» individuals.

The assumption seems questionable. First of all, resolution 1244, being adopted on the basis of Chapter VII of the UN Charter, does not meet the limit of domestic jurisdiction, otherwise granted to UN member States by art. 2.7 of the UN Charter (7). Even scholars following a dualistic (or pluralist) view on the relationship between international and domestic systems have no difficulty in recognizing that, where Chapter VII applies, the acts of the UN can directly affect rights and duties of individuals. The Court does not consider this possibility, but it could actually lead to a totally different conclusion: this is why the issue deserves some attention.

The problem concerning the possible direct effects of provisions contained in the UNSC resolutions is dealt with by scholars wishing to demonstrate that such resolutions — being based on Chapter VII — can produce direct effects for individuals even before — or without — the adoption of national provisions of implementation by Member States (8). The case of Kosovo does not even pose this kind of a problem, since resolution 1244 was adopted with the consent of Serbia and as Serbian law is suspended with relation to Kosovo, the Serbian Government is lacking capacity to enact any measures of implementation.

Since the domestic jurisdiction limit does not come into consideration, then it is both possible and necessary to ascertain whether UNSC resolution 1244 is able produce direct effects on individuals in Kosovo, though being formally addressed only to States. To this purpose, it could be useful to recall how — more than fifty years ago — the Court of Justice of the European Communities was able to firmly acknowledge the possible existence in the field of international law of a «new kind of legal system» that recognizes as subjects not only member States, but also their citizens [8]. On this premise, over the years the European Court has been normally admitting that some

provisions of the treaties establishing the European Union — having a clear, detailed and unconditioned content — are capable of creating both rights and obligations for individuals, even if such effects are not textually provided for by the provisions themselves, formally addressed only the Member States .

A similar reasoning could lead to recognize that even the UNSC resolution 1244 can be effective in producing some direct effects for individuals, in the new provisional legal system for Kosovo. From this perspective, it should be ascertained whether a prohibition to declare the independence of Kosovo could be inferred from resolution 1244, and whether this provision could be binding upon individuals. The answer might well be positive. Actually, the resolution does not mention a specific prohibition to declare independence but, in this regard, it is nevertheless sufficiently clear, precise and unconditional, as the resolution itself meets the «genetic limit» mentioned above, being committed to respect the territorial integrity of Serbia: so, the resolution and the provisional system based on it can not assume as legal any behavior (either by private citizens or by the provisional institutions) aimed at determining the final status of Kosovo (9).

The declaration of independence in itself clearly violates this principle not merely because of its formal adoption, but for its huge political consequences, affecting the position of Serbia: so, The day following the declaration, indeed, the first recognitions by other States were issued, and many others followed: thus creating a situation that, by the time when the Court's opinion was delivered, appeared to be politically irreversible (10).

6. The uncertain position of the provisional system operating in Kosovo, between domestic law and international law

In the Court's opinion, only UNSC resolution 1244 and the CF belong to international law, but nothing is said about the nature of the provisional system operating in Kosovo. In the Court's perspective, it has to be a non international legal system: had it been otherwise, the Court would have included it in the international *lex specialis* considered to answer the question. The conclusion — obviously — should be that the provisional legal system operating in Kosovo is a domestic system. However, this assumption does raise some perplexity.

The resolution 1244 does not apply directly on the level of individuals. On such a level, UNMIK regulations are meant to be the main source of applicable law. However, these regulations as well as the CF draw their legal force from the resolution 1244, and their preambles never fail to underline the commitment to respect the limits set by the founding norms. It seems necessary to conclude, than, that the limits to the provisional system set by UNSC resolution 1244 are transmitted also to UNMIK regulations: including the prohibition of any behavior aimed at determining the final status of Kosovo. Hence this same limit, by means of the UNMIK regulations, meets the legal position of individuals, making that prohibition binding on them.

In the Court's reasoning, however, that limit is effective (only) on the level of international law, so allowing to conclude that the declaration of independence — being placed on a different level — can not be affected by that limit. At this point, it becomes quite clear why the Court took so much care in distinguishing between international

law and non international law and in stating how only UNSC resolution 1244 and the CF (but not the UNMIK regulations) fall in the first.

It might have been opportune — not only for the decisive importance that this approach takes on in the final answer to the question, but also in general — that more exhaustive argument had been furnished on the nature of the legal system operating in Kosovo. Indeed, the Court's reasoning necessarily implies that the system in question at some point ceases to be international and becomes a domestic system: but this point is not specified. The Opinion seems to suggest that a boundary between the field of international law and that of domestic law can be drawn according to the subject matter concerned (11).

A possible explanation — still within the approach of the Court — could be that the «watershed» is given by the CF, which would be considered, on the one hand, an act of international law and, on the other hand, a sort of founding charter of the domestic system operating in Kosovo. This interpretation however is not convincing, since the CF itself is a UNMIK regulation and does not contain any element that could be seen as marking a solution on continuity between the international norms situated «upstream» and the domestic legal system operating «downstream». Therefore the provisional system itself should be placed in the domain of international law (12).

A final remark is possible. According to the Court, the authors of the declaration of independence did not act on behalf of the Assembly of Kosovo, but in a different private capacity, as if they had intentionally put themselves outside the provisional system, not to encounter the fundamental limit set by UNSC resolution 1244, that — the Court assumes — can be binding only upon provisional institutions (13). It seems that individuals, in this way, could choose whether to remain or not to remain under the rule of a legal system — while being in the territory where it is operates — and by so doing avoid having to comply with the rules established by that system itself.

Admitting that such an option were possible (as the Court implicitly does), then it would be necessary to specify in which system the declaration of independence is to be placed (14). As international law — in the Court's perspective — is excluded, two answers are left possible.

The first is that the legitimacy of the declaration has to be assessed by the law of Serbia. Despite being what it seemed necessary to avoid, it is nevertheless a logical consequence of the reasoning followed. If an act is placed outside the provisional system, it has to fall under the underlying earlier system. The system of Serbia certainly was suspended by resolution 1244, but, as seen above, its operation is allowed for matters not regulated by the provisional system.

The second and even more surprising possible answer would be that the authors of the declaration of independence, by placing themselves outside the provisional system, had entered a legal vacuum. If so, then an extremely complicated question would be raised: is it possible to conceive of a vacuum in law?

Conclusion

The weak points found in the reasoning of the Court are such that a different and more logic approach would have led to a conclusion diametrically opposed to that reached by the Court. Indeed, the Court was aware of the political consequences that

a different answer would entail. The declaration of independence of Kosovo actually came soon after the failure of the negotiations carried out by the UN Special Envoy, Marti Ahtisaari, who had eventually declared he did not believe that the final political settlement called for in UNSC resolution 1244 could be reached (15). At the time the opinion was issued, many States had already recognized Kosovo. It is easy to understand, therefore, why the Court avoided concluding that the declaration of independence of Kosovo was not in accordance with international law.

However, the Court is not a political body. Once it had accepted to give an opinion, it was legitimate to expect that it would offer stronger legal support for the conclusion reached (16). Leaving delicate substantial questions aside, the Court preferred to keep its reasoning on a technical and formal level. The path however proved to be less aseptic than foreseen, leading to even more complex questions, for example, on matters of relations between legal systems and the possible effects of the acts of international organizations on individuals.

Indeed, the weakest point in the opinion is that it can be read as implicitly admitting that individuals can put themselves outside a legal system and so legitimately carry out some acts that that system would not allow (including... a sort of coup d'état) (17). This interpretation could eventually affect the principle of integrity of States, more than a different conclusion would, admitting the right of Kosovo to an exceptional remedial secession.

COMMENTARIES

- (1) Annex 1 to resolution 1244 sets out the general principles to be followed during the negotiations, as decided by the Foreign Ministers of the G8. The resolution 1244 is directed to the Federal Republic of Yugoslavia, the name of the State then became Republic of Serbia, in 2006: in the Advisory Opinion both names are used.
- (2) UNMIK regulation n. 1999/1 [29], adopted on July 25, 1999, was made retroactive to 10 June 1999, to let its effects start on the very same date of the adoption of resolution 1244. The power to enact such a comprehensive regulation, however, is not clearly provided for by resolution 1244, to the point that Serbia could speak of usurpation of power by the SRSG [10. P. 240]
- (3) According to UNMIK reg. 1/1999 [29], as modified by UNMIK reg. 59/2000 [30]: «The law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence». The amendment made in 2000 was meant to limit the applicability of the law of the FRY: the time limit was dated back from 1999 — in the original version — to 1989, to make the new system applicable since the same year in which the FRY had abolished the autonomy previously granted to Kosovo. The purpose was obviously to exclude the applicability of the post-1989 FRY law, presumed to be less favourable to Kosovo.
- (4) In a Memorandum [23] the Government of the RFY claims that UNMIK exceeded the powers granted it by 1244, issuing some provisions incompatible with the FRY's continuing sovereignty in the region: in particular making its own dispositions on monetary and customs matters and issuing passports [10. P. 268].
- (5) Art. 12 of the CF provides: «The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish

- the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework». There will be several decisions by the SRSG annulling ultra vires acts [14. Para. 32]
- (6) The Court's opinion is quite clear: «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» [13. Para. 88]
 - (7) The limit of domestic jurisdiction, sanctioned by Art. 2.7 of the UN Charter, is to be understood as excluding the possibility that the UN resolutions produce direct effects towards individuals, within Member States' domestic legal order. This limit however does not affect measures adopted by the UNSC acting under Chapter VII [1. P. 412]. Resolution 1244 is adopted under Chapter VII, but only KFOR is authorized to use «all necessary means» to perform its mission. In any case, the limit of domestic jurisdiction is equally excluded for UNMIK operations, due to the acceptance of the resolution by Serbia.
 - (8) Though not consistently confirmed by the practice of States, the idea that resolutions of the UNSC can produce some direct effects is firmly supported by scholars [6. P. 352]
 - (9) In his dissenting opinion, Judge Bennouna affirms that UNSC resolution 1244 «is binding on all States and non-State actors in Kosovo as a result of the territory having been placed under UN administration» [15. Para. 62]. According to the Vice-president Tomka, «the notion of a settlement is clearly incompatible with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other» [14. Para. 28]
 - (10) The day after the declaration of independence, the President of the United States recognized Kosovo as an «independent and sovereign State» [22]. A further declaration by the US Secretary of State specified: «The unusual combination of factors found in the Kosovo situation (...) are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today» [9].
 - (11) The distinction *ratione materiae* between international law and domestic law, to which the Court seems to refer [13. Para. 89], is actually criticized by many scholars [1. P. 320]
 - (12) According to some scholars, all recent cases of provisional administration in Kosovo, as well as in East Timor and Iraq, allow to acknowledge «a development in international territorial administration towards the possibility of directly inserting international law into the legal order of the territory through international actors». [10. P. 240]. To the opposite, Judge Yusuf challenges the theory according to which an act shares the nature of the source from which it derives its legal nature, holding that this approach «confuses the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves». International administrations — he continues — have to act in a dual capacity when exercising regulatory authority: the conclusion is that «although they act under the authority of international institutions such as the UN, the regulations they adopt belong to the domestic legal order of the territory under international administration. The legislative powers vested in the SRSG in Kosovo under resolution 1244 are not for the enactment of international legal rules and principles, but to legislate for Kosovo and establish laws and regulations which are exclusively applicable at the domestic level» [17. Para. 18]. Some Authors equally support the opinion that the provisional system has to be considered a system of domestic law [19. P. 343].
 - (13) The Court declares: «the declaration of independence was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intended to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out a measure the significance and effects of which would lie outside that order» [13. Para. 105].

- (14) Consistently with its own premises, the Court did not consider the issue, having to deal (only) with the international law. In his dissenting opinion Judge Bennouna remarks: «the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and UN law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. What legal order governed the authors and the declaration itself?» [15. Para. 63-68]
- (15) The Court quotes Mr. Athisaari as declaring, at the end of his mission: «It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talk, whatever the format, will overcome this impasse». Therefore, he concluded that «the only viable option for Kosovo is independence, to be supervised for an initial period by the international community» [13. Para. 69]
- (16) For instance, it could have been useful to assess whether the resolution 1244 might in part be extinct due to a change in the fundamental circumstances existing at the moment of its adoption [7. P. 1131].
- (17) The remarks by Judge Koroma are pungent: «The Court's Opinion will serve as a guide and instruction manual for secessionists groups the world over...»: [16. Para. 4; 20].

REFERENCES

- [1] *Arangio-Ruiz G.* Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne // Recueil des cours. — 1990. — N° 4.
- [2] *Arp B.* The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities // German Law Journal. — 2010. — P. 847–866.
- [3] *Bothe M.* Kosovo, So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence // German Law Journal. — 2010. — P. 837–839.
- [4] *Burri T.* The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links // German Law Journal. — 2010. — P. 881–890.
- [5] *Cirkovic E.* An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence // German Law Journal. — 2010. — P. 895–912.
- [6] *Conforti B.* Diritto internazionale. — Napoli, 2014.
- [7] *Conforti B.* La risoluzione 1244 del Consiglio di sicurezza e il parere della Corte internazionale di giustizia sul Kosovo // Rivista di diritto internazionale. — 2010. — P. 1128–1131.
- [8] Court of Justice EEC, 5 February 1963, Van Gend & Loos // Reports. — 1963.
- [9] Declaration of the American Secretary of State // American Journal of International Law — 2008 — P. 638–640.
- [10] *Friedrich J.* UNMIK in Kosovo: Struggling with Uncertainty // Max Planck Yearbook. — 2005. — P. 225–293.
- [11] *Frowein J.A., Krisch N.* Art. 41, MN 20-22, in B. SIMMA [ed.], The Charter of the UN. A Commentary. — Oxford, 2002.
- [12] *Howse R., Teitel R.* Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo? // German Law Journal. — 2010. — P. 841–846.
- [13] ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion // I.C.J. Reports. — 2010. — URL: <http://www.icj-cij.org/docket/files/141/15987.pdf>.
- [14] ICJ, Declaration of Vice-President Tomka, annexed to the ICJ Advisory Opinion Accordance with international law of the unilateral declaration of independence in respect of Kosovo. — URL: <http://www.icj-cij.org/docket/files/141/15989.pdf>.

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- [15] ICJ, Dissenting Opinion of Judge Bennouna, annexed to the ICJ Advisory Opinion Accordance with international law of the unilateral declaration of independence in respect of Kosovo. — URL: <http://www.icj-cij.org/docket/files/141/15999.pdf>.
- [16] ICJ, Dissenting Opinion of Judge Koroma, annexed to the ICJ Advisory Opinion Accordance with international law of the unilateral declaration of independence in respect of Kosovo. — URL: <http://www.icj-cij.org/docket/files/141/15991.pdf>.
- [17] ICJ, Separate Opinion of Judge Yusuf, annexed to the ICJ Advisory Opinion Accordance with international law of the unilateral declaration of independence in respect of Kosovo. — URL: <http://www.icj-cij.org/docket/files/141/16005.pdf>.
- [18] *Irmscher T.H.* The Legal Framework for the Activities of the UN Interim Administration Mission in Kosovo: the Charter, Human Rights and the Law of Occupation // German Yearbook of International Law. — 2001. — P. 353–395.
- [19] *Jacobs D., Radi Y.* Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo // Leiden Journal of International Law. — 2011. — P. 331–353.
- [20] *Jamar H., Vigness M.K.* Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence // German Law Journal — 2010 . — P. 913–928.
- [21] *Korhonen O.* International Governance in Post-Conflict Situations // Leiden Journal of International Law. — 2001. — P. 495–529.
- [22] Letter of President Bush to the President of Kosovo, Fatmir Sejdiu, 18 February 2008 // American Journal of International Law. — 2008. — P. 638–640.
- [23] Memorandum of the Government of FRY on the implementation of UN Security Council Resolution 1244 [1999] // Moliterno J.E. What the ICJ’s Decision Means for Kosovars // German Law Journal. — 2010. — P. 891–894.
- [24] *Öberg M.D.* The Legal Effects of UN Resolutions in the Kosovo Advisory Opinion // American Journal of International Law. — 2011. — P. 81–90.
- [25] *Odendahl K.* The scope of Application of the Principle of Territorial Integrity // German Yearbook of International Law. — 2010. — P. 511–540.
- [26] *Stahn C.* Constitution Without a State? Kosovo Under the UN Constitutional Framework for Self Government // Leiden Journal of International Law. — 2001. — P. 531–561.
- [27] UN SC Resolution 1244 [1999], adopted by the Security Council at its 4011th meeting, on 10 June 1999, S/RES/1244 [1999].
- [28] UN UNMIK Regulation n. 1991/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1.
- [29] UN UNMIK Regulation n. 2000/59 of 27 October 2000 Amending UNMIK Regulation n. 1999/24 on the Law Applicable in Kosovo, UNMIK/REG/2000/59.
- [30] UN UNMIK Regulation n. 2001/9 of 15 may 2001 on a Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9.
- [31] UN GA Resolution 63 [2008] 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 8 October 2008, A/RES/63/3.
- [32] *Vidmar J.* The Kosovo Advisory Opinion Scrutinized // Leiden Journal of International Law. — 24. — 2011. — P. 355–383.
- [33] *Wolfrum R.* International Administration in Post-Conflict Situations by the UN and Other International Actors // Max Planck Yearbook. — 2005. — P. 649–696.

**ПРАВО, ПРИМЕНИМОЕ
К ДЕКЛАРАЦИИ НЕЗАВИСИМОСТИ КОСОВО:
ВСЕ ЕЩЕ СЛОЖНЫЙ ВОПРОС**

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В статье приводится анализ консультативного заключения Международного Суда ООН о декларации независимости Косово, проведенный европейским ученым проф. Алессандрой Пиетробон. Автор указывает, что Международный Суд ООН в своем консультативном заключении оставил открытыми некоторые ключевые вопросы международного права. В статье рассматриваются основные этапы рассмотрения дела Судом с тем, чтобы ответить на непростой вопрос о взаимосвязи международного и внутригосударственного права в этом деле. В частности, А. Пиетробон анализирует возможности исключения воздействия международного права на конкретных индивидов, что было решающим при вынесении Судом своего решения.

Ключевые слова: международное право, национальное право, Международный Суд ООН, национальная юрисдикция, прямое действие норм международного права.