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

By Björn Arp[*]

A. Introduction

Very seldom has a judgment or advisory opinion of the International Court of Justice (ICJ) received so much media coverage as the recent Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* rendered on 22 July 2010 in response to a question posed by the General Assembly.[1] The question had been forwarded on behalf of a request by Serbia and was phrased in the following way: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

Although this question entails a number of very relevant issues of contemporary international law, the present Advisory Opinion might not enter into the judicial history of the Court for its answer to this question, but rather for what it did not say. The Court's short and sometimes clumsy reasoning seems a tortious exercise of avoiding from commenting on complex and difficult legal issues, with its only objective of not stumbling into *non liquet*.[2]

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[1] G.A. Res. 63/3 (Oct. 8, 2008).

[2] This worry of the Court can be seen from the extensive arguing on the discretion the Court has to deliver an Advisory Opinion, according to Article 61, ¶ 1 of the Statute of the International Court of Justice [hereinafter the Statute]. It carefully weighed all possible arguments, including those submitted by States in their observations. Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141, ¶ 29 – 48 (July 22) [hereinafter Advisory Opinion]. This dutiful compliance with the burden of rendering an Advisory Opinion in a politically shaded case is enlighted by a number of declarations and dissenting opinions, whose volume outweighs by far the actual text of the Advisory Opinion and which bring some clarity into this topic. They really constitute the "opinion" of "advisory" character for any reader of these materials, although they do not reflect the opinion of the Court as an institution. Indeed, some judges expressed their disagreement with this narrow focus of the Court. Judge Simma, for instance, disqualified the Court's ruling declaring that "the Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively." Declaration of Judge Simma, ¶ 7.

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In the present article, though, we will only consider one specific aspect: the implication of this Advisory Opinion on the protection of minorities. Indeed, the issue of protection of minorities is inextricably related to the argument of "remedial secession" put forward by some delegations.[3] Yet the Court undertook only a very limited analysis of this argument in its Advisory Opinion. So it states:

> The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).[4]

Furthermore, the Advisory Opinion did not enter into the consideration of the other argument put forward by some delegations, according to which the declaration of independence by Kosovo was a case *sui generis*, to which there was no predeterminable answer stemming from international law,[5] and which had to be handled in a pragmatic

[3] This argument had been advanced by some States in their submissions. Just to mention the most relevant contributions to the debate before the Court, we ought to point out that Estonia considered that Kosovo had the right to external self-determination as an *ultima ratio*, after all other possible solutions had been exhausted. Estonia's Written Submission, ¶ 2.1.2. This State also considered that due to the particular circumstances of the facts, this was a *sui generis* case, which had to be treated in a different manner than previous situations. Also, Ireland adhered to the idea of remedial secession. Ireland's Written Submissions, ¶ 7(d). The Netherlands considered that the independence of Kosovo was justified on the ground of remedial secession; *see* Netherlands' Written Submissions, § 3. Poland considered that Kosovo was indeed a *sui generis* case, and also that there exists a right to remedial self-determination, *see* Poland's Written Statements, § 6. Switzerland adhered to this argument in its Written Submissions, and offered a long reasoning as to how this right to remedial secession had been recognized in international law. *See* Switzerland's Written Submissions, ¶ 81-86 (with exhaustive anaylsis of the violations of international rules protecting minorities in Kosovo.)

[4] Advisory Opinion, ¶ 81.

[5] This argument was certainly the most common which amalgamized the different factual and legal aspects discussed by the majority of States. Among others, it was implicitly defended in its written submissions by the

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way, keeping in mind the international community's strive for peace and security as well as the protection and promotion of the human rights of all those living in Kosovo. This is even more surprising as the Special Envoy of the Secretary-General on Kosovo's future status, Martti Ahtisaari, had already recognized in 2007 that Kosovo was a special case which required a solution that "takes into account Kosovo's recent history, the realities of Kosovo today and the need for political and economic stability in Kosovo."[6]

Instead of covering the relevant legal questions at stake in this matter, the Court limited itself to declare whether general international law allows for declarations of independence. Once this question was answered, the Court narrowly focused onto what it called *lex specialis*, i.e. the regime set up by the Security Council Resolution 1244. In its assessment the Court left out a number of decisive issues. First, the ICJ failed to weigh all the possible norms comprising *lex specialis* in this case. In particular, we refer to the applicable legal order set up in the European continent. Second, and to a certain extent this is a consequence from the first point, the Court should have weighted more thoroughly certain situations where according to international law a declaration of independence might not be valid.

Before this background, and keeping our focus on the protection of minorities, this article will start by pointing out a criticism of the fact that the Court has not applied all relevant norms of international law, including the regional norms on national minorities (Section B.). Thereby we will focus on the application of the Council of Europe Framework Convention for the Protection of National Minorities (FCNM).[7] The application of the FCNM, as manifested by the practice of the organs entrusted with its supervision, sheds

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Czech Republic, *see* Czech Republic's Written Submissions, at 12, Conclusions. Also Denmark considered that the declaration of independence formulated by Kosovo was a *sui generis* case, mainly because of two reasons: the history and dissolution of the SFRY and the S.C. Res. 1244. Denmark's Written Submissions, at 6. France, too, acknowledged the *sui generis* character of the Kosovo situation, from which there cannot be drawn conclusions as to other situations in international practice. France's Written Submissions, § 2. Germany dedicated to the *sui generis* argument section V of its written submissions, bringing up a number of arguments why this is such a unique case. Germany's Written Submissions, § V, at 26-27. The same approach was followed by Japan, Japan's Written Submissions, at 5-8, which almost exclusively delt with the *sui generis* character of Kosovo. The United Kingdom, too, followed essentially the argument of Kosovo being a *sui generis* case, *see* United Kingdom's Written Submissions § I, ¶ 4.

[6] *See* Special Envoy of the Secretary-General on Kosovo's future status, ¶ 16, U.N. Doc. S/2007/168 (2007). It should also be noted that the analysis of State practice shows that the only case where after 1945 a new State was recognized outside the colonial context by an overwhelming number of third States was Bangladesh. The United Nations did not treat Bangladesh as a territory that had exercised the right to self-determination, but rather as a *fait accompli* achieved as a result of foreign military assistance in special circumstances. This may show that until now the only way of admitting a new State into the international community without the consent of the predecessor State is by arguing its *sui generis* character. See more in detail about this precedent, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 415-416 (2nd ed. 2006).

[7] *Council of Europe Treaty Series* (*ETS*) No. 157.

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light on almost all relevant aspects for the protection of minorities in political, social and economic life.

Then we will consider some substantive aspects of this case, starting with the argument of remedial secession (Section C). The substantive practice before the control mechanisms of the FCNM, jointly with other international norms applicable for the protection of minorities, will be the threshold for assessing this argument, which—as we have just noted—has not been conclusively discussed by the Court in the Advisory Opinion. Following the analysis of remedial secession, we will identify other arguments which the Court did not address in its Advisory Opinion, but which would have had some impact on its decision, had it taken them into account (Section D). These arguments relate to the authorship and legitimacy of the persons who adopted the declaration of independence. We will focus on the right to be consulted and to actively participate in the decision of declaring independence. Additionally, we want to raise the question of how international law would qualify a declaration of independence adopted by individuals who might be responsible for international crimes. This question is particularly idoneous in the case of Kosovo, where the International Criminal Tribunal for the former Yugoslavia (ICTY) has the competence of declaring individual criminal liability. Once we have finished this analysis, we will resume our findings in a short secton on conclusions.

B. A General Comment on the Argumentation of the Court: Consideration of Regional International Law and Other *Lex Specialis*

The ICJ, generally using the correct reasoning to answer the case's central question, analyzes the legal framework offered by general international law to declarations of independence, and then proceeds to consider how specific rules of international law apply to the given circumstances in Kosovo. These rules, called *lex specialis*, can be of different kinds. It is either possible to find regionally applicable norms that bind the States located in a certain geographic area, and those that constitute local rules, binding upon a limited and individually determined number of States. Although we do not want to discard the existence of other *lex specialis* applicable in the Balkans, we might take a deeper look at two sets of rules particularly relevant for the protection of minorities in Kosovo: the European norms for their protection, and the international criminal law applicable by the ICTY.

Especially in Europe, international law has become increasingly complex due to the fact that the States in this region have engaged in a large number of regional agreements. These agreements further develop the standards of general international law or create new commitments among themselves in fields not previously regulated by general international law. The ICJ thus has to look into the regional legal order established in Europe whenever it has to solve any dispute among States in this region, or when it is asked to give an Advisory Opinion on a situation located in this continent. Indeed, in the present case the ICJ did not look into regional European law. The only reference it made to

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any regional provisions was to the 1975 Helsinki Final Act when it was arguing on the existence of a well-established principle of territorial integrity.[8]

Indeed, in the legal regime put into place in Kosovo interrelations exist between general and regional international law. Acting under Security Council Resolution 1244,[9] UNMIK signed an agreement with the Committee of Ministers of the Council of Europe on 30 June 2004 in order to allow the Advisory Committee to monitor its compliance with the FCNM. In signing this agreement, the parties made clear "that the present Agreement does not make UNMIK a Party to the Framework Convention and that it is without prejudice to the future status of Kosovo to be determined in accordance with Security Council Resolution 1244 (1999)".[10]

In Articles 23 to 25 the FCNM provides for a supervisory mechanism steered by the Council of Europe Committee of Ministers, with the technical assistance of the Advisory Committee. The Advisory Committee, formed of eighteen independent experts drawn from different States parties to the Convention, reviews the periodic reports submitted by the States' parties on their compliance with the provisions of the FCNM. The outcome of this compliance test is compiled by the Advisory Committee in an Opinion, which in turn forms the basis for the adoption of a Resolution on the compliance of the FCNM by the

[8] Advisory Opinion, ¶ 80.

[9] S.C. Res. 1244 (June 10, 1999) already specified that it decided that "the main responsibilities of the international civil presence will include protecting and promoting human rights" (¶ 11(j)). The provisions contained in S.C. Res. 1244 were further developed in UNMIK Regulation 2001/9 (May 15, 2001) on a Constitutional Framework for Provisional Self-Government. Chapter 3 enumerates a list of international human rights instruments, *inter alia* the Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities. The Constitutional Framework itself says that these instruments are "directly applicable" in Kosovo. Chapter 4 of this Framework is dedicated to the "Rights of Communities and their Members," where community means "communities of inhabitants belonging to the same ethnic or religious or linguistic group" (Constitutional Framework, ¶ 4.1). The many rights provided for minorities reflect to a large degree those contemplated in the Council of Europe FCNM, in contrast to the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135 (Dec. 18, 1992), which does not contain all the rights found in the Constitutional Framework. It should be noted that ¶ 4.5 and 4.6 provide for a control mechanism that gives the Special Representative of the Secretary General of the United Nations (SRSG) the right to intervene, in accordance with S.C. Res. 1244, for the purpose of protecting the rights of communities and their members. We have here, in essence, a field where general international law, as represented by the action of the United Nations through S.C. Res. 1244, meets the requirements of European law in the field of national minority protection. Unfortunately, the ICJ has not entered into these considerations, which might have been necessary for understanding the whole relevance of the question posed to it by the General Assembly.

[10] ¶ 9 of the Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, adopted on 23 August 2004, available at http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_Agreement_UNMIK_en.pdf (last visited July 29, 2010).

Committee of Ministers. Although neither the Opinion nor the Resolution set forth legally binding rules for the State which they address, the Opinion of the Advisory Committee and the Resolution of the Committee of Ministers are relevant in that they express the international legal evaluation of the performance of the State. The implementation of these international commitments still rests with the State. Indeed, the Advisory Committee considers that most of its recommendations refer to different regulatory models, which on a domestic level might be applied to protect minorities, so that the ultimate decision about which concrete measures to take in regard to each minority rests with the State. The Advisory Committee thus strives to evaluate the realization of the standards of minority protection within the domestic legal systems of the States and to contribute by way of a constructive dialogue to apply them in practice.[11] The Advisory Committee thus goes beyond its institutional character as an organ of the Council of Europe, and applies the norms generally accepted by States in the geographical area of this organization, and which are subsumed under the broad obligations enshrined in the Framework Convention. For this reason, although the Council of Europe has repeatedly expressed its neutrality in regard to the status of Kosovo,[12] this does not mean that the regional norms which have been developed under its auspices – such as those for the protection of minorities – are exempt from being complied with in this situation.

The other set of rules which the Advisory Opinion did not address, and which might be of relevance, as we will have the opportunity to point out when dealing with the authorship of the declaration of independence later, are the norms on individual criminal liability pursuant to the ICTY Statute.[13] The broad case-law that this international tribunal has built up over the years is a relevant element for assessing the legal setting in Kosovo. Indeed, Security Council Resolution 1244 itself calls upon the full cooperation and compliance with the ICTY.[14]

[11] This idea is explained in many Advisory Committee opinions. *See, e.g.*, Opinion on Hungary, CoE Doc. ACFC/INF/OP/I(2001)004, ¶ 49 (Sept. 14, 2001).

[12] *See, e.g.*, for instance, Report of the Council of Europe Commissioner for Human Rights' Special Mission to Kosovo, 23 – 27 March 2009, ¶ 3 CoE Doc. CommDH(2009)23 (July 2, 2009).

[13] S.C. Res. 827 (May 25, 1993), as modified by S.C. Res. 1660 (Feb. 28, 2006).

[14] ¶ 14 of the operational part of S.C. Res. 1244, "[*d*]*emands* full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia."

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C. Applying Regional International Law: Remedial Secession and the Law of Minorities

As we have already observed at the beginning of this article, the ICJ did all it could to circumvent the question of the legal qualification of remedial secession.[15] The Court briefly addressed this argument by stating that remedial secession was "a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question."[16] From this it can be inferred that the Court may consider that there is no consolidated legal opinion (*opinio iuris*) in international law on this topic. But the fact that the ICJ did not comprehensively analyze the issue of remedial secession will give leeway to both the partisans and detractors of this notion alike to include the Advisory Opinion into their argumentation in favor of their respective positions. To avoid any further speculation on this issue, it would have been appropriate for the Court to have interpreted the question more broadly and to have included into its assessment the legal qualifications of the declaration of independence, in order to determine its effects in regard to other States. If the Court would have done so, regional international law would have come into play, because the basis for the argument of remedial secession is the proper protection of minorities from abuses of the majority population—understood as a solution of last resort. The FCNM and the practice of the Advisory Committee can provide guidance as to the state of current regional international law in these matters.

The preamble of the FCNM, while protecting human rights, reiterates its adherence to the principle of territorial integrity of States. The preamble of the FCNM states:

> Being resolved to define the principles to be respected and the obligations which flow from them, in order to ensure, in the member States and such other States as may become Parties to the present instrument, the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities, within the rule of law, respecting the territorial integrity and national sovereignty of states.[17]

[15] The notion of remedial secession is used by some contemporary legal writers who argue that a minority deprived of the most basic human rights can ultimately claim independent statehood. This voice for remedial secession, although under different names, has been raised at least since the seventies of the XX century, as a further development of the law of decolonization. *See*, for a comprehensive description of this process and more bibliographical indications, Dietrich Murswiek*, The Issue of a Right to Secession – Reconsidered*, in MODERN LAW OF SELF-DETERMINATION, 21, 25-27 (Christian Tomuschat ed., 1993); Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo?*, *in* KOSOVO AND THE INTERNATIONAL COMMUNITY. A LEGAL ASSESSMENT, 203, 206-212 (Christian Tomuschat ed., 2002).

[16] Advisory Opinion, ¶ 80.

[17] Preamble of the FCNM, ¶ 12.

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Even though the Framework Convention announces this fundamental principle, by saying that territorial integrity will be "respected," it does not totally clarify whether in practice territorial sovereignty has preeminence over the protection of human rights. While monitoring the current 39 States parties, the general tone of the Advisory Committee has been to respect the territorial integrity of States. Even in regard to such extreme situations as Chechnya in the Russian Federation,[18] South Ossetia and Abkhazia in Georgia,[19] Transnistria in Moldova,[20] and Nagorno-Karabakh in Azerbaijan,[21] the Advisory Committee has maintained, without exceptions, that territorial integrity is a principle that has to be preserved.

This clear position of the Advisory Committee in all the above-mentioned cases is in some way differently perceived when dealing with Kosovo. During its first monitoring cycle, the Advisory Committee recognized that the achievement of an orderly coexistence in Kosovo seemed unlikely. The Committee stated, "The implementation of practically all principles

[18] In regard to the conflict in Chechnya this might be less clear, since apparently the Advisory Committee considers it out of question to discuss the territorial integrity of the Russian Federation. This is why the Committee demands from the Russian government the establishment of a well functioning administration in Chechnya when it comes to secure the rights under Article 7 of the FCNM (freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion). *See* First Opinion on the Russian Federation, CoE Doc. ACFC/INF/OP/I(2003)005, ¶ 141 (Sept. 13, 2002). Here, in regard to Article 7 of the FCNM, for instance, the Advisory Committee finds "that in Chechnya and in the areas directly affected by the conflict in Chechnya, a number of limitations of the rights under Article 7 have been reported and *considers* that the cessation of hostilities and consolidation of a well-functioning administration that fully respects human rights is essential for the implementation of Article 7 of the Framework Convention."

[19] First Opinion on Georgia, CoE Doc. ACFC/OP/I(2009)001, ¶ 12 (Oct. 10, 2009). In this context, the Advisory Committee took automatically for granted the territorial integrity of Georgia, and expressed its view on the conflicts in the two separatist regions as follows: "The Advisory Committee encourages the Georgian authorities, and all of the parties concerned, to step up their efforts and take an open and constructive approach with a view to finding a just and lasting solution to the conflict as soon as possible. In doing so, the principles enshrined in the Framework Convention must be fully respected to guarantee the rights of persons belonging to national minorities throughout the Georgian territory."

[20] First Opinion on Moldova, CoE Doc. ACFC/INF/OP/I(2003)002, ¶ 11 (Mar. 2002), where the Advisory Committee confirmed, once more, that "[c]oncerning those areas outside the effective control of the Government, the Advisory Committee can but join all those who have expressed the hope that a lasting and just political solution to the existing problems will be found. The Advisory Committee hopes that such a solution will protect the interests of all persons concerned, in conformity with the territorial integrity of the country and the principles of international law, and in accordance with Article 21 of the Framework Convention."

[21] First Opinion on Azerbaijan, CoE Doc. ACFC/INF/OP/I(2004)001, 3 (Jan. 26, 2004). The Advisory Committee states textually, that it "expects that the eventual solution will protect the rights of all persons concerned, in conformity with the territorial integrity of the country and other principles of international law." It should be noted that here the Committee made it very clear that whatever solution might be found, it would have to be "in conformity" with territorial integrity. This seems to discard the option of Nagorno-Karabakh reintegrating into Armenia or constituting itself as a separate State.

of the Framework Convention is made extremely difficult by the fact that inter-ethnic violence has seriously eroded trust between communities."[22]

This point is developed further at a later stage in the Opinion. Indeed, the Advisory Committee does not seem to perceive that much success can be achieved by negotiation, because the recent past has been very hard for the population of Kosovo. We will reproduce the considerations of the Advisory Committee at large, due to their relevance in this context:

> The Advisory Committee stresses that the negative legacy of the Milosevic regime is still widely felt in Kosovo and notably amongst Kosovo Albanians who were the main victims in Kosovo of the policies and practices of the said regime. At the same time, other communities in Kosovo, notably the Serbs and Roma, are still affected by the subsequent violence, in particular the extensive displacement and destruction of houses after the NATO intervention in 1999 and the eruption of Kosovo-wide violence in March 2004. Other events have further eroded inter-ethnic relations and trust. This legacy complicates the task of the present authorities to implement the Framework Convention and necessitates particularly decisive measures aimed at rebuilding inter-ethnic tolerance and true and effective equality. This would constitute a major challenge for any administration, let alone for the institutions of Kosovo that are only beginning to take on responsibilities in this domain and in many cases are yet to gain the confidence of the minority communities.[23]

According to the Advisory Committee, the fact that the future status of Kosovo is not yet determined, i.e. it is open, increases the difficulties in clarifying the distribution of competences between the different administrations in place, especially between the international and the local ones.[24] Only the presence of international personnel in key

[22] First Opinion on Kosovo, CoE Doc. ACFC/OP/I(2005)004, p. 3 (March 2, 2005).

[23] *Id*. ¶ 20, at 9-10.

[24] *Id.* at 3. Textually, the Advisory Committee said that, "The implementation and the monitoring of the Framework Convention is a particularly challenging task in Kosovo. The complexity of Kosovo's institutional arrangements means that the respective responsibilities of different international and local authorities are not always clear. Uncertainty as to the future status of Kosovo further complicates the picture."

institutions dedicated to human rights compliance, such as the institution of the Ombudsperson, eventually contributes to certain improvements of their situation.[25]

In the second monitoring cycle, the Advisory Committee reiterated that it recognized Kosovo only in so far as it was treated as a territory whose status has to be determined in accordance with Security Council Resolution 1244. It stressed that all reference to the authorities or to the constitutional legal order of Kosovo should be understood in full compliance with that resolution and "without prejudice to the status of Kosovo."[26]

In this second opinion the Advisory Committee also acknowledged the special character of the situation of Kosovo. The Committee expressly stated that "[t]he current situation in Kosovo is in many respects *sui generis*, and this is also the case regarding the responsibility for the implementation of the Framework Convention."[27] Nowhere in the Opinion does the Advisory Committee indicate support for the notion of remedial secession. For the Committee, the solution for inter-ethnic relations is a pragmatic one, not linked to any legal preconceptions in favour or against the independence of Kosovo. The ultimate aim of the Committee's activity is the complete application of the FCNM to all national minorities present on a set territory.

Furthermore, the Advisory Committee clarified what should happen with the Serbian minority in northern Kosovo after independence. The first relevant aspect the Committee underlined is that no further changes to the ethnic composition of the different regions within Kosovo are performed.[28] This addressed the risk that once independent, the remaining Serbian population in Kosovo, particularly around Mitrovica, would abandon these areas and move to the Serbian side of the border, being replaced with Kosovar-Albanian settlers. In addition, the Advisory Committee was concerned about incidents of inter-ethnic violence that continue in Kosovo. This violence does not only affect the smaller minority groups, but also the Serbs and the Kosovars.[29] As a consequence, the Advisory Committee demanded the adoption of "resolute" measures, something that certainly is a sign for the need to adopt all measures that in practice can mitigate the violence and conflicts which characterize that area.[30] Again, this highlights the need for a practical

[25] *Id*. at 4.

[26] Second Opinion on Kosovo, CoE Doc. ACFC/OP/II(2009)004, p. 4, fn. 3 (May, 31 2010).

[27] *Id*. at 5, ¶ 10.

[28] *Id*. at 48, ¶ 273.

[29] *Id*. at 50, ¶ 293-295.

[30] *Id*., *see* especially ¶ 299: "Take resolute measures to strengthen inter-ethnic dialogue and mutual understanding, including in areas where persons belonging to the majority are in a minority position; elaborate and implement a comprehensive strategy for reconciliation and inter-ethnic dialogue."

solution to the situation in Kosovo, yet the opinion contains no recognition of a right to remedial secession. Indeed, from the statements of the Advisory Committee, it seems that the problem in Kosovo is not one of remedial secession, which would be an argument by which the decision on the future status of Kosovo would be taken based on past events (in particular, the atrocities committed during the Milosevic regime). The problem rather lies in the present and the future, where pragmatic and workable solutions need to be found.

Finally, we should also underline that the same pragmatic approach of the Advisory Committee is felt in the treatment it gives Serbia, for example, with respect to education. Even after the unilateral declaration of independence of Kosovo, it requested Serbia to recognize school diplomas issued in Kosovo without regard to whether they had or had not the approval of UNMIK. By doing so, the Advisory Committee seemed not to pay due regard to Serbia's right to not recognize the acts of the new administration in Kosovo.[31] At the same time, it is also a sign that the Advisory Committee is trying to adhere to the new circumstance created *de facto*, and pushes towards the normalization of the situation with an independent Kosovo.

D. Authorship and Legitimacy of the Declaration of Independence

General international law requires the fulfilment of certain conditions that have to be met for a State to exist. Objective and material conditions are the existence of a territory and a population. These conditions are structured under an effective government.[32] International law prevents States from taking into serious consideration any declaration of independence adopted in circumstances where any of these elements are not existent.

In the context of the situation in Kosovo, it seems particularly worthwhile to analyze the criterion based on the existence of a population. The notion of "population" implicitly requires the adequate representation of these persons for a declaration of independence to be legitimate and admissible in international law. If, for instance, a declaration of independence is pronounced by terrorist groups, the character of its authors would automatically deem it unlawful. The unlawfulness of any act of such a group might be founded already in the domestic legal order. This is also what the Court seems to recognize.[33] But a further legal basis for unlawfulness in such a case is international law.

[31] Second Opinion on Serbia, CoE Doc. ACFC/OP/II(2009)001, ¶ 215 (June 25, 2009). It speaks diplomatically of "comprehensive and adequate" solutions to this recognition, yet still it would be a recognition.

[32] This was stated in the case of the *Deutsche Continental Gas-Gesellschaft v. État polonais*, Award of 1 August 1929, IX *Recueil des Décisions des Tribunaux Arbitrales Mixtes* 344 (1930). These criteria have also been reiterated in more recent practice, such as the Arbitration Commission of the International Conference on Yugoslavia (Badinter Arbitration Commission) in its First Opinion adopted on 29 November 1991, where it stated in ¶ (b) that, "the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority;" *see* 31 *ILM* 1494 (1992).

[33] *See* Advisory Opinion, ¶ 26, where the Court has recognized that although some States in their submissions said

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There are indeed international norms outlawing the acts of terrorist groups. There are also international norms that outlaw persons responsible for certain other international crimes. For instance, in the case where the authors of the declaration of independence were planning to establish an apartheid regime. Such declarations can hardly be "in accordance" with international law. In the present case, the Court did not see any need to delve into these questions.

This is in spite of the fact that in Kosovo there persists a situation of insecurity and occasional use of force, particularly by Kosovars against the Serb minority within Kosovo, which makes up roughly 7% of a total of two million people living in this region. Because of this insecurity, the Court should have analyzed more deeply the legal categorization applicable to the actual authors of the declaration. Ironically, the present Advisory Opinion seems to suggest that as long as these groups are not acting directly under the command of any organ of the United Nations, they can adopt a declaration of independence that validly can be considered by the international community.

I. The International Requirement of a Broad Consultation of Minority Groups

The declaration of independence was adopted after many years of negotiations led by the Provisional Institutions of Self-Government of Kosovo and UNMIK, with the mediation of the Secretary General and his Special Representative. If, according to the Court in its Advisory Opinion, the declaration of independence was adopted outside the institutional framework of the Institutions of Provisional Self-Government of Kosovo, the Court should have checked whether international standards applying to the consultation of those affected by any far-reaching political measures have been observed.

The obligation of minority consultation can be deducted from a wide range of international instruments in force. General international law provides for this consultation in the United Nations Declaration on Indigenous Peoples[34] and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[35] In

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that "international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration," the Court bases its jurisdiction to give an Advisory Opinion on questions of international law. Then, the Court went on to explain: "In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law." The same reasoning was already put forward, among others, in the written submissions of the United States of America; *see* Written Submissions of the United States of America, p. 56.

[34] Adopted by G.A. Res. 61/295 (Oct. 2, 2007), where in Article 38 it is stated in general for all rights contained in the Declaration: "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

[35] Adopted by G.A. Res. 47/135 (Dec. 18, 1992). Article 2 of this Declaration regulates the right of persons belonging to minorities "to participate effectively in cultural, religious, social, economic and public life." *Id.* ¶ 2. It furthermore stipulates that "persons belonging to minorities have the right to participate effectively in decisions

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European international law this right is specified with even more detail. In this context the European Convention on Human Rights[36] and the FCNM[37] stand out.

The jurisprudence of the European Court of Human Rights has declared a violation of Article 11 of the European Convention in a number of cases related to Turkey where that State prohibited the constitution of political parties or dissolved parties representing the Kurdish minority in Turkey.[38] When the Court analyzed some of the political programs of these parties, it indicated that "the fact that such a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules".[39] By doing so, the Court established two limits for this political activity: first, the means employed to attain their political goals have to be legal and democratic. Second, the proposed change of the structure of the State has to be compatible with fundamental democratic principles.[40]

Further, the Advisory Committee has a broad practice confirming the right to effective consultation of all relevant minority groups prior to the adoption of measures that might affect them. In principle, the Committee recognizes that no electoral system can guarantee that all national minorities are consulted in the adoption of any decision. Neverthelees, it requires that States take all possible measures to ensure "that the necessary structural guarantees—electoral or consultative—exist to allow for effective participation of all persons belonging to national minorities in the political process."[41] From this European

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on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation." *Id.* ¶ 3.

[36] The European Convention on Human Rights and Fundamental Freedoms was adopted in Rome on 4 November 1950*, ETS* No. 005. For political participation is particularly important Article 11 of this Convention, which regulates the freedom of association, including in political parties. Furthermore, Article 3 of the Additional Protocol (20 March 1952, *ETS* No. 009) to the European Convention enshrines the right to free elections.

[37] In this context there should be mentioned Article 15 of the FCNM, according to which "[t]he Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."

[38] There can be consulted, among others, *United Communist Party of Turkey, et al. v. Turkey,* 1998-I Eur. Court H.R., ¶ 61; *Yazar et al. v. Turquie,* 2002-II Eur. Court H.R., ¶ 57; and *Selim Sadik et al, v. Turkey* (No. 2), 2002-IV Eur. Court H.R., ¶ 47 in relation to ¶ 27-40.

[39] *Socialist Party et al. v. Turkey,* 1998-III Eur. Court H.R., ¶ 47; and *Partie de la Liberté et la Démocratie (ÖZDEP) v. Turkey,* Judgment of 8 December 1999, Case No. 23885/94, ¶ 41.

[40] *Yazar et al. v. Turkey,* 2002-II Eur. Court H.R., ¶ 49; and *mutatis mutandi* also *Socialist Party et al. v. Turkey*, 1998-III Eur. Court H.R., ¶ 46-47; and *Lawless v. Ireland,* Judgment of 1 July 1961, Series A, No. 3-A, ¶ 7 of the legal considerations.

[41] Opinion on Albania, CoE Doc. ACFC/INF/OP/I(2003)004, ¶ 72 (Feb. 18, 2003). In the same sense, *see* Opinion on the Czech Republic, CoE Doc. ACFC/INF/OP/I(2002)002, ¶ 70 (Jan. 25, 2002); Opinion on Hungary, *supra* note 11, at ¶ 47; in regard to the Travellers, *see* Opinion on Ireland, CoE Doc. ACFC/INF/OP/I(2004)003, ¶ 95 –96 (May 5,

practice, we can see that there is a great deal of importance attached to consultation of minorities in political processes. Consequently, it seems even more necessary to apply this requirement to any declarations of independence by the population of a region of a State, such as in Kosovo.

II. The International Requirement of Effective Participation of Minorities in Public Affairs

It is striking to read in the Advisory Opinion that the ethnic Serbian delegates have been boycotting the assembly that adopted the declaration of independence,[42] without the Court considering in more detail the implications of this lack of representation in the fundamental act of establishment of the Republic of Kosovo.[43] It is further surprising to see that some States participating in the proceeding before the Court endorsed the decision taken by the assembly, which voted for the declaration of independence, despite not including any member of the Serb minority, nor of other national minorities present in Kosovo.[44]

2004); Opinion on Romania, CoE Doc. ACFC/INF/OP/I(2002)001, ¶ 65 (Jan. 10, 2002); and Opinion on the United Kingdom, CoE Doc. ACFC/INF/OP/I(2002)006, ¶ 94 (May 22, 2002).

[42] Indeed, it should be noted here that according to the Constitutional Framework there is guaranteed ample representation to minorities. Nevertheless, since the ICJ itself has admitted that the declaration of independence was not adopted by any of the institutions created under this Framework, it is understandable that for the declaration their rules were not followed. In any case, Chapter 9.1.3. (b) of the Constitutional Framework provides for twenty "reserved seats" in the 120 member Assembly. Ten seats are reserved for representatives of the Kosovo Serb Community, and the other ten seats have to be allocated to the Roma, Ashkali and Egyptian Communities (4 seats), Bosniak Community (3 seats), Turkish Community (2 seats) and Gorani Community (1 seat).

[43] Indeed, the ICJ recognized that the declaration of independence has not been of a properly representative character. It was adopted on 17 February 2008 by 109 out of 120 members of the Assembly of Kosovo (which is one of the organs of the Provisional Self-Government of Kosovo, established in accordance with SC Res. 1244, although the Court did not give due regard to this fact). The ten representatives of the Serb national minority did not take part in the vote of the Declaration. Neither did one member of the Gorani community. *See* Advisory Opinion, ¶ 76. Since the Court needed arguments for justifying its position that the Declaration was not adopted by any institution which belongs to the Provisional Self-Government of Kosovo, this absence of the members of Serbian and Gorani origin was only welcome. Nevertheless, international law hardly would support the validity of a declaration of independence proclaimed by more than one hundred representatives of a population without any representative of the 7% of Serbian population, plus a smaller number of other national minorities, which were also not represented.

[44] Albania called the vote, where the Serb representatives did not take part, as an "overwhelming majority of the representatives of the people of Kosovo," *see* Albania's Written Submission, ¶ 103. Austria took up a very formalistic argument put forward previously by the Special Representative of the Secretary General of the United Nations and stated that "[e]lections regularly held since 2001 and opent to the entire population of Kosovo entitle the members of the Assembly to act as representatives of the Kosovar people," *see* Austria's Written Submission, ¶ 16.

The Advisory Committee has developed, also in application of Article 15 of the FCNM, with substantial clarity, a broad practice putting forward the criteria for effective participation of minorities in public life. According to the Advisory Committee, all national minorities enjoy the right to effetively participate in the public affairs of their host States. This participation has to take part in all areas of public power,[45] including the central, regional and local government levels.[46] Access to all these levels of government must be granted without discriminating among different minority groups.[47] Although the Advisory Committee has pointed this out, especially when it was dealing with the situation of Roma minorities,[48] it is also very important when addressing the participation of the Serb minority in the establishment of the Republic of Kosovo.

In regard to parliamentary participation, the Advisory Committee has underlined, also in application of Article 15 of the FCNM, that States have the obligation to allow national minorities to organize in political parties based on ethnic or national criteria.[49] States have the further obligation, depending on the particular circumstances of the case, to guarantee

[45] Opinion on Armenia, CoE Doc. ACFC/INF/OP/I(2003)001, ¶ 77 (Jan. 15, 2003).

[46] Id. at ¶ 82; Opinion on Azerbaijan, *supra* note 21, at ¶ 74; Opinion on Bosnia and Herzegovina, CoE Doc. ACFC/INF/OP/I(2005)003, ¶ 105 (May 11, 2005); Opinion on Moldova, *supra* note 20, at ¶ 90; Opinion on Poland, CoE Doc. ACFC/INF/OP/I(2004)005, ¶ 85 (Sept. 30, 2004); Opinion on Serbia and Montenegro, CoE Doc. ACFC/INF/OP/I(2004)002, ¶ 111 (March 2, 2004).

[47] In its analysis of Bosnia and Herzegovina the Advisory Committee underlines the notable difference between the protection of the constitutive nationalities of this State and the other national minorities which reside in it; *see* Opinion on Bosnia and Herzegovina, CoE Doc. ACFC/INF/OP/I(2005)003, ¶ 107 (May 11, 2005). The same happens in regard to other minorities elsewhere in Europe. *See* for the case of the Skogfinns, Opinion on Norway, CoE Doc. ACFC/INF/OP/I(2002)003, ¶ 61 (Feb. 13, 2003). Also in the Russian Federation this problem was raised by the Advisory Committee, because there minorities are in a different position when they are constituted in one of the republics than then they are not; *see* Opinion on the Russian Federation, CoE Doc. ACFC/INF/OP/I(2003)005, ¶ 102 (July 10, 2003). And in the FYROM there exists the risk of monopolyzign the debate about minorities on the relationship between Macedonians and Albanians; *see* Opinion on the FYROM, CoE Doc. ACFC/INF/OP/I(2005)001, ¶ 95 (Feb. 2, 2005).

[48] *See* among others, Opinion on Albania, *supra* note 41, at ¶ 75; Opinion on Austria, CoE Doc. ACFC/INF/OP/I(2002)009, ¶ 71 (May 16, 2002); Opinion on Bosnia and Herzegovina, *supra* note 46, at ¶ 108; Opinion on Croatia, CoE Doc. ACFC/INF/OP/I(2002)003, ¶ 65 (Feb. 6, 2002); Opinion on Hungary, CoE Doc. ACFC/INF/OP/I(2001)004, ¶ 54 (Sept. 14, 2001); Opinion on Lithuania, CoE Doc. ACFC/INF/OP/I(2003)008, ¶ 81 (Sept. 25, 2003); Opinion on Moldova, CoE Doc. ACFC/INF/OP/I(2003)002, ¶ 93 (Jan. 15, 2003); Opinion on Norway, CoE Doc. ACFC/INF/OP/I(2002)003, ¶ 63 (Feb. 13, 2003); Opinion on Poland, *supra* note 46, at ¶ 90; Opinion on Romania, *supra* note 41, at ¶ 69; Opinion on Serbia and Montenegro, *supra* note 46, at ¶ 101; Opinion on the Slovak Republic, CoE Doc. ACFC/INF/OP/I(2001)001, ¶ 47 (July 6, 2001); Opinion on Slovenia, CoE Doc. ACFC/INF/OP/I(2005)002, ¶ 72 – 74 (March 14, 2005); and Opinion on the FYROM, supra note 47, at ¶ 102.

[49] The Advisory Committee explained this idea when it criticized the party system in foce in Albania until the year 2000. This system did not allow the registration of any political party based on national interests of minorities, which was the case, among others, of the Greek party Omonoia. *See* further about this case, Opinion on Albania, CoE Doc. ACFC/INF/OP/I(2003)004, ¶ 71 (Feb. 18, 2003). In the same sense, *see also* Opinion on Lithuania, CoE Doc. ACFC/INF/OP/I(2003)008, ¶ 75 (Sept. 25, 2003).

seats in their parliaments for these minority parties,[50] to reduce the electoral thresholds,[51] or to set up specific procedures for those issues that affect these minorities.[52]

III. The Potential International Criminal Liability of Its Authors

Another form of declaration of independence potentially contrary to contemporary international law would include one produced in the wake of military activities where gross violations of human rights take place. It would certainly be worth thorough analysis to evaluate what the consequences would be if a declaration is adopted by persons who are accused or investigated by an international criminal tribunal for genocide, crimes against humanity or war crimes. In the specific situation of Kosovo, many of these crimes have been committed precisely against persons belonging to national minorities, which makes this issue relevant to our context. Furthermore, the jurisdictional practice of the ICTY, and eventually also the practice of the military tribunals in Serbia, could give indications as to the criminal liability and lawfulness of the representation of Kosovar leaders. Yet in the present Advisory Opinion the Court has missed the opportunity to discuss the relationship between general international law and the norms of international criminal responsibility of individuals. Due to the limited scope of the present article, we are only going to describe some widely known facts in order to illustrate that it would have been beneficial for the Court to address this question.

Indeed, there is the precedent of a former prime minister of Kosovo, Ramush Haradinaj, who had been accused of crimes against humanity and war crimes committed when he led the Kosovo Liberation Army (KLA, or UCK in the Albanian acronym) in 1998. He was charged, *inter alia*, for crimes committed against persons belonging to minorities, such as the Roma. In March 2005, immediately after the indictment was serviced by the Tribunal, he stepped down as President of the Provisional Self-Government of Kosovo. But due to the lack of evidence, he was acquitted on 3 April 2008.[53] The case was ultimately reopened

[50] This was the method used in Bosnia and Herzegovina; *see* Opinion on Bosnia and Herzegovina, supra note 47, at ¶ 102, 104; and in regard to the guarantee of seats for the Serb minority in Croatia; *see* Opinion on Croatia, supra note 48, at ¶ 60 – 61. In regard to the application of this method to Hungarians and Italians in Slovenia, *see* Opinion on Slovenia, *supra* note 48, at ¶ 71.

[51] The Advisory Committee commented positively on this method to guarantee the minorities' participation in regional parliaments in Germany. There, the electoral threashold of 5% is not applied to parties of national minorities in the *Länder* of Schleswig-Holstein and Brandenburg. *See* Opinion on Germany, CoE Doc. ACFC/INF/OP/I(2002)008, ¶ 63 (Sept. 12, 2002). Poland also applies this system for the elections to the Seijm and the Senate; *see* Opinion on Poland, *supra* note 46, at ¶ 86.

[52] Opinion on the FYROM, *supra* note 47, at ¶ 94.

[53] *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment of Trial Chamber I of April 3, 2008, ¶ 502.

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by the Appeals Chamber. Mr. Haradinaj was indicted again and his arrest was ordered just three days before the publication of the Advisory Opinion.[54]

The ICTY has also held Fatmir Limaj in custody, accusing him of a number of war crimes against Serbs and Albanians suspected of collaborating with the Serbs during the Kosovo war, but he, too, was subsequently acquitted due to lack of evidence. It was alleged that he had been a KLA/UCK commander responsible for the operation of the Lapušnik/Llapushnik area and the Lapušnik/Llapushnik KLA/UCK prison camp (about 25 km west of Pristina). After his acquittel on 27 September 2007,[55] he reintegrated into the political life in Kosovo and holds currently a ministerial position in the Republic of Kosovo.

Another noteworthy case is that of Hashim Thaçi, who has been holding the presidency of Kosovo since 9 January 2008. He participated in the declaration of independence and has been president of the self-proclaimed Republic of Kosovo since 17 February 2008. Nevertheless, he has been charged with a number of crimes for acts committed during the Kosovo conflict with Serbia in the late nineties, which are relevant to international law, and which until now have not been prosecuted before any tribunal, including the ICTY.[56]

Until a full investigation of these and other cases is completed, it is not clear whether members of the KLA/UCK or others who committed international crimes had participated

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[54] *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-A, Appeals Chamber Judgment of July 19, 2010, ¶ 377. This judgment ordered partial re-trial of Mr. Haradinaj and his renewed detention.

[55] *Prosecutor v. Fatmir Limaj, Isak Musliu & Haradin Bala,* Case No. IT-03-66, Appeals Chamber Judgment of 27 September 2007.

[56] There is information, according to which Thaçi has close relations with the Kosovo mafia and military groups. These assertions are based on an article published in *Die Welt Online*, according to which there exists a 67-page long, hard-hitting analysis by the German Intelligence Service (*Bundesnachrichtendienst*, BND) about organized crime in Kosovo, as well as confidential report contracted by the German military, the *Bundeswehr*. In contrast to the CIA and MI6, both German intelligence reports accuse Thaci as well as former Prime Minister Ramush Haradinaj and Xhavit Haliti of the parliamentary leadership of far-reaching involvement in organized crime. The BND writes: "The key players (including Haliti, Haradinaj, and Thaçi) are intimately involved in inter-linkages between politics, business, and organized crime structures in Kosovo." At the end of the 1990s, the report accuses Thaçi of leading a "criminal network operating throughout Kosovo." At that time he was a co-founder of the Kosovo Liberation Army, and led the Albanian delegation at the 1999 conference at Rambouillet that preceded the Kosovo war. The BND report also accuses Thaçi of contacts to the Czech and Albanian mafias. In addition, it accuses him, together with Haliti, of ordering killings through the professional hit man 'Afrimi', who is allegedly responsible for at least 11 contract murders. At the same time, this report explains how Thaçi has been protected against any indictments by the United States. *See German Spy Affair Might Have Been Revenge*, DIE WELT ONLINE, November 30, 2008, available at http://www.welt.de/english-news/article2806537/German-spy-affair-might-have-been-revenge.html (last visited July 30, 2010). Similar information is published in the article *Das Kosovo auf dem Weg in die Unabhängigkeit: Rechtsstaat – Lieber nicht*, 43 DIE WELTWOCHE (2005), available at http://www.weltwoche.ch/ausgaben/2005-43/artikel-2005-43-rechtsstaat-lieber-nicht.html (last visited July 30, 2010). Also other writers qualify Hashim Thaçi as a "guerrilla leader"; *see* DEON GELDENHUYS, CONTESTED STATES IN WORLD POLITICS 199 (2009), who cited from *The Economist*.

in the declaration of independence. In this context, it is surprising to observe that, except for very few notable exceptions, there seems to be no desire by the ICTY to further investigate and prosecute Kosovo Albanian leaders who might be responsible for crimes against humanity or war crimes during the war in 1998 and 1999, nor later, such as during the March riots of 2004.[57] Nevertheless, the validity of a declaration of independence in contemporary international law pronounced by persons with such a background is questionable, particularly taking into account the existence of regional norms on this matter.

E. Conclusions: Declarations of Independence and the Protection of Minorities

The ICJ has phrased its response to the question about the "accordance with international law" of Kosovo's declaration of independence in such a restrictive manner that it seems likely that in the future any legal position will be argued and upheld based on it. The contribution to the debate about the international legal character of unilateral acts of secession, especially those involving claims of minorities against their host States, is almost insignificant.

Nevertheless, in conformity with the objectives set out for this article, we have briefly considered those aspects of the case closely related to the protection of minorities. In the wake of this study we identified one problem in the argumentation of the Court related to the lack of consideration of regional international law, as well as several substantive shortcomings.

Regarding the argumentation of the Court, we stated that it should be called upon to apply more comprehensively regional international law. This is particularly relevant in Europe given the considerable complexity of regional international norms in this continent. During our study, we focused on the application of the Council of Europe Framework Convention for the Protection of National Minorities, although at times other regional sources of international law come into play.

Stemming from these considerations, a number of substantive legal shortcomings can be identified that the Court omitted to consider in the Advisory Opinion. The first is in regard to remedial secession, where we analyzed the practice of the FCNM's application. This practice shows no sign whatsoever favorable to remedial secession. Even in the worst scenarios in Russia, Georgia, Azerbaijan or elsewhere, the Advisory Committee has maintained that solutions have to be sought within the existing borders of the States. The same applies to the practice regarding Kosovo, although we observed that the Advisory

[57] This surprising observation was already pointed out by Claude Cahn in his contribution to the previous session of this symposium held by the *German Law Journal*. *See* Claude Cahn, *The Birth of a Nation: Kosovo and the Protection of Pariah Minorities*, 8 GER. L.J. 81, 83-84 (2007).

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Committee did not attach any legal valuation to the declaration of independence, but rather accepted the new circumstances as something given *de facto*.

Another aspect of the legal analysis surrounding the declaration of independence related to minority protection is the question of its authorship. European norms on the protection of minorities, and to a certain extent even general international law, have developed surprisingly stringent requirements for minority consultation and participation in all decisions taken that might be relevant to them. European practice in fact reinforces the view that the assembly that enacted the declaration of independence should have included some members belonging to the Serb community. This group constitutes, at least in the northern border area of Kosovo, a very relevant percentage of the population. Other minority representatives also were absent. Precisely in situations such as the one in Kosovo, where negotiations had been going on for many years, it is important that at least some minorities support such a dramatic step as declaring independence.

Finally, we point towards the fact that the Court did not take into consideration that currently the ICTY is investigating international crimes, such as genocide, crimes against humanity and war crimes, committed during the armed conflicts that took place on the territory of the former SFRY. In this context, we at least suggest that the Court should have confirmed or checked the identity of the members of the assembly that voted for the declaration of independence, and determined whether any of them has criminal charges. It would be contradictory if the Security Council on the one hand created an international tribunal to prosecute criminals responsible for the most heinous crimes, and at the same time approved declarations of independence adopted by those very persons responsible for committing these crimes.

For these reasons, and probably many more which are to be discussed by other contributors to the symposium convened by the *German Law Journal*, we can only underline once more that the present Advisory Opinion will ignite much debate in the years to come, not for what it said, but for what it diplomatically omitted to say.