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The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion

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V. CONCLUSIONS

The right to self-determination as it has been applied directly by the African Commission and indirectly through the right to property in the Inter-American human rights system has emerged as a significant norm that must be taken into account in economic development projects and in governance in general. Concern for territorial integrity retains its dispositive force in most instances, limiting any claimed right to secession and independence to only the most extreme cases of massive and discriminatory violations of human rights. Yet, it is clear that the African Commission has accepted the notion of “remedial secession” and the plain meaning of African Charter Article 20(2), which guarantees external self-determination to “colonial or oppressed peoples” (emphasis added).

Apart from recognizing a right to secession and independence in extreme cases of oppression, the African Commission’s jurisprudence has the potential to radically change internal governance in African states by requiring—for the benefit of the broadly defined peoples of Africa—considerably greater decentralization and public participation in decision making. The commission has been clear that prior consultations, informed consent, and benefit sharing are required when particular peoples are affected by economic development projects. If this set of requirements found to be part of the right to self-determination and the right to development is implemented across Africa, the commission will have made a major contribution to human rights and democratic governance within the region. The result may also enhance the attractiveness and stability of economic investments over time.

There remain many difficult issues with respect to the utilization of resources on indigenous and tribal lands. Subsurface mineral and water rights belong to the state in many countries, and even conveying title to indigenous peoples will not be sufficient to ensure that they are properly consulted and able to determine the nature and scope of projects affecting their lands. In addition, in some countries, communities in voluntary isolation and uncontacted indigenous peoples exist and need to be protected. The regional bodies have begun to develop the norms needed to ensure that the rights of indigenous communities are protected, especially in relation to the content and application of the right to self-determination. As so often happens in human rights law, the issue now is one of implementation and compliance.

THE LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS IN THE *KOSOVO* ADVISORY OPINION

*By Marko Divac Öberg**

As the international community waited for the International Court of Justice (the Court) to deliver its advisory opinion of July 22, 2010, commentators wondered whether the Court would skirt difficult issues by adopting a narrow reading of the question put to it.¹ While the

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¹ See, e.g., Marko Milanovic, *Kosovo Advisory Opinion Preview*, EJIL: TALK! (July 14, 2010), at <http://www.ejiltalk.org/kosovo-advisory-opinion-preview>.

Court's ruling in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*² did turn out to be limited, the opinion contributes significantly to the Court's jurisprudence on the legal effects of United Nations resolutions.

The Security Council and the General Assembly confer legal effects on their resolutions on the basis of their powers under the UN Charter. In its prior jurisprudence,³ the Court has distinguished between resolutions, or provisions thereof, that can have binding legal effects ("decisions") and those that cannot ("recommendations"). A resolution may create obligations, rights, and powers; contain factual and legal determinations that trigger such effects; and establish how and when they operate. The Court also appears to have found that resolutions may contribute to the formation of customary international law, but this controversial aspect of their legal effects is not addressed in the *Kosovo* opinion.⁴

Certain facts of the case and steps of the Court's reasoning may assist in understanding the developments with regard to the legal effects of UN resolutions in the *Kosovo* opinion. On June 10, 1999, following a humanitarian crisis and armed conflict in Kosovo, the Security Council adopted, under Chapter VII of the Charter, Resolution 1244, which provided for the establishment of international security and civil presences in Kosovo.⁵ The civil presence (the United Nations Interim Administration Mission in Kosovo or UNMIK) adopted a "Constitutional Framework" for Kosovo, which created the Provisional Institutions of Self-Government of Kosovo.⁶ After negotiations between Serbia and Kosovo on the future status of the Serbian province failed, Kosovo declared independence on February 17, 2008.⁷ On October 8 of that year, the General Assembly adopted Resolution 63/3, which asked whether "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [was] in accordance with international law."⁸ In its opinion the Court interpreted the meaning and scope of the question, finding that it was narrow and that the General Assembly had not predetermined the identity of the authors of the declaration.⁹ The Court also analyzed Security Council Resolution 1244, finding that it did not prohibit the authors of the declaration, whom the Court characterized as "representatives of the people of Kosovo," from declaring independence from Serbia.¹⁰ The Court concluded that the declaration did not violate applicable international law, declining to pronounce on its effects in international law.¹¹

² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion (Int'l Ct. Justice July 22, 2010) [hereinafter *Kosovo Opinion*]. Documents of the International Court of Justice referred to in this essay are available on the Court's Web site, <http://www.icj-cij.org/>.

³ For details, see Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879 (2005).

⁴ If anything, the Court retreated from that position. See *Kosovo Opinion*, *supra* note 2, para. 80 (interpreting its analysis of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970), in *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 101–03, paras. 191–93 (June 27)). The Court's discussion, *see id.*, para. 81, of the practice of the UN Security Council reaches no findings on the legal effects of its resolutions.

⁵ SC Res. 1244 (June 10, 1999); *Kosovo Opinion*, *supra* note 2, para. 58.

⁶ *Kosovo Opinion*, *supra* note 2, para. 62.

⁷ *Id.*, paras. 67–76.

⁸ GA Res. 63/3 (Oct. 8, 2008); *Kosovo Opinion*, *supra* note 2, para. 1.

⁹ *Kosovo Opinion*, *supra* note 2, paras. 49–56.

¹⁰ *Id.*, paras. 109, 119.

¹¹ *Id.*, para. 122. Richard Falk's analysis of the Court's opinion on these points appears in this Agora at Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AJIL 50, 50–52 (2011).

The Court's treatment of the legal effects of UN resolutions in the *Kosovo* opinion is in line with its past jurisprudence. For instance, the Court confirmed that "[w]ithin the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law."¹² The Court's new contributions on the legal effects of UN resolutions concern the effect on the Court itself of a factual determination made by the General Assembly, nonstate addressees of obligations contained in Security Council resolutions, the termination of the effects of such resolutions, and the delegation of powers by the Security Council through its resolutions, which are discussed in turn below.

I. THE EFFECT ON THE COURT OF FACTS STATED BY THE GENERAL ASSEMBLY

The prior jurisprudence of the Court appeared to indicate that, as a rule, a factual or legal determination by the Security Council or the General Assembly had the same legal force as the provision of the resolution in which it was contained. Thus, a determination made in a decision would itself be binding on its addressee(s). A determination made in a recommendation, on the other hand, would not be binding on its addressee(s). However, an interesting and unanswered question lurked in that jurisprudence, namely, whether a factual or legal determination made in a decision would also be binding on the Court.¹³ In the *Kosovo* opinion, the Court for the first time squarely addressed that question.

The prior jurisprudence made clear that General Assembly resolutions requesting that the Court give an advisory opinion qualified as decisions that *authorized* the Court to do so.¹⁴ In its request for the *Kosovo* advisory opinion, the General Assembly stated that the unilateral declaration of independence had been adopted by the Provisional Institutions of Self-Government of Kosovo.¹⁵ However, several participants in the proceedings contested this factual assertion.¹⁶ The Court noted that the identity of the authors of the declaration of independence could affect the answer to the question posed by the General Assembly, and proceeded to reach the following significant conclusion: "It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly."¹⁷ It added that "the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity."¹⁸ The Court then explored the identity of the authors of the declaration, found that the General Assembly's identification had been incorrect, and recast

¹² *Kosovo Opinion*, *supra* note 2, para. 85; *see also id.*, para. 88. The Court's statement in paragraph 85, "Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations," should not be misunderstood. A Security Council resolution does not need to be adopted under Chapter VII to have binding legal effect, and can contain language that does not create binding effect. *See* Divac Öberg, *supra* note 3, at 884–85.

¹³ For details on the Court's past treatment of these issues, *see* Divac Öberg, *supra* note 3, at 890–92.

¹⁴ *See id.* at 886–87; *see also Kosovo Opinion*, *supra* note 2, paras. 24, 29.

¹⁵ *Kosovo Opinion*, *supra* note 2, para. 49.

¹⁶ *Id.*, paras. 52, 103.

¹⁷ *Id.*, para. 52.

¹⁸ *Id.*, para. 54 (relying on a statement made in a different context in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ REP. 151, 157 (July 20) [hereinafter *Certain Expenses*]).

the factual situation.¹⁹ This finding constituted an important step in the Court's reasoning, which led to the conclusion that Security Council Resolution 1244 did not bind the authors of the declaration.²⁰

The Court's finding that it should not treat the matter as having been settled by the General Assembly is correct as a matter of principle. The fact-finding process of the Court is significantly different from that of the General Assembly, and as such could lead (and now did lead) to different conclusions. Fact-finding lies at the heart of a court's judicial function and should not, as a rule, be relinquished. Otherwise, the entity requesting the advisory opinion might manipulate its premises and thus its outcome.²¹ An advisory opinion premised on an incorrect factual basis would at best be of questionable legal assistance to the requesting party. This is not to say that the Court should lightly overturn stipulations of fact made by its fellow principal organs of the United Nations.

While the Court is likely to reiterate its pronouncement on the proper exercise of its judicial function in the future, many questions currently remain as to its scope. The pronouncement was immediately followed by the finding that the General Assembly had not intended to restrict the Court's freedom to determine for itself the identity of the authors of the declaration.²² This finding leaves open whether the General Assembly, if it did intend to do so, could make a determination that would bind the Court. Finally, the premise overturned by the Court in the *Kosovo* case was factual rather than legal, was contained in an authorization rather than an obligation, and was made by the General Assembly rather than the Security Council (let alone under Chapter VII of the Charter).²³ Would the Court, for instance, apply its pronouncement to the determination of a threat to the peace made by the Security Council under Article 39 of the UN Charter?

II. NONSTATE ADDRESSEES OF OBLIGATIONS IN SECURITY COUNCIL RESOLUTIONS

In the past, the Court had focused on which *states* could be bound by UN resolutions. The solution appeared to be that all member states could be bound whether or not they had voted against the resolution, or, in the case of resolutions adopted by the Security Council, were members of that body.²⁴ This interpretation was confirmed, as far as the Security Council is concerned, by the *Kosovo* opinion, which held that "Security Council resolutions can be binding on all Member States, irrespective of whether they played any part in their formulation."²⁵ As for Resolution 1244 itself, the Court noted that "[i]t is mostly concerned with creating obligations and authorizations for United Nations Member States as

¹⁹ *Id.*, paras. 102–09. Judges Tomka, Sepúlveda-Amor, Bennouna, and Yusuf contested the majority on this point, but not because they thought that the Court was bound by the determination of the General Assembly. *Id.*, Declaration Tomka, J., paras. 10–21; Sep. Op. Sepúlveda-Amor, J., paras. 23–32; Diss. Op. Bennouna, J., paras. 27–35; Sep. Op. Yusuf, J., paras. 20–21. Only Judge Koroma found that "[t]he Court does not have the power to reformulate the question—implicitly or explicitly—to such an extent that it answers a question about an entity other than the Provisional Institutions of Self-Government of Kosovo." *Id.*, Diss. Op. Koroma, J., para. 3.

²⁰ *Id.*, paras. 113–21 (majority opinion).

²¹ This situation is to be distinguished from the direction and influence inherent in choosing what questions to ask the Court and how to phrase them.

²² *Kosovo Opinion*, *supra* note 2, para. 53.

²³ For a cautionary tale, see Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945 (2007).

²⁴ See Divac Öberg, *supra* note 3, at 884–85.

²⁵ *Kosovo Opinion*, *supra* note 2, para. 94 (citation omitted). *But see infra* notes 73, 74.

well as for organs of the United Nations such as the Secretary-General and his Special Representative.”²⁶

While in the past the Court had also dealt with legal effects of UN resolutions on nonstate entities, notably UN organs and staff members, it had never dealt squarely with their legal effects on nonstate actors outside the UN system. Therein lies a major new contribution of the *Kosovo* opinion, which examined “whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008.”²⁷ In answering this question, the Court looked to the intent of the Security Council.²⁸ This led it to make two significant clarifications of the *Namibia* test for determining whether a resolution has binding effect:²⁹ first, that it serves to establish the intent of the Security Council; and, second, that it can also be applied, *mutatis mutandis*, to determine who is bound by that binding effect.³⁰

The Court found, on the basis of the plain meaning of the language in Resolution 1244, that the Security Council had intended to impose obligations on some actors other than UN member states and organs.³¹ The authors of the declaration, however, were not among them.³² The Court then examined the formulations used in other relevant Security Council resolutions, and found many—unlike Resolution 1244—that made demands on the Kosovo Albanian leadership.³³ The Court did not say whether these demands had any legal effect. It merely found that “it has not been uncommon for the Security Council to make demands on actors other than UN Member States and intergovernmental organizations.”³⁴ The Court concluded that nowhere in Resolution 1244 was there any prohibition on declaring independence addressed to the authors of the Kosovo declaration of independence (as the Court had identified them).³⁵

Since the Court found that the resolution contained no prohibition binding on the authors of the declaration of independence, it could avoid addressing whether as a matter of law the Security Council could issue a resolution with legal effects that would bind such actors. The Court may have preferred, for instance, not to make sweeping statements about the powers of the Security Council when it could decide the matter on narrower and more case-specific

²⁶ Kosovo Opinion, *supra* note 2, para. 115.

²⁷ *Id.*, para. 101.

²⁸ *Id.*, paras. 115, 117. See also, in a different context, *id.*, para. 94, and, for the General Assembly, para. 53.

²⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 53, para. 114 (June 21) [hereinafter *Namibia*].

³⁰ See Divac Oberg, *supra* note 3, at 885 (on establishing Council’s intent); Kosovo Opinion, *supra* note 2, para. 117.

³¹ Kosovo Opinion, *supra* note 2, para. 115 (noting that there was “no indication” in Resolution 1244 that the Council had “intended to impose, *beyond that*, a specific obligation to act or a prohibition from acting, addressed to such other actors” (emphasis added)).

³² The actors in question were the Kosovo Liberation Army and other armed Kosovo Albanian groups, as well as “all concerned,” including the international security presence, KFOR. *Id.*

³³ *Id.*, para. 116.

³⁴ *Id.*

³⁵ *Id.*, paras. 118–19. It is not entirely clear what other interpretive tools the Court used to establish on whom Resolution 1244 made demands, or what weight it gave those tools.

grounds. Consequently, one cannot conclude that it has found that the Security Council can bind nonstate actors.³⁶

Nevertheless, the Court has created a precedent that would facilitate a future determination that the Security Council does have that power. Would this course be legally defensible? The text of the UN Charter places no restrictions on the Security Council's power to impose obligations on nonstate actors. The Court's review of the practice of the Security Council confirms that it already often imposes obligations on nonstate actors.³⁷ It needs to do so in light of contemporary threats to the peace emanating from such actors, in order to exercise its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter.³⁸ It is therefore suggested that the Security Council has the implied power to bind nonstate actors.³⁹

III. TERMINATION OF THE EFFECTS OF SECURITY COUNCIL RESOLUTIONS

The prior jurisprudence of the Court had little to say about when the legal effects of UN resolutions start and end.⁴⁰ In the *Kosovo* opinion, the Court explicitly recognized that the Security Council had adopted a resolution terminating the binding effect created by one of its prior resolutions. Specifically, the Court stated, "By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998)."⁴¹ This formulation shows that the Court considered that both Resolution 1160 ("prohibition") and Resolution 1367 ("decided") contained decisions with binding effects. Indeed, if the first decision had not created any binding effect, there would be nothing to reverse, and if the second resolution had not had the same legal force, it could not have reversed the first resolution. Whether creating or extinguishing obligations, the same power is being exercised.

Of course, the Security Council can adjust the lifespan of its resolutions by including language to that effect. One such adjustment was made in Security Council Resolution 1244, which, the Court noted, "expressly provides that 'the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security

³⁶ Note, however, that the Court gave the authors of the declaration of independence some sort of standing before it. See *id.*, paras. 3–4, 6, 8–11, 13–14.

³⁷ *Id.*, para. 116; see also TSHIBANGU KALALA, LES RÉOLUTIONS DE L'ONU ET LES DESTINATAIRES NON ÉTATIQUES (2009); Maria-Lydia Bolani, *Security Council Sanctions on Non-state Entities and Individuals*, 56 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 401, 407–23 (2003); Jean-Luc Florent, *Les destinataires non étatiques des résolutions du Conseil de Sécurité*, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, COLLOQUE DU MANS: LE SUJET EN DROIT INTERNATIONAL 107 (2005).

³⁸ See Bolani, *supra* note 37, at 429–30; Florent, *supra* note 37, at 115.

³⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ REP. 174, 182–83 (Apr. 11); see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 286–87 (4th ed. 2005); KALALA, *supra* note 37, at 74–75, 119–21, 128–29; Bolani, *supra* note 37, at 430–38; Farid W. Dahmane, *Les mesures prises par le Conseil de Sécurité contre les entités non-étatiques*, 11 AFR. J. INT'L & COMP. L. 227 (1999); P. H. Kooijmans, *The Security Council and Non-state Entities as Party to a Conflict*, in INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 333 (Karel Wellens ed., 1998) (all reaching the same conclusion); see also Jochen A. Frowein & Nico Krisch, *Introduction to Chapter VII*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 701, 715–16 (Bruno Simma ed., 2d ed. 2002); Evelyne LaGrange & Pierre M. Eise-mann, *Article 41*, in LA CHARTE DES NATIONS UNIES: COMMENTAIRE, ARTICLE PAR ARTICLE 1195, 1202–03, 1215–16 (Jean-Pierre Cot et al. eds., 3d ed. 2005).

⁴⁰ See Divac Öberg, *supra* note 3, at 894–95.

⁴¹ *Kosovo Opinion*, *supra* note 2, para. 37.

Council decides otherwise'.⁴² In reality, this fine-tuning is difficult to distinguish from the default situation, which is that the legal effect continues unless it is repealed at a later stage. The Court confirmed this reading by concluding that "neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008."⁴³

Another argument put before the Court pertaining to the termination of a resolution's binding effect was that only the adopting body itself can repeal that effect. Some participants had claimed that the declaration of independence represented a unilateral attempt to abolish the international presence imposed under Resolution 1244, which the Security Council alone could do.⁴⁴ The Court did not address this argument, as its own findings made that superfluous,⁴⁵ but its earlier examination of whether the resolution remained in force dealt exclusively with what the Security Council had done.⁴⁶ There was no need to extend the analysis to the acts of the authors of the declaration of independence. In the absence of express provisions to the contrary in the UN Charter, the power to revoke a Security Council decision lies with the body with the power to issue it, the Council itself.⁴⁷ Hence, the authors of the declaration of independence could not terminate the legal effect, in the international legal order, of Security Council Resolution 1244.

IV. DELEGATION OF POWERS BY THE SECURITY COUNCIL THROUGH ITS RESOLUTIONS

In addition to binding effects, UN resolutions can contain empowering effects. Whereas binding effects create or extinguish obligations and rights, empowering effects confer the very ability to create or extinguish obligations, rights, and powers. In the past the Court has considered the empowerment by the General Assembly of a subsidiary body and disempowerment of itself through termination of a trusteeship, as well as the empowerment by the Security Council of an international criminal tribunal.⁴⁸ In the *Kosovo* case, the Court found itself dealing with Security Council Resolution 1244, "which authorized the creation of an international military presence (subsequently known as 'KFOR') and an international civil presence (. . . 'UNMIK') and laid down a framework for the administration of Kosovo."⁴⁹ The

⁴² *Id.*, para. 91 (quoting SC Res. 1244, *supra* note 5, op. para. 19).

⁴³ *Id.*

⁴⁴ *Id.*, para. 111.

⁴⁵ One notes in particular in this regard its finding that Resolution 1244 did not preclude the issuance of the declaration of independence because the two instruments operated on different levels. *Id.*, para. 114. Judge Koroma, on the other hand, found that "the unilateral declaration of independence is an attempt to bring to an end the international presence in Kosovo established by Security Council resolution 1244 (1999), a result which could only be effected by the Security Council itself." Diss. Op. Koroma, J., *supra* note 19, para. 11; *see also id.*, para. 17.

⁴⁶ *Kosovo Opinion, supra* note 2, para. 91; *see also* Sep. Op. Sepúlveda-Amor, J., *supra* note 19, para. 22.

⁴⁷ ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 251 (2004).

⁴⁸ *See* Divac Öberg, *supra* note 3, at 888–90; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), paras. 444–45 (Int'l Ct. Justice Feb. 26, 2007) [hereinafter *Bosnia Genocide* case]. The Court implicitly found that the Security Council had validly created the International Criminal Tribunal for the Former Yugoslavia, or it would have been a legal nullity that could not possibly qualify as an "international penal tribunal" under Article VI of the Genocide Convention.

⁴⁹ *Kosovo Opinion, supra* note 2, para. 37; *see also id.*, para. 58. Paragraph 42 of the opinion should not be read to mean that, by adopting Resolution 377A (V) (Nov. 3, 1950) ("Uniting for Peace"), the General Assembly empowered itself in any way, since a body cannot confer any power that it does not possess, hence cannot empower

authorization to create KFOR was addressed to member states and relevant international organizations, while the authorization to create (what would be known as) UNMIK was addressed to the UN secretary-general.⁵⁰ Since the secretary-general does not have the power under the Charter to create such a body, Resolution 1244 had the effect of empowering him to establish UNMIK, and also determined certain of its main responsibilities.⁵¹ Some of these lie at the heart of state sovereignty, such as the performance of basic civilian administrative functions and the maintenance of civil law and order.⁵²

Unfazed, the Court noted that “resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo.”⁵³ A chain of delegation of powers descended from the Security Council through Resolution 1244 to the secretary-general, and UNMIK (headed by the special representative of the secretary-general) through the “Constitutional Framework” to Kosovo’s “Provisional Institutions of Self-Government,” which possessed legislative, executive, and judicial powers.⁵⁴ One might be surprised to find powers normally associated with a sovereign state at the bottom of a chain of delegated powers in which no body can exercise or delegate more power than it possesses.⁵⁵ However, the Court has recognized in previous cases that a principal organ of the United Nations may assign functions to a subsidiary body that it cannot exercise itself.⁵⁶ Given that the Security Council is competent to delegate its powers to the secretary-general,⁵⁷ and that Resolution 1244 was adopted under Chapter VII of the UN Charter, which provides an adequate legal basis in Article 41,⁵⁸ one may conclude that the Security Council is competent to delegate such powers.

The Court did not explicitly acknowledge these immense empowering effects in Resolution 1244. It rather emphasized that the resolution had been adopted on the basis of Chapter VII, noting in passing that none of the participants in the proceedings had questioned the

itself. *Certain Expenses*, *supra* note 18, at 163–65, shows that Resolution 377A was based on powers conferred on the General Assembly by the UN Charter.

⁵⁰ SC Res. 1244, *supra* note 5, op. paras. 7, 10.

⁵¹ *Id.*, op. paras. 10–11; DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 51–53, 123–24 (1999); Erika de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, 103 AJIL 83, 87–90 (2009).

⁵² SC Res. 1244, *supra* note 5, op. para. 11(b), (i).

⁵³ Kosovo Opinion, *supra* note 2, para. 97; *see also id.*, paras. 60–62.

⁵⁴ *Id.*, paras. 58–62, 88–92, 97, 106.

⁵⁵ SAROOSHI, *supra* note 51, at 20, 42, 50–55.

⁵⁶ Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 ICJ REP. 47, 61 (July 13); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 ICJ REP. 166, 172–75, paras. 16–23 (July 12); *Bosnia Genocide case*, *supra* note 48; SAROOSHI, *supra* note 51, at 7–8, 11–13, 92–98; CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND 425–27 (2008).

⁵⁷ SAROOSHI, *supra* note 51, at 16–19, 51–53.

⁵⁸ STAHN, *supra* note 56, at 415–46, 450–51; Michael Bothe & Thilo Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 217, 230–35 (Christian Tomuschat ed., 2001); de Wet, *supra* note 51, at 87; Jochen A. Frowein & Nico Krisch, *Article 41*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 39, at 735, 744; Andreas Zimmermann & Carsten Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, 70 NORDIC J. INT’L L. 423, 436–41 (2001); *see also* SAROOSHI, *supra* note 51, at 59–62.

resolution's status as part of the relevant law.⁵⁹ Much of the ensuing reasoning is premised on the existence of empowering effects, such as the finding that the constitutional framework was in force and applicable, and formed part of the international law to be considered by the Court.⁶⁰ One might argue that the territorial state's consent to the deployment of UNMIK in Kosovo constitutes the real source of the sovereign-type powers exercised under the UNMIK legal regime.⁶¹ Indeed, Resolution 1244 repeatedly emphasizes this consent.⁶² Yet the Court notes this consent only once and in passing when discussing Resolution 1244.⁶³ It is therefore difficult to conclude that the *Kosovo* opinion supports this interpretation. In sum, the opinion confirms the Security Council's competence to delegate such powers to the secretary-general through its resolutions.⁶⁴

The Security Council's delegation of quasi-sovereign powers through its resolutions is qualified in two notable ways—it is temporary and leaves sovereign title to Kosovo unaffected.⁶⁵ In the *Kosovo* opinion, the Court stressed the interim nature of the regime set up under Resolution 1244.⁶⁶ It also found that the “interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its *continuing* sovereignty over the territory of Kosovo.”⁶⁷ Nevertheless, UNMIK has existed for more than a decade, and will not be dismantled until the Security Council so decides.⁶⁸ Under the UN Charter, any single permanent member of the Security Council can use its veto power to maintain this legal status quo, even while circumstances in Kosovo continue to change.⁶⁹ This situation approaches a permanent restriction of state sovereignty, which would be beyond even the Security Council's immense powers under Chapter VII of the Charter.⁷⁰ The powers of the Security Council are limited by the purposes and principles in Chapter I of the Charter.⁷¹ Under Article 2(1) of Chapter I, “The Organization is based on the principle of the sovereign equality of all its Members.” This principle includes the inviolability of the territorial integrity of states.⁷² Finally, since the Court itself has found that Serbia was not a member of the United Nations at the time Resolution

⁵⁹ Kosovo Opinion, *supra* note 2, para. 85.

⁶⁰ *Id.*, paras. 91, 93.

⁶¹ See Bothe & Marauhn, *supra* note 58, at 224–28, 241; Zimmermann & Stahn, *supra* note 58, at 438–41.

⁶² SC Res. 1244, *supra* note 5, pmb., op. para. 5, & Annex 2, para. 3.

⁶³ Kosovo Opinion, *supra* note 2, para. 58.

⁶⁴ The *Kosovo* opinion has at the very least created a precedent that would enable the Court to find later that the territorial state's consent is not required. In favor of the position that it is not required, see STAHN, *supra* note 56, at 421; Carsten Stahn, *The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis*, 2001 MAX PLANCK Y.B. UN L. 105, 138–39, available at <http://www.mpil.de/ww/en/pub/news.cfm>. See also SAROOSHI, *supra* note 51, at 62.

⁶⁵ SC Res. 1244, *supra* note 5, pmb., op. paras. 10–11, Annex 1, 4th, 6th principles, & Annex 2, paras. 5, 8; STAHN, *supra* note 56, at 428, 454–55, 463–65; Bothe & Marauhn, *supra* note 58, at 236; Stahn, *supra* note 64, at 118–20, 143–44; Zimmermann & Stahn, *supra* note 58, at 442–44.

⁶⁶ Kosovo Opinion, *supra* note 2, paras. 89, 95, 98–100, 104, 114 (in particular).

⁶⁷ *Id.*, para. 98 (emphasis added).

⁶⁸ SC Res. 1244, *supra* note 5, op. para. 19.

⁶⁹ UN Charter Art. 27(3); see STAHN, *supra* note 56, *Preface* at xxix–I (paperback 2010).

⁷⁰ Carsten Stahn, *Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT'L L. 531, 541–42 (2001); see also DE WET, *supra* note 47, at 182–87; SAROOSHI, *supra* note 51, at 16–19; STAHN, *supra* note 56, at 420; Divac Öberg, *supra* note 3, at 884–85.

⁷¹ Namibia, *supra* note 29, at 52, para. 110; see also DE WET, *supra* note 47, at 191–95.

⁷² GA Res. 2625 (XXV), annex, *supra* note 4; Kosovo Opinion, *supra* note 2, para. 80.

1244 was adopted and became one only on November 1, 2000,⁷³ the Court could perhaps have paid more attention to the legal significance of Serbia's consent to the deployment of UNMIK.⁷⁴

V. CONCLUSION

While remaining largely consistent with the Court's prior jurisprudence on the legal effects of UN resolutions, the *Kosovo* opinion contains the most significant developments since the *Namibia* advisory opinion of 1971 with regard to the legal effects that the Security Council and the General Assembly confer on their resolutions. The Court declined to be bound by a factual determination that figured in a General Assembly resolution addressed to the Court. It made significant new statements about the possible addressees of obligations set forth in Security Council resolutions, as well as the modalities of terminating their effects. Finally, it validated the delegation by the Security Council of its extensive powers of international territorial administration. In all these matters, the Court made the right legal choices while avoiding unnecessary obiter dicta, leaving fertile ground for additional advances in the future.

⁷³ *E.g.*, Legality of Use of Force (Serb. & Montenegro v. Belg.), Preliminary Objections, 2004 ICJ REP. 279, 310–11, paras. 78–79 (Dec. 15). For a critical overview of the Court's treatment of the status at the United Nations of successive incarnations of Serbia, see Yehuda Z. Blum, *Was Yugoslavia a Member of the United Nations in the Years 1992–2000?* 101 AJIL 800 (2007).

⁷⁴ One should not conclude that the Court found that any legal effects of Resolution 1244 were binding on a nonmember state, *see Namibia*, *supra* note 29, at 56, para. 126; Divac Öberg, *supra* note 3, at 885, for the following reasons: the membership issue had apparently not been raised by any participants in the proceedings; the Court explicitly stated that Security Council resolutions could bind "all Member States," *see supra* note 25 and corresponding text; and to answer the question before it, the Court needed to examine the effects of Resolution 1244 on the authors of the declaration of independence at the time of the declaration, which was after Serbia resumed membership in the United Nations.