

An Analysis of the ICJ Advisory Opinion on Kosovo’s Unilateral Declaration of Independence

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A. Introduction

The International Court of Justice (ICJ) ruled in an advisory opinion on 22 July 2010 that Kosovo’s 17 February 2008 unilateral declaration of independence from Serbia did not violate international law.¹ The Kosovo Parliament’s declaration of independence stated that Kosovo would continue to be bound by the United Nations Security Council Resolution 1244 (1999) (hereinafter “SC Resolution 1244 (1999)”), as well as the Ahtisaari plan.² UN Special Envoy for Kosovo Martti Ahtisaari’s proposal, produced in February 2007, defined Kosovo’s internal settlement, minority-protection mechanisms, and allowed for independence under international supervision.³ The proposal increased the powers devolved to Kosovar institutions but without providing for the complete removal of international oversight and authority.⁴

SC Resolution 1244 (1999) authorized the creation of an international military presence (KFOR) led by the North Atlantic Treaty Organisation (NATO), an international civil presence (the United Nations Interim Administration Mission in Kosovo (UNMIK), and laid down a framework for the administration of Kosovo.⁵ The powers and responsibilities laid out in SC resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter “Constitutional Framework”), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and

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¹ Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22) [hereinafter Advisory Opinion].

² S.C. Res. 508, U.N. Doc. S/RES/1244 (June 10, 1999).

³ Security Council Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1 (Mar. 26, 2007).

⁴ *Id.*, art. 9, art. 15.

⁵ See *supra* note 2, paras. 5 -11.

the Provisional Institutions of Self Government of Kosovo.⁶

The authors of the Kosovo's declaration of independence claim to represent the "call of the people to build a society that honours human dignity."⁷ The declaration relates the decision to the recent strife and violence in Kosovo, albeit in "spirit of reconciliation and forgiveness."⁸ It gives special emphasis to the commitment to promote democratic principles and welcomes the international community's continued support through the international presence established in Kosovo on the basis of SC Resolution 1244 (1999).⁹ The declaration observes that Kosovo "is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."¹⁰ Notably, the declaration stops short of directly referring to the Kosovo's claim to self-determination.¹¹ Instead, it implies to represent the collective decision of Kosovo's population as a whole, because it speaks as the "will of the people" in the operative paragraph 1.¹² The "will of the people" refers to a particular image of Kosovo formed by the Contact Group (composed of the U.S., UK, France, Germany, Italy and Russia) in response to the war in Bosnia in the early 1990s. Namely, the November 2005 Contact Group produced a set of "Guiding Principles" to resolve Kosovo's future status, which defined Kosovo as a unitary structure that cannot be partitioned or united with any other country (i.e. Albania).¹³

In response to the Kosovo's declaration of independence, to date, sixty-nine of United Nations Member States, including United States, United Kingdom, and France, have formally recognized the Republic of Kosovo as an independent state. Other states, such as Serbia, People's Republic of China, Russia and India, rejected the declaration as illegal and illegitimate. In October 2008, Serbia requested a vote from the UN Member States for the ICJ to give an Advisory Opinion. Following the request from Serbia, the United Nations General Assembly (UNGA) requested an Advisory Opinion from the ICJ on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of

⁶ On a Constitutional Framework For Provisional Self Government in Kosovo, United Nations Interim Administration Mission in Kosovo, UNMIK/REG/2001/9 (May 15, 2001).

⁷ KOSOVO DECLARATION OF INDEPENDENCE, preamble (Feb. 17, 2008), available at http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf (last visited Aug. 21, 2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, Letter from the President of the Security Council to the Secretary-General, Annex, U.N. Doc. S/2005/709 (Nov. 10, 2005), para. 6.

Self-Government of Kosovo in accordance with international law?"¹⁴

The ICJ narrowly interpreted the request by the UNGA in providing its opinion on whether or not the declaration of independence is in accordance with international law. It considered that the debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession" are beyond the scope of the question posed by the UNGA.¹⁵ The Court only answered the more narrow question determining whether the declaration of independence violated general international law or the *lex specialis* created by SC Resolution 1244 (1999). The ICJ concluded that general international law contains no applicable prohibition of declarations of independence. The adoption of the declaration of independence did not violate general international law, the SC Resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.¹⁶

This paper observes both the political and legal ramifications of the ICJ Advisory Opinion. First, it will address the manner in which the ICJ reformulated and interpreted the question posed by the UNGA. It will then focus on the ICJ's approach to the status of the unilateral declaration of independence in first, general international law, and second, its validity under the SC Resolution 1244 (1999) and the UNMIK Constitutional Framework. In view of the Court's brief treatment of the right to 'remedial self-determination,' the analysis will conclude with general remarks on the status of this right in international law and its relationship to the case of Kosovo.

B. The Question

In its Advisory Opinion on the question posed in the UNGA resolution A/RES/63/3, the Court explained its interpretation of the question as follows:

The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States, which have recognized it as an independent State. Accordingly, the Court does not

¹⁴ G.A. Res. 63/3, U.N. Doc. A/RES/63/3 of (Oct. 8, 2008).

¹⁵ See *supra* note 1, para. 83.

¹⁶ *Id.* para. 122.

consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly.¹⁷

In the Court's view, it was not called upon to decide whether Kosovo had a right or entitlement to declare independence. The Court recalled that, "in some previous cases, it departed from the language of the question put to it where the question was not adequately formulated."¹⁸ In interpreting the question put to it by the UNGA, the Court stated that "[t]he answer to that question turns on whether or not the applicable international law prohibited the declaration of independence."¹⁹ The Court contrasts the Kosovo case with the *Reference relating to the Secession of Quebec from Canada*,²⁰ where the question put to the Supreme Court of Canada asked whether there was a right to "effect secession," and whether there was a rule of international law that conferred a positive entitlement on any organs named.²¹ In contrast, as the Court argued, the answer to the UNGA question turns on whether or not the applicable international law prohibited the declaration of independence.

The ICJ reformulated the question regarding Kosovo's independence in a way that not only modified the original question but also created a new question that focused on whether there are prohibitive rules against declarations of independence in international law. Accordingly, in answering the question as to whether or not the declaration was in accordance with international law, the Court took the view that it needed to decide whether or not the declaration of independence was adopted in violation of international law and is not required by the question to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.²²

The Court concluded in paragraph 3 of the operative clause (paragraph 123) that the declaration of independence "did not violate international law." Relying on the *Lotus*

¹⁷ See *supra* note 1, para. 51.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada, [1998] 2 S.C.R. 217 (Can.).

²¹ See *supra* note 1, para. 56.

²² *Id.*

Judgment, stating restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order,²³ the Court concluded in the *Kosovo* opinion that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition. The Court did not address whether an act, while not specifically in violation of international law, could be performed in such a way so as to violate an existing law. The Court claimed that, "The fact that a question has political aspects does not deprive it of its character as a legal question. The Court is not concerned with the political motives behind a request or the political implications which its opinion may have."²⁴

In his Separate Opinion, Judge Simma questioned this conclusion of the Court. The answer, as provided by the ICJ, remains vague, for it does not explicitly permit or prohibit declarations of independence. As he further argues, it is possible for international law to be consciously silent or neutral on a specific fact or act, without being *nonliquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. This would suggest that there are areas where international law has not yet come to regulate, without posing a broader conceptual problem relating to the coherence of the international order.²⁵ Instead, according to Simma, "the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from 'tolerated' to 'permissible' to 'desirable.'"²⁶ Significantly, however, the answer given by the Court does not imply that international law expressly permits declarations of independence. The Court then proceeded to address the legality of Kosovo's declaration of independence in relation to general international law, the SC Resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder.

C. Kosovo's Unilateral Declaration of Independence and General International Law

The ICJ concluded that because general international law contains no applicable prohibition of declarations of independence, the Kosovo declaration of independence did not violate general international law. The ICJ acknowledged the varied historical record of declarations of independence. During the eighteenth, nineteenth, and early twentieth centuries, there were numerous instances of declarations of independence; some were

²³ Lotus Judgment No. 9, 1927 P.C.I.J. (ser. A) No. 10, at 18.

²⁴ See *supra* note 1, para. 27.

²⁵ Advisory Opinion, Separate Opinion of Judge Bruno Simma, para. 9.

²⁶ *Id.*, para. 8.

contested, some were not.²⁷ In paragraph 79 The Court argued: "In no case, however does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence."²⁸ It notes that during the second half of the twentieth century, the developments in the right to self-determination in international law created a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. "A great many new States," the Court argued, "have come into existence as a result of the exercise of this right."²⁹ The practices of States in instances of declarations of independence outside this context does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

The ICJ thus recognized that there is a right to external self-determination in international law, which can result in creation of new states, and that declarations of independence are not illegal. It also argued that declarations of independence can happen outside of the context of self-determination and state creation. It did not, therefore, entirely avoid the discussion of self-determination; rather, it affirmed its existence, albeit in a limited manner. The Court referred to the participants' arguments in the proceedings that claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of "remedial secession" in the face of the situation in Kosovo.³⁰ It reiterates paragraph 79 stressing that "one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination" in the context of "non-self-governing territories and peoples subject to alien subjugation, domination and exploitation". It recognizes that on the subject of whether "the international law of self determination confers upon part of the population of an existing State a right to separate from that State" is related by radically different views and that "[s]imilar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances."³¹ Further, there was also a "sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo."³²

²⁷ See *supra* note 1, para. 79.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, para. 82.

³¹ *Id.*

³² *Id.*

After the mention of the subject of self-determination, however, the Court considered in paragraph 83 “that it is not necessary to resolve these questions in the present case”, because “[t]he General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law.”³³ Indeed “[d]ebates regarding the extent of the right of self-determination and the existence of any right of “remedial secession . . . concern the right to separate from a State.”³⁴ This issue, however, was “beyond the scope of the question posed by the General Assembly.” As it is, 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).

The Court noted that the Security Council did condemn particular declarations of independence such as those of Rhodesia or Northern Cyprus. The issue in these cases related to an “unlawful use of force or other egregious violations of norms of international law,” in particular, *jus cogens*.³⁵ In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

What then is the Court’s position on territorial integrity in international law? The Court recalled that that territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” It further quotes the General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.” In reference to *Military and Paramilitary Activities in and against Nicaragua*³⁶ the General Assembly resolution reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.”³⁷ The resolution further enumerated various obligations incumbent upon States to

³³ *Id.*, para. 83.

³⁴ *Id.*

³⁵ *Id.*, para. 81.

³⁶ *Nicaragua v. United States of America*, 1986 I.C.J. paras.101-103, 191-193.

³⁷ *See supra* note 1, para. 80.

refrain from violating the territorial integrity of other sovereign States.³⁸ In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV).³⁹ The Court then concluded: “the scope and the principle of territorial integrity is confined to the sphere of relations between states.”⁴⁰ Based on this reasoning, the Court found that declarations of independence are primarily domestic affairs and that the UN does not condemn such declarations unless there is a separate violation of international law (such as the prohibition on the use of force).

In his Separate Opinion, Judge Abdulqawi A. Yusuf stated that the Court provided an overly restrictive and narrow reading of the General Assembly’s question. He argued that the declaration of independence of Kosovo:

[I]s the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordancy with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which prevailed in that territory.⁴¹

If the declaration of independence is seen as a purported act of secession and state creation, this was never explicitly stated in the submission of Kosovo. Judge Simma notes that, “None other than the authors of the declaration of independence make reference to the ‘will of [their] people’ in operative paragraph 1 thereof, which is a fairly clear reference to their purported exercise of self-determination.”⁴² Indeed, the declaration states, “We,

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Advisory Opinion, Separate Opinion of Judge Abdulqawi A. Yusuf, para. 2.

⁴² *See supra* note 25, para. 2.

the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state", which implies an exercise of external self-determination of Kosovo.⁴³ As this paper will address below, international law does not treat secession as expressly legal or illegal. It does, however, uphold territorial integrity as one of its foundational principles.⁴⁴

In some cases, as the Court indicated, international law may explicitly *prohibit* secession, as was the case with Northern Cyprus, due to the use of inter-state force. In the case of external self-determination, it may create a right of secession. Furthermore, the argument presented by the Court that territorial integrity is a question applying only between states, and not actors within states, is rather vague, because in several other instances (as in the case of indigenous peoples), right to secession of groups within state borders has not been recognized in international law. The ICJ did not need to address the issue of self-determination in the case of Kosovo because the GA's question does not ask the Court to rule whether Kosovo had a right to declare independence, but whether its unilateral declaration of independence was in accordance with international law, which only necessitated the Court to address the existence of prohibition of such declarations in international law.

D. The Legal Relevance of Security Council Resolution 1244 and the UNMIK Constitutional Framework

The Court further assessed the compatibility of the declaration of independence with the legal regime established under SC Resolution 1244 (1999), and whether it was prohibited by regulations of the UNMIK and the Constitutional Framework. In ICJ's view, SC Resolution 1244 (1999) was concerned with creating an interim regime for Kosovo and did not contain any provisions dealing with the final status of Kosovo.⁴⁵ It also held that SC Resolution 1244 (1999) was not addressed to the Kosovo Albanian leadership.⁴⁶ The Court concluded that the provisional institutions of self-government for Kosovo did not issue the declaration of independence in that capacity and that the UNMIK regulations formed part of international law. This is arguably the most strained and complex aspect of the ICJ Advisory Opinion because the SC Resolution 1244 (1999) provides the legal framework for the UNMIK regulations, which were intended for a domestic system of law. Consequently, this does not signify that the regulations form part of international law.

⁴³ See *supra* note 7, Preamble.

⁴⁴ See THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995). But see Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 23 N.Y.U. J. INT'L L. & POL. 471 (2003).

⁴⁵ See *supra* note 1, para. 114.

⁴⁶ *Id.*, paras. 116-117.

Regarding the identity of the drafters of the declaration, the ICJ concluded that “taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”⁴⁷ The Court sought to establish that the authors of Kosovo’s unilateral declaration of independence were acting ‘outside’ of the legal framework of the UNMIK. The Court, however, does not specify within which legal framework they were acting. It appears that the drafters of the declaration thus were simultaneously acting outside of an organ of which they were part, and as ‘representatives of the people of Kosovo.’

The Court further analyzes whether the entities created by UNMIK are bound by SC Resolution 1244 (1999), which includes the Provisional Institutions of Self-Government within the Constitutional Framework (PISG).⁴⁸ The PSIG could not declare independence if they were bound by the SC Resolution 1244 (1999). However, according to the Court, the conditions of the final status of Kosovo would be relevant only to UN member states and UN organs, which do not include “other” and “non-state” actors.⁴⁹ If the authors of the declaration of independence are ‘other actors’ and outside of the PISG, then the SC Resolution 1244 (1999) does not apply to them. However, if the SC Resolution 1244(1999) did not create obligations for the Kosovo authorities, or determine the final status of Kosovo, it is not clear why the Court had to establish the identity of the authors of the declaration.

This decision is clarified in the Court’s discussion of whether the declaration of independence is in accordance with the Constitutional Framework, promulgated by the Special Representative of the Secretary General (SRSG) on behalf of UNMIK in May 2001. The Court concluded that, “Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.”⁵⁰ If the Kosovo representatives were acting as part of the PISG, they would be within the legal framework of the UNMIK and therefore SC Resolution 1244 (1999). The Court established that the SC Resolution 1244 (1999) and the Constitutional Framework form part of the international law. If the authors of the declaration acted in their capacity as part of the Kosovo Assembly and therefore within the legal framework established by the UNMIK, they would have been in violation of the provisions of Constitutional Framework. For this reason the Court concluded that the authors of the declaration acted in a different

⁴⁷ *Id.*, para. 109.

⁴⁸ *Id.*, para. 62.

⁴⁹ *Id.*, paras. 115-118.

⁵⁰ *Id.*, para. 93.

capacity, which remains unspecified.

According to Judge Yusuf's Separate Opinion, the observation of the Court that the Constitutional Framework derives its binding force from the binding character of SC Resolution 1244 (1999) and thus from international law, "confuses the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves."⁵¹ He argues that the international administrations belong to the domestic legal order of the territory under international administration. This applies to the legislative powers vested in the SRSG in Kosovo under resolution 1244, which are not for the enactment of international legal rules and principles, but to legislate for Kosovo and establish laws and regulations which are exclusively applicable at the domestic level. And further, "The fact that the exercise of legislative functions by the SRSG may be subject to the control of international law, or that they may have been derived from the authority conferred upon him by a resolution of the Security Council does not qualify these regulations as rules of international law for the purposes of the question put to the Court by the General Assembly."⁵² Thus, according to Judge Yusuf, the Constitutional Framework, as well as all other regulations enacted by the SRSG, form part of a domestic legal system established on the basis of authority derived from an international legal source. If the Constitutional Framework was not part of international law, the very question of whether the declaration of independence was in accordance with international law, or the identity of its authors, would not be significant. The Court would then have to ascertain whether the declaration of independence could be considered as outside of the powers of the PISG. The Court, however, could not conclude that the declaration of independence was standing outside the parameters of international law, while at the same time establishing that it was in accordance with international law. For this reason, the discussion about the identity of the authors of the declaration remained ambiguous.

In the end, if the Court concluded that the declaration of independence was in violation of the Constitutional Framework, it would arguably have had to address whether a right to (external) self-determination in the form of remedial secession exists as part of general international law. It is argued here that this position of the Court reveals that international law remains ambiguous in how it treats non-state actors. While it cannot be argued that international law prohibits secession in every case, the approach of the international community has been piecemeal and fraught with political conflicts and interests. Thus, there is a framework within which certain claims to secession are favored or disfavored, depending on the facts.

⁵¹ See *supra* note 41, para. 18.

⁵² *Id.*

E. General Considerations on the Right to 'Remedial Secession'

The Advisory Opinion of the ICJ is not binding, but rather advises on the interpretation of the law. The ICJ is generally not bound by precedent, or the principle of *stare decisis* that defers to previous rulings, decisions, or advisory opinions. Article 59 of the ICJ statute stipulates that, "The decision of the Court has no binding force except between the parties and in respect of that particular case."⁵³ Consequently, ICJ advisory opinion cannot expressly serve as a precedent for other secessionist movements. In reference to Kosovo's unilateral declaration of independence, the Court states that:

The advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). Nevertheless, precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting and are not relevant to the Court's exercise of its discretion whether or not to respond.⁵⁴

Furthermore, the Kosovo declaration of independence explicitly observes, "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."⁵⁵ By defining Kosovo case as *sui generis* the authors of the declaration indicated that they are not creating new law, which other peoples in similar situation can use. The authors also assume that no other situation resembles the case of Kosovo. Implicitly, future cases would have to follow the same criteria. Could the extensive argument, offered in the special opinion of Judge Cancado Trindade, apply in cases of oppression of peoples and egregious violation of their human rights, thus severely impacting the existing system of territorial borders? The Court's Advisory Opinion could, arguably, have broader political implications. This paper will provide some broader

⁵³ Statute of the International Court of Justice, art. 59.

⁵⁴ See *supra*, note 1, para. 33.

⁵⁵ See *supra* note 7.

conclusions regarding the right to 'remedial secession' in international law in view of its treatment by the ICJ in the case of Kosovo.

Arguably, part of the unique character of the Kosovo case is related to the failure of the negotiation process between Serbia and Kosovo. This process involved different proposals for a settlement including formal partition, or a federation of Serbia and Kosovo subject to a referendum to be held at a later stage.⁵⁶ Furthermore, the "humanitarian emergency" created a special situation in which discussion of precedent had to be set aside in order to alleviate the situation at hand. Following, for instance Judge Cancado Trindade's argument, oppressed peoples everywhere could challenge state borders in situations of severe violations of human rights. States are created for the people and by the people and not the other way around.⁵⁷ However, that same vocabulary has not applied in all cases. In other situations, the doctrine of territorial integrity seems to outbalance claims to secession resulting from legacies of violence and oppression.

Contemporary juristic and political debates over self-determination have focused on the question of whether it has become a criterion for statehood and if so, with what effects. As the ICJ affirms, the right of peoples to self-determination has been acknowledged to be a principle of customary international law and even *jus cogens*—a preemptory norm of universal application.⁵⁸ Still, the narrow association of self-determination with the right of an entity to be a state has presented a challenge to the existing borders, and separatist claims have been met with piecemeal and inconsistent responses by the international community.⁵⁹ At the same time, international law's embrace of democratic governance and human rights as universal entitlement, focused on the right to governance by the consent of the governed, challenging the traditional state-centered, sovereignty discourse.⁶⁰ Self-determination has become an important constitutive aspect of state building, as well as a disintegrative challenge to existing borders. Claims to self-determination have challenged the cosmopolitan attempts of international law to create rules applicable to all, as they came to reveal the constant re-emergence of particular end-state interests.

⁵⁶ See *supra*, note 1, para. 56.

⁵⁷ Advisory Opinion, Separate Opinion of Judge A. A. Cancado Trindade.

⁵⁸ JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97 (2004); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 389 (6th ed. 2003); PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 14 (1991).

⁵⁹ Diane Orlenticher, *Separation Anxiety: International Response to Ethno-Separatist Claims*, 23 *YALE J. INT. L.* 1 (2003).

⁶⁰ See *supra* note 44.

In his Separate Opinion, Judge A. A. Cancado Trindade argues that, "Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it."⁶¹ And further,

No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized. What has happened in Kosovo is that the victimized "people" or "population" has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination (cf. *infra*). The basic lesson is clear: no State can use territory to destroy the population.⁶²

The international community, however, has not as of yet recognized varied forms of governance outside the traditional purview of sovereignty doctrine, which is rooted in the traditional dichotomy of 'internal' vs. 'external' aspect of self-determination.⁶³ In 1996, the *Committee on the Elimination of Racial Discrimination* adopted *General Recommendation XXI* on self-determination, which observes the distinction between internal and external self-determination.⁶⁴ It identified the *internal* aspect of self-determination as the right of all peoples to freely pursue their economic, social, and cultural development without outside interference, and *within* the existing borders.

Self-determination is linked with the right of every citizen to take part in the conduct of public affairs at any level. In consequence, governments are to represent the whole population without distinction as to race, color, descent or national or ethnic origin. In the

⁶¹ See *supra* note 57, at 175.

⁶² *Id.*

⁶³ Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF DETERMINATION 225 (Christian Tomuschat ed., 1993); Gudmundur Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, in MODERN LAW OF SELF DETERMINATION 50-54 (Christian Tomuschat ed., 1993); Rosalyn Higgins, *Post Modern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29 (Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck eds., 1993).

⁶⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation XXI (48)*, U.N. Doc. A/51/18 (1996), para. 4.

declaration of independence of Kosovo, the Court recognizes “the will of the people” as representing the whole population of Kosovo. Namely, the declaration describes Kosovo as a “democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law.”⁶⁵ The reference to the internal aspect of self-determination for all its inhabitants is clear in the declaration of Kosovo leaders to “protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.”⁶⁶

The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community. The *external* domain of self-determination deals exclusively with peoples' status or dealings in relation to other peoples, occupying mutually exclusive spheres of community. The Kosovo declaration of independence accordingly references “the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people” that would justify the creation of different communities through independence.⁶⁷ Judge Cancado Trindade thus argues:

In the present stage of evolution of the law of nations (*le droit des gens*), it is unsustainable that a people should be forced to live under oppression, or that control of territory could be used as a means for conducting State-planned and perpetrated oppression. That would amount to a gross and flagrant reversal of the ends of the State, as a promoter of the common good.⁶⁸

Antonio Cassese has argued that *internal* self-determination is emerging as a customary rule in the international community.⁶⁹ However, “[b]oth customary and treaty law on internal self-determination have little to say with respect to the possible modes of implementing democratic governance . . . still less do they furnish workable standards concerning some possible forms of realizing internal self-determination, such as devolution, autonomy, or ‘regional’ self-government.”⁷⁰ The binary view of self-determination does not have provisions for autonomy regimes, as these would constitute

⁶⁵ See *supra* note 7, at para. 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *supra* note 57, 137.

⁶⁹ U.N. LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 347, 311 (Antonio Cassese ed., 1979).

⁷⁰ *Id.* at 332.

self-determination of a part of the population of a state and not its whole.⁷¹ For Thomas Franck, the inclusion of the right within the ICCPR meant that it “ceased to be a rule applicable only to specific territories. . . It also . . . stopped being a principle of exclusion (secession) and became one of inclusion, a right to participate.”⁷² Consequently, the internal/external dichotomy views of self determination as being either a right of a people to manage their internal issues, such as political participation, or their relationship with other peoples as whole, such as state to state relations, and freedom from alien rule.

Such an end-state approach focuses on the self-determination of ‘peoples’ as had been established during the decolonization process, and still is relevant in some situations. In contrast, James Anaya’s framework of constitutive and ongoing self-determination takes into consideration both inward and outward looking dimensions of units of human organizations, as well as the multiplicity of spheres of human association.⁷³ The constitutive aspect of self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. The ongoing aspect of self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis. It provides the criteria for the continuous functioning of the governing order. In its constitutive aspect, self-determination includes criteria for procedures leading to the creation of—or change in—institutions of government within any given sphere of community.⁷⁴ These criteria include participation and consent, resulting in a political order that can reflect collective will of the people or peoples concerned.

The remedial prescriptions that may follow the violations of the right to self-determination primarily include prescriptions to undo the classical institutions of colonialism, which violated both the constitutive and ongoing aspects of self-determination. Pursuant to the principle of self-determination, the international community has deemed historical patterns giving rise to colonial rule illegitimate and has promoted corresponding remedial measures retroactively, irrespective of the effective control exercised by the colonial power and notwithstanding the law contemporaneous with the historical colonial patterns.⁷⁵ The remedial aspect of self-determination has been affirmed by the ICJ in its

⁷¹ See Higgins, *supra* note 63.

⁷² Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 58-59 (1986).

⁷³ ANAYA, *supra* note 58, 103-110.

⁷⁴ *Id.*, 106.

⁷⁵ The International Court of Justice (ICJ) recognized self-determination as the basis for the process of decolonization in: Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 31. For the role of self-determination in the decolonization process, see also AURELIA CRITESCU, *THE RIGHT TO SELF-DETERMINATION: HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS* (1981).

Western Sahara case, the opinion on the postwar law of decolonization.⁷⁶ The Court found that it was competent to comply with General Assembly's request for an advisory opinion despite the fact that one of the parties, Spain, had not consented to court proceedings. In this way, it established more permissive rules for granting advisory opinions. The Court defined the primary role and meaning of self-determination as "the need to pay regard to the expressed will of the peoples" as well as asserting that the right was the right to decolonization.⁷⁷ It affirmed that self-determination gives precedence to the present-day aspirations of aggrieved peoples over historical institutions. The Court stressed the validity of the principle of self-determination in the decolonization of the Western Sahara, and that integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes.⁷⁸ The Court then—at that time significantly—affirmed the importance of remedies in the decolonization process as well as the consideration for contemporary interests and wishes of the affected populations.

Preferences for the protection of state territorial integrity and political unity have limited the capacity of the international system to regulate matters within domestic spheres of authority. Still, under the contemporary international human rights regime the doctrine of sovereignty, while affirmed in the UN Charter, is also tempered by human rights values, as they are expressed in the Charter and affirmed by the international community. This tension between the human rights protection and the affirmation of state sovereignty and territorial integrity is reflected, for instance, in various admissibility provisions, such as the individual complaints procedure established by the Optional Protocol to the ICCPR, where the Committee may receive and consider complaints brought by individuals subject to the jurisdiction of states parties to the Optional Protocol who claim to be victims of a violation by that state party of any of the rights set forth in the Covenant, provided that certain admissibility conditions are met.⁷⁹ These conditions are, among others, that the author of the communication is the victim of the alleged violation or a duly authorized representative and that all available domestic remedies have been exhausted.⁸⁰

⁷⁶ *Western Sahara*, 1975 I.C.J. 25. Further decisions and advisory opinions of the International Court of Justice on the question of peoples' right to self-determination are: Case concerning Right of Passage over Indian Territory (Portugal v. India) 1960 I.C.J. 6; Case concerning Northern Cameroon (Cameroon v. United Kingdom), 1963 I.C.J. 3; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 14; Certain Phosphate Lands in Nauru (Nauru v. Australia), 1989 I.C.J. 12, 1991 I.C.J. 3; and East Timor (Portugal v. Australia), 1995 I.C.J. 90.

⁷⁷ *Western Sahara*, para. 59.

⁷⁸ *Id.* paras. 57-59.

⁷⁹ PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 116-244 (2002).

⁸⁰ *Id.*

How then, can secession be recognized in some cases and not in others? International law has not yet identified whether the right to self-determination should be recognized for group A resulting in the breakup of state B, and whether sub-groups residing in the territory of group A have that same right. As Koskenniemi argues, this is the “onion problem” of nationalism “that one’s definition of the “nation” depends on the perspective (the distance) from which one’s vision is formed.”⁸¹ This depends on the facts of each case and how the international community comes to view them in accordance with political interests of individual states. The quest for formalism and universality has not been able to conceal politics of power at the international level. Rather, formalism in international law has served as a mask for particular interests, as a veneer of universality and neutrality.⁸²

F. Conclusion

As the ICJ concludes in its advisory opinion, there is no prohibition of declarations of independence in international law according to State practice. The Court specifically negates the contention that the prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. However, international law also does not create a right to secession. The Court avoided the discussion of secession and self-determination due to its political and contested nature. In this sense, ICJ also avoided a potential *non liquet* conclusion. The conclusion that the scope of the principle of territorial integrity is confined to the sphere of relations between States remains vague. In this respect, ICJ reveals that international law has little to say in relation to non-state actors.

Indeed, international law does not contain clear rules on how to respond to declarations of independence. The Court was not requested to provide an opinion on the principle of recognition by other states. Declarations of independence depend on the act of recognition by other states, a topic that remains beyond the scope of this paper.

Thus, the response of the Court was technical, but so was the question posed to it by the General Assembly. It could be argued then that its jurisdiction was narrowed by the way Member States of the GA chose to phrase the question. In effect, the vagueness of the Court is a symptom of a broader problem: the continuous tension in the international legal system’s ability to provide rules on claims to external self-determination.

⁸¹ Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 260 (1994).

⁸² MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006). MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006).