A Note on the ICJ Advisory Opinion on Kosovo

By Robert Muharremi[*]

A. Introduction

On 22 July 2010, the International Court of Justice (hereinafter the "ICJ") delivered its advisory opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo. The ICJ concluded that the declaration of independence dated 17 February 2008 did not violate any applicable rule of international law consisting of general international law, UNSC resolution 1244 (1999) (hereinafter the "Resolution 1244") and the Constitutional Framework for Provisional Self-Government in Kosovo (hereinafter the "Constitutional Framework").[1] The ICJ delivered the advisory opinion in response to a question set out in resolution 63/3 dated 8 October 2008 of the General Assembly of the United Nations Organization (hereinafter the "General Assembly"), which asked if "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo is in accordance with international law."

The advisory opinion seems to have resolved only few of the contentious legal questions, which are relevant in the context of the Kosovo issue. The ICJ expressly rules out that it is providing an opinion on whether Kosovo has achieved statehood; it remains silent on the validity or legal effects of the recognition of Kosovo as an independent state by other states[2]; it does not deal with the question of whether international law confers a positive entitlement on Kosovo unilaterally to declare its independence, or whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it[3], and it does not want to address the extent of the right of self-determination and the existence of a right of "remedial secession."[4] Despite this, significant public reaction across the world interpreted the advisory opinion as endorsing Kosovo's independence and eventually setting a precedent for other secessionist

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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] *Id.* at ¶ 51.

[3] *Id.* at ¶ 56.

[4] *Id.* at ¶ 83.

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movements.[5] Others criticized that the opinion was too narrow and restricted in scope and that its utility for legal and political purposes was very limited.[6] An analysis of the opinion reveals that there are many nuances in the ICJ's dicta that require attention, as to their possible implications for resolving the Kosovo question, in the course of the forthcoming diplomatic efforts at regional and international level. However, the opinion might indeed cause more legal confusion than provide clarity and, thus, allow for various interpretations, which limit the opinion's usefulness.

The following will discuss the reasoning of the ICJ as regards its jurisdiction and exercise of discretion in delivering the advisory opinion, the ICJ's arguments for clarifying the question asked by the General Assembly, the methodology applied by the ICJ in answering the question, its interpretation of UN Security Council resolution 1244 (1999), and the ICJ's reasoning on the principle of territorial integrity and the right of self-determination.

B. The ICJ's Jurisdiction and Discretion

Regarding the jurisdiction of the ICJ, the fact that the Security Council is seized of the Kosovo issue precludes neither the General Assembly from requesting an advisory opinion nor the ICJ from delivering it. According to the ICJ, a request for an advisory opinion is not in itself a recommendation with regard to a dispute or situation in the meaning of Article 12.1 of the UN-Charter. Hence, Article 12.1 of the UN-Charter and the fact that the Security Council is seized of the Kosovo issue may only limit the General Assembly's action once the advisory opinion has been delivered by the ICJ.[7]

Furthermore, the ICJ ascertains that once a question is formulated in terms of law and raising problems of international law, the ICJ will consider it a legal question in the terms of Article 96 of the UN-Charter and Article 65 of the ICJ Statute irrespective of the fact that the question has political aspects, and without regard for the motives which may have inspired the request or the political implications of the opinion.[8]

Concerning the ICJ's discretion in rendering an advisory opinion, the ICJ operates on the presumption that an advisory opinion should not be refused, unless there are compelling reasons to do so, which the Court, in turn, has to take into consideration when assessing

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[5] *See Uno-Gericht segnet Unabhöngigkeit des Kosovo ab*, FINANCIAL TIMES DEUTSCHLAND, July 22, 2010, http://www.ftd.de/politik/europa/:klage-von-serbien-uno-gericht-segnet-unabhaengigkeit-des-kosovo-ab/50147532.html.

[6] Chiang Huang-chih, *ICJ's Kosovo decision is vague and very limited*, TAIPEI TIMES, July 28, 2010, at 8, *available at* http://www.taipeitimes.com/News/editorials/archi-ves/2010/07/28/2003478995.

[7] Advisory Opinion at ¶ 24.

[8] *Id.* at ¶ 25, 27.

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the propriety of the exercise of its judicial function.[9] In this respect, the motives of individual states which sponsor or vote in favor of a resolution of the General Assembly requesting an advisory opinion,[10] whether the General Assembly needs the opinion for the proper performance of its functions[11] and whether the opinion might have an adverse affect,[12] do not have an impact on the ICJ's discretion to deliver an advisory opinion.

With respect to the relationship between the Security Council and the General Assembly concerning a situation, which the Security Council has characterized as a threat to international peace and security, and which continues to be on the agenda of the Security Council, the ICJ reiterates its position that, according to Article 24 of the UN-Charter, the Security Council has only a primary, but not necessarily exclusive, competence for the maintenance of international peace and security.[13] The primacy of the Security Council in such matters merely restricts the authority of the General Assembly to make recommendations according to Article 12 of the UN-Charter, but it does not prevent the General Assembly from discussing the matter.

As an exception, Article 12 of the UN-Charter does not prevent the General Assembly from making recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to peace, breach of the peace or act of aggression, and the Security Council is unable to act because of lack of unanimity of the permanent members.[14] The ICJ thereby makes explicit reference to General Assembly resolution 377A (V) ("Uniting for Peace"),[15] which sets out the General Assembly's secondary responsibility for the maintenance of international peace and security, and which has been confirmed by the ICJ in the *Certain Expenses* Advisory Opinion and the court's subsequent case-law.[16] The General Assembly may, therefore, use the advisory opinion to discuss and make recommendations with regard to the declaration of independence and other aspects of the situation in Kosovo provided that the General

[9] *Id.* at ¶ 31.

[10] *Id.* at ¶ 33.

[11] *Id.* at ¶ 34.

[12] *Id.* at ¶ 35.

[13] *Id.* at ¶ 40.

[14] *Id.* at ¶ 42.

[15] *Id.* On GA resolution 377A (V), see BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 33-36 (Philippe Sands & Peter Klein eds., 2001); Volker Epping, *Internationale Organisationen, in* VÖLKERRECHT (Knut Ipsen ed., 1999).

[16] Advisory Opinion on Certain Expenses of the United Nations, 1962 I.C.J. 162-164; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J 150.

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Assembly does not interfere with the powers of the Security Council. This means that the conditions set out in the "Uniting for Peace" resolution must be fulfilled.[17]

Current efforts made by Serbia to have the General Assembly pass a resolution in response to the Advisory Opinion may have to be seen against this background.[18] For the General Assembly to pass a resolution on Kosovo there must first of all be a determination that the Security Council cannot act because of lack of unanimity of the permanent members. The meeting of the Security Council held on Kosovo on 3 August 2010, which exposed the Security Council as still being divided on the Kosovo question, may be used for such purpose.[19] But even if there is lack of unanimity in the Security Council, any recommendations which could be made by the General Assembly would not be legally binding on the member states.[20]

However, if such a resolution deals with general norms of international law, then its acceptance by a majority vote could constitute evidence of *opinio juris* for the purpose of establishing customary international law.[21] A statement included in a General Assembly resolution condemning secession as a lawful means of resolving territorial issues, as proposed by Serbia in its draft resolution, could then be interpreted as an expression of international *opinio juris* and be subsequently used as an argument against the legality of Kosovo's independent statehood, despite the fact that the ICJ has not considered the declaration of independence to be inconsistent with international law. This may also explain media reports on a possible counter-proposal of a draft resolution to be submitted by the EU member states to the General Assembly, calling for further talks while not making any statement on Kosovo's status.[22] Such language would not question the legality of Kosovo's statehood, which the majority of the EU member states have recognized, and could not be used as an expression of international *opinio juris* of secession being unlawful. This competition for resolutions, what in Kosovo is already termed "a battle of General Assembly resolutions on Kosovo," will certainly test the willingness and authority of the General Assembly to make recommendations in respect of Kosovo and possibly divert the focus of the debates on Kosovo from the Security Council to the General Assembly.

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[17] Advisory Opinion at ¶ 44.

[18] On July 28 2010, Serbia's Mission to the UN proposed a draft resolution to the General Assembly condemning one-sided secession as a means of resolving territorial issues and calling for a mutually acceptable solution for all disputed issues through peaceful dialogue, available at: http://www.srbija.gov.rs/vesti/vest.php?id=67879.

[19] U.N. SCOR, 6367th mtg., U.N. Doc. S/10000 (Aug. 3, 2010) (Security Council Press Release), *available at* http://www.un.org/News/Press/docs/2010/sc10000.doc.htm.

[20] ANTONIO CASSESE, INTERNATIONAL LAW 196 (2005).

[21] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14-15 (2003).

[22] Gazeta Express dated 30 July 2010, at: http://www.gazetaexpress.com.

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C. The ICJ's Interpretation of the Question

The wording of the question as formulated by the General Assembly already identified the authors of the declaration of independence as being the Provisional Institutions of Self-Government (hereinafter the "PISG"). However, the ICJ considers that the identity of the authors of the declaration of independence is a matter which may affect the answer to the question of whether the declaration was in accordance with international law, and that it would be incompatible with the court's proper exercise of its judicial function if the identity of the authors of the declaration was already determined by the General Assembly.[23] The ICJ, therefore, recalls established case-law that it has the authority to depart from the language of the question put to it, where the question was not adequately formulated, or, where the court determined that the request did not reflect the legal questions really in issue.[24] Taking into account that the identity of the authors of the declaration was contested during the proceedings, and that resolution 63/3 was discussed in the General Assembly under an agenda item, which referred to a declaration of independence of Kosovo and not of the PISG, the ICJ determined that the common element of all these circumstances was whether the declaration of independence as such is in accordance with international law.[25] In this respect, the ICJ would have to be free to decide if the declaration was promulgated by the PISG or some other entity.[26]

Following an assessment of the circumstances and proceedings leading to the declaration of independence, including the language of the text of the declaration, the ICJ concludes that the authors of the declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within the legal order created by Resolution 1244, but set out to adopt a measure that the significance and effects of which would lie outside that order.[27] Therefore, the authors of the declaration of independence did not act as the PISG but as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.[28] Hence, the ICJ interprets the SRSG's silence with respect to the declaration of independence as an expression of the SRSG's understanding, that the declaration of independence was not an act attributable to the PISG designed to take effect within the legal order established by resolution 1244 and the Constitutional Framework.

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[23] Advisory Opinion at ¶ 52.

[24] *Id.* at ¶ 50.

[25] *Id.* at ¶ 53.

[26] *Id.* at ¶ 54.

[27] *Id.* at ¶ 105.

[28] *Id.* at ¶ 109.

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This is indeed the critical component determining the opinion's outcome. The ICJ confirms that resolution 1244 and the Constitutional Framework for Provisional Self-Government in Kosovo (hereinafter the "Constitutional Framework") were applicable international law on the day of the declaration of independence.[29] Resolution 1244 was adopted by the Security Council on the basis of Chapter VII of the UN-Charter and as such imposed international legal obligations.[30] The Constitutional Framework, as with the ICJ, derives its binding force from the binding character of resolution 1244—thus from international law—and, therefore, possesses an international legal character.[31] The PISG was established by the Constitutional Framework and was subject to the overriding authority of the UN Special Representative of the Secretary-General (SRSG), who remained the final legislative and executive authority in Kosovo.[32] Any draft legislation prepared by the PISG entered into force only upon promulgation by the SRSG and provided the subject-matter belonged to the "transferred responsibilities," which excluded status or sovereignty related matters.[33] If the ICJ had come to the conclusion that it was the PISG which had declared independence, it would have been impossible to come to a conclusion other than that the PISG had violated its competences under the Constitutional Framework, which would also mean a violation of international law.

The ICJ's interpretation of the question and the conclusion that not the PISG, but representatives of the people of Kosovo acting outside the legal framework established by Resolution 1244, were the authors of the declaration sparked severe criticism as expressed in some of the dissenting opinions. The counter-arguments refer primarily to procedural faults of the authors of the declaration, who on several occasions during the process leading to the declaration of independence had made reference to the Constitutional Framework and, thus, appeared to act as the PISG.[34] Reference is also made to reports of the UN Secretary-General to the Security Council qualifying the declaration of

[29] *Id.* at ¶ 91.

[30] *Id.* at ¶ 85.

[31] *Id.* at ¶ 88.

[32] *Id.* at ¶ 89.

[33] On a Constitutional Framework For Provisional Self Government in Kosovo, United Nations Interim Administration Mission in Kosovo, UNMIK/REG/2001/9 (May 15, 2001), *available at* http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf.

[34] Advisory Opinion (Declaration of Vice-President Tomka), ¶ 18-20, *available at* http://www.icj-cij.org/docket/files/141/15989.pdf.

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independence as an act attributable to the PISG.[35] The ICJ's intent-oriented approach is also criticized, because merely the intent to act as the representatives of a people does not necessarily mean that the persons acting with such intent are indeed the representatives of a people.[36] Thus, the ICJ's interpretation that, not the PISG, but the representatives of the people of Kosovo declared independence may at best be described as controversial, with the potential to fuel further debates.

D. The ICJ's Distinction Between "Declaring" and "Effecting" Independence

The ICJ restricts its opinion strictly to the narrow formulation of the General Assembly, focusing on the act of declaring independence. As the ICJ states, the question asked by the General Assembly was not about the legal effects of the declaration of independence or a right to secession.[37] This is the critical element that, according to the ICJ, distinguishes the question, asked by the General Assembly, from the opinion of the Supreme Court of Canada in *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada*.[38] Therefore, the ICJ sees no need to address questions about the possible legal ramifications of the declaration of independence.

A significant aspect of the ICJ's reasoning on the declaration of independence is that such a declaration may be measured against public international law and that it is not merely a political act or exclusively a matter of domestic constitutional law.[39] However, a declaration of independence alone is not sufficient for turning an entity into a state, since, in the words of the ICJ, sometimes a declaration of independence results in the creation of a new state and in others it does not.[40]

It is evident from the above that the ICJ tries to avoid declaring its position on both the legal aspects of secession and the eventual creation of a new state and, therefore, distinguishes between declaring independence and effecting independence. But, such a distinction appears to be very artificial and not necessarily convincing. The ICJ creates the impression that an entity first declares independence, and then starts taking measures to

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[35] Advisory Opinion (Dissenting Opinion of Judge Bennouna), ¶ 48-52, *available at* http://www.icj-cij.org/docket/files/141/15999.pdf.

[36] Advisory Opinion (Dissenting Opinion of Judge Koroma), ¶ 4-5, *available at* http://www.icj-cij.org/docket/files/141/15991.pdf.

[37] Advisory Opinion at ¶ 55.

[38] *Id.* at ¶ 55.

[39] *Id.* at ¶ 26.

[40] *Id.* at ¶ 79.

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effecting statehood. This does not reflect the process of creating a new state,[41] and it especially does not reflect the process of state-building in Kosovo. The factual conditions for Kosovo's statehood were developed gradually since 1999, when Kosovo was placed under the administration of the United Nations, and Serbia ceased to exercise any form of government authority or have jurisdiction in Kosovo. When independence was declared in 2008, all government structures, including a completely new legal framework, were already in place for Kosovo to effectively and independently discharge the functions of a state. After declaring independence, it required very little additional institution-building, foremost in the security sector, to have all state institutions in place and functioning. Thus, the declaration of independence would have to be treated as declaration of a will to create a new state at the end rather than at the beginning of Kosovo's process towards statehood, and is thus an essential legal and factual element of the process of effecting statehood.

The ICJ's distinction between declaring and effecting independence implies that there are different rules of international law governing separately a declaration of independence and effecting statehood. While the ICJ concludes that there appears to be no rule of international law prohibiting an entity to declare independence, it implies that whether Kosovo has indeed achieved statehood, or not, is to be measured against criteria set by general international law, leaving it in the discretion of individual states to accord recognition to Kosovo based on such assessment. Considering that a declaration of independence cannot be treated in isolation from the process of effecting statehood, because it is an integral element of such a process, it is not surprising that the ICJ cannot find a rule of international law, which prohibits making a declaration of independence. Instead, the ICJ should have exercised its judicial authority to interpret the question asked by the General Assembly more profoundly than it already did, because the legal question really in issue is whether there is any rule of international which prohibits Kosovo to secede from Serbia. The expectations of all parties and the general public were indeed that the ICJ will pronounce itself on the legality of secessions. But, by assessing the legality of a declaration of independence in isolation from the overall process of effecting statehood, the ICJ not only frustrated the expectations of all involved, it also failed to properly discharge its judicial functions, since the advice given to the United Nations is of very limited use in view of the real problem, as it leaves all the important legal questions unanswered and to be determined in a future political process.

E. The ICJ's Application of the "Lotus-Presumption"

When assessing the declaration of independence against general international law, and international *lex specialis* in form of Resolution 1244 and the Constitutional Framework, the ICJ does not ask if there was a legal entitlement under international law to make such a

[41] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 651 (2006).

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declaration, but merely if there is a rule of international law prohibiting a declaration of independence. By applying such a negative-test, the ICJ concludes that there is no rule of international law prohibiting a declaration of independence and that, therefore, the declaration did not violate international law. According to Judge Simma, the underlying approach of the ICJ reflects an old view of international law expressed in the "Lotus" Judgment of the Permanent Court of International Justice, according to which restrictions on the independence of states cannot be presumed because of the consensual nature of the international legal order.[42] Judge Simma's criticism of the ICJ's methodology is based on an understanding of international law, which is not exclusively based on the consent of states. He claims that contemporary international legal order is strongly influenced by ideas of public law,[43] which means that it is not necessarily consensual[44] in nature, and also not compatible with the nineteenth century positivism,[45] which is reflected in the "Lotus-Presumption". In view of the development of the concept of *ius cogens*, which creates international legal obligations without the consent of a state, and the right of peoples to self-determination, which is primarily a permissive and not a prohibitive rule, the remarks made by Judge Simma may certainly be seen as valid.

The concerns with the ICJ's approach could, however, go further. The Lotus-Presumption, as formulated by the Permanent Court of International Justice, applies to relations between independent states, as expressed in the following passage:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions and usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.[46]

[42] Advisory Opinion (Declaration of Judge Simma), ¶ 2, *available at* http://www.icj-cij.org/docket/files/141/15993.pdf.

[43] *Id.* at ¶ 3.

[44] *Id.* at ¶ 3.

[45] *Id.* at ¶ 8.

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

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The Lotus-Presumption was confirmed in subsequent ICJ case-law, e.g. the Nicaragua Judgment,[47] and the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,[48] and was applied in relations between states. In the present opinion, the ICJ applies the Lotus-Presumption to an entity declaring its independence, which may or may not yet be a state. This raises the question of whether the ICJ has extended the Lotus-Presumption to be applicable as a general principle of international law, which is not confined to relations between states, but which also applies to entities which could be considered states in *statu nascendi*, peoples in the exercise of their right to external self-determination, or peoples seceding and establishing a new state based on the principle of effectiveness outside the ambit of the right of self-determination.

F. The ICJ's Interpretation of Resolution 1244

With regard to the interpretation of Security Council resolutions adopted under Chapter VII of the UN-Charter, the ICJ reiterates its position expressed in previous case-law, that they are part of the framework of obligations under international law.[49] For the purpose of interpreting such resolutions, the ICJ applies the rules on treaty interpretation, as embodied in the Vienna Convention on the Law of Treaties, merely as guidance, while other factors, e.g. statements made by representatives of members of the Security Council at the time of their adoption, other resolutions of the Security Council on the same issue, as well as any subsequent practice of relevant United Nations organs and of states affected by such resolutions, must also be taken into account.[50] On this basis, the ICJ concludes that resolution 1244 established an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo, which suspended the legal order in force at that time in Kosovo and which set up an international territorial administration.[51] However, the establishment of this territorial administration was meant to be an exceptional measure relating to civil, political and security aspects, and which aimed at addressing the crisis existing in Kosovo in 1999.[52] The implementation of the interim administration was, thus, primarily designed for humanitarian purposes[53] and

[47] Case Concerning Military and Paramilitary Activities in and against Nicaragua (merits), 1986 I.C.J. 101, ¶ 269.

[48] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 52.

[49] Advisory Opinion at ¶ 85.

[50] *Id.* at ¶ 94.

[51] *Id.* at ¶ 97.

[52] *Id.* at ¶ 97.

[53] *Id.* at ¶ 98.

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could not be understood as putting in place a permanent institutional framework in the territory of Kosovo.[54]

As regards the determination of Kosovo's final status, the ICJ provides that at the time of the adoption of resolution 1244, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution.[55] However, the specific contours and the outcome of the final status process were left open by the Security Council, because the resolution does not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.[56] The ICJ expressly states that the Security Council did not reserve for itself the final determination of the situation in Kosovo, and remained silent on the conditions for the final status of Kosovo.[57] In other words, resolution 1244 established an interim administration, which exercises government functions primarily for humanitarian purposes, while matters pertaining to the determination of Kosovo's final status are not covered by resolution 1244. This is the reason why the ICJ then concludes that resolution 1244 does not preclude the issuance of the declaration of independence because such declaration is an attempt to determine the final status of Kosovo, which is not a matter covered by resolution 1244.[58]

The ICJ supports this conclusion by adding that resolution 1244 created legally binding obligations and authorizations only for United Nations organs and member states[59] and not for other actors, such as the representatives of the people of Kosovo, who according to the ICJ have promulgated the declaration of independence. Thus, any kind of action taken by actors other than United Nations organs and member states for the purpose of determining Kosovo's final status, including declaring independence and, consequently, also the establishment of a new state in the territory of Kosovo, is not covered by resolution 1244 and therefore not in violation of international law. The ICJ also states that the term "political settlement" of Kosovo would be subject to various interpretations,[60] which implies that any kind of action aimed at resolving Kosovo's final status would be possible. It thus implies that a determination of Kosovo's final status must not necessarily be based on an agreement between Kosovo and Serbia, or that even Serbia's consent would be required. Moreover, since the declaration of independence was made by the

[54] *Id.* at ¶ 99.

[55] *Id.* at ¶ 104.

[56] *Id.* at ¶ 104, 114.

[57] *Id.* at ¶ 114.

[58] *Id.* at ¶ 114.

[59] *Id.* at ¶ 115.

[60] *Id.* at ¶ 118.

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representatives of the people of Kosovo and not by the PISG, who were the addressees of the legal obligations established by the Constitutional Framework, there is also no violation of the Constitutional Framework.[61]

On the other hand, the ICJ confirms that resolution 1244 continues to remain in force and that the SRSG continues to exercise its functions as authorized by such resolution.[62] This implies that all the institutional and legal framework established under resolution 1244, including the Constitutional Framework, continues to remain in force as part of international *lex specialis* applicable to Kosovo. But the Constitution of the Republic of Kosovo of 2008 has created an entirely new institutional and legal framework and is a source of constitutional authority in its own right not based on resolution 1244. The Constitution of the Republic of Kosovo, like the declaration of independence, has to be considered as an attempt to resolve Kosovo's political status, which is therefore also not covered and influenced by resolution 1244. Since 2008, Kosovo government authorities exercise their powers exclusively on the basis of the Constitution of the Republic of Kosovo and not on the basis of the Constitutional Framework or resolution 1244. By confirming the continuation of resolution 1244, which vests the sole responsibility for the governance of Kosovo in the SRSG, the ICJ maintains the untenable legal fiction that the SRSG is still in charge of governing Kosovo, while Kosovo is in fact governed under the Constitution of the Republic of Kosovo, which does not recognize the SRSG as a public authority. This legal fiction will eventually create more problems for the European Union Rule of Law Mission (EULEX) which operates under resolution 1244 and the authority of the SRSG while it has to discharge its judicial and prosecutorial functions within the institutional and legal framework of the Republic of Kosovo.[63]

G. The Principle of Territorial Integrity and Self-Determination of Peoples

The ICJ acknowledges that the interim administration in Kosovo, established under resolution 1244, was designed to temporarily suspend Serbia's exercise of its authority, flowing from its continuing sovereignty over the territory of Kosovo.[64] Since resolution 1244 did not provide for the conditions of determining Kosovo's final status, one would have to conclude that resolution 1244 did not affect Serbia's sovereignty over Kosovo to the same extent as it did not prevent the representatives of the people of Kosovo to declare independence and to establish a new state based on the principle of effectiveness. However, by making reference to General Assembly resolution 2625 (XXV) ("Friendly-

[61] *Id.* at ¶ 121.

[62] *Id.* at ¶ 92.

[63] Erika de Wet, *The Governance of Kosovo: SC Res. 1244 and the Establishment and Functioning of EULEX*, 103 AM. J. INT'L L. 83 (2009).

[64] Advisory Opinion at ¶ 98.

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Relations Declaration"), which the ICJ confirms as reflecting customary international law, the ICJ concludes that the principle of territorial integrity is confined to the sphere of relations between states,[65] and, therefore, does not apply to declarations of independence or other acts taken by non-state actors. The ICJ's interpretation of the principle of territorial integrity is criticized as disregarding the "safeguard-clause" contained in the Friendly-Relations Declaration, which provides that the entitlements under the right of self-determination must not

> [B]e construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole of the people belonging to the territory without distinction as to race, creed or color.[66]

However, the "safeguard clause" applies merely in relation between the right of self-determination and the principle of territorial integrity and means that a people have no right to external self-determination, e.g. the creation of a new state to join another state, if the state the people belong to respect that entity's internal self-determination.[67] The "safeguard clause" does, therefore, not apply to secessions which are outside the scope of the right to self-determination.

With respect to Kosovo, the ICJ qualifies the authors of the declaration of independence as the representatives of the people of Kosovo, which could be understood as a reference to the right of self-determination. On the other hand, the ICJ confirms its previously expressed view that the international law of self-determination creates a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, and that some states have been created as a result of the exercise of this right.[68] It is interesting to observe that the ICJ applies the Lotus-Presumption to the declaration of independence by representatives of a people (liberty to act unless prohibited by international law), while, on the other hand, it affirms that a people may only exercise its right to independence, i.e. to effect independence,

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[65] *Id.* at ¶ 80.

[66] Advisory Opinion (Dissenting Opinion of Judge Koroma) ¶ 22. *See also* G.A. Res. 2625 (XXV), U.N. DOC. A/8082 (Oct. 24, 1970).

[67] CASSESE, *supra* note 20, at 63.

[68] Advisory Opinion at ¶ 79.

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provided it is entitled to do so under the principle of self-determination (taking action only if permitted by international law). Such reasoning may indeed be questioned in terms of its logic, and can be justified only in view of the ICJ upholding the artificial distinction between declaring and effecting independence.

H. Final Remarks

To summarize, according to the ICJ, there is no norm of international law which prohibits an entity to declare independence, which is different from effecting independence. Resolution 1244 does not apply to matters pertaining to the determination of Kosovo's final status and the authors of the declaration of independence are representatives of the people of Kosovo and not of the PISG acting under the authority of a UN organ. Therefore, there is also no violation of Resolution 1244 and the Constitutional Framework. Whether Kosovo is a state or not will be determined according to criteria set by general international law (which are vague and which are interpreted by individual states primarily according to political preferences).

While the ICJ does not want to pronounce itself on a right to secession and the extent of the right of self-determination, certain conclusions on these aspects could be drawn from the ICJ's dicta. It appears from the ICJ's reasoning that a people, whether or not it qualifies under the right of self-determination, have the liberty to declare independence without violating international law. But the ICJ remains silent on the consequences of such declaration of independence and whether effecting independence may or may not violate international law. Can it be that an entity declares independence without violating international law but then violates international law, when it effects independence by seceding and creating a new state? Such a conclusion would not be consequential and only conceivable in view of the ICJ's unsatisfactory distinction between declaring and effecting independence. Therefore, since there is no rule of international law, which prohibits a declaration of independence, one could argue that there is also no norm of international law, which prohibits secessions. General international law, and especially the principle of effectiveness, would determine if a declaration of independence has resulted in the creation of a new state. The right of self-determination, as a permissive rule of international law and applicable to a limited number of peoples, may then play a role in answering the question, what degree of effective government would be required in order to consider the new entity as a new state. It is established that a lower standard of effective government is required for peoples in the exercise of their right to external self-determination than it is for peoples, which cannot rely on such right. However, in the end the principle of effectiveness would determine if the secession has been successful or not. Unfortunately, the ICJ has not brought much clarity and legal certainty with regard to these matters and has, in fact, left the question of the legality of effecting independence through secession to be answered by state practice.

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