

Dr. Miodrag A. Jovanović

Associate Professor

University of Belgrade Faculty of Law

miodrag@ius.bg.ac.rs

AFTER THE ICJ'S ADVISORY OPINION ON KOSOVO: THE FUTURE OF SELF-DETERMINATION CONFLICTS*

Despite the expectation that the ICJ's Advisory Opinion on Kosovo will profoundly contribute to the clarification of international law on self determination, the Court, nevertheless, confined itself to a rather narrow reading of the submitted question. Yet, I will argue that some of its findings are of general nature. Such are the following conclusions: 1. that "general international law contains no applicable prohibition of declarations of independence", except in cases where they are in connection with a violation of general international legal norms of jus cogens; 2. that "the scope of the principle of territorial integrity is confined to the sphere of relations between States" and, hence, does not concern non state actors, including secessionist groups; and 3. that "persons who acted together in their capacity as representatives of the people" of some territory under the UN interim regime of governance are not bound to act within the framework of powers and responsibilities established to govern the conduct of provisional institutions. I will argue, furthermore, that these findings might have disastrous consequences for the future of self determination conflicts. First, by being excluded from the duty to respect the jus cogens norm of territorial integrity, secessionist groups, as non state actors, might be inclined to use all possible means, including the violent ones, to seize as much power as possible over delineated piece of territory of the recognized state. Second, secessionists may now even more relentlessly resort to the issuing of UDIs, while simultaneously searching for some patron(s) among Great Powers, which would at the critical moment back up their strive for statehood, by formally recognizing the new entity as a state. This, in turn, may even affect the role of 'recognition theory' in international law. Finally, states drawn into prolonged self determination conflicts with their rebellion minorities will be dissuaded from entering into provisional UN mandated conflict settlement

* Earlier versions of this paper were presented at the Annual Conference of the Association for the Study of Nationalities, which took place from 14 to 16 April, 2011, at the Columbia University, New York, as well as at the international conference 'Implementation of the Right of Peoples to Self determination Avoiding Conflict', which was from 18 to 19 November, 2011 organized by the Belgrade Centre for Human Rights.

arrangements, because no guarantee will exist that 'representatives of a self determining people' would not unilaterally dissolve them.

Key words: *International Court of Justice. Self determination conflicts. Unilateral declaration of independence. Non state actors. Territorial integrity .*

1. INTRODUCTION

All those who tried to enter the International Court of Justice's (ICJ) web site in the late afternoon of July 22, 2010 were denied access for several hours, because the system simply could not manage to utilize such a large number of potential visitors. This unprecedented interest of the global public opinion in the ICJ's Advisory Opinion on the accordance of Kosovo's unilateral declaration of independence (UDI) with international law¹ was triggered by the expectation that the rendered opinion will profoundly contribute to the clarification of one of the most obfuscated areas of international law, that of self-determination. This process has drawn attention of both academia and various state and non-state actors, which eagerly waited for a decision that would, preferably, advance their own political interests.² Having this huge expectation in mind, it came as no surprise that the ICJ's opinion³ was eventually met with an open disgruntlement. This particularly holds for international legal scholars, who almost unanimously criticized the ICJ for its overtly narrow interpretation of the posed question, which eventually led it to hardly illuminating conclusions.⁴ Hence, one may come across various downgrading qualifications of the ICJ's final product, such as "die Kunst des Nich-

¹ The UN General Assembly submitted the following question to the ICJ: "Is the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo in accordance with international law?" UNGA A/63/L. 2.

² This was the first Advisory Opinion case in which all the permanent Security Council's members have participated in the oral proceeding and submitted their written statements.

³ International Court of Justice, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, No. 2010/25, 22 July 2010. (Advisory Opinion)

⁴ A notable exception, in that respect, is Szewczyk's characterization of the ICJ's Advisory Opinion as "a groundbreaking decision". (B. M. Szewczyk, Lawfulness of Kosovo's Declaration of Independence, *ASIL Insight* 14/2010, 26, at <http://www.asil.org/files/insight100817pdf.pdf>, acc. 5 Feb. 2012) On the other hand, d'Aspremont says that "the astonishment expressed by some commentators is baffling. How could one have seriously believed that the Court would come with a grand opinion about statehood and self determination by re interpreting broadly the very narrow question submitted to it?" J. d'Aspremont, The Creation of States before the International Court of Justice: Which (II) legality?, 2 at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/DAspremont_Kosovo_EN.pdf, acc. 5. Feb. 2012

tssagens” (the art of saying nothing)⁵, “an exercise in the art of silence”,⁶ or “the sounds of silence and missing links”.⁷ This overall scholarly dissatisfaction is probably most eloquently summarized in the following observation – “the present Advisory Opinion might not enter into the judicial history of the Court for its answer to this question, but rather for what it did not say”,⁸

Without discussing what would presumably be the most adequate course of action for the ICJ,⁹ this paper will focus on those findings of the Advisory Opinion, which are of a rather general nature and, as such, might potentially affect various self-determination conflicts. Since the ICJ deliberately refrained from a more direct elaboration of international law of self-determination,¹⁰ these findings are the following ones: 1. that

⁵ A. Peters, “Das Kosovogutachten und die Kunst des Nichtssagens”, *Jusletter* 25. Oktober 2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701093, acc. 5. Feb. 2012.

⁶ C. Pippan, “The International Court of Justice’s Opinion on Kosovo’s Declaration of Independence”, *Europäisches Journal für Minderheitenfragen* 3 4/2010, 145 166.

⁷ T. Burri, “The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links”, *German Law Journal* 8/2010, 881 889.

⁸ B. Arp, “The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and International Protection of Minorities”, *German Law Journal* 8/2010, 847.

⁹ Opinions on this matter largely differ. While some commentators bluntly speak of the ICJ’s “cowardice” (see, M. C. Mineiro, *The Cowardice of the Restrictive Advisory Opinion Approach: A Failure of the ICJ to exercise its judicial prerogative in the application of General Principles of International Law in fulfillment of International Peace and Security*, Memo Prepared for the Hague Academy of International Law Summer Public International Law Directed Studies Program (4 August 2010), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654265, acc. 5 Feb. 2012), others argue that “it would have been more appropriate for the Court to decline jurisdiction in this case.” P. Hilpold, *The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question* (3 January 2011), 48, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734443, acc. 5 Feb. 2012. There are commentators, on the other hand, who argue that the ICJ positioned itself more as a means of dispute settlement than as a legal advisory body. Judged by this standard, “[t]he Court succeeded, in the sense that it created a favorable climate for talks between Belgrade and Pristina, though at the cost of a lost opportunity for the development of international law and some confusion of its contentious and advisory functions.” D. Richemond Barak, *The International Court of Justice on Kosovo: Missed Opportunity or Dispute “Settlement”?*, 3, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723034, acc. 5. Feb. 2012

¹⁰ The Court explicitly states at a number of places what it was not required to address in its opinion. More particularly, it specifies that the submitted question “does not ask about the legal consequences” of the UDI, just as 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.” (Advisory Opinion, par. 51) Consequently, “[t]he Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitle

“general international law contains no applicable prohibition of declarations of independence”¹¹, except in cases where they are in connection with a violation of general international legal norms of *jus cogens*;¹² 2. that “the scope of the principle of territorial integrity is confined to the sphere of relations between States” and, hence, does not concern non-state actors, including secessionist groups;¹³ and 3. that “persons who acted together in their capacity as representatives of the people” of some territory under the UN interim regime of governance are not bound to act within the framework of powers and responsibilities established to govern the conduct of provisional institutions.¹⁴

After scrutinizing these findings of the ICJ, in the remainder of the paper I will embark upon their plausible consequences for other self-determination conflicts around the globe. At first glance, this might appear a thankless role, because it seems akin to making a political prognosis. Not so, however. Although, in legal terms, the Advisory Opinion clearly does not set any kind of precedent rule, which might be directly applicable in analogous disputes,¹⁵ it will be argued that the concerned actors elsewhere might, nonetheless, infer some straightforward legal conclusions from the aforementioned general findings of the ICJ. These legal conclusions, in turn, might significantly shape political options and preferences of relevant parties to self-determination conflicts.¹⁶ When taken

ment 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.” Moreover, “it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.” (par. 56) Finally, the Court specifically underlines that the questions, as to whether Kosovo has the right to separate statehood in accordance with international law on self-determination or as a form of ‘remedial secession’, go “beyond the scope of the question posed by the General Assembly.” (par. 83)

¹¹ *Ibid.*, par. 84.

¹² *Ibid.*, par. 81.

¹³ *Ibid.*, par. 80.

¹⁴ *Ibid.*, paras. 109, 121.

¹⁵ On the other hand, the ICJ did not employ ‘the unique case’ thesis of the pro Kosovo independence camp. On non-sustainability of this thesis, see, M. Jovanović, “Is Kosovo and Metohija Indeed a ‘Unique Case’?”, *The Kosovo Precedent: Implications for Statehood, Self-determination and Minority Rights* (ed. J. Summers), Martinus Nijhoff Publishers, Leiden–Boston, 2011, 345–374.

¹⁶ One can here draw a parallel with the situation created after the Badinter Commission’s opinions, which legally qualified the case of Yugoslavia as the one of state disintegration. Federal scholars have promptly criticized this ruling, arguing that it “in effect declassifies federal states internationally into ‘second class unitary states’.” (T. Fleiner, H. Schneider and R. L. Watts, *Report of the Expert Group on Proposals for the Constitutional Reorganization of the Federal Republic of Yugoslavia*, Institute for Liberal Democratic Studies, Belgrade, 2001, 17.) Moreover, they argued that this ruling might be

in conjunction, three ICJ's findings might trigger the following patterns of political behavior. First, by being excluded from the duty to respect the *jus cogens* norm of territorial integrity, secessionist groups, as non-state actors, might be inclined to use all possible means, including the violent ones, to seize as much power as possible over delineated piece of territory of the recognized state. Second, secessionists may now even more relentlessly resort to the issuing of UDIs, while simultaneously searching for some patron(s) among Great Powers, which would at the critical moment back up their strive for statehood, by formally recognizing the new entity as a state. This, in turn, may even affect the role of 'recognition theory' in international law. Finally, states drawn into prolonged self-determination conflicts with their rebellion minorities will be dissuaded from entering into provisional UN-mandated conflict-settlement arrangements, because no guarantee will exist that 'representatives of a self-determining people' would not unilaterally dissolve them.

2. THE STATUS OF UDI UNDER INTERNATIONAL LAW

In the proceeding before the ICJ, some states expressed the view that a UDI is a fact that cannot be subjected to legal assessment, and, thus, it cannot be considered either valid or invalid. For the purposes of this paper, I will single out the statements of two prominent authorities in the field, James Crawford, representing Great Britain, and Martti Koskeniemi, representing Finland. In order to make his point more vivid, the former at some point solemnly declared the independence of South Australia. This utterance was followed with two rhetorical questions. Crawford, first, asked if, by unilaterally declaring independence, he committed

another nail in the coffin of the very idea of federalism, because it will most likely dissuade governments "either from entrusting minorities with a broad measure of local autonomy or from entering into federal arrangements as a method of regulating interethnic relations. In the event of a severe crisis, in which it is judged by an outside authority that the state is in the process of dissolution, the sub state units of government so created may be considered as vested with a right to separate statehood." (M. Rady, "Self Determination and Dissolution of Yugoslavia", *Ethnic and Racial Studies* 2/1996, 387) This prediction turned accurate, particularly in post communist Europe, where no state opted for the model of ethno cultural territorial autonomy, despite frequent requests of minority communities for such a status. The only post communist federal states are Russia and Bosnia and Herzegovina, which rather reluctantly entered into this arrangement (see more general in, M. Jovanović, *Transition and Federalism – East European Record*, in M. Jovanović and S. Samardžić, *Federalism and Decentralisation in Eastern Europe: Between Transition and Secession*, Institut du Fédéralisme, LIT Verlag, Fribourg Vienna, 2007, 1 167). The third post communist federal state was the State Community of Serbia and Montenegro, which eventually dissolved after the Montenegro's constitutionally mandated referendum for independence. See, M. Jovanović, "Consensual Secession of Montenegro Towards a Good Practice?", *On the Way to Statehood: Secession and Globalization* (eds. A. Pavković and P. Radan), Ashgate, Aldershot, 2008, 133 148.

any internationally wrongful act in the Court's presence. Secondly, he asked whether the committed act was effective. Since the answer to both questions was clearly negative – in the first case, because he had no representative capacity, and in the second, because no one would rally to his call – he asked if it, then, made more sense to treat as illegal only those UDIs, which had been issued by representative bodies and which were likely to be effective? The answer to this question was all the more obvious and it was negative again. Crawford said that the reason for such an answer was quite simple “A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community”.¹⁷

Koskenniemi expressed a similar standpoint. He noticed that the question submitted to the ICJ implied that there were precise international legal rules regulating the making of independence declarations. However, “there are no such rules. No treaty, no custom regulates the matter ... A declaration is simply a fact, or the endpoint of an accumulation of facts. Just like possession of territory, population or government are facts”.¹⁸

The ICJ, nevertheless, “did not agree with the argument that UDIs are not legally accessible at all.”¹⁹ It entered into the discussion regarding legality of the UDI in the case of Kosovo. However, in doing so, the ICJ proceeded from a revised formulation of the question. Whereas it was asked to assess whether the Kosovo UDI was “in accordance with international law”, the ICJ somewhat laconically concluded that “[t]he answer to that question turns on whether or not the applicable international law prohibited the declaration of independence”.²⁰ Putting aside the issue of whether the ICJ is generally legally authorized to change the advisory request²¹, particularly when proceeding from the statement that the one it deals with “is clearly formulated”,²² many commentators argued that, with this specific reformulation in mind, the ICJ resurrected the outdated Lotus principle.²³ As put by Judge Simma, in his separate Declaration,

¹⁷ CR 2009/32, p. 47.

¹⁸ CR 2009/30, p. 57.

¹⁹ M. Vashakmadze and M. Lippold, “Nothing But a Road Towards Secession? The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo”, *Goettingen Journal of International Law* 2/2010, 631.

²⁰ Advisory Opinion, par. 56.

²¹ Kammerhofer is, for instance, of the opinion that the ICJ is not legally entitled to such an act. J. Kammerhofer, *Begging the Question? The Kosovo Opinion and the Reformulation of Advisory Requests*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684539, acc. 5 Feb. 2012

²² Advisory Opinion, par. 51.

²³ “Lotus”, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18.

“[t]he underlying rationale of the Court’s approach reflects an old, tired view of international law, which takes the adage, famously expressed in the ‘*Lotus*’ Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order.” In other words, “it is not necessary to demonstrate a permissive rule so long as there is no prohibition”.²⁴ By using this approach, not only did the ICJ fail “to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law”,²⁵ but, curiously enough, it also helped the secessionists’ cause, despite the fact that the *Lotus* was originally intended to protect sovereignty of states.²⁶ Consequently, this reinterpretation of the question decisively affected the scope of the ICJ’s advisory role²⁷, thereby seriously damaging the integrity of its judicial function.²⁸

Once it decided to narrow down the question as to investigate the existence of a general prohibitive rule of international law²⁹, the ICJ swiftly concluded that the state practice throughout eighteenth and nineteenth century “points clearly to the conclusion that international law contained no prohibition of declarations of independence.” Many new states came to existence in the second half of twentieth century, by way of exercising the right to self-determination. Moreover, unilateral declarations were issued on a numerous occasions outside of the context of de-

²⁴ Declaration of Judge Bruno Simma, par. 2

²⁵ *Ibid.*, par. 3

²⁶ A. Peters, 2.

²⁷ In a pre Advisory Opinion analysis of potential courses of action of the ICJ, Milanović argued that much would depend on how the Court will deal with ‘The Question Question’. M. Milanović, Kosovo Advisory Opinion Preview, at www.ejiltalk.org/kosovo-advisory-opinion-preview/, acc. 5 Feb. 2012

²⁸ In Hilpold’s view, the ICJ’s decision to avoid highly contentious issues of the right to self determination, statehood and the legality of the acts of recognition “might have been a good choice”, but “[t]he advisory role of the ICJ as such and the integrity of the judicial function, however, have suffered further reputational damage.” P. Hilpold, 28. Similarly, Judge Simma closes his Declaration with the following conclusion: “To not even enquire into whether a declaration of independence might be ‘tolerated’ or even expressly permitted under international law does not do justice to the General Assembly’s request and, in my eyes, significantly reduces the *advisory* quality of this Opinion.” Declaration of Judge Bruno Simma, par. 10.

²⁹ With regard to this issue, Koskeniemi’s position seems to be more nuanced than Crawford’s, insofar as he claims that even when no explicit rule in international law regulates certain behavior, it still does not follow that it cannot be judged as valid or invalid on the basis of some more general legal principle. In that respect, Koskeniemi explicitly refers to the wording of the ICJ’s decision in the 1951 *Fisheries* case. After drawing a parallel with this case, he concludes that “the fact that there are no mechanical rules on declarations of independence may not make it impossible to judge what their effect should be. Such judgment must only be based on a balanced assessment of the relevant facts, including as the Court then stated the needs of the communities as can be detected from their histories.” CR 2009/30, p. 58.

colonization, and yet “[t]he practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”.³⁰

This assertion implies two further separate conclusions. The first one concerns several cases in which the Security Council did condemn UDIs, which were brought up by some participants in the oral proceedings. With regard to these cases, the ICJ stated that the illegality attached to those declarations of independence “stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”.³¹ In other words, it is a particular legal context, within which the fact of issuing a unilateral declaration of independence may subsequently trigger its illegality.

The second conclusion concerns a potential source of legal prohibition of a UDI under international law. While there is no general prohibitive rule against UDIs, such a prohibition may still be envisaged by some special rule of an international legal instrument. Such a special rule would outweigh the general non-prohibitive one, according to the well-established legal principle *lex specialis derogat legi generali*. It was exactly for this reason that the ICJ found it necessary to determine whether the Kosovo UDI was in accordance with a special legal regime, established in the SC Resolution 1244.³²

It can be, thus, argued, contra Crawford, that it very much made sense for the ICJ to determine the legality/illegality of the Kosovo UDI. This was so, because the question before the Court was not merely whether the Kosovo UDI was in accordance with *general* international law, which was largely in the focus of Crawford’s attention, but whether it was in accordance with *applicable* international law.³³ This implies that the Kosovo UDI would be deemed illegal either if it were issued in connection with some violation of general international legal norms of *jus co-*

³⁰ Advisory Opinion, par. 79.

³¹ *Ibid.*, par. 81.

³² The ICJ went a step further and investigated whether the UDI contravened the Kosovo Constitutional Framework, arguing that “[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.” Advisory Opinion, par. 88. For an interesting challenge of this ICJ’s view, see, D. Jacobs, *The Kosovo Advisory Opinion: A Voyage by the ICJ into the Twilight Zone of International Law*, at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Jacobs_Kosovo_Note_EN.pdf, acc. 5 Feb. 2012.

³³ Crawford did assert that not only “international law does not regulate declarations of independence as such”, but also that there was “nothing in the surrounding circumstances, including resolution 1244, to impose any contrary obligation.” However, he did not bother much to justify this statement. CR 2009/32, p. 52.

gens, or if it were as such prohibited by the special legal regime of the SC Resolution 1244. The first form of illegality would exist if the authors of the Kosovo UDI were in violation of the principle of territorial integrity, as argued by some participants in the proceedings. The second form of illegality would exist if the SC Resolution 1244 did exclude such an option for determining the final status of the province.

3. NON-STATE ACTORS AND THE PRINCIPLE OF TERRITORIAL INTEGRITY

The first aforementioned form of the prohibitive use of a UDI implies that the peremptory norm of general international law regarding the duty to respect the principle of territorial integrity binds not only states, but non-state actors as well. This position is on the behalf of Serbia elaborated by another expert in the field, Malcolm Shaw. He offered several arguments for such a claim. First, the concept of international relations is now widely acknowledged as to include civil wars, violations of humanitarian law, terrorism and the internal seizure of power. Secondly, international law tends nowadays to directly address non-state entities, and even the authors of the Kosovo UDI reluctantly admit that that is the case. They particularly mention the Colonial Declaration, which, in their own words, “may perhaps be read as broadening the beneficiaries of the principle of territorial integrity so as to include not just the State but the people of the State”. Shaw, thus, concludes that “[t]he classical structure of international law has changed and no State or other entity may seek now to cling to it in the face of established evolution. The clock may not be turned back”.³⁴ That this is so is, furthermore, evidenced in the recent practice, which demonstrates that non-state entities within existing states are directly addressed in the context of internal conflict and with regard to territorial integrity. Examples include SC Resolution 787 (1992), calling “all parties and others concerned to respect strictly the territorial integrity” of Bosnia and Herzegovina, as well as resolutions relating to the Democratic Republic of Congo, Somalia and Sudan, which also strongly reaffirmed the importance of the sovereignty and territorial integrity of those states faced with internal secessionist conflicts. It can be, thus, concluded that “the international community now accepts that non-State entities and groups within sovereign States may be directly required to respect the territorial integrity of that State”.³⁵

Finally, numerous international and regional instruments concerning the protection of minorities and indigenous peoples explicitly stipulate that nothing in the instrument in question may be construed as per-

³⁴ CR 2009/24, p. 66.

³⁵ *Ibid.*, p. 67.

mitting any activity contrary to, *inter alia*, the sovereignty and the territorial integrity of states. This formulation can be found in the 1992 UN Declaration on the Rights of *Persons Belonging* to National or Ethnic, Religious and Linguistic Minorities, as well as in the specific regional instruments, such as the European Charter on Regional or Minority Languages and Framework Convention for the Protection of National Minorities. Moreover, the recent UN Declaration on the Rights of Indigenous Peoples refers in this context to both states and peoples. Shaw, thus, concludes that it is

simply incorrect to maintain that international law does not apply directly to non-State entities nor that the norm of territorial integrity is today limited to third States alone. Practice makes it very clear that such norm is now recognized as applying to non-consensual situations of internal conflict and secessionist attempts. This has been most recently recognized in the Report on the Conflict in Georgia of the Mission established by the Council of the European Union.³⁶

A number of countries that supported the Kosovo UDI challenged this reasoning.³⁷ I will here focus again on Koskenniemi's argumentation. He notices that the principle of territorial integrity "does not at all concern the relation between a State and an entity seeking self-determination". This is testified by the explicit wording, as well as *raison d'être* of instruments, such as the 1970 Friendly Relations Declaration and the 1975 Helsinki Final Act. Both of them "deal with *inter-State relations* and in particular the *duty of other States not to intervene* in internal political processes".³⁸ To say this, however, is not to argue that the present day international law does not contain rules concerning individuals. To the contrary, there are such rules in the areas of human rights, economic relations and the environment. However, "rules about sovereignty or territorial integrity are not among those — and we understand well why. It would be absurd to claim that international law takes any position beyond respect of human rights and non-violence in respect of the agendas of domestic groups or federalist movements, for example".³⁹

Koskenniemi, thus, concludes that, although territorial integrity lays out a general value of unharmed statehood, which international law seeks to protect, "it should be weighed against countervailing values, among them the right of oppressed people to seek self-determination in-

³⁶ *Ibid.*, p. 67. This position was advanced by representatives of several other states in the oral proceedings: Argentina, CR 2009/26, p. 38, Brazil, CR 2009/28, p. 17, China, CR 2009/29, p. 33, Spain, CR 2009/30, p. 15, Romania, CR 2009/32, p. 20, Venezuela, CR 2009/33, p. 6, Vietnam CR 2009/33, p. 20.

³⁷ See, Austria CR 2009/27, p. 9, Bulgaria CR 2009/28, p. 25, United States CR 2009/30, p. 30, France CR 2009/31, p. 12, United Kingdom CR 2009/32, p. 53.

³⁸ CR 2009/30, p. 59.

³⁹ *Ibid.*, pp. 59–60. (emphasis in the original)

cluding by way of independence.” In such a conflict, “it is the factual context that should decide which value should weigh heaviest”.⁴⁰ This reading of external self-determination, as a last resort right of oppressed groups, which is applicable outside the colonization context, is not only today favored by “a broad body of scholarship”, but it may be said to constitute a “part of the traditional law of self-determination that was always to be balanced against territorial integrity”. As the *Aaland Islands* case demonstrates, this balancing is principally always opened for the application of the external form of self-determination, that is, independent statehood.⁴¹ Having in mind a specific historical context of the Kosovo case, which was determined by the violent break-up of the SFRY and, particularly, by “the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State. This was”, in Koskenniemi’s words, “achieved by the facts of history and symbolized by the Declaration of Independence of 17 February 2008”.⁴²

Eventually, the ICJ did accept the reasoning of the pro-Kosovo independence camp with respect to the circle of subjects bound by the *jus cogens* principle of territorial integrity, but as noticed by some commentators, “it remains regrettable that the Court offers no further line of argumentation.” Having particularly in mind the growing importance of non-state actors in international relations, the ICJ could more thoroughly investigate “whether non-State actors, which have a certain degree of structure or organization, are bound by the principle of territorial integrity”.⁴³ Instead, the ICJ resorted to [a textual interpretation of the selected number of provisions on territorial integration, assuming, alongside with Koskenniemi, that “[t]he will of the drafters is the language of the instrument.” Any other interpretative technique that might have searched for the purpose of the relevant body of law beyond the plain text would amount to “speculation about what might be a good (acceptable, workable, realistic, or fair) way to apply it”.⁴⁴ For Koskenniemi, this would imply abandoning *formalism*, which he tends to endorse generally,⁴⁵

⁴⁰ *Ibid.*, p. 60.

⁴¹ *Ibid.*, p. 62.

⁴² *Ibid.*, p. 64.

⁴³ M. Vashakmadze and M. Lippold, 632.

⁴⁴ M. Koskenniemi, “What is International Law For?”, *International Law* (ed. M. D. Evans), Oxford University Press, Oxford, 2003, 99.

⁴⁵ Koskenniemi is aware that formalism in its pure form is today hardly possible, especially with the disappearance of the bipolar world, which is marked with “the turn to ethics in international law”. Nonetheless, Koskenniemi says that “against the particularity of the ethical decision, I would like to invoke formalism as a horizon of universality,

for the sake of *instrumentalism*, which is never devoid of a political choice.⁴⁶

However, precisely Koskenniemi's argumentation goes beyond mere textual interpretation and 'formalism', when asserting the right of an oppressed people to remedial secession. Koskenniemi is, naturally, aware of the fact that the stipulated objectives of international law, like 'peace' or 'justice', just as well as general concepts, like '*jus cogens*' or '*erga omnes* obligations', are so broad as to inevitably raise complex interpretative disputes. Hence, he notices that 'self-determination' "may be constructed analytically to mean anything one wants it to mean, and many studies have invoked its extreme flexibility".⁴⁷ This is, actually, what he does when interpreting international law on self-determination as to encompass the 'remedial right to external self-determination'. Unlike in the case of territorial integrity, Koskenniemi does not offer any formal source of international law for such a claim, but instead refers to "a broad body of scholarship" and to a single case, which predated international law on self-determination of the UN era. This has led him to a rather strong conclusion that 'remedial right to self-determination' should not be considered as some newly invented rule, but as a composite "part of the traditional law of self-determination".⁴⁸

In its written statement to the ICJ, Germany elaborated this stance in more details,⁴⁹ but apparently, both authors of this submission and Koskenniemi failed "to furnish a convincing basis in positive international law for such an assumption." Actually, as pointed out by Hilpold, "no such basis exists".⁵⁰ It seems that the most that supporters of this argu-

embedded in a *culture* of restraint, a *commitment* to listening to others' claims and seeking to take them into account." What would such a culture and commitment, or lack thereof, imply, he illustrates on the case of the NATO bombing of Serbia. "The reference to 'moral duty' in the justification of the bombing of Serbia was objectionable because it signified a retreat from such commitment into the private life of the conscience, casting the Serbs as immoral 'criminals' with whom no political community could exist and against whom no measures were excessive. By contrast, a commitment to formalism would construct the West and Serbia as political antagonists in a larger community, whose antagonism can only be set aside by reference what exceeds their particular interests and claims." M. Koskenniemi, "The Turn to Ethics in International Law", *Thesaurus Acroasiarum*, 33/2010, 394.

⁴⁶ "A legal technique that reaches directly to law's purposes is either compelled to think that it can access the right purpose in some politics independent fashion in which case it would stand to defend its implicit moral naturalism or it transforms itself to a licence for those powers in position to realise their own purposes to do precisely that." M. Koskenniemi (2003), 98.

⁴⁷ *Ibid.*, 106.

⁴⁸ CR 2009/30, p. 62.

⁴⁹ Written Statement of Germany of April 15, 2009, p. 35.

⁵⁰ P. Hilpold, 43.

ment could convincingly claim is that the offered interpretation represents a “new” and an “emerging normative trend” in international law of self-determination. This is how Cassese, for instance, perceives it in the closing chapter of his thoroughly analytical treatise on self-determination.⁵¹ Accordingly, if Koskenniemi’s argument in favor of the right of oppressed people to external form of self-determination has any support in international law, it can only be found in some form of ‘instrumentalism’, whereby the specific objectives of this field of international law would be interpreted differently outside the decolonization context.

In that case, however, the employed instrumental interpretative technique would have to be extended to the countervailing principle of territorial integrity as well. It is a well-established fact of the international legal system of the UN era that the introduction of the principle of territorial integration served one of the main objectives of this legal system, that of world peace. If anything received such a universal acceptance as a lesson of two World Wars was the belief that peace would be impossible in the absence of explicit provisions forbidding aggressive war and the violation of territorial integrity of states. For a long period, state actors were justifiably held to be the key menace to world peace. No wonder, thus, that the aforementioned international legal instruments from 1970s addressed explicitly only states as bearers of the duty to refrain from harming territorial integrity. One may, nonetheless, reasonably challenge a mechanical application of these provisions on the circumstances of the current-day world.⁵² As Marshall and Gurr persuasively demonstrated in several consecutive global reports on armed conflicts and self-determination movements, “ethnonational wars for independence” be-

⁵¹ Cassese argues that in “exceptional cases where factual conditions render internal self determination impracticable”, international law should be open for the possibility of external self determination of ethnocultural minorities. This exit option should be re considered if, “in a multinational State, armed conflict breaks out and one or more groups fight for secession”, or “when the central authorities of a multinational State are irremedi ably oppressive and despotic, persistently violate the basic rights of minorities and no peaceful and constructive solution can be envisaged”. Antonio Cassese, *Self determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge 1995, 359.

⁵² That is what actually Koskenniemi himself suggested in a 1994 article dealing with the issue of self determination. While arguing that the 1975 Helsinki Final Act recognized that self determination is applicable beyond the colonial context, he, nonetheless, notices that “it is doubtful whether that statement of principle was intended to be taken literally (however much Eastern European populations now aim to take the West at its word). Its revolutionary potential was tempered by the Final Act’s strong emphasis on territorial integrity and the preservation of existing boundaries.” Yet, “then came the events of 1989 and suddenly geopolitics and nationalism existed everywhere.” In dramatically changed circumstances, a simple recourse to “doctrinal purity” was hardly an option for international lawyers. M. Koskenniemi, “National Self determination Today: Problems of Legal Theory and Practice”, *International and Comparative Law Quarterly* 2/1994, 242–243.

came in the post-Cold War period “the main threat to civil peace and regional security”.⁵³ Even Koskenniemi in one of his articles illustrates the so-called “paradox of objectives” in international law, by pointing out that “[t]o say that international law aims at peace *between States* is perhaps already to have narrowed down its scope unacceptably”.⁵⁴ Among non-state actors, one can hardly find a better candidate than rebellion secessionist groups for the status of bearer of duties aimed at preserving international peace.⁵⁵ If those duties include forbearance from violence, as asserted by Koskenniemi himself when referring to “domestic groups”, than it seems reasonable to argue that they also encompass the duty to respect territorial integrity, particularly when violent means are employed in the secessionist struggle and when the non-state actor in question is partially recognized as an international subject, that being the case with Kosovo Albanians.⁵⁶

The duty of a rebellion secessionist group to respect territorial integrity of the host state would be, in this respect, a logical corollary of the state right to unharmed statehood, which, on the other hand, is not absolute and should be counterweighted with the right of an oppressed people to external self-determination. Had the ICJ come to this conclusion and resorted to the balancing of countervailing claims, it would have decided the case, as suggested by Koskenniemi, on the merits of “the factual context” and on its considerations “which value should weigh heaviest.” Instead, the ICJ simply refrained from entering into this problem area. It acknowledged that ‘remedial secession’ is “a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question”, which led it to eventually conclude, “that it is not necessary to resolve these questions in the present

⁵³ M. G. Marshall & T. R. Gurr, *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self Determination Movements, and Democracy*, MD: CIDCM, College Park, 2003, 1, at <http://www.systemicpeace.org/PC2003.pdf>, acc. 5 Feb. 2012

⁵⁴ M. Koskenniemi (2003), 90. (emphasis in the original)

⁵⁵ Vashakmadze and Lippold rightly stress that one should differentiate between various types of non state actors, as well as various areas of international law, because “the concept of international legal personality does not necessarily encompass the same range of rights and duties for all subjects of law.” M. Vashakmadze and M. Lippold, 633.

⁵⁶ This opinion is shared by Milano, who argues that the right to territorial integrity is, first, “opposable, externally, to third states against actions aimed at changing the territorial configuration of the state”. However, it is also opposable “internally, to international subjects, such as peoples, insurgents, de facto independent entities that may acquire international legal personality due to effective control or international recognition in binding instruments (that being the case for Kosovo’s provisional authorities) and may seek to disrupt the territorial unity of a state.” E. Milano, “The Independence of Kosovo Under International Law”, *Kosovo Staatsschulden Notstand EU Reformvertrag Humanitätsrecht (Beiträge zum 33. Österreichischen Völkerrechtstag 2008 in Conegliano)* (eds. S. Wittich, A. Reinisch and A. Gattini), Peter Lang, Frankfurt, 2009, 24.

case”.⁵⁷ As for the principle of territorial integrity, the ICJ merely asserted that non-state actors are not generally bound by the duty to respect it.⁵⁸

While it is arguable whether the ICJ could simply circumvent the issue of ‘remedial secession’ by narrowing down the scope of the submitted question⁵⁹, it is clear that it should have provided far more stronger arguments that the non-state actor in this particular case was not bound with the *jus cogens* duty of territorial integrity.⁶⁰ This is so in light of the fact that several UN resolutions explicitly addressed “Kosovo Albanian community” as being obliged to comply fully with the established duties, including the one of respecting territorial integrity of the host state. Hence, the Resolution 1203 (1998), while reaffirming the territorial integrity of the Federal Republic of Yugoslavia (to be succeeded by Serbia), also demanded that “the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998).” Both of these resolutions reaffirmed that a political solution to the Kosovo problem had to be based on the territorial integrity of the FRY. Finally, the SC Resolution 1244 (1999), as the key legal instrument to this conflict, commences by recalling previous resolutions, including the mentioned ones. According to the Serbian side: “In this way, the Security Council underlined the earlier resolutions that had called for a political solution based on the territorial integrity of the Federal Republic of Yugoslavia and autonomy for Kosovo and had also demanded that the Kosovo Albanian leadership and community accept this”.⁶¹ If the ICJ endorsed this argument, it would then also have to conclude that the Kosovo UDI was unlawful, because it violated the principle of territorial integrity. The ICJ, however, argued that the omission of an explicit mention of the “Kosovo Albanian community” from the SC Res-

⁵⁷ Advisory Opinion, paras. 82, 83.

⁵⁸ *Ibid.*, par. 80.

⁵⁹ In Burri’s opinion, “one cannot credibly avoid dealing with the legality of secession, when asked to assess the legality of a declaration of independence in the circumstances of this case ... It is not persuasive to rely on the wording of the question asked to avoid the true issue behind the question. The ICJ should have addressed the real issue whether Kosovo’s remedial secession from Serbia was lawful or, applying discretion, have declined to give an opinion altogether.” T. Burri, 886.

⁶⁰ After reminding that the ICJ did acknowledge unlawfulness of UDIs that are connected to blatant violations of *jus cogens* norms, Howse and Teitel ask “how could the Court be so sure that the Kosovo declaration was *not* or *would not* be connected to such violations of other norms?” They subsequently demonstrate that the Court’s approach, which relied on the method of “reducing the declaration to a statement of hopes and wishes, mere words without obvious effects” is not sustainable. R. Howse and R. Teitel, “Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo?”, *German Law Journal* 8/2010, 842.

⁶¹ Written Statement of Serbia, p. 182.

olution 1244, “notwithstanding the somewhat general reference to ‘all concerned’”, could be interpreted as excluding this non-state actor from the circle of subjects, which are under stipulated duties.⁶²

4. UN-MONITORED INTERIM INSTITUTIONS AND ‘REPRESENTATIVES OF THE PEOPLE’

I have earlier indicated that the second form of illegality of the Kosovo UDI would exist if the SC Resolution 1244 did exclude such an option for determining the final status of the province. Accordingly, in order to refute such a claim, one would need to demonstrate either that the UDI is in accordance/does not violate the Resolution 1244 or that the authors of the UDI are not those bound by the Resolution 1244. It was already clear after the submitted written statements and oral proceedings before the ICJ, that the issue of “how to characterize the authors of the UDI”, which at first glance “might seem to be quite marginal or even peculiar”,⁶³ could turn to be crucial for the final decision of the Court.

Although the question submitted to the ICJ by the UN General Assembly referred to “the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*”, the Court, nonetheless, argued that, because the authorship was contested in the oral proceedings, it had to address this question separately. The ICJ argued that “[t]he identity of the authors of the declaration of independence ... is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law.”⁶⁴ This investigation focused on determining whether the UDI was an act of the “Assembly of Kosovo”, which is one of the Provisional Institutions of Self-Government, or “whether those who adopted the declaration were acting in a different capacity”.⁶⁵ The ICJ undertook not only a detailed linguistic analysis of the adopted UDI, but it also tried to grasp into intentions of its authors. This led the ICJ to conclude:

This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo “as an independent and sovereign state” (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary,

⁶² This interpretation is, however, not related to the ICJ’s discussion concerning the principle of territorial integrity, but to its determination of whether the authors of the UDI acted in violation of the SC Resolution 1244. Advisory Opinion, par. 118.

⁶³ M. Milanović, at www.ejiltalk.org/kosovo_advisory_opinion_preview/

⁶⁴ Advisory Opinion, par. 52.

⁶⁵ *Ibid.*, par. 102.

the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.⁶⁶

In the Court's opinion, this conclusion is evidenced by the fact that the original text of the UDI has no reference of the authorship to the "Assembly of Kosovo", but instead the self-reference of the persons adopting the declaration as "the democratically-elected leaders of our people".⁶⁷ Moreover, the silence of the Special Representative of the Secretary General indicates that he did not consider the UDI to be the act of the Provisional Institutions, for otherwise he would have been obliged to take action against it, as an act *ultra vires*.⁶⁸ For all the stated reasons, the ICJ concluded that the authors of the UDI did not act as one of the Provisional Institutions, "but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration".⁶⁹ After having made this initial step, the ICJ more easily inferred the conclusion that the SC Resolution 1244 did not bar the authors from issuing a UDI and that, accordingly, this act did not violate the resolution in question. While the objective and purpose of the Resolution 1244 was the establishment of an interim administration, the authors of the UDI tried to determine the final status for Kosovo. The fact that the Resolution 1244 stipulates that such a status shall come as a result of "political settlement" does not, in the ICJ's opinion, make a unilateral declaration an illegal act.⁷⁰

In his separate declaration, the ICJ's Vice-President Tomka discards the Court's majority opinion regarding the authorship as "nothing more than a *post hoc* intellectual construct." Such a stance of the ICJ assumes "that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina" – neither Serbia, when proposed the question; nor other States that adopted the Resolution 63/3; nor the Secretary-General and his Special Representative; nor even the Prime Minister of Kosovo, when introducing the text of declaration at the special session of the Assembly of Kosovo.⁷¹ As Judge Tomka persuasively demonstrates, however, all the mentioned actors, including the representatives of the major powers that backed Kosovo's independence, such as the UK, USA, and France, referred in their official statements to "provisional institutions" and/or "Kosovo Assembly" as the author of the UDI.⁷² That

⁶⁶ *Ibid.*, par. 105.

⁶⁷ *Ibid.*, par. 107.

⁶⁸ *Ibid.*, par. 108.

⁶⁹ *Ibid.*, par. 109.

⁷⁰ *Ibid.*, paras. 118, 119. Using the same reasoning, the ICJ concluded that the UDI was not in violation of the Constitutional Framework as well. (par. 121)

⁷¹ Declaration of Vice President Tomka, par. 12.

⁷² *Ibid.*, paras. 13 18.

this is so becomes particularly obvious from the solemn introductory statement of the Kosovo Prime Minister, who stressed that the “invitation for a *special session* is extended *in accordance with the Kosovo Constitutional Framework*” (Judge Tomka’s emphasis), whereby one of the items on the agenda was declaration of independence for Kosovo. Accordingly, the authors “wished to act in accordance with that framework and not outside of it, as the majority asserts”.⁷³ Finally, in addition to the President of Kosovo, its Prime Minister and the President of its Assembly, all those who added their signatures below the declaration did so as members of the Kosovo Assembly “as *verbis expressis* confirmed on the original papyrus version of the declaration, in the Albanian language.” The Court’s majority conclusion “that ‘[n]owhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo’ (paragraph 107) is thus plainly incorrect, not enhancing the credibility of the majority’s intellectual construct.”⁷⁴

This ‘intellectual construct’ appears, thus, as a necessary logical premise for the conclusion that the UDI was not in violation of the SC Resolution 1244 and the Constitutional Framework. If the declaration were attributable to the Kosovo Assembly, it would have to be declared illegal. This stems, for instance, from the 2001 UNMIK expert opinion on legal nature of the Constitutional Framework, in which a special part is devoted to the constraints imposed by the SC Resolution 1244. One of them concerns the determination of the final status by provisional institutions. It is particularly stated that the Kosovo Assembly is not authorized “to reverse the position as reflected in the Constitutional Framework. Should it try, the SRSG will be obliged under SCR 1244 to block it.”⁷⁵ And indeed, the Special Representative did exercise this power on several occasions from 2002 to 2005.⁷⁶ In its Advisory Opinion, however, the ICJ largely relied on “[t]he silence of the Special Representative of the Secretary-General” in the aftermath of the February 2008 UDI, interpreting it as the sign that he did not consider this declaration as an act of the Provisional Institutions “designed to take effect within the legal order for the supervision of which he was responsible”.⁷⁷ Judge Tomka rightly notices that, even if this was so,

the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002–2005, would no longer have any such character in

⁷³ *Ibid.*, par. 19.

⁷⁴ *Ibid.*, par. 20.

⁷⁵ A. Borg Olivier, Behind the Framework, 25 May 2001, UNMIK/FR/0040/01, available at <http://www.unmikonline.org/pub/features/fr040.html>, acc. 5 Feb. 2012

⁷⁶ See, Declaration of Vice President Tomka, par. 32.

⁷⁷ Advisory Opinion, par. 108.

2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.⁷⁸

This leads Ker-Lindsay to draw an even more far-reaching conclusion. He says that the problem stems from the fact that “the Special Representative in question openly supported independence.” Moreover, even if this was not the case, “there is a good argument to be made that if he had decided to do try to annul the declaration, it would have led to violent incidents that would almost certainly have placed UN officials in Kosovo in extreme danger.” Put differently, one could argue that in the given circumstances “the UN was acting under duress”.⁷⁹

Be that as it may, the ICJ’s entire argumentative construct hinges upon a dubious assumption that “the representatives of the Self-Government Institutions and the authors of the UDI are partially the same persons, meeting in the official building of the Self-Government, but acting in a different capacity”.⁸⁰ This subsequently led the ICJ to a “circular and tautological” line of reasoning, according to which “[t]hose who violated the law (the members of the Kosovo Assembly) set themselves outside the law and as a consequence no more violation was given (as Res. 1244/1999 did not cover this situation)”.⁸¹ In other words, “since the PISG were not empowered to declare independence, they could not have been acting in the capacity of the PISG when they did so.” This argument, however, obviously runs counter the general legal principle, equally applicable in international law, “that an organ may commit *ultra vires* conduct while still acting in official capacity”.⁸²

As a consequence, one may reasonably ask whether any legal order governed “democratically elected representatives of the people” at the moment of their adoption of the Kosovo UDI.⁸³ The ICJ’s reasoning makes us believe that the answer is: “None”.⁸⁴ From the purely legal point of view, this situation is unsustainable. As noticed by Vidmar, the

⁷⁸ Declaration of Vice President Tomka, par. 33. Judge Tomka, thus, concludes: “The legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and realities in Kosovo. The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.” par. 35.

⁷⁹ J. Ker Lindsay, “Not Such a ‘*Sui Generis*’ Case After All: Assessing the ICJ Opinion on Kosovo”, *Nationalities Papers* 1/2011, 6.

⁸⁰ M. Vashakmadze and M. Lippold, 639.

⁸¹ P. Hilpold, 33.

⁸² J. Cerone, “The Kosovo Advisory Opinion of the International Court of Justice”, *Annals of the Faculty of Law in Belgrade – Belgrade Law Review* 3/2010, 212.

⁸³ Cf. Dissenting Opinion of Judge Bennouna, par. 64.

⁸⁴ Cf. C. Pippan, 164.

ICJ “here tries to ride on two horses. If the individuals acted outside of the framework of self-governing institutions, they did not have the capacity to act. If they had the capacity to act, they acted within the framework of these institutions. There is no third way”.⁸⁵ Consequently, the ICJ’s legal conclusion could be justified only within the constitutional law theory of ‘*pouvoir constituant*’. This theory would imply that secession is a revolutionary act, which tends to establish the normative discontinuity with the preceding legal order. Such an argumentative strategy is, however, “very risky, because with the reference to ‘extra-legality’, all possible violations could be treated as seemingly legitimate”.⁸⁶ Moreover, the notion of ‘*pouvoir constituant*’, “if translated into the language of international law – is inherently linked to the very issue the ICJ was determined not to address in its opinion on Kosovo (self-determination)”.⁸⁷

5. THE FUTURE OF SELF-DETERMINATION CONFLICTS

As soon as one comes to the issue of plausible effects of the Advisory Opinion for the future of similar self-determination conflicts, one finds out that opinions range from the statement that the ICJ’s ruling provides “a guide and instruction manual for secessionist groups the world over”⁸⁸, to the statement that “the Opinion itself remains unique and limited to the circumstances of the concrete case”.⁸⁹ The latter stance is accurate to the extent that the ICJ deliberately avoided discussing some open and general issues pertaining to self-determination, statehood and recognition, and instead focused, as much as possible, to the case in question. On the other hand, I already said that once the Advisory Opinion is carefully unpacked, it becomes clear that there is much of accuracy in the former statement as well. Three previously discussed conclusions of the ICJ, which are also of general nature, have the potential of seriously affecting developments of other self-determination conflicts.

Let me first start with the ICJ’s coarse statement that non-state actors, including rebellion secessionists, are not bound by the *jus cogens* norm of territorial integrity. Previous analysis demonstrates that this con-

⁸⁵ J. Vidmar, *The Kosovo Opinion and General International Law: How Far reaching and Controversial is the ICJ’s Reasoning?*, 5, at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Vidmar_Kosovo_Note_EN.pdf, acc. 5 Feb. 2012.

⁸⁶ A. Peters, 3.

⁸⁷ C. Pippan, 164. For an interesting theoretical exposition of the subject matter, see, Z. Oklopić, “*Populus Interruptus*: Self Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood”, *Leiden Journal of International Law* 4/2009, 677–702.

⁸⁸ Dissenting Opinion of Judge Koroma, par. 4.

⁸⁹ M. Vashakmadze and M. Lippold, 647.

clusion might be challenged from the standpoint of purposive interpretation of relevant international legal instruments. Even more specifically, Gazzini argues that the ICJ's finding "is both unnecessary for the purpose of this advisory opinion and possibly misleading as a matter of general international law." It is unnecessary, because it is obvious that any secessionist's declaration of independence is aimed at affecting territorial integrity of the host state. It is, on the other hand, misleading "as it conveys the idea that entities other than States are not bound by the general prohibition on the use of force." Gazzini notices that there is "a legal paradox" behind the question of applicability of the general prohibition on the use of force to secessionist groups. He notices that every process of gaining independence is, by a rule, an incremental one and it usually goes through several phases. In the first one, internal turbulences are normally subjected to domestic rules, as well as to some rules of humanitarian law. However, in the course of conflict, insurgents may acquire the status of a subject of international law. Gazzini notices that to determine when this has effectively happened, "may be particularly problematic as it requires an assessment of the independence and effectiveness." Once this is determined, however, the relationship between the parties turns into one governed by rules of international law. In such a situation, it remains open as to "whether these rules include the prohibition on the use of force in spite of the ongoing armed conflict and whether such a prohibition would apply also to the State concerned". In any way, the ICJ's cursory finding is "superficial and ultimately unconvincing".⁹⁰

The aforementioned argument becomes more plausible if one takes into account a highly instructive case of the Kosovo Liberation Army. This organization quickly passed the way from a US State Department listed terrorist group to the one of liberation movement that closely and actively cooperated with NATO.⁹¹ The absence of a clear international legal rule, which would differentiate between terrorists and freedom fighters, coupled with the ICJ's reasoning that non-state actors are exempted from the duty to respect territorial integrity, seems to reward secessionists, more openly than ever, with a wide range of tactics for the achievement of their ultimate goal. These by no means exclude the resort to violence in order to trigger reprisals, which would in turn change the nature of the conflict into international one and, perhaps, force the international community to intervene on the side of secessionists. As pointed out by Ignatieff, "The KLA's success between 1997 and 1999 was a vintage demonstration of how to exploit the human rights conscience of the West

⁹⁰ T. Gazzini, *The Kosovo Advisory Opinion from the Standpoint of General International Law*, 3. at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Gazzini_Kosovo_Note_EN.pdf, acc. 5 Feb. 2012.

⁹¹ See, *The KLA Terrorists or Freedom Fighters?*, BBC, June 28, 1998, at <http://news.bbc.co.uk/2/hi/europe/121818.stm>, acc. 5 Feb. 2012.

in order to incite an intervention that resulted eventually in guerilla victory”.⁹²

This leads me to the second plausible effect of the Advisory Opinion, which concerns the status of UDI in international law. The ICJ’s overall argumentative strategy was to separate the fact of issuance of the declaration of independence from the purported legal effects of that act. It supposedly focused only on the former issue, while leaving aside the latter. However, one can reasonably ask: “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?” Since this reasoning would hardly be consequential, one can still infer an implicit ICJ’s conclusion regarding unilateral acts of secession. It is that “[g]eneral international law, and especially the principle of effectiveness, would determine if a declaration of independence has resulted in the creation of a new state”.⁹³ Many hoped that the ICJ would fill the lacuna in this area of law, by providing some more firm guidelines for the legality of secessionist politics. This has not happened, partly because “a legal framework of any kind for secession would risk bolstering secessionist movements and as such endanger national and international stability.” However, one can easily attach the same consequences to the Advisory Opinion as it was finally handed down:

It almost certainly does not discourage groups intent on secession to hold that the legality of declarations of independence is in no way linked to the legality of secession. On the contrary, it probably encourages them to assert their identity symbolically and declare themselves independent, as general international law according to the ICJ’s opinion establishes no obstacles in this regard. Whether a wave of ‘irrelevant’ declarations of independence serves international and national stability better than some guidance provided by a legal framework, even if limited, remains to be seen, but it is doubtful to say the least.⁹⁴

This ICJ’s stance raises another interesting question that is of general nature. It concerns the status of the act of recognition. Gazzini, for instance, argues that the “crux of the matter” is not whether a UDI of a would-be State is as such prohibited by international law, “but whether international law imposes upon other States any obligations in relation to a declaration of independence.” These obligations may vary, as to include the duty not to recognize the new entity, or not to support it, etc. In any way, international law seems to be “more concerned with the consequences of declaration of independence for other States, rather than on the law-

⁹² M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton and Oxford, 2001, 45.

⁹³ R. Muharremi, “A Note on the ICJ Advisory Opinion on Kosovo”, *German Law Journal* 8/2010, 880.

⁹⁴ T. Burri, 888.

fulness of such a declaration”.⁹⁵ Generally, it is assumed that international law has not much to say about the legality of other states’ recognition of newly independent states. This means that there is neither a duty to recognize, nor a duty to refrain from recognizing a state. Accordingly, “recognition of newly independent states is generally lawful, so long as that new state has effectively established its independence in fact.” In the context of an attempted secession, however, the act of recognition of a claimant to statehood that did not fulfill the Montevideo criteria of statehood would constitute an unlawful intervention in the internal affairs of the host state. The unlawfulness of recognition equally exists when effective control over territory was acquired through a violation of some peremptory norm of international law. Finally, the unlawfulness of recognition can stem from an explicit ban of the Security Council on recognizing a particular entity, as it was the case with Southern Rhodesia. It is within these specific contexts “that the otherwise separate questions of the existence of a state and recognition of that state may intersect”.⁹⁶

The ICJ did not address the legal situation of third-party states, especially those that already recognized Kosovo. However, the answer to this question “is important for the future.” As the previous paragraph demonstrates, a premature recognition of not yet effectively established state is unlawful. In the case of Kosovo, one may argue there is more to it, insofar as “the Security Council has created a legal regime binding all States by which it has reserved the final word on the Kosovo status for itself, and by which it has excluded the unilateral termination of the territorial integrity of Yugoslavia (now Serbia)”.⁹⁷ The ICJ essentially dismissed this line of reasoning by claiming, first, that the UDI was merely “an attempt to determine finally the status of Kosovo”,⁹⁸ and not an act of secession itself, and second, that the authors of the UDI were not provisional institutions. This argumentation, however, takes us back again to the legal situation of countries that already recognized Kosovo – “If the declaration is what the majority says it is, can it be on its own an adequate basis for recognition of statehood?”⁹⁹

Consequently, the fact that the ICJ did not explicitly address the legality of third-states’ acts of recognition of Kosovo might lead many

⁹⁵ T. Gazzini, 2.

⁹⁶ J. Cerone, “The Legality and Legal Effect of Kosovo’s Purported Secession and Ensuing Acts of Recognition”, *Annals of the Faculty of Law in Belgrade Belgrade Law Review* 3/2008, 65.

⁹⁷ Moreover, since “[t]he Court says that this regime is still valid”, one may conclude that “negotiations must continue.” M. Bothe, “Kosovo So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence”, *German Law Journal* 8/2010, 839.

⁹⁸ Hence, the UDI and the SC Resolution 1244 are two instruments that “operate on a different level”. Advisory Opinion, par. 114.

⁹⁹ R. Howse and R. Teitel, 843.

secessionists to conclude that the easiest way for solving intricate legal situations and gaining statehood would be to safeguard recognition of as many states as possible, and preferably the most powerful ones.¹⁰⁰ This would not only fundamentally reverse the abovementioned doctrinal stance that the existence of a state is one thing, its recognition or non-recognition another¹⁰¹, but it would open the room for a world of the increasing number of ‘Selfistans’¹⁰², which would in international arena dwell as half-recognized ‘pet states’ of the Great Powers.¹⁰³ It is, in this respect, interesting to remind of Crawford’s statement in the oral proceedings before the Court, which to a certain extent strengthen the ‘constitutive’ theory of recognition. He said,

international law *has* an institution with the function of determining claims to statehood. That institution is recognition by other States, leading in due course to diplomatic relations and admission to international organizations. A substantial measure of recognition is strong evidence of statehood, just as its absence is virtually conclusive the other way. In this context, general recognition can also have a curative effect as regards deficiencies in the manner in which a new State came into existence.¹⁰⁴

Again, it seems that the ICJ implicitly endorsed this reasoning, by leaving to the discretion of individual states to determine the ultimate status of Kosovo in international law. One may reasonably ask, “whether this state of affairs serves the purpose of strengthening the rule of law in international relations or whether it contravenes such a purpose”.¹⁰⁵

A final potential effect of the Advisory Opinion to be mentioned here concerns the fate of provisional UN-mandated conflict-settlement

¹⁰⁰ Conversely “As for other territories that seek independence, but do not have the support of influential parts of the international community, their hopes for achieving statehood remain as remote as they ever were.” J. Ker Lindsay, 8.

¹⁰¹ Sterio’s analysis suggests that this is already a situation in international law. She says: “Statehood in practice seems to hinge on recognition: in other words, an entity seems to be treated as a state only if the outside world, and specifically, the most powerful states (the Great Powers), wishes to recognize it as such.” M. Sterio, “On the Right to Self Determination: “Selfistans”, Secession, and the Great Powers’ Rule”, *Minnesota Journal of International Law* 1/2010, 149.

¹⁰² Sterio borrowed this term from Rushdie’s novel ‘Shalimar the Clown’, in which the author at one place says sarcastically: “Why not just stand still and draw a circle round your feet and name that Sefistan?” *Ibid.*, 137, n. 1.

¹⁰³ Cf. C. J. Borgen, “The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self Determination in the Cases of Kosovo and South Ossetia”, *Chicago Journal of International Law* 1/2009, 1–33.

¹⁰⁴ CR 2009/32, pp. 47–48. Contrast this statement with the one from his much celebrated book on the creation of states. There, he says that “[t]he conclusion must be that the status of an entity as a State is, in principle, independent of recognition”, even though recognition “can resolve uncertainties as to status and allow for new situations to be regularized.” J. Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, Oxford, 2006, 28, 27.

¹⁰⁵ M. Vashakmadze and M. Lippold, 634.

arrangements, which eventually may be dissolved by a unilateral act of one party to the conflict. This point was already in the oral proceedings raised by the Serbian representative, Zimmerman. He asked, “whether both, the relevant members of the Security Council, as well as the individual States concerned, would in the future accept such solutions, were the Court to tolerate that such United Nations-led administration is nothing but a road towards secession”.¹⁰⁶ A number of commentators of the Advisory Opinion share his worry, that the adopted ICJ’s stance could seriously jeopardize this role of the world organization. Peters notices that this is one plausible legal-political outcome of the Opinion, because states will have legitimate fear that an internationally governed part of their territory may end up independent without their consent.¹⁰⁷ After demonstrating that it would be “totally illogical” to assume that the special legal regime of 1244 is construed as to open the room for unilateral declaration of independence,¹⁰⁸ Hilpold also stresses potential far-reaching consequences of the Court’s reasoning. He says that a unique experiment of international administration of Kosovo

that avoided a further deterioration of the situation in this region was based on trust and associated with legitimate expectations not only on the side of Serbia but also on that of many other allied nations. It could be the case that in future similar experiments, though necessary they may be from a humanitarian perspective, will have a hard time to find the necessary approval as these expectations were, at the end, totally ignored.¹⁰⁹

6. A CONCLUDING NOTE

The purpose of this paper was to show that even narrowly construed, the ICJ’s Advisory Opinion on Kosovo offers several important general legal conclusions, which might significantly affect patterns of political behavior of the interested political actors in similar existing or future self-determination conflicts. To state potential effects, however, is not to predict future events. In fact, no one can really tell what will be the future of the Kosovo case itself. At first, it appeared as if the ICJ’s ruling,

¹⁰⁶ CR 2009/24, p. 60

¹⁰⁷ A. Peters, 4.

¹⁰⁸ Hilpold also points out that the reference to “settlement” in the SC Resolution 1244 “can only be understood as a consensual solution to be found or at least accepted by the Security Council.” Finally, “It can hardly be assumed that this resolution should allow for the evolving of a situation where the institutions created by the Council can take over the reins and at the same time not acting illegally just because they had acted *ultra vires*.” Consequently, to explain the developments as the Court eventually did is for him “tanta mount to ridicule Serbia (and its friends and allies) for having believed in the solemn and peremptory language of Res. 1244/1999.” P. Hilpold, 34.

¹⁰⁹ *Ibid.*, 45.

despite its alleged silence on the issue, would consolidate Kosovo's claim to statehood. As put by Kammerhofer, the Advisory Opinion "has led to the popular conception that the Court in *Kosovo* has confirmed that Kosovo has validly seceded from Serbia and is now a state." He says that, although his colleagues "will know not to interpret this outcome into the Court's silence, the political effect is the same as if it had pronounced itself in favour of an independent Kosovo".¹¹⁰ Yet, the expected new wave of recognitions of Kosovo did not occur.¹¹¹ Thus, it remains open whether the Kosovo Advisory Opinion indeed provides a first-help tool kit for various secessionists around the globe,¹¹² or its effects will be far more modest. What is, however, clear is that the ICJ's Opinion can hardly advance the cause of international rule of law in self-determination conflicts.¹¹³

¹¹⁰ J. Kammerhofer, 10.

¹¹¹ As Ker Lindsay notes, "a number of countries have analyzed the decision and come to the conclusion that it has not provided a firm justification for Kosovo's independence, and has not therefore opened the way for widespread recognition." J. Ker Lindsay, 8.

¹¹² The immediate impact of this sort cannot be underestimated. For instance, the foreign ministry in Transdnierster welcomed the "landmark" decision, perceiving it as a plausible "model" for political behavior (Quoted from J. Ker Lindsay, 6.) Similarly, pro independence commentators in Catalonia emphasize the ICJ's conclusion that "general international law contains no applicable prohibition of declarations of independence". More particularly, they take notice of the fact that "[t]he plural in 'declarations' gives an indication that this doesn't only apply to the matter of Kosovo, but that it is understood to be a general principle." From this, they readily infer the conclusion that "a State cannot declare itself indivisible under international law." Finally, "since a popular referendum on self government along the lines of those envisaged for Scotland or Quebec is unthinkable given the political realities of Spain, Catalonia might well find in a unilateral declaration of independence the only means to start a peaceful process of separation."

At http://www.catalonianewstate.com/2010_07_01_archive.html, acc. 5 Feb. 2012. For potential effects of the Opinion in Africa, which "currently has more conflicts or civil wars within its geographical area than any other continent in the world", see, O. Oladele Osinuga, ICJ Advisory Opinion on Kosovo: An African Perspective, at http://www.modernghana.com/news/286020/50/icj_advisory_opinion_on_kosovo_an_african_perspect.html, acc. 5. Feb. 2012

¹¹³ As pointed out by Trifunovska, "a Kosovo argument" will be in the future "used by various subjects, states supporting independence, states opposing independence and entities claiming the independence. What will be the strength of this argument in each particular case will depend on their particular circumstances and prevailing interests." S. Trifunovska, "The Impact of the 'Kosovo Precedent' on Self Determination Struggles", *Kosovo: A Precedent*, (ed. J. Summers), 393.