

Article

ICJ's Kosovo Decision: Economical Reasoning of Law and Questions of Legitimacy of the Court

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“[T]he primary purpose of the International Court . . . lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.”¹

“Such declarations are foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.”²

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¹ HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 3 (1982).

² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶ 69 (dissenting opinion of Judge Bennouna).

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Upendra D. Acharya*

Introduction

It is unfortunate for international law, international justice, international lawyers and the system of international governance as a whole if the International Court of Justice ("ICJ"), the supreme judiciary of the international governing system, acts as a rubber stamp for the dominant power of the Security Council and the judges' national political affiliations by adopting an economy of judicial reasoning in its decisions. The ICJ's recent advisory opinion on Kosovo's unilateral declaration of independence from Serbia seems to fall within this unsatisfactory category.³ However, the Kosovo opinion also enhances the role of the General Assembly in maintaining international peace and security, and answers important questions about the interplay of the roles of the ICJ, General Assembly, and Security Council in maintaining international peace and security. Unfortunately, the ICJ's ruling that Kosovo's declaration of independence did not violate international law ignores contentious international legal issues. These include the right to self-determination via remedial secession, the law of statehood, the territorial integrity of states, and the legal effect of recognition by other states. Because the ICJ ignored these issues in its legal analysis by its adoption of a dearth of judicial reasoning, the advisory opinion marks a state of confusion and complicates similar independence claims by other territories and entities.

Perhaps the biggest disappointment is that the ICJ's majority opinion answers little about the core issue: whether the Kosovar people are entitled to independence under the principle of self-determination. Instead of addressing this obvious issue, the majority took an exceptionally

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³ Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50, 50 (2011) (The author blames the Court's advisory opinion on Kosovo as a "bland assertion" and contends that the Court acted in a somewhat political manner by focusing on the geopolitical wishes and avoiding the textual intention of Security Council Resolution 1244.).

minimalist approach to the question presented and based its opinion on the international legal truism that anything not banned by international law is generally permitted.⁴ Finding that declarations of independence generally are not banned in any abstract sense,⁵ the majority found the declaration of independence was made in accordance with international law notwithstanding any issues that might arise concerning the actual legal status of the physical region known as Kosovo.⁶ But as dissenting and separate opinions point out, the Court should have fully answered all issues raised when issuing the advisory opinion on Kosovo.

From the language of the resolution, it seems like Serbia had anticipated that the Court would recognize the explicit language of Security Council Resolution 1244 that affirms Serbian sovereignty.⁷ Therefore, Serbia took an initiative to seek an advisory opinion at the General Assembly to challenge Kosovo's declaration of independence. Serbia expected the Court to find the declaration to be unlawful, which would help Serbia by strengthening its role in future negotiations. Because Serbia believed that the Court would find the declaration unlawful, it did not give much attention to the language of the resolution. The language simply reads: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"⁸ The Court neither confirmed nor denied Serbia's prediction. The Court did not render any particular legal reasoning or analysis in its opinion relating to the legal factors concerning the process of the creation of a new state.

Because the ICJ did not consider whether Kosovo had achieved statehood, the Court failed to contribute to the development of international law regarding a peoples' right to self-determination via remedial secession.⁹ By revitalizing the archaic international legal truism that

⁴ Kosovo Opinion, 2010 I.C.J. 141, ¶ 2 (declaration of Judge Simma) (citing *S.S. Lotus*, 1927 P.C.I.J. (ser A) No. 10, at 18 (Sept. 7)) (holding that an act is allowed in the absence of a prohibition).

⁵ *Id.* ¶ 83 (determining that the issue of whether the declaration of independence violated international law could be decided without consideration of the right to self-determination pursuant to remedial secession). *See also id.* ¶ 2-6 (declaration of Judge Simma) (noting that the Court's invocation of the *Lotus* doctrine reflects an "old, tired view of international law," the application of which ultimately leaves the important question of self-determination unanswered); *id.* ¶ 20 (dissenting opinion of Judge Koroma) (finding the Court's holding that declarations of independence do not violate international law only makes sense in the abstract).

⁶ *Id.* ¶ 122. *See also* Falk, *supra* note 3, at 55 (The author points out that the Serbian claim of sovereignty and territorial integrity may be justified for the Court to consider, if not for all of Kosovo, at least for the northern ten percent of Kosovo where Serbians are overwhelmingly present.).

⁷ S.C. Res. 1244, ¶ 11(f) U.N. Doc. S/RES/1244 (Jun. 10, 2010).

⁸ G.A. Res. 63/3 (Oct. 8, 2008).

⁹ In general, remedial secession, or external self-determination, is legal principle under which a territory may break free from the bonds of a state where the people of that territory are denied internal self-determination by the state. *See* G.A. Res. 2625.

actions not disallowed are permitted,¹⁰ the ICJ allowed the political dispute over Kosovo to proceed with minimal legal guidance on the real issues surrounding the declaration. In sum, the ICJ advisory opinion expansively discussed the jurisdiction of the ICJ, but paradoxically, contributes very little to the development of international law concerning the human rights and territorial sovereignty issues at hand. Is it because the context of the case was politically and institutionally sensitive? Was the Court concerned about its authority over the long run, given the engagement of a few powerful nations and governmental bodies including the US and the EU? Most of the cases presented to the Court will be politically and institutionally sensitive. Should the Court have refrained from exercising its advisory jurisdiction, as suggested by Judge Keith?¹¹

This paper identifies and analyzes the legal issues that the ICJ's advisory opinion on Kosovo's declaration of independence should have addressed. While analyzing the Court's ruling, consideration will be given to the issue of whether the advisory opinion could have eliminated or ameliorated further controversy by defining the parties' rights and obligations. More specifically, this paper addresses whether the ICJ's advisory opinion on Kosovo contributes to the development of international law concerning remedial secession, statehood, territorial integrity, and the legal effect of recognition by other states. In addition, this paper will address whether the advisory opinion has embraced a cogent analysis of law and its application to the facts, or whether the ICJ has simply endorsed one side's political will.

I. Role of the ICJ in International Peace and Security

As an initial matter, the ICJ had to identify or otherwise reaffirm its role in maintaining international peace and security.¹² The UN Charter has awarded the Security Council with the responsibility for maintaining

¹⁰ Kosovo Opinion, 2010 I.C.J. 141.

¹¹ *Id.* ¶ 1 (separate opinion by Judge Keith). In Judge Keith's view, the Court "should have exercised its discretion to refuse to answer the question which the General Assembly submitted to it on 8 October 2008 in resolution 63/3." Judge Keith points out the relative interests of different U.N. organs, namely the Security Council and the General Assembly, and concludes that the Security Council has been active in making substantial decisions with regard to the security and civil presence in Kosovo through Kosovo Force ("KFOR") and United Nations Interim Administration Mission in Kosovo ("UNMIK"). He concludes that only the Security Council has interests in the Kosovo issue, not the General Assembly, and if the Security Council had requested an advisory opinion, it would have been a legal question presented to the Court. Since the request for an ICJ advisory opinion is presented by the General Assembly, which does not have primary interests in the Kosovo context, made the request political rather than legal. Therefore, the Court should have refused to exercise its jurisdictional discretion.

¹² *Id.* ¶ 22.

international peace and security.¹³ The ICJ does not have direct authority to prevent actual outbreaks of violence, but the Security Council may do so to maintain international peace and security.¹⁴ However, the ICJ conducts its peace-preserving function by clarifying and developing international law via compulsory¹⁵ and advisory opinion jurisdiction.¹⁶ Under the so-called optional clause of the Statute of the ICJ, the Court exercises compulsory jurisdiction when a sovereign state voluntarily accepts its jurisdiction. Acceptance is optional because a state that does not submit to the jurisdiction of the ICJ, or is not a party to a treaty conferring jurisdiction to the ICJ, is not obliged to submit its dispute to the ICJ.¹⁷ Because the compulsory jurisdiction is based upon a voluntary act of a state, the Court's role in maintaining peace and security depends upon the willingness of Member States. Although limited in scope due to voluntary adjudication, ICJ pronouncements or decisions have made significant contributions toward international peace and security by shaping the landscape of legal thinking.¹⁸

Under its "advisory opinion" jurisdiction, the ICJ has the potential to illuminate a multitude of points of interest for the benefit of the international community.¹⁹ The logic is simple. Peaceful coexistence of independent states is one of the major prerequisites of international peace and security. It is impossible to peacefully coexist without commonly accepted standards of conduct. These standards contribute to peace by fostering the cause for interdependence and international cooperation in the development of economic and social conditions conducive to international stability, peace, and security.²⁰ There may be uncertainty or contention in how to apply such standards to a particular set of facts. When such

¹³ U.N. Charter art. 24, ¶ 1.

¹⁴ *Id.*

¹⁵ The Statute of the International Court of Justice art. 36, ¶ 2.

¹⁶ *See* U.N. Charter art. 96(a) ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."). The ICJ provides an opportunity for settling disputes through an advisory opinion where both parties would hesitate to adopt a solution by way of negotiations and creates a climate of respect for the rule of law under its compulsory jurisdiction. *See* LAUTERPACHT, *supra* note 1, at 3.

¹⁷ U.N. Charter art. 36(2). Article 36(2) of the Statute reads: "The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties." *See also* NAGENDRA SINGH, *THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE* 14-25 (1989).

¹⁸ James P. Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AM. J. INT'L L. 568, 583 (1986) (citing the Nicaragua Case, the author states: "the United States would do well to weigh its implications for achieving the goal of an ordered international society in which international law and international adjudication, not force, are ascendant").

¹⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶ 33.

²⁰ *See* U.N. Charter art. 1 (Purposes and Principles).

disputes or cases of confusion arise, the Court has the judicial responsibility to interpret the law concerning the question presented to it and deliver a decision or opinion. This decision or opinion should further the development of international law in order to strengthen cooperation among nations and contribute to international peace and security. Advisory opinions are not capable of reconciling disputes between states as a matter of law, but the ICJ and its advisory opinions have been treated as a “better or higher source of authority at the international level.”²¹ Therefore, when the Court exercises its advisory jurisdiction, it should not depart from its judicial character in clarifying law and developing international law because the Court is required “to help that process rather than to frustrate it.”²²

In this way, one of the functions of the Court is to further develop international law by keeping abreast of the evolving needs of the international community. But the Court must not be oblivious to the danger of undue conservatism and stagnation present in the law. The Court has the responsibility to balance the need for stability and certainty of the law on the one hand and the need for the progressive development of law on the other.²³ In this regard, the ICJ faces a challenge when it delivers an advisory opinion: whether it should choose a restrained approach concerning principles and laws or whether it should choose a comprehensive approach based upon the evolution of judicial and state practice in the context of contemporary problems. Applying the latter method, the Court should not allow an action merely because it is not disallowed. This approach will halt the development of international law, and will create lacunas for contemporary international legal issues of first impression. Furthermore, this course would seemingly preclude application of the equitable principle of *ex aequo et bono*, even though this doctrine is expressly available to the Court when rendering advisory or contentious opinions.²⁴ The ICJ’s contribution in maintaining international peace and security depends upon which approach it embraces. As a former

²¹ Falk, *supra* note 3, at 52.

²² SINGH, *supra* note 17, at 35.

²³ See OLIVER J. LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 3-38 (1951) (The author discusses the general role of law in society; the functions of international law and its application by the ICJ in reducing friction in the international community; the need for the development of international law; judicial decisions in the development of international law; the Court’s contribution to international law; and factors affecting performance of the Court’s law-developing function as conditions of peace.).

²⁴ The Statute of the International Court of Justice art. 38 ¶ 2 (allowing the ICJ to utilize principles of equity when rendering advisory opinions, including *ex aequo et bono*, meaning “according to the right and good.”).

ICJ judge aptly stated, “the fostering of peace is the task of the judge,” or *pacis tutela apud judicem*.²⁵

II. Jurisdictional Questions and Separation of Powers within UN Agencies

In the Kosovo opinion, the ICJ first had to determine whether it had jurisdiction to issue an advisory opinion at the request of the General Assembly and, if so, whether it should exercise that jurisdiction.²⁶ There are two legal conditions to be met before requesting an advisory opinion. First, an authorized body must request an advisory opinion under *ratione personae* jurisdiction. Second, an advisory opinion must be related to a legal question within the purview of the UN Charter and the ICJ Statute to satisfy the *ratione materiae* jurisdiction requirement.²⁷ On the initial issue of whether the ICJ had jurisdiction, the Court noted that “[i]t is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to seek it.”²⁸ The majority also noted that the General Assembly may request an advisory opinion on “any legal question.”²⁹

Five judges on the fifteen-judge panel objected³⁰ to the Court’s assertion of jurisdiction because the Security Council was seized of the matter and the question presented was a political, not legal one.³¹ On the first point, the majority noted that the General Assembly may not “make any recommendation with regard to [any matter seized by the Security

²⁵ *Id.*; SINGH, *supra* note 17, at 1. The Latin proverb is carved on the façade of the Peace Palace at The Hague.

²⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶¶ 17-48.

²⁷ MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE: 1946-2005 39 (2006). Other scholars have added elements or conditions to the two conditions precedent for the Court to exercise its advisory opinion jurisdiction. For example, Shavtai Rosenne states two elements: 1) competence of the requesting organ and 2) the subject matter (legal nature) of the request. 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 1028 (1997). In addition, Chittharanjan Amerasinghe states that the Court, when it conflicts with its own judicial character, must protect its judicial character in exercising its jurisdiction. CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS (2003) at 154.

²⁸ Kosovo Opinion, 2010 I.C.J. 141, ¶ 19 (citing Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 66, ¶ 21 (July 23)).

²⁹ *Id.* ¶ 21 (citing U.N. Charter art. 96 ¶ 1).

³⁰ Judges Tomka, Koroma, Keith, Bennouna and Skotnikov made the objections. Kosovo Opinion, 2010 I.C.J. 141. Judge Keith, in particular, dissented on the issue of jurisdiction asserting that the Court should not have exercised its discretion to accept the question because the General Assembly should never have posed it to the Court. *Id.* ¶ 1 (separate opinion by Judge Keith).

³¹ Kosovo Opinion, 2010 I.C.J. 141, ¶¶ 24, 26.

Council] unless the Security Council so requests.”³² However, an advisory opinion is not a “recommendation” by the General Assembly. Article 12 of the UN Charter merely limits what the General Assembly can do with an advisory opinion, not whether it may issue it in the first place.³³

On the issue of whether the question presented was legal or political, the Court noted that questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible to a reply based on law” and capable of determination under Article 96 of the Charter and Article 65 of the ICJ Statute.³⁴ The majority indicated that a response to a legal question with political underpinnings could be dispensed with by addressing the legal aspects of the question presented and ignoring the political aspects.³⁵ Judge Cançado Trindade even went so far as to say that the distinction between whether a question is legal or political is illusory because issues can have both legal and political aspects, and legal theory is commonly enmeshed in the political process.³⁶ Whether a question is legal or political concerns the resolution of a question, not its content, and judicial opinions need necessarily deal only with legal issues.³⁷

The Court’s rationale reflects the reality that all legal issues may have political aspects because all laws, one way or the other, are by-products of political processes. Once a legal question is brought to the Court, even one loaded with political aspects, it is the duty of the Court to adopt a legal method to address the question in order to develop legitimate guidance for the future political behavior of nations. Law and politics are intertwined; nevertheless, they depart from each other in two fundamental ways. First, they depart in terms of purpose because the purpose of politics is power and the purpose of law is justice.³⁸ And second, legal disputes, unlike political disputes, are resolved by adopting legal/judicial methods.

Judge Skotnikov, in dissent, urged that “Security Council resolutions are political decisions,” and any interpretation of a Security

³² *Id.* ¶ 23 (citing U.N. Charter art. 12, ¶ 1) (“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”).

³³ *Id.* ¶ 24 (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (Palestinian Wall Case), 2004 I.C.J. 136, ¶ 25 (July 9)).

³⁴ *Id.* ¶ 25 (citing *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, ¶ 15 (Oct. 16)).

³⁵ *Id.* ¶ 27 (citing *Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 I.C.J. 57, at 61 (May 28); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, ¶ 13 (July 8)).

³⁶ *Id.* ¶¶ 8-12 (separate opinion of Judge A.A. Cançado Trindade).

³⁷ *Id.*

³⁸ See Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT’L L. & POL’Y 653, 653 (2009).

Council resolution, however legally accurate, would be politically inaccurate from the Security Council's perspective.³⁹ Judge Bennouna's dissent elaborates on this point by stating that inaction by the Security Council is "action" that is contemplated within the UN Charter and is consistent with the role of the Security Council in maintaining international peace and security.⁴⁰ Judge Skotnikov points out that the Court declined to consider whether Serbia and Montenegro had become a state prior to recognition by the international community and membership in the United Nations,⁴¹ even though the issue was crucial for *jus standi*,⁴² or standing. Applying the rationale of the prior case, Judge Skotnikov argued that the ICJ should not have answered the political question of whether the declaration was legitimate because this was an issue bearing on statehood.⁴³ Judge Bennouna agreed, writing that the request for the advisory opinion was used to exploit the ICJ in a political debate.⁴⁴ Despite these oppositions to the exercise of jurisdiction by the ICJ, the majority of the Court ultimately found that it had jurisdiction.⁴⁵

Finding it had jurisdiction, the majority next turned to the question of whether it should deny the request for an advisory opinion on prudential grounds. The Court may refuse to give an advisory opinion if a statute or treaty uses the word "may" in reference to the Court's ability to issue an advisory opinion on "any legal question." This implies that the ICJ has the right to decline jurisdiction.⁴⁶ Interestingly, the ICJ has never refused to give an advisory opinion on prudential grounds. This is because, as the majority points out, issuing advisory opinions is an important aspect of the ICJ's function in the UN, and such requests should not be denied unless

³⁹ Kosovo Opinion, 2010 I.C.J. 141, ¶ 9 (dissenting opinion of Judge Skotnikov).

⁴⁰ *Id.* at ¶ 54-57 (dissenting opinion of Judge Bennouna).

⁴¹ Legality of Use of Force (Serb. & Montenegro v. Belg.), Preliminary Objection, 2004 I.C.J. 279, ¶ 79 (Dec. 15).

⁴² *Jus standi*, in relation to jurisdiction, is understood to be the Court's power to solve concrete disputes and is an autonomous and separate processual condition. Substantively, it means a general, potential right of a State entitling it, under the additional proviso of the existence of a proper jurisdictional instrument, to participate in a case before the Court in the capacity of a party as an Applicant, Respondent, or intervening party. As such, *jus standi* is a general positive processual condition. It is materialized if a State possessing *jus standi* brings legal action, has an action brought against it, or, in accordance with the relevant rules of the Court, intervenes in proceedings pending before the Court. Being autonomous, *jus standi* belongs to a State even if the State is not a party to the dispute or a party to the proceedings pending before the Court. *See*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment (Int'l Ct. Justice Feb. 26, 2007) ¶ 30 (separate opinion of Judge ad hoc Kreca).

⁴³ Kosovo Opinion, 2010 I.C.J. 141, ¶ 10-11 (dissenting opinion of Judge Skotnikov).

⁴⁴ *Id.* at ¶ 3 (dissenting opinion of Judge Bennouna).

⁴⁵ Kosovo Opinion, 2010 I.C.J. 141, ¶ 28.

⁴⁶ U.N. Charter art. 96(a) ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.")

there are “compelling reasons” for doing so.⁴⁷ Taking the most permissive view, Judge Cançado Trindade opined that any discretion in the issuance of advisory opinions would serve as an obstruction to the evolution of international law, and, therefore, such discretion should never be exercised.⁴⁸ The majority recognized that an important aspect of the ICJ’s function is to not deny a request for an advisory opinion from the General Assembly.

Three arguments were made in favor of declining jurisdiction: first, states with secessionist objectives requested it.⁴⁹ Second, the request could not provide any useful aid to the General Assembly.⁵⁰ And third, the separation of powers among the ICJ, General Assembly, and Security Council does not permit the ICJ to issue advisory opinions on matters seized of by the Security Council unless the Security Council makes the request.⁵¹ The majority quickly dismissed the first argument, pointing out that the Court should consider only the organ requesting the opinion, not the “motives of individual states.”⁵²

The second argument was given similarly short treatment. The Court wrote: “it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions.”⁵³ Two dissenting opinions rejected this line of reasoning and noted that the purpose of advisory opinions is to furnish the requesting organs with the “elements of law necessary for them in their action.”⁵⁴ Since the General Assembly could not perform any action, the dissenters noted that the ICJ could not issue an opinion to guide such non-action.⁵⁵ This dissenting view clearly ignores the possibility that the ICJ can contribute to the discussion and development of public international law.

⁴⁷ Kosovo Opinion, 2010 I.C.J. 141, ¶ 30 (citing Palestinian Wall Case, 2004 I.C.J. 136; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 78, ¶ 29 (Apr. 29); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. 121 (May 5)).

⁴⁸ *Id.* ¶ 27 (separate opinion of Judge A. A. Cançado Trindade).

⁴⁹ It is rather curious that this issue would be raised since Serbia, not Kosovo, requested the Advisory Opinion. It is unlikely that Serbia, which was at the time trying to forbid Kosovo’s declaration of independence, wanted to provide an authoritative blueprint for furtherance of secessionist movements, as was suggested by participants in the proceedings. Kosovo Opinion, 2010 I.C.J. 141, ¶ 34.

⁵⁰ *Id.*

⁵¹ *Id.* ¶ 36.

⁵² *Id.* ¶ 33.

⁵³ *Id.* ¶ 34.

⁵⁴ *Id.* ¶ 3 (dissenting opinion of Judge Skotnikov) (quoting Palestinian Wall Case, 2004 I.C.J. 136, ¶ 60). See also Kosovo Opinion, 2010 I.C.J. 141 ¶ 33 (declaration of Vice-President Tomka) (noting that the request was beyond the scope of the General Assembly’s authority).

⁵⁵ Kosovo Opinion, 2010 I.C.J. 141, ¶ 3 (dissenting opinion of Judge Skotnikov).

The third argument, the role of the ICJ in matters “seized” by the Security Council, was much thornier. It raised a strong dissent from Judge Skotnikov,⁵⁶ and consumed thirteen paragraphs of the Court’s opinion.⁵⁷ The relationship among the UN branches is necessarily implicated when the ICJ issues advisory opinions because any request must be “authorized by or in accordance with the [UN Charter].”⁵⁸ Article 10 of the UN Charter allows the General Assembly to discuss matters relating to the powers of other organs “except as provided in Article 12.”⁵⁹ Article 12 prohibits the General Assembly from offering recommendations on matters seized by the Security Council. This is crucial because the Security Council seized itself of the matter when it issued Resolution 1244, which created an interim government that was supposed to work toward a “political settlement” of the Kosovo situation.⁶⁰ The question became whether the General Assembly could request an advisory opinion where the Security Council was seized of the situation, where the Security Council had not requested the advisory opinion, and where the issuance of the advisory opinion would involve interpreting Security Council Resolution 1244.

The Court determined on several grounds that it could properly issue the advisory opinion: the Security Council has a primary, but not exclusive role in maintaining international peace and security;⁶¹ the General Assembly has powers with respect to making recommendations on humanitarian issues and discussing international peace and security issues;⁶² and the General Assembly may act in certain situations where the Security Council has failed to fulfill its obligations due to a veto by a

⁵⁶ *Id.*

⁵⁷ Kosovo Opinion, 2010 I.C.J. 141, ¶¶ 36-48.

⁵⁸ *Id.* ¶¶ 18, 21.

⁵⁹ “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.” U.N. Charter art. 10.

“1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.” U.N. Charter art 12.

⁶⁰ Kosovo Opinion, 2010 I.C.J. 141, ¶ 118 (citing S.C. Res. 1244, ¶ 11(f) U.N. Doc. S/RES/1244 (Jun. 10, 2010)).

⁶¹ *Id.* ¶ 40 (citing U.N. Charter art. 24).

⁶² *Id.* ¶ 41.

permanent member of the Security Council.⁶³ The plain meaning of the UN Charter necessarily implies that concerted efforts by the other organs of the UN are needed to serve the broad goal of maintaining international peace and security. The majority noted that simply because “one aspect” of a situation is related to international peace and security does not mean that the General Assembly has no interest in other aspects of the issue, such as humanitarian, social, and economic aspects. The fact that the Security Council is seized of an issue does not preclude the General Assembly from “discussing” and requesting an advisory opinion on that issue; it merely means that the General Assembly cannot make “recommendations” on that issue.⁶⁴

Most importantly, based on GA Resolution 377A (“Uniting for Peace”) the ICJ noted that the General Assembly can recommend collective measures to restore international peace and security where the Security Council is unable to reach a decision due to lack of unanimity.⁶⁵ The Court did note that Uniting for Peace came from the *Palestinian Wall Case*, where the Security Council was not seized of the situation.⁶⁶ However, the Court also recognized that it has interpreted the decisions of other organs in the past when rendering advisory opinions and deciding contentious cases.⁶⁷

Those in favor of more restraint by the ICJ will argue that the advisory holding falls short of actually applying Uniting for Peace because the Court distinguished Kosovo from Israel, noting the General Assembly’s ability to “discuss” international peace without making “recommendations,”⁶⁸ and never expressly held that the Security Council failed in Kosovo. However, a broad reading of this holding enables the ICJ to issue opinions on matters seized by the Security Council where it is not effectively performing its tasks due to vetoes from its members. After all, the Court does adopt the conclusion of Special Envoy Martti Ahtisaari that “the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted . . . [and that] the only viable option for Kosovo is independence, to be supervised . . . by the international community.”⁶⁹ Therefore, it may be concluded that the roles of the ICJ, the General Assembly and the Security Council are clarified by the decision.

⁶³ *Id.* ¶ 42.

⁶⁴ *Id.* ¶ 41.

⁶⁵ *Id.* ¶ 42.

⁶⁶ *Id.* ¶ 42-44.

⁶⁷ *Id.* ¶ 45.

⁶⁸ *Id.* ¶¶ 43-4.

⁶⁹ *Id.* ¶ 69 (citing Letter from Secretary-General to President of the Security Council Attaching Rep. of the Spec. Envoy of the Secretary General on Kos. Future Status (Mar. 26, 2007) [hereinafter Ahtisaari Plan]).

First, the request for an advisory opinion is not a recommendation by the General Assembly and, therefore, Article 12 does not limit the General Assembly's authority to request an advisory opinion, even if the Security Council is exercising its authority under Chapter VII of the Charter with respect to a dispute or situation concerning international peace and security.⁷⁰ This conclusion empowers the General Assembly to intervene in matters that threaten international peace and security, notwithstanding the Security Council's primary role in maintaining international peace and security. The Security Council is not the exclusive entity to discuss international peace and security. The General Assembly can discuss international peace and security issues, even where those issues are seized by the Security Council.⁷¹ The Security Council cannot ask the General Assembly to refrain from discussing matters of international peace and security, as the General Assembly is free to discuss any issue it pleases.⁷² This interpretation clearly inhibits the power of the Security Council to create areas of indefinite instability and disrupts the Security Council's monopoly in its role in maintaining international peace and security. Under the General Assembly's function of maintaining international peace and security, the Court not only recognized, but also endorsed the Assembly's adoption of five resolutions regarding human rights issues in Kosovo and fifteen resolutions concerning the financing of the United Nations Interim Administration Mission in Kosovo ("UNMIK"). The General Assembly did so even though the resolutions were adopted after the Security Council actively took up the Kosovo issue in 1998.⁷³

Second, if the question presented is a "legal question" within the meaning of Article 96 of the UN Charter and Article 65 of the Statute of the ICJ, the Court will exercise jurisdiction.⁷⁴ Even if the question has some political aspects, the ICJ will not refrain from discharging its essentially judicial tasks, as long as the question has legal elements.⁷⁵ It is not necessary for either the General Assembly or any other UN agency with authority to request an advisory opinion to explain the purpose of the

⁷⁰ *Id.* ¶ 24.

⁷¹ The interpretation of the term "primary" responsibility as prescribed in Article 24 (1) has not been as exclusive in U.N. practice. The General Assembly adopted the United for Peace resolution by 52 votes to 2, (with 2 abstentions) in response to the deadlock that existed in the Security Council. *See* United for Peace, G.A. Res 377 (V), U.N. Doc. A/RES/377(V) (Nov. 3, 1950). *See generally* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 25-49 (2001).

⁷² *See* U.N. Charter, Art. 12 (limiting General Assembly's ability to "make recommendations," not to discuss any issue).

⁷³ Kosovo Opinion, 2010 I.C.J. 141, ¶¶ 37-38, 40.

⁷⁴ Statute of the International Court of Justice art. 65.

⁷⁵ Kosovo Opinion, 2010 I.C.J. 141, ¶ 27.

question.⁷⁶ Further, the Court need not inquire into any system of domestic law where the international issues operate outside the boundaries of that domestic legal system,⁷⁷ a prerequisite seemingly always present when peoples declare independence on the principle of self-determination. The Court could have done a better job explaining how the regime imposed under Security Council Resolution 1244 was, in fact, a domestic legal provision, given that it resulted in a hybrid legal system: a domestic legal provision authorized by an international legal mechanism.⁷⁸

Third, the ICJ will reject a request for an advisory opinion by the General Assembly or other UN agencies only when the Security Council also has requested the ICJ's opinion.⁷⁹ Thus, it is clear that the General Assembly can ask for an advisory opinion anytime during a process initiated by the Security Council in any international peace and security matter. Absent "compelling reasons" that will trigger the Court's discretion to turn down a request, the Court will issue advisory opinions to the UN agencies.⁸⁰ The Court further affirmed this when it stated: "the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions."⁸¹

In the end, the Court asserted jurisdiction to deliver the advisory opinion requested by the General Assembly, even though the matter is under discussion and consideration by the Security Council per Chapter VII of the UN Charter. The Court can use and interpret the resolutions passed by the Security Council and evaluate the legal effects of the decisions made by one of the UN's organs in the course of answering questions put forth by the General Assembly.⁸² This approach establishes an expansive authority for the ICJ as a judicial organ of the UN that can act under its jurisdiction if a question is presented to it.

In addition, the Court departed from the *condition precedent* argument, which asserts that the Security Council's recommendation is a condition precedent to a decision of the General Assembly concerning the

⁷⁶ *Id.* ¶ 34.

⁷⁷ *See generally id.* ¶¶ 114, 121 (noting that the declaration of independence operates "on a different level" than the interim domestic legal system established by the Security Council and, as a result, could not violate that legal order).

⁷⁸ *Id.* ¶ 100 (noting that, "save to the extent . . . expressly preserved . . . it superseded the Serbian legal order).

⁷⁹ *Id.* ¶ 39.

⁸⁰ *Id.* ¶ 30.

⁸¹ *Id.* ¶ 44.

⁸² *E.g., id.* ¶ 46.

admission of a state as a member of the UN.⁸³ The Court declared that the action taken by the General Assembly in requesting an advisory opinion is a legal action rather than a recommendation by the General Assembly. Thus, the General Assembly undermined the action already taken by the Security Council, which had not been exhausted and was still in place. Given the drama of veto politics at the Security Council level and the serious threat to the democratic aspect of the international legal process, the Court suggested an alternative approach that may undermine the ongoing role of the Security Council in addressing threats to or breaches of international peace and security.

III. Declaration of Independence and Relevant International Law

The most regrettable outcome of this decision is the majority's unwillingness to address the broader legal issues raised by the exercise of external self-determination of the Kosovar people. The majority held that the declaration, as an isolated act, did not violate international law.⁸⁴ But actions do not exist devoid of factual surroundings, and the Court's opinion did nothing to shed light on the legal issues raised by those surroundings. For example, has Kosovo achieved statehood? Did the Kosovar people's exercise of self-determination violate customary international law? The majority missed the opportunity to answer these important legal questions by interpreting the question presented narrowly and specifically⁸⁵ and by describing the action as if it was somehow divorced from its real-world consequences.⁸⁶

As mentioned earlier, dissents, separate opinions, and declarations alike suggest that the Court should have taken a more holistic approach to the question presented by elaborating on the issues before it. For example, in his declaration, Judge Simma lamented that the important question of self-determination of peoples was abandoned in favor of revitalizing the "anachronistic, extremely consensualist vision of international law" that

⁸³ Competence of Assembly Regarding Admission to the United Nations, 1950 I.C.J. 4, 8 (Mar. 3) (stating, "...the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is affected.").

⁸⁴ Kosovo Opinion, 2010 I.C.J. 141, ¶ 122.

⁸⁵ See *id.* ¶ 51.

⁸⁶ See Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 Am. J. Int'l L. 60, 61 (2011) (noting that the Court did not address the issue of self-determination and remedial secession in its *Kosovo opinion*, which may lead to sources of conflict, practice, and jurisprudence in many regions of the world). See also Marko Divac Oberg, *The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*, 105 Am. J. Int'l L. 81, 82 (2011) (stating that the Court's ruling on the *Kosovo opinion* turned out to be limited); Falk, *supra* note 3, at 55.

actions not forbidden are permitted.⁸⁷ Simma pointed out that the question of whether declarations of independence were legal had been addressed previously by the Supreme Court of Canada when it ruled on self-determination, and he opined that the Court could have done more to advance the understanding and cultivate the development of international law.⁸⁸

The Kosovo opinion has blurred related aspects of international law, including self-determination, remedial secession, statehood, and territorial integrity. In doing so, the Court has ostensibly permitted any group subject to human rights abuses to declare independence. It is undisputed that the human rights of Kosovars were abused and autonomy was seized by Serbia. However, their autonomy was restored and human rights were advanced during the post-Milosevic era.⁸⁹ While exercising their human rights and autonomy, Kosovars did not practice tolerance toward Serbs in Kosovo, but rather were motivated by revenge against their prior abusers.⁹⁰ The Security Council-sponsored Kosovo Force ("KFOR") could not restrain this vengeance.⁹¹ The Security Council can try to resolve a problem, but often fails to produce a solution due to political reasons because its members have ties to either side of almost every debate.⁹² As a result, any abused group can forego protracted negotiations and merely declare independence because, according to the ICJ, this act would not violate international law.⁹³ The ultimate legitimacy of this act, it would seem, will need to be based upon political factors, such as recognition by other states, rather than legal factors.⁹⁴

The Court chose to resolve the legal question posed to it based on political acts of recognition by other states rather than on judicial reasoning. The Court could have reached the same conclusion without disregarding issues of international law. In deciding the scope of the question presented to it, the Court ignored four aspects of international law:

⁸⁷ Kosovo Opinion, 2010 I.C.J. 141 (declaration of Judge Simma)

⁸⁸ *Id.*

⁸⁹ Article VI(2) of the Constitution of FRY incorporated the European Convention for the protection of human rights and fundamental freedoms to be applied in Kosovo. The Kosovo Assembly had the power to enact into law other international human rights laws. Each national community was able to elect its own representative and institution. MARC WELLER, *CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE* 140-141 (2009).

⁹⁰ HUMAN RIGHTS WATCH, *FAILURE TO PROTECT: ANTI-MINORITY VIOLENCE IN KOSOVO*, MARCH 2004 (2004), available at <http://www.unhcr.org/refworld/docid/412eec8b4.html>.

⁹¹ See generally WILLIAM G. O'NEILL, *KOSOVO: AN UNFINISHED PEACE* 51-73 (2002).

⁹² Recent discussions on Syria at the Security Council is an example of the Security Council's failure to reach an agreement due to vetos imposed by China and Russia.

⁹³ Kosovo Opinion, 2010 I.C.J. 141, ¶ 2.

⁹⁴ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 106 (Can.) (finding the ultimate success of unilateral secession would be dependent upon recognition by international community, not a decision by a domestic Court).

self-determination through remedial secession, statehood, territorial integrity and recognition. Instead, the Court adopted a restraintivist approach in answering the question of the declaration. The Court considered the declaration as an isolated act:

The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, 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.⁹⁵

The Court did not even take the responsibility of addressing international legal questions as the Canadian Supreme Court did when questioning the legality of secession by Quebec.⁹⁶ Although, the Court mentioned the Canadian case, it unfortunately ignored the international legal questions raised by that opinion.⁹⁷ Is this due to a fear that a majority vote could not be reached on the issue of self-determination? This raises an

⁹⁵Kosovo Opinion, 2010 I.C.J. 141, ¶ 56.

⁹⁶ See *generally* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

⁹⁷ See Kosovo Opinion, 2010 I.C.J. 141, ¶ 56.

important question regarding the ethical position of the judges. Had the Court, at least the majority, already made up its mind as to the decision it was going to make?

A. *Right to Self-determination through Remedial Secession*

A people's right to self-determination and remedial secession are interrelated legal issues. A group within a territory can exercise a right to remedial secession if the group is recognized as a people and the group is deprived of its civil, political, social, cultural, religious, and linguistic rights.⁹⁸ Before exercising the right of remedial secession, it is important to determine whether a people have attempted to exercise rights as a group and have been denied meaningful access.⁹⁹ If there is a possibility for meaningful access, the group may not have the right of remedial secession but will have to exercise rights through the domestic government, a process known as "internal self-determination."¹⁰⁰ However, if the existing state is not willing to guarantee the group's rights and some form of autonomy, then the group may exercise its right of remedial secession as a last resort — a process known as external self-determination.¹⁰¹ The ICJ and its predecessor recognized the right to self-determination, which has become customary in international law and which countries have exercised.¹⁰² The principle of self-determination is embodied in the UN Charter and General Assembly resolutions.¹⁰³ The right to self-determination allows a people to be free from colonial power, but not within countries where the rights of peoples are protected.¹⁰⁴ It balances the interest of territorial integrity, the

⁹⁸ *See id.* ¶ 138.

⁹⁹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

¹⁰⁰ Kosovo Opinion, 2010 I.C.J. 141, ¶ 174 (separate opinion of Judge A. A. Cançado Trindade).

¹⁰¹ *Id.* *See generally*, A Report Presented To the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7 21/68/106 (1921) [hereinafter Åland Islands Case].

¹⁰² *See generally* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.); Åland Islands Case, *supra* note 101; East Timor (Port. v. Austl.) 1995 I.C.J. 90 (Jun. 30); Western Sahara, Advisory Opinion, 1975 I.C.J. 61 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Jun. 21).

¹⁰³ *See* U.N. Charter art. 1, ¶ 2 ("[Among t]he purposes of the United Nations are [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."); G.A. Res. 1514, (XV), ¶¶ 4 and 17, U.N. Doc. A/Res/1514 (Dec. 14, 1960) ("All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected."); GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970).

¹⁰⁴ GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970) ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action [by any group] 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 principles of equal rights and self-determination of

interest in preserving the right of self-determination of peoples, and the interest in respecting human rights of minorities.¹⁰⁵ The right of self-determination can manifest in various forms, including autonomy, self-government, or free association; and it does not automatically trigger the right to remedial secession.¹⁰⁶ This is because secession generally is at odds with the principles of territorial integrity and sovereignty as outlined in Article 2(4) of the UN Charter¹⁰⁷ and the core principles of international law.¹⁰⁸

To distinguish Kosovo and prevent the Balkanization of other regions, such as Georgia, states in support of an independent Kosovo describe it as *sui generis*. This is based on three factors: the status of Kosovo as a federal unit prior to the dissolution of the former Yugoslavia; human rights violations committed by the Serbian forces during the 1999 conflict; and the international administration of the territory of Kosovo by UNMIK.¹⁰⁹ On the first point, Kosovo had obtained federal status along with the six republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) according to its 1974 Constitution.¹¹⁰ Upon the dissolution of the Socialist Federal Republic of Yugoslavia (“SFRY”), Kosovo was arguably entitled to independence, just as those other republics were entitled to independence. However, the Milosevic regime replaced Tito’s policy of brotherhood and reduced Kosovo’s

peoples as described above and thus possessed of a government representing the people without distinction as to race, creed or colour.”)

¹⁰⁵ See, e.g. *id.*; Falk, *supra* note 3, at 57 (emphasizing that the exercise of self-determination should never be allowed to undermine the unity of an existing sovereign state, and adding that this viewpoint is in line with the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States with the Charter of the United Nations, GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970)).

¹⁰⁶ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶ 176 (separate opinion of Judge A. A. Cançado Trindade).

¹⁰⁷ See U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

¹⁰⁸ See generally, George A. Critchlow, *Stopping Genocide Through International Agreement When the Security Council Fails to Act*, 40 Geo. J. Int’l L. 311 (Winter, 2009). Although U.N. Charter art. 2, ¶ 4 might be read to only be applicable to states because it refers to United Nations Members, this principle has been applied to peoples through GA Res. 2625 (XXV), which states that “{n}othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action [by any group] 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 principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the people without distinction as to race, creed or colour.” GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970). However, the majority opinion finds that U.N. Charter art. 2, ¶ 4 only applies to state actors. See Kosovo Opinion, 2010 I.C.J. 141, ¶¶ 80-84.

¹⁰⁹ WELLS, *supra* note 89, at 270-71.

¹¹⁰ See *id.* at 11.

independence and autonomy.¹¹¹ Further, Serbia enacted discriminatory legislation directed at the Albanian population in Kosovo: Serbia introduced a Serb settlement program to reduce ethnic Albanian population numbers, claiming that Kosovo has ancient religious sites important to Serbs.¹¹² The second point concerning human rights atrocities follows the previous discussion concerning remedial secession based upon repression and lack of political representation, as discussed in the *Quebec* case.¹¹³ This later view is the most widely accepted and even garnered the support of Russia. Although Russia does not believe that Kosovo is entitled to independence, it does believe that this principle justifies the independence of Abkhazia and South Ossetia.¹¹⁴ It is not immediately apparent why the last point, that Kosovo was internationally administered, would provide an impetus for the creation of an independent state. But international administration has been used to facilitate changes in territory before, such as in East Timor¹¹⁵ and West Irian.¹¹⁶ Both Kosovo's ability to exercise self-governance during this period and the fact that Security Council Resolution 1244 (requiring a final status based upon "the will of the people") support the notion that international displacement aided the independence of the Kosovars in a manner that sets it apart from other regions.¹¹⁷

Given the number of legal issues swirling around the debate on the status of Kosovo, the Court could have taken a different approach, which would have contributed to the development of international law by applying these principles to a case of first impression. In Kosovo, the Security Council had initiated a peace process toward reaching a "political settlement,"¹¹⁸ but had failed to produce a solution. KFOR provided the necessary military presence to avoid violence, but it failed to encourage tolerance among the "majority minority" (Kosovar Albanians) and "minority minority" (Kosovar Serbs).¹¹⁹ Negotiations took place under the

¹¹¹ WELLER, *supra* note 89 at 311.

¹¹² *See id.*

¹¹³ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.)

¹¹⁴ *See, eg, id.* at 274.

¹¹⁵ *See* G.A. Res. 3485, U.N. GAOR, 30th sess., Supp. No. 34, at 118 U.N. Doc. A/10634 (1975) (The General Assembly denounced Indonesia's aggression and identified the inhabitants of the territory of East Timor as a "people" with a right to self-determination.)

¹¹⁶ Thomas M. Frank, The Stealing of the Sahara, 70 Am. J. Int'l L. 694, 700-01 (1976) (quoting Report of Agenda Item No. 98, at 2, U.N. Doc. A/7723 (1969)).

¹¹⁷ *See id.* at 275-76.

¹¹⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶ 118.

¹¹⁹ O'NEILL, *supra* note 91.

Ahtisaari Plan but failed.¹²⁰ The Troika — the European Union, United States and Russia — took responsibility for the negotiations between Serbia and Kosovar Albanians. They also failed.¹²¹ On the one hand, both the Kosovars and Serbians ignored and disregarded the Security Council and the Special Envoy of the UN, who was endorsed by the Security Council. On the other hand, the Troika undermined the Security Council process and continued to claim to maintain international peace and security.¹²² This also failed.¹²³ Therefore, the Court implied that where the UN system and the international community fail, and where people have no room left to negotiate, people can declare independence under the principle of remedial secession; the right to self-determination need not be discussed.¹²⁴ The Court rushed to deliver its legal opinion without examining the factual and legal backgrounds concerning the right to self-determination and secession.¹²⁵ If the Court would have discussed these legal principles and concluded that the declaration accorded with international law, it would have challenged the structural and functional existence of the United Nations system and the role of self-proclaimed peacekeeping nations on the Security Council.

Dissenting Judges Koroma, Bennouna, Skotnikov, and Vice President Tomka focused on the *lex specialis*, and would have liked to dispose of the question presented by simply stating that the legal framework of UNMIK does not provide for the self-determination of the Kosovar people.¹²⁶ This approach begs the question of whether Security

¹²⁰ Special Envoy of the Secretary-General, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, U.N. Doc. S/2007/168 (Mar. 26, 2007). (The U.N. Security Council did not endorse the Ahtisaari Plan due to Russia's threat to veto any resolution expressing support for the Plan's proposal to grant independence to Kosovo).

¹²¹ Press Release, U.S.-E.U.-Russ. Troika, Troika Press Release Communique: The Baden Conference (Nov. 28, 2007)

http://www.consilium.europa.eu/ueDocs/cms_data/docs/PressData/en/declarations/97300.pdf.

¹²² No coalition of powerful nations can act as the Security Council or on behalf of the Security Council without prior authorization of the Security Council under Chapter VII of the U.N. Charter.

¹²³ Press Release, U.S.-E.U.-Russ. Troika, Troika Press Release Communique: The Baden Conference, *supra* note 121.

¹²⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141.

¹²⁵ *E.g.*, GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970); Vienna Program of Action, U.N. Doc. A/Conf.157/23 (Jul. 12, 1993); U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the Sub-Commission on Prevention of Discrimination and Protections of Minorities on its 45th Session, U.N. Doc. E/CN.4/Sub.2/1993/45 (1993); Committee on the Elimination of Racial Discrimination, General Recommendation 20, The Guarantee of Human Rights Free from Racial Discrimination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 124 (Sept. 30, 1996), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 208 (2003).

¹²⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, (dissenting opinion of Judge Koroma); *id.* (dissenting opinions of Judge Bennouna, Judge Skotnikov, Vice President Tomka).

Council Resolution 1244 must provide for the right of self-determination, because it is a *jus cogens* principle guaranteed to all peoples.¹²⁷ Although these opinions appear to state the obvious — that self-determination of peoples can be shaped by Security Council intervention to maintain international peace and security — they appear to go one step too far in granting deference to the Security Council with respect to action or inaction regarding the self-determination of peoples. It may be true that the Security Council has a duty to maintain international peace and security, and that an issue of self-determination can trigger this duty. But it does not follow that the Security Council may abrogate the right to self-determination for the territorial integrity and sovereignty of a nation.

Taking the Dissent's view to its logical extreme, the Security Council could issue resolutions that violate human rights and humanitarian law, or reject any human rights and humanitarian law where realization of those rights conflicted with the Security Council's objective. This would be true even if the Security Council were completely deadlocked and could not address the issue itself due to inaction of the permanent members of the Security Council. Thus, the Dissent's cure would be worse than the condition, as the implications of their reasoning would do far more harm to the maintenance of international peace and security than just hamstringing the ICJ's capacity to respond to deadlocks in the Security Council in accordance with Uniting for Peace.

The approach espoused by Judge Cançado Trindade most accurately reflects this author's view of the proper role of the ICJ in issuing advisory opinions. Judge Trindade found that self-determination is an international legal issue linked to human rights, and is a topic particularly within the jurisdiction of the Court.¹²⁸ He went on to elaborate on the issue of self-determination in great detail. Before doing so, he pointed out that "the purpose of the Court's advisory opinion is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion."¹²⁹ Further, the purpose of giving an advisory opinion is to contribute to the "*prevalence of the rule of law* in the conduction of international relations."¹³⁰

¹²⁷ Report of the International Law Commission on the second part of its seventeenth session and eighteenth session, U.N. Doc. A/6309/Rev. 1(1966) at 248.

¹²⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶ 16 (separate opinion of Judge A. A. Cançado Trindade) (citing ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, 174 (Cambridge University Press 1995)).

¹²⁹ *Id.* ¶ 17 (separate opinion of Judge A. A. Cançado Trindade).

¹³⁰ *Id.* ¶ 25 (emphasis in original).

To support his assertion that the Court should have addressed the factual underpinnings of Kosovo's declaration of independence, Judge Trindade indicated that the Court has done so in the past.¹³¹ In the 1971 Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), the Court, in great detail, "consider[ed] and summarize[ed] some of the issues underlying the question addressed to it."¹³² In particular, Judge Trindade emphasized that the Court in *Namibia* decided to address the human rights issues underlying the question presented.¹³³

Judge Trindade also pointed to the Advisory Opinion of 1975 concerning *Western Sahara*, which addressed the social and political context of the Western Saharan population.¹³⁴ In addition, the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* illustrates yet another instance where the ICJ looked at the implications of Israel's construction of a wall and its establishment of settlements in the occupied territories.¹³⁵ The ICJ found that the Israeli action violated the right to self-determination of the Palestinian people.¹³⁶ Had the ICJ merely determined that it was legal for Israel to construct walls in the abstract sense, the decision would not have been a legitimate decision and would not have been helpful.

The ICJ offered more examples. In the case concerning *Armed Activities in the Territory of the Congo*, the ICJ carefully considered the factual background before deciding that violations of international humanitarian law had been committed.¹³⁷ Ironically, the human rights atrocities suffered by the Kosovar people were documented by a case not mentioned in the majority opinion.¹³⁸

According to Judge Trindade, the humanitarian catastrophe in Kosovo and its subsequent declaration of independence set the stage for Security Council Resolution 1244. But neither Security Council Resolution 1244 nor the declaration of independence can be viewed

¹³¹ Kosovo Opinion, 2010 I.C.J. 141, ¶ 36.

¹³² Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, ¶ 44 (Jun. 21).

¹³³ Kosovo Opinion, 2010 I.C.J. 141, ¶ 36 (separate opinion of Judge A. A. Cançado Trindade).

¹³⁴ *Id.* (citing Western Sahara, Advisory Opinion, 1975 I.C.J. 16, ¶ 89).

¹³⁵ *Id.* (citing Palestinian Wall Case, 2004 I.C.J. 136, ¶¶ 79-85).

¹³⁶ Palestinian Wall Case, 2004 I.C.J. 136.

¹³⁷ *Id.* ¶ 39 (separate opinion of Judge A. A. Cançado Trindade) (citing Armed Activities in the Territory of the Congo (New Application: 2002), (Dem. Rep. Congo v. Rwanda), 2002 I.C.J. 6, ¶ 211 (Feb. 3, 2006)).

¹³⁸ Kosovo Opinion, 2010 I.C.J. 141, ¶ 36 (separate opinion of Judge A. A. Cançado Trindade) (citing Case Concerning Legality of Use of Force, (Yugoslav. v. Belg.), Request for the Indication of Interim Measures, 1999 I.C.J. p. 131 ¶ 16)).

without considering the human rights abuses that led to those actions. Finding that “no state can invoke territorial integrity to commit atrocities,” Judge Trindade ultimately concludes that the Kosovar Albanians are entitled to self-determination because they constitute a people and were the subject of historical oppression, subjugation, and tyranny.¹³⁹ But, the ICJ did not consider the broader factual background showing violations by both sides to the conflict.¹⁴⁰

Notably, Judge Trindade takes a differing view on the separation of powers issue. He points out that “[t]he Security Council is not the legislator of the world” and is only seized of situations to provide for international peace and security by making declarations that are neither permitted nor prohibited under international law.¹⁴¹ He accurately suggests that the interest in protecting fundamental *jus cogens* human rights from severe violations is more important than the jurisdictional issue that claimed most of the attention of the majority.

B. Statehood

Statehood is a major legal consideration for an entity or group that breaks off from its mother state and claims to become an independent state. International law regarding statehood demands that four criteria be satisfied to establish statehood under the Montevideo Convention.¹⁴² Those four criteria are: a defined territory, a permanent population, a government, and

¹³⁹ *Id.* ¶ 175 (separate opinion of Judge A. A. Cançado Trindade).

¹⁴⁰ Relevant background facts may include Milosevic’s suppression and ethnic cleansing of Kosovar Albanians, reverse ethnic cleansing in aid of the project of an independent Kosovo, the effect of bombing in Kosovo, Dr. Ranta’s medico-legal investigations of the Racak incident, and all other aspects of the humanitarian violations committed by both sides within the SFRY. For factual analysis see JOHN NORRIS, COLLISION COURSE: NATO, RUSSIA, AND KOSOVO (2005) (The author presents Kosovo as a misadventure by NATO, in which NATO did not consider the centuries-old border dispute between Serbia and Albania in its political agenda and caused excessive damages in the Kosovo bombing as a result of not having ground troops.); MICHAEL MANDEL, HOW AMERICA GETS AWAY WITH MURDER: ILLEGAL WARS, COLLATERAL DAMAGE AND CRIMES AGAINST HUMANITY, 57-114 (2004) (The author has highlighted the facts with contexts and argued that the U.S. and other NATO countries have destroyed the true meaning of international rule of law by manipulating the facts or ignoring the real humanitarian issues in Kosovo and they have escaped liability for an illegal war in Kosovo.); WELLER, *supra* note 89 (The author has presented a comprehensive factual and legal background of the Kosovo saga and has implied that the crisis in Kosovo was best addressed through “collective cabinet diplomacy” rather than by way of international or supranational organizations.)

¹⁴¹ Kosovo Opinion, 2010 I.C.J. 141, ¶¶ 175- 220 (separate opinion of Judge A. A. Cançado Trindade). *See also* Oberg, *supra* note 86, at 81 (analyzing the legal effects of the Security Council and General Assembly resolutions and delegation of authority from Security Council Resolution 1244 in the Kosovo Opinion, and concluding that the Court declined to be bound by a factual determination addressed in the General Assembly Resolution and validated the extensive power of the Security Council in delegating its power concerning international territorial administration.)

¹⁴² Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

the capacity to enter into international relations.¹⁴³ As prescribed by the Montevideo Convention, statehood as a legal theory is akin to a minor entering adulthood. It requires that all four attributes of statehood be satisfied in an objective manner so the new state can be a responsible member of the international community. With all four criteria satisfied, statehood provides political existence to a state; however, political recognition by other states does not establish the legality of statehood.¹⁴⁴

While pronouncing the Kosovo declaration to be in accordance with international law, the ICJ does not address the legal factors that determine statehood. How can a state be independent if the state has not satisfied the legal criteria of statehood? If Kosovo has satisfied the four necessary criteria of statehood, why would the ICJ be reluctant to address this aspect of the problem? Can the ICJ's avoidance of this issue eliminate the need to consider the important legal fundamentals concerning independence? The answer is simple — no. Again, the ICJ missed the opportunity to contribute to the development of international law regarding the independence of a state. Statehood is a major legal principle that is necessarily tied to Kosovo's declaration of independence, as well as to the issue of international peace and security. By not addressing the issue of statehood, the ICJ has not only done an injustice to the legal aspect of statehood, but has also endorsed the practice of prematurely declaring independence and the practice by other nations' of immediately recognizing newly independent states without regard to the rules of international law concerning the right to self-determination, statehood, and territorial integrity. This political practice of undermining the rules of international law has created friction among nations, causing sour relations and international insecurity. At least the ICJ could have produced some standards interpreting the law of statehood in relation to independence for Kosovo and for future potential territories.¹⁴⁵ By not establishing any standards on statehood, the ICJ has explored the third degree of self-

¹⁴³ *Id.* at Art. 1.

¹⁴⁴ *Id.* at Art. 3 (“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its Courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”).

¹⁴⁵ South Ossetia, Abkhazia, and Kosovo are already a few examples of political practice in creating independent nations, which the ICJ has endorsed by its Advisory Opinion on Kosovo. *See* Kosovo Opinion, 2010 I.C.J. 141.

determination based on an “ethnic/geographic fragment of a federal substate unit.”¹⁴⁶

Serbia and Albania both may claim territorial rights over Kosovo. For Serbia, Kosovo has always been Serbian land. For Albania, people in Kosovo are Kosovar Albanians who moved to Kosovo hundreds of years ago. However, the requirement of territory is at times not necessary for a state to be legally justified.¹⁴⁷ It may be disputed whether Kosovo’s population is a permanent population due to Serbian and Albanian refugees that have moved in and out of Kosovo during the conflict period. Kosovo now has a government, but the stability of the Kosovar government depends upon the EU and the UN.¹⁴⁸ Because international forces provide Kosovo’s internal and external security,¹⁴⁹ Kosovo by itself does not have the capacity to enter into relationships with other sovereign nations — at least until the international guarding agencies and forces produce a peaceful transition toward nation building.¹⁵⁰ Thus, it has been claimed that Kosovo never satisfied the criteria of statehood within the meaning of public international law, as it lacked the necessary effective governmental control over the territory, an essential constituent element of statehood.¹⁵¹ The question here is not whether Kosovo should be granted independence, but rather whether the ICJ approached the legal dispute regarding Kosovo’s independence with sound legal analysis. By not bringing these legal elements into its analysis and decision, the ICJ may have opened Pandora’s Box for political elements to influence similar decisions in the future.

The ICJ could have elaborated on its reasoning by analyzing these facts and applying the relevant laws to them. If the ICJ had considered the issue of statehood, it could have turned to other legal theories that may support the idea of Kosovo’s independence, such as the theory of earned

¹⁴⁶ Falk, *supra* note 3, at 58 (describing and analyzing the first, second, and third degree of self-determination as follows: “If Kosovo attains statehood in the full sense, a virtual certainty in the near future, it will be an example of self-determination to the third degree, though not officially described as such. The first degree is at the level of a sovereign state, as when a society manages to achieve political independence and end colonial rule. The second degree is a domestically sovereign unit of the sort that constitutes federal states, such as the sovereign states that emerged after the collapse of the Soviet Union and Yugoslavia. The third degree is an ethnic/geographic fragment of a federal substate unit, such as the claimant movement in Chechnya, South Ossetia, Abkhazia.”).

¹⁴⁷ See JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 115 (3d ed. 2010).

¹⁴⁸ S.C. Res. 1244; Interim agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999 [hereinafter *Rambouillet Accord*].

¹⁴⁹ The UNMIK and KFOR.

¹⁵⁰ John Cerone, *The Legality and Legal Effect of Kosovo’s Purported Secession and Ensuing Acts of Recognition*, 3 *Annals Fac. L. Belgrade Int’l Ed.* 60 (2008).

¹⁵¹ Andreas Zimmermann & Carsten Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflection on the Current and Future Legal Status of Kosovo*, 70 *NORD. J. INT’L L.* 423, 427 (2001).

sovereignty.¹⁵² Under this theory, it is expected that the new state 1) will be able to maintain independence in its state actions by following a UN sanctioned pattern and 2) will become a reliable partner in the world community. This theory is described as “standards before status.”¹⁵³ Another theory of independence that may be applicable is the theory of qualified state sovereignty.¹⁵⁴ Under this theory, Kosovo’s statehood could be justified based upon Serbia’s gross violation of human rights, including ethnic cleansing under the regime of Milosevic. This oppression, however, led to humanitarian intervention in Serbia to protect Kosovar Albanians in Kosovo, which in turn led the international community and the UN to consider the final status of Kosovo. Albanians were not protected by the laws of Serbia, so with international assistance and guardianship, Kosovo may exercise local authority toward becoming an independent sovereign nation.¹⁵⁵

The ICJ could have also focused on humanitarian intervention and the international effort to separate a country. All the steps undertaken by the Security Council, NATO and the UN until the declaration of independence create a connection between the NATO bombing in Kosovo and the rush to recognize the independence of Kosovo by some nations. However, all the relevant GA resolutions, the Athisaari Plan, and the Troika negotiations acknowledge the territorial integrity and sovereignty of Serbia.¹⁵⁶ The members of the Security Council and Troika who were also involved in the UNMIK process disregarded the acknowledgement. The ICJ did not even bother to analyze this legal aspect of the conflict.¹⁵⁷

C. Territorial Integrity

The principle of territorial integrity restricts the principle of external self-determination, otherwise known as remedial secession,

¹⁵² James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 DENV. J. INT’L L. & POL’Y 355, 356 (2003) (defining earned sovereignty as a process for attaining legitimate state sovereignty and which is comprised of three core elements: 1) shared sovereignty, 2) institution building, and 3) status determination and three optional elements: 1) phased sovereignty, 2) conditional sovereignty, 3) constrained sovereignty).

¹⁵³ Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 6 (2005).

¹⁵⁴ Hooper & Williams, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ Special Envoy of the Secretary-General, *supra* note 120.

¹⁵⁷ The U.N. involvement in finding a political solution appeared to be the factor for the secession of Kosovo in this particular case, whereas other countries’ secession from the former Yugoslavia did not involve U.N. involvement in finding a political solution. Does this mean that when the U.N. gets involved in finding a political solution in a disturbed territory there will be a likelihood of secession? Does the U.N. or the Security Council have the power to separate an independent country under the broad authority of international peace and security? *See generally* Bing Bing Jia, 8 CHINESE J. INT’L L. 1, 27-46 (2009).

whereby a portion of a state's territory and peoples secede from the parent state in order to form a new state. Territorial integrity is and has been one of the central principles of international law because it directly relates to peaceful coexistence among nations. Quoting the Helsinki Conference and Friendly Declaration, Judge Trindade points out that the principle of territorial integrity is not a shield when the people of a state are subjected to human rights abuse by that state.¹⁵⁸

Sticking to its economy of legal analysis, the Court did not go quite as far. Referring to *Nicaragua v. United States*,¹⁵⁹ the majority proclaimed that states shall refrain in their international relations from the threat or use of force against the territorial integrity of any state.¹⁶⁰ The Kosovo majority opinion skirted the issue by holding that the principle of territorial integrity is confined to the sphere of the relations between states,¹⁶¹ and thus the declaration of independence by a people within a state is primarily a domestic affair. However true this may be, the majority missed an opportunity to clarify the law of remedial secession. This omission probably occurred because the majority agreed upon the decision to be made but could not agree upon the reasoning underlying that decision.

The majority seemed to suggest that the declaration could not violate international law unless it was accompanied by a separate violation of international law by the Kosovar people, such as the achievement of independence through violent insurrection and human rights abuses.¹⁶² Indeed, this view is in keeping with the relatively little that international law has to say about the law of secession.¹⁶³ It is widely accepted that states cannot legally recognize as legitimate the results of an internationally wrongful act.¹⁶⁴

Judge Yusuf's separate opinion stated that the ICJ provided an overly restrictive and narrow reading of the question presented to it.¹⁶⁵ The ICJ basically implied that UNMIK, under Security Council Resolution 1244, temporarily suspended Serbia's sovereignty over Kosovo, and due to the failure of all proposed processes, Kosovo's declaration of independence is not illegal. Therefore, Kosovo does not have to demonstrate the legality

¹⁵⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶¶ 177-181.

¹⁵⁹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 I.C.J. 101, ¶ 191 (Jun. 27).

¹⁶⁰ Kosovo Opinion, 2010 I.C.J. 141, ¶ 80.

¹⁶¹ *Id.*; Cerone *supra* note 150, at 60.

¹⁶² Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo's Declaration of Independence*,

11 GERMAN L.J. 895, 902 (2010).

¹⁶³ Cerone, *supra* note 150, at 64.

¹⁶⁴ Responsibility of States for Intentionally Wrongful Acts, G.A. Res. 56/83, Annex art. 40, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001).

¹⁶⁵ Kosovo Opinion, 2010 I.C.J. 141, ¶ 2 (separate opinion of Judge Yusuf).

of independence because international law does not require it. The ICJ's ruling that the declaration of independence did not violate Security Council Resolution 1244 does not dismiss Serbia's claim of territorial integrity.¹⁶⁶ The ICJ justified its disregard of the territorial issue by stating that the declaration is one thing, while the successful establishment of an independent state is another. The ICJ dismissed the declaration as a mere piece of paper, although over sixty countries had recognized Kosovo as an independent state at the time of the ICJ's decision.

D. Recognition and Its Legal Effect

There are two theories of international law regarding recognition: the constitutive theory and the declarative theory. The constitutive theory holds that recognition of a state is not automatic. A state may become a state only when other states recognize it as such. Since there is no particular international law of recognition, other states exercise their discretion in recognizing a new state, and this becomes a political act of other states rather than a legal one.¹⁶⁷ This theory tends to undermine the elements of statehood under the Montevideo Convention and suggests that only other states' recognition can create a new state. On the other hand, the declarative theory of recognition permits a new state to assert its existence by its own declaration of recognition as a state once the new state can establish that it has satisfied the four criteria of the Montevideo Convention. This theory presupposes that statehood is a legal determination and other states' recognition is merely an acknowledgement of that legal determination.¹⁶⁸

While the constitutive theory regards recognition as a condition precedent to statehood, the declarative theory merely requires that a state asserts its sovereignty to become sovereign.¹⁶⁹ Both theories, however, are instrumental in analyzing recognition and its effects and compliance with the Montevideo criteria, but they do not provide any particular solution to the problem of statehood. Rather, they merely highlight the existing divide between scholars and state practices.¹⁷⁰ Although most legal scholars agree

¹⁶⁶ Michael Bothe, *Kosovo-So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence*, 11 GERMAN L. J. 837, 839 (2010).

¹⁶⁷ Hersch Lauterpacht argues that a new state exists only when other states recognize the new state. Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 419 (1944).

¹⁶⁸ William Thomas Worster, *Law, Politics, and the Concept of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, 116 (2009).

¹⁶⁹ Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 827 (2009).

¹⁷⁰ Worster, *supra* note 168 (describing and analyzing the existing divide between scholars and state practices concerning the recognition theories and modes of state recognition).

that recognition is just a political action and not a legal one, the ICJ in the *Quebec* case held that recognition legitimizes the creation of states.¹⁷¹ Indeed, it is difficult to understand how a state could exist without recognition, given that the Montevideo Convention requires that all states have the capacity to enter into foreign relations. The Badinter Commission, in its opinion on the status of statehood in the former Yugoslavia, stated that “the effects of recognition by other states are purely declaratory.”¹⁷² International law of recognition took a different turn when the EC adopted the Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.” The Guidelines have attempted to include normal standards of international practice,¹⁷³ political realities, commitment to the UN Charter, the rule of law, principles of democracy and human rights norms.¹⁷⁴ However, the case of the Former Yugoslavia is one of dissolution, not of secession, as found by the Badinter Commission.¹⁷⁵

Kosovo is more likely a case of secession, and the question of statehood and recognition could be much more contestable than other provinces of the Former Yugoslavia. Sixty-nine states have recognized Kosovo as an independent state, thus meeting the fourth element of the Montevideo criteria – the capacity to enter into foreign relations based on the declaration of independence. What is the legal situation regarding the recognition of states under international law? This question has neither been asked nor answered.¹⁷⁶ However, one could extrapolate the following answer based upon the ICJ’s reasoning: it is legal because international law does not prohibit recognition, although the ICJ did not confirm whether Kosovo had reached statehood. The ICJ did not bother to consider whether premature recognition constitutes a prohibited intervention into the internal affairs of another state or whether the Security Council had terminated its recognition of the territorial claim of Serbia under S.C. Res. 1244. The ICJ seems to conclude that the territorial integrity claim of Serbia is still open, that Security Council Resolution 1244 regime is still valid, and thus negotiations must continue.¹⁷⁷ While Security Council Resolution 1244 is

¹⁷¹Vidmar, *supra* note 169, at 828.

¹⁷²Conference on Yugoslavia Arbitration Commission, Opinion Nos. 1 and 8 31 I.L.M. 1488 and 1494 (1992) [hereinafter Badinter Commission]. Although the Badinter Commission emphasized that the recognition by other states has no legal effect the European Community foreign ministers and the US decided to recognize Bosnia. DUNOFF, RATNER, WIPPMAN, *supra* note 147, at 143.

¹⁷³Which could be Montevideo criteria.

¹⁷⁴Declaration on the Guidelines of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (1992).

¹⁷⁵Badinter Commission, Opinion No. 1 1494, *supra* note 172.

¹⁷⁶Bothe, *supra* note 166, at 838.

¹⁷⁷*Id.*

valid, the ICJ said that the authors of the declaration of independence did not violate the resolution because as actors outside of the UN Framework, they are not obligated to comply with it. Are Kosovars not part of the negotiations under the framework designed to address the Kosovo issue? The ICJ avoids this question by treating as separate entities the Kosovo government in place at the time of Security Council Resolution 1244 and the Kosovo people. This is so even though the persons that signed the declaration were members of the Kosovar government.¹⁷⁸

The ICJ did not consider past and possible future accusations or investigations by relevant tribunals, such as the International Criminal Tribunal for Yugoslavia (“ICTY”) of crimes against humanity, war crimes, or genocide committed by the authors of the declaration. There are already some questions as to the criminal liability and lawfulness of the representation of Kosovo leadership in respect to abusing the human rights of minorities, such as the Serbs in Kosovo during the conflict.¹⁷⁹ The ICJ should have scrutinized the legal effect of recognition and authorship of the declaration of independence in order to answer unsettled questions. But it chose not to.

Conclusion

By narrowing the scope of the question presented to it and not addressing the relevant international law issues, the ICJ has placed itself at odds with the judicial history of the ICJ. This ICJ may be remembered, not for what it said, but for what it did not say. It is apparent that the ICJ was not interested in contributing to the development of international law concerning the declaration of independence because it ignored the major international legal issues pertaining to the question, which may be regarded as a judicial endorsement of political might rather than a cogent analysis of international law. It is unfortunate that the ICJ was not able to bring much

¹⁷⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Kosovo Opinion), 2010 I.C.J. 141, ¶¶ 16-20 (declaration of Vice-President Tomka).

¹⁷⁹ Former Prime Minister of Kosovo Ramush Haradinaj was accused of crimes against humanity and war crimes committed against Roma minorities when he led the KLA in 1998. After the indictment, he stepped down as President of the Provisional Self-government of Kosovo. Later, he was acquitted in 2008 due to lack of evidence. The case was ultimately reopened by the Appeals Chamber. He was indicted again and his arrest was ordered just three days before the publication of the Advisory Opinion. Prosecutor v. Ramush Haradinaj, Case no. IT-04-84-T Appeals Chamber Judgment (July 19, 2010) available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>. Even Hashim Thaci, President of Kosovo has been charged with a number of crimes for acts committed during the Kosovo conflict with Serbia in the late nineties. See Bjorn Arp, *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities*, 11 GERMAN L. J. 847, 856 (2010).

clarity and legal certainty to important relevant legal aspects of the Kosovo conflict with regard to independence, statehood, territorial integrity, secession, self-determination, and the legal effect of recognition. Rather, it left these issues to be answered by state practices based on political stratagems.¹⁸⁰ Other factors worth mentioning that might have guided the ICJ to reach its conclusion include: the poor drafting of General Assembly Resolution 63/3 with the initiative of Serbia; Serbia's assumption and expectation that the ICJ would find the declaration unlawful; the failed negotiation efforts of the Security Council and TROIKA; and the ICJ's tacit fear that by not bringing its opinion in line with a few permanent members of the Security Council, the ICJ would lose its legitimacy. Whatever other factors there might be, the ICJ had the opportunity to clarify certain legal standards with regard to the process of the creation of a new state, particularly during a time when ethnic, political, and geographically based movements and demands for new states are on the rise.

¹⁸⁰ Professor Richard Falk, an international law expert presents a similar view. Referring to the Kosovo Opinion, Professor Falk states: "it would encourage an expansive reading that would give direct aid and comfort to an array of secessionist movements waiting in the wings of the global political stage." Falk, *supra* note 3, at 51.