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The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?

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Abstract

The objective of this paper is to examine how the Court has dealt with existing general international law governing secession and to evaluate the effects that this opinion could have on future developments in this field. The narrow interpretation of the question submitted by the UN General Assembly permitted the Court to avoid many important questions. The Court made no statements concerning Kosovo's statehood and recognition by third states and made no mention of statehood requirements or the 'principle of effectiveness'. The Court also refused to examine whether Kosovo (or any other entity outside the colonial context) had a 'right' to secession, but gave no endorsement to attempts to apply external self-determination outside the colonial context or to the theory of 'remedial secession'. This paper explains why the Court *did not* apply the '*Lotus*' freedom principle in the *Kosovo* case. It welcomes the indirect, but clear, position of the Court that a declaration of independence *can*, in some situations (and especially in the case of external aggression), be illegal – a position that contradicts the old theory, stemming from Jellinek, that the creation of a state is nothing but a 'simple fact'. While the Court correctly found that outside these exceptional circumstances, no general prohibition against unilateral declarations of independence exists in international law, it should have added that international law is not 'neutral' in this field, that it disfavors secession, and that it creates a presumption against the effectiveness of secession. The 'legal-neutrality' stance adopted by the Court is not without risks. Indeed, the Court should have been more cautious in its assertion that 'the scope of the principle of territorial integrity is confined to the sphere of relations between states', not only because recent practice clearly indicates the contrary, but also because its position could have an unwelcome effect in resolving future separatist conflicts by rendering countries extremely sceptical of solutions of autonomy or international administration.

Key words

Kosovo; *Lotus*; secession; self-determination; state

Introduction

The advisory opinion of the ICJ on Kosovo was eagerly expected not only by those concerned by the destiny of Kosovo, but also by all those interested by the problem

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of secession outside a colonial context.[1] Traditionally, case law in this field was limited to some domestic decisions, which acquired, *faute de mieux*, an emblematic status in academic works.[2] But on 22 July 2010, for the first time in history, the 'principal judicial organ of the United Nations' handed down an advisory opinion about the legality of a unilateral declaration of independence outside the context of colonization. The objective of this paper will be precisely to focus on the 'General International Law' part of the advisory opinion (§§79–84) in order to examine not only how the Court has dealt with existing law (or lack of it), but also the effects this part of the opinion could have on future developments in this field.[3]

We could have imagined that taking into consideration the importance of the subject, the Court could have first of all 'ascertained the international law applicable in this area'[4] before applying it to the case of Kosovo. This is exactly what the Court has done all too often in the past, and what it has done, in any event, in its most famous advisory opinions.[5] But this method has been abandoned this time. Clearly, in this judgment, the resolve of the Court was to answer the question in the narrowest way possible. While the Court has accepted, as we will see, to examine the case under general international law, the part of the opinion dedicated to this international law governing secession is extremely brief (only six tiny paragraphs in a total of 123), which constitutes a deliberate strategy on the part of the Court.

In order to understand which was the position of the Court in this field and which could be its influence in future cases of self-determination and secession, we have to examine not only what the Court has said (section 2), but also what the Court has not said or has not wanted to say (section 1).

1. What the court did not say

The narrowness of the question submitted by the UN General Assembly permitted the Court to 'duck' all the important questions concerning Kosovo. It should be recalled that the resolution requesting this advisory opinion, adopted on 8 October

1 The impressive number of states participating in the proceedings highlights the interest of the case. In total, 40 states plus Kosovo participated in the written and/or oral proceedings. This cannot match the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, in which 57 states or organizations participated, but it is almost as many as in the *Legality of the Threat or Use of Nuclear Weapons* case (45 states).

2 Traditionally, scholars refer to the case *Madzimbamuto v. Lardner-Burke & Phillip George* [1968] UKPC 2 concerning Southern Rhodesia and, since 20 August 1998, to the decision of the Canadian Supreme Court in the *Reference by the Governor-General Concerning Certain Questions Relating to the Secession of Quebec from Canada* [1998] 2 SCR 217.

3 We will not discuss here the position of the Court concerning the *lex specialis* analysed by other contributions to this symposium.

4 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, Judge Bennouna, Dissenting Opinion, para. 37.

5 In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, at 69, the Court said that it will first 'indicate the applicable law before seeking to establish whether that law has been breached' (see also paras. 86 ff). Similarly, in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, at 23, the Court declared that 'In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law' and wrote 13 long paragraphs to determine what this is, before 'applying this law to the present case' (at 35).

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2008, had been drafted by Serbia itself.[6] It remains a mystery why Serbia drafted this question in such a poor manner and in a way that was detrimental to its interests. Whatever its reasoning was,[7] the majority of the Court was without doubt very happy with this narrow drafting and did absolutely nothing to adopt a broader perspective. The Court thus kept a hermetic silence in relation to some very important questions.

1.1. The Court said nothing about Kosovo's statehood and recognition by third states

The Court emphasized (§51) that the General Assembly asked for an opinion on whether or not the declaration of independence was in accordance with international law. It did not ask about the legal consequences of such a declaration.

It was thus not necessary, according to the Court, to make a decision upon whether Kosovo had achieved statehood or not. During the proceedings, there was much discussion about statehood requirements in international law, about the principle of effectiveness, and about Kosovo's ability to exercise effective control over its territory.[8] The Court eschewed the question completely: it did not even mention the criteria of statehood in its advisory opinion, let alone hold any discussion about 'effectiveness'.

The answering of these questions was nonetheless fundamental in order to assess some of the arguments used in order to criticize Kosovo's almost immediate recognition by many states. These recognitions have been qualified as 'premature' and thus as an illegal interference in Serbia's domestic affairs on the basis of the argument that when the recognitions were granted, Kosovo did not comply with the factual requirements for statehood.[9] But the Court did not deal with this fundamental problem. It explained that the question submitted by the General Assembly was *not* about the validity or legal effects of the recognition of Kosovo by the states that have recognized it as an independent state.[10] It must be emphasized that during

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6 The question to the Court was approved as contained in Draft Resolution UN Doc. A/63/L.2 (2008) introduced in the General Assembly by the minister of foreign affairs of Serbia. See also the letter by the same minister, 15 August 2008, to the Secretary-General of the United Nations, requesting the inclusion in the agenda of the Sixty-Third Session of the General Assembly of a supplementary item entitled 'Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo Is in Accordance with International Law', UN Doc. A/63/195 (2008).

7 See, e.g., contribution of M. Weller to this symposium.

8 See, e.g., the position of Serbia according to which Kosovo 'does not fulfill the constituent requirements of a state as there is no effective independent government in Kosovo' (Written Statement of the Republic of Serbia (2009) at 336 and, more generally, at 333–40) or a similar position by Cyprus arguing that the role of the international community in Kosovo is such as to preclude Kosovo from meeting the requirement of independence (Written Statement of the Republic of Cyprus (2009), paras. 159–192). Compare with the detailed response of Kosovo 'that it does in fact clearly meet the criteria for statehood' (Written Contribution of the Republic of Kosovo (2009), at 11–28) and the similar position of the United States (Written Statement of the United States of America (2009), at 34 ff.).

9 H. Lauterpacht was already writing in his famous *Recognition in International Law* (1947), at 8: 'It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency.' For an application of this notion to Kosovo and other recent cases, see O. Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées: Du Kosovo à l'Ossétie du Sud et à l'Abkhazie', 112(4) RGDIP (2008), at 751–7.

10 *Kosovo* AO of 22 July 2010, at 51: 'The Court notes that, in past requests for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court's opinion on the legal consequences

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the proceedings, almost no state took the position that the Court should make a pronouncement about Kosovo's statehood or recognition.

1.2. The Court did not say that Kosovo (or any other entity outside the colonial context) had a 'right' to secession

The General Assembly asked the Court whether the declaration of independence was 'in accordance with' international law. The Court considered that the answer to this question turns on whether or not the applicable international law *prohibited* the declaration of independence. During the proceedings, Serbia and other states tried desperately to convince the Court that the question was not only about the existence of a rule that *prohibits* secession, but also about the existence of a rule *authorizing* the declaration of independence. The Court did not follow this path. According to the advisory opinion:

> 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.[11]

It could be argued that the Court could have easily adopted a broader approach as it has done in past cases within its advisory function[12] when it has emphasized that 'a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffectual but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization'.[13] Indeed, even in the *Kosovo* case, the Court agreed to 'adjust' the question submitted by the General Assembly in order to keep its autonomy concerning the 'authors' of the declaration. This 'slight adjustment' proved to be 'outcome-determinative'.[14] But the Court refused to explore whether a rule authorizing secession exists in international law. It declared

of an action, have framed the question in such a way that this aspect is expressly stated . . . . The Court accordingly sees no reason to reformulate the scope of the question.'

11 *Kosovo* AO, *supra* note 10, at 56.

12 Cf. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, Separate Opinion of Judge Sepulveda-Amor, paras. 33–35. During the proceedings in *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, where the question submitted to the Court by the General Assembly was 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?', there were many discussions concerning the meaning of the question. The use of the word 'permitted' was criticized by certain nuclear powers on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in international law. Such a starting point, those states submitted, was 'incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent', at 21. The Court nonetheless took a broader perspective, saying that the 'real objective [of the question] is clear: to determine the legality or illegality of the threat or use of nuclear weapons', at 20. And the Court concluded: 'The argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposition of the issues before the Court', at 22.

13 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, para. 35.

14 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010, Separate Opinion of Judge Tomka, at 1.

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that:

> 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.[15]

Finally, what did Serbia receive from the Court? A disastrous (in terms of its interests) advisory opinion asserting that Kosovo's declaration of independence *was not* illegal. What could have happened if the question drafted by Serbia had been different? Instead of asking 'Is the unilateral declaration of independence . . . in accordance with international law?', Serbia could have asked:

> Did international law give the Provisional Institutions of Self-Government of Kosovo the right to issue a unilateral declaration of independence of Kosovo from Serbia? In this regard, is there a right to self-determination under international law that would give Kosovo the right to unilateral secession from Serbia?

This is a paraphrase of the question submitted to the Supreme Court of Canada by the Federal Government in respect to Quebec's secession.[16] The precedent was there, but Serbia did not use it. Had Serbia formulated the question in such a way, the outcome could have been different,[17] as there are many reasons to believe that such a right to secession does not exist outside the colonial context or situations of occupation.[18] This is exactly what the Supreme Court of Canada said in its 1998 decision when it stated that 'International law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state'.[19]

In a similar way, the International Fact-Finding Mission on the Conflict in Georgia arrived at the conclusion that 'Abkhazia *was not allowed* to secede from Georgia under International Law, *because the right to self-determination does not entail a right to secession*'.[20]

15 *Kosovo* AO, *supra* note 10, at 56.
16 *Reference by the Governor-General Concerning Certain Questions Relating to the Secession of Quebec from Canada*, *supra* note 2.
17 During the Cambridge ESIL IGPS workshop of 2 September 2010, some delegates pointed out that 'the real problem was not the question but the answer'. It would certainly be unfair to focus only on the question when it was pretty clear that the majority of the Court wanted, anyway, to give a very narrow answer. But had Serbia formulated the question using those terms, we can hardly see how the Court could have avoided making a pronouncement about the (in)existence of a right to secession outside the colonial context, without rephrasing the question in a narrower way!
18 For a detailed analysis, see T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (1999), at 35–322.
19 *Reference by the Governor-General Concerning Certain Questions Relating to the Secession of Quebec from Canada*, *supra* note 2, para. 111.
20 *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, 30 September 2009, Vol. II, at 147, available at www.ceiig.ch (emphasis added).

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1.3. The Court gave no endorsement to attempts to apply external self-determination outside the colonial context or to the theory of 'remedial secession'

During the proceedings, some states claimed that the population of Kosovo had the right to create an independent state either as a manifestation of a general right to self-determination[21] or pursuant to the more specific theory of a right of 'remedial secession' in the face of the situation in Kosovo.[22]

The Court highlights the controversial nature of those arguments, indicating that many other states completely reject them.[23] But once again, it explains that 'it is not necessary to resolve these questions in the present case',[24] as the only real question is whether there is a rule prohibiting the declaration of independence. The advisory opinion thus adds nothing[25] to the existing debate on those questions.[26]

1.4. The Court did not apply the '*Lotus* freedom principle'

During the proceedings, there has been considerable discussion about the '*Lotus* freedom principle'. In his declaration to the advisory opinion, Judge Simma suggests that the Court endorsed this principle and that the Court's approach 'in a formalistic fashion, equate[s] the absence of a prohibition with the existence of a permissive rule'.[27]

With due respect, we think that this position needs to be qualified. The fact that the Court found that the declaration of independence was not contrary to international

21 In reality, very few states suggested in a clear enough way that there is a right to external self-determination outside the colonial context. This seems to be only the position of the Netherlands (Written Comments of the Kingdom of the Netherlands (2009), at 3 ff.), Switzerland (Written Statement of Switzerland (2009), at 20 ff.) and Slovenia (Written Statement of the Republic of Slovenia (2009), at 2–3). The position of Albania was more ambiguous: after stating that 'through the DoI the people of Kosovo exercised its right of self-determination' (Written Statement of the Republic of Albania (2009), at 39), Albania seemed to link this right to 'remedial secession'. It is interesting that even though Kosovo initially refused to give its view concerning the existence of a right to secession on the basis of the argument that the Court does not need, in the light of the question, to 'reach the issue of the right of self-determination' (Written Contribution of the Republic of Kosovo (2009), at 157), it subsequently made some ambiguous comments presenting Kosovo as 'a self-determination unit' (Further Written Contribution of the Republic of Kosovo (2009), at 4.45), arguing that the principle of territorial integrity is not a principle that disfavours changes in international boundaries (at 4.38), and insisting that 'since the right [of self-determination] is not limited to situations of decolonization, it is entirely irrelevant that Kosovo did not constitute a mandate or trusteeship territory or was not listed as dependent territory by the United Nations General Assembly' (at 4.35). Kosovo seemed to link nonetheless also all those arguments to the theory of 'remedial secession'.

22 This position was held by Albania, Estonia, Finland, Germany, Ireland, Jordan, Lithuania, Maldives the Netherlands, Poland, Russia, Slovenia, Switzerland, and the Authors of the Declaration. For exact quotations, see the contribution of O. Corten in the present symposium, note 28.

23 Indeed, during the proceedings, the majority of states rejected the existence of both a 'general right to secession' outside the colonial context and of a more specific right to 'remedial secession'. This was, for example, the position of Argentina, Azerbaijan, Belarus, Bolivia, Brazil, Burundi, China, Cyprus, Iran, Romania, Slovakia, Serbia, Spain, Venezuela, and Vietnam. For exact quotations, see the contribution of O. Corten in the present symposium, note 30.

24 *Kosovo* AO, *supra* note 10, at 83.

25 But see contribution of O. Corten in the present symposium.

26 For this debate compare, for example, the opposite positions of L. Buchheit, *Secession: The legitimacy of Self-Determination* (1978), at 221 ff. and O. Corten, 'A propos d'un désormais "classique": Le droit à l'autodétermination en dehors des situations de décolonisation, de Théodore Christakis', (1999) 36 *RBDI*, at 340–7.

27 *Kosovo* AO, *supra* note 10, Declaration of Judge Simma, at 3.

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law does not mean at all that this declaration was 'authorized' by international law or that it constituted the exercise of a right conferred by it.

First of all, even in relations between states, it is very doubtful that international law endorses today the extreme voluntaristic approach espoused by the PCIJ in 1927 according to which the sovereign state is free to do whatever it wants in the absence of a *specific* prohibition provided by international law.[28]

In the *Legality of the Threat or Use of Nuclear Weapons* case, in 1996, the Court did not listen to the siren's song sung by some nuclear powers asking it to declare the use of nuclear weapons legal on the basis of the *Lotus* 'freedom' principle.[29] The fact that the Court found that there was no 'specific prohibition' was thus not an obstacle for the Court to declare that the use of nuclear weapons 'would generally be contrary to the rules of international law applicable in armed conflict'.[30]

But even if the *Lotus* principle is still applicable today, this principle is necessarily confined to inter-state relations. The rationale of this principle according to the Court in 1927 was that 'the rules of law binding upon States emanate from their own free will' and that 'restrictions upon the independence of States cannot thus be presumed'.[31] The '*Lotus* principle' is inexorably linked to the phenomenon of sovereignty of states and suggests that to the extent that the international obligations are the product of the 'auto-limitation' of sovereign states (an idea that goes back to Jellinek and the theory of *Vereinbarun*g), there is a residual principle according to which a state is free to act if it is not bound by a specific, express prohibition.

The *Lotus* principle is therefore a principle always *protecting* the sovereign state. It would be extremely weird to apply this principle *against* sovereign states, insinuating that if secession is not prohibited, that means that entities situated within those states 'have a right' to declare independence.

The absence of a prohibition to attempt secession can simply not be assimilated to the existence of a right to do so. Non-self-governing territories *had* 'the right' to external self-determination, which means that attempts not to let them exercise this right were illegal.[32] Entities outside the colonial context *do not have* such a

28 Many authors have criticized this extreme positivistic approach, which seems to suggest that the international legal order is 'closed' and 'complete' and thus unable to have any *lacuna* because everything that is not prohibited is permitted (which leaves no room for gaps or for neutrality of the law). According to G. Fitzmaurice, 'The Problem of Non-Liquet' (1974) *Mélanges offerts à Charles Rousseau* 89, at 109, for example: 'This basis is itself deficient and unsatisfactory, . . . because it speedily leads to a *reductio ad absurdum*, – for if the logic of the matter is pressed, the outcome would be that even if the legal order contained *no* substantive rules or principles at all, it would still be formally complete since on that very basis the tribunal could give a decision in favour of the respondent-defendant.' See also H. Lauterpacht, 'Some Observations on the Prohibition of Non-Liquet and the Completeness of the Law', (1958) *Mélanges Verzijl* 196, at 203.

29 The argument used in this case by France and Russia, and to a lesser extent by the United Kingdom and the United States, was that since the use of nuclear weapons during wartime is not expressly and specifically prohibited by international law, states remain presumptively free to use those weapons. For an analysis, see M. P. Lanfranchi and T. Christakis, *La licéité de l'emploi d'armes nucléaires devant la Cour internationale de justice (analyse et documents)* (1997), at 48–53.

30 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, Point E of the *dispositif.* In his Declaration to this Opinion, at 12, President Bedjaoui wrote: The Court's decision in the "*Lotus*" case, which some people will inevitably resurrect, should be understood to be of very limited application in the particular context of the question which is the subject of this Advisory Opinion.'

31 *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, Ser. A No. 10, at 18.

32 Amongst other things (e.g. international responsibility), this illegality authorizes external interference. We can easily think, for example, of the universal pressure against Portugal's refusal to accept self-determination

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right, which means that the sovereign states concerned have not only the possibility to regulate secession internally in their respective domestic orders, but also have the right to take all measures compatible under international law, including police measures and the use of force, in order to protect their territorial integrity against these secessionist attempts. Separatist movements across the word should not misread the ICJ's advisory opinion, becoming inadvertently '*Lotus* eaters',[33] because the disillusion could be great . . . .[34]

2. What the court said

What the Court did not say is, without any doubt, important, but what is even more important is to try to understand and to comment on what the Court did say. The laconic character of the part of the advisory opinion dedicated to general international law governing secession requires a reading between the lines in order to fully grasp the semantic relations and connotations set up by the Court.

2.1. The Court refused to consider Kosovo as a '*sui generis*' case outside the realm of law

The authors of the UDI, but also many of the states that recognized Kosovo, have constantly claimed that the independence of Kosovo is a '*sui generis*' case. This argument has been repeated many times during the proceedings in the ICJ and even after the publication of the advisory opinion.[35] This argument was not necessarily used in a political sense, in order to suggest that every ethno-political conflict has its own particular facts and historic elements, which is undoubtedly true. It was used

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for Portuguese non-self-governing territories in Africa during the Salazar years. In UN Doc. A/RES 2918 (1972), the General Assembly affirmed that 'the national liberation movements of Angola, Guinea-Bissau and Cape Verde, and Mozambique are the authentic representatives of the true aspirations of the peoples of those territories' and recommended that, pending the independence of those territories, all governments and UN bodies should, when dealing with matters pertaining to the territories, ensure the representation of those territories by the liberation movements concerned. International reaction in other similar cases, like Namibia or Southern Rhodesia, demonstrates also that there is a big difference between *having* a right to independence and *not having* such a right . . . .

33 In Odyssey IX, Homer speaks about the *lotophagi*, who were a race of people from an island near North Africa. The lotus fruits and flowers, primary food of the island, were delicious, but were narcotic and addictive, causing the people who eat them to sleep in apathy. See Christakis, *supra* note 18, at 79. For a more recent piece about some other '*Lotus* eaters' in international law, see www.ejiltalk.org/the-lotus-eaters/#more-2279.

34 For a detailed analysis, see Christakis, *supra* note 18, at 78–84, criticizing the position of Th. Frank submitted at the Supreme Court of Canada by the experts of the *amicus curiae* in *Reference by the Governor-General Concerning Certain Questions Relating to the Secession of Quebec from Canada*, *supra* note 2, rapports d'experts de l'amicus curiae, No. 25506 (December 1997), at 2.11, according to which: 'It cannot seriously be argued today that international law *prohibits* secession. It cannot seriously be denied that international law *permits* secession. There is a *privilege* of secession recognized in international law. . . .'

35 Commenting on the ICJ opinion, the 'foreign minister' of Kosovo, S. Hyseni, said: 'It is clear that Kosovo's independence has not set any precedent. Kosovo is and has always been a special case.' Foreign minister of Italy F. Frattini said that the ICJ's decision 'clearly states that Kosovo must remain a unique case and that it cannot cause a domino effect, since such an event would lead to a crisis of international relations'. The UK foreign secretary, W. Hague, said that 'Kosovo is a unique case and does not set a precedent'. And assistant Secretary of the US State Department Ph. Gordon, said that 'The court's opinion was closely tailored to the unique circumstances of Kosovo. This was about Kosovo. It was not about other regions or states. It doesn't set any precedent for other regions or states', available at www.state.gov/p/eur/rls/rm/2010/145104.htm. All this information has been compiled in Wikipedia entry *Reactions to the International Court of Justice Advisory Opinion on Kosovo's Declaration of Independence*, available at en.wikipedia.org/wiki.

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as a legal argument in order to convince the international community that this case is so unique that it is situated out of the realm of international law and cannot be considered in any way as a 'precedent' for future secessionist attempts. The goal of the argument was thus to suggest that Kosovo is situated in a 'twilight zone', where, as by miracle, and 'in the interest of International stability', international law does not apply any more.[36]

Although the ICJ did not discuss this argument as such, its methodology clearly demonstrates that the Court rejected this position. Nowhere in the advisory opinion did the Court treat Kosovo as a 'unique' case. The Court *accepted* to examine the lawfulness of the declaration of independence of Kosovo both under general international law and under the *lex specialis* created by Security Council Resolution 1244. This is very important because it demonstrates that international law cannot be waived as a matter of political discretion and convenience. It goes without saying then that all that the Court has stated about secession is applicable not only to Kosovo, but also to all secessionist attempts all over the world. The 'precedential effect' of this case can thus not be avoided.

2.2. The Court refused the argument that international law does not deal with secession and unilateral declarations of independence

During the proceedings, a limited number of states advanced the argument that 'international law does not regulate declarations of independence'.[37] This position was based on the old theory, stemming from Jellinek, that the creation of a state is always a simple fact remaining outside the realm of law. According to this theory, the state is a 'primary fact', and international law cannot regulate its birth. It can only take note of its existence exactly in the same way as domestic law takes note of the birth of a human.[38] According to the states that presented those arguments at the Court, even if the creation of the state is the product of an aggression or of another significant violation of international law, the problem cannot be addressed in terms of 'validity' or the 'legality' of the creation of a new state, but only under the angle of international responsibility (and the obligation not to recognize a situation created by a violation of a fundamental rule of international law).[39]

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36 As Cyprus emphasized, Written Statement Commenting on Other Written Statements of the Republic of Cyprus (2009), at 28: 'This argument does not purport to apply the general rules of international law to special facts; on the contrary it attempts to exempt the situation of Kosovo from the rules.'

37 See, e.g., Kosovo, Verbatim Record, CR 2009/25 (2009), at 39.

38 For a detailed presentation and discussion of this theory, see T. Christakis, 'The State as a "Primary Fact": Some Thoughts on the Principle of Effectiveness', in M. Kohen (ed.), *Secession: A Contemporary International Law Perspective* (2006), at 138–70, and A. Tancredi, 'A Normative "Due Process" in the Creation of States through Secession', in Kohen, *supra*, at 171–207.

39 Burundi's main argument was that 'The creation of a State is a question of fact and cannot be the object of a judgment of validity'. For Burundi, 'to pursue an argument of validity in this case would be tantamount to espousing what, in the theory of international law, is traditionally regarded as a "Kelsenian" approach .... Such an approach would presuppose that, of itself, international law *validates* the creation of subjects of the international legal order. According to Burundi, this concept does not correspond to positive international law. International law does not regulate the creation of states as regards the exercise of the right to self-determination, the violation of the latter having no consequence as regards validity, only as regards responsibility, for example with respect to the obligation not to recognize. This is confirmed by practice, as the case of Rhodesia illustrates. Moreover, it is because international law does not validate the creation

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The Court rejects this argument in an indirect but clear way. Noting the fact that several participants have invoked resolutions of the Security Council condemning particular declarations of independence (as in the cases of Southern Rhodesia, Northern Cyprus, or the Republika Srpska), the Court did not find that the Security Council was wrong, and it did not state that international law cannot regulate the creation of a state, but instead that:

> the illegality attached to the declarations of independence stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).[40]

It is then clear that according to the Court, a declaration of independence *can*, in some situations (and especially in the case of external aggression), be illegal and create an unlawful situation. It is precisely because this illegal situation exists that there are some important consequences in the field of international responsibility, like the obligation not to recognize a situation created by a violation of a fundamental rule of international law.[41]

We thus consider that the position of the Court confirms that secession is not only a question of 'fact', but also a question of 'law' and that the traditional factual criteria for statehood can be and have been progressively complemented by some legal ones. The maxim *ex injuria jus non oritur* defines the external limits of acceptance of the principle of effectiveness.[42] It is interesting to observe that the overwhelming majority of states participating in the proceedings, including many who pleaded in favour of Kosovo, accepted that in some cases, and especially in case of illegal use of force,[43] secession is illegal. As France stated:

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of States that secessions are almost always regarded, in doctrine, as pure questions of fact which are not subject to any judgment of validity as regards international law' (Burundi, Verbatim Record, CR 2009/28 (2009), at 32 ff., notes omitted). Similarly, Kosovo argued that 'several States claimed during the written phase that declarations of independence are actually subject as such to the requirement of compliance with international law, because in certain situations, such as where an attempt is made to create a State by the use or threat of force by a third State or a régime is established based on apartheid or racial discrimination, these declarations are not recognized by the international community and are even declared invalid by the Security Council . . . . However, in no way does it follow from the examples given in the Written Statements and Comments that declarations of independence proclaimed, for example, with resort to armed force are intrinsically invalid; instead their condemnation by the Security Council and the international community stems from the principle that there should be no recognition of a situation created by a serious breach of an obligation arising under a peremptory norm of general international law and no aid or assistance rendered in maintaining such a situation' (Kosovo, Verbatim Record, CR 2009/25 (2009) at 41, notes omitted).

40 *Kosovo* AO, *supra* note 10, at 81.

41 In the case of violation of a peremptory norm, this illegality exists, according to us, in an intrinsic way and independently of the adoption of a UN Security Council resolution asking states not to recognize the illegal situation thus created. For an analysis of this point, see T. Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales', in Ch. Tomuschat and J. M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (2005), at 134 ff.

42 Christakis, *supra* note 38, at 139.

43 See, e.g., Written Statement of Switzerland (2009), para. 28; Written Statement of the Federal Republic of Germany (2009), at 29; Written Statement of the Republic of Estonia (2009), at 4; Written Statement of Finland (2009), para. 2; Written Statement of Ireland (2009), para. 22.

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> If Kosovo's declaration of independence could be considered to be the consequence of the violation of one of those fundamental principles or one aspect of a complex situation that constituted a violation of that nature, it would certainly be within the discretion of the Court to find the declaration to be contrary to international law. But the fact is that none of these prohibitory rules is relevant in this case.[44]

In this respect, it should be remembered that what happened in Kosovo after 1999 (and thus after 2008 also) was very much the result of a massive military intervention of NATO states against Serbia. The legality of this military intervention was seriously put in doubt and Serbia tried unsuccessfully, as we know, at that time, to bring the case before the Court.[45] But during the Kosovo proceedings, neither Serbia nor any other state used the argument of the illegality of the NATO military intervention, which probably indicates that even Serbia now considers that the causality link between the 1999 military intervention and the 2008 declaration of independence of Kosovo is too remote.

2.3. The Court reaffirmed that there is no general prohibition against unilateral declarations of independence (but neglected to mention that international law disfavours secession)

The Court found that outside these exceptional circumstances, no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council or from any other factor(s). Nobody can seriously dispute this position, which was skilfully expressed by Professor Crawford in his oral presentation at Court:

> Mr. President, Members of the Court, I am a devoted but disgruntled South Australian. 'I hereby declare the independence of South Australia.' What has happened? Precisely nothing. Have I committed an internationally wrongful act in your presence? Of course not.[46]

It is almost undisputed that international law does not, in principle, prohibit secession, unless, of course, there is a violation of a fundamental principle such as the prohibition of aggression, as stated before.

But that is only half the truth. The Court's statement could give the impression either that separatist movements can act without restrain in a '*Lotus* land of freedom' or that international law is completely neutral in this field. From this point of view, the advisory opinion could have, to quote Judge Skotnikov, 'an inflammatory effect'.[47]

The Court could have added the other half of the truth, which is that if international law does not, in principle, prohibit secession, then this does not mean that

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44 Written Statement of the French Republic (2009), para. 2.14.

45 See *Legality of the Use of Force (Serbia and Montenegro v. United Kingdom), (Serbia and Montenegro v. Portugal), (Serbia and Montenegro v. Netherlands), (Serbia and Montenegro v. Italy), (Serbia and Monténégro v. Germany), (Serbia and Montenegro v. France), (Serbia and Montenegro v. Canada), (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgments of 15 December 2004.

46 United Kingdom, Verbatim Record, CR 2009/32 (2009), at 47.

47 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010 Dissenting Opinion of Judge Skotnikov, para. 17.

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international law is 'neutral', or that it puts the state and the separatist movement on an equal footing. International law dislikes, disfavours, secession and erects many barriers against secession. The main obstacle is that international law creates a presumption against the effectiveness of the secession and in favour of the territorial integrity of the parent state, which can use all lawful means at its disposal in order to battle secession.[48]

2.4. The Court took the controversial position that the principle of respect of territorial integrity of states is confined to the sphere of relations between states

In paragraph 80 of the *Kosovo* AO, the Court states that 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'. Although this is a widely held doctrinal position,[49] the Court should have been more cautious, for at least two reasons.

First, recent practice clearly indicates that the principle of respect of territorial integrity of states is not confined to the sphere of relations between states, but also applies to entities within those states.[50]

International organizations such as the UN, or regional organizations, have frequently used the principle of respect of territorial integrity of states in an exclusively internal separatist conflict. When, for example, in 1997, the Organisation of African Unity declared to do 'everything in its power' to fight secession in the Comoros in order to implement the 'cardinal principle of the OAU of respecting the unity and territorial integrity of States', it was clear that this principle was not 'confined to the sphere of relations between States' (no external involvement was present in this case).[51]

It is additionally clear that the 'saving clauses' based on this principle and introduced in some well-known international treaties or to the United Nations or other declarations concerning minorities or indigenous peoples have as recipients not only other states (in order to avoid any external assistance to separatism), but also those minorities or indigenous peoples. For example, Article 21 of the 1995 European Framework Convention for the Protection of National Minorities clearly states that:

> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.[52]

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48 See T. Christakis, 'La sécession: Une question de simple fait?', *Working Papers of the European Society for International Law* (2007), available at www.esil-sedi.eu/fichiers/en/Agora_Christakis_855.pdf.

49 See Written Statement of Austria (2009), para. 37; Written Statement of the Republic of Estonia (2009), at 4; Written Statement of the French Republic (2009), paras. 2.6–2.8; Written Statement of Ireland (2009), para. 18; Written Statement of Switzerland (2009), para. 55; Written Statement of United Kingdom (2009), paras. 5.8–5.11; Written Statement of the United States of America (2009), at 69.

50 For a detailed presentation, see Christakis, *supra* note 18, at 177–236.

51 Ibid., at 231.

52 The French text indicates even more clearly that the principle of territorial integrity applies also to individuals: '*Aucune des dispositions de la présente Convention-cadre ne sera interprétée comme impliquant pour un individu*

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It seems that the goal of the introduction of the principle of respect of the territorial integrity of the parent state in these treaties and declarations is not to *prohibit* secession. But the 'internal' use of this principle has the goal of demonstrating that the rights proclaimed in those instruments do not include a right to external self-determination and of demonstrating that international law disfavours secession and protects the existing states against disintegration.[53]

The second reason for which the Court should have been more cautious is that its position could have an unwelcome effect in resolving future separatist conflicts.

In the case of Kosovo, the principle of respect of territorial integrity of Serbia stemmed not only from general international law, but also from the *lex specialis*: it is precisely on the basis of the Security Council Resolution 1244, guaranteeing that its territorial integrity would not be threatened, that Serbia accepted to withdraw its troops from Kosovo and permit the deployment of international forces. If paragraph 80 of the *Kosovo* AO could be interpreted as meaning that the scope of the principle of territorial integrity is *always* and *necessarily* 'confined to the sphere of relations between States',[54] this means that states all over the world facing separatist conflicts should no longer trust the guarantees offered in general by international instruments and more specifically by ad hoc resolutions of international organizations, including the UN Security Council. Indeed, a devil's advocate could argue that if the 1999 'deal' is broken, if, in other terms, the guarantee (the protection of its territorial integrity against secession) on the basis of which Serbia accepted to withdraw from Kosovo is not valid, then Serbia should be allowed to defend its territorial integrity against separatism, in exactly the same way as any sovereign country in the world has the right to defend its territory against secession.[55]

Fortunately, Serbia declared that it had no intentions of this kind.[56] But henceforth, which state would be foolish enough to accept arrangements that include loss of effective control? Will countries accept the guarantees of the UN Security Council or any other international organization promising respect of their territorial integrity in exchange for autonomy or provisional international administration arrangements knowing that 'the scope of the principle of territorial integrity is *confined* to the sphere of relations between States' and that this guarantee does not bind the separatist movement that can take advantage of the situation in order to declare

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un droit quelconque de se livrer à une activité ou d'accomplir un acte contraires aux principes fondamentaux du droit international et notamment à l'égalité souveraine, à l'intégrité territoriale et à l'indépendance politique des Etats' (emphasis added).

53 Christakis, *supra* note 18, at 180–3.

54 This interpretation is possible. Indeed, the Court not only used the term 'confined', but it also stated no exception to this 'confinement'.

55 Central governments facing separatist conflicts all over the world use, if needed, police or military force to quell armed separatist movements. During those last years, for example, states like Russia, India, Sri Lanka, Indonesia, the Philippines, Papua New Guinea, Georgia, China, the Comoros, Senegal, and many other states in all continents took action to defend their territory against secessionist attempts.

56 In all declarations since the UDI of Kosovo and since the ICJ *Kosovo* AO, Serbia clearly stated it will only seek a solution by 'peaceful means'. See, e.g., V. Jeremić, minister for foreign affairs for Serbia, during the discussion of the *Kosovo* AO at the UN security Council, UN Doc. S/PV 6367 (2010), at 6: 'From the very onset of this grave crisis, the Republic of Serbia responded to the UDI in a non-confrontational manner. We will continue to use all diplomatic resources at the disposal of a sovereign State to oppose this attempt to forcibly change our borders in peacetime.'

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independence and establish effective control? From this point of view, Kosovo is a 'precedent' and a bad one.[57] What the Court has said about 'territorial integrity' could render countries extremely sceptical of international involvement in their separatist conflicts exactly at the point in time that it is needed the most.

57 Indeed, the *Kosovo* AO has been received with great enthusiasm by separatist movements all over the world (see the Wikipedia entry *Reactions to the International Court of Justice Advisory Opinion on Kosovo's Declaration of Independence*, available at http://en.wikipedia.org/wiki).

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