

## **The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or principles?**

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## Abstract

In its Advisory Opinion of 22 July 2010, the International Court of Justice concluded that the declaration of independence in respect of Kosovo in its precise historical circumstances "did not violate any applicable rule of international law". In its reasoning, the Opinion is concerned with territorial integrity, self-determination and Security Council competence under Chapter VII UN Charter. The Court's Opinion – its reasoning and outcome – can be assessed from several angles. Adopting instead the perspective of legal theory, our concern will be what we can learn from the Opinion about the normative structure of international law in general, and as applied in the context of secessions in a non-colonial context. The paper will argue that the approach of the International Court of Justice to international law, as evidenced in the case at hand, may be labeled rule-oriented. After reconstructing the main planks of the Court's reasoning, the paper will set out an alternative conceptual framework, arguing for a shift from a rule-centered to a principle-based approach to international law in the interest of legal certainty. It will then explore what room there is for such an approach to secessionist situations based on the understanding of self-determination as principle.

## A. Introduction

A UN General Assembly resolution adopted on 8 October 2008 backed the request of Serbia to seek an Advisory Opinion from the International Court of Justice on the legality of Kosovo's unilaterally proclaimed independence.<sup>1</sup> The International Court of Justice delivered its Advisory Opinion on 22 July 2010.<sup>2</sup> It concluded that the declaration of independence in respect of Kosovo in its precise historical circumstances "did not violate any applicable rule of international law".<sup>3</sup> For the Court of Justice, this was a case of first impression insofar as it touches on the matter of secession in a non-colonial context, a matter concerning the fundamental

<sup>1</sup> GA Res. 63/3, 8 October 2008.

<sup>2</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010 [Kosovo-Opinion], available at <http://www.icj-cij.org/docket/files/141/15987.pdf> (last visited 28.11.2010).

<sup>3</sup> Para 3 of the operative clause, Kosovo-Opinion, *supra* note 2, 44, para. 123.

structure of international law. In its reasoning, the Opinion is concerned with territorial integrity, self-determination and Security Council competence under Chapter VII UN Charter. The Court's Opinion – its reasoning and outcome – can be assessed from several angles. A doctrinal standpoint for instance would query the compatibility of the Court's pronouncements with the system of international law as hitherto understood or properly to be understood. A consequentialist or functional standpoint for instance would ask whether the outcome of the opinion on secession in a non-colonial context is conducive to the values of the international community. In that respect, it could be stated that the Opinion furthers a negotiated outcome, by removing rights that either the territorial state or the group seeking secession may use to hold back. There is now no legal right against secession that the territorial state could invoke and which would allow it to hold out during the negotiations. Lacking a right to oppose the potential case of secession, the territorial state is well advised to fully engage in any international process of negotiations set up by the international community. But neither has the group a recognized right to remedial secession. They also can be assured of making a declaration of independence not running foul of the law only at the issue of fruitless negotiations. So they, too, have an incentive to engage in these negotiations.

None of these perspectives, all of them interesting in their own right, shall concern us in these pages. It is felt that these perspectives cannot exhaust the matter, or do justice to this rich Opinion. Adopting instead the perspective of legal theory, our concern will be what we can learn from the Opinion about the normative structure of international law in general, and as applied in the context of secessions in a non-colonial context.<sup>4</sup> The Court's Opinion lends itself to this perspective for it positions itself very clearly. The paper will argue that the approach of the International Court of Justice to international law, as evidenced in the case at hand, may be labeled rule-oriented. A Rule is any norm whose structure can be described as consecutive. If the conditions x are fulfilled, consequence y results. The first part of this paper will reconstruct the main planks of the Court's reasoning, showing that the Opinion's rule-centered approach. Part 2 will offer a critique that it does not further the value of legal certainty as much as the Court may have hoped. It will then set out an alternative conceptual framework. It will argue for a shift from a rule-centered to a principle-based

<sup>4</sup> For a more detailed account of the underlying legal theory see A. Halpin & V. Roeben, 'Introduction', in A. Halpin & V. Roeben (eds.), *Theorising the Global Legal Order* (2009).1-8

approach to international law. Part 3 will explore what room there is for such an approach to secessionist situations based on the understanding of self-determination as principle. The paper will finish with a number of conclusions.

## B. What the Court Said: a Rules-Centered View of International Law, and its Application to the Case at Hand

This part of the paper will offer a reconstruction of the Kosovo-Opinion by focusing on four critical junctures. These junctures are: the premise that the Court must look for prohibitive rules of international law only (I), the “horizontal” rule-interpretation of territorial integrity (II), the equally rule-modeled interpretation of Security Council Resolution 1244 (III), and the inconclusiveness of a right to remedial self-determination in a non-colonial context (IV).

### I. The Premise: There Must be a (Prohibitive or Permissive) Rule of International Law

Throughout the Opinion, the Court of Justice consistently adopts a specific lens or premise for identifying and construing relevant norms. This premise is articulated in the opening paragraphs of the Opinion,<sup>5</sup> shaping the subsequent reasoning of the Court. This premise of the Opinion is that it is the General Assembly’s request for an Advisory Opinion on the “Accordance with international law of the declaration of independence” means “non-prohibition by international law”. In other words, there must not be norms prohibiting the DI, or expressly permitting it as that would logically exclude a prohibition. It is noteworthy that the Court here relies on procedure only, on an interpretation of the request of the General Assembly for an Advisory Opinion. There is no attempt to link this procedural point to a consideration of underlying substantive structure of international law.<sup>6</sup> But

<sup>5</sup> Kosovo-Opinion, *supra* note 2, 19, paras 49-51.

<sup>6</sup> Kosovo-Opinion, *supra* note 2, 21, para. 55 and 56 seemingly do so. But they really consider the subtly different question of the consequences of a declaration of independence. By contrast, the Permanent Court of International Justice, in *Lotus*, placed the very notion of prohibitive rules in the context of substantive law, “*Lotus*”, Judgment, No. 9, 1927, P.C.I.J., Series A, No. 10, 18. See below sub III.1b).

folded into this explicitly articulated statement of the Court there is a second yet unarticulated premise. This second premise is that the relevant norms will be constructed as rules in the structural sense outlined above. They will not be seen or construed as principles.

This two-fold premise leaves the Court with a clean course for the remainder of the Opinion. It will be checking whether there are rules that prohibit (expressly permit) the declaration of independence in relation to Kosovo. The Court focuses in turn on general international law (2), S/Res 1244 (3) and self-determination (4), each of which it discards in turn.

## II. General International Law: Territorial Integrity as a “Horizontal” Rule

The first substantive yardstick that the Court employs is territorial integrity, in this case of Serbia. This is seen as a norm of general (customary) international law although it is also enshrined in the Charter making it treaty law, but the Court really makes short shrift of it by simply and authoritatively stating that territorial integrity applies between States only, horizontally, but not vertically within one state.<sup>7</sup> It can therefore not prohibit acts of a non-state actor such as a declaration of independence expressed by a people claiming self-determination. Territorial integrity is directed against other states only. Not against non-state actors.

The Court is not ready to interpret territorial integrity in a more open way. As such it is not open to a broader interpretation that would have resort to the spirit of the norm as reflected in relevant documents. As a matter of positive international law, the exclusively horizontal understanding of territorial integrity is a somewhat problematic interpretation of the principle that may be seen as disconnected from the development of PIL since the adoption of the Charter. A closer analysis of the documents cited by the Court itself would reveal that they are concerned with territorial integrity in a horizontal context. That is arguably true for the so-called safeguard clause of the Friendly Relations Declaration<sup>8</sup> as it is for Art. 46(1)<sup>9</sup> of the

<sup>7</sup> Kosovo-Opinion, *supra* note 2, 30, Para. 80.

<sup>8</sup> GA Res. 2625 (XXV), 24 October 1970.

<sup>9</sup> Article 46 (1) reads: Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the

Declaration on Rights of Indigenous Peoples.<sup>10</sup> Be that as it may, the Court could not have expressed itself more clearly: For the Court, territorial integrity is a rule the meaning of which is precisely determined.

### III. Security Council Resolution 1244 is an Interim Arrangement Only

A similar approach underlies the interpretation and application of the controlling Security Council resolution 1244(1999). The Court proceeds to the question whether S/RES 1244(1999) prohibits the declaration of independence in relation to Kosovo. The Court denies this question. The Court initially advances an interpretative theory for Security Council resolutions.<sup>11</sup> This Court acknowledges the relevance of Arts. 31-32 Vienna Convention on the Law of Treaties, but it emphasizes that the resolutions of the Security Council are collective acts of the organ of an international organization. This interpretative theory remains somewhat unfinished business and it is not clear which parts of the Court's subsequent reasoning bear it out. It seems, however, to support a rather narrow reading of Security Council 1244, as a sort of stop gap measure: The resolution does not apply in the case at hand, so says the Court, for it only addresses itself to the Provisional Institutions of Self-Government of Kosovo, which, however, did not issue the declaration. As to S/Res 1244, the Court finds it to be essentially an interim arrangement, establishing provisional territorial administration including the PISG and an internationalized framework for negotiations that stops well short of determining the final status of Kosovo.<sup>12</sup> S/Res 1244(1999) is a rule the meaning of which is precisely determined. In this reading, S/Res 1244 cannot adapt to changing realities and cannot be seen as a measure that can steer a process rather than an arrangement frozen in time. That leaves the Court with secondly stating whether the declaration of independence is an act of the PSIG and as such is covered by S/Res 1244 or not. According to the Court, the declaration of independence is an act not of the PISG but of members of the PISG acting in a different capacity.<sup>13</sup> Here much rides on the facts, namely the precise

territorial integrity or political unity of sovereign and independent States (emphasis added).

<sup>10</sup> GA Res. 61/295, 13 September 2007.

<sup>11</sup> Kosovo-Opinion, supra note 2, 34, para. 94.

<sup>12</sup> *Id.*, 36, para. 99.

<sup>13</sup> *Id.*, 36, para 102 reads: "The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of

timing of the declaration of independence and the circumstances surrounding it. It is worthwhile quoting the relevant para. 105 of the Opinion:

“105. *The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. ...Proceeding from there, the authors of the declaration of independence emphasize their determination to “resolve” the status of Kosovo and to give the people of Kosovo “clarity about their future” (thirteenth preambular paragraph).* This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo “as an independent and sovereign state” (para. 1) (emphasis added).

From this, the Court then concludes that this is not an act *ultra vires* of the Provisional Institutions of Self-Government (PISG)<sup>14</sup> but rather that the declaration of independence was taken by self-constituting representatives of the Kosovo people rather than the PSIG.<sup>15</sup>

The problem with this is that there now is actually much less legal certainty than meets the eye. It remains doubtful whether the declaration of independence is actually an act by the *pouvoir constituant* of the Kosovo people rather than the *pouvoir constitué* of the PISG.<sup>16</sup> While the elections to the PISG conferred would have conferred authority from the Kosovo people on the administration of the self-governance regime under Res. 1244 only, it would not have conferred the authority for setting up a new constitutional regime. Most glaringly, it remains unclear whether the framework of S/Res 1244 would have taken a position on a hypothetical declaration of independence at an earlier point in time. Further crucial issues

the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.”

<sup>14</sup> *Id.*, 39, para. 108.

<sup>15</sup> *Id.*, 39, para 109 reads: “The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”

<sup>16</sup> As for instance Germany argued in its Written Comments, July 2009, available at <http://www.icj-cij.org/docket/files/141/15690.pdf> 7. In that vein, all further action by the PISG such as the adoption of a constitution would also reflect the authority of the *pouvoir constituant* acting through the existing institutions.



remain unresolved, namely whether the Security Council under Chapter VII could actually set parameters for the final status negotiations, whether the resolution remains in force even after self-constituting acts of the sovereign. However, the Opinion does not give answers to all of these points. It would seem fair to say that little or no guidance on declarations of independence in a secessionist context can be taken from the rule-centered line of reasoning of the Court.

#### IV. There is no Right to a Declaration of Independence in a Non-Colonial Context

A right (for whichever bearer) to independent statehood would encompass the right to issue a declaration of independence as a necessary preliminary step. Such a right would be an explicit permissive rule that would logically exclude any prohibitive rule applying to the same set of facts. The Court approaches this issue twice. At the very outset of the opinion, the Court deals with self-determination in its colonial dimension. The Court clarifies this by stating that the right to self-determination of peoples under colonial domination does indeed extend to the right to create an independent state, and so the Court implies, making a declaration of independence is a step in the process of creating that state. That right may not be opposed by other states including the colonial power. But self-determination has not matured into a right to statehood outside of this context. At the end of its Opinion, the Court then revisits the issue, tackling the question of self-determination as a right for a group to secede from an existing sovereign. In reply, the Court quite simply points to the inconclusiveness of States' views as expressed in their Written Statements. There is no *opinio iuris*.<sup>17</sup> Quite what the status of a declaration of independence in a non-colonial context is the Court does not say. The Court does not need to dig any deeper here since anything below a fully fledged

<sup>17</sup> It is an interesting question what legal value accrues to the positions taken by States in Written Statements and Comments made in the proceedings of the Kosovo-Opinion. A full discussion is beyond the scope of this paper, but surely these are first of all part of court proceedings, and the position may be taken that they collectively have value only to the extent that the Court makes reference to them in the text of the decision or opinion. However, it may also be argued that it surely would seem contradictory for each state that has gone on record through a Written Statement to express a legal opinion not in line with the Statement on other occasions, unless justified by reference to the Court pronouncement on the issue.

right would not logically exclude a prohibition of a declaration of independence, which is what the Court is interested in.

### C. A Critique of the Court's Rule-Centered Approach and its Alternative: Principles in International Law

Throughout its Opinion, the Court adopts rules-based approach. That is true even with respect to territorial integrity and self-determination both of which would naturally lend themselves to a different principle-based approach. With respect to territorial integrity, the Court essentially foregoes resort to the spirit of territorial integrity. It does so by interpreting territorial integrity as rule fixed in its conditions and consequences as accepted at a certain point in time. Similarly, self-determination is seen as a rule or rather a reservoir of rules. There is one in for a declaration of independence in a colonial context and one for a declaration of independence in a non-colonial context. Security Council resolutions are also subjected to a narrow reading seeking to distil them into rules fixed in time and meaning.

Several possible justifications for such a rule-based approach can be thought of. The consensual legitimacy of international law could be such a justification as could be the self-perception of an international court as a dispenser of justice not as an activist developer of international law. Both of these justifications would coalesce around legal certainty. An assessment of the Opinion against the yardstick of legal certainty leaves the following result: the state of affairs for declaration of independence in a colonial context remains unsettlingly uncertain in spite of the apparent clarity and rigor of the Court's reasoning. It remains unclear what the coverage of the Court's findings really is beyond the precise historical circumstances of the case. Does the Opinion extend to declaration of independence in the precise historical circumstances only as determined by the Court, i.e. by a group of persons issuing the declaration of independence at the unsuccessful completion of a lengthy internationalized negotiation process? Would it have covered an earlier declaration of independence as well, or can the law be considered to frown on such a premature DI? These questions cannot easily be answered from the Opinion, if at all. Ultimately, this uncertain state of affairs is the result of the exclusively rule-centered approach of the Court. Measured against the yardstick of legal certainty, not so much seems to speak in its favor.

The rule-centered approach to international law is not without alternatives. More coherence of the law, more predictive power and ultimately greater legal certainty can be expected from a principle-based

approach. Rules and principles are the two sides of a basic distinction in legal theory, and the characteristics of one category of norms are the reverse of the other category's characteristics. Principles are inter-subjective values, but more than that a legal principle is directive in nature. A norm having the structure of a principle allows for a reasoned or discursive understanding of the spirit of the norm, which may change over time, and it also allows for varied consequences to be provided. The consequences of rules are limited to the dichotomy of lawful or not lawful. Rules allow for a binary logic only. Principles are not limited to this binary logic as to the potential consequences. Rather the understanding of the function and spirit of the principle and the range of consequences correlate. It is a fair statement that there is now considerable agreement in legal theory about the distinction between principles and rules.<sup>18</sup> There is less clarity about the proper way of concretizing principles, of progressively developing the spirit of a principle, which, of course, the possibility of which is, of course, very much the point of having principles in the first place. Several approaches can be envisaged. One would be empirical. A second conceptual approach may be seen as normative in nature. Again, there are two ways through which normative concretization of a given general principle can conceivably be achieved, one extrinsic and one intrinsic. Extrinsic normative concretization of a given principle may be achieved through balancing with conflicting extrinsic principles under proper principles of conflict and coordination. Intrinsic normative concretization may be achieved through adducing additional principles that do not conflict with but rather complement the principle in question. Intrinsic may be understood as here are referring to issues that arise in and of itself at medium levels of abstraction.

#### D. Conceptualizing Self-Determination as a Principle in a Non-Colonial Context After Kosovo?

Part 3 of this paper will apply this theoretical framework to the positive law of self-determination in a non-colonial context, bearing in mind the parameters set by the Court in *Kosovo*. This will be undertaken in four steps: there is a principle of self-determination in positive international law

<sup>18</sup> For an excellent recent discussion of the principle-rule distinction including intrinsic and extrinsic elements as well as further relevant references see S. Macdonald, 'A suicidal woman, roaming pigs and a noisy trampolinist: refining the ASBO'S definition of "anti-social behaviour"', *69 Modern Law Review* (2006) 2, 183-213.

(I). A shared understanding of its meaning in a non-colonial context can be achieved intrinsically (II). This understanding requires proceduralization and internationalization (III). A declaration of independence within these parameters is then best understood to be an allegation of competences (*Kompetenzbehauptungen*), whose relative weight depends on the precise historical circumstances in which they are made (IV).

## I. Self-Determination as a Principle of Positive International Law

### 1. The UN-Charter

Self-determination is a principle of positive international law. The UN Charter enshrines the foundational principles of modern international law. One of these principles is the self-determination of peoples.<sup>19</sup> There is a core shared understanding of the principle of self-determination that has been established through state practice and the decisions of the Court, and that is the right to self-determination for colonial peoples. The right to self-determination of peoples under alien domination has legally undergirded and politically driven the creation of a large number of new states in Africa and Asia.<sup>20</sup> Indeed even the emphatic statement of the International Court of Justice that there is a “right” to self-determination not a mere objective principle may be seen to refer to the colonial context. Beyond that core, in a non-colonial context, the meaning and indeed function of self-determination have remained subject to controversy, mainly as to the position of socially and culturally discreet groups within a state. This is because self-determination of colonial peoples does not endanger the territorial integrity of any of the existing equal sovereigns, while self-determination resulting in the secession of a people from the territorial sovereign obviously does. As a minimum, it can be said that a consensus view distinguishes internal and external self-determination, primarily as a doctrinal distinction, but there

<sup>19</sup> In the context of the Charter, this principle has both an inherent and a functional significance. Inherent insofar as it is a collective human right, functional insofar as its full realisation will be conducive to the maintenance of international peace and security, the overriding objective of the Charter, by removing causes for conflict between peoples and nations.

<sup>20</sup> Kosovo-Opinion, supra note 2, 30, para. 79: self determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien domination.

remain doubts as to what external self-determination potentially means and whether it may even comprise so-called remedial secession in response to sustained systematic suppression of a minority. In some respects, therefore, the operationalization of the right to self-determination is asymmetrical. Well developed in the colonial context, much less well developed in other contexts. Alas, practically important is mostly the latter today.

## 2. The Principle of Self-Determination in the Non-Colonial Context: The Kosovo Opinion and its Take on Lotus

SD as a principle might in its spirit also extend to declarations of independence in a non-colonial context. The precise consequences would then have to be determined. But how much room is there for a principle of self-determination in a non-colonial context after the Kosovo-Opinion? The Court states that there is no right to remedial secession flowing from self-determination for lack of consistent *opinio iuris*. That leaves the reader baffled. Is there no substantive law on the issue, a *non liquet* of sorts? The Court, of course, does not say that either, it rather says that for procedural reasons it will look for prohibitive or permissive rules only. Whether there is any other substantive law will not retain the Court here. But the Court has in the past recognized that the procedural mandate for prohibitive rules does not exhaust the cosmos of law applicable in a given case. Quite the reverse, prohibitive rules receive their meaning in the context of such law and in particular principles only. This is the essence of the *Lotus* case. The reminiscences of the well known *Lotus* case in which the Permanent Court of Justice formulated its view of the structure of international law have already been highlighted.<sup>21</sup> In *Lotus*, of course, the PCIJ was also proceeding from a procedural perspective, the *compromis* between France and Turkey, which asked the PCIJ to identify prohibitive rules restricting the extraterritorial exercise of Turkish jurisdiction. But the *Lotus*-Court went beyond the *compromis*, expressly stating that it was in line with the substantive structure of international law. The *Lotus*-Court's restatement of substantive international law in its completeness contextualized the

<sup>21</sup> Declaration of Judge Simma, available at <http://www.icj-cij.org/docket/files/141/15993.pdf> (last visited 28.11.2010), 1, para. 2.

prohibitive rules on state conduct. It is worth quoting the original passage from the decision:<sup>22</sup>

“The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons is confronted in the first place by a question of principle which [...] has proved to be a fundamental one. [...] the Turkish Government takes the view that Article 15 [of the Turkish law] allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law. The latter view seems to be in conformity with the special agreement itself. [...] According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings. *This way of stating the question is also dictated by the very nature and existing conditions of international law. International law governs relations between independent States.* The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent entities with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”

The quote reveals that *Lotus* did not state that the Turkish exercise of extraterritorial criminal jurisdiction fell into a vacuum under international law. Rather it is covered by state sovereignty as a residual principle of international law of a general nature which, however, will cede to more specific rules. Far from saying that there was no international law other than the prohibiting rules, the PCIJ actually stated that the foundational *international law principle* of state sovereignty – or in Charter terms: equal sovereignty – would permit state action of any type, including extraterritorial jurisdiction, unless another rule of international law prohibited it. Under *Lotus*, a sovereign state is allowed to act as it wishes as long as it is not prohibited from doing so by a rule of international law. State

<sup>22</sup> *Lotus Case (France v Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No. 10, 18 (1927). (emphasis added).

sovereignty under international law thus permits all action by a state unless prohibited by a consensual rule (or expressly allowed by such a rule). This encompassing principle forms the bedrock of the claim of international law to forming a coherent legal order<sup>23</sup> rather than a mere collection of norms. As a legal order, international law will declare the legality or otherwise of any given course of action of states, but it will not countenance legally indifferent states of affairs<sup>24</sup>

In *Lotus*, far from letting procedure stand on its own, the PCIJ self-consciously reflected its procedural approach on the level of substantive law where the prohibitive rules were then perceived as constituting exceptions to a comprehensive permissive principle of international law, i.e. state sovereignty. The Kosovo-Court emulates the *Lotus*-Court only in respect of the procedural level but it does not explicitly reflect the procedure on the substantive level of international law. The Court's silence in this respect does not foreclose space for a substantive principle of self-determination to cover Declarations of Independence in a non-colonial context and to provide for their consequences. Indeed, a direct transposition of the *Lotus* principle to the case at hand is not possible since state sovereignty cannot provide the underlying principle justifying the Declaration of Independence in respect of Kosovo for the simple reason that Kosovo is not (yet) a sovereign state. But self-determination of peoples can take the place of state sovereignty. As pointed out above, the UN Charter recognizes self-determination as one of the principles upon which friendly relations between States shall be based. The Charter thus recognizes its foundational quality. This quality lies in the *aspirational* claim to political self-organization and self-government of a people that self-determination underpins. This claim encompasses all the steps that need to be taken en route to the establishment of statehood. Once statehood is reached, the people's claim to self-determination is subsumed by its claim to territorial sovereignty, at which point *Lotus* becomes applicable.

<sup>23</sup> Cf. A. Halpin & V. Roeben, 'Conclusions', in: A. Halpin & V. Roeben, supra note 4, 273-278.

<sup>24</sup> Cf. V. Bruns, 'Völkerrecht als Rechtsordnung', 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), 1, 6.

## II. Changing the Shared Understanding of Self-Determination

There may have been a shared understanding if not shared support for function and spirit of self-determination at the time of drafting and entry into force of the UN Charter. Self-determination was meant to bring colonialism to an end and to help the former colonies become sovereign states. As such the principle was applied, and through application and experience it hardened into a right of self-determination. But its underlying power of conviction also resided in the fact that there was a shared understanding if not necessary shared political support that this is what the Charter intended. Beyond this shared core, there is no fixed understanding. The question arises, then, how to achieve a shared understanding of self-determination in a non-colonial context. For self-determination to say something about declaration of independence in a non-colonial context presupposes a change in the received shared understanding of self-determination. Such change can be brought about by inclusive normative principles (3). On the other hand, the *Kosovo-Opinion* forecloses empirically changing the understanding of self-determination (1), and it also forecloses extrinsic concretization of the self-determination (2).

### 1. Empirical Change

The *Kosovo-Opinion* provided an opportunity for the Court, the principal judicial organ of the UN, empirically to advance and change the proper understanding of self-determination. The Court preferred, however, to adopt a restrictive rules-centered approach that positively restated the shared understanding that self-determination was a right in a colonial context.

### 2. Extrinsic Normative Change

The Court also makes it impossible to achieve any extrinsic normative concretization of the principle of self-determination. Such normative concretization would require the balancing of self-determination with another extrinsic principle. It is true that a clear candidate for an extrinsic principle to be balanced extrinsically with self-determination would be territorial integrity. Some of the written statements of States to the Court have anticipated this question, suggesting a legal framework for the exercise of the right to self-determination. A fine example of this approach is the Written Statement of Finland. Finland set forth the two principles of



territorial integrity and self-determination, and sought to achieve to balance them in the instance of the case, achieving *praktische Konkordanz*.<sup>25</sup> The doctrinal foundations of this elegant approach have, it has to be said, been knocked away by the Court's view that territorial integrity does not have a vertical application or protection against interference as a matter of positive international law. According to the *Kosovo*-Opinion, as has been seen above, territorial integrity applies horizontally only but not vertically and can therefore not be balanced with self-determination. The Court opinion may be seen as rejecting the relevance of extrinsic principles – such as territorial integrity – and this is a pronouncement that needs to be taken seriously. Thus, the *Kosovo*-Court spoke firmly on territorial integrity asserting its constitutional court functions. Under the firm pronouncement of the Court, territorial integrity does not bind non-state actors. This restrictive “horizontal” interpretation of territorial integrity chimes with the interpretation that the ICJ has given it in the context of the right to self-defense against an armed attack that a territorial sovereign enjoys under Art. 51 UN Charter. In both *Oil platforms*<sup>26</sup> and in *Congo/Uganda*<sup>27</sup>, the Court has reconfirmed that self-defense can only be exercised against an armed attack by another state, but not by other actors. The possibility of that interpretation, of course, had been implied by the Security Council in its resolution 1244 stating that the right to self-defense of the US was engaged by the Al/Qaida attacks of September 11<sup>th</sup> 2001.<sup>28</sup> It would seem that in this line of cases the Court is reaffirming its authority as the principal judicial organ of the UN making it the ultimate interpreter of the quasi-constitutional layer of public international law. Such authority of the Court would prevail over pronouncements of both the political organs of the UN and of its other judicial organs such as the International Criminal Court for the Former Yugoslavia. As a consequence, territorial integrity remains the law governing the relations between territorial sovereigns. There is no space left

<sup>25</sup> Written Statement of Finland, 16 April, p. 2-3, available at <http://www.icj-cij.org/docket/files/141/15630.pdf> (last visited 10 December 2010). The Written Statement of Germany follows a similar line of reasoning, Written Statement of Germany, 17 April 2009, 32-36, available at <http://www.icj-cij.org/docket/files/141/15624.pdf> (last visited 10 December 2010)

<sup>26</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I. C. J. Reports 2003, 161, 186, para. 51

<sup>27</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168, 223, para. 147.

<sup>28</sup> SC Res. 1368, 12 September 2001.

for either the Security Council or the GA developing it in a different direction.

### 3. Intrinsic Normative Change

This leaves normative change through intrinsic principles. This is the theoretical approach outlined above that focuses on additional intrinsic principles to advance the understanding of the most abstract or general principles. The general principle that we are concerned with here is of course self-determination. Such a quest first should be directed to identifying such principles as would intrinsically advance our understanding of self-determination. Additional principles of medium abstraction that could be advanced would be the proceduralization of substantive law and territorial administration. Such a principle of proceduralising contentious substantive law positions can be induced from a number of reference areas.

UN practice supports the conceptualization of (external) self-determination in its non-colonial context as process. In the first instance, UN Security Council secondary law is proceduralising the exercise of self-determination.<sup>29</sup> The *Kosovo*-Court acknowledges the manifold Security Council action regarding Kosovo and Serbia, and it expressly recognizes the resulting territorial administration of Kosovo as a legal concept. This may be seen as recognition of the continuing involvement of the UN in the process of achieving a negotiated and internationally supervised independence on the basis of self-determination. But the Court did not foreclose progressive development of self-determination in the non-colonial context by the UN's political organs through secondary law-making. Rather it implicitly endorsed the developments achieved by the political organs of the UN not just in Kosovo but also in other secessionist instances. It may even be lawful for the UN (the Security Council) to go beyond the template of S/Res 1244(1999) and to impose obligations not on the internationalized institutions of self-government of a people but on the people itself. Thus, the Court finds that the Security Council has proceeded to setting forth the inviolability of Cyprus and parameters of the final status of the disputed territory. By pointing to relevant Security Council Resolution/Res 1251 (1999)<sup>30</sup>, the Court arguably states that the potential authority of the Security Council exists to set parameters for the possible outcomes of internationalized negotiations in a secessionist situation. Such a parameter

<sup>29</sup> In *Lotus* terms, the subsequent placing of limitations on unfettered self-determination.

<sup>30</sup> *Kosovo*-Opinion, *supra* note 2, 40, para. 114.

can certainly be the preservation of the integrity of an existing territorial sovereign if the Security Council so wishes.<sup>31</sup> Seen in this light, the Kosovo-Opinion creates space at the level of primary law for the Security Council and the General Assembly progressively to develop self-determination in a non-colonial context through secondary law-making. At this point in time, the law has been evolving to the point that a case of systematic repression is a tipping point for the internal and the external dimension of self-determination but that there is an expectation on the people concerned that it will have to seek an internationalized negotiated solution with the territorial sovereign. The international community, acting through the UN Security Council, has the right to establish a territorial administration provisionally barring the territorial sovereign from exercising its powers while internationalized negotiations between the sovereign and the would-be secessionists are being conducted. In the practice of international law, it is increasingly becoming accepted that the response to instances of suppression involves the organized international community. Much as the original decolonization did. This involvement has taken various shapes and sizes, ranging from supervised elections to fully fledged territorial administration. In line with the way that international law is developing generally, there will be further cascading or incremental concretization of what the international community can do, on the one hand, and of what is expected of the people seeking secession, on the other. This development is achieved not through a balancing of the right to self-determination with conflicting principles of the same normative hierarchical value but through the development of secondary law by the UN – both through the Security Council and the General Assembly - within the sphere of application of the right to self-determination. It is also clear that this limitation on the exercise of the right to external self-determination is of a general nature, not confined to the specific instance of Kosovo.

#### 4. Declarations of Independence in a Non-Colonial Context

Understanding self-determination as aspirational self-government can be the basis for all acts falling under the thus determined remit. And a

<sup>31</sup> “The Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded”, SC Res. 1251, 29 June 1999, para 11. See also most recently resolution SC Res. 1930, 15 June 2010 on the situation in Cyprus focusing on the ongoing negotiations between the parties.

declaration of independence certainly fits this remit. The legal effects of such a declaration of independence must then be carefully determined. There is, the Court has pointed it out, not a right to make a declaration of independence as step on the way to nationhood that other states would have to respect. The fact that there is no right to self-determination through secession does not mean, of course, that Declarations of Independence in these contexts cannot be conceptualized legally. The Court was simply not concerned with any conceptualization below the level of a full blown legal right - a rule - that would positively permit the declaration. The declaration of independence in the case at hand is best conceptualized as an allegation of competence (*Kompetenzbehauptung*). A competence is alleged, but the consequence (only) is that the allegation may be challenged by states, including the territorial state.<sup>32</sup> Declarations of independence are not outside the law. There would be, of course, the possibility that international law does not extend to declarations of independence, that they belong to the political rather than the legal functional system. Indeed, while potentially unlimited in its reach, any given legal order may restrict its substantive reach. But the Court did not say that such declarations were outside of the reach of international law.<sup>33</sup> Rather the Court clearly says that the law – in the instance self-determination – can extend to declarations of independence and that is has done so in the colonial context. Declarations of independence are not per se out of reach of international law, they may be encompassed by self-determination. It is to be determined what position self-determination takes in respect of each historical declaration.

At the conceptual level, it is very much possible to argue that external self-determination is increasingly being operationalized through proceduralization and internationalization. It is arguably the case that S/Res 1244, even under the narrow interpretation of the Court, would not have tolerated a declaration of independence at an earlier stage when negotiations for a peaceful settlement were still under way. At an earlier juncture, the authors could not have viably claimed to speak as the *pouvoir constituant*. S/Res 1244 would arguably have forbidden it. It may be concluded that

<sup>32</sup> But the declaration of independence in the case at hand has had an effect on the UN and the territorial administration it has set up. In fact, the UN Secretary General started to reconfigure the functions of UNMIK as reaction to the Declaration, see e.g. Report of the Secretary-General on the United Nations Interim Administration of Kosovo, S/2008/692 of 24 November 2008, para.50.

<sup>33</sup> But see UK Written Statement, 17 April 2009, 125, available at <http://www.icj-cij.org/docket/files/141/15638.pdf> (last visited 12 December 2010).

general international law frowns upon premature declarations of independence. The concrete declaration of independence at issue here escaped this frowning because it was made at a point in time when negotiations had been undertaken but had exhausted themselves. The inconclusiveness of the Opinion in respect of the law that actually governs the situation in Kosovo after the declaration of independence has been discussed at Security Council. At the meeting of the Security Council on 3 August 2010, Member States agreed that the Opinion had not changed parameters significantly.<sup>34</sup> The Security Council meeting did not issue a resolution or any statement. As an organ, the Council remains silent, and this may be interpreted as acquiescence in the evolving framework for negotiations including the administrative restructuring of the role of UNMIK by the UN Secretary General.<sup>35</sup> By contrast, the GA has taken a position<sup>36</sup>, for which it is competent under Arts. 10 and 11 UN Charter<sup>37</sup>. The resolution endorses the continued regionalized negotiations:<sup>38</sup>

<sup>34</sup> Security Council 6367th meeting, 3 August 2010, UN Doc S/PV 63.67. UK and US have welcomed the opportunity to continue negotiations. Russia continues to consider the declaration of independence illegal, and so does Serbia which also continues to oppose it. In the Security Council meeting of 3 August 2010, The UNSG, who also heads UNMIK has emphasised that after the Opinion, outstanding issues may be solved through negotiation, that the status of S/RES 1244 remains unaffected, and that he is engaged in active negotiations with EULEX, Report of the Secretary General S/2010/401.

<sup>35</sup> In spite of Russian and Serbian protests, UN Secretary-General Ban Ki-moon proceeded with the reconfiguration plan. On 15 July 2008, he stated: "In the light of the fact that the Security Council is unable to provide guidance, I have instructed my Special Representative to move forward with the reconfiguration of UNMIK... in order to adapt UNMIK to a changed reality". According to the Secretary-General, the "United Nations has maintained a position of strict neutrality on the question of Kosovo's status", Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/458, 2. On 26 November 2008, the UN Security Council gave the green light to the deployment of the EULEX mission in Kosovo, Statement by the President of the Security Council, 26 November 2008, S/PRST/2008/44. The EU mission is to assume police, justice and customs duties from the UN, while operating under the UN resolution 1244 that first placed Kosovo under UN administration in 1999.

<sup>36</sup> GA Res. 64/298, 13 October 2010.

<sup>37</sup> The Kosovo-Opinion, supra note 2, 16, para 40, confirms this, reading as follows: "While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10

“/2 Welcomes the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people.”

This is an endorsement by the GA of the dialogue between Serbia and Kosovo on the way to full secession and full membership of the EU and of the continuing international oversight of the process. In other words, the GA, in the absence of another positive statement by the Security Council, has provided an indication by the organized international community about the possible final status solution. It is by implication full statehood of Kosovo as only sovereign states can be members of the EU. The international oversight of the process is a joint international and regional one. The international element continues to be provided by UNMIK, the regional by EULEX.<sup>39</sup>

and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, , paragraph 26, ‘Article 24 refers to a primary, but not necessarily exclusive, competence’. The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.“

<sup>38</sup> The UN GA did not fail to notice that its resolution 63/3 of 8 October 2008 had requested the International Court of Justice to render an Advisory Opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”, but that it received the Advisory Opinion of the International Court of Justice of 22 July 2010 on the Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo.

<sup>39</sup> As of 15 December 2010, 72 out of 192 (37%) United Nations member states have formally recognised the Republic of Kosovo as an independent state, for an overview see <http://www.kosovothanksyou.com/> (last visited 10 December 2010). Notably, 22 out of 27 (81%) member states of the European Union and 24 out of 28 (86%)

## E. Conclusions

This most anticipated Opinion of the Court undoubtedly disposes of the issue at hand. The opinion does, however, only shed light on a small fraction of the full normative picture relating to the matter of declarations of independence in a non-colonial context. The real value of the opinion may lie not so much in what it says but in what it does not say but implies.<sup>40</sup> It is, to use a metaphor, the dark side of the moon that should attract our attention. There are indeed two aspects to the Court's Opinion. The Court explicitly says that no rules of international law prohibit the declaration of independence in this non-colonial context. What it says not explicitly but impliedly is, however, probably more interesting. What it implies is that not rules but rather principles govern such secessionist situations: There is room for basing on self-determination such acts forming part and parcel of secession, but the consequence is not a right that would have to be respected by the other subjects of international law but rather a mere allegation of competence. As such, the declaration of independence will initially remain contestable by the territorial sovereign, but will increasingly be less so as negotiations progress and ultimately conclude.

This principle-centered approach may indeed be seen as inspired by the conception of international law first evidenced in the well-known *Lotus* case of 1927. A re-reading of the *Lotus* case confirms that the PCIJ in the case does not at all limit itself to determining negative, prohibitive rules. Rather it advances the idea of a system of international law centered on principles. State sovereignty as in *Lotus* may be seen as one – at the time probably the only principle of positive law – that could underlie the claim of international law to be a coherent normative system: a legal order. In modern international law, sovereignty is complemented by self-determination.

There then becomes visible a division of competence between the ICJ and the political organs of the UN for the progressive development of the foundational principles of international law. The Court of Justice assumes responsibility at the constitutional level setting the fundamental parameters

member states of NATO have recognised Kosovo. Russia and Serbia refuse recognition and China has expressed scepticism.

<sup>40</sup> Niklas Luhmann has not failed to point out that the law (as other societal functional systems) operates by putting distinctions into an existing unity. The focus on one side of the distinction does not mean that the other ceases to exist, rather the unmarked space it is always present. And the law can revisit this other side and start drawing new distinctions from there.

of the foundational principles, to the exclusion of the Security Council. But practice namely of the Security Council but also the General Assembly can then flesh out these fundamentals. The Court is leaving open the field of the law of self-determination in a non-colonial context to be progressively developed by other actors, namely the UN Security Council, the UN General Assembly, and the UN Secretary General. These bodies' law-making capacity is recognized and left unfettered, fleshing out the principle through the development of institutions of medium-level abstraction as well as permissive and prohibitive rule-making that matures over time. Such law will be secondary in nature in the sense that it results from the activity of the organs established by the Charter as primary law. The legal status of such secondary law will vary depending on the powers of each organ under the Charter. But that sustained practice of the Security Council will generate concept of a general nature on which it may draw when regulating specific instances of a conflictual self-determination. The Security Council enjoys broad discretion in framing the parameters for solving each case, including the permanent status of a territory.



The ICJ Advisory Opinion on the Unilateral Declaration of  
Independence in Respect of Kosovo: Rules or Principles?

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