TERRITORIAL INTEGRITY AND SELF-DETERMINATION: THE APPROACH OF THE INTERNATIONAL COURT OF JUSTICE IN THE ADVISORY OPINION ON KOSOVO

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1. Introduction

On 17 February 2008 Kosovo approved its declaration of independence from Serbia.[1] The declaration was raised as a unilateral secession, a category which to date is widely debated by the international community, but supported in that case by a large proportion of the United Nation member states.[2] As is well known, on 8 October 2008, through its resolution 63/3, the United Nations General Assembly issued a request for an advisory opinion to the International Court of Justice (ICJ). Serbia sought to have the court's opinion on whether the dec-

Article received 16/01/12; approved 29/02/12.

1. The translation into English of the full text of the declaration of independence of Kosovo is available at http://news.bbc.co.uk/2/hi/europe/7249677.stm (last visited on 7 December 2011).

2. When the Advisory Opinion was delivered 69 of the UN's 192 member states recognized Kosovo.

laration was in breach of international law and also to reopen the negotiating process for determining the future of Kosovo.[3] In a trial vote 120 of the 192 members gave their backing to Serbia's request to refer the matter to the ICJ.[4] The question was framed as follows:

> Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

The question was resolved by the International Court of Justice through the Advisory Opinion (*AO*) of 22 July 2010 on the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.[5] In this study we shall analyse some of the aspects arising from this ruling, focusing on the territorial issue. Firstly we shall analyse the scope of the principle of territorial integrity of States and how it operates, and secondly, we shall focus on the scope of that principle in relation to the interior of the State, and ask how international law operates in relation to declarations of independence. Lastly, we shall deal with the principle of respect for territorial integrity in the specific case of Serbia with respect to Kosovo, and then end with a series of general conclusions.

2. Territorial Integrity and International Law: A Principle That Operates Between States

The notion of territorial integrity is employed by very few international instruments. Article 2(4) of the United Nations Charter stipulates that "[A]ll Members shall refrain in their international relations from

3. A finding determining the declaration of independence unlawful might have returned Kosovo to the previous status, the status of an entity under international administration. Kosovo would have to resume negotiations on status and continue these until Serbia was ready to agree a settlement.

4. In the real vote, the United Nations General Assembly adopted this proposal on 8 October 2008 with 77 votes in favour, 6 votes against and 74 abstentions. See United Nations General Assembly Resolution 63/3 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 (A/RES/63/3).

5. International Court of Justice (ICJ), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), General List No. 141, 22 July 2010, hereafter *Kosovo AO*.

the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Article 2(4) of the United Nations Charter does not affect directly individuals or peoples, but rather, the relations between States.

The other important international instrument that refers the territorial integrity is the Helsinki Final Act (adopted on Aug. 1, 1975), requiring the following: "[T]he participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State …". The Helsinki Final Act condemns the use of force against territorial integrity: the use of external force or threat of use it against the territorial integrity and political independence. Nevertheless the Helsinki Final Act does not unconditionally advocate for the absolute maintenance of territorial integrity. Chapter 1 specifically holds that "[f]rontiers can be changed, in accordance with international law, by peaceful means and by agreement."[6] Within the domain of this provision the notion of territorial integrity is closely linked to the question of the use of external force, and is explicitly addressed to the participating States.

The principle of territorial integrity of states is well established and is protected by a series of consequential rules prohibiting interference within the domestic jurisdiction of states.[7] The principle of territorial integrity is traditionally interwoven with the fundamental principle of the prohibition of the threat or use of force. The principle appears to conflict on the face of it with another principle of international law, that of the self-determination of peoples.[8] As a general principle, the right to self determination will be exercised by peoples within the framework of the existing states, consistently with the maintenance of the territorial integrity of those states.[9] Although, following the traditional theory, the right to uni-

6. See also the Guidelines on recognition of New States in Eastern Europe and the Soviet Union adopted by the European Community and its member states on 16 December 1991, 92 ILR, p. 173.

7. See Malcolm Nathan Shaw, *International law* (Cambridge: Cambridge University Press, 2003) p. 443 *et seq.*

8. See *inter alia* ICJ, *Burkina Faso v. Mali*, ICJ reports, 1986, pp. 554; 80 ILR, p. 469.

9. See J. Crawford, "State Practice and International Law in Relation to Secession" 69 BYIL, 1998, p. 85.

lateral secession arises only in the most extreme cases, and under carefully defined circumstances (colonial situations where the group is subject to extreme and unremitting persecution).[10] The Supreme Court of Canada in the *Quebec case*[11] suggested also that secession might also apply to cases as a last resort where a people's right to internal self-determination was blocked.[12] In fact state practice shows that territorial integrity limitations on the right of self-determination are often ignored, as seen in the recognition of the independence of Bangladesh (from Pakistan), Singapore (from Malaysia), and Belize ("despite the claims of Guatemala"). In the same way, as the ICJ has highlighted, in the case of declarations of independence outside the context of the international law of self-determination (even during the second half of the twentieth century), the practice of the states does not point to the emerge in international law of a new rule prohibiting the making of a declaration of independence in such cases.[13] The ICJ considers that there is no emerging prohibition of secession as arising from the principle of territorial integrity.

In the *Kosovo AO* the ICJ has not challenged the traditional conception that the non-state entities are not addressed by the rule of territorial integrity but it has strengthened this view, as we will see below. In fact, the argument upheld by Serbia in the legal proceedings was that international law guarantees respect for the territorial integrity of States as arising from the principle of sovereignty and equality between States.[14] This position was also defended by other member states.[15] The ground for maintaining this stance was that

10. *Inter alia* A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1999) p. 120. J. Castellino, *International law and Self-Determination* (The Hague: Martinus Nihjhoff, 2000); Theodore Christakis*, Le droit à l´autodétermination en dehors des situations de décolonisation* (Paris: La documentation française, 1999) p. 35 *et seq*.

11. Supreme Court of Canada *Reference re Secession of Quebec*, [1998] 2 *SCR.*

12. Supra note 11, at paragraph 348 *et seq.*

13. *Kosovo AO*, supra note 5, at paragraph 79.

14. CR 2009/24 hearing of 1 December 2009, Serbia, paragraphs 4-6 pp. 63-65.

15. Among others, Russia, CR 2009/30 hearing of 8 December 2009, paragraphs 5-7, p. 41 and paragraph 34: "[t]he duty to respect sovereignty and territorial integrity exists independently from resolution 1244. It is a legal obligation stemming from peremptory norms of international law. Those norms are binding not only upon Member States, but upon all subjects of international law." See also Spain CR 2009/30 hearing of 8 December 2009, paragraph 31 p. 16; China CR 2009/29 30 hearing of 7 December 2009 paragraph 15, p. 33.

territorial integrity has been assumed in many texts of international law, quoting Art. 2 of the United Nations Charter,[16] to conclude the following: "[f]ew principles in present-day international law have been so firmly established as that of territorial integrity which requires that the very territorial structure and configuration of a State be respected. In addition to constituting one of the key elements in the concept of sovereign equality, territorial integrity has been seen as essential in the context of the stability and predictability of the international legal system as a whole".[17]

The opposite stance was upheld, among others, by the United States of America, for whom the unilateral declaration of independence does not violate the general principle of territorial integrity, insofar as this principle operates on a different plane: "[F]or that basic principle calls upon States to respect the territorial integrity of *other States*. But it does not regulate the internal conduct of groups within States, or preclude such internal groups from seceding or declaring independence".[18] This view is in line with the dominant opinions of scholarship. Following Georges Abi-Saab "[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity and not encroach on the territory of their neighbours; it does not apply within the State".[19]

In the *Kosovo AO* the International Court of Justice underlines the substantial relevance of the principle of territorial integrity in international law[20] and interprets its subjective scope using as a ba-

16. See also the Colonial Declaration, General Assembly resolution 1514 (XV); the Declaration on Principles, General Assembly resolution 2625 (XXV); the Definition of Aggression, General Assembly 3314 (XXIV) and the United Nations Millennium Declaration, General Assembly resolution 55/2 affirmed in the World Summit Outcome, General Assembly resolution 60/1, paragraph 5. Also the Helsinki Final Act 1975; the Charter of the Commonwealth of Independent States 1992; and the Charter of the Organization of American States, as amended in 1967, 1985, 1992 and 1993. See Written Statement of Serbia, paragraph 440 *et seq.*

17. Serbia CR 2009/24 hearing of 1 December 2009, paragraph 4, p. 63.

18. See United States of America (Mr. Harold Hongju Koh) CR 2009/30 hearing of 8 December 2009, paragraph 20, p. 30.

19. Georges Abi-Saab, "Conclusion", in Marcelo Kohen (ed.) *Secession: International Law Perspectives* (Cambridge and New York: Cambridge University Press, 2006) p. 474.

20. Affirming "[t]he Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4" (*Kosovo AO*, supra note 5, at paragraph 80).

sis two relevant texts: the General Assembly resolution 2625 (XXV) of 1970, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations" and the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference).[21] The conclusion of the International Court is that "[t]he scope of the principle of territorial integrity is confined to the sphere of relations between States".[22]

The interpretation of the Court is held as balanced on the basis of the traditional view that international law remains neutral in regard to secession.[23] Upholding the strictly inter-sate character of the territorial integrity principle, the Court refused to challenge the "legal neutrality" thesis.[24] The principle of the territorial integrity of States is a basic principle of international law that operates on the sphere of relations between states. The territorial integrity of States is an international law principle that operates with regard to some subjects and to some circumstances, but not in an absolute or unlimited way preventing the exercise of rights also recognised by international law to other subjects.[25] The prototypical example could be the right of

21. As regards the first of these texts, the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV).

22. *Kosovo AO*, supra note 5, at paragraph 80 (*in fine*).

23. As an exception, a declaration of independence can, in some situations (and especially in the case of external aggression), be illegal and create an unlawful situation. See Theodore Christakis, "The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?" *Leiden Journal of International Law* 24 (2011) p. 82. See also, the same author "L'obligation de non-reconnaissance des situations créés 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.

24. See Oliver Corten "Territorial Integrity Narrowly Interpreted: Reasserting the Clasical Inter-Sate Paradigm of International Law"*Leiden Journal of International Law* 24 (2011), p. 89.

25. If this were not understood as being so, state sovereignty would imply the blocking of the status quo of states, which could possibly amount to a violation of international law (supposing a military occupation, or a state were to act against a people through il-

self-determination. In any event the *Kosovo AO* appears to point not so much in the positive legal entitlement (the right to secede) as in the absence of a general international law prohibiting the declarations of independence.[26] The legal neutrality argument seems to be applicable regardless of the legitimating title but not regardless of the procedural circumstances, as we will see below.

The principle of territorial integrity has clearly external effects. Nevertheless it could have also internal effects when applying international law. We could think on the external support or promotion of secessionist movements. Another example could be if there is not compliance with the requirements imposed by the international law when applying international law rights as the external self-determination (where appropriate) or remedial secession. If the requirements are not fulfilled the territorial integrity could oppose to relay to such an international collective right. However the *Kosovo AO* seems to show us that secession could be brought about aside from international law categories (even if human rights law and possibly the law of armed conflicts are always applicable). In other words, the ban on unilateral secession[27] is not a ban on sub-state actors but a ban on states to recognize entities created such unlawful circumstances. We will come back to this point later when analyzing issues regarding the recognition by third states.

The pronouncement of the ICJ has a substantially wider significance. It refused to admit some new extensive interpretation of the rule of territorial integrity. As is well known there has been argued that the *ius cogens* status of the prohibition of the use of force against the political independence and territorial integrity of states also extends to protection from threats from within. Mainly since the beginning of this century, the classical conception of the legal neutrality is challenge by those thinking that the increasing threat posed by terrorist or oth-

legal uses of force or violate other peremptory norms, such as the prohibition against apartheid).

26. The *Kosovo AO* seems to circumvent the basics of international law by avoiding the discussion of most difficult issues thereof and by offering pragmatic, politically inclined solutions instead. See Milena Sterio "The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law?" *Georgia Journal of International and Comparative Law* 37 (2009) 2, p. 289.

27. In the *Kosovo AO* the ICJ addresses declarations of independence but what was really at stake was not the declaration as a speech act, but secession. The Court recognizes this when analyses the legal scope of the territoriality principle (see Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?" *Leiden Journal of International Law* 24 (2011) at 96.

er groups should lead to a new interpretation extending the rule prohibiting the use of force to non-state entities.[28] This view was not supported by the ICJ. As Oliver Corten highlights, it is significant that the Court strongly insists on the inter-state character of Article 2(4) of the UN Charter; it appears therefore incompatible with any attempts to "denationalize" or "privatize" this article.[29] The general obligation of respecting the territorial integrity of States is of an *erga omnes* nature but such obligation only concerns parties subject to international law.[30] The remaining open question is to know whether the view that precludes any applicability of the territorial integrity principle between the state and the non-state actor could affect *a contra sensu* the effectiveness of the remedial secession doctrine.

It is important to stress that in spite of the ICJ's narrow interpretation of the subjects concerned by Article 2(4) of the Charter, the *ratio materiae* of this Article is not unrelated to the other subjects. The ICJ gave examples for declaration of independence that were tainted by the illegal use of force, and were condemned by the Security Council.[31] The ICJ stated that "[t]he illegality attached to the declarations of independence thus 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 (*ius cogens*)."[32] A declaration of independence adopted in breach of the principle of non-use of force is considered illegal.[33] In other words, the principle of territorial integ-

28. See Oliver Corten *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) *in toto*; T. Franck, "Terrorism and the Right of Self-defense" AJIL 95 (2001) 840; C. Tams, "Swimming with the Tide or Seeking to Stem It? Recent ICJ Rulings on the Law on Self-Defense" RQDI 18 (2005) 275.

29. Oliver Corten "Territorial Integrity Narrowly Interpreted" supra note 24, at 90.

30. If it is affirmed that non-government entities are also subject to the international obligations related to territorial integrity, it must be affirmed, on the same basis, that they will also benefit from the principle of non-intervention guaranteed by international law. Affirming the former and denying the latter could be a selective interpretation.

31. See, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

32. *Kosovo AO*, supra note 5, at paragraph 81.

33. As a consequence of this illegal situation, the primary effect in the field of international responsibility would be the obligation not to recognize the situation created by violation

rity is confined to the sphere of relations between states while the principle of non-use of force, that has a procedural substance, is related to all kind of subjects including non-state actors. Following the ICJ, non-use of force is considered *ius cogens* and that is why it is applicable also within the territory of the state; evidently, due to the same reason this rule must be respected by the central government as well.[34]

Ultimately, the unilateral nature of declarations of independence is not the issue on which the Security Council resolves, but rather, the specific circumstances taking place in each case. Moreover, there are Security Council resolutions that applaud the access of new States to independence. This is the case of the Resolution 1272 (1999) on East Timor[35] while explicitly welcoming the will of the Timorese people for independence, which led to the emergence of a new State. This shows that the Security Council sees no contradiction between the respect for territorial integrity and processes leading towards independence.

Another argument which could be made against the ICJ's assertion that the principle of respect of territorial integrity of states is confined to the sphere of relations between states could be the existence of clear standards. It is certainly true that international law increasingly contains rules regulating activities of non-State actors and even individuals. However, these rules has not been systematically developed as a whole but on a limited and targeted basis concerning other issues such as human rights, humanitarian law or individual criminal responsibility, issues that are not at stake in the context of a declaration of independence. In this regard certain legal documents of international law and of a regional scope include the respect for the principle of territorial integrity through making reference to aspects related to the rights of minorities and indigenous peoples[36] However, reference to sovereignty and territorial integrity in those

of a fundamental rule of international law (see Theodore Christakis "The ICJ Advisory Opinion on Kosovo" supra note 23, at p. 82).

34. Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?" supra note 27, at p. 106.

35. See Resolution 1272 (1999) on East Timor, paragraph 3.

36. See Björn Arp "The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities" *German Law Journal* 11 (2010) 8, pp 853-856). This formulation appears in, for example, the Declaration on Minorities of 1992, the European Charter on Regional or Minority Languages (art. 5), the Framework Convention for the Protection of National Minorities (art 21), and United Nations Declaration on the Rights of Indigenous Peoples (art 46.1).

cases refers to the interpretation of the treaty in which they are included, without it being possible to hold that they are general obligations directed at entities to which those provisions assign no legal personality. The goal of these references to the principle of respect of the territorial integrity is not to prohibit secession, but to note that the (linguistic, minority or indigenous) rights recognised in those treaties do not include the right to external self-determination.[37]

In summary, the principle of the territorial integrity of States as a fundamental principle of the international law does not at all concern the relation between a State and an entity seeking self-determination. Declarations of independence are considered primarily domestic affairs.[38] Such declarations are relevant for international law if there is a separate violation of international law, that is to say, in the event that the methods used to implement the secession are not in accordance with international law. In sum, secession as such can not be considered expressly legal or illegal; international law may deals with particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms. Examples for such violations are the unlawful use of force, the breach of an international agreement (as in the case of Cyprus) or racial discrimination (as in the case of Southern Rhodesia).

From this standpoint, it could not be said that the International Court validates the "principle of effectiveness" or consummated facts, irrespective of how they are implemented. International law adopts a neutral stance on declarations of independence that do not infringe peremptory norms. The exercise of democratic rights guaranteed to individuals and peoples by international law is the factor that contributes balance to the "principle of effectiveness" in current international law.[39]

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37. See, Theodore Christakis "The ICJ Advisory Opinion on Kosovo" supra note 23, p. 85. Regarding the scope of Article 5 of the European Charter for Regional or Minority Languages, see Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages. A Critical Commentary* (Strasbourg: Council of Europe Publishing, 2005) at p. 86, highlighting that there is no provision in the Charter which directly challenges the principle of national sovereignty and territorial integrity. The purpose of Article 5 is primarily to forestall misinterpretation of the Charter. The respect of the geographical area of each regional or minority language (art 7.1.b ECRML) does not encroach on national territorial integrity.

38. See the opinion of Elena Cirkovic "An analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence" *German Law Journal* Vol. 11, 08, p. 902.

39. Following to K. Doehring "Effectiveness" *EPIL* Vol. 7, 1984, p. 70 "effectiveness is only legally relevant as far as the legal system permits it."

3. Territorial Integrity Inside States: Does the International Law Deals With the Declarations of Independence?

The question that the General Assembly posed to the International Court of Justice was to assess the accordance of the declaration of independence of 17 February 2008 with "international law".[40] The answer to that question turns on whether or not the international law prohibited the declaration of independence. The Court chose to focus its answer in terms of non-violation, taking a less demanding approach. In any case, there is a big gap between the *non-prohibited* and *allowed* regarding secession.[41] Under the assumption of a presumption against the admissibility of secession, the narrow approach of the ICJ left unresolved issues: could it be interpreted as a new guideline for coping with the deliberate silence of international law? It must be borne in mind that the conclusion to draw from deliberate silence (the opposite of a legal lacuna) depends on the prior establishment of the residual rule (freedom to secede or preservation of the state).[42]

Perhaps, the wording of the question was not particularly fortunate. It was open to the Court to examine the possible legal grounds under international law that may be argued to have authorized the declaration of independence.[43] The ICJ opted for a more formal approach, leaving aside the substantive issues such as the international characterization of the right to secede inside and (eventually) outside of the right of self-determination. The question was focused on under

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40. Resolution 63/3 of the General Assembly, 8 October 2008. A/RES/63/3 Sixty-third session. Available at http://www.asil.org/files/ilib081017_r3.pdf (last visited on 29 July 2011). There were two ways for answering that question: on the one hand, analyzing whether there was a rule of international law that conferred a positive entitlement to declare independence, and on the other hand, focusing on whether there are prohibitive rules against declarations of independence. The ICJ adopted the second strategy. Accordingly the Kosovo case contrasts with the *Reference relating to the Secession of Quebec from Canada*, where the question put to the Supreme Court of Canada asked whether there was a right to "effect secession" and whether there was a rule of international law that conferred such a positive entitlement.

41. See Declaration of Judge Simma, paragraph 9.

42. See Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?" supra note 27, p. 99.

43. See Marcelo G. Kohen and Katherine del Mar, "The Kosovo Advisory Opinion and UNSCR 1244(1999): A Declaration of Independence from International Law?" *Leiden Journal of International Law* 24 (2011) at 111.

the eventual existence of international law provisions establishing the way in which internal declarations of independence can be made in order to be lawful. There is no explicit rule prohibiting declarations of independence and there are no procedural provisions (however not all means to achieve the secessionist objective are allowed), and neither are there any international treaties that deal with this question or any international practices or customs that lay down the method to be used. What international practice does indicate is that international law does not deal directly with declarations of independence. The current State diversity is the result of a varied and heterogeneous range of cases that cannot easily be reduced to precise patterns.[44]

International law does not authorise the unilateral secession of a territory from the State to which it pertains. The international law recognises a unilateral right to secede only in certain exceptional circumstances linked to the right of self-determination. Upon this a question arises: to what extent international law affect the legality of a unilateral declaration of independence in situations not expressly covered by it? International law does not recognise the right to secession as such, but can it be affirmed that international law denies its existence? From the opposing view, why did the Court not resort to the *Lotus* principle?

According to the *Lotus* principle[45] sovereign states may act in any way they wish so long as they do not contravene an explicit

44. The still-unfinished evolution of the right to self-determination shows that from the 1960s, the international law of 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 subjugation, domination and exploitation (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paragraphs 52-53; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, paragraph 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, paragraph 88). On this regard see J. Crawford, *The creation of States in International Law* (Oxford: Oxford University Press, 2006) esp. Ch. 3; A. Buchanan "Theories of secession" *Philosophy and Public Affairs* 26 (1997) 1, pp. 30-61; Daniel Philpott "Self-Determination in Practice" in M. Moore (ed), *National Self-Determination and Secession* (Oxford: Oxford University Press, 2003) pp. 83-86. H. Hannum *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) pp. 3-118. A Cassese, *Self-determination of peoples,* supra note 10, pp. 120-125; J. Castellino, *International Law and Self-determination,* supra note 10, pp. 56-58.

45. See Permanent Court of Justice, SS Lotus Case (France v. Turkey), PCIJ Rep. (1927) Series A No 10, at 18: "rules of law binding upon states… emanate from their own free will… Restrictions upon the independence of States cannot therefore be presumed."

prohibition. In the *Kosovo AO* the residual rule of freedom was not applied to the state, but to the authors of the declaration of independence.[46] Perhaps by doing so the ICJ wanted to confirm that they have not proceeded as persons acting inside the legal framework of the interim administration but as persons acting outside it.[47] In any event, the *Lotus* principle is a principle always protecting the sovereign state; being as so, affirming that secession is not prohibited the question that arises is whether or not the Court is insinuating that that subject have a right to declare independence outside the colonial context. As have been said, the ICJ did not resort to the *Lotus* principle but the absence of a prohibition to attempt secession can not be assimilated to the existence of a right to do so.[48] The extreme positivistic approach that *Lotus* implied, which seems to suggest that the international legal order is complete, offers currently points of challenge, discussion and debate. What is clear is that the *Kosovo AO* provides an open interpretive toolbox highlighting that "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."[49]

If the principle of respect of territorial integrity of states is confined primarily to the sphere of states and if there is no prohibition of secession in international law, then what the role of the self-determination principle is? The ICJ in the *Kosovo AO* does not address this question. The main implications of the right to self-determination have to do with the legal entitlement to statehood and especially with the recognition by third states. On the basis of a general presumption against the effectiveness of secession and in favour of the territorial integrity of the host state,[50] and even considering that there is no prohibition to unilateral secession, the fulfilment of the external self-determination criteria establishes a positive entitlement

46. See Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?" supra note 27, at p. 100.

47. See a critical analysis in Marcelo G. Kohen and Katherine del Mar "The Kosovo Advisory Opinion and UNSCR 1244(1999)" supra note 43, pp. 109-127.

48. See Theodore Christakis "The ICJ Advisory Opinion on Kosovo" supra note 23, at p. 79.

49. *Kosovo AO*, supra note 5, at 56.

50. See Theodore Christakis "The ICJ Advisory Opinion on Kosovo" supra note 23, at p. 84; Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?", supra note 27, at p. 99.

to statehood.[51] It definitely provides access to international support. On the other hand, if the required exceptional circumstances are not met[52] there shall be no positive entitlement to self-determination. However, in the latter case, is statehood precluded or just unprivileged as it could be the case of Kosovo?[53] Following Ralph Wilde's approach here, for sub-state groups who aspire to independence the central matter is not so much what the international-law position is on the legality of declarations of independence, but rather their prospects for enjoying the support of at least the kind of critical mass of other states that will make their claim practically viable.[54]

The ICJ did not address whether the support of certain states to the authors in the issuance of the unilateral declaration of independence would constitute an infringement of the obligation not to interfere in the domestic affairs of another state, and the obligation to respect the territorial integrity of states. While the declaration said that Kosovo is declared to be an independent and sovereign state, the International Court does not considerer specifically the declaration as an act of secession. But if it is as so, what was the legal basis for those States that have already recognised Kosovo's independence?[55]

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51. See Marc Weller, "Modesty can be a virtue: Judicial Economy in the ICJ *Kosovo* Opinion", *Leiden Journal of International Law* 24 (2011) at p. 136, stating that the right of self-determination (in the colonial context) generates pre-state legal personality.

52. As it could be, perhaps, the case of Kosovo after 1999 (see Hurst Hannum, "The Advisory Opinion on Kosovo: An Opportunity Lost, or Poisoned Chalice Refused?" *Leiden Journal of International Law* 24 (2011) at p. 157. Paying attention to the previous 1989-1999 period the conclusion could be different (see Separate Opinion of Judge Cançado Trinidade, paragraphs 41-42).

53. See Marc Weller, "Modesty can be a virtue" supra note 51, at p. 137. In the view of Ralph Wilde "Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion" *Leiden Journal of International Law* 24 (2011) at p. 153 it could constitute an unlawful violation of the state's right to territorial integrity.

54. Ralph Wilde "Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion" supra note 53, at p. 153. See *also* James Summers "Relativizing Sovereignty: Remedial Secession and Humanitarian Intervention in International Law" *St Antony's International Review* 6 (2010) 1, at p. 16 *et seq*.

55. See the reflections of Robert Howse and Ruti Teitel "Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?" *German Law Jornal* 11 (2010) 8, p. 842. See also Jure Vidmar "Remedial Secession in International Law: Theory and (Lack of) Practice" *St Antony's International Review* 6 (2010) 1, at pp. 37-56 suggesting that remedial secession is not tantamount to an entitlement but can only be said to be given effect through recognition.

There are no provisions in international law that directly regulate secession even though secession is indirectly addressed by, at least, the law of state succession, the requirements for statehood and the legality of the recognition by third states. The law of state succession regulates some aspects of secession.[56] It is obvious that one cannot tackle the question of state succession, i.e. the issue of transmission of rights and obligations from one state to another without at first confronting the problem of statehood, but the Vienna Conventions' definition of state succession avoids tricky questions as to, what is a state.[57]

In the Quebec case, the Supreme Court of Canada acknowledged that "[a]lthough there is no legal right, under the Constitution or at international law, to unilateral secession […] this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession".[58] The Supreme Court seems to indicate that the secession will be effective if it is an effective political fact. The ultimate success of such secession would be dependent on recognition by the international community.[59]

Thomas M. Franck contends that "[i]t is wrong, to say there is no right of secession if by that one seeks to convey the impression that any secession is prohibited by international Law".[60] Malcolm Shaw opines in the same sense that "[i]t is true that the international community is very cautious about secessionist attempts, especially when

56. Secession is a modality of succession of States which can be defined, as "the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter" Marcelo Kohen, "Introduction", in Marcelo Kohen (ed) *Secession. International Law Perspectives* (Cambridge and New York: Cambridge University Press, 2006) at 3.

57. Vienna Convention on State Succession in Respect of Treaties, 17 ILM (1978) 1488, art. 2(1)(b); Vienna Convention on State Succession in Respect of Property, Archives and Debts, 1983, 22 ILM (1983) 306, art. 2(1)(a). See Andreas Zimmermann "Secession and the law of State sucesión" in Marcelo Kohen (ed.), *Secession: International Law Perspectives* (Cambridge and New York: Cambridge University Press, 2006) pp. 208-230.

58. Supreme Court of Canada *Reference re Secession of Quebec*, [1998] 2 *SCR*, paragraph 155.

59. Defending the constitutive theory on the role of recognition in international law that holds that recognition is an essential criterion of statehood, see among others, J. Crawford, *The Creation of States in International Law* supra note 44, at p. 4. The prevailing view on recognition is the declaratory theory, according to which statehood is a legal status independent of recognition, see among others I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008) at 88.

60. Thomas M. Franck "Experts Report", reproduced in A.F. Bayefsky (ed.), *Self-determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law, 2000) p. 335.

the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law".[61]

The precedents regarding declarations of independence and recognition of sovereignty show that declarations of independence are not, *per se,* contrary to international law.[62] It cannot be argued that international law prohibits secession in every case. As a matter of international law the issuance of a declaration of independence is primarily a factual event: a factual event which together with other facts, such as a defined territory and permanent population, may be deemed to result, immediately or over time, in the creation of a new state. Once an entity breaks off from its mother state and seeks to become recognised as a new state, the legal question that arises is whether that entity satisfies the relevant international legal criteria of statehood. According to the 1933 Montevideo Convention, an entity can achieve statehood if it fulfils four criteria: if it has a defined territory, a permanent population, a government, and the capacity to enter into international relations.[63] Secession appears to be a political fact from which conclusions may be drawn under international law when it leads to the establishment of effective and stable state authorities. In any case, the claims to secession are favoured or disfavoured depending on the facts.

Regarding the unilateral declaration of independence the International Court of Justice has confirmed that the obligations of international law with respect to territorial integrity are only binding upon state entities and, likewise, that there is no prohibition in international law to such ends. In short "[t]he Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general interna-

61. Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, supra note 60, p. 136.

62. See Austria CR 2009/27 hearing of 3 December 2009, paragraph 18, pp. 10-11.

63. See art. 1, Montevideo Convention on the Rights and Duties of States, 26 Dec. 1933, 156 LNTS 19. Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria, which are at least in theory independent from the political reality underlying many attempts at secession or separation. In fact, article 3 of the Montevideo Convention states that "[t]he political existence of the state is independent of recognition by the other states."

tional law".[64] In other words, international law remains neutral with respect to the declaration of independence made by non-State actors. The International Court did not take a position on the effectiveness of said declaration.

The International Court of Justice only reaches this point without issuing any decision about the exercise of the right to self-determination or the right of remedial secession in the particular case of Kosovo. The Court contends that "[i]t is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State".[65]

Nevertheless, despite the fact that the question of self-determination was not a matter about which the General Assembly requested the opinion of the Court, the latter did not entirely avoid the discussion of self-determination.[66] The Court does make a brief mention of the differences existing as regards the interpretation of the scope of that right. This shows, above all, firstly, that international law remains ambiguous in how it treats non-state entities, and secondly, that international law cannot oppose a declaration of independence based on the territorial integrity of the State without this affecting the right to self-determination.[67] Maybe one of the weak points of the ICJ decision is the lack of clarity about how the non-state actors are bound by the norm of territorial integrity. What is clear is that the principle of territorial integrity of States is not an insurmountable obstacle to the peoples entitled to exercise the right to self-de-

64. *Kosovo AO*, supra note 5, at paragraph 84.

65. *Kosovo AO*, supra note 5, at paragraph 83.

66. On this regard see Committee on the Elimination of Racial Discrimination, *General Recommendation XXI* (48), UN Doc. A/51/18 (1996) paragraph 4, analysing the distinction between internal and external self-determination. While the first one deals with the right of all peoples to freely pursue their economic, social, and cultural development without outside interference within the existing borders, the second one reflects the right to all peoples to determine freely their political status and their place in the international community, dealing in relation to other peoples.

67. See Margaret Moore "The territorial dimension of Self-Determination" in M. Moore (dir.) *National Self-Determination and Secession* (Oxford: Oxford University Press, 2003) pp. 134-157. Also Michael P. Scharf, "Earned Sovereignty: Judicial Underpinnings", *Denver Journal of International Law and Policy* 31 (2003), p. 379.

termination in accordance with international law, albeit indirectly the principle of territorial integrity could be a determinant factor through its constraining effect on acts of recognition by other states.

The underlying issue of this approach is the search for a point of balance between these two principles –territorial integrity and the right to self-determination– and the exercise thereof. In this respect, as the Court affirms, "[d]uring the second half of the twentieth century, the international law of 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 subjugation, domination and exploitation".[68] Nonetheless, it also underscores the existence of declarations of independence outside this context, saying that even in these cases they cannot be held to contravene international law.[69]

Therefore, the question we could pose is whether there are reasons that justify secession being limited to the scope of decolonisation. If the State fails to provide people sufficient guarantees of protection for their development as a group, if the political accommodation through the internal self-determination is blocked or persistently and seriously hindered, or if the channels of negotiation are exhausted, as was finally the case of Kosovo, would it not be reasonable to consider an overriding reason for secession? The analysis of cases such as that of Croatia or Bangladesh, not linked to a colonial context, have led some authors to speak of a "qualified right of secession" that would make it possible to exercise external self-determination, which may be exercised through unilateral secession granted by international law to a minority-people within an existing State only in certain exceptional circumstances as a measure of last resort when the process seeking for a negotiated settlement are exhausted, and when a clear majority of the population by democratic means supports this course for realizing people's right of self-

68. *Kosovo AO*, supra note 5, at paragraph 79. See also (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paragraphs 52-53; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, paragraph 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004 (I), pp. 171-172, paragraph 88.

69. On this matter see the reflections of James Crawford "State Practice and International Law in Relation to Unilateral Secession" in A.F. Bayefsky (ed.), *Self-determination in International Law: Quebec and Lessons Learned*, 2000, supra note 60, p. 65.

determination.[70] There is no explicit rule prohibiting declarations of independence and, conversely, there is not consensus in the international community which would have enabled us to discuss a right to secede. A possible general interpretation could be that there is no absolute right either to remedial secession / external self-determination or to maintain the statehood over the peoples. The violation of the right to internal self-determination may lead to using the last resort, namely remedial secession, guaranteeing, in addition, a procedural guideline: all effective remedies must have been exhausted in the pursuit of a settlement before a people may have resort to the exercise of the right to external self-determination.[71] In addition, contemporary international law has established procedural requirements for secession, notably the non-use of force and a democratic process.[72]

This is the approach underlying the position of the Supreme Court of Canada when it says "[w]hen a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession".[73] The Canadian Supreme Court held that a people has a right to internal self-determination first, and that only if that right is not respected by the mother- state, the same people's right to break off may accrue. In other words, the right to separate is conditioned on the non-respect of the right to some form of provincial autonomy.[74]

The ICJ in the *Kosovo AO* took not position on the issue, highlighting that there are radically different views in relation to the existence of such a right.[75] Meanwhile, following Marc Weller, it would be wrong to claim that the Court has therefore denied the existence of this right, given the requirement in international law of widespread

70. David Raic, *Statehood and Self-Determination* (The Hague: Kluwer Law, 2002) p. 365.

71. See, inter alia, Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, *International Law, Norms, Actors, Process* (Aspen Publishers, 2010) p. 222.

72. See Anne Peters "Does Kosovo Lie in the *Lotus*-Land of Freedom?" supra note 27, at p. 99.

73. Supreme Court of Canada *Re Secession of Quebec*, supra note 11, paragraph 134.

74. See Milena Sterio "The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law?" supra note 26, p. 10; Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, *International Law: Norms, Actors, Process*, supra note 71, at p. 222.

75. *Kosovo* AO, supra note 5, at paragraph 31.

and uniform practice and *opinio iuris*, which is apparently not met.[76] It could be a right in the process of emerging but that has in any event not yet been consolidated.

As affirmed by the Finnish Delegation in the proceedings before the International Court of Justice, a ruling on the operation of the principle of self-determination cannot be issued without an analysis of the specific case.[77] It is true that since 1945 the operation of the right to self-determination has been restricted to the colonial sphere, which practice has remained unaltered since 1989, although it must be mentioned that during that period, 22 new States have been recognised.[78] The remedial character of self-determination has been affirmed by the International Court of Justice in its *Western Sahara* case.[79] At all events, it must also be said that in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, for the first time, accepted a right of self-determination outside the context of decolonisation.[80] The right to self-determination includes the right of peoples to freely determine their political status.

In most extra-colonial cases, the international community has not considered secession as an exercise of the right to self-determination, but as a consequence of covenants and agreements, in some cases founded on international law and in others, founded on the internal relations between the peoples aspiring to sovereignty and their States, also as a consequence of the "special", "unique" or *sui generis* character of the case. The question that may be raised is, is this not a ma-

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76. Marc Weller, "Modesty Can Be a Virtue" supra note 51, at p. 137.

77. Finland, CR 2009/30, hearing of 8 December 2009, paragraph 24, p. 62.

78. James Crawford "State Practice and International Law in Relation to Unilateral Secession" in A.F. Bayefsky (ed.), *Self-determination in International Law: Quebec and Lessons Learned*, 2000, supra note 60, p. 60.

79. ICJ Advisory Opinion of 16 October 1975 on Western Sahara (1975 I.C.J. 25), paragraphs 55-60, pp. 23-26. See also the case concerning Northern Cameroon (Cameroon v. United Kingdom) 1963 I.C.J. 3; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) 1986, I.C.J. 14; Certain Phosphate Lands in Nauru (Nauru v. Australia) 1989 I.C.J. 12, 1991 ICJ 3; and East Timor (Portugal v. Australia) 1995 I.C.J. 90.

80. ICJ Advisory Opinion of 9 July 2004, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paragraph 88, p. 39 and paragraph 122, p. 184. The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see, *East Timor* (Portugal v. Australia), 1995 I.C.J. p. 102, paragraph 29).

nifestation of the right to self-determination? Is it not true that the cases in which sovereignty has been obtained outside the colonial context respond to the classic rule of self-determination that always seeks to strike a balance between territorial integrity and the free development of peoples, making it possible to use an external solution as a last resort? It appears clear that a ruling regarding the current manner of exercising of the right to self-determination cannot be issued without taking into account and analysing each specific case, and this may contain the key to the question of exercising the right to self-determination at present, above and beyond more or less restrictive doctrinal theories.

4. Territorial Integrity and the Security Council Resolution 1244 (1999)

Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999 and therefore clearly imposes international legal obligations.[81] In this resolution, the Security Council, "determined to resolve the grave humanitarian situation" and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "[a]n interim administration for Kosovo which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo."[82]

In essence, resolution 1244 (1999) did four things. It adopted measures to secure and maintain an end to violence in Kosovo.[83] It

81. ICJ *Kosovo* AO, supra note 5, paragraph 85. The Court observes, also, that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

82. Security Council resolution 1244 (1999) on the situation relating Kosovo. S/RES/1244 (1999) Adopted by the Security Council at its 4011th meeting, on 10 June 1999, paragraph 10.

83. See paragraphs 3, 9 and 15 of the Security Council resolution 1244 (1999).

established interim institutions to ensure conditions for peace and normal life for all inhabitants in Kosovo.[84] It established an interim framework based on substantial self-government for Kosovo taking full account of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.[85] And it put in train a political process designed to determine Kosovo's future status.[86]

The question raised by Serbia was that insofar as the authors of the declaration of independence of Kosovo were the Provisional Institutions of Self-Government in Kosovo, that declaration should be considered as being in violation of international law, particularly resolution 1244 (1999). It also affirmed that "[r]ather than providing for a right of Kosovo to separate from Serbia, resolution 1244 formally reaffirmed the territorial integrity of Serbia. It thus precluded the possibility of Kosovo unilaterally seceding. Instead, resolution 1244 provided for a political process to determine the future status of Kosovo by way of an agreed settlement to be endorsed by the Security Council. No hint of a referendum, not even by way of cross-reference, and no reference to the right of self-determination can be found in resolution 1244."[87]

International intervention in the government of Kosovo and the establishment of provisional democratic self-governing institutions (PISG) backed by the UN gave the case of the declaration of independence a series of unique characteristics. It should be considered that a declaration of independence made in a context of provisional government intervention by the UN could be deemed contrary to international law, precisely due to its possible incompatibility with the Resolution of the Security Council. Note that under that resolution the Security Council decided to create the provisional institutions whose task was to locally govern the territory of Kosovo in a democratic and autonomous manner "pending a political settlement". PISG must operate within the legal framework established by the Security Council,

84. See paragraphs 5, 6 and specially 10 of the Security Council resolution 1244 (1999).

85. See paragraph 11 of the Security Council resolution 1244 (1999). This character was set out in detail in the United Nations Interim Administration Mission in Kosovo regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"). This resolution defined the distribution of powers and responsibilities between the Special Representative of the Secretary-General and the Provisional Institutions of Self Government of Kosovo.

86. See in particular paragraph 11.e) of the Security Council resolution 1244 (1999).

87. Serbia CR 2009/24, hearing of 1 December 2009, paragraph 11, p. 51.

and a unilateral declaration of independence by the PISG will be regarded as contrary to the resolution 1244. Therefore, the questions posed in relation to the preventive effects of resolution 1244 (1999) referred back to two aspects: on the one hand, to the identification of the subject responsible for the same, to ascertain whether these are the self-governing institutions endorsed by the international community, acting on the basis of the powers granted by resolution 1244 (1999); and on the other, whether the contents of resolution 1244 (1999) contain provisions that are incompatible with the declaration of independence.

Both questions were analysed by the International Court of Justice. In relation to the identification of the subject, the Court starts by delimiting the context of the declaration of independence and states that the language used in the declaration indicates that the action was not taken within the framework of interim self-administration of Kosovo, but that they were aimed at establishing Kosovo "as an independent and sovereign state". The Court arrives at the conclusion that "[t]he declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."[88] Furthermore the Court underscores that the words "Assembly of Kosovo" only appear on the heading of the translations of the declaration of independence in English and French, but not in the original text drafted in Albanian, and also that the text starts with the words "We, the democratically-elected leaders of our people…" without the Kosovo Assembly being named as the subject, in addition to the fact that the President of Kosovo, who is not a member of the Assembly of Kosovo, signed the document.[89] Even so,

88. *Kosovo AO*, supra note 5, at paragraph 105.

89. *Kosovo AO*, supra note 5, at paragraph 107. The International Court also points out that it is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between

"[t]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".[90]

Regarding the identification of the authors of the declaration of independence, the opinion of the majority of the members of the ICJ could be subject to criticism.[91] The question put to the Court was referred to the accordance with the international law of the declaration of independence *by the Provisional Institutions of Self-Government of Kosovo.* As Judge Koroma stated, "the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the provisional institutions of self-government of Kosovo."[92] The wording of the declaration refers to the Assembly of Kosovo several times.[93] . Even if the declaration of independence was adopted by the Assembly, the president and the prime minister of Kosovo, they all constituted organs of the Provisional Institutions of Self-Government of Kosovo. All of them were acting in that capacity, since they considered themselves to be the democratically elected representatives. As Judge Tomka highlights they wished to act in accordance with the legal framework and not outside of it.[94] Indeed the Court stressed the content of the declaration in order to justify that the authors were not acting within the standard framework of the interim administration. In this regard the Judge Ben-

2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be "beyond the scope of [the Assembly's] competencies". The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible.

90. *Kosovo AO*, supra note 5, at paragraph 109.

91. The issue on the authorship of the declaration of independence was emerged during the written phase of the advisory proceedings. During the previous phases all the intervenients agree with the fact that the Assembly of Kosovo had issued the declaration of independence.

92. Declaration of Judge Koroma, paragraph 3.

93. See first preambular paragraph of the declaration referring the Assembly of Kosovo.

94. See Declaration Judge Tomka, paragraphs 19-20.

nouna stated that "[i]n law, it is not merely because an institution has adopted an act exceeding its powers (*ultra vires*) that the legal bond between the institution and the act is broken. In such a case, the institution must be considered to be in breach of the legal framework that justifies and legitimizes it."[95] As a result of the Court's finding that the declaration was not an *ultra vires* act because the authors were acting in a different capacity, the Court effectively absolved the United Nations of international responsibility for the issuance of the declaration of independence.[96]

The second question is in relation to the content of resolution 1244 (1999). Serbia and many other states asserted that the resolution, referring to the territorial integrity of Yugoslavia, the Security Council actually prohibited the parties to act unilaterally, and that therefore, the independence of Kosovo was not compatible with it.[97] Based on this approach, a permanent settlement for Kosovo could only be achieved by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo.

The International Court of Justice does not so much focus on the question from that standpoint as from the standpoint of the purpose of the resolution 1244 (1999). The Court affirms, in agreement with the position of the United States of America and the United Kingdom, among others, that Security Council resolution 1244 (1999) was essentially designed to create an interim regime for Kosovo, with a view to channelling the long-term political process to establish its final status. In other words, the resolution contains no provisions dealing with the final status of Kosovo or with the conditions for its achievement. Resolution 1244 (1999) does not reserve for itself the final determination of the status of Kosovo and remains silent with respect to those conditions.[98] Even so, "[r]esolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level:

95. See Declaration of Judge Bennouna, paragraph 44.

96. See Marcelo G. Kohen and Katherine del Mar "The Kosovo Advisory Opinion" supra note 43, at p. 121.

97. Serbia CR 2009/24 hearing of 1 December 2009, paragraphs 7, p. 33; paragraph 30, p. 45; and specially paragraphs 7-22, pp. 50-57; Russia CR 2009/30 hearing of 8 December 2009, paragraphs 32-43 pp. 46-48.

98. *Kosovo AO*, supra note 5, at paragraph 114.

unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo".[99] That is, the system regulated by the resolution is provisional, and its objective is to facilitate the final status of Kosovo, whereas the declaration of independence would have a decisive effect to the extent that it establishes that final status. In the final analysis, "[t]he Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose".[100]

The approach taken by the Court implicitly condoning the unilateral imposition of an outcome by one party in a settlement-of-dispute could be considered paradoxical. The Court's position could be seen as a license to use unilateral means, even when the Security Council has adopted a resolution founded on Chapter VII of the UN Charter.[101] The question suggested by the approach used by the Court is that the territorial integrity of Serbia does not appear to be considered an essential aspect of resolution 1244 (1999). Neither is there a need for agreement between the parties, a "*political settlement*"[102] as a condition of the final status for Kosovo, at least with respect to the declaration of independence. In effect, the political settlement mentioned in section 11,c) of resolution 1244 (1999) makes reference to the responsibilities of the international civil mission in Kosovo, and not so much to the parties: Serbia and Kosovo.[103] A strict interpretation of the resolution may lead to that conclusion.

The reference to the territorial integrity of the Federal Republic of Yugoslavia was included in the preamble of resolution 1244 (1999).[104] In any case, its context is addressed to member states and

99. *Ibid.*

100. *Kosovo AO*, supra note 5, at paragraph 118.

101. See Oliver Corten "Territorial Integrity Narrowly Interpreted" supra note 24, at p. 94.

102. See paragraph 11 (c) of the resolution 1244 (1999) that says: "[t]he main responsibilities of the international civil presence will include: ... c) [o]rganising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a *political settlement*, including the holding of elections." (Emphasis added).

103. See *Kosovo AO* supra note 5, at paragraph 118 (*in fine*).

104. The 10th paragraph of the preamble states as follows: "[R]eaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic

not to non-state entities.[105] Even if the Resolution affirms the necessity to respect the territorial integrity, this does not mean that this principle is applicable in the relations between the state and the secessionist group.[106] Secondly, annex 2 of resolution 1244 (1999) also contains a reference to territorial integrity, albeit its scope has to be interpreted through a general reading of the provision. It reads thus: "[A] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarisation of UCK."

Annex 2, the scope of which is limited to the interim period, refers the principle of sovereignty and territorial integrity in a coordinated manner with the consideration of the Rambouillet accords. These accords are also mentioned in section 11,c) of resolution 1244 (1999) that envisages "[a] political process designed to determine Kosovo's future status, taking into account the Rambouillet accords."[107] The Rambouillet accords[108] established that the final settlement for Kosovo was to be based on the "will of the people". Chap. 8, Art. I (3) contains the following provision:

> [T]hree years after the entry into force of this Agreement, an international meeting shall be convened to determine a mecha-

of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2."

105. It is worth remembering that the Federal Republic of Yugoslavia protest at the time that the resolution was adopted saying that "[o]pens up the possibility of the secession of Kosovo ... from Serbia and the Federal Republic of Yugoslavia" (Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, Dossier No. 33).

106. See Oliver Corten, supra note 24, at p. 94 concluding that even in this case the classical inter-state paradigm of international law still remains.

107. On this regard and the historical context see James Crawford, *The Creation of States in International Law, s*upra note 44, at p. 63; Peter Radan, *The Break-Up Of Yugoslavia And International Law* Routledge Studies in International Law (London and New York: Routledge, 2002) pp. 196-197. Rob Dickinson, "Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet" *Arizona Journal of International & Comparative Law* Vol. 26, No. 3, p. 562.

108. See 125.2. Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, UN Doc. S/1999/648 (June 7, 1999), available at http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html [hereinafter Rambouillet Accords].

> nism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures. (S/1999/648).

The paragraph is not very clear but the concept of mutual consent was not incorporated.[109] Based on the above, it can be upheld that the scope of resolution 1244 (1999) does not oppose a declaration of independence, and that the basic aspect of the final solution is the free will of the people of Kosovo. However, as Hurst Hannum highlights, by mandating that one potentially crucial element of that dialogue be ignored, the entire concept is undermined.[110] There is nothing magical about existing state borders, which may always be changed by agreement. There is no fundamental moral or political reason why Kosovo should not be independent, either, even if that independence is not currently mandated or even supported by general international law.[111]

5. Conclusion

Does the recognition of the independence of Kosovo by 69 United Nation's member States (at the time of the Advisory Opinion) violate the obligations not to interfere in Serbia's domestic affairs and especially not with the territorial integrity of Serbia? What could have happened if the ICJ had affirmed that the declaration of independence was unlawful? Could reasonably be expected more from the ICJ? The *Kosovo AO* leaves some critical issues unresolved but in the same time

109. On this regard see USA CR 2009/30 hearing of 8 December 2009, paragraph 24, p. 32: "[I]n the negotiations over the Accords –and the four so-called "Hill Agreements" upon which Rambouillet was modeled– the negotiators rejected any requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined53. As Professor Murphy explained last Tuesday (CR 2009/25), the first three drafts of the Hill Agreements would have required the FRY's express agreement to change Kosovo's status at the end of the interim period. But, in the fourth draft of the Hill Agreement, that language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or resolution 1244."

110. Hurst Hannum "The advisory opinion on Kosovo", supra note 52, at p. 161.

111. *Ibid.*

it contains important findings related to the principle of territorial integrity of states, among which we highlight the following:

1. The principle of the territorial integrity of states is a basic principle of international law and operates primarily on the inter-state sphere. It does not affect individuals or peoples, but rather, relations between states. International law does not authorise the unilateral secession of a territory from the state to which it pertains but the prohibition of unilateral declarations of independence is not implicit in the principle of territorial integrity. There is no prohibition of unilateral secession in international law. Respect for territorial integrity operates with external relevance, but in the current system of international law, it does not do so with internal relevance.

2. When dealing with non-state entities, the international principle of territorial integrity has a limited scope, whose effects are indirect acting in a secondary level: the level of the effectiveness of the secession and the recognition by third states. The ICJ has not challenged the traditional conception that the non-state entities are not addressed by the rule of territorial integrity but it has strengthened this view. Stating that the scope of the principle of territorial integrity is confined to the sphere of relations between States, the ICJ has refused to admit some new extensive interpretation of the rule of territorial integrity. The principle of territorial integrity is confined to the sphere of relations between states while the principle of non-use of force, that has a procedural substance, is related to all kind of subjects including non-state actors. In any case, the ban on unilateral secession is not a ban on sub-state actors but a ban on states to recognize entities created such unlawful circumstances. A state remains a matter of fact.

3. The *Kosovo AO* has confirmed the traditional view that international law remains neutral in regard to secession. Upholding the strictly inter-state character of the territorial integrity principle, the Court refused to challenge the "legal neutrality" thesis. There is no prohibition of unilateral secession. Secession as such can not be considered expressly legal or illegal; secession is not regulated by international law but international law may deals with particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms. These are concerns regarding the process and the effectiveness of secession. Only peaceful and democratic procedures are allowed while the use of force is prohibited.

4. The *Kosovo AO* appears to point not so much in the positive legal entitlement (the right to secede) as in the absence of a general international law prohibiting the declarations of independence. The legal neutrality argument seems to be applicable regardless of the legitimating title but not regardless of the procedural circumstances, as the following:

– The non-use of force. This principle is considered *ius cogens* and that is why it is applicable also within the territory of the state; evidently, due to the same reason this rule must be respected by the central government as well.

– The process seeking for a negotiated settlement must be exhausted.

– The process must be democratic (a clear majority of the population by democratic means must supports this course).

5. If there is no prohibition of secession in international law and the respect for the territorial integrity is a binding principle only for states, how does the principle of self-determination operates? In order to answer this question a distinction must be drawn between the following two scenarios:

a) In the case of declarations of independence inside de traditional self-determination collective right, the general presumption against the effectiveness of secession and in favour of the territorial integrity of the host state does not operate, providing access to international support. International law cannot oppose a declaration of independence based on the territorial integrity of the state without this affecting the right to self-determination. The territorial integrity of the state is not a principle alien to international law, although it cannot block the exercise of other rights also recognised by international law to other subjects, such as to the peoples and specially the right to external self-determination as a last resort. International law remains neutral as regards the declarations of independence that do not infringe peremptory norms. The exercise of the right to self-determination in accordance of each specific case and through the democratic rights guaranteed to individuals by international law is the balancing factor of the "principle of effectiveness". International law cannot oppose a declaration of independence on the basis of the territorial integrity of states without affecting the right to self-determination.

b) In the case of declarations of independence outside the context of the international law of self-determination (even during the second half of the twentieth century), the practice of the states does

not point to the emerge in international law of a new rule prohibiting the making of a declaration of independence. The ICJ considers that there is no emerging prohibition of secession as arising from the principle of territorial integrity. The question that arises in such cases is whether or not the statehood is precluded or just unprivileged. In any case, the International Court did not take a position on the effectiveness of said declaration. The Court did not pronounce upon whether a right to unilaterally secede territory exists, nor did it articulate any legal criteria for the creation of states outside self-determination. We can conclude, however, that there is no explicit rule prohibiting declarations of independence and, conversely, there is not consensus in the international community which would have enabled us to discuss a positive right to secede. After the *Kosovo AO* it would be wrong to claim that the Court has therefore denied the existence of this right. Could it be considered as a right in the process of emerging? Or to what extent international law affect the legality of a unilateral declaration of independence in situations not expressly covered by it?

In view of the current state of development of the international law, the legitimacy of declarations of independence that do not infringe peremptory norms will ultimately depend first and foremost on the democratically-expressed opinion of the citizens living in the concerned territory and also on the circumstances of each case. The democratic principle seems to emerge as the balancing factor of the principle of effectiveness and represents the most important contribution to stability.

ABSTRACT

On 17 February 2008 Kosovo approved its declaration of independence from Serbia. The declaration was raised as a unilateral secession, a category which to date is widely debated by the international community, but supported in that case by a respectable number of the United Nation member states. A great many legal issues have been raised by the International Court of Justice's Advisory Opinion on Kosovo. This opinion was eagerly awaited by legal scholars due to both its possible effects and the scope of its principles outside the context of decolonization in what it could constitute of new approach to the international scenario for the twenty-first century. The ICJ stated that the declaration of independence was in accordance with international law if it was not prohibited. The answer turned on whether or not international law prohibited the declaration of independence, without ever examining whether an entity seeking secession is entitled with a positive right to secede and if so, under which circumstances. The basic issue can be summarised as whether or not we are facing a new course in the interpretation of certain classical categories of international law: the principle of territorial integrity, statehood, sovereignty, recognition, the right to external self-determination, etc. In this study we shall analyse some of the aspects arising from the Advisory Opinion of the International Court of Justice on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo focusing on the territorial issue. Firstly we shall analyse the scope of the principle of territorial integrity of States and how it operates; secondly, we shall focus on the scope of that principle in relation to the interior of the State, and ask ourselves how international law operates in relation to declarations of independence. Lastly, we shall deal with the principle of respect for territorial integrity in the specific case of Serbia with respect to Kosovo, and then end with a series of general conclusions. This study aims, definitely, to contribute to the theoretical debate on the challenges to the traditional certainties of international law in this area.

Key words: territorial integrity; self-determination; declaration of independence; secession.

RESUM

El 17 de febrer de 2008, Kosovo va aprovar la declaració d'independència de Sèrbia. La declaració es va fer en qualitat de secessió unilateral, una categoria que fins al moment present està sent àmpliament debatuda per la comunitat internacional. Un nombre respectable dels Estats membres de Nacions Unides hi van donar suport. S'han sotmès moltes qüestions jurídiques sobre

la independència de Kosovo a informe consultiu del Tribunal Internacional de Justícia. L'informe ha estat llargament esperat pels estudiosos del dret, tant pels seus efectes com per l'abast dels seus principis fora del context de descolonització, per tal com podria constituir un nou enfocament sobre l'escenari internacional del segle XXI. El Tribunal Internacional de Justícia va concloure que la declaració d'independència era conforme al dret internacional sempre que aquell no la prohibís expressament. El contingut de l'informe pivotava entorn de si el dret internacional prohibeix o no la declaració d'independència, sense entrar a dirimir si a una entitat que busca la secessió l'assisteix un dret positiu a la secessió ni, en cas afirmatiu, en quines circumstàncies. La qüestió bàsica és si estem o no estem davant d'un nou curs en la interpretació de certes categories clàssiques del dret internacional: el principi d'integritat territorial, què dóna carta de naturalesa a un estat, la sobirania, el reconeixement, el dret a la lliure determinació externa, etc. En aquest estudi analitzem alguns dels aspectes que sorgeixen en l'informe consultiu del Tribunal Internacional de Justícia sobre la conformitat amb el dret internacional de la declaració unilateral d'independència de Kosovo a partir de la qüestió territorial. En primer lloc analitzarem l'abast del principi d'integritat territorial dels estats i la forma en què opera; en segon lloc, ens centrarem en l'àmbit d'aplicació d'aquest principi en relació amb l'interior de l'Estat, i ens preguntarem com opera el dret internacional en relació amb les declaracions d'independència. Finalment, tractarem el principi de respecte a la integritat territorial en el cas específic de Sèrbia respecte de Kosovo, i acabarem amb una sèrie de conclusions generals. Aquest estudi té com a objectiu, en definitiva, contribuir al debat teòric sobre els desafiaments a les certeses tradicionals del dret internacional sobre aquesta qüestió.

Paraules clau: autodeterminació; declaració d'independència; integritat territorial; secessió.

RESUMEN

El 17 de febrero de 2008, Kosovo aprobó su declaración de independencia de Serbia. La declaración se hizo en calidad de secesión unilateral, una categoría que hasta el momento presente está siendo ampliamente debatida por la comunidad internacional. Un número respetable de estados miembros de Naciones Unidas le prestaron su apoyo. Numerosas cuestiones jurídicas sobre la independencia de Kosovo han sido sometidas a informe consultivo del Tribunal Internacional de Justicia. El informe ha sido largamente esperado por los estudiosos del derecho, tanto por sus efectos como por el alcance de sus principios fuera del contexto de descolonización, ya que podría constituir un nuevo enfoque sobre el escenario internacional del siglo XXI. El Tribunal Internacional de Justicia concluyó que la declaración de independencia era conforme al derecho internacional siempre que aquel no la prohibiera ex-

presamente. El contenido del informe pivotaba en torno a si el derecho internacional prohíbe o no la declaración de independencia, sin entrar a dirimir si a una entidad que busca la secesión le asiste un derecho positivo a la secesión ni, en caso afirmativo, en qué circunstancias. La cuestión básica es si nos encontramos o no ante un nuevo curso en la interpretación de ciertas categorías clásicas del derecho internacional: el principio de integridad territorial, qué da carta de naturaleza a un estado, la soberanía, el reconocimiento, el derecho a la libre determinación externa, etc. En este estudio analizamos algunos de los aspectos que surgen en el informe consultivo del Tribunal Internacional de Justicia sobre la conformidad al derecho internacional de la declaración unilateral de independencia de Kosovo a partir de la cuestión territorial. En primer lugar analizaremos el alcance del principio de integridad territorial de los estados y la forma en que opera; en segundo lugar, nos centraremos en el ámbito de aplicación de este principio en relación con el interior del Estado, y nos preguntamos cómo opera el derecho internacional en relación con las declaraciones de independencia. Finalmente, trataremos el principio de respeto a la integridad territorial en el caso específico de Serbia respecto de Kosovo, y acabaremos con una serie de conclusiones generales. Este estudio tiene como objetivo, en definitiva, contribuir al debate teórico sobre los desafíos a las certezas tradicionales del derecho internacional sobre esta cuestión.

Palabras clave: autodeterminación; declaración de independencia; integridad territorial; secesión.