AGORA: THE ICJ'S *KOSOVO* ADVISORY OPINION

THE *KOSOVO* ADVISORY OPINION: CONFLICT RESOLUTION AND PRECEDENT

*By Richard Falk**

I. POINT OF DEPARTURE

The somewhat surprising majority view in the advisory opinion of the International Court of Justice (ICJ) assessing Kosovo's declaration of independence[1] has some bearing on prospects for an eventual end to the bitter conflict between Kosovo and Serbia. It may also have some relevance for a variety of political movements around the world whose leaders might be more inclined than previously to tempt fate by declaring their people and territory to be internationally independent of the sovereign state within which they are now geographically located. Significantly, the ICJ majority sidestepped the question put to it by the General Assembly, in a move objectionable to the four dissenting judges, recasting it in such a way as to limit its response to whether Kosovo's declaration of independence, issued on February 17, 2008, was "in accordance with international law" to the rather bland assertion that the declaration *did not violate international law.*[2] The Court did not say, and explicitly ruled out any interpretation suggesting, that Kosovo's declaration was acceptable under international law, although by *Lotus* reasoning, what a state is not expressly prohibited from doing is permitted.[3] The majority also expressed its view that the declaration was not to be viewed as deciding upon Kosovo's final status in world diplomacy.

This seemingly surgical delimitation of the response to the General Assembly wins applause from those who seek a conservative jurisprudence from the Court that narrows findings to the extent possible, and derision from detractors who would like the Court to be less deferential to the sensitivities of sovereign states. From another angle the Court behaved in a somewhat political manner, deferring to geopolitical wishes by rather unexpectedly validating the Kosovo declaration, yet seeking to prevent wider policy effects, which seemed to avoid a simple textual application of the intentions of the Security Council as set forth in Resolution 1244.[4]

* Of the Board of Editors.

[1] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Int'l Ct. Justice July 22, 2010) [hereinafter Kosovo Opinion]. Documents of the ICJ and the Permanent Court of International Justice referred to in this essay are available on the ICJ Web site, http://www.icj-cij.org/.

[2] *Id.*, paras. 1, 123(3); GA Res. 63/3 (Oct. 8, 2008).

[3] S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10.

[4] Security Council Resolution 1244 (June 10, 1999) contains several passages that seem inconsistent with the Kosovo declaration of independence. In the preamble the following clause appears: "*Reaffirming* the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region . . . ." Then, in operative paragraph 10 the United Nations secretary-general is authorized "to

The puzzle that emerges is why the majority would decline to invalidate the Kosovo declaration of independence without endorsing it in accordance with the language of the General Assembly's question. Apparently, the majority found the declaration acceptable if strictly limited to the Kosovo situation, but did not want to endorse in any way the general practice, as it would encourage an expansive reading that would give direct aid and comfort to an array of secessionist movements waiting in the wings of the global political stage. In some respects, divergent views on whether such fine-tuning is appropriate and effective help explain the split between the majority of ten and the dissenting minority of four.[5]

This equivocation with respect to the wider legal implications of the advisory opinion will likely lend memorable prominence to the colorful concluding sentence of Judge Bennouna's dissent: "Such declarations are no more than foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present."[6] Whether such a prediction of inconsequentiality is accurate or not, only the future can tell. Other dissenters seem to express their worry in opposite terms, contending that upholding the declaration will measurably encourage secessionism in inappropriate and undesirable ways.[7]

The majority tried to meet Judge Koroma's concerns by making clear that its *legal* reasoning cannot properly be understood as giving aid and comfort to the separatist initiatives being pursued with respect to Northern Cyprus and the Republika Srpska. The *judicial* attachment of such limitations on the applicability of the Court's refusal to invalidate the Kosovo declaration to other secessionist/self-determinative initiatives seems unlikely to be *politically* effective over time in restricting the scope of its assessment in this instance. In effect, the outcome regarding Kosovo is likely in the future to be read broadly even though the majority view is written narrowly, precisely to discourage such a broad endorsement of unilateral declarations of statehood. This concern appears to be a large part of what worries dissenters about the approach taken by the majority. The decision explicitly indicated that some unilateral declarations similar to that made by Kosovo would be in violation of international law. In the instance of Cyprus, it pointed out that the relevant Security Council resolution (which is more or less equivalent to Resolution 1244) took pains to specify the contours of the final political disposition as one that would retain the reality of a unified state with a single citizenship.[8] The Court declared that its interpretations of Security Council resolutions proceed on a case-by-case basis, taking account of all surrounding circumstances.[9] But why would secessionist political movements

establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia"; and paragraph 4 allows an agreed number of Serb military and police personnel to return to Kosovo to perform their functions. All in all, it is hard to negative the conclusion that in Resolution 1244 the United Nations confirmed Serbia's claim to sovereignty over Kosovo.

[5] Four members of the Court dissented from paragraph 123(3) on the declaration's nonviolation of international law: Vice President Tomka, who appended a declaration to the advisory opinion, and Judges Koroma, Bennouna, and Skotnikov, who appended dissenting opinions to it.

[6] Kosovo Opinion, *supra* note 1, Diss. Op. Bennouna, J., para. 69.

[7] *E.g.*, *id.*, Diss. Op. Koroma, J., para. 4.

[8] *See* Kosovo Opinion, *supra* note 1, para. 114 (majority distinguishing SC Res. 1251 (June 29, 1999) on Cyprus). Republika Srpska's declaration of independence would also not be acceptable, as the breakaway was achieved through violations of international humanitarian law in the form of ethnic cleansing.

[9] Kosovo Opinion, *supra* note 1, para. 117 ("When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations."). The Court relied on a similar approach in *Legal Consequences for States of the*

bother to distinguish between a conclusion that the Kosovo declaration of independence did not violate international law and a finding that the declaration was "in accordance with international law"?

II. THE AUTHORITY OF ADVISORY OPINIONS

Many commentators tend to belittle the stature of advisory opinions by stressing their "advisory" character, which generalizes upon Judge Bennouna's cynical remark that the outcome here is no more than "foam." I have argued against such thinking in the past.[10] I believe that advisory opinions should be read and treated as providing the most authoritative international law assessments available, and deserve respect by affected parties and by the political organs of the United Nations, as well as by scholars. True, advisory opinions are explicitly disabled from deciding disputes between states, but for legal guidance there is no better or higher source of authority at the international level than the highest judicial body in the United Nations system. Much effort and expense is invested in the process of obtaining an advisory opinion, which seems to confirm its potential value to the political forces behind a particular request. In this proceeding, in the period from December 1 to 11, 2009, alone, twenty-seven states (not including Serbia and Kosovo) decided to take advantage of the opportunity to persuade the judges as to the proper reading of international law relative to the Kosovo declaration in the form of elaborate oral pleadings.[11] Some of these governments were represented by advocates who rank among the world's most influential jurists, which further testifies to the importance the leadership of many states attributes to the advisory opinion process. Is it then wasteful, and subversive of the international rule of law, to suppose that the outcome of such a proceeding, as embodied in the carefully crafted opinions of eminent judges representative of the world's main legal systems and reflective of the geographic dispersion of UN membership, significantly affects the weight of informed opinion about the proper resolution of contested international law issues? In this proceeding important issues of regional stability were at stake, as well as more general concerns about the proper limits of the right to self-determination. Surely, such a deliberative process should count for something more than "advisory" in the development of international law.

How advisory opinions of the ICJ are treated by governments, nonstate political actors, and the media and public opinion is at its core an issue of legal sociology, a matter for empirical inquiry into whether the community of states and its institutional mechanism accord such opinions respect or are quick to cast them aside whenever sovereign states reject the conclusions reached or geopolitical pressures are brought to bear. But in our less statist post-Westphalian world, it is also relevant to consider whether advisory opinions exert influence in civil society, among nongovernmental organizations, and on world public opinion.

As matters now stand, the unfortunate term "advisory" has generally been treated *politically*,

Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 53, para. 114 (June 21).

[10] Richard A. Falk, *Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall*, 99 AJIL 42 (2005); *see also* Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AJIL 64, 66 (1997).

[11] *See* Transcripts of ICJ Public Sittings, CR/2009/24–33 (Dec. 1–11, 2009).

especially by governments opposed to the policy implications of the ICJ approach, as if the legal findings in an advisory opinion were advisory in their essence, that is, without any entitlement to binding or obligatory force. This is a fact of international life, which in effect has given states a linguistically and jurisprudentially respectable option to ignore or defy the legal conclusions reached by this procedure without suffering adverse consequences. Given these considerations it is almost assured that advisory opinions on controversial issues will almost never be respected by governments whose national policies collide with the legally determined outcomes reached by the ICJ. At most, the infrequent attempts to implement such controversial opinions have produced bitter political confrontations that have rarely been resolved by compliance with the Court's view of the international law issue at stake.[12] Unlike the *constitutional* exceptionalism embodied in the UN Charter through the veto power given to permanent members, *judicial* exceptionalism associated with advisory opinions is available to all sovereign states, and apparently the cognate organs of the United Nations itself.

Yet unlike a contentious case in which states have either directly or indirectly expressed their consent to adjudication, and implicitly their willingness to comply with the outcome reached,[13] an advisory proceeding enables an international law question on very sensitive issues to be put to the ICJ in the face of the strenuous objections of concerned states, even leading states.[14] The Court mechanically reaffirms its fidelity to the *Eastern Carelia* principle, which has routinely been understood to stand for the proposition that an advisory opinion cannot function as a disguised or indirect way of pronouncing upon a dispute between states that has not been submitted to the Court for adjudication.[15] But in practice the Court has responded to requests from organs of the United Nations, especially the General Assembly, that are relevant to ongoing controversies involving the policies of sovereign states.[16] The legal assessments in these advisory opinions have usually not been implemented because of political resistance by important states that oppose the whole idea of ICJ pronouncements as to the acceptability of policy under international law, especially if the outcome casts a shadow of unlawfulness over established patterns of behavior.[17]

[12] The most prominent example of this dynamic arose in the Cold War setting, with the United States leading the effort to give effect to, and the Soviet Union holding out in defiance of, the international law view pronounced by the Court on obligations of members for contributions to peacekeeping budgets for operations that they opposed. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ REP. 151 (July 20).

[13] But the *Nicaragua* case illustrates that even the denial by the Court of the U.S. effort to withdraw consent from a contentious proceeding and the U.S. refusal to participate in the merits phase did not lead to compliance with an adverse decision, but to rejection of the judgment. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (June 27); Contemporary Practice of the United States, 79 AJIL 438–41 (1985) (indicating U.S. withdrawal from proceedings); Contemporary Practice of the United States, 80 AJIL 163–65 (1986) (noting U.S. termination of ICJ's compulsory jurisdiction); UN SCOR, 41st Sess., 2716th mtg. at 7, UN Doc. S/PV.2716 (Oct. 22, 1986) (quoting statement to Security Council rejecting Court's jurisdiction in case by U.S. ambassador Vernon Walters).

[14] The United States used its political leverage unsuccessfully in the General Assembly to prevent referring the issue of the legality of nuclear weaponry to the ICJ for an advisory opinion.

[15] Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 19–21 (July 23).

[16] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226 (July 8) [hereinafter Nuclear Weapons]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136 (July 9) [hereinafter Wall].

[17] *See, e.g.*, Nuclear Weapons, 1996 ICJ REP. at 266–67, para. 105(2)(C), (D), (F); Wall, 2004 ICJ REP. at 201–02, para. 163(3).

In view of this predilection for nonimplementation, a somewhat persuasive practical argument can be made for viewing advisory opinions as inherently lacking in political force even if legally authoritative. It is essentially an argument that combines legal positivism with political realism and parallels the affirmative case for the veto in the Security Council: At the present stage of international society, it is not desirable to push the requirements of international law beyond their voluntary acceptance by major states.[18] Further, any attempt to do so will consistently result in disregard, and thus will actually contribute to the cynical dismissal of the international rule of law as irrelevant to the behavior of important sovereign states. Consequently, the argument runs, since the outcomes of high-visibility advisory opinions raise such low expectations of compliance by the actors whose interests are adversely affected, it is always unwise to seek them in the first place. Of course, there is a degree of circularity here arising from the preemptive discounting of the legal authoritativeness of such international law assessments by labeling them as merely advisory.

It should be pointed out that several high-profile, controversial advisory opinions, especially *Legality of the Threat or Use of Nuclear Weapons* and the *Wall* case, were vigorously promoted by civil society actors that mounted strong pressure on governments. These actors view a favorable outcome in an advisory opinion as an important victory even if not implemented. Such an advisory opinion functions as a crucial element in "legitimacy wars" fought with soft-power instruments that are nonviolent yet intend to be coercive.[19] Arguably, such an advisory opinion can also help shape wider public attitudes that over time may exert pressure on governments to act in accordance with a legal mandate contained in its findings, and perhaps eventually generate respect and compliance.

III. WHETHER TO ASSESS THE KOSOVO DECLARATION OF INDEPENDENCE

In some respects, several of the dissenting opinions seem to rest their concerns on an implied posture of judicial restraint, arguing that the question put to the ICJ was of a political nature and needed to be resolved through negotiations by the parties, or, if this failed, by the Security Council. For this reason the appropriate response to the General Assembly's question was for the Court to exercise its discretion to turn down the request, while affirming that the issue contained in the question was one of international law, and therefore satisfied jurisdictional requirements.[20] More precisely, several dissenters contended that aside from the political character of the status of the Kosovo declaration, the UN role in determining the future of Kosovo was really a matter for the Security Council, which made the Court's willingness to respond

[18] Hedley Bull's formulation of this position remains the clearest. *See* Hedley Bull, *The Grotian Conception of International Society*, *in* HEDLEY BULL ON INTERNATIONAL SOCIETY 95 (Kai Alderson & Andrew Hurrell eds., 2000).

[19] The exemplary case of a legitimacy war was the antiapartheid campaign of the late 1980s and early 1990s that was waged by way of sanctions, boycotts, and divestment, instruments of coercion reinforced by symbolic support from the United Nations. The General Assembly's repudiation of the judicial outcome in the *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 ICJ REP. 6 (July 18), was one contribution by the United Nations to the antiapartheid campaign. *See* GA Res. 2145 (XXI) (Oct. 27, 1966).

[20] It is notable that on the jurisdictional question the Court was unanimous. Kosovo Opinion, *supra* note 1, para. 123(1).

an inappropriate exercise of discretion to accept the question because the General Assembly should never have posed it.[21]

The majority judges obviously did not support this minimizing approach to the role of the ICJ in its advisory function with regard to Kosovo's declaration of independence. Their attitude favored responding to the General Assembly and seemed partly to reflect a sense of institutional responsibility, namely, that the Court should always do its best not to rely on its discretion to decline to respond whenever a major UN organ poses an international law question to it. In effect, the majority believes it has a duty to clarify the relevance of international law whenever it is appropriately requested to do so, regardless of motivation or where the chips might fall with respect to implementation. The debate among the judges here is mainly over the issue of appropriateness in relation to the Kosovo circumstances, although sharp differences emerged as to the proper substantive response once it was decided to answer the question.

In one sense an unusual feature marks the debate about this particular advisory opinion. Almost always, the country taking the initiative in seeking an advisory opinion has been correct in predicting that the Court would agree with its interpretation of the facts and law at issue. In this situation, Serbia was the moving party within the General Assembly that challenged the Kosovo declaration of independence and pushed for an ICJ advisory opinion. Serbia was undoubtedly convinced that its view of the unlawfulness of the declaration would prevail or at least lead to an ambivalent response, given the explicit affirmation of Serbian sovereignty over Kosovo in the language of Security Council Resolution 1244, which Serbia and Russia reasonably expected to control the ICJ's response to the General Assembly's question.[22] Serbia probably also anticipated that a favorable outcome at the World Court would somewhat strengthen its hand in future negotiations, especially with regard to the northern 10 percent of Kosovo's territory where the Serbian minority is overwhelmingly concentrated. In addition, Serbian officials may have believed that it would be useful in their presumed pursuit of a partition of Kosovo to be able to cede a degree of sovereignty. This concession would set up the basis for a compromise allowing the northern area of Kosovo with its Serbian majority to be incorporated into Serbia, possibly coupled with some sort of compensatory territorial exchange that would give Kosovo control over the Albanian villages in today's southern Serbia. In fact, both sides and the large number of participating parties seemed to believe that an advisory opinion in their favor could substantially influence future diplomacy despite the limitations discussed above with respect to authoritativeness and compliance.

Not surprisingly, Serbia was angered and disappointed by the results. It had clearly lost the advisory opinion battle, although not completely, as the majority never affirmed the independence of Kosovo or the current suitability of Kosovo for membership in the United Nations and other international institutions, or even whether Kosovo was entitled to diplomatic relations owing to its claimed status as a sovereign state. Nevertheless, it was to be expected that the top Serbian officials would denounce the advisory opinion, so that its findings will have no bearing on the outcome of further negotiations with Kosovo.[23] Whether Serbia will be

[21] See separate opinion of Judge Keith, who dissented on this issue alone, voting with the majority on the question of substance. *Id.*, Sep. Op. Keith, J. (explaining his vote against paragraph 123(2) of the *dispositif*).

[22] For the sovereignty language in Resolution 1244, see note 4 *supra*.

[23] *See, e.g.*, *Serbians Strive to Keep Kosovo*, AUSTRALIAN, July 28, 2010, at 9 (quoting parliamentary motion stating that Serbia would never recognize Kosovo's "unilaterally proclaimed independence" and citing Serb president Boris Tadić to same effect), *available in* LEXIS, News Library, Major World Newspapers File; Daniel McLaughlin,

successful in nullifying the impact of the advisory opinion on the eventual resolution of the international legal status of Kosovo and its future relationship to Serbia remains to be seen.

Kosovo, as the winner before the Court, has naturally argued in support of respecting the advisory opinion, and of rapidly formalizing the de facto realities of independence that have now been legally endorsed, if only indirectly.[24] It is a short step from allowing the declaration of independence to stand and concluding that Kosovo should be regarded as de jure independent and fully respected as a sovereign state and permitted to become a full-fledged member of international society. After more than a decade of de facto independence, Kosovo could not possibly continue in any meaningful sense to be treated as subject to the sovereignty of the former Federal Republic of Yugoslavia or be indefinitely consigned to a kind of diplomatic purgatory.[25] The ensuing decade has not provided much reassurance about the capacity and willingness of the Kosovo government to protect the human rights of minorities, especially the Serbs. The difficulties associated with fulfilling this commitment have not eroded the strong international political consensus favoring normalization of Kosovo's de facto structure of independence. The consensus cannot be implemented diplomatically or legally because of the steadfast refusal of Serbia to renounce its claim of sovereignty over Kosovo, reinforced geopolitically by Russia's readiness to veto any effort to legalize the sovereignty claims of Kosovo at the United Nations.

IV. IMPLICATIONS FOR THE RIGHT TO SELF-DETERMINATION AND SECESSION MOVEMENTS

Kosovo has never made a secret of the fact that it is uncompromisingly dedicated to becoming an independent sovereign state with full membership in international society, and without any ties to Serbia. Ever since the NATO war of 1999 expelled the Serbian military presence from Kosovo, it has seemed like a political certainty that Kosovo would achieve its aspiration to be an independent state. This outcome also corresponded with the unanimously manifested preferences of the Albanian population, which constitutes close to 90 percent of the total. From a political and moral perspective, there was strong support, especially in Europe and North America, for the view that Serbia had lost its sovereign authority over Kosovo as a result of a persistent pattern of gross violations of fundamental human rights of its inhabitants, as well as the purported intention to carry out ethnic cleansing of a significant portion of the Albanian

Serbia in UN Bid to Ward off Kosovo's Secession, IRISH TIMES, July 31, 2010, at 9, *available in id.* (noting Serbia's submission of draft resolution to General Assembly calling for peaceful dialogue by all parties involved to find a mutually acceptable solution).

[24] *See, e.g.*, UN Press Release SC/10000 (Aug. 3, 2010) (citing statement to Security Council of Kosovo foreign minister Skender Hyseni).

[25] The Independent International Commission on Kosovo issued a report in 2000 that recommended at that time "conditional sovereignty," subject mainly to reliable assurances that Kosovar minorities would be protected. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 259–79 (2000), *available at* http://www.reliefweb.int/library/documents/thekosovoreport.htm; INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE? (2001), *available at* http://www.heimat.de/home/illyria/kosovocommission.org_report_english_2001.pdf (elaborating on the earlier report). The present author was a member of the commission.

community. In this regard, the advisory opinion is merely confirmatory of a legitimacy approach to sovereignty, that is, that sovereignty is no longer to be treated as unconditional but is contingent on maintaining governmental control and respect for fundamental human rights.[26] Against this overall background it might have been expected that the Court's majority would at least refuse to treat the declaration of independence by Kosovo as contrary to international law.

Disregarding the plain language of Resolution 1244 definitely upset the dissenters, and seems to go against the view that the Court should refrain from a politicized treatment of international law issues.[27] The majority appears to have been walking a tightrope, balancing an effort to be constructive in light of surrounding circumstances against the temptation to take sides in the unresolved political struggle between Serbia and Kosovo. In this sense, the majority opinion gave Kosovo's aspirations muted and indirect encouragement, while evidently trying to avoid the rigidifying impact of a legalistic construction supportive of the sovereignty claim relied upon by Serbia.[28]

Some other contextual factors help to explain the stance chosen by the majority. The diplomatic tensions that preceded the drafting of Resolution 1244 demonstrated that the only way to avoid a Russian veto in the Security Council was to insert vague language affirming Serbian sovereignty even though the states favoring humanitarian intervention expected and wished that Kosovo would be severed from Serbia in the future. To undercut the Serbian claim seemed to require the Court to employ this somewhat strained construction of the language in Resolution 1244 as a way of avoiding a regressive application of legality criteria.[29] It is also plausible to conjecture that the majority was influenced by legitimacy considerations, not wanting to take a legalistic course in view of Serbia's past abusive behavior in Kosovo.

Because this balance was struck by the majority, the issue of whether Kosovo could claim a right to self-determination was finessed. Here the likely motivation was a great reluctance to depart in law from the general view that the exercise of self-determination should never be allowed to undermine the unity of an existing sovereign state. This legal position was entirely consistent with the approach taken in the most widely influential formulation of the right to self-determination in international law, which is contained in the Declaration on Friendly Relations Among States.[30] At the same time, it was seen as destabilizing and morally regressive to do anything that might strengthen Serbian intransigence about

[26] *See* FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

[27] *See* note 4 *supra.*

[28] *Compare, e.g.*, ICJ, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Contribution of the Republic of Kosovo (Apr. 17, 2009), *and* Written Statement of the United States of America (Apr. 2009), *with* Written Statement of the Government of the Republic of Serbia (Apr. 15, 2009), *and* Written Statement of the Russian Federation (Apr. 16, 2009) (conveying a sense of the geopolitical encounter as expressed in the opposed legal interpretations of the status of the Kosovo declaration).

[29] For extensive academic discussion of legality/legitimacy trade-offs, including in light of the Kosovo intervention by NATO, see LEGALITY AND LEGITIMACY (Richard Falk, Mark Juergensmeyer, & Vesselin Popovski eds., forthcoming 2011).

[30] The declaration conditionally affirms the idea that the right to self-determination should not disturb the unity of existing states. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970) ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as

granting de jure status to normalize Kosovo's de facto independence. From the standpoint of human rights, as well as political realism, the Kosovo claim is highly reasonable. It would be irresponsible and extremely destabilizing to insist on a legal reversal of the de facto independence that Kosovo has enjoyed, with UN backing and administration, and regional and geopolitical reinforcement (even with an acknowledgment of Russian opposition), for more than a decade.

Nevertheless, the endorsement of self-determination for an ethnic community and delimited geographic region within Serbia, which was not itself a sovereign state but a federal component of the former Federal Republic of Yugoslavia, has some destabilizing potentialities. If Kosovo attains statehood in the full sense, a virtual certainty in the near future, it will be an example of self-determination to the third degree, though not officially described as such. The first degree is at the level of a sovereign state, as when a society manages to achieve political independence and end colonial rule. The second degree is a domestically sovereign unit of the sort that constitutes federal states, such as the sovereign states that emerged after the collapse of the Soviet Union and Yugoslavia. The third degree is an ethnic/geographic fragment of a federal substate unit, such as the claimant movements in Chechnya, South Ossetia, and Abkhazia.

This approval of Kosovo's march to sovereignty, even if not so described, amounts to a greatly enlarged view of the right to self-determination. As such, it seems to disregard, or at least significantly qualify, the international law view that the territorial unity of existing sovereign states should, without exception, be respected. On the basis of the Kosovo precedent, any "people" living in a geographically distinct area, if suffering from gross abuse of human rights, could claim sovereign independence and statehood. As suggested, careful reading shows that the majority tried to avoid such reliance by presenting the Kosovo declaration as exceptional because of surrounding circumstances. But why could not the people of South Ossetia, Abkhazia, Eastern Anatolia (Kurdish separatists), Chechnya, Xinjiang, Quebec, Hawaii, Puerto Rico, Kashmir, and countless other places make equally compelling *legitimacy* arguments, reinforced, at least to a small degree, *legally* and psychologically by the Kosovo precedent? This precedent draws on the advisory opinion, but it additionally can point to the political and diplomatic encouragement given to Kosovo to become an independent state, including by the style and substance of the UN administration ever since 1999.

V. THE PALESTINIAN CASE

Obviously, one possible extension of the Kosovo precedent would be to Palestine.[31] Among the variety of treatments of the legal/legitimacy issues, John Quigley's book makes an elaborate argument to the effect that Palestine is already a state.[32] But the approach of

described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.").

[31] The present author was designated as special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 by the UN Human Rights Council in 2008.

[32] JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT (2010).

the Kosovo advisory opinion is to suggest that the issuance of a declaration of independence by the Palestinian Authority (PA) would bolster the case with respect to both present and future status. The PA prime minister, Salam Fayyad, has often hinted at the intention to take such an initiative in the near future if the current peace talks fail. Yet just as repudiating the Kosovo declaration would seem destabilizing, so respecting a Palestinian declaration might have a similar destabilizing effect, given the dramatically different surrounding circumstances.

The prospect that destabilization would arise from a Palestinian declaration stems from two considerations not present in the Kosovo context: first, the relative strength and presumed opposition of Israel, which would almost certainly lead to a drastic response to such a Palestinian move, and the likelihood that the United States would back Israel by dismissing as a nullity any declaration of independent statehood by the PA that was not the outcome of international negotiations endorsed by Israel; and second, the extent to which the de facto reality for Palestine is one of prolonged Israeli occupation involving Israel's establishment of over one hundred settlements with an overall population approaching five hundred thousand in the occupied West Bank and East Jerusalem. In other words, a Palestinian declaration would presumably be far more ambitious and provocative than the Kosovo claim to legalize the status quo. The essence of a Palestinian declaration would be to overcome the status quo resulting from more than four decades of occupation and settlement building. The declaration would presumably insist on the removal of the Israeli presence from all Palestinian lands occupied after 1967, the right of return for Palestinians living in refugee camps or exile, and a more or less literal implementation of the iconic Security Council Resolution 242 mandating withdrawal of Israeli forces, including from East Jerusalem.[33]

From the Palestinian side, the temptation to issue a declaration of independence is likely to grow much stronger in the event that this latest attempt to negotiate a peace fails, as seems almost a certainty. If that eventuality materializes, the ICJ response to the Kosovo declaration will be remembered and invoked. In some respects the Palestinians' case is stronger than that of the Kosovars. For one thing, there is no instrument comparable to Resolution 1244 that affirms Israeli sovereignty; on the contrary, there is Resolution 242, as well as an international consensus that Palestinian claims to sovereign status are both justified and too long denied. For another, there is the view that Israel has been systematically guilty of gross violations of the human rights of the Palestinians living under occupation, and that the occupation of Gaza has included a series of further violations of international humanitarian law amounting to crimes against humanity.[34] Finally, there is the mounting judgment that prolonged occupation, now lasting more than forty-three years, is itself a condition of de facto unlawfulness that represents a continuing denial of the right to self-determination and gives rise to a right of resistance within the confines of international humanitarian law. Overall, then, the legitimacy/legality assessment of the Palestinian situation seems more supportive of a unilateral declaration than the case of Kosovo. At the same time, the Israeli military options,

[33] SC Res. 242 (Nov. 22, 1967).

[34] *See* UN Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict ["Goldstone Report"], UN Doc. A/HRC/12/48 (Sept. 25, 2009). For a general assessment of Israeli violations of international humanitarian law in occupied Palestine, see Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Richard Falk, UN Doc. A/65/331, at 2 (Aug. 30, 2010).

combined with an unfavorable balance of geopolitical forces from the Palestinian perspective, might still make it imprudent to issue such a declaration and thus outweigh the legitimacy rationale that has built support for the Kosovo path to independence and sovereignty. In effect, the benefits of legitimacy and legality perform a role for the Palestinians similar to that of Banquo's ghost in *Macbeth*.

SELF-DETERMINATION IN REGIONAL HUMAN RIGHTS LAW: FROM KOSOVO TO CAMEROON

*Dinah Shelton**

The right of self-determination has long been celebrated for bringing independence and self-government to oppressed groups, yet it remains a highly controversial norm of international law. From the breakup of the Austro-Hungarian and Ottoman Empires after World War I to the struggle of colonial territories for independence following World War II and the later dissolution of the former Yugoslavia, there has been an unavoidable conflict between the efforts of peoples to achieve independence and the demands of existing states to preserve their territorial integrity.[1] The UN Declaration on Principles of International Law reflects this tension.[2] It gives the principle of self-determination universal scope as a right belonging to undefined "peoples" but rejects any secession from independent states "conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." The 1993 Vienna Declaration adopted by the World Conference on Human Rights similarly affirmed the universal application of the right of self-determination to peoples under colonial or other forms of alien domination or foreign occupation, but also specified, in conformity with the Declaration of Principles, that the right

> shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people.[3]

In its recent *Kosovo* advisory opinion,[4] the International Court of Justice (ICJ) found no prohibition of unilateral declarations of independence in either general international law or in the practice of the UN Security Council.[5] In fact, the Court noted that "during the second half

* Of the Board of Editors.

[1] *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995).

[2] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970).

[3] Vienna Declaration and Progamme of Action, para. 2, UN Doc. A/CONF.157/23 (July 12, 1993).

[4] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (Int'l Ct. Justice July 22, 2010). ICJ documents cited in this essay are available on the ICJ Web site, http://www.icj-cij.org.

[5] "[N]o general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council." *Id.*, para. 81.