THE *KOSOVO* CASE: AN ARGUMENT FOR A REMEDIAL DECLARATION OF INDEPENDENCE

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I. INTRODUCTION

"We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."[1] This is the operative clause of the unilateral declaration of independence (UDI) of Kosovo.[2] It is also the recent concern of the International Court of Justice (ICJ), the supreme judicial body of the United Nations (UN).[3] The UN General Assembly (General Assembly), prompted by a draft resolution submitted by Serbia,[4] asked the ICJ to exercise its advisory function and determine whether the UDI, written by the Provisional Institutions of Self-Government of Kosovo (Provisional Institutions), was in accordance with international law.[5]

In late July 2010, the ICJ issued an advisory opinion answering the General Assembly's question (*Kosovo* Opinion).[6] Rather than accepting the General Assembly's wording of the question, the ICJ investigated whether the Provisional Institutions even wrote the UDI.[7] The ICJ concluded that the Provisional Institutions did not.[8] Since the Provisional Institutions did not issue the UDI,[9] the law that governs Provisional Institutions[10] did not govern the authors of the UDI.[11] Furthermore, because there is no explicit

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[1] Assembly of Kosovo, Kosova Declaration of Indipendence (Feb. 17, 2008) [hereinafter Kosovo Declaration of Independence], *available at* http://www.icj-cij.org/docket/files/141/15038.pdf (scroll down to page 20 of the document).

[2] *Id.*

[3] MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946–2005, at 1 (2006).

[4] Draft 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, U.N. Doc. A/RES/63/L.2 (Sept. 23, 2008).

[5] 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 G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008) [hereinafter G.A. Res. 63/3].

[6] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 404 (July 22) [hereinafter *Kosovo* Opinion].

[7] *Id.* at 424, para. 52.

[8] *Id.* at 447, para. 109.

[9] *Id.*

[10] For a description of the laws governing the decision in the *Kosovo* Opinion, see *id.* at 439–42, paras. 85–93; S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) [hereinafter SCR 1244]; Special Representative of the Secretary-General, *Constitutional Framework for Provisional Self-Government in Kosovo*, UNMIK/REG/2001/9 (May 15, 2001) [hereinafter Constitutional Framework], *available at* http://www.icj-cij.org/docket/files/141/15034.pdf (scroll down to page 121 of the document).

[11] *Kosovo* Opinion, *supra* note 6, at 452, paras. 119, 121.

prohibition of UDIs in general international law,[12] the February 2008 UDI is in accordance with international law.[13]

This Note will tackle the question: Why did the ICJ rule this way? The ICJ's objective-oriented adjustment of the General Assembly's question as well as the narrow[14] and vague holding do not seem to amount to an expansion of international law. However, this Note argues that this decision unintentionally developed a new concept of the doctrine of remedial secession: the remedial declaration of independence. The remedial declaration of independence could, and in the Kosovo case does, circumvent existing international law and impose constitutional frameworks that are designed to be temporary, but prove to be immobile.[15] Furthermore, this Note argues that institutional, doctrinal, and political barriers prevent an explicit endorsement of Kosovo's declaration of independence and that, by its declaration, the Republic of Kosovo is an independent and sovereign state.

In Part II, this Note examines the opinion in the Kosovo case itself, first by examining the history prior to the opinion's issue, and then by examining both the holding of the opinion and the controversial adjustment of the question. In Part III, this Note surveys international law regarding secession and self-determination in international law, and concludes that the practical import of the opinion was to give politically frustrated people a legally recognizable option for a remedial declaration of independence. Finally, in Part IV, this Note argues that the ICJ championed the most expansive doctrine practically available to it without upsetting international laws and the political nature of the creation of sovereign states.

II. THE *KOSOVO* OPINION

The *Kosovo* Opinion begins with a historical background. An analysis of the opinion should start the same way before moving on to the crucial elements of the case: the reformulation of the General Assembly's question and the opinion's formal holding.

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[12] *Id.* at 438–39, para. 84.

[13] *Id.* at 452, para. 122 (concluding that the adoption of the UDI did not violate any applicable rule of international law).

[14] *But see infra* notes 57–61 (arguing that the ICJ's reformulation of the question was a grand expansion of ICJ's jurisdiction).

[15] For the imposed frameworks and law that govern Kosovo, see Constitutional Framework, *supra* note 10; SCR 1244, *supra* note 10.

A. The Historical Background of the Kosovo Case

Kosovo is a province in southern Serbia that was granted partial autonomy in a Yugoslavian constitution in 1974,[16] but was stripped of that autonomy in September 1990.[17] Kosovo holds historical significance to Serbia, as it is the site of the great Serbian defeat at the Battle of Kosovo to the Ottoman Turks in 1389.[18] In 1999, when Serbian President Slobodan Milosevich suppressed the rebel Kosovo Liberation Army with force,[19] the UN Security Council (Security Council) intervened.[20]

On June 10, 1999, the Security Council adopted Security Council Resolution 1244 (SCR 1244).[21] SCR 1244 authorized the UN Secretary-General (Secretary-General) to establish an interim civil administration in Kosovo (UNMIK) that will transition into provisional democratic self-governing institutions.[22] Although Kosovo is to have "substantial self-government," SCR 1244 proposed that the final status of Kosovo was to be an autonomous part of the Federal Republic of Yugoslavia.[23]

On May 15, 2001, the UNMIK issued a Constitutional Framework for Provisional Self-Government (Constitutional Framework), which defined the responsibilities of the Provisional Institutions.[24] As part of that framework, "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244(1999) and the terms set forth in this Constitutional Framework."[25] Furthermore, the Provisional Institutions was forbidden to affect or diminish the Secretary-General's ability to enforce SCR 1244.[26] In other words, the Provisional Institutions, which includes the Assembly of Kosovo,[27] could not decide for itself whether or not it was governed by SCR 1244.

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[16] УСТАВ СОЦИЈАЛИСТИЧКЕ ФЕДЕРАТИВНЕ РЕПУБЛИКЕ ЈУГОСЛАВИЈЕ [CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA] (1974); *see also* Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 CHI.-KENT L. REV. 3, 7 (2005) (discussing the 1974 Constitution and the establishment of Kosovo as an "autonomous province").

[17] MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER 160 (1992).

[18] *Id.* at 38.

[19] Perritt, *supra* note 16, at 8–9.

[20] *Id.* at 9.

[21] SCR 1244, *supra* note 10.

[22] *Id.*

[23] *Id.*

[24] Constitutional Framework, *supra* note 10, ch. 9.

[25] *Id.* ch. 2(a).

[26] *Id.* ch. 8.1(b).

[27] *Id.* ch. 9.1.1. "The Assembly [of Kosovo] is the highest representative and legislative Provisional Institution of Self-Government of Kosovo." *Id.* It is a proportionally selected parliamentary body, chaired by a President, of 120 representatives with three-year terms. *Id.* ch. 9.1.

In a report submitted to the Security Council in 2005, Kai Eide, the Secretary-General's Special Envoy, reviewed the political situation in Kosovo and recommended that the final status process envisioned in SCR 1244 commence.[28] The Security Council agreed, but instructed the Secretary-General that it would "remain actively seized of the matter."[29] A group of nations known as the Contact Group agreed to a set of principles to govern the final status process, which included refraining from unilateral steps and requiring that the final status of Kosovo should be endorsed by the Security Council.[30]

Between February 20, 2006 and September 8, 2006, negotiations were held between Serbia and Kosovo.[31] These talks did not progress.[32] By March 2007, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status [was] exhausted. . . . [T]he conclusion [was] that the only viable option for Kosovo [was] independence, to be supervised for an initial period by the international community."[33] While the Security Council undertook the Kosovo mission, it could not come to a final decision, and a draft resolution failed to gain any traction.[34]

On November 17, 2007, elections were held for several democratic governing organizations in Kosovo.[35] The inaugural session of the Assembly

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[28] U.N. Secretary-General, Letter dated Oct.7, 2005 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2005/635 (Oct. 7, 2005) [hereinafter U.N. Secretary-General Letter dated Oct. 7, 2005].

[29] Statement by the President of the Security Council, U.N. Doc. S/PRST/2005/51 (Oct. 24, 2005).

[30] For a list of these principles see U.N. President of the S.C., Letter dated Nov. 10, 2005 from the President of the Security Council addressed to the Secretary-General, Annex, U.N. Doc. S/2005/709 (Nov. 10, 2005) [hereinafter U.N. President of the S.C. Letter dated Nov. 10, 2005]. The Contact Group was France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States.

[31] U.N. Secretary General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2006/361 (June 5, 2006) (covering the period from January 1 to April 30, 2006); U.N. Secretary General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc S/2006/707 (Sept. 1, 2006) (covering the period from May 1 to August 14, 2006); U.N. Secretary General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo,* U.N. Doc. S/2006/906 (Nov. 20, 2006) (covering the period from August 15 to October 31, 2006).

[32] E.U./U.S./RUSSIA TROIKA ON KOSOVO, REPORT OF THE E.U./U.S./RUSSIA TROIKA ON KOSOVO (Dec. 4, 2007) [hereinafter TROIKA REPORT], *available at* http://www.kosovocompromise.com/cms/item/topic/en.html?view=story&id=343&sectionId=2 (follow the "PDFDownload PDF Document" link).

[33] U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council, paras. 3, 5, U.N. Doc. S/2007/168 (Mar. 26, 2007) [hereinafter U.N. Secretary-General Letter dated Mar. 26, 2007].

[34] *Kosovo* Opinion, *supra* note 6, at 433, para. 71.

[35] U.N. Secretary General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2007/768 (Jan. 3, 2008).

of Kosovo was held in January 2008.[36] On February 17, 2008, the Assembly approved the Kosovo Declaration of Independence, issued by "the democratically-elected leaders of [the Kosovar] people."[37]

In August 2008, the Permanent Representative of Serbia asked that a request for an ICJ advisory opinion be placed on the agenda.[38] During the debate on the request, the United Kingdom's representative in the UN called Kosovo's independence "a reality," and described the request as political rather than legal.[39] The U.S. voted against the request, but the draft resolution was nevertheless adopted 77 votes to 6, with 74 abstentions.[40]

On July 22, 2010, the ICJ issued its advisory opinion on the Kosovo UDI.[41] The opinion was prompted by the approved General Assembly Resolution 63/3,[42] which requested that the Court answer the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[43]

B. The Reformulation of the Question

A critical element of the *Kosovo* Opinion is the ICJ's reformulation of the question posed to it by Resolution 63/3.[44] The Kosovo case is an exercise of the ICJ's advisory function. Therefore, the beginning of the decision considers whether the ICJ has the jurisdiction to answer the question.[45] "The ICJ, in accordance with Articles 96 of the UN Charter and 65 of the Court's Statute, may give an advisory opinion upon requests submitted to it by the General Assembly, Security Council and by other UN organs and specialized

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[36] U.N. Secretary General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2008/211 (Mar. 28, 2008).

[37] Kosovo Declaration of Independence, *supra* note 1.

[38] U.N. General Assembly, Letter dated Aug. 15, 2008 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/195 (Aug. 22, 2008).

[39] U.N. GAOR, 63rd Sess., 22nd plen. mtg. at 2–3, U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

[40] *Id.* at 11.

[41] *Kosovo* Opinion, *supra* note 6.

[42] G.A. Res. 63/3, *supra* note 5.

[43] *Id.*

[44] *See* Michael C. Mineiro, The Cowardice of the Restrictive Advisory Opinion Approach: A Failure of the Court to Exercise its Judicial Prerogative in the Application of General Principles of International Law in Fulfillment of International Peace and Security, Memorandum Prepared for the Hague Academy of International Law (Aug. 4, 2010), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1654265_code1104261.pdf?abstractid=1654265&mirid=1 (follow the "Download This Paper" link) ("This limitation of the question defined the entire advisory opinion.").

[45] *Kosovo* Opinion, *supra* note 6, at 412–23, paras. 17–48.

agencies authorized by the General Assembly."[46] The language of the question may be found in the appeal of the requesting agency; in the Kosovo case, it is the General Assembly and Resolution 63/3.[47]

However, the ICJ is not, and has never been, exclusively restricted to the question's language.[48] In an exercise of the advisory function of the ICJ, the requesting body cannot limit the ICJ's considerations through the language of the question.[49] In the *Kosovo* Opinion, however, the ICJ acknowledges that it may, on occasion, depart from the language of the question "where the question was not adequately formulated," where the question does "not reflect the 'legal questions really in issue,' " or where the question requires clarification.[50] In the *Kosovo* Opinion, the ICJ asserts that it did not depart from the language of the question, finding that the question posed to it was "narrow and specific."[51]

Rather, the ICJ expands the scope of its inquiry into the question.[52] The question, again: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[53] The ICJ finds that the General Assembly had no right to bind the court into accepting the General Assembly's identification of the authors of the UDI.[54] In other words, the General Assembly had no right to make the court accept as a predetermined fact that the authors of the UDI were the Provisional Institutions of Self-Government of Kosovo. This predetermination is "incompatible" with the ICJ's advisory function to accept the identities of the authors of the UDI; who wrote the UDI was a matter capable of affecting the outcome.[55] The ICJ supports its decision with the legislative history of Resolution 63/3:[56] the debate over the resolution did not include considerations of the author of the UDI, nor did the resolution's original wording contain a reference to the author of the UDI.[57]

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[46] ALJAGHOUB, *supra* note 3, at 38.
[47] G.A. Res. 63/3, *supra* note 5.
[48] ALJAGHOUB, *supra* note 3, at 56–57.
[49] *Id.* at 57.
[50] *Kosovo* Opinion, *supra* note 6, at 423, para. 50.
[51] *Id.* at 423–24, para. 51 (citing Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, para. 35 (Dec. 20)).
[52] Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence*, 11 GERMAN L.J. 895, 898 (2010) ("The ICJ reformulated the question regarding Kosovo's independence in a way that not only modified the original question but also created a new question . . . .").
[53] *Kosovo* Opinion, *supra* note 6, at 423, para. 49; G.A. Res. 63/3, *supra* note 5.
[54] *Kosovo* Opinion, *supra* note 6, at 425, para. 54.
[55] *Id.* at 424, para. 52.
[56] *Id.* at 424–25, para. 53.
[57] *Id.*

This decision prompted fierce opposition from *Kosovo* Opinion dissenters.[58] Vice-President Judge Peter Tomka called this exercise an adjustment of the question, and found that there was no need for it.[59] Furthermore, examining the legislative history of Resolution 63/3, he found that most major parties accepted that the Provisional Institutions promulgated the UDI.[60] Judge Mohamed Bennouna wrote that the ICJ "amended the question posed in a manner contrary to its object and purpose" and that such an exercise "would seriously prejudice the sense of judicial security" of the ICJ.[61] Judge Abdul Koroma also wrote "[never] before has [the ICJ] reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it."[62] According to these judges, the ICJ answered the question that it wanted to answer, rather than the actual question set forth by the General Assembly.[63]

This is not the only opinion in which the ICJ has reformulated or adjusted the question posed to it.[64] In 1961, the General Assembly resolution authorizing the ICJ to take up the Advisory Opinion on Certain Expenses of the United Nations (Certain Expenses Advisory Opinion), Resolution 1731 (XVI), was the subject of a proposed but never adopted amendment by France.[65] The amendment would have changed the language of the advisory opinion's question.[66] The ICJ finds, as a preliminary matter, that "[t]he rejection of the French amendment does not constitute a directive to the Court . . . if the court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in its discharge of judicial functions."[67] In the *Kosovo* Opinion, the ICJ cites the Certain Expenses Advisory Opinion as justification for "decid[ing] for itself whether [the UDI] was promulgated by the Provisional

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[58] *See* Giuseppe Bianco, *And Nothing Else Matters: The ICJ's Judicial Restraint in its Opinion on Kosovo's Independence*, 2 PERSPECTIVES ON FEDERALISM, no. 2, at N–24, N–30 nn.XIX–XX (2010), *available at* http://www.on-federalism.eu/attachments/073_download.pdf (describing the dissenting judges' censure of the ICJ's intent-based authorship investigation).

[59] *Kosovo* Opinion, *supra* note 6, at 456, para. 10 (Tomka, J., declaration).

[60] *Id.* at 458–59, paras. 16–18 (Tomka, J., declaration).

[61] *Id.* at 507, paras. 34–35 (Bennouna, J., dissenting).

[62] *Id.* at 467–68, para. 3 (Koroma, J., dissenting).

[63] *Id.*

[64] *See* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 156–57 (July 20) (explaining that the ICJ may consider any aspect of a question which it views appropriate).

[65] *Id.*

[66] *Id.* at 156.

[67] *Id.* at 157.

Institutions of Self-Government or some other entity" despite the fact that this was not the question asked to it.[68]

There is a question of whether this adjustment affected the outcome; if it did, it may complicate the use of advisory jurisdiction by bodies such as the General Assembly.[69] The ICJ determines this question by first considering whether SCR 1244 and the Constitutional Framework are still an active part of international law.[70] SCR 1244 declares that the resolution is in effect until "the Security Council decides otherwise,"[71] and the Security Council, besides deciding to "remain actively seized of the matter,"[72] had not acted by February 2008.[73] Additionally, there is no inherent mechanism for termination of either SCR 1244 or the Constitutional Framework.[74]

Those legal regimes, and the institutions that they empowered, cannot exceed the powers delegated to them.[75] The Constitutional Framework, which governed the Provisional Institutions, delegates to the Special Representative the authority over "concluding agreements with states and international organizations[,] . . . overseeing the fulfilment of commitments in international agreements[,] . . . [and] external relations."[76] At least between 2002 and 2005, the Assembly of Kosovo, which is authorized to govern based on the Constitutional Framework, was not free to act as a sovereign body.[77] Under the Constitutional Framework, the Special Representative of the Secretary-General in Kosovo has the power to annul measures of the Provisional Institutions and declare them null and void if they are incompatible with the Constitutional Framework.[78] In his separate declaration, Vice-President Tomka illustrated two incidents in which the Special Representative annulled acts of the Assembly of Kosovo that were similar to the February 2008 UDI.[79]

In February 2003, the Assembly of Kosovo drafted a declaration entitled "Declaration on Kosov[o] — A Sovereign and Independent State," which

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[68] *Kosovo* Opinion, *supra* note 6, at 425, para. 54.

[69] Mark Angehr, Comment, *The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, 103 NW. U. L. REV. 1007, 1021 (2009) (arguing that "a revitalized advisory jurisdiction could potentially reduce the frequency of advisory opinion requests").

[70] *Kosovo* Opinion, *supra* note 6, at 442, para. 93.

[71] SCR 1244, *supra* note 10, para. 19.

[72] *See infra* note 30 and accompanying text.

[73] *Kosovo* Opinion, *supra* note 6, at 441, para. 91.

[74] *Id.*

[75] *Id.* at 447, para. 108.

[76] *Id.* at 446, para. 106 (quoting Constitutional Framework, *supra* note 10, ch. 8.1).

[77] *Id.* at 447, para. 108.

[78] *Id.*; *id.* at 464–65, para. 32 (Tomka, J., declaration).

[79] *Id.* at 464–65, para. 32 (Tomka, J., declaration).

contained language suggesting that it was a declaration of independence.[80] The UN administration informed the Assembly that the declaration was "beyond the scope of its competencies."[81] Another attempted declaration by the Assembly in November 2005 was again pre-empted by the Special Representative, who informed the Assembly that such a declaration "would be in contravention to the UN Security Council resolution [1244] . . . and it therefore will not be with any legal effect."[82]

However, the ICJ notes that it is "of some significance" that the Special Representative did not undertake similar action when faced with the February 2008 UDI.[83] The ICJ concludes that, based on prior practice of annulling such declarations, the Special Representative has a legal "duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*."[84] Therefore, the silence of the Special Representative suggests that it was not a Provisional Institution that instituted the UDI, but an entity outside of that legal framework.[85]

Despite this implicit confirmation, the ICJ looks beyond the immediate responsibilities and powers delegated to the individual branches of the Provisional Institutions when it examines the question of who was the author of the UDI. It includes the "larger context."[86] SCR 1244 and the Constitutional Framework contemplate "that the final status of Kosovo would flow from, and be developed within, the framework set up by [SCR 1244]."[87] However, "[t]he declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached."[88] Therefore, the authors of the UDI "set out to adopt a measure the significance and effects of

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[80] Assembly of Kosova, Declaration on Kosova – A Sovereign and Independent State (Feb. 3, 2003), *available at* http://www.icj-cij.org/docket/files/141/15038.pdf (scroll down to page 6 of the document).

[81] Letter from Charles H. Brayshaw, Principal Deputy Special Representative of the Sec'y-Gen., to Nexhat Daci, President of the Assembly of Kos. (Feb. 7, 2003), *available at* http://www.icj-cij.org/docket/files/141/15038.pdf (scroll down to page 9 of the document).

[82] *Kosovo* Opinion, *supra* note 6, at 464–65, para. 32 (Tomka, J., declaration) (quoting U.N. Interim Mission in Kosovo, *Press Briefing Notes*, Nov. 16, 2005, at 4–5).

[83] *Id.* at 447, para. 108 (main opinion).

[84] *Id. Ultra vires*, Latin for "beyond the powers (of)," means beyond the scope of power allowed or granted by a corporate charter or law. BLACK'S LAW DICTIONARY 1662 (9th ed. 2009).

[85] *Kosovo* Opinion, *supra* note 6, at 447, para. 108; *see also* Robert Muharremi, *A Note on the ICJ Advisory Opinion on Kosovo*, 11 GERMAN L.J. 867, 871 (2010) (finding that the silence was a positive expression of the Special Representative's understanding that the declaration was an act not attributable to the Provisional Institutions).

[86] *Kosovo* Opinion, *supra* note 6, at 445, para. 104.

[87] *Id.*

[88] *Id.* at 445–46, para. 105.

which would lie outside [the legal order created for the interim phase]."[89] Further, the ICJ, when it was looking to identify the authors of the UDI, did not look to who actually signed the document, which were the 109 members of the Assembly of Kosovo, the President of Kosovo, and the Prime Minister of Kosovo.[90]

Rather, the ICJ looked to the circumstances surrounding the UDI, and it inquired into the intent of the UDI. Was the UDI designed to work within the existing *lex specialis*[91] that governed the territory covered by the UDI, or was it intended to work outside of it? "If the ICJ had come to the conclusion that it was the [Provisional Institutions] which had declared independence, it would have been impossible to come to a conclusion other than that the [Provisional Institutions] had violated its competences under the Constitutional Framework . . . ."[92] Therefore, the ICJ concluded that the February 2008 UDI was intended to work outside of the international legal regime that governed Kosovo,[93] and that regime did not preempt the UDI from being issued.

C. The Holding

There are two holdings of the *Kosovo* Opinion, addressing two different forms of international law: general and *lex specialis*. The holding addressing general international law is "that general international law contains no applicable prohibition of declarations of independence."[94] This holding cannot be read as a determination that the declaration was legal.[95]

The second holding is broken into two sections. First, the holding investigates who authored the UDI and concludes that the authors were not the Assembly of Kosovo acting as a Provisional Institution.[96] Second, as the authors were not governed by the *lex specialis* of SCR 1244 and the Constitutional Framework, the authors were in "accordance with international law."[97]

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[89] *Id.*
[90] *Id.* at 435, para. 76.
[91] *Lex specialis*, from Latin, from the phrase *lex specialis derogat legi generali*, means that a specific law overrides a general law, and the shorthand of the phrase refers to specific governing law that overrules general principles. Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1, 5 n.16 (2010).
[92] Muharremi, *supra* note 85, at 872.
[93] *Kosovo* Opinion, *supra* note 6, at 452, para. 121.
[94] *Id.* at 438–39, para. 84.
[95] Cirkovic, *supra* note 52, at 900.
[96] *Kosovo* Opinion, *supra* note 6, 444–48, paras. 102–109.
[97] *Id.* at 448–52, paras. 110–119.

The ICJ recognizes three broad fields of general international law under which a prohibition or a permission for unilateral declarations of independence may be found: historical state practice, the principle of territorial integrity, and the right to self-determination. The investigation into the first field did not lend itself to an answer; nineteenth and twentieth century state practice did not demonstrate a prohibition on declarations of independence.[98] The ICJ acknowledges that historically, declarations of independence could result in a new state, but that on many occasions a new state did not develop in spite of the declaration.[99] Despite this complex history, the ICJ notes that state "practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence."[100]

The ICJ does not end the historical argument with a simple statement of customary law. Instead the ICJ recognizes that "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."[101]

The principle of territorial integrity might be contrary to a permissive ruling on declarations of independence.[102] The UN Charter, as well as several General Assembly resolutions and conferences, "enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States."[103] The ICJ considers the principle of territorial integrity an important part of the legal order.[104] Its importance, however, is irrelevant to the ICJ's consideration of the Kosovo case: the principle of territorial integrity only applies to state action vis-à-vis other states, and therefore is inapplicable in this case.[105]

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[98] *Id.* at 436, para. 79.

[99] *Id.*

[100] *Id.*; *see also* Daniel Fierstein, Note, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L.J. 417, 431 (2008) ("State practice suggests that there is very little, if any, support for unilateral declarations of independence like that of Kosovo, where the government of a particular State demonstrates opposition to secession.").

[101] *Kosovo* Opinion, *supra* note 6, at 436, para. 79.

[102] *Id.* at 437–38, para. 81; *see, e.g.*, *id.* paras. 20–27 (written statement of Spain), *available at* http://www.icj-cij.org/docket/files/141/15644.pdf (arguing that UN Conventions and state practice confirm that respect for territorial integrity is controlling over "an alleged right to self-determination exercised via a unilateral act").

[103] *Kosovo* Opinion, *supra* note 6, at 437, para. 80; *see, e.g.*, Declaration on Friendly Relations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018, at 123 (Oct. 24, 1970); Final Act of the Conference on Security and Cooperation in Europe art. 1, Aug. 1, 1975, 14 I.L.M. 1292 (1975).

[104] *Kosovo* Opinion, *supra* note 6, at 437, para. 80.

[105] *Id.* ("[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States.").

The ICJ does not explicitly consider whether the right to self-determination or remedial secession informs the question presented in the *Kosovo* Opinion.[106] Because, as it argues, a unilateral declaration of independence may not "be in violation of international law without necessarily constituting the exercise of a right conferred by it," the ICJ finds that there is no need to consider whether a right does exist.[107] This argument is based on the *Lotus* presumption that whatever international law does not prohibit is *e contrario* allowed.[108] The ICJ thus recognizes that unilateral declarations of independence are not per se illegal.

III. THE CASE FOR A REMEDIAL DECLARATION OF INDEPENDENCE

Despite the fact that the ICJ explicitly denies that it made any ruling on "remedial secession,"[109] the process used by the ICJ to the identity of the authors of the UDI contained elements of remedial secession doctrine. The February 2008 UDI and the ICJ's UDI authorship argument are similar to a Supreme Court of Canada ruling in a similar case over the secession of Quebec.[110] The ICJ refuses this comparison; unlike the Supreme Court of Canada, the ICJ claims it was not asked "to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence."[111] Because the General Assembly did not pose the question of remedial secession, the ICJ attempted to avoid answering it.

However, in the arguments it made supporting its holdings, the ICJ unquestionably relied on concepts drawn from the doctrine of remedial secession.[112] The following is not only a survey of the law of remedial secession as it applies to Kosovo; it is also the outline for an argument that the Kosovo case established a precedent for remedial acts of self-determination, including the remedial declaration of independence.

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[106] *Id.* at 438, para. 83.

[107] *Id.* at 425–26, para. 56.

[108] S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, para. 46 (Sept. 7); *see also* Thomas Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 GERMAN L.J. 881, 883 (2010) (finding that the *Lotus* presumption is not appropriate in modern international law, as the *lacunae* are often supplanted by "soft rules").

[109] *Kosovo* Opinion, *supra* note 6, at 425–26, 438, paras. 56, 82–83.

[110] *See* Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 814–18 (2009) (discussing the remedial secessionist framework developed by the Canadian Supreme Court as applicable to the Kosovar declaration of independence).

[111] *Kosovo* Opinion, *supra* note 6, at 425–26, para. 56.

[112] For an explicit argument that the ICJ should have granted Kosovo the right to remedial secession based on humanist grounds, see *id.* at 584, para. 156 (Trindade, J., separate opinion).

A. Remedial Secession in International Law

Compare this preliminary remedial declaration of independence with the existing body of law that recognizes a positive right to remedial secession.[113] Remedial secession is the exercise of the right to self-determination in "case[s] in which intra-State groups with a particular identity (minorities, indigenous peoples) are victims of serious breaches of their fundamental civil and human rights."[114] Remedial secession is a function of the paradoxical discouragement and encouragement of secession in the UN Declaration on Friendly Relations.[115] The Declaration on Friendly Relations reaffirms that, as a principle of international law, "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[116] This is contrasted against, in the same declaration, "[t]he principle of equal rights and self-determination of peoples."[117] The impossibility of reconciling the principle of territoriality with the right to self-determination evolved into the doctrine of remedial secession.

Commentators are split as to when the right to remedial secession is activated. Some commentators argue that there are two conditions to activation: the first, a violation of the group's right to self-determination, and the second, the commission of gross violations of human rights to its detriment.[118] Other commentators argue that the existence of either condition activates the right to remedial secession.[119] In either case, under the circumstances in Kosovo, the classical right to self-determination applies.[120]

These issues are not new to international courts. The League of Nations, the predecessor to the UN and the ICJ, dealt with the issue of remedial self-determination in the *Aaland Islands* Case.[121] In 1809, Sweden ceded Finland and an archipelago in the Baltic Sea known as the Aaland Islands to

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[113] Vidmar, *supra* note 110, at 814–18.

[114] Antonello Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 171, 176 (Marcelo G. Kohen ed., 2006).

[115] KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 76–77 (2002) (noting that the right to self-determination cannot violate the principle of territorial integrity outlined in the Declaration on Friendly Relations, *supra* note 103).

[116] Declaration on Friendly Relations, *supra* note 103, pmbl.

[117] *Id.*; Tancredi calls this clause the "safeguard clause." Tancredi, *supra* note 114, at 178.

[118] Tancredi, *supra* note 114, at 177.

[119] *Id.*

[120] *Id.*

[121] *Decision of the Council of the League of Nations on the Åland Islands Including Sweden's Protest* (Sept. 1921) [hereinafter *Aaland Islands* Case], *available at* http://www.kulturstiftelsen.ax/traktater/eng_fr/1921a_en.htm.

Russia.[122] After the Bolshevik Revolution, Finland declared independence, but the islands declared that they would be Swedish.[123] Finland invaded the islands to quell the uprising, and the League of Nations became involved.[124] The second Commission of Rapporteurs on that case indicated while there was not a general right to secede, the "separation of a minority from the State of which it forms part and its incorporation into another State may only be considered as an altogether *exceptional* solution, *a last resort* when the State lacks either the will or the power to apply just and effective guarantees."[125] In the League of Nations' resolution of the matter, it made certain "guarantees" to the islanders against Finland's full sovereignty, including an "autonomy law" and the preservation of the islanders' native tongue, Swedish.[126] The predecessor of the UN thus partially abrogated the principle of territoriality in favor of self-determination.

B. Remedial Secession under Reference re Secession of Quebec

The ICJ recognized, in the *Kosovo* Opinion, that the Canadian Supreme Court had addressed the issue of remedial self-determination in an advisory opinion.[127] In *Reference re Secession of Quebec* (*Reference re Secession*), the Canadian Supreme Court responded to three questions submitted to it.[128] The most important was the second question, the language of which the ICJ quoted verbatim in the *Kosovo* Opinion,

> Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?[129]

Following this question, the Canadian Supreme Court declared that there is no legal right for component territories of a state to secede unilaterally

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[122] Oliver Diggelmann, *The Aaland Case and the Sociological Approach to International Law*, 18 EUR. J. INT'L L. 135, 136–37 (2007).
[123] *Id.* at 136.
[124] *Id.* at 137.
[125] *Report Submitted to the Council of the League of Nations by the Comm'n of Rapporteurs*, League of Nations Doc. B7.21/68/106, paras. 21, 28 (1921).
[126] *Aaland Islands* Case, *supra* note 121.
[127] *Kosovo* Opinion, *supra* note 6, at 425–26, paras. 55–56.
[128] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).
[129] *Id.* para. 2; *Kosovo* Opinion, *supra* note 6, at 425, para. 55.

from their parent.[130] Furthermore, where "unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination."[131] This matches the *Aaland Islands* Case's position that the right to self-determination could trump territorial cohesion.[132]

The Canadian Supreme Court splits self-determination into two cognizable forms: internal and external.[133] Internal self-determination is defined as: "a people's pursuit of its political, economic, social, and cultural development *within the framework of an existing state*."[134] The definition of external self-determination, which arises "in only the most extreme of cases and, even then, under carefully defined circumstances," was borrowed from the Declaration on Friendly Relations as "a sovereign and independent State . . . [with] the free association or integration with an independent State."[135]

Further, the Canadian Supreme Court recognizes three situations in which a cognizable right to self-determination, either internal or external, develops: "colonial peoples," peoples "subject to alien subjugation, domination, or exploitation," and peoples who claim a right to remedial secession.[136] The right to remedial secession occurs "when a people is blocked from the meaningful exercise of its right to self-determination internally."[137] This might occur, for example, if external and imposed frameworks (e.g., SCR 1244) prevent a conclusion mandated by international law (e.g., Kosovo's *de facto* independence).

Therefore, the Kosovo case had the hallmarks of an opportunity for the ICJ to opine on and define remedial secession,[138] but the ICJ expressly denies that it needed to decide on whether such a right existed "outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation."[139] A turn to classical secessionist analysis, as the ICJ suggests, does not leave the ICJ with any clearer legal territory.

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[130] *Reference re Secession of Quebec*, 2 S.C.R. para. 111.
[131] *Id.* para. 112.
[132] Diggelmann, *supra* note 122, at 137.
[133] *Reference re Secession of Quebec*, 2 S.C.R. para. 126.
[134] *Id.*
[135] *Id.* (quoting Declaration on Friendly Relations, *supra* note 103, at 124).
[136] *Id.* paras. 131–134.
[137] *Id.* para. 134.
[138] Mindia Vashakmadze & Matthias Lippold, *"Nothing But a Road Towards Secession"? – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2 GOETTINGEN J. INT'L L. 619, 636 (2010).
[139] *Kosovo* Opinion, *supra* note 6, at 425–26, 438, paras. 55–56, 82–83.

C. Problems of Classical Secession Law

In all likelihood, Kosovo does not have a right to secede in classical international law for two reasons: one, the Kosovars are not a traditional "peoples" whose rights to external self-determination are protected by international law,[140] and two, Kosovo does not possess the classical requirements for statehood.[141]

The concept of a "people" is poorly defined in international law, allowing disparate views to coexist and further complicate the definition.[142] The term "people" traditionally describes particular and clearly defined groups: "citizens of a nation-state, the inhabitants in a specific territory being decolonized by a foreign power, or an ethnic group."[143] The definition of who is a "people" is important because the UN Charter imparts a right to self-determination to "peoples,"[144] and subsequent UN conventions support the conclusion that a right to self-determination belong to certain "peoples."[145]

Whether or not a certain collectivity is a "people" is a qualitative question, not a quantitative one.[146] While the question has been written on extensively, a definitive answer to whether the Kosovars are a "people" is not forthcoming.[147] The vagueness of international law provides extensive rights to peoples, but not to similar collectivities that are not entitled to the title.[148] Because the Kosovars have not definitively asserted the right to be

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[140] *See generally* U.N. Charter art. 1, para. 2, art. 55; G.A. Res. 1514(XV), U.N. Doc. A/4684 (Dec. 14, 1960); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[141] *See* Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 3802 L.N.T.S. 19 [hereinafter Montevideo Convention].

[142] *Compare* Fierstein, *supra* note 100, at 433 (finding that, despite treaty law and judicial opinion support for defining "peoples" as an ethnic minority within a particular territory, state practice supports defining "peoples" as an entire nation), *with* K. William Watson, *When In the Course of Human Events: Kosovo's Independence and the Law of Secession*, 17 TUL. J. INT'L & COMP. L. 267, 282 (2008) (finding that defining Albanian Kosovars as a "people" is "not a difficult task," and that defining "peoples" is either a self-evident question or in contrast with the definition of "[a] 'minority' ").

[143] Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, ASIL INSIGHTS (Feb. 29. 2008), http://www.asil.org/insights080229.cfm.

[144] U.N. Charter, *supra* note 140, art. 1, para. 2, art. 55.

[145] *E.g.*, Declaration on Friendly Relations, *supra* note 103, at 122; ICCPR, *supra* note 140; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

[146] David Makinson, *Rights of Peoples: A Logician's Point of View*, *in* THE RIGHTS OF PEOPLES 69, 73 (James Crawford ed., 1988).

[147] Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova:* Uti Possidetis*, the Ethnic Principle, and Self-Determination*, 80 CHI.-KENT L. REV. 353, 367 (2005).

[148] ICCPR, *supra* note 140, art. 1.

considered a people and the default status of an undefined collectivity is not a people, the Kosovar community is not a "people" under international law.

In order to determine whether Kosovo has reached or achieved full statehood, it must first be established that the international criteria for statehood must be met.[149] In the 1993 Montevideo Convention, four criteria were outlined to qualify whether an entity can achieve statehood: a defined territory, a permanent population, a government, and the capacity to enter into international relations.[150] Some scholars assert that Kosovo meets three out of four of the criteria of the Montevideo Convention, excluding "effective government over its territory,"[151] but alternatively, others conclude that it meets all of the traditional Montevideo criteria.[152] However, the Constitutional Framework explicitly reserves the capacity to enter into international relations to the Special Representative, not to any of the Provisional Institutions.[153] Since the Constitutional Framework is active international law, Kosovo must not meet at least the 'capacity to enter into international relations' prong of the Montevideo Convention and accordingly does not possess all of the traditional criteria for statehood.[154] Therefore, classical secession law does not apply to Kosovo.

D. The Remedial Declaration of Independence

No matter what its intent, the ICJ frames the circumstances surrounding the February 2008 UDI in the doctrine of remedial secession. While the ICJ cannot find Kosovo independent or certify Kosovo's declaration of independence,[155] this case stands as precedent to undertake such action. The remedial declaration of independence, drawn from the Kosovo case, is not the first act of a sovereign state, or even an act in a continuum of action with its final goal being sovereignty.[156] If the *Kosovo* Opinion stands for anything, it is that international law is silent on declarations of independence.[157] Furthermore, international law cannot precisely define

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[149] Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 147 (2010).
[150] Montevideo Convention, *supra* note 141, art. 1.
[151] Watson, *supra* note 142, at 290.
[152] Fierstein, *supra* note 100, at 440 ("Kosovo seems to objectively satisfy the traditional criteria.").
[153] Constitutional Framework, *supra* note 10, ch. 8.
[154] *Kosovo* Opinion, *supra* note 6, at 442, para. 93.
[155] *See infra* Part IV (the consent-driven nature of international law prevents a self-conscious court from exerting power not granted to it).
[156] Richard Caplan, *The ICJ's Advisory Opinion on Kosovo* (U.S. Inst. of Peace, Peace Brief No. 55, Sept. 17, 2010).
[157] *Kosovo* Opinion, *supra* note 6, at 438–39, para. 84.

when and how non-State action precipitates into sovereign State action.[158] However, the Kosovo case clarifies an important point: when an actor who has been partially granted sovereignty by a "parent" sovereign entity is frustrated in its pursuit of internal self-determination by external circumstances, the actor may issue a declaration of independence purporting to establish external self-determination in violation of applicable *lex specialis* if the "parent" does not positively exclude such action.[159]

1. The Partially Sovereign Actor, the "Parent," and the Lex Specialis

In Kosovo from 1999 until 2010, political and legal authority was undoubtedly held by the UNMIK, authorized by SCR 1244.[160] This political and legal authority derived from clause 11(e) of SCR 1244, in which "the international civil presence" would be responsible for "[f]acilitating a political process designed to determine Kosovo's future status."[161] This political process is enshrined in the Constitutional Framework, adopted in 2001, which also reserves significant powers in the Special Representative.[162] Further, the Special Representative is obligated to "[undertake] the necessary measures to facilitate the transfer of powers and responsibilities to the Provisional Institutions of Self-Government."[163] Having granted itself the exclusive right to hold political and legal authority over Kosovo, the UN became the "dominant government administrator" of Kosovo.[164]

Furthermore, it is exceedingly unclear who is sovereign over Kosovar territory. An annex to SCR 1244 contemplates that the future status process of Kosovo would end with an autonomous Kosovo within a sovereign State of Serbia.[165] However, the Assembly of Kosovo resolved that the political process would end with an independent and sovereign Kosovo.[166]

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[158] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 261–62 (2d ed. 2006) (noting that "it is not easy to formulate any satisfactory test for determining the statehood of the seceding entity before its complete success").

[159] For a discussion on a different paradigm of self-determination and secession, which includes factors such as human rights violations, attempted negotiated settlements, the will of the supermajority, and economic and international political viability, and how it applies to Kosovo, see Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT'L L. 419 (2010).

[160] SCR 1244, *supra* note 10.

[161] *Id.*

[162] Constitutional Framework, *supra* note 10, ch. 8.

[163] *Id.* ch. 14.2.

[164] Fierstein, *supra* note 100, at 438.

[165] SCR 1244, *supra* note 10, Annex II; *see also* Prime Minister of the Republic of Serbia, Letter dated Jan. 3, 2007 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, Annex, U.N. Doc. S/2007/2, U.N. Doc. A/61/688 (Jan. 5, 2007) ("[SCR 1244] explicitly reaffirmed the sovereignty and territorial integrity of the

Describing with any specificity the relationship between the people and territory of Kosovo and the UN governing them is incredibly complex, but crucial to understanding the *Kosovo* Opinion's holding. For example, this is not a protectorate relationship because Kosovo never agreed to be bound by the Security Council and it was never entitled to do so under international law.[167] The process of slowly transferring authority from the Special Representative to the partially sovereign Assembly of Kosovo would properly be classified as devolution.[168] There is a difficulty "reconciling formal dependence with substantial practical autonomy" in devolution relationships, but the partial sovereignty remains subordinated until "all substantial legal links . . . are severed."[169]

The requirement that a state must be completely separate from its parent before achieving sovereignty is the "unitary State theory,"[170] and was endorsed by the ICJ in its predecessor form, the Permanent Court of International Justice (PCIJ), in the *Lighthouses in Crete and Samos* Case.[171] The question presented to the PCIJ was whether the Ottoman Empire could enter into a concession agreement with a French company with regard to lighthouses situated on Crete and Samos, two islands that were formally part of the Ottoman Empire but were now functionally autonomous.[172] The PCIJ found that only by a treaty of cession could Crete claim sovereignty:

> Notwithstanding its autonomy, Crete had not ceased to be a part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights to sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridicial point of view.[173]

Republic of Serbia, stipulating that the province of Kosovo . . . should be ensured substantial autonomy within the State of Serbia.").

[166] Assembly of Kosovo, Resolution on Riconfirmation of Political Will of Kosova People for Kosova an Indipendent and Sovreign State (Nov. 17, 2005), *available at* http://www.assembly-kosova.org/common/docs/Resolution.%20english,%20version.17.11.05.pdf.

[167] CRAWFORD, *supra* note 158, at 287.

[168] *Id.* at 349.

[169] *Id.* at 349–51.

[170] *Id.* at 351.

[171] Lighthouses in Crete and Samos (Fr. v. Greece), 1937 P.C.I.J. (ser. A/B) No. 62 (Oct. 8) [hereinafter *Lighthouses*].

[172] *Id.* para. 3; CRAWFORD, *supra* note 158, at 354.

[173] *Lighthouses*, *supra* note 171, para. 38.

A separate opinion implied that the concession agreement was an interventionist act done to protect residual imperial interests,[174] which were the lighthouses themselves.[175]

Applying the unitary state theory to Kosovo immediately prior to February 2008, the only conclusion that one can draw is that strong political links remained between the Provisional Institutions and the Special Representative. They shared political power.[176] SCR 1244 is still in effect and the Special Representative still holds "considerable supervisory powers."[177] Therefore, sovereign power cannot devolve to the Assembly of Kosovo.

If the relationship is not one of devolution, then some alternative explanation must exist for the Special Representative to declare the February 2003 and November 2005 acts of the Assembly of Kosovo illegal[178] and the ICJ to find that the February 2008 act was not illegal. Without other sources of law, the alternative explanation must be found in the *lex specialis* that governs the relationship between the two parties: SCR 1244 and the Constitutional Framework.

The ICJ makes three explicit statements about SCR 1244 and the framework it creates. First, it was a crisis response and "must be understood as an *exceptional measure* . . . aimed at addressing the crisis."[179] Second, SCR 1244 "was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order."[180] Third, it "clearly establishe[d] an interim regime; it cannot be understood as putting in place a permanent institutional framework."[181] Therefore, SCR 1244, the Constitutional Framework, and the powers of the Special Representative were exceptional, temporary, and humanitarian in purpose. But since these powers were *temporary*, there was a legal obligation on all parties to constantly seek an end to the use of those powers.[182] At what point is there a danger of these powers becoming

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[174] *Id.* para. 82 (Hurst, J., separate opinion).
[175] CRAWFORD, *supra* note 158, at 355–56.
[176] The Constitutional Framework gave the Special Representative judicial and executive powers over Provisional Institutions. *See* Constitutional Framework, *supra* note 10, ch. 8.1.
[177] *Kosovo* Opinion, *supra* note 6, at 440–42, paras. 90–93.
[178] *Id.* at 464–65, para. 32 (Tomka, declaration).
[179] *Id.* at 443, para. 97 (main opinion).
[180] *Id.* at 443–44, para. 98.
[181] *Id.* at 444, para. 99.
[182] *See* Constitutional Framework, *supra* note 10, pmbl. ("[R]esponsibilities will be transferred to Provisional Institutions . . . with a view to facilitating the determination of Kosovo's future status . . . ."). *But see* U.N. SCOR, 54th Sess., 4011th mtg. at 14, U.N. Doc. S/PV.4011 (June 10, 1999) (The United States representative said, in the debate over SCR 1244, that "[t]his resolution provides for the [UNMIK] to remain in place until the Security Council affirmatively decides that conditions exist for their completion").

permanent, so that a declaration of independence would be timely? The ICJ answers this question by identifying several key events that exemplified frustrating external circumstances.[183]

2. The Frustrating External Circumstances

Because the UNMIK and the Special Representative could not satisfy their legal obligations under the governing *lex specialis*, the ICJ implicitly recognized that extraordinary action was appropriate.[184] The ICJ believes that the starting date of these new obligations occurred on October 24, 2005, when the Security Council announced that it supported the commencement of "the final status process," which is supported by the categorization of this statement as the chronologically first "relevant" event to the UDI.[185]

Responding to the Security Council's announcement, the Secretary-General appointed a Special Envoy to govern the negotiations for the final status process, which the Security Council approved.[186] However, after multiple rounds of negotiations, the Envoy concluded in its March 2007 letter that no "mutually agreeable outcome" was available, and explicitly endorsed a Kosovar UDI.[187] This letter came after the February 2003 and November 2005 declarations of independence by the Assembly of Kosovo, which the Special Representative declared illegal, but before the February 2008 declaration, which the Special Representative did not.

Despite this inconsistency, the Security Council, although actively seized of the matter, did not act on the issue[188] as it "was not able to reach a decision regarding the final status of Kosovo." A draft resolution, circulated but not adopted by the Security Council, would have terminated the international civil presence in Kosovo after 120 days from the date the resolution was adopted.[189] A "Troika" of the EU, Russia, and the United States attempted to negotiate a final status process, but despite the fact that

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[183] *Kosovo* Opinion, *supra* note 6, at 430–33, paras. 64–71.

[184] *Id.* at 445–46, para. 105 ("The declaration of independence reflects the awareness . . . that a critical moment for the future of Kosovo had been reached.").

[185] *Id.* at 430, para. 64; *see also* Statement by the President of the Security Council, *supra* note 29 ("The Security Council agrees . . . that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process.").

[186] Statement by the President of the Security Council, *supra* note 29; U.N. Secretary-General Letter dated Oct. 7, 2005, *supra* note 28.

[187] *Kosovo* Opinion, *supra* note 6, at 430–32, paras. 65–69; *see also* U.N. Secretary-General Letter dated Mar. 26, 2007, *supra* note 33 (stating that Kosovo's future status should be internationally supervised independence).

[188] *Kosovo* Opinion, *supra* note 6, at 433, para. 71.

[189] Belgium, France, Germany, Italy, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, U.N. Doc. S/2007/437 (July 17, 2007).

talks went on for 120 days at the highest levels of Serbian and Kosovar governments, "the parties were unable to reach an agreement on Kosovo's status."[190] "[M]ost, if not all, realistic options other than separation had failed."[191]

The inability of the international community and internationally designated actors such as the Special Envoy to agree on a final status process for Kosovo for three years (from March 2005 to February 2008) may be the type of impediment Kosovo's right to internal self-determination that would permit action under the third prong of the Canadian Supreme Court's secession analysis.[192] International negotiations, such as the one presented here,[193] are hampered because "[t]here is no agreement over common basic principle, above all self-determination and its practical application."[194] Even if a definitive and legally binding statement on the principle of self-determination existed, which could have but did not occur in the *Kosovo* Case,[195] remedial secession would be available "only in the most dire situations."[196]

Even though the Security Council remained seized of the Kosovo matter and that "[t]he final decision on the status of Kosovo should be endorsed by the Security Council,"[197] the ICJ concludes that "the Security Council did not reserve for itself the final determination of the situation in Kosovo."[198] In his separate declaration, Vice-President Tomka complained that "the [majority's opinion] provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002–2005, would no longer have any such character in 2008."[199] The explanation is likely the Special Envoy's March 2007 letter and proposal, the failure of the Security Council to adopt either the Special Envoy's proposal or an alternative, and the Troika's failure to find a special settlement. These events, which only demonstrate the frustration of the UN mandate under international law to facilitate a political process to determine Kosovo's future

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[190] TROIKA REPORT, *supra* note 32.
[191] Borgen, *supra* note 143.
[192] Fierstein, *supra* note 100, at 437–38.
[193] *See* TROIKA REPORT, *supra* note 32.
[194] ISTVAN BIBO, THE PARALYSIS OF INTERNATIONAL INSTITUTIONS AND THE REMEDIES: A STUDY OF SELF-DETERMINATION, CONCORD AMONG THE MAJOR POWERS, AND POLITICAL ARBITRATION 92 (1976).
[195] *See* Watson, *supra* note 142, at 291–92 (hypothesizing that the ICJ could "provide definitive insight into the law of secession" in the Kosovo case).
[196] Fierstein, *supra* note 100, at 434.
[197] *Kosovo* Opinion, *supra* note 6, at 462, para. 27 (Tomka, declaration) (citing U.N. President of the S.C. Letter dated Nov. 10, 2005, *supra* note 30; SCR 1244, *supra* note 10, para. 210).
[198] *Id.* at 449, para. 114 (main opinion).
[199] *Id.* at 466, para. 34 (Tomka, J., declaration).

status, were sufficient to give a remedial process toward external self-determination legitimacy under international law.

3. The Silent Agreement

Under this theory, the "parent" state constructs an interim regime that should naturally conclude in self-determination of the actor, but fails due to external, unforeseen circumstances. Without further action or inaction where action is demanded from the "parent," nothing happens. The latter presents in the Kosovo Opinion when the ICJ classifies the silence of the Special Representative as having "some significance." The majority concludes that the silence suggested "that [the Special Representative] 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."[200] Vice-President Tomka, in his separate declaration, believes that this silence was part of a conspiracy to implement the Special Envoy's March 2007 proposal, and had no legal significance.[201]

The majority, however, concludes that where prior practice has established that the Special Representative may declare acts of other institutions *ultra vires*, the Special Representative is thereafter under a legal obligation to do so.[202] Furthermore, because the ICJ takes the silence as evidence that the act was not *ultra vires*, the ICJ also concludes as a corollary that the Special Representative's pronouncements on the matter are legally significant.[203] This is in contrast to the UNMIK Reports to the Secretary-General, which the ICJ accords no legal weight.[204]

Special Representatives therefore play an important discretionary role. Whereas the Constitutional Framework might explicitly give the Special Representative the power of external self-determination over a territory, the Special Representative may withhold or devolve that power to local authorities where he or she deems it is appropriate.[205] The Special Representatives hold veto power over declarations of independence. As a matter of policy, the ICJ is permitting a much more localized (as opposed to a more removed body such as the Security Council) determination of whether explicit acts of external self-determination are appropriate at a given time or place.

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[200] *Id.* at 447, para. 108 (main opinion) (emphasis added).
[201] *Id.* at 466, para. 34 (Tomka, J., declaration).
[202] *Id.* at 447, para. 108 (main opinion).
[203] *Id.*
[204] *Id.*
[205] *See* Constitutional Framework, *supra* note 10, ch. 12 ("The exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the [Special Representative] . . . .").

IV. THE ICJ'S PRACTICAL LIMITS

In Judge Simma's declaration, attached to the *Kosovo* Opinion, he wrote that the ICJ was holding onto old world conceptions and not moving forward with international law at the pace that he would like.[206] For example, he specifically criticized the ICJ's desire to hold onto the *Lotus* principle.[207] Unfortunately for Judge Simma, the ICJ likely had no choice in the matter. Not only as a matter of the complexity of crafting a ruling of law on a subject dominated by political, not legal concerns, but as a matter of the institutional structure of international tribunals, the ICJ was likely prohibited from a more expansive ruling.

A. Hersch Lauterpacht's Theory of Judicial Caution

Sir Hersch Lauterpacht wrote an excellent criticism and analysis on international judicial reticence, and one that is fully applicable to the Kosovo case. Lauterpacht received his doctorate in law from the University of Vienna, and wrote another dissertation for the London School of Economics.[208] He wrote his key work in 1933, *The Function of Law in the International Community*.[209] In 1954, he was elected a judge on the ICJ, and in 1957, he published a work entitled *The Development of International Law by the International Court*, where he articulated his theory of judicial caution.[210]

Lauterpacht wrote that judicial caution—likely a central system of reasoning driving the majority's holding in the *Kosovo* Opinion—results from "the fact that courts have to *apply* the law and that they have to apply the *law in force*."[211] International judges have a proscribed field in which

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[206] *Kosovo* Opinion, *supra* note 6, at 480, para. 7 (Simma, J., declaration).

[207] *Id.* at 478, para. 2 (Simma, J., declaration) ("The underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the *'Lotus'* Judgment, according to which the restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order (citation omitted)."). The *Lotus* principle, from the Permanent Court of International Justice opinion *Case of the S.S. Lotus* (*France v. Turkey*), assumes that, barring a prohibitory rule in international law, there is no restriction on independent state action. Ole Spiermann, Lotus *and the Double Structure of International Legal Argument*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 131 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

[208] Ana Filipa Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EUR. J. INT'L L. 1163, 1168–69 (2009).

[209] *Id.* at 1177; *see also* H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933).

[210] H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 75 (1957).

[211] *Id.*

they must both find the applicable law and then utilize that law to resolve disputes, or, in the case of the Kosovo case, answer questions posed to them. While Lauterpacht did argue that judicial caution resulted from the principles of the international judiciary, judges were not "limited to the barest minimum which is required for the decision," and could craft opinions with serious implications in international law.[212]

However Lauterpacht made one point clear, which also must apply here: "It is not [the international courts'] . . . function deliberately to change the law so as to make it conform with their own views of justice and expediency."[213] Why? Because "[i]f Governments are not prepared to entrust with legislative functions bodies composed of their authorised representatives, they will not be prepared to allow or tolerate the exercise of such activity by a tribunal enjoined by its Statute to apply the existing law."[214] If Serbia is not willing to entrust sovereign power to the Republic of Kosovo, then it would not abide by an ICJ opinion that did.

This basis of judicial caution, then, has much less to do with the difficulty of finding an international law to apply to a certain dispute. Lauterpacht argued that the international tribunal is self-aware of the possibility of a suicide by judgment.[215] This reticence acknowledges that making an expansive ruling based on an international judiciary's policies, rather than a state's, is not a judicial feature but a political one.[216] In short, the tribunal's rulings, judgments, and findings will always have, as a source of law, the tribunal's interest in self-preservation.

However, when a state seeks not to be bound by the ICJ, it does not try to attack the ICJ's existence. In some cases, especially the *Corfu Channel* Case,[217] the state that seeks not to be bound practices defiance.[218] In the *Corfu Channel* Case, Albania boycotted a portion of the proceedings.[219] However, while there may be a greater political cost for boycotting ICJ proceedings than ever before, the ICJ is still mindful that it has little recourse without state participation.[220]

As a result, judicial caution is expressed "in the disinclination to make pronouncements on questions not essential to an exhaustive examination of

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[212] *Id.*
[213] *Id.*
[214] *Id.* at 76.
[215] *Id.*
[216] *Id.*
[217] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 30–49 (Apr. 9) [hereinafter *Corfu Channel* Case].
[218] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 403 n.3 (2004).
[219] *Id.*
[220] *Id.* at 404.

the contentions of the parties, and, generally, in avoiding so far as possible a dogmatic manner in the statement of the law."[221] To illustrate this point, Lauterpacht proceeded to cite a number of cases in which the ICJ, when given an opportunity to rule aggressively on points of international law, declined to do so.[222] Judge Simma's complaint of an overly cautious tribunal is, therefore, not unusual.[223]

This judicial reticence, to make clear statements of law, impeded the function of the ICJ as an organ that clarifies and explains the law.[224] However, by restating the law as it already exists, the exercise of this function is nearly legislative in character and may run afoul of the ICJ's position as an organ that exists at the whim of state consent. This extreme judicial restraint prompted Lauterpacht to note that "writers" filled what would have been the clarifying function of the ICJ.[225] The Statute of the ICJ specifically permits the ICJ to use writers as a source of law.[226] Therefore, the ICJ is willing to partially delegate what would be intrinsic functions to non-state and non-tribunal actors prior to accepting certain precepts as its own. This would support the practice of delegating to the Special Representative a veto power over remedial declarations of independence.

Lauterpacht then uses the *Corfu Channel* case[227] to show that, while there were important, substantive issues of international law at play in the case that would have benefited from clarification or restatement, the ICJ refused to elucidate on them.[228] In the *Corfu Channel* Case, "a great deal of the effort of the [ICJ] . . . was directed to the elucidation of disputed and complicated questions of fact."[229] Also, such a discussion, like an elucidation on remedial secession and declarations of independence, might have been considered *obiter dictum*[230] and not directly applicable to the decision.[231]

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[221] LAUTERPACHT, *supra* note 210, at 77.

[222] *Id.* at 77–79.

[223] *See Kosovo* Opinion, *supra* note 6, at 478 (Simma, J., declaration).

[224] LAUTERPACHT, *supra* note 210, at 83 ("It is possible to hold that in its capacity as an organ which may be expected to develop international law, in addition to deciding cases before it, and to secure the requisite degree of certainty in the administration of justice, the Court ought to give a wider interpretation of the scope of its task.").

[225] *Id.*

[226] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 ("The Court . . . shall apply: . . . judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

[227] *Corfu Channel* Case, *supra* note 217.

[228] LAUTERPACHT, *supra* note 210, at 89.

[229] *Id.* (citation omitted).

[230] *Obiter dictum*, Latin for "something said in passing," is a judicial comment made while delivering a judicial opinion but not precedential. BLACK'S LAW DICTIONARY, *supra* note 84, at 1177.

[231] LAUTERPACHT, *supra* note 210, at 90.

Certain features of Lauterpacht's arguments become clear. (1) The ICJ's decisions are heavily influenced by its own awareness that a state's sovereign power trumps its judicial ruling. (2) Because the ICJ's words are not binding between states as international law, ICJ opinions may only be ratified as law by state action. (3) Since the ICJ requires state cooperation to conduct its affairs, it has an interest in saying as little as possible so as not to overreach. Therefore, when it is presented with an issue involving a novel issue of international law, unclear sovereignty over territory, and conflicting state action, it would be more important, not less, to issue a narrow opinion.

B. Recognition

The modern understanding of international recognition of new states complicates Kosovar self-determination and secession, and the examination of this particular problem has been extensive.[232] Because a new sovereign state may have to be recognized by pre-existing sovereign states prior to the full accession of a non-sovereign state to sovereignty, an explicit recognition of the Republic of Kosovo by the ICJ could not occur in the Kosovo case. If such a requirement exists, then the ICJ could not have declared Kosovo a sovereign state or decided whether Kosovo was empowered with external self-determination.

Recognition is crucial because, before they are accepted into the international community, new states must interact with other states in a bilateral relationship, which in turn cannot occur if states refuse to recognize the new state.[233] Non-recognition in the international community can delegitimize a state that would otherwise fulfill the minimum legal requirements of a state.[234] Lauterpacht wrote that non-recognition is the minimum resistance the international community can take to the illegal formation of a state and a "continuous challenge to a legal wrong."[235]

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[232] *See generally* Bartram S. Brown, *Human Rights, Sovereignty, and the Final Status of Kosovo*, 80 CHI.-KENT L. REV. 235, 261 (2005) (comparing the state practice of recognition toward the new Balkan states to Kosovo); Fierstein, *supra* note 100, at 438–41 (noting that although Kosovo seems to meet objective criteria for statehood, international recognition is essential for a successful secession claim); Sterio, *supra* note 149, at 147–53, 164–67 (finding that Kosovo would not have achieved independence without the assistance of recognition by the "Great Powers," i.e., France, the United Kingdom, and the United States).

[233] Christopher Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts,"* 9 OR. REV. INT'L L. 477, 507 (2007) (citation omitted).

[234] *Id.* (citation omitted).

[235] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 437 (1948); *see* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 202(2) (1987) ("A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed forces in violation of the United Nations Charter.").

There are two broad and recognized theories of recognition in international law. The first, and most widely accepted, premise is known as the declaratory theory.[236] The first major adoption of the declaratory theory was in the *Tinoco Arbitration* case, in which Chief Justice Taft, acting as arbitrator, wrote, "[W]hen recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty . . . but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight . . . ."[237] Article 3 of the Montevideo Convention partially codified the theory: "The political existence of a state is independent of recognition by other states."[238] Recognition becomes a discretionary and political act that is non-binding and without legal significance in the purely objective determination of whether a political entity is a sovereign state. Unsurprisingly, state practice complicates the theory:

> It is, however, difficult to maintain that an entity that has received recognition by none or a very few States, such as the Turkish Republic of Northern Cyprus or South Africa's Bantustan States . . . can claim to be a State, as it cannot demonstrate its capacity to enter into relations with other States and thus from a functional point of view cannot be described as a State.[239]

Since the capacity to enter into relations with other states defines a state, other states' cooperation in the formation of a new state is a necessary precondition to the new state's full accession to sovereignty.[240]

The other major theory of recognition is the constitutive theory, which sourced the accession of a political entity to a sovereign state solely in the recognition, either express or implied, of other sovereign states.[241] The question of how a state becomes a state is irrelevant; the only relevant question is whether that state is recognized.[242] Lauterpacht was a proponent of the constitutive theory.[243]

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[236] CRAWFORD, *supra* note 158, at 22.
[237] *Id.* at 23; Royal Bank of Canada Claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923).
[238] Montevideo Convention, *supra* note 150, art. 3; Fierstein, *supra* note 100, at 439.
[239] John Dugard & David Raič, *The Role of Recognition in the Law and Practice of Secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES, *supra* note 114, at 94, 98 (citation omitted).
[240] *Id.* at 99 (citation omitted).
[241] CRAWFORD, *supra* note 158, at 21.
[242] *Id.* at 19.
[243] *Id.* at 19–20; *see generally* LAUTERPACHT, *supra* note 235.

admission to the United Nations."[256] Since UN membership "requires substantial support from existing Member States, admission is [therefore] strong evidence of the necessary status."[257] However, ICJ law, facts, and state practice make Kosovo recognition and admission irresolvable.

The ICJ did not recognize the Republic of Kosovo during the proceedings prior to the *Kosovo* Opinion. Instead, it invited the authors of the UDI—as authors and not as the Republic of Kosovo—to join the Member States in submitting written arguments.[258] The Republic of Kosovo's website lists eighty-six nations as recognizing Kosovo, including the United States, United Kingdom, and France.[259] However, Russia is "utterly opposed" to Kosovar statehood.[260] Since UN membership cannot occur without the approval or abstention of every permanent member of the Security Council,[261] and Russia is one,[262] it is unlikely that the UN will recognize and admit Kosovo.

ICJ law and state practice regarding UN membership conflict, complicating an expansive ICJ decision in the Kosovo case. One of the earliest cases of the exercise of ICJ advisory jurisdiction was *Conditions of Admission of a State to Membership in the United Nations* (1948) (*Admissions* Case).[263] The question posed was whether UN Member States could condition their consent to the admission of other states to the UN on conditions not found within the UN Charter.[264] The ICJ concludes that the conditions for membership laid out in Article 4 of the UN Charter "constitute an exhaustive enumeration" and that those conditions are both sufficient and necessary for UN membership.[265] It affirmatively denies that Member States could deny membership on the basis of alternative political considerations, finding that such considerations lead to an impermissible "indefinite and practically unlimited power of discretion."[266] Contrary to this ruling,

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[256] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 319 (1st ed. 1979).
[257] *Id.* at 544–45; U.N. Charter, *supra* note 140, art. 4, para. 1.
[258] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order, 2008 I.C.J. 409 (Oct. 17).
[259] *Countries That Have Recognized the Republic of Kosova*, REPUBLIC OF KOSOVO – MINISTRY OF FOREIGN AFF., http://www.mfa-ks.net/?page=2,33 (last visited Feb. 7, 2012).
[260] Luke Harding, *Kosovo Breakaway Illegal, Says Putin*, GUARDIAN (Feb. 14, 2008), http://www.guardian.co.uk/world/2008/feb/15/russia.kosovo.
[261] HALPERIN ET AL., *supra* note 17, at 67; U.N. Charter, *supra* note 140, art. 4, para. 2 ("The admission . . . will be effected by a decision of the General Assembly upon the recommendation of the Security Council.").
[262] *Members of the Security Council in 2011*, UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/inc/searchres_sc_year_english.asp?year=2011 (last visited Feb. 7, 2012).
[263] Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948 I.C.J. 57 (May 28).
[264] *Id.* at 58.
[265] *Id.* at 62.
[266] *Id.* at 62–63.

Member States during the Cold War used political considerations to block membership of countries aligned with one power or another, as was demonstrated in 1955.[267]

Therefore, the ICJ could recognize the practical difficulties of acknowledging that Kosovo had acceded to a sovereign state. Despite the acceptance of the declaratory theory, the constitutive theory holds considerable sway in state practice; individual states still have some form of independent, sovereign authority to impart statehood on external political entities.[268] Individual, sovereign states oppose any ICJ action to remove that authority from them.[269] So long as Russia opposed Kosovo UN membership on political grounds, Kosovo is barred from one of the most powerful symbols of modern statehood: collective recognition by UN membership. If the ICJ declared a Kosovar right to secession based on remedial grounds, it could be interpreted as denying the sovereign states' political right to recognize, and to withhold recognition, in favor of a legal and objective right to secession. Therefore, following Lauterpacht's guidelines of judicial caution,[270] it declined to rule so expansively, lest its ruling be disregarded entirely.

C. Effectivity

The most problematic of doctrines regarding self-determination and secession that the ICJ faces is likely the effectivity principle. The Canadian Supreme Court, in its *Reference re Secession* opinion, defines the effectivity principle as an illegal act that "may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane."[271] International recognition of an entity's statehood only has legal effect once a political entity has achieved secession as a political fact.[272] The effectivity principle is a corollary of the constitutive theory of recognition.[273] If an act of secession is "successful in the streets, [it] might well lead to the creation of a new state."[274]

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[267] HALPERIN ET AL., *supra* note 17, at 67 n.36 (noting the sixteen nations that joined the UN after a superpower impasse had been resolved).

[268] *See* Dugard & Raič, *supra* note 239, at 97–99 (finding considerable support for the constitutive position in case studies).

[269] Lee Seshagiri, Note, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553, 573 (2010) (concluding that states are "naturally averse" to legal obligations to recognize or withhold recognition based on an objective criteria as it would "eliminate an area of vast diplomatic discretion").

[270] *See supra* Part IV.*A* (discussing Lauterpacht's theory of Judicial Caution).

[271] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 146 (Can.).

[272] *Id.* para. 142.

[273] *Id.* para. 146.

[274] *Id.* para. 142.

The Canadian Supreme Court rejected the effectivity principle argument for the secession of Quebec, asserting that it did not provide an *ex ante* explanation or justification of an act.[275] However, the legality of an act of secession is not a precondition for international recognition of that new state.[276] For example, the Canadian Supreme Court, in its criticism of the effectivity principle, argues that states are less likely to recognize a new state if it separated from its parent state in violation of municipal law or in breach of a good-faith duty to negotiate from that parent state.[277] Thus nations are less likely to recognize Kosovo if the declaration of independence violated the sovereignty of the Federal Republic of Yugoslavia under SCR 1244,[278] or a violation of the Constitutional Framework.[279]

If the ICJ expressly accepted this theory, it would directly contradict the dozens of states that recognized Kosovo prior to the *Kosovo* Opinion's issue.[280] The Canadian Supreme Court's pronouncement that states would withhold recognition in cases of illegal state formation is an opinion rather than a statement of law, and has little legal precedent.[281] Therefore, the critical point of *Reference re Secession*'s discussion of the effectivity principle is this: while a unilateral declaration of independence and secession by Quebec might eventually acquire legal status, the success of that geopolitical process would not support a doctrine that a unilateral declaration of independence would be legal even if the subsequent secession is recognized.[282]

The ICJ faces the same problem with effectivity as it does with recognition.[283] A ruling declaring the February 2008 UDI affirmatively legal or illegal would attack the effectivity principle. This would fly in the face of state practice and directly contradict the *Lotus* principle. By finding that the

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[275] *Id.* paras. 107–108; *see also* Patrick Dumberry, *Lessons Learned from the Quebec Secession Reference Before the Supreme Court of Canada*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES, *supra* note 114, at 436, 436 n.106 (describing the dichotomy of explanation and fact as the difference between rights and powers).

[276] Dumberry, *supra* note 275, at 438.

[277] *Id.* at 439.

[278] SCR 1244, *supra* note 10, Annex II(5) ("Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations.").

[279] Constitutional Framework, *supra* note 10, ch. 8.1.

[280] *See Countries That Have Recognized the Republic of Kosova*, *supra* note 259 (listing the that countries that have recognized Kosovo, showing that most of the states that recognized Kosovo did so prior to the July 22, 2010 opinion).

[281] Dumberry, *supra* note 275, at 439.

[282] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 144 (Can.).

[283] *See supra* Part IV.*B* (individual states can determine who is a state, and do not wish to surrender that power to the ICJ)

authors of the UDI were not restricted by SCR 1244,[284] the ICJ permits the effectivity principle to govern the declaration and later political acts by individual actors. In effect, the ICJ acknowledges that the best test for the legality of Kosovo's independence is not in the courtroom, but in the diplomatic arena, and affirms that the effectivity principle governs this sort of action.[285]

V. CONCLUSION

The remedial declaration of independence is a new instrument for territories seeking self-determination. The ICJ could not use the Kosovo case to fully confirm the doctrine of remedial secession. Doing so would step on the toes of preexisting state power and privilege. The ICJ, by explicitly denying that it was building a doctrine of remedial secession, was allowed to take a tiny step forward. The Kosovo case allowed the Assembly of Kosovo, confirmed by the Special Representative's silence and encouraged by international indecisiveness, to make the February 2008 UDI. The ICJ left the political ramifications of the UDI to the international community. It was institutionally barred from doing otherwise.

The *Kosovo* Opinion will not be known as a seminal case, nor will it be fondly remembered for its clarity. The remedial declaration of independence is a compromise, not a definitive doctrine. However, Quebec separatists now know that a remedial and unilateral declaration of independence have not been opposed by international law.[286] This territory, and others around the globe, may learn that they also deserve the protection of the *Lotus* principle: since the ICJ did not say no, it might as well be yes.

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[284] *See Kosovo* Opinion, *supra* note 6, at 451–52, para. 118.

[285] *See* Seshagiri, *supra* note 269, at 578.

[286] Milan Markovic, *What the Kosovo Ruling Means For Canada: Trouble*, GLOBE & MAIL (July 31, 2010), http://www.theglobeandmail.com/news/opinions/what-the-kosovo-ruling-means-for-canada-trouble/article1656513/.