CAUCASIAN REVIEW OF INTERNATIONAL AFFAIRS
VOL. 4 (4) –AUTUMN 2010

"TRADITIONAL GAP" IN THE ICJ'S ADVISORY OPINION ON KOSOVO

Mushfig Mammadov*

Abstract

On February 17, 2008 Kosovo, hitherto the internationally recognized territory of Serbia, unilaterally declared its independence. Three of the five permanent members of the UN Security Council (the USA, UK and France) immediately recognized the independence of Kosovo, while the other two, Russia and China, sharply criticized Kosovo's step and have thus far refused to recognize Kosovo as an independent state. In October 2008 the UN General Assembly requested the International Court of Justice (ICJ), upon the initiative of Serbia, to render an advisory opinion with regard to whether the unilateral declaration of independence adopted by the provisional institutions of Kosovo was in accordance with international law. In its non-binding advisory opinion, delivered on July 22, 2010 the Court stated that the unilateral declaration of independence of Kosovo did not violate international law. Nonetheless, this conclusion is not so clear and simple as it at first might seem, nor so "dangerous", as it was described in the media and in some reactions, especially upon a closer reading of the entire text of the advisory opinion.

Keywords: *Kosovo, Serbia, ICJ advisory opinion, UN General Assembly, self-determination, secession, frozen conflicts, South Caucasus*

Introduction

On July 22, 2010 the ICJ rendered an advisory opinion (hereinafter referred to interchangeably as the Opinion) which stated that the declaration of the independence of Kosovo adopted on February 17, 2008 did not violate international law.[1] Although the Opinion does not have any binding force, i.e. it is only a recommendation, several reactions and comments published in the media about it were nonetheless accompanied by alarmist slogans such as "giving a green light to separatist movements" or "an erosion of European order".[2] Such reactions to the Opinion were based on concerns with regard to its possible

* ***Mushfig Mammadov*** *is currently a PhD Candidate at the Faculty of Law of the Humboldt University of Berlin (Germany).*

[1] The ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion (hereinafter referred to as the Opinion), July 22, 2010, p. 44, para. 123, http://www.icj-cij.org/docket/files/141/15987.pdf (accessed July 29, 2010). It was actually the second declaration of independence by Kosovo's ethnic-Albanian political institutions, the first having been proclaimed on 7 September 1990.

[2] See, for instance, Fyodor Lukyanov, "Kosovo Ruling Accelerates Erosion Of European Order", *Radio Free Europe,* July 29, 2010, http://www.rferl.org/content/Kosovo_Ruling_Accelerates_Erosion_Of_European_Order/2112355.html (accessed July 31, 2010).

impact as a precedent to latent or ongoing secession conflicts in other countries.[3] The Opinion was immediately followed by differing comments in the South Caucasus which is also affected by three "frozen" secession conflicts (in Abkhazia, South Ossetia (both in Georgia) and Nagorno-Karabakh (Azerbaijan)). Official statements issued by the governments in Azerbaijan and Georgia, as well as commentaries given by some experts in these countries, have noted generally that the ICJ's Opinion would not have any impact on the perspectives for the resolution of the conflicts in Nagorno-Karabakh, Abkhazia or South Ossetia. By contrast, the representatives of the de facto regimes in Nagorno-Karabakh (as well as some officials and representatives of civil society in the Republic of Armenia), Abkhazia and South Ossetia, drew attention to the precedent-setting effect of the Opinion and thus portrayed themselves as indirect winners.[4] But the latter based their statements only upon the operative clause of the Opinion[5] (i.e. that declaration of independence of Kosovo did not violate international law) and, consequently, to a great extent contributed to the misunderstanding of this legal document in its entirety. This misunderstanding concerns, first, the question as to whether the Court, through its opinion, arguably gave a "green light" to secession movements all over the world and whether it was correct or adequate to speak about any consequences or a precedent-setting effect of the Opinion, as many secession movements, including the three in the South Caucasus, have claimed.

Due to the importance of these questions, it has become necessary to explain the precise meaning of the Opinion of the ICJ on Kosovo in a systematic way in order to highlight how and why the Court arrived at such conclusion, and that the declaration of independence of Kosovo was in accordance with international law. The purpose of this clarification, in particular, is to find out whether the Court actually acknowledged the existence of a right to secession from an existing state, which is considered a highly problematic issue in contemporary international law.[6] After a detailed account of these issues, an inquiry will be made into the question of whether the secession conflicts in the South Caucasus can also be brought before the ICJ, and if so, what would be the benefits of such a proceeding.

---

[3] Similarly, Dissenting Opinion of Judge Koroma to the Opinion (hereinafter as Judge Koroma), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4 (accessed July 29, 2010), p. 2, para. 4: "The Court's Opinion will serve as a guide and instruction manual for secessionist groups the world over and the stability of international law will be severely undermined."

[4] For more details about the comments of the parties of the conflicts in the South Caucasus, see Rauf Mirkadirov, "Азербайджан, скорее всего, "заполучит" Брайза. А вот решение Международного суда создает определенные проблемы" [Azerbaijan most likely will "get hold" of Bryza. And here a decision of the ICJ creates some problems], *Zerkalo,* July 24, 2010, Political section; Nüşabə Fətullayeva, "Haaqa Məhkəməsinin qərarı Dağlıq Qarabağ münaqişəsinə nə vəd edir?" [What does the Opinion of ICJ promise to the Nagorno-Karabakh Conflict?], *Azadlıq Radiosu,* July 25, 2010, http://www.azadliq.org/content/article/2108108.html (accessed July 27, 2010); Nino Xaradze, "Gürcülər Kosovo ilə Qafqaz regionunun fərqi haqqında" [The Georgians on the Difference between Kosovo and the Caucasus], *Azadlıq Radiosu,* August 1, 2010, http://www.azadliq.org/content/article/2115526.html (accessed August 2, 2010); and Lilit Harutyunyan, "Erməni ekspertlər Qarabağ ilə Kosovonu müqayisə edirlər" [The Armenian experts compare Karabakh and Kosovo], *Azadlıq Radiosu,* July 31, 2010, http://www.azadliq.org/content/article/2114702.html (accessed August 1, 2010).

[5] Its whole text actually consists of 44 pages, plus separate and dissenting opinions as well as the declarations of some members of the Court (totaling more than 100 pages).

[6] For more on secession see Lee C. Buchheit, *Secession – The Legitimacy of Self-Determination* (New Haven: 1978); Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: 1991); James Crawford, "State Practice and International Law in Relation to Secession", *British Yearbook of International Law*, vol. 69 (1998): 85; Christine Haverland, "Secession", in *Encyclopedia of Public International Law* vol. IV, ed. Rudolf Bernhardt,(Amsterdam, 2000) 354; and Marcelo G. Kohen, *Secession. International Law Perspectives* (Cambridge: 2006).

Why Did the ICJ Actually Render an Opinion on Kosovo?

Pursuant to Article 96 of the UN Charter, the General Assembly, the Security Council as well as other organs of the United Nations and specialized agencies may request the International Court of Justice to give an advisory opinion on any legal question.[7] Based upon this provision, the UN General Assembly requested through its Resolution 63/3 (initiated by Serbia and adopted on 8 October 2008) that the ICJ render an advisory opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[8] And the advisory opinion from 22 July 2010 was an answer to this question.

The ICJ`S "Narrow Approach" in Answering the General Assembly's Request

A declaration of independence of an entity, i.e. the expression of the will of a part of the population to create its own state, is one of the implementation modes of the right to self-determination.[9] That is why the ICJ, within the Kosovo advisory proceeding, could have in fact clarified the issues concerning the contradiction between the right of peoples to self-determination and the principle of sovereignty and territorial integrity of existing states. In particular, it could have answered the question as to whether international law contains a right to unilateral secession, perhaps deriving from the right of peoples to self-determination, and if so, which preconditions should be met in order to have recourse to such a right. However, the Court did not express its standpoint on these matters and thus continued to retain the "traditional gap" in its advisory jurisprudential practice concerning the clarification of the precise content of the right to external self-determination, i.e. the right to secession in the post-colonial context.

Ten members of the Court were of the view that Kosovo's declaration of independence, adopted on 17 February 2008, did not violate international law; while four were of the opinion that it violated international law.[10] Three members of the Court who voted against the operative clause of the Opinion (Judges Koroma, Bennouna and Skotnikov) appended their dissenting opinions and one (Vice-President Tomka) submitted a declaration to the advisory opinion. They criticized the mistakes that they perceived the Court made in the Opinion, as well as its conclusion regarding whether Kosovo`s declaration of independence was in accordance with international law. Even some judges who voted in favour expressed their

[7] Other bodies of the UN and specialized agencies can do so if two conditions are met: 1) they are authorized by the General Assembly to do so and 2) a legal question arises within the scope of their activities.
[8] United Nations General Assembly Resolution 63/3. Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law (A/RES/63/3).
[9] See the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, adopted by the UN General Assembly on 24 October 1970, which reads, "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."
[10] One member of the Court, Judge Xue Hanqin, did not participate in the case.

dissatisfaction with the Court's approach to some of the questions in the Opinion.[11] All separate and dissenting opinions, as well as declarations attached to the Opinion thus show that there were serious differences amongst the judges of the Court (even between those judges who voted in favour of the operative clause of the Opinion) in its rendering, as will be explained below.

Before analysing the concrete answer of the Court to the General Assembly's request, however, it is necessary to draw attention to some paragraphs in the Opinion which predefine the Court's approach in responding to the question posed. They are of paramount importance to understand fully why the Court arrived at its conclusion (i.e. that the declaration of independence of Kosovo did not violate international law) and thus the meaning of the Opinion in its entirety. Within the Opinion, the Court repeatedly underlines the content of the question addressed to it by the UN General Assembly and indicates that the Court should not exceed its scope – i.e. it should only give a *narrow* answer to the *narrow* question, contrary to its previous practice with regard to advisory proceedings.[12] Consequently, this meant that many legal issues deriving from the General Assembly's question were intentionally disregarded and left unanswered by the Court:

> *In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State […]. Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly*.[13]

Furthermore the ICJ declares that in order to respond to the request of the UN General Assembly it needs only to determine whether applicable international law contains *prohibitive* rules preventing declarations of independence.[14] Besides it differentiates in its observations, between an *act* of declaration of independence, on the one hand, and the *right* to secede from a state, on the other, while failing to clarify on which legal basis a declaration of independence does occur.[15] The unorthodox approach taken here by the ICJ more clearly continues in another part of the Opinion, in which it states in principle (although indirectly), that a declaration of independence does not yet express an exercise of a right to secede from a State, or, to assert it more precisely, that a declaration of independence shall not be tantamount to the secession from a state:

> *The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the*

[11] See, for example, Declaration of Judge Simma to the Opinion (hereinafter as Judge Simma), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4 (accessed August 15, 2010).
[12] The Court has in the past extended the question posed in order to reply to it as fully as possible. See, for example, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, pp. 88-89, para. 35; Certain Expenses of the United Nations (Art. 17, para. 2, of the Charter), Advisory Opinion, ICJ Reports 1962, pp. 156-157.
[13] See the Opinion, pp. 19-20, para. 51. Likewise p. 29, para. 78.
[14] See the Opinion, p. 21, para. 56.
[15] Ibid.

right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State […].[16]

Summarizing the aforementioned points of view of the ICJ, one can see that it has interpreted the question posed very narrowly and thus limited itself to determining the question of whether or not the applicable international law prohibited Kosovo's declaration of independence. Consequently, in the Court's view it was not necessary to deal, for example, with issues such as the legal results of such declarations, especially whether they can lead to the creation of a state in all cases per se, and whether statehood can be gained only on the basis of acts of recognition by existing states. This self-limitation of the Court also took place with regard to answering the question of whether a right to secede from a state does exist in modern international law, and if so, which preconditions should be met in order to find recourse to it. More specifically, the Court avoided answering the question of whether or not Kosovo Albanians do have such a right to break away from Serbia.

Unconvincing Reasoning of the ICJ

After limiting the scope of its answer to the request, the ICJ first determined whether the declaration of independence by Kosovo was in accordance with general international law. According to the ICJ's view, international law does not contain any applicable rule prohibiting declarations of independence, which is why it concluded that Kosovo's declaration of independence did not violate general international law.[17] However, it must be noted that this conclusion of the Court is based upon a very cursory examination of general international law.[18] In the the Court`s view, then, the declarations of independence according to general international law are legal because the respective practice of states prohibiting such declarations, which should have led to the creation of a respective prohibitive rule, does not exist.[19] Some UN Security Council resolutions, adopted in the past and condemning the unilateral declarations of independence,[20] according to the Court could not change this conclusion either, as those resolutions concerned illegal declarations of independence, which were connected with the unlawful use of force or other violations of norms of general international law, in particular of *jus cogens* norms, and thus had an exceptional nature.[21]

Because of such a cursory analysis, Court member Judge Simma, who actually voted in favour of the operative clause, in his Declaration attached to the Opinion, criticized the Court's modus operandi. In Simma's view, "by unduly limiting the scope of its analysis, the

[16] See the Opinion, p. 31, para. 83.
[17] See the Opinion, pp. 29-32, paras. 79-84. For an interpretation critical of the definition of "general international law" by the Court, see the Dissenting Opinion of Judge Skotnikov to the Opinion (hereinafter as Judge Skotnikov), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4, pp. 5-6, para. 17. According to him, the Court's view that "general international law contains no applicable prohibition of declarations of independence" is a misleading statement which, unfortunately, may have an inflammatory effect. General international law simply does not address the issuance of declarations of independence, because "declarations of independence do not 'create' or constitute States under international law."
[18] See Dissenting Opinion of Judge Bennouna to the Opinion (hereinafter as Judge Bennouna), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4, p. 8, para. 40.
[19] See the Opinion, p. 30, para. 79.
[20] SC-Resolution 216 (November 12,1965, para. 1) and 217 (November 20, 1965, para. 3) concerning Southern Rhodesia; SC-Resolution 541 (November 18, 1983, para. 2) concerning northern Cyprus; SC-Resolution 787 (November 16, 1992, para. 3) concerning the Republika Srpska. This argument was put forward by several participants of the proceedings; see the Opinion, p. 30, para. 81.
[21] See the Opinion, p. 31, para. 81.

Court has not answered the question put before it in a satisfactory manner. To do so would require a fuller treatment of both *prohibitive* and *permissive* rules of international law as regards declarations of independence and attempted acts of secession than what were essayed in the Court's Opinion [my emphasis]".[22] Furthermore, he mentioned the reference by some participants in the proceedings to the Supreme Court of Canada and indicated that

> *it is indeed true that the request is not phrased in the same way as the question posed. However, this difference does not justify the Court's determination that the term "in accordance with" is to be understood as asking exclusively whether there is a prohibitive rule; according to the Court, if there is none, the declaration of independence is* ipso facto *in accordance with international law.*[23]

Finally Simma came to the conclusion that "the General Assembly's request deserv[ed] a more comprehensive answer, assessing both permissive and prohibitive rules of international law [which] would have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/territories."[24] Similar to Judge Simma, another member of the Court, Judge Sepúlveda-Amor, who also voted in favour of the operative clause, pointed out in his Special Opinion that "the scope of the right to self-determination, the question of 'remedial secession' […], the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions."[25] In addition, Court member Judge Yusuf, who likewise voted in favour of the operative clause, in his Special Opinion emphasized that a broader approach of the Court was necessary in answering to the request of the General Assembly:

> *The declaration of independence of Kosovo is the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordance with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which prevailed in that territory. Thus, the restriction of the scope of the question to whether international law prohibited the declaration of independence as such voids it of much of its substance.*[26]

After the Court concluded that Kosovo's declaration of independence did not violate general international law, it examined whether this declaration of independence in any way violated the UN Security Council Resolution 1244 of 10 June 1999. Although it arrived at the conclusion that Kosovo's declaration of independence violated neither the UN Security Council Resolution 1244 nor the regulations adopted thereunder, the arguments it put forward for substantiating this conclusion do not seem convincing either. In particular, this concerns

[22] See Judge Simma, p.1, para. 3.
[23] Ibid, p. 2, para. 5.
[24] Ibid, p. 2, para. 7.
[25] See Separate Opinion of Judge Sepúlveda-Amor to the Opinion (hereinafter as Judge Sepúlveda-Amor), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4, p. 7, para. 35.
[26] Separate Opinion of Judge Yusuf to the Opinion (hereinafter as Judge Yusuf), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4, p. 1, para. 2. See also p. 2, paras. 5-6..

the arguments according to which the authors of the declaration, i.e. the Assembly of Kosovo, did not act as a "provisional institution" in the sense of the question addressed by the UN General Assembly.[27] Based upon the above-mentioned allegation, the Court concluded that they did not violate the UN Security Council Resolution 1244 and Constitutional Framework adopted in 2001, because the authors of the declaration were not subject to them.[28] This approach was sharply criticized by Court members Tomka,[29] Skotnikov,[30] Koroma[31] and Bennouna,[32] who voted against the operative clause of the advisory opinion. In addition, those judges who voted in favour of the clause expressed their dissatisfaction concerning the interpretation of "provisional institutions" of Kosovo.[33]

In summarizing the aforementioned issues one must bear once more in mind that the ICJ's conclusion was based only upon a narrow approach of the Court in its answer to the General Assembly's request. The Court stated that there is no prohibitive rule preventing declarations of independence, and that Kosovo's declaration of independence adopted on 17 February 2008 was in accordance with international law. In other words, in the Court's view Kosovo's declaration of independence, taken as a particular act (and thus disregarding the results deriving from that act), is not prohibited by international law. The Court did not deal with the question as to whether and under which circumstances a right to secede from a state exists in international law. As such, the Court essentially failed (contrary to the wishes of some of its

[27] For a critical view of this point, see Declaration of Vice-President Tomka to the Opinion (hereinafter as Judge Tomka), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4, p. 10, para. 33. According to this Declaration, "[t]he above facts demonstrate that the Special Representative of the Secretary-General, entrusted by the United Nations with the interim administration of Kosovo, qualified a number of acts of the Assembly of Kosovo between 2002 and 2005 as being incompatible with the Constitutional Framework and, consequently, with Security Council resolution 1244. These acts, whether they sought directly to declare the independence of Kosovo or whether they fell short of it, were deemed to be "beyond the scope of its [i.e., the Assembly's] competencies" (United Nations dossier No. 189, 7 February 2003), in other words *ultra vires*. See also, p. 10, para. 34 (ibid). Likewise Judge Koroma, p. 2, para. 6, as well as, Judge Bennouna, p. 10, para. 52.

[28] See the Opinion, p. 37, para. 102; p. 39, para. 109.

[29] See Judge Tomka, p. 5, para. 19: "The majority had, at the end of the day, to concede that the President of the Kosovo Assembly and the Prime Minister of Kosovo "made reference to the Assembly of Kosovo and the Constitutional Framework" (Advisory Opinion, paragraph 104), while maintaining its intellectual construct that the authors of the declaration "acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (ibid., paragraph 109). The Members of the Assembly, are they not "representatives of the people of Kosovo"? The President of Kosovo, is he not the representative of the people of Kosovo? […]." See also paras. 1, 10-18, 20, 21, 32 (ibid).

[30] See Judge Skotnikov, p. 5, para. 15: "Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework […].The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it."

[31] See Judge Koroma, p. 2, para. 4: "Moreover, the Court's conclusion that the declaration of independence of 17 February 2008 was made by a body other than the Provisional Institutions of Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court's perceived intent of those authors […]". See also para. 5: "It is also question-begging to identify the authors of the unilateral declaration of independence on the basis of their perceived intent, for it predetermines the very answer the Court is trying to develop: there can be no question that the authors wish to be perceived as the legitimate, democratically elected leaders of the newly-independent Kosovo, but their subjective intent does not make it so […]". See also paras. 7-11, 15, 16, 18, 19 (*ibid*).

[32] See Judge Bennouna, p. 12, para. 63: "Finally, even if it is assumed that the declaration of 17 February 2008 was issued by a hundred or so individuals having proclaimed themselves representatives of the people of Kosovo, how is it possible for them to have been able to violate the legal order established by UNMIK under the Constitutional Framework, which all inhabitants of Kosovo are supposed to respect?" See also paras. 31, 32, 34, 44, 46-50, 64, 65.

[33] See Judge Sepúlveda-Amor, pp. 5-6, paras. 23-32; see Judge Yusuf, p. 6, para. 20

members described above) to respond to the question as to whether or not the Kosovo Albanians on the basis of such a right could secede from Serbia.[34] In doing so, the Court followed the approach put forward in its previous advisory opinions, when it considered the question of the right to self-determination. In those opinions the Court has already left the issue on the application and precise content of the right to so-called external self-determination in the postcolonial context open and never spoke of or pointed to the existence of any possible right to secession perhaps stemming from the right to self-determination.[35] Consequently, this traditional gap in the Court's advisory practice, when dealing with the question of the right to self-determination, was not filled after the Opinion on Kosovo either. For these reasons it is not correct or adequate for the secession movements all over the world, including those in the South Caucasus (Georgia and Azerbaijan), to allege the so-called green light effect or the precedent-setting effect of the Opinion. Apart from its non-binding character, the Court did not acknowledge at all the existence of an eventual right to secede from a state to which secessionist movements could refer.

Kosovo's Status after its Declaration of Independence

Apart from the aforementioned points, the ICJ also left open the question on the present status of Kosovo. In particular, the Court did not say that Kosovo, through its declaration of independence, effectively seceded from Serbia and thus that the new state of "Kosovo" emerged. That is why after reading the Opinion an important question arises about Kosovo's status, i.e. whether it can be assumed that Kosovo gained independent statehood after its declaration of independence and after its recognition as an independent state by 71 states to date, or whether it remains legally a part of Serbia.[36]

In this regard it is first useful to understand what the ICJ says in the Opinion about the validity of UN Security Council Resolution 1244 (10 June 1999), which legitimizes the presence of international territorial administration in Kosovo, i.e. where Kosovo's present status derives from. Nowhere in this Opinion does the Court call into question the continuation of the validity of this resolution. Judge Skotnikov concluded from this "silence" in the Opinion that "a political process designed to determine Kosovo's future status envisaged in this resolution […] has not run its course and that a final status settlement is yet

[34] See in this regard Judge Koroma, p. 8, para. 23: "[…] The question now before the Court, on the other hand, asks not about the existence of a "right" to declare independence but about the "accordance" of a declaration of independence with international law. This provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. That court, in response to the specific question asked, made clear that international law does not grant a right to secede. This Court, in response to the specific question asked by the General Assembly, should have made clear that the applicable international law in the case before the Court contains rules and principles explicitly preventing the declaration of independence and secession. The unilateral declaration of independence of 17 February 2008 was tantamount to an attempt to secede from Serbia and proclaim Kosovo a sovereign independent State created out of the latter's territory".

[35] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, June 21, 1971, ICJ Reports 1971, p. 31, para. 52; *Western Sahara*, Advisory Opinion, October 16, 1975, ICJ Reports 1975, pp. 32-33; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9, 2004, ICJ Reports 2004, pp. 182-183, para. 118. For more detailed information about this standpoint of the Court, see James Crawford, "The General Assembly, the International Court and self-determination", in *Fifty years of the International Court of Justice – Essays in honour of Sir Robert Jennings,* eds. Vaughan Lowe and Malgosia Fitzmaurice (Cambridge, 1996), 603.

[36] See Kosovo's Ministry of Foreign Affairs site, http://www.mfa-ks.net/?page=2,33 (accessed November 6, 2010)

to be endorsed by the Security Council".[37] In addition, other members of the Court agreed with this view and stated that the final status of Kosovo shall be endorsed by the UN Security Council.[38] In summarizing these views one could conclude that UN Security Council Resolution 1244 on Kosovo is still in force until a new resolution is adopted by the Council.[39] As according to this resolution, Kosovo shall only be given the substantial autonomy within Federal Republic of Yugoslavia (Serbia).[40] It can thus be stated that, from a legal point of view, Kosovo still remains part of Serbia.[41] Likewise, ICJ Vice-President Tomka rightly points out that "the *legal régime* governing the international territorial administration of Kosovo by the United Nations *remained*, on 17 February 2008, *unchanged*" [my emphasis].[42] This conclusion was also confirmed by the fact that the Minister of Foreign Affairs of Kosovo, Skender Hyseni, on 4 August 2010, requested that the UN Security Council adopt a new resolution which would contain the fact of a declaration of independence and pointed out that the new resolution shall replace Resolution 1244. However, it is very difficult to imagine that two of five permanent members of UN Security Council, Russia and China, in view of their dismissive position to date, will agree with the adoption of a resolution, which would legalize Kosovo's declaration of independence.[43]

"Frozen" Secession Conflicts in the South Caucasus

Nevertheless it is still possible to give to the ICJ a chance to fill the traditional gap in its advisory jurisprudence. In such a case the Court would have to define the scope and normative content of the right to external self-determination in postcolonial situations. The need to clarify these issues derives also from the fact that if doors for secessionist groups are left too widely open, then a whole host of claims may severely upset the world order.[44] The potential "cases" in this context could be the three secession conflicts in the South Caucasus, namely, Abkhazia, South Ossetia (both in Georgia), as well as Nagorno-Karabakh (Azerbaijan). From a legal standpoint these secession conflicts have some similarities with the conflict between Serbia and Kosovo. In these conflicts the contradiction between the right to self-determination and the principle of territorial integrity is a key issue, i.e. to which of these two important principles of international law a priority should be given. Hence, in

[37] See Judge Skotnikov, p. 6, para. 18..
[38] See Judge Tomka, pp. 7-9, paras. 27, 28, 31; Judge Koroma, p. 6, para. 17; Judge Bennouna, p. 10, para. 53.
[39] Likewise, UN Secretary-General Ban Ki-moon reaffirmed on 9 September 2010 that the UN Mission will continue its work in Kosovo, as set out in UN Security Council Resolution 1244. So also in his view this resolution "remains valid and effective"; see N. Krastev, "UN General Assembly passes Kosovo Resolution Urging Parties to Negotiate", August 10, 2010, http://www.rferl.org/content/UNGA_Passes_Kosovo_Resolution/2153707.html (accessed November 2, 2010).
[40] See UN SC-Resolution 1244 (1999) of 10 June 1999, para. 10, operative part. See also the Preamble, where "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2" was explicitly reaffirmed. See, too, in this regard, Judge Tomka, p. 6, paras. 22-25; Judge Koroma, pp. 4-5, paras. 13-14; Judge Bennouna, p. 12, paras. 61, 62; and Separate Opinion of Judge Keith, available at: http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4 (hereinafter as Judge Keith), p. 5, para. 14.
[41] See Judge Koroma, p. 8, para. 24.
[42] See Judge Tomka, p. 10, para. 35.
[43] On 9 September 2010 the UN General Assembly passed a Serbian-backed compromise resolution that opens the way for dialogue between Belgrade and Kosovo. Nonetheless, Vuk Jeremić, Minister for Foreign Affairs of Serbia, stated once more that "the Republic of Serbia does not and shall not recognize the unilateral declaration of independence of Kosovo." More information about this resolution and its background is available at http://www.un.org/News/Press/docs/2010/ga10980.doc.htm (accessed September 14, 2010).
[44] Similarly, Judge Yusuf, p. 2, para. 5.

connection with the conflicts in the South Caucasus the governments of Georgia and Azerbaijan could initiate, like Serbia, the adoption of a resolution in the UN General Assembly requesting the ICJ's advisory opinion on the legality of the secession claims of Abkhazia, South Ossetia and Nagorno-Karabakh. In order to "strengthen" this request Moldova could also join said initiative and question, together with the two South Caucasus states, the legality of secession claims of its own breakaway region, Transnistria (R. *pridnestrovskaia moldavskaia respublica*).[45] It is difficult to imagine that such a draft resolution would not be supported by the member-states of the UN General Assembly, so that there would be no problems with the necessary number of votes for adoption of such a Resolution, as many western states (especially because of Georgia) and Islamic countries (because of Azerbaijan) would presumably support such a draft in order to get enough votes for the adoption of the respective resolution. This is one of the key factors for why the four secessionist conflicts in post-soviet space should be brought in one package before the ICJ. In order to fill the aforementioned traditional gap, i.e. to leave no chance in advance for the Court to avoid answering questions concerning the right to secession, it would be advisable to formulate this question as following:

> *Do the Abkhazians, the South Ossetians, the Armenians of Nagorno-Karabakh and the Transnistrians have the right to break away or secede from Georgia, Azerbaijan and Moldova, respectively, and create their own independent states according to the norms and principles of international law concerning the right to self-determination of peoples?*

Except for questions concerning an eventual right to secession, other questions with regard to said secessionist conflicts could be posed to the ICJ. For instance, it would perhaps be appropriate to put another question within the same request as to whether one can assume that the four breakaway regions could have already gained statehood only on the basis of the time lapse (since they seceded nearly 20 years ago), or on the basis of factual fulfillment of minimal preconditions to be met for statehood such as (1) a defined territory, (2) a permanent population and (3) an effective government.[46]

Of course, one can argue that the territorial integrity of Georgia, Azerbaijan and Moldova has already been recognized by many international organizations and by the majority of states in the world. The UN Security Council, notably, adopted many resolutions affirming the territorial integrity and sovereignty of Georgia and Azerbaijan.[47] That is why one could

[45] Since 1997 Georgia, Azerbaijan and Moldova, as members of the regional international organization GUAM (Georgia, Ukraine, Azerbaijan and Moldova), have been trying to contribute jointly to the resolution of the secessionist conflicts in their territories. A typical example of these efforts was a preparation of the draft resolution of UN the General Assembly (UN General Assembly Draft Resolution A/62/L. 23) on 4 December 2007 entitled *Protracted conflicts in the GUAM area and their implications for international peace, security and development*. The Text of this draft resolution is available at: http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=12R206772H45C.108259&profile=bibga&uri=full=3100001~!847587~!27&ri=1&aspect=subtab124&menu=search&source=~!horizon (accessed October 26, 2010).

[46] More about these preconditions see Karl Doehring, "State" in *Enyclopedia of Public International Law*, vol. IV, ed. Rudolf Bernhardt (Amsterdam 2000), 600.

[47] For Georgia, see SC-Resolution 876 (1993) from 19 October 1993, para. 1; SC-Resolution 906 (1994) from 25 March 1994, para. 2; SC-Resolution 1096 (1997) from 30 January 1997, paras. 3, 4; SC-Resolution 1187 (1998) from 30 July 1998; SC-Resolution 1255 (1999) from 30 July 1999, para. 5; SC-Resolution 1364 (2001) from 31 July 2001, para. 3; SC-Resolution 1524 (2004) from 30 January 2004, paras. 2, 3, 6; SC-Resolution 1666 (2006) from 31 March 2006, para. 1; SC-Resolution 1752 (2007) from 13 April 2007, para.1; SC-Resolution 1781 (2007) from 15 October 2007, para. 1; and SC-Resolution 1808 (2008) from 15 April 2008, para. 1. For Azerbaijan, see SC-Resolution 822 (1993) from 30 April 1993, preamble und para. 1; SC-

conclude that this standpoint reflects already the position of the international community, according to which the secession of Abkhazia, South Ossetia and Nagorno-Karabakh has not been recognized (apart from Russia, Nicaragua, Venezuela and Nauru in Abkhazia's and S. Ossetia's case). However, it should be noted that despite those decisions the "legal battles" amongst the respective parties could not yet be stopped. That means that each party to the conflict continues, to date, to present its arguments for substantiating its position in attempting to convince the international community of its own version of the truth. Furthermore, Article 36(3) of the UN Charter states that in making recommendations for the peaceful settlement of disputes under Chapter VI, the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the ICJ in accordance with the provisions of the Statute of the Court."[48] With this in mind, it would be advisable to bring the issue of the frozen conflicts in the former Soviet space before the ICJ according to the *advisory* proceedings rules, especially as it is not possible to present the issue as a legal dispute before the ICJ within a *contentious* proceeding.[49] An advisory opinion with regard to the secessionist conflicts in the South Caucasus, even without binding force, could at least help to bring to an end the "legal battle" amongst the parties to the conflicts, provided that the Court did not refrain from exercising its advisory jurisdiction.[50] At the same time the Court, as mentioned earlier, could be given a chance to express its views on the due content of the right to self-determination in the post-colonial context. Lastly, such an opinion could serve as a good basis in the peaceful and lasting resolution of the respective secession conflicts taking into account their legal aspects.[51]

Conclusion

The ICJ's Opinion on Kosovo stating that the declaration of independence did not violate international law was based only upon a narrow approach taken by the Court in answering the General Assembly's request. According to the Court's approach, whereby there is no *prohibitive* rule preventing declarations of independence, Kosovo's declaration of independence, adopted on 17 February 2008, was in accordance with international law. But,

---

Resolution 853 (1993) from 29 July 1993, para. 3; SC-Resolution 874 (1993) from 14 October 1993, preamble; and SC-Resolution 884 (1993) from 12 November 1993.

[48] Likewise, the aforementioned resolutions of the UN Security Council were adopted on the basis of Chapter VI of the UN Charter.

[49] Because within contentious proceedings both the claimant and defendant must be states. Moreover, some other procedural preconditions to be met for this type of the proceedings before the ICJ must be fulfilled, for the detailed explanation of those preconditions on the example of Nagorno-Karabakh conflict M. Mammadov, Все ли средства урегулирования Нагорно-Карабахского Конфликта исчерпала азербайджанская дипломатия? [Did Azerbaijani diplomacy exhaust all means to solve the Nagorno-Karabakh conflict?], in: *Zerkalo*, 8 November 2008, http://old.zerkalo.az/rubric.php?id=37413&dd=8&mo=11&yr=2008 (accessed September 22, 2010).

[50] That the ICJ has jurisdiction in a given case does not yet mean that it is obliged to exercise it. See in this regard *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, July 9, 2004, ICJ Reports 2004 (I), p. 156, para. 44: "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court *may* give an advisory opinion [...]', should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met [my emphasis]."

[51] Concerning the resolution of the Nagorno-Karabakh conflict, the Parliamentary Assembly of the Council of Europe expressly suggested to Armenia and Azerbaijan that they should consider using the ICJ if the negotiations fail. See Council of Europe, *Parliamentary Assembly Resolution 1416 from 25 of January 2005*, para. 7. But as Armenia does not consider itself as a party to the conflict in Nagorno-Karabakh and, in addition, because neither Armenia nor Azerbaijan recognize the compulsory jurisdiction of the ICJ, it seems unrealistic to frame the conflict on Nagorno-Karabakh as a legal dispute between Armenia and Azerbaijan before the ICJ within contentious proceedings. For more detailed, see Mammadov, "Did Azerbaijani diplomacy".

at the same time, the Court did not determine whether there are *permissive* rules in international law which allow for a secession of a part of territory of existing states. As such, the Court should have considered in particular the question as to whether and under which circumstances a right to secede from a State exists in international law, and if so, whether or not the Kosovo Albanians on the basis of such a right could secede from Serbia.[52] In doing so, the Court followed its approach in its previous advisory opinions and, consequently, failed to close the traditional gap by saying, once again, nothing about the due content of the right to self-determination, especially in the postcolonial context, as well as about the eventual right to secede from a state and preconditions to be met in order to recourse to such a right. Secession movements all over the world, including the three in the South Caucasus, could not derive from the ICJ's Opinion on Kosovo the conclusion that it gave them a so-called green light or created the precedent-setting effect. Apart from its non-binding character, the Opinion does not touch upon the existence of an eventual right to secession, nor does it state that every secession movement has a right to secede from the respective state and can refer to this Opinion in order to substantiate its standpoint.

The Court did not state in the Opinion that Kosovo through its declaration of independence effectively seceded from Serbia and thus the new state of "Kosovo" emerged. As it did not call into question the validity of UN Security Council Resolution 1244 (1999), which legitimizes the presence of international territorial administration in Kosovo, one can conclude that this resolution is still in force until a new resolution is adopted by the Council. In fact, according to this resolution, Kosovo shall only be given substantial autonomy within the Federal Republic of Yugoslavia (Serbia). Hence it can be stated that, from a legal point of view, Kosovo still can be seen as part of Serbia.

In order to fill the traditional gap in the Court's advisory jurisprudence with regard to the explanation of the due content of the right to self-determination, the frozen conflicts in the post-soviet space could be brought before the ICJ. But in this case the question should be formulated differently, in order to leave no chance in advance for the Court to avoid an answer to questions concerning the right to external self-determination (secession) in the postcolonial context. Apart from filling the traditional gap in the ICJ's practice, such an advisory opinion could also bring an end to the "legal battles" amongst the conflict parties and serve as a good basis in the negotiations process for their resolution.

[52] See in this regard Judge Koroma, p. 8, para. 23: "The question now before the Court, on the other hand, asks not about the existence of a 'right' to declare independence but about the 'accordance' of a declaration of independence with international law. This provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. That court, in response to the specific question asked, made clear that international law does not grant a right to secede. This Court, in response to the specific question asked by the General Assembly, should have made clear that the applicable international law in the case before the Court contains rules and principles explicitly preventing the declaration of independence and secession. The unilateral declaration of independence of 17 February 2008 was tantamount to an attempt to secede from Serbia and proclaim Kosovo a sovereign independent State created out of the latter's territory […]".