

The Law and Politics
of the Kosovo Advisory
Opinion

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Kosovo—The Questions Not Asked Self-Determination, Secession, and Recognition

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1. Pointless Question, Semi-Answer

A silly question calls for a silly answer. This could—and from my point of view should—have been so in the case of the Advisory Opinion concerning the independence of Kosovo. In fact, the Court generously gave a very considered answer to a question which did not deserve that much attention and, while it formally stuck to a strict interpretation of the question asked, it suggested partial answers to the real underlying issues.

The question asked to the ICJ by resolution 63/3 of the General Assembly of the UN in accordance with Article 96 of the Charter and pursuant to Article 65 of the Statute of the Court reads as follows:

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

As explained in other contributions to this volume, the initiative to request an advisory opinion came from Serbia which clearly conceived the Opinion to be given by the Court as a support for its fight against the secession of Kosovo. Introducing the text before the General Assembly, the Serbian Minister of Foreign Affairs, Mr Vuk Jeremić, declared that sending the question to the Court 'would prevent the Kosovo crisis from serving as a deeply problematic precedent in any part of the globe where secessionist ambitions are harboured'.¹ From this statement—and others²—it is apparent that what was expected was a clear-cut condemnation of Kosovo's secession.

* The author acted as Counsel for France in this case. The views expressed in this paper are his own and do not commit the French Government. Many thanks to Benjamin Samson for his assistance in preparing the present paper.

¹ UN doc. A/63/PV.22 (2008), at 1.

² See, e.g., the declarations of the Serbian Minister of Foreign Affairs and the Serbian President in April 2009 (<http://www.b92.net/eng/news/politics.php?yyyy=2009&mm=04&dd=22&nav_id=58669> and <http://www.expatica.com/news/local_news/Serbia-expects-ICJ-to-rule-against-Kosovo-split--_51873>.

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³ Albania, CR 2009/12 (Gill); Argentina, CR 2009/8-12, paras. 10-23; Belarus, CR 2009/24 (Calzadilla Sarmiento); CR 2009/30, at 41-42, paras. 33-7, paras. 22-42, 10-12 (Mr Aurescu); CR 2009/33, at 10-11 (Mr Nguyen Thi Hoang).

⁴ CR 2009/24, at 41-42, paras. 33-7, paras. 22-42, 10-12 (Mr Aurescu); CR 2009/33, at 10-11 (Mr Nguyen Thi Hoang).

⁵ See, e.g., Burri, 'The 11 German Law Journal's Declaration of Independence', 11 *German Law Journal* 11 (2006), at 240-2; or Koh, 'The Declaration of Independence of Kosovo', 11 *German Law Journal* 11 (2006), at 240-2.

⁶ See *Accordance of Kosovo*, Separate Opinion of Judge Yusuf, ICJ Reports 2009, at 131-2; 'The Court's sticking to its guns: to permissibility' (ited by Weller, 'Modes of Remedies', 11 *German Law Journal* 11 (2006), at 240-2).

⁷ Weller, 'Modes of Remedies', 11 *German Law Journal* 11 (2006), at 240-2; 'The Court's sticking to its guns: to permissibility' (ited by Weller, 'Modes of Remedies', 11 *German Law Journal* 11 (2006), at 240-2).

Thinking they were being skillful, the Serbian Government avoided straightforwardly asking a question on the real issue. Instead of putting before the Court the issue of the lawfulness of Kosovo's secession, they focused on the *declaration of independence*, probably with the idea that a narrow question would limit the risk of a discussion on the right to secession under international law, the result of which was no doubt risky, as will be shown later in this paper. However, they probably realized their mistake during the proceedings since Serbia abundantly pleaded (as, it is true, did several other 'participants')³ on issues relating, e.g., to the right to self-determination or territorial sovereignty.⁴ The risk of playing a game is that you may be taken at your own word. This is exactly what happened in this case. The Court strictly kept to the question asked—and rightly so; contrary to the views of some commentators⁵ and of two individual Judges,⁶ it is not for the Court to act as a scholar and to clarify questions because they are obscure or interesting: in its contentious role, its function is to decide disputes between states which are submitted to it; when it gives an advisory opinion, it must answer the legal question(s) asked by an authorized body—no more and no less. 'The jurisdiction of the Court in this matter was shaped by the request, and so was the—narrow—focus of its enquiry ... [h]aving failed to frame the question differently may have been a miscalculation on the part of Serbia, but this failing is hardly attributable to the Court'.⁷

html>)andthestatementoftheRussianMinisterofForeignAffairsaftertalkswiththeSerbianMinisterofForeign Affairs on 5 October 2009 (<http://sofiaecho.com/2009/10/07/795947_russia-pledges-backing-for-serbia-at-icj-hearing-on-kosovo>). See also, e.g., the statements of the Representatives of Romania (UN Doc. A/63/PV. 22 (2008), at 6) or Comoros (*ibid.*, at 9–10).

³ Albania, CR 2009/26, at 13–16, paras. 19–32 (Mr Frowein) and at 18–23, paras. 2–16 (Mr Gill); Argentina, CR 2009/26, at 42–6, paras. 18–26 (Ms Ruiz Cerutti); Austria, CR 2009/27, at 8–12, paras. 10–23 (Mr Tichy); Azerbaijan, CR 2009/27, at 18–25, paras. 10–45 (Mr Mehdiev); Belarus, CR 2009/27, at 27–32 (Ms Gritsenko); Bolivia, CR 2009/29, at 8–13, paras. 6–25 (Mr Calzadilla Sarmiento); Finland, CR 2009/30, at 57–64, paras. 13–26 (Mr Koskenniemi); Russia, CR 2009/30, at 41–4, paras. 8–25 and at 46–8, paras. 32–43 (Mr Gevorgian); Jordan, CR 2009/31, at 33–7, paras. 22–40 (Prince Zeid Raad Zeid Al Hussein); Romania, CR 2009/32, at 20–1, paras. 10–12 (Mr Aurescu) and at 26–9, paras. 2–10 and at 30–6, paras. 13–30 (Mr Dinescu), Venezuela, CR 2009/33, at 10–16, paras. 18–40 (Mr Fleming) and Vietnam, CR 2009/33, at 17–21, paras. 5–16 (Mr Nguyen Thi Hoang Anh).

⁴ CR 2009/24, at 63–74, paras. 1–32 (Mr Shaw) and at 76–85, paras. 2–22 (Mr Kohen). See also Written Statement of Serbia, at 147–242 and Written Comments of Serbia, at 101–50.

⁵ See, e.g., Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links', 11 *German Law Journal* (2011) 882, at 885–7; Crépet-Daigremont, 'Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo', 56 *AFDI* (2010) 229, at 238 and 240–2; or Kohen and Del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of Independence from International Law?', 24 *LJIL* (2011) 109, at 111–12.

⁶ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinions of Judge Simma, ICJ Reports 2010, at 478–81, paras. 1–9 and *Judge Yusuf*, ICJ Reports 2010, at 619–20, paras. 4–6. Although I respectfully disagree with them on their excessively wide interpretation of the question, I fully agree with Judge Simma in his criticism of the Court's sticking to the untenable and outdated 'Lotus principle' assimilating 'the lack of a prohibition to permissibility' (*ibid.*).

⁷ Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion?', 24 *LJIL* (2011), at 131–2; see also: Hilpold, 'The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question', 14 *Austrian Review of International and European Law* (2009) 259, at 298–300 and 302–3.

It can certainly be a source of frustration that the Court conspicuously stuck to the narrow question asked by the General Assembly—and all the more so that, as Judge Yusuf very aptly noted, ‘since a declaration of independence is not per se regulated by international law, there is no point assessing its legality, as such, under international law’.⁸ This is probably the right and sufficient answer to the question—and it is very neatly and convincingly given at paragraph 84 of the Opinion.⁹ However, while the question is indisputably pointless, the answer given by the Court is less so and gives too much credit to the question asked since the Court went beyond what was necessary in discussing at some length some peripheral issues, including those related to the author of the declaration and, arguably, resolution 1244 (1999) of the Security Council.

While conceding that it could depart ‘from the language of the question put to it where the question was not adequately formulated ... or where ... the request did not reflect the ‘legal questions really in issue’, or ‘where the question asked was unclear or vague’, the Court found that

[i]n 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.¹⁰

And in a subsequent passage of its Opinion, the Court also specified that, since ‘[t]he General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law’, ‘the extent of the right of self-determination and the existence of any right of “remedial secession” ... concern the right to separate from a State’ and are ‘beyond the scope of the question posed by the General Assembly’.¹¹

Moreover, the Court rightly observed ‘that the question in the present case is markedly different from that posed to the Supreme Court of Canada’ on the occasion of the *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*:¹²

⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Yusuf, ICJ Reports 2010, at 620, para. 5.

⁹ At p. 438: ‘general international law contains no applicable prohibition of declarations of independence’.

¹⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403, at 423–4, paras. 50–1.

¹¹ *Ibid.*, at 438, para. 83.

¹² 2 SCR(1998)217; 161 DLR(1998) 385; 115 ILR536. The relevant question in that case was: ‘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?’ The present writer

The question to ‘effect secession’ is a positive one required by the law conferred or, *a fortiori*, situated within for a particular violation of it. It is therefore the right to the three members of the Court—for briefly deals

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¹³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, at 403, para. 5.

¹⁴ 1966 ILR 1(2) and 1(3).

¹⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, at 403, para. 5.

¹⁶ See, e.g., Rosas, ‘Irregular Secession’ (Martinus Nijhoff, 2008).

¹⁷ See, e.g., Opinions of the ICJ, 3 E

The question put to the Supreme Court of Canada inquired whether there was a right to 'effect secession', and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast ... [t]he Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act—such as a unilateral declaration of independence—not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.¹³

It is therefore apparent that the right of the Kosovar people to self-determination, the right to secession under international law, and recognition by third states are the three main underlying questions which have remained unanswered by the Court—for the excellent reasons that they were not asked. The present paper very briefly deals with each of them in turn.

2. The Right to Self-Determination of Non-Colonial Peoples

There is no doubt that '[a]ll peoples have the right to self-determination'.¹⁴ But this is a right of variable content. As the Court rightly notes in the *Kosovo Opinion*, '[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'.¹⁵ But the right to self-determination has not exhausted its effects with the substantial completion of the decolonization process, nor can it be alleged that it has a purely domestic connotation limiting it with a right to a democratic system¹⁶ and/or to the right of minorities to exist within the state.¹⁷ It is obviously not because a people is entitled to benefit from internal self-determination that it is deprived of the right to enjoy external self-determination.

was consulted by the *amicus curiae* appointed by the Supreme Court in this case on certain questions of international law. The present paper is largely based on his expert opinions in this case, which have been published in English in A. F. Bayefsky (ed), *Self-Determination in International Law—Quebec and Lessons Learned* (The Hague, Kluwer Law Internl, 2000), at 85–124, 185–212 and 225–30.

¹³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403, at 425–6, paras. 55–6.

¹⁴ 1966 International Covenants on Human Rights, Art. 1; see also Charter of the United Nations, Arts. 1(2) and 55.

¹⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403, at 436, para. 79.

¹⁶ See, e.g., A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP, 1995), at 101 or Rosas, 'Internal Self-Determination', in C. Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, 1992) 225, at 232.

¹⁷ See, e.g., Arbitration Commission for the Former Yugoslavia (text reproduced in Pellet, 'The Opinions of the Badinter Arbitration Committee—A Second Breath for the Self-Determination of Peoples', 3 *EJIL* (1992), at 184).

On the contrary, if a people is deprived of its fundamental 'internal right' to self-determination—which can most probably be described as 'a peremptory norm of general international law' (*jus cogens*)¹⁸—then the creation of an independent state may be the only means of ensuring that this right is achieved; it is then more in the nature of a *consequence of the violation* ('remedy') of the principle of the right of peoples to self-determination than a component of that right.

Moreover, it is this type of reasoning that is the source of the recognition of the right of colonial peoples to independence: colonialism is considered by the United Nations, at least since the famous resolution 1514(XV) of 14 December 1960, to be a 'denial of fundamental human rights, [which] is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation', and the right to freely determine political status (including the right of colonial peoples to accede to sovereignty) is regarded as an antidote to the violence done to those peoples. *Mutatis mutandis*, the reasoning may be transposed to non-colonial peoples whose existence and identity are denied by the state into which they are integrated. This is moreover what has led to the recognition of the right to sovereignty of peoples subject to alien occupation.

It can then certainly be accepted that there is a right of 'remedial secession' under contemporary international law,¹⁹ even though, to my knowledge, there exists no clear and undisputable precedent.

In its Opinion in the case concerning *Certain Questions relating to the Secession of Quebec from Canada*, the Supreme Court of Canada concluded that 'neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions ... possess a right, under international law, to secede unilaterally from Canada', but the only reason for this position was that the exceptional circumstances in which a people is entitled to a right to external self-determination were 'manifestly inapplicable to Quebec under existing conditions'. However, the Court in Ottawa seemed to accept that when a people is 'denied the ability to exert internally [its] right to self-determination', 'as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development', then, such a people is granted a right to external self-determination similar to that of colonial peoples, which includes the right to independence.²⁰

¹⁸ See, e.g., P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (L.G.D.J., 8th ed, 2009), at 223 and 227 or M. Shaw, *International Law* (CUP, 7th ed, 2014), at 185–6. See also *East Timor (Portugal v. Australia)*, ICJ Reports 1995, 90, at 102, para. 29 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, at 172, para. 88.

¹⁹ See Statement of Albania, CR 2009/26, at 22–3, para. 15 (Mr Gill); Statement of Russia, CR 2009/30, at 43–4, paras. 19–22 (Mr Gevorgian) and Statement of Romania, CR 2009/32, p. 21, para. 12 (Mr Aurescu) and p. 30, para. 13 and p. 33, paras. 22–3 (Mr Dinescu); See also, e.g., Corten, 'Déclarations unilatérales d'indépendance et reconnaissances prématurées: du Kosovo à l'Ossétie du Sud et à l'Abkhazie', 112 *RGDIP* (2008) 721; Sterio, 'On the Right to External Self-Determination: "Selfistans", Secession, and the Great Powers' Rule', 19 *Minn J Int'l L* (2010) 137.

²⁰ SCC, Judgment, 20 August 1998, Case n° 25506, 2 SCR (1998) 217, para. 138.

Now, if one applies this reasoning to the case of Kosovo, the following elements must be kept in mind:

- On 23 March 1989, Serbia forced the Kosovo Assembly to approve the removal of Kosovo's autonomy;²¹
- On 5 July 1990, Serbia suspended the Kosovo Assembly;²²
- In late 1990, the Kosovo Constitutional Court was abolished by Serbia;²³
- From the early 1990s onwards, Kosovo Albanians were subject to systematic state-sanctioned discrimination, dismissed from position in both the private and public sector and replaced by Serbs, and tortured and mistreated;²⁴ and
- Up until the late 1990s the situation worsened and the Albanian Kosovars were victims of 'the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which has resulted in numerous civilian casualties'.²⁵

A full discussion of these facts would exceed the limits of this paper. However, their mere enumeration, from neutral authorities, rather eloquently shows that the Kosovar people²⁶ was 'denied the ability to exert internally [its] right to self-determination' and that Serbia did not behave in respect to Kosovo's population as a democratic state protecting on an equal basis all its citizens. Therefore it seems that the conditions for a right to self-determination, including a right to secede, were met.

3. The Right to Secession *v.* Territorial Integrity

Supposing, however, that the Kosovar could not invoke a right to a 'remedial secession', it should be admitted nevertheless that international law does not prohibit secession nor does it encourage it: it takes note of it when it results in an effective statehood.

²¹ ICTY, Trial Chamber, Judgment, 26 February 2009, *Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, paras. 217–221.

²² *Ibid.*, paras. 223–230, referring to Law on Termination of the Activity of the Assembly of the SAP of Kosovo, 5 July 1990.

²³ *Ibid.*, referring to Decision on Relieving of Duty the Judge[s] of the Kosovo Constitutional Court, Municipal Court Judges and Judges and Officers of the Municipal Organs for Misdemeanours, and Election of Judges to the District Court and Municipal Courts in Kosovo, 28 December 1990.

²⁴ *Ibid.*, para. 224, referring among others to the report on the situation of human rights in the territory of the former Yugoslavia prepared by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, 17 November 1992, paras. 99–113. See also GA Res. 47/147, 18 December 1992; 48/153, 20 December 1993; 49/204, 23 December 1994; 50/190, 22 December 1995; 51/111, 12 December 1996; 52/139, 12 December 1997; 53/164, 9 December 1998; and 54/183, 17 December 1999. See also the Report of the OSCE Kosovo Verification Mission, 'Kosovo/Kosova, As Seen/As Told', June 1999 (available at <<http://www.osce.org/odih/17772?download=true>>).

²⁵ SC Res. 1199, 23 September 1998.

²⁶ I cannot discuss at any length here the question of the legal nature and characters of the people in question.

Indeed, it clearly stems from the previous Section that there is no general right to secession in international law or, as the Supreme Court of Canada put it in the case concerning *Certain Questions relating to the Secession of Quebec*, '[i]t is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state'.²⁷ However, this does not mean that secession is prohibited under international law nor, in particular, that it necessarily collides with the principle of the territorial integrity of states as existing in positive international law.

Several participants in the proceedings challenged the 'right' of Kosovo to secede as contradicting the principle of territorial integrity embodied in Article 2, paragraph 4 of the Charter. Thus, according to Argentina, 'la déclaration est en contradiction flagrante avec le respect de l'intégrité territoriale de la Serbie'.²⁸ And this also was one of the main Serbian arguments: 'Most importantly, the UDI has been an attempt to create an independent State, to violate Serbia's territorial integrity and to terminate or modify the international legal régime for the administration of Kosovo'.²⁹

In this respect the conclusions of the five jurists which had been consulted in 1992 on the territorial integrity of Quebec in the event of the accession of Quebec to sovereignty are still entirely well-founded:

- *In the first place*, the principle of the right of peoples to self-determination does not create a right to independence of peoples that are not in a colonial or 'remedial' situation.
- *In the second place, however*, no principle of international law prohibits a people from seceding, and when such is the case, the law of nations simply takes note of the existence of the new State.³⁰

Indeed, there is no doubt that secession, unlike decolonization,³¹ does in fact undermine the territorial integrity of the state. Secession is, however, a fact, and it must be determined whether that fact is, or may be, in compliance with the rules of international law as they actually stand. Two powerful arguments militate in favour of an affirmative answer to this question.

In the first place, as rightly stated in the Kosovo Opinion recalling General Assembly resolution 2625(XXV) of 1970 and the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe, 'the principle of territorial integrity is confined to the sphere of relations between States';³² it does not concern

²⁷ SCC, Judgment, 20 August 1998, *supra* note 20, para. 111.

²⁸ CR 2009/26, at 38, para. 8 (Ms Ruiz Cerutti).

²⁹ CR 2009/24, at 41, para. 17 (Mr Djerić); see also: CR 2009/24, at 75, para. 36 (Mr Shaw).

³⁰ See: Franck, Higgins, Pellet, Shaw, and Tomuschat, 'The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty', Reports prepared for Québec's Ministry of International Relations, 1992, para. 4.01 (available at <http://english.republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainment_of_sovereignty>).

³¹ As very convincingly noted by the General Assembly 'The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it' (GA Res. 2625(XXV), 24 October 1970).

³² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403, at 437, para. 80.

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the relations between a single state and its own population. This is also evidenced, for example, by the wording of paragraph 4 of Article 2 of the United Nations Charter, which is the major provision establishing and regulating this principle. It follows that the principle of territorial integrity, as contemplated by the United Nations Charter, excludes any *foreign* intervention whose aim or effect is the dismemberment of a state, in particular through armed support given to a secessionist movement (as is shown, for example, by the reactions of the international community to the creation of 'bantustans' by South Africa, to the establishment of the 'Turkish Republic of Northern Cyprus' or to Russia's hasty annexation of Crimea).

In its Opinion concerning *Certain Questions relating to the Secession of Quebec from Canada*, the Supreme Court of Canada stressed that '[t]he various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states' at least when sovereign and independent states conduct 'themselves in compliance with the principle of equal rights and self-determination of peoples and thus [possess] a Government representing the whole people belonging to the territory without distinction'.³³ As noted above, it is highly debatable that this was the case with Serbia before Kosovo declared its independence.

In any case, there is no basis for alleging that secession as such is condemned by international law and, as also noted in the *Kosovo* Opinion, while, in some instances, the Security Council has condemned particular declarations of independence,³⁴ in all of those instances 'the illegality attached to the declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position'³⁵ neither concerning the declaration of independence, nor the secession itself.

Second, while the principle of territorial integrity is unquestionably a principle of positive law, it is not peremptory: no one would doubt that a state may, in the exercise of its sovereign jurisdiction, cede part of its territory. Therefore, there certainly is a right for the predecessor state to accept secession. And there can be no doubt that there is no legal objection to the predecessor state's agreeing to the secession of part of its territory nor that such an agreement is a powerful—usually decisive—element for a successful secession whether the concerned part of the

³³ See SCC, Judgment, 20 August 1998, *supra* note 20, paras. 127–30.

³⁴ The Court mentions SC Res. 216, 12 November 1965 and 217, 20 November 1965, concerning Southern Rhodesia (although it is a case of decolonization); SC Res. 541, 18 November 1983, concerning northern Cyprus; and SC Res. 787, 16 November 1992, concerning the Republika Srpska (ICJ Reports 2010, 403, at 237, para. 81).

³⁵ ICJ Reports 2010, 403, at 437, para. 81.

predecessor's territory joins another pre-existing state³⁶ or becomes itself a new sovereign state.³⁷

Such an agreement amply facilitates the effectiveness of the new state; but this is not to say that the agreement of the predecessor state is an indispensable condition for the lawfulness of a secession. Even outside the framework of decolonization, many examples of successful secessions can be cited which occurred as a result of a victorious armed struggle against the state from which they have seceded. Bangladesh is an example of such a secession—but, admittedly, a rather dubious one since, notoriously, it was successful with (and probably owing to) India's strong military involvement; but there are others. Eritrea and the states resulting from the dissolution of former Yugoslavia being the most recent and topical examples. In other words, 'successful' secessions are not the secessions accepted by the predecessor state, but *de facto* secessions.

These findings are in keeping with the very definition according to which a state is a 'primary fact', 'a fact that precedes the law and that the law recognizes when it has materialized, attributing to it certain effects, including a certain legal status'.³⁸ As rightly explained in Opinion n° 1 of the Arbitration Commission for the Former Yugoslavia (Badinter Commission), 'the existence or disappearance of the state is a question of fact'.³⁹

The international community certainly does not encourage secession, but when secession succeeds there is no example in which third states, and the United Nations, have not drawn the inferences therefrom, regardless of the attitude of the predecessor state. The new state in no way depends on the consent of the state from which it is derived for the legal justification of its existence; that justification lies in the mere fact that it exists and that it effectively and peacefully exercises state functions, that is, in accordance with the principle of effectiveness.

In the case of Kosovo, with the passage of time, it seems more and more difficult to deny that it has obtained full statehood. Indeed, when independence was declared, it could have been sustained that its independence was artificially maintained with massive assistance from the UN (through the United Nations Interim Administration Mission in Kosovo (UNMIK)), NATO (through the NATO Kosovo Force (KFOR)) and the EU through the European Union Rule of Law Mission in Kosovo (EULEX) (the mandate of which has been extended until 14

³⁶ As was the case, for example, in: Cocos (Keeling) Islands (Australia); Greenland (Denmark); Northern Cameroons (Nigeria); Northern Mariana Islands (United States); Southern Cameroons (Cameroon). (See J.R. Crawford, 'State Practice and International Law in Relation to Unilateral Secession', 19 February 1997, para. 21, reproduced in Bayefsky (ed), *supra* note 12, at 40.)

³⁷ See, e.g., Mali, Syria, Singapore, the Baltic States and more generally the new states resulting from the dissolutions of the former USSR or Czechoslovakia, even though in many of these cases the consensual character of these secessions can be put in doubt.

³⁸ Abi-Saab, 'The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law', 18 December 1997, in Bayefsky (ed), *supra* note 12, at 70; see also: 'Cours général de droit international public', 207 *Recueil des Cours* (1987) 9, at 68.

³⁹ Arbitration Commission for the Former Yugoslavia, Opinion n° 2, 29 November 1991 (text reproduced in Pellet, 'Badinter Arbitration Committee', *supra* note 17, at 182-3).

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June 2016).⁴⁰ Moreover, on 10 September 2012, the 'supervised independence' of Kosovo came to an end and the Constitution of Kosovo—which was taken from 'provisions concerning international supervision of Kosovo'—became the unique legal framework.⁴¹ Therefore, it seems hardly debatable today that Kosovo's sovereignty is a fact, and this seems progressively accepted by Serbia itself.⁴²

4. Recognition by Other States

Kosovo has also gained recognition: 63 states had recognized Kosovo as a state at the date of the hearings on the Advisory Opinion; there were 110 by mid-August 2014. Speaking strictly from a legal point of view, this has no particular consequence.

In the first place, neither recognition nor admission to the United Nations creates a state. Either of these factors may, obviously, consolidate the existence of a state whose foundations are weak, and as the Badinter Commission noted, recognition, 'along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law'.⁴³ Nonetheless, according to the predominant doctrine, 'recognition by other states has purely declarative effects'.⁴⁴

Consequently and secondly, even though premature recognition cannot be excluded (and is not necessarily illegal),⁴⁵ it is normal and legitimate for them to be expressed *after* the effective inauguration of the independence of which they are not a condition, but an indication. Now, recognition is dependent upon diplomatic vicissitudes, of which the ups and downs of the recognition of the Sahrawi Arab Democratic Republic (SADR) by third states is a telling example.⁴⁶ Palestine, Israel, Chinese Taipei are other examples of back and forth recognitions (sometimes by the same state). However, in the case of Kosovo, the number of states recognizing it as a state is increasing, slowly but surely, and, to my knowledge, no recognition has been withdrawn.

Moreover, Serbia itself, while still refusing to formally recognize Kosovo, increasingly accepts relations with it. Thus, on 19 April 2013, Kosovo and Serbia initialled the 'First agreement on principles governing the normalization of relations', which 'provides for the establishment of such an association/community with a

⁴⁰ See, <http://www.b92.net/eng/news/politics.php?yyyy=2014&mm=06&dd=13&nav_id=90656>.

⁴¹ See the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 8 November 2012, S/2012/818, paras 6–7.

⁴² See *infra* notes 46 and 47.

⁴³ Opinion n° 8, 4 July 1992 (text reproduced in Türk, 'Recognition of States: a Comment', 4 *EJIL* (1993) 66, at 88.

⁴⁴ *Ibid.* See also: the Declaration of Montevideo on the Rights and Duties of States of 26 December 1933, Art. 3: 'The political existence of the state is independent of recognition by the other states'.

⁴⁵ Verhoeven, 'La reconnaissance internationale: déclin ou renouveau', 39 *AFDI* (1993) 7. *Contra*: M. Bothe, 'Kosovo—So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence', 11 *German Law Journal* (2010) 837, at 838–9.

⁴⁶ The SADR had been recognized by 85 states; the number has now decreased to hardly 45.

statute and range of competences'.⁴⁷ Since then, officials of both Parties have met regularly in order to implement this agreement.⁴⁸

The same remarks apply to admission to the United Nations. In the case of Bangladesh, the period of three years and two months that elapsed between accession to independence and that admission definitely seems very short, given the obvious and massive intervention of a third party state on the side of the Awami League. The example of the State of Palestine, which was recognized as such by the General Assembly on 29 November 2012⁴⁹ but not admitted as a Member of the United Nations while it has been admitted to several UN organizations, also shows that recognition by the 'organized international community' can be progressive.

In the case of Kosovo, no such formal step has been taken at the UN level but Kosovo has been a full member of the IMF and of the World Bank Group since 29 June 2009.⁵⁰ And, in spite of the reservations maintained by some Member States of the EU, Kosovo is listed as a potential candidate on the European Commission's webpage.⁵¹ On 28 October 2013, the European Union and Kosovo started negotiating a Stabilisation and Association Agreement⁵² which was initialled on 25 July 2014.⁵³ Indeed, Kosovo's admission to the UN and/or the EU, or any kind of association with these organizations as a state, would be important 'markers' of the statehood of the Kosovar entity—as, and even more decisively, would be a formal or even an unambiguous *de facto* recognition by Serbia. However, even absent such recognitions, Kosovo can be held to possess statehood as long as it meets in fact the conditions for statehood as described by the famous *dictum* of the Badinter Commission: 'the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; ... such a state is characterized by sovereignty'.⁵⁴

⁴⁷ See the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 30 April 2013, S/2013/254, para. 4.

⁴⁸ See the recent Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 26 July 2013, S/2013/444, paras. 3–15; 28 October 2013, S/2013/631, paras. 3–11; 30 January 2014, S/2014/68, paras. 3 and 12; 29 April 2014, S/2014/405, paras. 3–4 and 1 August 2014, S/2014/558, para. 3.

⁴⁹ GA Res. 67/19.

⁵⁰ See respectively <<https://www.imf.org/external/np/sec/pr/2009/pr09240.htm>> and <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/0,,contentMDK:22230081-menuPK:258604-pagePK:2865106-piPK:2865128-theSitePK:258599,00.html>>.

⁵¹ <http://ec.europa.eu/enlargement/countries/detailed-country-information/kosovo/index_en.htm>.

⁵² European Commission, MEMO/13/938, 28 October 2013 (<http://europa.eu/rapid/press-release_MEMO-13-938_en.htm>).

⁵³ <<http://www.mei-ks.net/?page=2,5,1011>>.

⁵⁴ Opinion n° 1, 29 November 1991 (text reproduced in Pellet, 'Badinter Arbitration Committee', *supra* note 16, at 182); see also Opinion n° 8, 4 July 1992 (text reproduced in Türk, *supra* note 44, at 87–88) and the 1933 Declaration of Montevideo on the Rights and Duties of States, prec., Art. 17: 'The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states'.

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For these reasons, had the good—or, say, the interesting—questions been put to the Court, they should probably have answered by finding that:

- (1) the Kosovar people's right to self-determination included the right to secede from the Republic of Serbia as a consequence of Serbia's denial of its democratic equal rights and disproportionate repression (remedial secession);
- (2) in any case, the principle of territorial integrity, which applies between states, does not exclude the possibility of a secession from a pre-existing state;
- (3) although it might have been more debatable at the time of the Opinion than today, Kosovo seems to fulfil all the conditions of statehood; and
- (4) the rising number of recognitions by third states, although not a condition nor sufficient evidence of statehood, tends to reinforce the conclusion above in spite of the absence of formal recognition by Serbia and the fact that Kosovo is not a member of the United Nations.