THE ICJ OPINION ON KOSOVO: SYMPHONY OR CACOPHONY?

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Abstract

On July 22, the ICJ delivered its Opinion on the Kosovo unilateral declaration of independence in response to the request by the General Assembly to do so in GA Resolution 63/3 of October 8, 2008. This paper reviews the Opinion, highlighting the major aspects on self-determination and secession. It concludes that while the Court's pronouncements on territorial integrity and the non-prohibition of secession in international law are symphonic and welcome, its failure to examine and pronounce on the availability or not of the right to remedial secession, leaves a cacophony of questions to be answered in that aspect of international law.

I. INTRODUCTION

Following the intervention of NATO in Kosovo, giving rise to humanitarian concerns from ethnic fighting between Serbs and Kosovo-Albanians in 1999, the United Nations set up an interim administration under Security Council Resolution 1244 (1999) to oversee the affairs of Kosovo pending a peaceful political solution to the crisis and determination of the future status of Kosovo vis a vis Serbia (then Federal Republic of Yugoslavia) in accordance with the wishes of the parties. Attempts by the UN Secretary General's envoy, Martti Ahtisaari and the Troika (USA, Russia and the EU) to reach an amicable solution failed. The recommendation of the envoy for supervised independence for Kosovo and the Comprehensive Proposal for the Kosovo Status Settlement could not be agreed on by the Security Council.

So, on February 17, 2008, 109 representatives of the Kosovo Assembly declared the independence of Kosovo from Serbia. The declaration was recognized by at least 69 UN member nations[1] as of May 10, 2010, including the U.S. and some EU nations. Serbia, Russia and some other states condemned the declaration as a violation of international norms. But the US and Britain insisted that the Kosovo situation is unique, unprecedented and ought to be recognized. With the active support of Russia, Serbia requested the UN General Assembly to refer the Kosovo independence issue for the advisory opinion of the International Court of

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1. See list available at <http://en.wikipedia.org/wiki/International_recognition_of_Kosovo> last visited on July 30, 2010.

Justice. The General Assembly therefore adopted a Resolution[2] requesting the ICJ to give an 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?

A. The Court's Opinion

On July 22, 2010, the Court delivered its landmark Opinion on the issue, which is the first of its kind on any issue of self-determination since its establishment in 1945. The Court first emphasized that it was called upon to decide whether the unilateral declaration of independence by Kosovo was in accordance with international law and not whether the declaration has established Kosovo's statehood or the legal consequences of the declaration.[3] It further stated that it has not also been called upon to determine whether or not there is a rule of international law that entitles Kosovo or a unit of a State to unilaterally declare independence.[4] The Court then proceeded to make its finding in accordance with the character of the question posed in the GA Resolution 63/3.

Without dwelling on its pronouncements on preliminary objections to the jurisdiction of the Court, which are not necessary for the purpose of this paper, the Court held generally, that from the 18th to the 20th centuries, unilateral declarations of independence had been made. While some resulted in the creation of new States, others did not; but that the practice of States as a whole does not suggest that the act of unilateral declaration of independence was regarded as contrary to international law; instead, States practice actually establish that there is no rule of international law that prohibits unilateral declaration of independence. It also traced the principle of self-determination from the mid-20th century, first associated with a right of independence to peoples of Non-Self-Governing Territories and peoples subjected to alien subjugation, domination and exploitation, but concluded that although there have also been declarations of independence outside this context, States practice in the latter cases does not also point to the emergence in international law of any rule prohibiting the making of a declaration in such cases.[5]

One of the arguments proffered by participants in the case for opposing the declaration was that it violated the much hallowed international principle of territorial integrity. The Court vigorously examined the principle

2. General Assembly Resolution A/RES/63/3 of Oct. 8, 2008.
3. Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Reports 2010, July 22, 2010, para. 51.
4. *Ibid.*, para. 56.
5. *Ibid.*, para. 79.

as entrenched in Article 2(4) of the United Nations Charter and the Friendly Relations Declaration, GA Res. 2625(XXV) 1970 and the Helsinki Final Act 1975 and ruled that although the principle of territorial integrity is an important part of the international legal order, its scope is confined to the sphere of relations between States.[6] It then referred to Security Council Resolutions on Southern Rhodesia, Northern Cyprus and Republika Sprska, cited by participants as authority for upholding the principle of territorial integrity and ruled that the illegality attached to those declarations was not based on their unilateral character but on their connection with the unlawful use of force or other egregious violations of norms of international law of *jus cogens* status. It was further held that the Security Council has not made any such finding in the Kosovo case and that the exceptional character of the above resolutions laid credence to the assertion that no general prohibition against unilateral declaration of independence may be inferred from the practice of the Security Council.[7]

The issues of whether there is a rule of international law permitting a unit of a State to break away or whether there is an international law right to remedial secession and whether such justification existed in the Kosovo case, were also considered. However the Court, having earlier stated that it was not called upon to decide on these issues, merely stated that opinion was sharply divided among participants in the proceedings over the existence of such rights in international law and ruled that the issue of the extent of self-determination or the existence of a right of remedial secession was outside the scope of the question posed by the General Assembly.[8] It however concluded that general international law does not prohibit declarations of independence. Consequently, the unilateral declaration of independence by Kosovo on February 17, 2008 did not violate general international law.[9]

Having found that the declaration did not violate any rule of general international law, the Court proceeded to apply the *lex specialis*. It held that the *lex specialis* in this case were Security Council Resolution 1244 (1999) and the Constitutional Framework for Provisional Self-Government, established by UNMIK Regulation 2001/9 of May 15, 2001, having not been repealed as at the time of the declaration.[10] With respect to Resolution 1244 (1999), the Court held that the Resolution established a temporary, exceptional legal regime which, save to the extent that it preserved it, superseded the Serbian legal order, aimed at the stabilization of Kosovo. It

6. *Ibid.*, para. 80.
7. *Ibid.*, para. 81.
8. *Ibid.*,paras. 82-83.
9. *Ibid.*, para 84.
10. *Ibid.*, paras. 85-91 and 93.

was designed to do so, on an interim basis.[11] It then ruled emphatically that Resolution 1244 (1999) did not provide for the final status of Kosovo and that following contemporaneous practice of the Security Council, where restrictions are intended in the final status of a territory, such restrictions are expressly specified in the relevant resolution, citing Security Council Res. 1251 (1999) on Cyprus, adopted shortly after Res. 1244 (1999), where the Council at paragraph 11, expressly reaffirmed its position that "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded". Such restrictions not being present in Res. 1244(1999), the Court held that Res. 1244(1999) did not preclude the making of the declaration of February 17, 2008.[12]

On whether the declaration was in violation of the Constitutional Framework established by UNMIK REG/2001/9, the Court considered who the addressees of Res. 1244 (1999), from which the said Regulation derived its validity, were. The question posed to the Court alleged that the declaration was made by the Provisional Institutions of Kosovo contrary to the Constitutional Framework under which the institutions were established. It found that Res. 1244 was addressed mostly to the UN Member States and UN organs and representatives such as the Secretary General and his Special Representative. The Resolution also addressed KLA (Kosovo Liberation Army) and other armed groups to disarm and cooperate with the settlement efforts. The Court observed that the authors of the declaration did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework but rather as persons who acted together in their capacity as representatives of the people of Kosovo.[13] It held that, although Security Council Resolutions had been addressed to non-State actors in time past, Res. 1244 (1999) did not specifically address the authors of the declaration of February 17, 2008.[14] That being so, it further held that Res. 1244 did not therefore bar the authors of the declaration from issuing such declaration, hence the unilateral declaration did not violate Res. 1244 (1999).[15] Having held that the authors of the declaration did not act as the Provisional Institutions of Self-Government in Kosovo, neither was the declaration intended to take effect within the framework of the institutions, the Court concluded that the authors of the declaration were not bound by the framework of the Provisional Institutions of Self-Government. Therefore, the unilateral declaration did not also violate the Constitutional Framework.[16]

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11. *Ibid.*, para 100.
12. *Ibid.*, para 114.
13. *Ibid.*, para 109.
14. *Ibid.*, paras 115-116.
15. *Ibid.*, para 119.
16. *Ibid.*, para 121.

In the final analysis, the Court held that the unilateral declaration of independence by Kosovo did not violate general international law, Res. 1244 (1999) or the Constitutional Framework, or any applicable rule of international law.[17]

II. ANALYSIS

As was observed earlier, this is the first time a matter on self-determination has come up before the ICJ for determination. This is despite the fact that the topic of self-determination has generated a lot of controversies among scholars and actors on the international stage. Thus, it becomes pertinent to review some of the decisions of the Court with a view to ascertaining whether some previously, widely held views have been upheld or upturned and whether new rules have been laid down by the Court in this Opinion.

In the first place, it has been a widely held opinion that there is no rule of international law that prohibits unilateral secession.[18] The Court so found too. It emphasized that neither in the colonial context nor in post-colonial cases has there been a rule of international law or States practice prohibiting secession. The cases in which secession has been condemned in Security Council practice have been on grounds of violation of the rule against the use of force or some egregious violations of *jus cogens* rules of international law. Thus, this finding of the Court has added judicial impetus to the previously held view to the same effect. It is now clear that secessions are not unlawful except where they violate rules of international law. No law permits them either. States oppose them vehemently and there is also no rule of international law that forbids a State from resisting the

17. *Ibid.*, para 122.

18. J. Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2nd ed., 2006), p. 390,
where the author states that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally"; see also H. Lauterpacht, *Recognition in InternationalLaw* (Cambridge University Press, Cambridge, 1947), p. 8, cited in Crawford, ibid., footnote 63; C. Tomuschat, "Secession and Self-determination", in M. G. Kohen, (ed.), *Secession: International Law Perspectives* (Cambridge University Press, 2006), p.23 at p. 43, footnote 81, where there are further references; see also, J. P. Harris, "Kosovo: An Application of the Principle of Self-Determination", *Hum. Rts. Br.*, vol. 6, no. 28 (1999). All the above authors state that secession is neither prohibited nor permitted in international law. Cf. Y. Dinstein, "Who Argues that There is a Right of Secession in International Law", in K. Greene, *Are International Institutions Doing Their Job?, International Responses to Secessionist Conflicts*, Proceedings of the American Society of International Law, *Am. Soc'y Int'l L. Proc.*, vol. 90 (March 27-30, 1996), pp. 301-302.

secession of a group from its territory unless such resistance involves egregious violations of humanitarian rights.

That takes us to the next important part of the Opinion. States rely on the principle of territorial integrity to resist secession and sometimes even seek and obtain aid from other States in that regard. Doctrinal opinion on this has been more in favour of upholding territorial integrity.[19] Raic ventured to suggest that territorial integrity is not applicable to secession because it is a principle that regulates the relationship among States only.[20] This was however a lone voice until now. The Court's ruling that the principle is only relevant to the relationship among States and not that of States and their citizens or non-State actors is therefore a welcome development and a vindication of Raic's insistence. States are no longer at liberty to engage in repression of their citizens who are seeking secession as a means of exercising their right to self-determination in the name of territorial integrity. This is without prejudice to the fact that the decision is an advisory opinion of the Court which has no binding effect. But such a crucial pronouncement would help international actors henceforth, in placing separatist conflicts in proper perspective. This much seems to be the sentiments also expressed in the separate Opinion of Judge Trindade, when he observed:

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19. Declaration on the Granting of Independence to Colonial Territories and Peoples, GA Res. 1514(XV), December 14, 1960, paragraph 6; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625(XXV), October 24, 1970, Principle V, paragraph 7; see also Principle V, paragraph 8, and Principle VI, paragraph 2(d) for further assurances of territorial integrity; Article 3, Charter of the Commonwealth of Independent States 1993, available at <http://untreaty.un.org/unts/120001_144071/6/8/00004863.pdf> visited on May 20, 2010; J. Mayall, "Nationalism, Self Determination and the Doctrine of Territorial Unity", in M. Weller, and B. Metzger, (eds.), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers, Leiden/Boston, 2008), p. 5 at p. 6; R. Higgins, *Problems and Process* (Oxford, 1994), p. 124; M. N. Shaw, *International Law* (Cambridge University Press, London, 4th ed., 1997), pp. 181 - 182; Hilpold, P., "The Kosovo Case and International Law: Looking for Applicable Theories", *Chinese J. Int'l L.*, vol. 8, no. 47 (2009); D. J. Harris, *Cases and Materials on International Law* (Sweet and Maxwell, London, 6th ed., 2004), p. 112;

20. D. Raic, *Statehood and the Law of Self-Determination* (Kluwers Law International, The Hague, 2002), pp. 317- 318; J. Dugard and D. Raic, "The Role of Recognition in the Law and Practice of Secession", in M. G. Kohen, (ed.), *Secession: International Perspectives* (Cambridge University Press, Cambridge, 2006), p. 94 at p. 105; see also B. Boutrous-Ghali, *Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, paragraph 17, available at <http://www.un.org/Docs/SG/agpeace.html> visited on February 22, 2010, where the Secretary-General observed, "The time of absolute and exclusive sovereignty, however, has passed".

> States exist for human beings and not vice-versa. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State... States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population. Thrown into lawlessness, their victims sought refuge and survival elsewhere, in the jus gentium, in the law of nations, and, in our times, in the Law of the United Nations. I dare to nourish the hope that the conclusion of the present Advisory Opinion of the International Court of Justice may conform the closing chapter of yet another long episode of the timeless saga of the human kind in search of emancipation from tyranny and systematic oppression.[21]

In this regard, mention must be made of the dissenting Opinion of Judge Koroma, who observed:

> The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain. Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent. According to the above-mentioned Declaration, [GA Res 2625(XXV)], "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country". The Declaration further emphasizes that "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[22] (Emphasis supplied).

It would appear that His Excellency chose to adopt the aspect of Resolution 2625 that suited his argument. In the same resolution, and in the same paragraph aptly quoted by the much revered Judge, it is also provided that the territorial integrity of a State is not to be violated if the State conducts itself in:

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21. Separate Opinion of Judge Cancado Trindade, p. 71, paras 239-240.
22. Dissenting Opinion of Judge Abdul G. Koroma, p. 7, paras 21 and 22.

> compliance with the principle of equal rights and self determination of peoples described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The import of the above conditional or safeguard clause, as it is popularly referred to, is that a State's territorial integrity cannot remain inviolable if it runs a government that is unrepresentative of all the people of the territory or does so, tainted with discrimination on the basis of race, creed or colour, which is not in compliance with the principle of equal rights and self-determination. If His Excellency had addressed his mind to the above safeguard clause, he would perhaps have come to the conclusion that the territorial integrity principle is no longer sacrosanct, as he seems to be insisting in his dissenting Opinion. His Excellency's opinion would only be relevant where Serbia ran a government that was representative of all the people of the Federal Republic of Serbia, including Kosovo in this case and the unilateral declaration was brought about by another or a group of other sovereign States. It is clear that Serbia massively curtailed, discriminated and repressed the Kosovo population, which led to the NATO intervention and Resolution 1244. The declaration was an act of representatives of Kosovo; not other States. So, the majority opinion of the Court could not be more correct in the given circumstances of the case before them.

A third aspect of the Opinion which must be considered at this stage is the decision of the Court not to delve into the issue of whether or not there is an international law right to secession or whether there is a remedial right to secession. While it is true that the question posed by the General Assembly did not address that issue, it was nevertheless a very relevant issue that the Court ought to have decided on and not shied away from. In the reference Re Secession of Quebec, the Canadian Supreme Court had observed that there was an emerging concept of remedial secession, which was yet to be fully ascertained as an international law right. The Canadian Court however declined to push the issue further, as the people of Quebec were not in any way under any of the categories that justifies remedial secession.[23] In that case, the relevant question referred to the Supreme Court for its opinion, among others 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?

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23. Re Secession of Quebec [1998] 2 S.C.R. 217, pp. 285-287, paras 134-136.

It is submitted that the question above is not radically and fundamentally different from that posed by the General Assembly in the Kosovo case. The crux of both the questions is whether there is an international law right to unilateral declaration of independence; or whether unilateral declaration of independence (secession) is in accordance with international law. The Canadian Court deemed it fit to examine the incidents of self-determination that could lead to independence, including secession. It identified remedial secession as an emerging concept but made a detour because the issue was not relevant for the case it was dealing with. The reason the ICJ declined to explore the concept and make a finding on it was also because it was not relevant to the Kosovo case and outside the scope of the question posed. But is it true that the determination of the question of the existence or not of a right to remedial secession was not relevant to the determination of the Kosovo case? We shall answer this question in the negative.

The ICJ was asked to decide whether the unilateral declaration of independence by the Kosovo Provisional Institutions was in accordance with international law. To answer the question, the Court needed to examine the issue of secessions in international law, which it did and came to the conclusion that there was no rule of general international law prohibiting secession. In doing so, the Court traced the principle of self-determination and its primary application to colonial cases. The Court observed that secessions have also occurred in non-colonial context, which have not also been expressly forbidden in international law. An answer to the question whether there is a right to remedial secession was thus crucial as such right if available, would have further thrown light on the Kosovo declaration in international law. For instance, some of the non-colonial declarations may have hinged on the remedial concept. If there is such a right, then the question would have been did the Kosovo declaration violate the right? In avoiding the question, the Court has shirked its responsibility in this regard. It is to be observed that the Kosovo situation was preceded by egregious violations of human and humanitarian rights, a situation acknowledged in Res. 1244 (1999).[24] One of the circumstances justifying remedial secession is such violation in respect of a selected group within a State by the government of the State.[25] So, that Res. 1244 acknowledged such violations ought to have attracted the Court's attention and persuaded it to dwell on the issue.

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24. See preambular paragraphs 4 and 6, SC Res 1244 (1999), June 10, 1999.

25. M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff, Leiden/Boston, 2008), p. 59; B. Coppieters, "Conclusion: Just War Theory and the Ethics of Secession", in B. Coppieters and R. Sakwa (ed.), *Contextualizing Secession: Normative Studies in Comparative Perspective* (Oxford University Press, Oxford, 2003), p. 225 at p. 257.

The Court cannot pretend that remedial secession is novel in modern era. In the League of Nations era, The Commission of Rapporteurs in the Aaland Islands Case held:

> The separation of a minority from the State of which it forms part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.[26]

Although this was in a case involving the desire of the Islanders to be joined with their kin in Sweden from Finland, it is however related and relevant here for the proposition above. Repression or rights violation of a group in a discriminatory way constitutes unjust and ineffective guarantees and that entitles the victim group to leave or separate from the Tormentor State. Thus, remedial secession had been acknowledged as far back as 1921, as an exceptional right. Again in the Katangese Peoples' Congress v. Zaire, the African Commission on Human and Peoples' Rights held:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self determination that is compatible with the sovereignty and territorial integrity of Zaire. ...The quest for independence of Katanga, therefore, has no merit under the Charter on Human and Peoples' Rights.[27]

The above case expressly listed the conditions for remedial secession viz: violations of human rights and the denial of the right to participate in government. Again, paragraph 7 of Principle V to the Friendly Relations Declaration makes it abundantly clear that the territorial integrity of a State is to be respected and preserved if and only if the State conducts itself "in compliance with the principle of equal rights and self determination of peoples described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". In other words, if a State acts contrary to the principle or runs a government that is discriminatory like it was against the Kosovar Albanians by the Serb-dominated government of Serbia, the victim group could move away, posing its justification on the judicial precedent.

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26. Aaland Islands Case (Report of the Commission of Rapporteurs,) LN Doc. B7.21/68/106, 1921, pp. 22-23, quoted in D. Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International, The Hague, 2002), p. 199.
27. African Commission on Human and Peoples' Rights, Comm. No. 75/92, 1995, para. 6, cited in M. Weller, *Escaping the Self Determination Trap* (Martinus Nijhoff, Leiden/Boston, 2008), p. 60

If the ICJ had considered the entire background of the Kosovo situation that prompted the adoption of Res. 1244, it ought to have found support in international law from the above precedents, though only persuasive on the Court, to make a finding on the existence of such a right. Having so found, it would have further justified its Opinion on that ground. If the Court could venture out of general international law to consider the *lex specialis* in this case, there was no justifiable reason for not considering remedial secession as a rule in international law. As it is, over 90 years after the first inkling of remedial secession, it is regrettable that the issue is still unsettled in international law in the UN era. The ICJ has missed the rare opportunity to make a pronouncement on this crucial issue in this era. We may have to wait for another opportunity, if ever to avail itself, for the Court to make a pronouncement on this crucial aspect of the law.

Perhaps the final aspect of the Opinion that deserves mention here is the ruling of the Court that the declaration of February 17, 2008 did not also violate Res. 1244 or the Constitutional Framework. In doing this, the Court held that the authors of the declaration were not bound by Resolution 1244 and consequently not also bound by the Constitutional Framework. The reason for this finding was that the authors did not act or purport to act within the framework of the Provisional Institutions established by UNMIK REG/2001/9 the Constitutional Framework. The Court found as established, the following facts:

> 1. ...pursuant to Chapter 2 (a), (Constitutional 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". (Parenthesis added)
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> 2. Similarly, according to the ninth preambular paragraph of the Constitutional Framework, "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)".
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> 3. In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained "broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2001/565, 7 June 2001).[28]

28. Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Opinion, note 3, para 62.

The Court made a definite finding that there was nothing in Res. 1244 that prohibited the declaration of independence as it merely provided an interim legal order for Kosovo and not the final status. The Provisional Institutions were to exercise their authorities consistent with Res. 1244 under the ultimate authority of the Special Representative of the Secretary General, who could veto any act of the Institutions that was inconsistent with Res. 1244. The declaration was never at anytime condemned by the Security Council that passed Res. 1244 or by the Special Representative, who could have vetoed such act. In order words, the declaration was not in violation of Res. 1244. To this end, the Court was perfectly in order. The reason adduced by the Court that the authors were not the addressees of the Resolution was also in order but the ruling that the authors of the declaration did not act as one of the Provisional Institutions set up under the Constitutional Framework is in our humble opinion not a sound one.

The Court had found at paragraph 76 of its Opinion that the declaration of independence was adopted in a meeting held on February 17, 2008, by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister and the President who is not a member. In other words, the authors were members of the Kosovo Assembly except the President. The declaration was made at the precinct of the Assembly. The Kosovo Assembly was established under the Constitutional Framework and was inaugurated on January 4 and 9, 2008 respectively. Coming back to the ruling that the authors were not one of the Provisional Institutions, in the operative paragraph of the declaration, the authors described themselves as "We the democratically elected leaders of our people..." This is what the Court relied on in its ruling. It held that they were democratically elected representatives and not the Provisional Institutions. The question that must be asked is who elected them and under what dispensation? It is clear that they were elected as members of the Kosovo Assembly, under the Framework. The Kosovo Assembly was therefore, one of the Provisional Institutions established under the Constitutional Framework. When they declared themselves as elected leaders, there is no doubt that they did so in their capacities as elected members of the Assembly. They were therefore acting as one of the Provisional Institutions under the Constitutional Framework.

A crucial part of the declaration is a proclamation that "We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK)". They also undertook to abide by the Ahtisaari Proposal. The interim administration and the Comprehensive Proposal submitted by Ahtisaari were all part of powers exercised by the Secretary General under Res. 1244 in furtherance of the objective of the Resolution. Thus, it was clear that the authors purported to act within the framework of the Constitutional Framework and intended the declaration to operate within

same. The Court's ruling that the authors were not bound by the Constitutional Framework or that the declaration was not intended to take effect under the Framework was an error, with due respect to their Excellencies. It is sound judgment that the declaration did not violate the Constitutional Framework or Res. 1244 as there was nothing prohibiting the making of such declaration in any of the two *lex specialis*; but as to the reason adduced for reaching this conclusion, as stated above, we beg to disagree with the Court.

Again, reference is made to Judge Koroma's dissenting Opinion, where he emphatically rules that the authors were members of the Kosovo Assembly and thus constituted one of the provisional institutions of Kosovo. This is a sound reasoning, as we have argued above but again, we beg to disagree with his insistence that the declaration was in violation of Res. 1244. His reason for such insistence is that Res. 1244 envisaged that the Kosovo issue would be resolved in a negotiated political settlement by the parties, that is, Serbia and Kosovo and that the resolution also preserved the territorial integrity of the Federal Republic of Yugoslavia (as it then was). The unilateral declaration, he insisted, was an attempt to bring to an end the international presence in Kosovo, contrary to the intent of Res. 1244.[29]

It is true that that the international presence can only be terminated by the Security Council. The arrangement brought about by the Security Council under Res. 1244 was an interim one, without direction on how the Kosovo issue should be finally settled. The resolution only talked of a negotiated settlement but provided nothing concerning would happen if the parties failed to reach an agreed settlement, which was the case as found by the Court, from both the Reports of the Special Envoy of the Secretary General and the Troika. It did not say, in case of failure to reach a settlement, "thou shall not declare independence." The reference to the territorial integrity of the Federal Republic of Yugoslavia in Res. 1244 no doubt carries with it the responsibility not to dismember it but, as we have argued earlier in support of the majority opinion, territorial integrity only applies to inter-State relations.

The Court has correctly found that the authors of the declaration were not the addressees of Res. 1244. So, even if there was a violation of the resolution, it can only affect the validity of the declaration if done by one of the addressees. In any case, it is also the Security Council that can determine whether its Resolution 1244, had been violated. The fact that the international presence is still in Kosovo even after the declaration shows that the maker of the resolution does not see any violation of it. A recent statement by the head of UNMIK, Lamberto Zannier, on the ICJ Opinion

29. Koroma's Opinion, note 22, p. 3, para. 11.

on Kosovo, read, "the UN's preliminary legal assessment is that the opinion does not affect the status of UNMIK, or its status-neutral policy. "The issuance of the ICJ opinion, therefore, should now open a new phase and allow Belgrade and Pristina to engage in a constructive dialogue with a view to the resolution of these issues."[30]

As another dissenting Judge correctly puts it but in a different context,

> It must be borne in mind that Security Council resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244 a determination central to the régime established for Kosovo by the Security Council without a request from the Council, it substitutes itself for the Security Council.[31]

The above pronouncement sums it all. From the legal point of view, the declaration did not violate Res. 1244, as an explicit prohibition of such declaration was not specified in the Resolution or UNMIK Reg. 2001/9, made under it. And as it has been argued above, even territorial integrity is no longer sacrosanct. So, the Court was right in so holding. Whatever were the political implications of the Resolution were not for the Court to inquire into. The Security Council should do that.

III. CONCLUSION

In the course of the review of the ICJ Opinion on the Kosovo unilateral declaration of independence, it has been observed that the Court has made important pronouncements on the right to self-determination and secession as an arm of the right. The Court has observed that self-determination was originally perceived as a right of independence to colonial peoples but that there have been instances where the right has been asserted by peoples outside the colonial context in the form of secession. In all these, States practice and UN practice have not shown any evidence that such assertions amounted to illegality in international law. The Court, therefore, concluded that there is no rule of general international law prohibiting secession.

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30. "Kosovo: UN Envoy Stresses Need for Dialogue to Resolve Outstanding Issues", UN News Centre, August 3, 2010, available at <http://www.un.org/apps/news/story.asp?NewsID=35523&Cr=kosovo&Cr1> visited on August 27, 2010.
31. Dissenting Opinion of Leonid Skotnikov, p. 3, para. 9.

Secondly, the Court has emphatically ruled that the principle of territorial integrity does not apply to non-State actors like secessionist groups within a State. The principle, though important in the international legal order, only applies to States in their relationship among each other. This, we observed, is a welcome pronouncement that will guide future treatment of secession cases by States. Of course, there have been lone voices saying the same but such voices seemed to have been drowned by the tyranny of the majority.

The failure or refusal of the Court to consider the Kosovo secession under the emergent exceptional right to remedial secession was regretted in this paper. It was reasoned that a positive pronouncement on the issue would have added impetus to the declaration and would have affirmed the right in international law. As it is now, the existence or otherwise of the right still hangs in the balance. Thus, it would be concluded that the Opinion delivered by the Court, while symphonic in respect of the first two pronouncements above, however left much to be desired on the question of the existence of the right to remedial secession. The resultant effect of that abstinence is that it leaves a cacophony of questions behind.