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THE RIGHT TO SELF-DETERMINATION – THE KOSOVO CASE BEFORE THE INTERNATIONAL COURT OF JUSTICE*

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„PRAVO NA SAMOODREĐENJE – SLUČAJ KOSOVA ISPRED MEĐUNARODNOG SUDA“

Sažetak

Međunarodni sud je 2010. godine izdao svoje Savjetodavno mišljenje odgovarajući na pitanje Opće skupštine UN o legalnosti jednostrane deklaracije o nezavisnosti Kosova. Međutim, to mišljenje Suda nije pojasnilo situaciju – ono je samo utvrdilo da prihvaćanje deklaracije o nezavisnosti od 17. veljače 2008. nije prekršilo ni pravila općeg međunarodnog prava niti rezoluciju Vijeća sigurnosti 1244 (1999) kao ni Ustavni okvir. Stoga, prihvaćanje te deklaracije nije prekršilo ni jedno relevantno pravilo međunarodnog prava. Ono što, međutim, mišljenje Suda nije razjasnilo, jesu pravne posljedice deklaracije, kao ni je li Kosovo dobilo državnost, a Sud se nije izjasnio ni o valjanosti i pravnim učincima priznanja Kosova.

***Gljučne riječi:** Kosovo, Međunarodni sud, Savjetodavno mišljenje, samoodređenje, jednostrana deklaracija.*

1. INTRODUCTION

The principle of self-determination has for long been one of the most controversial principles in international law. It started off as a political principle and only subsequently became a principle of international law. The principle gained

* This article is based on the final paper presented and defended in 2011 at the Faculty of Law in Rijeka.

full affirmation during the decolonization era when the international community supported peoples living under foreign oppression to become free and independent. However, today, the picture is not that clear. For decades, the case of Palestine or the case of Northern Cyprus has been a source of controversy and territorial disputes. After the dissolution of the former Soviet Union, for example, a number of territories “proclaimed independence”, such as Nagorno Karabakh, South Ossetia or Abkhazia in the Caucasus Region or Transdnier in the Balkans, although they have in fact been occupied and supported by Russia. Their invoking of the self-determination principle has so far fallen on deaf ears of the international community.

Kosovo seems to be a different case. In 2008 Kosovo unilaterally declared independence from Serbia after a brutal and bloody armed conflict that followed years of oppression and discrimination of the Albanian majority in Kosovo. Five years later, 96 states, including 22 European Union member states have recognized its status as an independent state, but a number of states still oppose it.¹ The biggest opposition, naturally, comes from Serbia whose many historic myths and legends are connected to Kosovo as the cradle of the Serbian statehood. However, Serbia is under pressure by the European Union to accept the reality of Kosovo if it wants to start its accession negotiations.²

In 2010 the International Court of Justice (hereafter: ICJ) issued its Advisory Opinion in response to the General Assembly request on the legality of Kosovo’s unilateral declaration.³ The international community expected the ICJ to decide on the legal consequences of the declaration or whether or not Kosovo has achieved statehood, or about the validity or legal effects of the recognition of Kosovo. Above all, it was expected that the court would give some direction on the applicability of the principle of self-determination outside the context of anti-colonialism.

It is the purpose of this article to show the state of international law principle of self-determination before this advisory opinion and the contribution of the ICJ, if any, to its further development. Furthermore, we shall try to see whether the opinion had any effect on the present day status of Kosovo.

1 Despite the strong economic and politic power of the Kosovo independence proponents, it is evident that a certain number of big countries (China, Russia, and some big EU countries) does not want to recognize Kosovo, and is instead aiming at leaving this question, important for the political as well as the international legal order, open. Data available at the web pages of the Kosovo Foreign Ministry: <http://www.mfa-ks.net/?page=2,33> (visited: 20.05.2013)

2 Serbia-EU accession talks face ‘narrow but deep’ Kosovo gap, <http://www.euractiv.com/enlargement/narrow-deep-gap-separates-serbia-news-518851>, (visited: 9.04.2013). Bosnia and Herzegovina, another neighboring country, also does not recognize Kosovo.

3 Accordance with international law of the unilateral declaration of independence in respect of Kosovo, International Court of Justice, Advisory Opinion of 22 July 2010, available at: <http://www.icj-cij.org> (visited: 9.04.2013) (hereafter: Advisory Opinion).

2. THE RIGHT TO SELF-DETERMINATION AS A LEGAL PRINCIPLE OF INTERNATIONAL LAW

The principle of self-determination is one of the most debated principles of international law. While it has been included in various treaties, it still remains insufficiently defined. For example, there are still questions such as what is the scope of this right, who is entitled to this right and what exactly does the right involve. This chapter will try to give answers to these questions.

According to one of the many definitions, the principle of self-determination is a principle of international law which states that nations have the right to freely choose their sovereignty and international political status with no external compulsion or external interference.⁴ Furthermore, it refers to the right of a people to determine its own political status. Beyond this broad definition, however, no legal criteria determine which groups may legitimately claim this right in a particular case, which makes it one of the most complex issues the international community is facing today.⁵

Complete understanding of the principle of self-determination is impossible without a legal background, so to try to give a better perspective and understanding of the nature and content of self-determination, some of the most important acts dealing with the said principle will be mentioned.

The first and most important international convention in which the principle of self-determination was introduced is the United Nations Charter, adopted in 1945, in Article 1(2) (Purposes and Principles). Accordingly, one of the purposes of the UN is to „develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples“, which shows that the creators of the Charter, although they did not provide us with the definition of the principle or the conditions for its use, listed self-determination as one of the purposes or objectives of the UN Organization.⁶

The concept of self-determination undeniably moved from an aspiration to a recognized right when it was included in the common Article 1 of the UN Covenants on Human Rights, considered to be the cornerstone treaties of international human rights law;⁷ the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights, adopted in 1966.

4 Conference on Security and Co-operation in Europe, Helsinki Final Act 1975 <http://www.osce.org/mc/39501>, visited: 9.04.2013.

5 Unterberger, B. M., Self-Determination, *Encyclopedia of American Foreign Policy* (2002), p. 461.

6 Article 55 of the Charter guides the UN to promote higher standards of living, solutions to health and cultural problems, and universal respect for human rights „with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples...“

7 Borgen, C., *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, *Chicago Journal of International Law*, Vol. 10, 2009, p. 7.

On the other hand, the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations explains the principle as a principle of general international law. As the International Court of Justice stated in one of its advisory opinions, this Declaration “reflects customary international law”.⁸ Furthermore, this Declaration is considered to be an authentic interpretation of the UN Charter⁹ and one of the most authentic international instruments dealing with and further developing the principle of self-determination (‘the principle of equal rights and self-determination of peoples’). The Declaration, although not explicitly, makes a distinction between internal and external self-determination. According to the former “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.” The external self-determination is seen as the right to establish “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”.

The principle has appeared in a number of other international legal and political instruments, including the Final Act of the Conference on Security and Co-operation in Europe, adopted on 1 August 1975 (the Helsinki Final Act). However, the problem in these instruments is the lack of any definition of the term ‘people’ as the title-holder to self-determination. As one author states, “the subject of the right to self-determination is notoriously undefined in the same documents that proclaim it.”¹⁰ The state practice has been far from consistent so the term has been used to denote citizens of a nation-state or the inhabitants in a specific territory going through the process of decolonization but it was also used to mark an ethnic group.¹¹ Nevertheless, the undisputed value of the right to self-determination was authoritatively confirmed by the ICJ in the East Timor Case as an *erga omnes* obligation under international law.¹²

8 Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, ICJ Reports 1986, pp. 101-103, paras.191-193.

9 Degan, V.Đ., *Međunarodno pravo*, Pravni fakultet u Rijeci, Rijeka, 2000, p. 235.

10 Cismas, I., *Secession in Theory and Practice: the Case of Kosovo and Beyond*, Göttingen Journal of International Law, 2, (2010) p. 541.

11 See the Report of the Commission of Jurists of the League of Nations in 1920-21. When asked to determine whether the Swedish inhabitants of the Aaland Islands had the right to secede from Finland, the commission found that for the purposes of self-determination one cannot treat a small fraction of people as one would a nation as a whole: “The separation of a minority from the State of which it forms a 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”. Report presented to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106 (1921) (excerpted and reprinted), p. 4.

12 East Timor Case (Portugal v. Australia), ICJ, Judgment of 30 June 1995, par. 29: „In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it

However, there are different views on the relationship between that right and the right to territorial integrity. On the one hand, there are opinions that the consent of the territorial state is an absolute prerequisite to secession and on the other that in some circumstances the right to secede overcomes the principle of territorial integrity. The 1970 Declaration gives precedence to “the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.” From this quotation, it follows that the disclaimer is of a restricted nature.¹³ *A contrario*, states that do not conduct themselves in compliance with those principles would not enjoy such right. The last paragraph of this section reiterates that any interruption of the territorial integrity of other states is not allowed: “Every 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.”

Some authors¹⁴ argue that the right to territorial integrity and the right to self-determination are not mutually exclusive. In fact, territorial integrity does not mean the lack of legal obligation - the former only has precedence over the latter in case of internal self-determination, that is when all of the rights of a ‘people’ are guaranteed and enabled to exercise within the framework of an existing sovereign state. In the opposite situation, when a ‘people’ is denied its right to internal self-determination and heavily oppressed, territorial integrity cannot be the sole argument against self-determination. In other words, only when states are fully in compliance with the rule of law and human rights are they entitled under international law to protection of their territorial integrity. While it seems logical that right of a ‘people’ to secede can overcome the right of the territorial state to maintain its unity, the state practice shows this to be rare.¹⁵ When asked about the status of the Western Sahara the ICJ “did not express a clear opinion on the question as to which of the two principles – self-determination or territorial integrity – should get precedence, although it did support the application of self-determination in Western Sahara”.¹⁶

As it is possible to conclude from the above mentioned legal sources, the general international law does not advocate the absolute preservation of state’s

evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”

13 Sharma, Surya P., *Territorial acquisition, disputes, and international law*, The Hague, Boston, 1997, p. 216.

14 Cismas, I., *op. cit.*, p. 551.

15 In the last 65 years no State which has been created by unilateral secession has been admitted to the UN against the declared wishes of the government of the predecessor State. For example, Bangladesh applied for UN admission in 1972 but was not admitted until 1974, subsequent to its recognition by Pakistan.

16 Sharma, Surya P., *op. cit.*, p. 222. Significantly, Judge Dillard in his individual opinion categorically expressed the view that the claim of territorial integrity should not get precedence over the principle of self-determination.

territory, but only condemns the use of external threat or force against the territorial integrity of other states, i.e. it confines the scope of the territorial integrity only to the sphere of relations between states.

3. INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION

A. Jurisdiction of the Court

The International Court of Justice has a dual jurisdiction: it decides, in accordance with international law, disputes of a legal nature that are submitted to it by states; and (since states alone have capacity to appear before the Court) it gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request. Hence, the advisory opinion is the only way such organs, organizations or agencies can appear before the Court.

The other important difference between advisory opinions and judgments is the fact that they do not have binding effect – it is usually up to the requesting party to decide, by any means open to it, what effect to give to these opinions. They are binding only in rare cases, and even then only if it is stipulated beforehand that they shall have binding effect.¹⁷ Of course, the advisory opinions of the Court carry great legal weight and moral authority. They are often used as a preventive diplomacy and peace-keeping instrument. Advisory opinions can also help clarify and develop international law and consequently to strengthen peaceful relations between states.¹⁸

In this particular case the Court had to decide whether General Assembly was allowed to make the request since Security Council was seized of the situation in Kosovo¹⁹ and whether the question was a “legal question” since it had political aspects. The Court answered affirmatively on both questions and unanimously decided that it had jurisdiction to give its advisory opinion.²⁰ However, the judges split over the question whether the Court should in fact exercise it or use its discretionary power to refuse it: the majority of nine judges decided that it should give the advisory opinion as requested by the General Assembly.²¹

17 For example, the Convention on the Privileges and Immunities of the United Nations, Section 30: „The opinion given by the Court shall be accepted as decisive by the parties.“ Convention on the Privileges and Immunities of the United Nations, 1946. http://www.undp.org.vn/digitalAssets/28/28622_UN_Convention_on_Priviledges_and_Immunities.pdf (visited: 9.04.2013)

18 ICJ Advisory jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (visited: 9.04.2013)

19 Article 12, paragraph 1 of the Charter limits the powers of General Assembly when Security Council is seized with a problem.

20 Advisory Opinion, par. 28.

21 *Ibid.*, par. 123.

B. Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)

In October 2008 the UN General Assembly requested 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?” Interestingly enough, this was the first case ever before the court regarding unilateral declaration of independence.

1. Statements of the participating states

The states participating in the procedure opposing Kosovo’s independence (Serbia, Russia, China, Spain, most of the Latin American countries, Cyprus) based their arguments on legal provisions and international law in general, stating that for one, international law prohibits unilateral declarations of independence outside the colonial context and that the Provisional Institutions of Self-Government had no power to declare independence. Furthermore, they invoked the UN Security Council Resolution 1244 (1999)²² as the main argument against the declaration of independence, in addition to the expressed commitment to the sovereignty and territorial integrity of Serbia, by saying that the term “settlement” asked for an agreement between both parties, and not a unilateral action. As far as the moral right of the Kosovo Albanians to secession is concerned, they did acknowledge it existed, but in 1999 when Milošević was still in power and the grave breaches of human rights were taking place and not in 2008, so remedial secession is, according to them, out of the question.

On the other hand, states in favor of Kosovo independence were basing their arguments mostly on moral and ethical grounds (gross violations of human rights, right to self-determination as the last resort after all the negotiations were exhausted etc.). Also, they never denied that the Resolution 1244 stated commitment to the sovereignty and territorial integrity of Serbia, but claimed that it was stated only in the preamble, hence with no propositions as to the final status of Kosovo. One of the most important arguments was that the principle of territorial integrity constrains only other states, and not domestic actors; or as the United States put it in their oral argument before the Court: „Neither did Kosovo’s Declaration violate the general principle of territorial integrity. For that basic principle calls upon states to respect the territorial integrity of *other states*. But it does not regulate the internal conduct of groups *within* states, or preclude such internal groups from seceding or declaring independence.... We do not deny that international law may regulate particular declarations of independence, if they are con-joined with illegal uses of force or

22 This resolution was adopted on 10 June 1999 unanimously (China abstaining). It authorized an international civil and military presence in Kosovo (then part of Serbia) and established the United Nations Interim Administration Mission in Kosovo (UNMIK).

violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here....²³

As the above statement shows, it is not possible to argue that the right to territorial integrity of Serbia was not violated – even the states supporting the independence of Kosovo agree on that - which is why they chose another approach, by claiming that the principle is confined only to other states, in contrast to the secessionist movements (individuals and non-state actors) within the state.²⁴

2. Scope and the meaning of the question

The Court characterized the question as “clearly formulated, narrow and specific” and elaborated further: “... [The question] 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.”²⁵ In this way, the ICJ gave an indication about the limited scope of its reply. Since in the past, according to the Court, the General Assembly and the Security Council have framed their questions in such a manner that it explicitly demanded opinion on the legal consequences of an action, the Court did not consider it necessary to reformulate the scope of the question or, moreover, to assess the existence of the state of Kosovo. It became obvious that the Court had no intention to clarify the questions which arose from the Kosovo case, or to define remedial secession in detail.

Some of the participating states drew a parallel with the Quebec case²⁶, and once again, by differentiating between the questions posed in the Quebec Case²⁷ and the one in the present case, the Court reiterated that it was not required to decide whether there is a positive entitlement under international law, either generally or in this specific case, on entities situated within a state to unilaterally break away from

23 Crook, J. R., United States support Kosovo's Declaration of Independence in ICJ, *American Journal of International Law*, Vol. 104, 1/2010, p. 103-104

24 According to Borgen: “... the US and the EU did not engage the legal issues; they simply repeated that Kosovo was a unique case and could not be used as precedent.... Serbia and Russia could use legal rhetoric because they used simple and understandable concepts: you cannot dismember a state without the consent of that state, and so on.” Borgen, C., *The language of Law and the Practice of Politics*, *Chicago Journal of International Law*, Vol. 1, 2009, p. 13-14.

25 Advisory Opinion, par. 51.

26 Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, <<http://scc.lexum.org/en/1998/1998scr2-217/1998scr2-217.html>>

27 “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?”

it.²⁸ Accordingly, “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”.²⁹

3. Is the declaration of independence in accordance with international law?

In order to answer the question asked by the General Assembly, the Court held necessary to assess general international law provisions as well as the Security Council Resolution 1244 (1999).

The Court concluded that although in the second half of the twentieth century only the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation were entitled to a right to independence, “there were, however, also instances of declarations of independence outside this context. The practice of states in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”³⁰

As to the argument that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity, the Court recalled that this principle is, as an important part of the international legal order, enshrined in the Charter of the United Nations, but after taking the “Declaration on Friendly Relations” and the “Helsinki Final Act” into consideration, it concluded that the scope of the principle of territorial integrity is confined to the sphere of relations between states. The Court admitted that some Security Council resolutions condemned particular declarations of independence, for example the Security Council resolution 541 (1983), concerning Northern Cyprus, and the resolution 787 (1992), concerning the Republika Srpska. However, the Court noted that illegality of those declarations resulted from the use of unlawful force or “other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)”, and not from their unilateral character.³¹ As the Court further stated, the Security Council has never taken that position in the Kosovo case, so there are no valid arguments to the claim that there exists a general prohibition against unilateral declarations of independence in the practice of the Security Council.

As far as the right to “remedial secession” is concerned, the Court acknowledged the opposing views of the participants, but did not consider it

28 “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, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence.” Advisory Opinion, par. 56.

29 Loc. cit.

30 Ibid., par. 79.

31 Ibid., par. 81.

necessary to resolve those dilemmas in the present case since it was not the question asked.³²

Finally, the Court concluded that since general international law does not contain any applicable prohibition of declarations of independence, the Kosovo declaration of independence did not violate general international law.

Concerning the Security Council Resolution 1244 and the Constitutional Framework by the Special Representative of the Secretary-General, the Court stated that since the resolution was adopted on the basis of Chapter VII of the United Nations Charter, it clearly imposes international legal obligations.³³ At the same time, the Constitutional Framework derives its binding force from the binding character of Resolution 1244 (1999) and therefore from international law, thus it possesses an international legal character.³⁴ Both instruments “entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration in Kosovo”, hence they formed the international law applicable to Kosovo on 17 February 2008.

Moreover, the Court acknowledged that “the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis”.³⁵

In order to establish whether the Security Council Resolution 1244 (1999) or the measures adopted there under, contains a prohibition regarding issuing a declaration of independence, the Court needed to determine the identity of the authors of the declaration.

Two views were expressed by the participants regarding the authors: one stating that “the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government within the limits of the Constitutional Framework”,³⁶ which would have been a clear breach of Resolution 1244 (1999) since the Provisional Institutions of Self-Government were subjected to the Special Representative of the Secretary-General. The other view claimed the opposite, “that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the government of Kosovo during the interim phase”.³⁷ The Court agreed with the latter group, and based its decision on the following arguments: the fact that the declaration was the work of the Assembly

32 Ibid., par. 83.

33 “Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law”. Ibid., par. 85.

34 Ibid., par. 88.

35 Ibid., par. 100.

36 Ibid., par. 103.

37 Loc. cit.

of Kosovo is not mentioned in the Albanian version of the text; it is signed by the President of Kosovo, who was not a member of the Assembly. In addition, the silence of the Special Representative is significant because “he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*”, i.e. “he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible”.³⁸ The final argument of the Court was that the authors “did not seek to act within the standard framework of interim self-determination of Kosovo”. On the contrary, they undertook international obligations of Kosovo, and “were set out to adopt a measure the significance and effects of which would lie outside that order”.³⁹ That being said, the Court concluded that the authors just acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.⁴⁰

After the Court established the identity of the authors of the declaration of independence, it answered the question whether their act was in accordance with the Security Council Resolution 1244 (1999) or the Constitutional Framework adopted there under.

Once again, two different points of view appeared among the participating states. The first one was that only the Security Council itself could have brought international presence in Kosovo to an end. Moreover, it was argued that the final status for Kosovo could only have been achieved either by an agreement of all parties or by a specific Security Council resolution.

The opposition claimed that, as was previously mentioned, the resolution did not regulate Kosovo’s final status, but only the interim administration. In addition to that, they asserted that “if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning Republika Srpska”.⁴¹

In respect to this question, the Court made two points: first of all, the resolution 1244 (1999) did not contain any provision which dealt with the final status of Kosovo or with the conditions for its achievement; Security Council would in fact specify conditions for the permanent status of a territory if it had wished to do so, just the way it did in resolution 1251 (1991) concerning Cyprus.⁴²

Secondly, nowhere in the resolution are there obligations imposed on actors other than United Nations member states, the organs of the United Nations, “the KLA and other armed Kosovo Albanian groups”, i.e. the authors of the resolution.⁴³ The Security Council has made demands on actors other than United Nation

38 Ibid., par. 108.

39 Ibid., par. 105-106.

40 Ibid., par. 109.

41 Ibid., par. 112

42 Ibid., par. 114

43 Ibid., par. 155

member states and intergovernmental organizations in several other resolutions. In fact, the Kosovo Albanian leadership was “*eo nomine* addressed”. Since there was no prohibition against declaring independence stated in the resolution 1244 (1999) (moreover, there was no prohibition addressing the authors), the Court concluded that the declaration of independence did not violate Security Council resolution 1244 (1999).

Furthermore, since independence was not declared by the Provisional Institutions of Self-Government of Kosovo, nor were they intending to act within the legal order in which those Provisional Institutions operated, the authors or the declaration of independence itself did not violate the Constitutional Framework.

In conclusion, the Court decided by 10 votes to 4 that the adoption of the declaration of independence of 17 February 2008 “did not violate any applicable rule of international law”.⁴⁴

The opinion raised some controversial reactions; it was praised by some and criticized by others. Some expressed their disappointment with narrowness of the opinion and the missed opportunity to resolve problematic issues, such as self-determination, secession and recognition; the other argued that it was not the advisory opinion that was too narrow, but the question posed by the General Assembly.

For example, Borgen argued that „the ICJ has written an advisory opinion in which it almost seems to regret having accepted the reference from the General Assembly. It has chosen restraint and narrow readings. We are left with what may have been the consensus before we started: declarations of independence are primarily domestic affairs, and the UN does not condemn such declarations unless there is a separate violation of international law”.⁴⁵ On the other hand, Christian Tams expressed the view that „when faced with high profile disputes courts often decide to be technical and the ICJ is no exception”. He put the blame on the General Assembly’s formulation of the question and concluded that the “opinion reflects a state of the law that is highly unsatisfactory. This, it is submitted, should be the real source of disappointment”.⁴⁶

Richard Falk objected that the Court answered the question whether the declaration was “in accordance with international law” with the rather bland assertion that “the declaration did not violate international law”.⁴⁷ However,

44 Ibid., par. 122. Four judges voted against the final conclusion: Vice-President Tomka; Judges Koroma, Bennouna, Skotnikov. The judges who could not accept the majority view appended dissenting opinions, separate opinions or declarations in accordance with the Statute of the Court. In all, nine judges expressed some kind of disagreement with the adopted opinion.

45 Borgen, C., Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (ICJ), Introductory Note, International Legal Materials, Vol. 49, 2010, p. 1405-1406

46 Tams, C., The Kosovo Opinion, <<http://www.ejiltalk.org/the-kosovo-opinion/>>, 6 August 2010

47 Falk, R., The Kosovo Advisory Opinion: Conflict Resolution and Precedent, Am. J. Int’l L., Vol. 105, 2011, p. 50-60.

this author wonders, why would secessionist movements bother to make such a distinction? He argues that Kosovo will be considered as precedent by many separatists claiming sovereign independence and statehood.⁴⁸

4. KOSOVO TODAY

So, the Advisory Opinion confirmed that the Kosovo unilateral declaration did not violate international law. However, it fell short of confirming Kosovo as an independent state or recommending that Kosovo should be admitted to the United Nations and other international institutions or affirming its right to establish diplomatic relations with other sovereign states. At the same time, the opinion did not reverse the *de facto* status of independence that Kosovo had enjoyed for almost a decade.

As stated before, Kosovo's independence has been formally recognized by 96 states. However, it has not become a member state of relevant intergovernmental organizations, other than the World Bank and the International Monetary Fund in 2009. Its application to the United Nations or to the Council of Europe has been barred by a strong opposition from states like Russia and Serbia. Although Kosovo is represented at different diplomatic levels in these organizations, the fact that it has not become a full-fledged member state seriously hampers its diplomatic relations.

In the meantime, the unresolved issue of the northern part of Kosovo, mostly inhabited by ethnic Serbs, presents a constant source of ethnic unrest and violence as the Serbian population continues to reject formal integration into Kosovo.⁴⁹ Serbia, on the other hand, continues vehemently to deny independence of Kosovo, especially since the last elections in Serbia.⁵⁰ On the other hand, Kosovo still has to prove its ability to guarantee fundamental human rights to all without discrimination, especially to the Serb minority in the south.

Nevertheless, pressured by the EU foreign policy chief Mrs. Catherine Ashton, the two countries entered into negotiations and after ten rounds of talks signed a promising agreement in Brussels on 19 April 2013.⁵¹ The agreement provides for the merger of the four Serb municipalities in the north (North Mitrovica, Zvečan, Zubin Potok and Leposavic) subject to Kosovo law. The agreement stipulates that only the Kosovo police force will be deployed in the north, but the regional commander will be a Serb and the force will reflect the area's ethnic make-up. Regarding justice,

48 Ibid., p. 58.

49 „Serbs in northern Kosovo rejected the authority of Pristina in a referendum“ at: <http://www.advance.hr/vijesti/srbi-na-sjeveru-kosova-na-referendumu-odbacili-vlast-pristine/>

50 See Jerusalem Post, 29.04.2013: “Nikolic ... insisted that Serbia will not recognize the declaration of independence by the breakaway province of Kosovo, despite the ‘terrible pressure’ that his country faces.” <http://www.jpost.com/Diplomacy-and-Politics/Serbian-leader-hails-Israel-ties-before-visit-311405> (visited: 20.5.2013).

51 Serbia and Kosovo sign historic agreement, at: <http://www.guardian.co.uk/world/2013/apr/30/serbia-kosovo-historic-agreement-brussels> (visited: 20.5.2013).

a division of the Kosovo court of appeal will hold a permanent session at North Mitrovica, with mainly Serb judges. As for local councilors, elections should be held in 2013, also under Kosovo law. The NATO Kosovo Force currently deployed there will play a key role in maintaining law and order during the poll.

Although the agreement provoked mass demonstrations on the Serbian side, it is to be hoped that it will pave the way to normalization of their relations. The proverbial carrot offered by the EU is the beginning of accession negotiations. The question of formal recognition of Kosovo seems to be, at least for now, pushed aside.⁵²

5. CONCLUSION

The right to self-determination is a subject of different interpretations and opinions, due to the fact that it has been included in numerous international law instruments, but not explicitly defined in any of them. The declaration of Kosovo independence from 17 February 2008 put it under the scope of international public and showed that some crucial questions are still open, such as who is entitled to the right, what the conditions for remedial secession are and if the right to self-determination can ever overcome the right to territorial integrity of a state.

The ICJ Advisory Opinion on the Kosovo unilateral declaration of independence did not meet the expectations by many in the international community that it would clarify the issues connected with unilateral declarations of independence. The Court limited its opinion to the particular case of Kosovo, sending the message that each case will have to be analyzed separately and treated as a *sui generis* case. Time will show whether the Court missed the opportunity to make a progressive step forward and establish relevant rules of international law thus contributing to world peace and stability.

⁵² In the meantime, Constitutional Court of Serbia accepted an initiative to review the legality of the agreement.

Summary

THE RIGHT TO SELF-DETERMINATION – THE KOSOVO CASE BEFORE THE INTERNATIONAL COURT OF JUSTICE

In 2010 the International Court of Justice (hereafter: ICJ) issued its Advisory Opinion in response to the General Assembly request on the legality of the Kosovo's unilateral declaration of independence. However, the ICJ advisory opinion on Kosovo did nothing to clarify the situation – it solely concluded that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law. It did not, however, decide about the legal consequences of the declaration or whether or not Kosovo has achieved statehood, or about the validity or legal effects of the recognition of Kosovo.

Key words: Kosovo, International Court of Justice, Advisory Opinion, self-determination, unilateral declaration.

Zusammenfassung

DAS RECHT AUF SELBSTBESTIMMUNG – DER FALL KOSOVO VOR DEM INTERNATIONALEN GERICHT

Im Jahr 2010 hat der Internationale Gerichtshof (weiterhin: IGH) auf Anforderung der UN-Generalversammlung das Gutachten über die Rechtmäßigkeit der einseitigen Unabhängigkeitserklärung des Kosovo erstattet. Dieses Gutachten hat aber die Situation nicht geklärt; es hat nur festgestellt, dass die Anerkennung der Unabhängigkeitserklärung vom 17. Februar 2008 das generelle Völkerrecht, die Resolution 1244 (1999) des Sicherheitsrates und den Verfassungsrahmen nicht verletzt hat. Demzufolge hat die Anerkennung dieser Erklärung keine relevante Regel des Völkerrechts verletzt. Das Gutachten hat aber weder die Rechtsfolgen der Erklärung noch die Frage der Kosovo Staatlichkeit geklärt. Ebenfalls hat sich das Gericht zur Gültigkeit und zu den rechtlichen Einwirkungen von Anerkennung des Kosovo nicht geäußert.

Schlüsselwörter: Kosovo, Internationaler Gerichtshof, Gutachten, Selbstbestimmung, einseitige Erklärung.

RIASSUNTO

„DIRITTO ALL’AUTODETERMINAZIONE – IL CASO DEL KOSOVO DINNANZI AL TRIBUNALE INTERNAZIONALE“

Il Tribunale internazionale nel 2010 ha emanato il proprio parere consultivo rispondendo al quesito posto dall’Assemblea generale dell’ONU circa la legalità della dichiarazione unilaterale d’indipendenza del Kosovo. Tuttavia, tale parere del Tribunale non ha chiarito la situazione: esso ha unicamente accertato che l’accettazione della dichiarazione d’indipendenza del 17 febbraio 2008 non ha violato le regole del diritto internazionale generale né la risoluzione del Consiglio di sicurezza 1244 (1999), come nemmeno il quadro costituzionale. Pertanto, con l’accettazione di tale dichiarazione non è stata violata nemmeno una regola rilevante per il diritto internazionale. Ciò che, invece, il parere del Tribunale non ha chiarito sono le conseguenze giuridiche della dichiarazione, come nemmeno la circostanza se il Kosovo sia divenuto uno stato. Inoltre, il Tribunale non ha nemmeno fatto chiarezza sulla validità e sugli effetti giuridici del riconoscimento del Kosovo.

Parole chiave: *Kosovo, Tribunale internazionale, parere consultivo, autodefinizione, dichiarazione unilaterale.*