The Dichotomy of Law and Politics: *Kosovo* and Beyond

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Abstract

The dichotomy of law and politics has been integral to the paradigm of legal theory- omnipresent and irresolvable. Since law and politics are bereft of any exacting borders, both often overstep into the domain of each other. This note examines this complexity in the light of the advisory opinion of the International Court of Justice on whether the Unilateral Declaration of Independence in respect of Kosovo by the Provincial Institutions of Self-government of Kosovo was in accordance with international law where the Court refrained from answering the question whether Kosovo had the right to self-determination. The Court desisted from doing so since the question was political in nature and hence beyond the jurisdiction of the Court. However, it is argued that in exercising judicial restraint, the Court has failed to recognize the fact that the dichotomy of law and politics could be used as an instrument to bring order to the chaos perpetuated by a world driven by political conflict. The purpose is to underscore the point that any assessment of the right to self-determination must necessarily involve the appreciation of political facts, and any resistance to do so is to prejudice a complete understanding of the international politico-legal order.

Introduction

In Plato's dialogue *Apology*[1], Socrates was condemned to death by a jury for violating the laws of Athens. In his defence or *apology*, Socrates contended that his philosophical ideas did not violate the laws of Athens and that he was a believer in the law of the Gods.[2] However, the jury found him guilty nonetheless.[3] Their decision was political, for the views of Socrates were too radical for their acceptance. The jury's sentence took the expression of law and resulted in the execution of Socrates.[4] The jury's political opinion which took the form of law is one in many ways that the relationship of law and politics manifests itself in. One form of this relationship is symbiotic, wherein law and politics merge with each other to take the form of legislations, judicial dicta, etc. However, the other form of this relationship may be characterised by a conflicting element wherein, sometimes, the

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1. Plato, The Apology, Phædo and Crito 1909–14 (Benjamin Jowett trans. 2001).
2. *Id.* at 1910.
3. *Id.* at 1911-13.
4. *Id.* at 1914.

domains of both law and politics sought to be treated as separate so as to not interfere with the jurisdiction of the other. This dual relationship may be euphemised as the dichotomy of law and politics.

In this article, I seek to examine the dichotomy of law and politics in the context of right to self-determination and the role of the International Court of Justice in reconciling with this dichotomy.[5] At the outset, it is pertinent to note that by "politics" I refer to a multi-dimensional form of human deliberation and action that is characterised by values of identity, interests, rightful conduct and the means to acquire interests.[6] Such "politics" is also characterised by human action and reason implicit in the struggle for power or dominance.[7]

In Part I of this article, I seek to examine the interrelationship between law and politics in the context of relevant jurisprudential theories. This shall serve as a theoretical prelude establishing that the dichotomy of law and politics is an irresolvable one and the two cannot be segregated as mutually exclusive. I shall also examine the relationship between international law and politics in the context of theories of international relations. The purpose is to demonstrate that in reality, any legal institution of adjudication cannot simply segregate law and politics. Part II examines the concept of the right to self-determination as a practical embodiment of this dichotomy, drawing from international law perspectives which foreground the political nature of the law relating to self-determination. Thereafter, Part III discusses the role of the International Court of Justice in movements of self-determination in the context of its recent advisory opinion on the Unilateral Declaration of Independence of Kosovo. This part underscores that the International Court of Justice must refrain from distancing itself from this dichotomy owing to the political nature of truly legal conflicts relating to the right to self-determination. Finally, the conclusion shall summarise the major premise of this article along with the context it is extrapolated in.

I. The Dichotomy of Law and Politics: A Jurisprudential Perspective

The major premise of this article revolves around the dichotomy of law and politics. This has to be understood from two different perspectives. On the one hand, it is crucial to examine this dichotomy as reflected in legal theory. This shall provide

5. The overarching theme of this paper is the dichotomy of law and politics as seen in the context of the International Court of Justice in addressing questions of the right to self-determination. To this effect, without specifically or exhaustively dealing with the three strands of jurisprudence, politics and the role of the International Court of Justice in understanding law and politics discourse, I've discussed them connectedly to bring out the dichotomy in the context of right to self-determination to suggest a stand that must be adopted by the Court to reconcile this dichotomy.

6. Christian Reus–Smith (ed.), The Politics of International Law 5-25 (2004).

7. *Id.* at 15.

a theoretical basis to the understanding of the inseparable relationship between law and politics. On the other hand, it is important to contextualise and further nuance this understanding in terms of the relationship between international law and international relations. A holistic reading of the two shall serve as a relevant theoretical preface to the analysis of the advisory opinion of the International Court of Justice on the Unilateral Declaration of Independence in respect of Kosovo.[8]

A. Jurisprudential Analysis

The discourse on the relationship between law and politics has been integral to jurisprudence since the 20th Century.[9] The analytical positivists subscribed to the *idea*[10] of law "as it is" or law "simply and strictly so called."[11] Implicit in this is the notion that rules that form the structure of law are immune to social, moral, economic and cultural principles that form the very *idea* of politics.[12] In other words, law in its very form, "as it is, simply and properly so called" is immune and indifferent to the stimulus of politics.[13] However, there exists a relationship between the two. On the one hand, the bare essence of the legal rule remains constant and unaffected by politics. On the other hand, the interpretation of the factual content that gives form to the essence of such a legal rule may be guided by politics or a political ideology from time to time.[14] For example, if a certain law posits that a consistent violation of human rights of a peoples is a ground for claiming the right to self determination; then the *bare* right to self-determination arising out of a consistent violation of human rights is unaffected by any political environment. However, the matter of what constitutes a "consistent violation of human rights" is something that may be affected by and interpreted according to political considerations such as the social and cultural conditions of that society in that

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

9. Mark A. Graber, *Introduction to Law's Allure Symposium: Law and Politics—An Old Distinction, New Problems*, 35 Law & Soc. Inquiry 1025, 1028 (2010).

10. I refer to the term "idea" to encapsulate the true essence of law and politics for lack of a better adjective.

11. John Austin, *A Positivist Conception of Law*, *in* The Providence of Jurisprudence Determined xiv (1832).

12. *See* H.L.A Hart, The Concept Of Law 238-276 (P. A. Bulloch and J. Raz (ed.), 2nd ed. 1994).

13. *See* Cotterrell, Law's Community 317-320 (1997).

14. Teun A. Van. Dijk, *Politics, Ideology and Discourse*, *in* Ruth Wodak (ed.), Elsevier Encyclopedia of Language and Linguistics. Volume on Politics and Language.728-740 (2005). At this point it is worthwhile to differentiate between "politics" and "political ideology" by referring to the latter as a basis for the "social organisation of politics." An ideology may be defined "as the foundation of the social representations shared by a social group." When such an ideology serves a political purpose, then it may be called political ideology. Such political ideologies influence the sphere of politics. For example, "the overall organization of social beliefs as a struggle between the Left and the Right is the result of the underlying polarization of political ideologies that has permeated society as a whole." For the purpose of this article, it is relevant to understand the dichotomy of law and politics as manifesting itself in the International Court of Justice distancing itself from "politics" and not "political ideology" *per se*.

particular time or the political ideology of the court interpreting the rule.

One the other hand, the critical legal scholars opine that "all law is politics"[15] and all legal decisions are political in themselves. In other words, law does not have a system of existence outside of the ideologies that dominate society.[16] Their belief in the indeterminacy of law perpetuates the notion that legal rules can often be conflicting even though they may appear neutral and one may need to make a choice between policies which are inevitably based on social and political grounds.[17] For example, in the adjudication of any question of law formed in a political context such as the right to self-determination of peoples, a court would have to choose an answer that would in turn be premised upon on a certain real and existing context—economic, social, political, military and technological.[18]

The legal realists are particularly relevant when one has to consider the role of courts in dispensing with questions of law and politics.[19] According to the former, law is empirical in nature and hence is constitutive of human ideas that determine what law is.[20] Hence, law consists of elements that find their origin in social and political phenomenon.[21] For example, the decisions of courts are influenced by what the judges perceive as "the law ought to be."[22] This in turn is influenced either by their own political ideologies and reasoning or all those constitutive factors that form the very *idea* of politics.[23] While judges might lay down the law after going through a process of formalism and legal reasoning, however, when they have to choose between different legal constructions (which might in turn be attributable to politics) they are influenced by various factors that can render their ultimate decision as political even though, the pre-dominant element is the legality of the decision.[24]

B. International Law and Politics: Through the Lens of Theories of International Relations

I shall now discuss the relationship between international law and politics. One interpretation ascribed to this relationship is that politics develops the law

15. M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 936 (1994). Albeit, various critical legal scholars differ in the extent of their interpretations.
16. *Id.* at 938.
17. Robert Unger, *The Critical Legal Studies Movement,* 96 Harvard L. Rev. 561, 675 (1982).
18. Jack M. Balkin, *Critical Legal Theory Today*, *in* francis j. mootz, On Philosophy in American Law 6 (2008); R. Unger, *Politics*, *in* M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 1054 (2001).
19. This is significant since a court can never attempt to exist in political vacuum.
20. Alf Ross, *Tû-tû*, 70 Harvard L. Rev. 818, 822(1957).
21. Llewellyn, *Some Realism about Realism*, 44 Harvard Law Review 1237, 1240 (1931).
22. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 Columbia L. Rev. 593, 594(1940).
23. *Id.* at 595.
24. *Id.* at 596.

while international law is viewed as a simple reflection of underlying power politics or a solution to problems of cooperation between parties.[25] The realist conception of politics is a power-struggle between sovereign states and law is a reflection of the prevailing balance of power.[26] On the other hand, the rationalists say politics is the process through which states seek to maximise self-interests and international law seeks to solve cooperation problems encountered in this regard.[27] The constructivists perceive politics as a socially constitutive form of action and international law as central to the structures that condition the politics of rightful action.[28]

According to E.H Carr, law cannot be understood independently of the political foundations on which it rests and of the political interests which it serves.[29] Hence, an undisputable fact exists in the notion that the international public order has several aspects that cannot be divorced from their inherent legal aspects. Implicit in this very notion, is the fact that such aspects might have a political character to them. In other words, the conduct of a state might be politically characterised, motivated and qualified; however, this, in no manner, detracts from the legitimacy of evaluating such conduct from a legalistic point of view.[30] The relation between international law and politics is dialectic and symbiotic.[31] Both exist in a state of dynamism wherein politics has given international law the framework, structure and content within which it continues to expand and in turn, international law has afforded in the shaping of politics through the instrumentality of interpretation of rules and norms and the duty of obligation and obedience to the international order.[32]

II. Making a Case for the Right to Self-Determination

A. A Social Contract Justification

For John Locke, self preservation is the fundamental law of nature[33] which is also shared by John Stuart Mill in his treatise on liberty.[34] Locke's social contract

25. John Gerard Ruggie, *Territoriality and Beyond: Problematising Modernity in International Relations*, *in* International Organisation 144 (1993).
26. *Id.* at 15.
27. *Id.* at 16.
28. *Id.* at 17.
29. E.H. Carr, The Twenty Years Crisis, 1919-1939: An Introduction to the Study of International Relations 94 (1936).
30. *Supra* note 6, at 20.
31. Law is constantly faced by two opposing forces. One force pulls law in the direction of influencing politics. The other force pulls law in terms of being influenced by politics. Eventually, the two converge in a symbiotic relationship that determines the international politico-legal order. For a relevant exposition on the above mentioned idea *see* Gunther Teubner, *The Transformation of Law in the Welfare State*, *in* Walter de Gruyter, Dilemmas of Law in the Welfare State 6-7 (G. Teubner ed. 1986).
32. Michael Byers, The Role of Law in International Politics: Essays in International Relations and International Law 1-13 (2000).
33. John Locke, *Two Treatises of Government*, *in* M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 140 (1994).
34. John Stuart Mill, *On Liberty* (1859), *in* Jules Coleman, Philosophy of Law 261 (6th ed. 2000). He also shares the view that the principle of "self protection" is what may compel mankind to interfere with the liberty of others.

theory is premised on all men in the state of nature giving up their rights and natural power to punish to a ruler, for the sake of preservation of property and consequently the subsistence of political society.[35] However, he states that "it is lawful for the people….to resist their king."[36] Such resistance is justified when the ruler uses of his political power "not for the good of those, who are under it, but for his own private separate advantage."[37] According to Locke, the legislative can never have a right to destroy, enslave, or designedly to impoverish the subjects; the only end of the legislative is the self-preservation of all its subjects.[38] Rousseau, another social contract theorist, in his book *The Social Contract* states that in such a situation each person would assume all his rights and natural liberty.[39] This, I believe serves as a jurisprudential *rationale* for the right to self-determination that may become effective when a nation state fails in its duty to preserve the life of its subjects.

B. International Legal Recognition to Self-determination

Self determination is defined as "the right of a people or a nation to determine freely by themselves without outside pressure to pursue their political and legal status as a separate entity."[40] Article 1 of the United Nations Charter provides that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determinations of a peoples." This is common to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which state that: "All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[41] Further, the Declaration of the United Nations General Assembly on Principles of International Law Concerning Friendly Relations

35. *Id*.

36. John Locke, *Two Treatises of Government*, *in* VERE CHAPPELL, THE CAMBRIDGE COMPANION TO LOCKE 437(1994).

37. *Id.* at 416-417.

38. *Id.* at 229 ("The supreme power or the Legislative does not have the power to act arbitrarily or destroy the lives and properties of others' since the social contract is constituted by each man in the state of nature and "nobody can transfer to another more power than he has in himself.").

39. J.J. Rousseau, *The Social Contract*, *in* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 141 (1994).

40. *See* Ediberto Roman, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1998); Otto Kimminich, *A "Federal" Right of self-determination?*, *in* MODERN LAW OF SELF-DETERMINATION 85 (CHRISTIAN TOMUSCHAT ED. 1993); Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 (1991); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992); Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 321 (1995); Fredric L. Kirgis, Jr., *Self-Determination of Peoples and Polities*, 86 AM. SOC'Y INT'L L. PROC. 369, 369-70 (1992).

41. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 1; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 1. *Also See* Charter of the United Nations, art. 55; G.A. Res. 545, U.N. GAOR, 6th Sess., Supp. No. 20, U.N. Doc. A/2219 (1952), at 36; G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 18, UN Doc. A/4884 (1960) at 66; G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No.28, UN Doc. A/2517 (1970) at 121.

and Co-operation among States promotes the right to self-determination as a duty of the States.[42] Hence, that the right to self-determination exists in international law is a well settled fact.[43] A careful perusal of these provisions in the light of the jurisprudential justification of this right confirms that such a right is manifested through concepts of independence, self-government, local autonomy and other forms of participation in government. These concepts are inherent in the *idea* of politics.[44] Further, the political concepts of sovereignty[45], territorial integrity[46] and political rights[47] are integral components of the right to self-determination, both, in terms of international law and as a political concept.[48] Hence, that self determination is a political issue is no hidden fact.[49] What is pertinent is that inherent in the nature of the very *idea* of self-determination is the *idea* of politics or conversely the existence of a political character that shall determine the substantive content of the factual reality that gives rise to this right. Hence, such political issues in the right to self-determination are determinative of a relationship between law and politics[50] and to deny this[51], misses the *raison d'être* of self-determination.

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42. G.A. Res. 2625 (xxv) of October 24, 1973, at ¶ 1.
43. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15th Sess., Supp. No. 16, U.N. Doc. A/L323 (1960), at 66; Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information called for under Article 73e of the Charter, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A./4684 (1960) at 29; The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), at 121.
44. *See* A.A. Idowu, *Revisiting the Right of Self-determination in Modern International Law: Implications for African State*, 6 Euro J. Soc. Sci., 43(2008).
45. *See* Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap between Sovereignty and Self- Determination,* 40 Stan. J. Int'l L. 347 (2004).
46. *See* Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools,* 33 Brook. J. Int'l L. 503 (2008).
47. *See* Joshua Dilk, *Reevaluating Self-Determination in a Post-Colonial World,* 16 Buff. Hum. Rts. L. Rev. 289 (2010).
48. The concepts of sovereignty, territorial integrity and political rights are issues that are inherently political in nature. Since they form an integral component of the right to self-determination, this indicates that the right to self-determination is as much political in nature as it is legal in terms of international law. To assess whether the right to self-determination exists for a peoples, it would be vital to address the conflict between sovereignty and territorial integrity which is a matter of international politics.
49. *See* Ian Brownlie, Principles of Public International Law 593 (3rd ed. 1979); Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at The International Court of Justice*, 17 Hastings Int'l & Comp. L. Rev. 323 (2004); Deborah Z. Cass, *Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 Syracuse J. Int'l L. & Com. 21(1992).
50. *See* Dianne Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 Syracuse J. Int'l L. & Com. 65 (1995).
51. Paul H. Brietzke, *Self Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 Wis. Int'l. L.J. 69, 71 (1995) ("Any elaborate doctrinal edifice built upon a legal positivism is misleading. One does not have to be a legal realist or a crit to realize that the positivist attempt rigidly.").

III. The International Court of Justice: Law or Politics?

Before discussing the role of the International Court of Justice[52] in adjudicating upon questions of self-determination in the context of the dichotomy between law and politics, it might be worthwhile to discuss certain important characteristics of the Court. The Court is considered one of the principal organs of the United Nations.[53] As far as the jurisdiction of the Court is concerned, it has both adjudicatory and advisory jurisdiction.[54] The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The jurisdiction of the Court is provided under Article 36(1) and Article 36(2) of the Statute and extends to only those states that submit themselves to the Court. According to Article 36(2) of the Statute such jurisdiction may "extend to any question of international law" or "the existence of any fact which, if established, would constitute a breach of an international obligation."

With respect to self-determination the Court has expressed its opinion in favour of recognising the right to self-determination as part of international law. For instance, this issue was recognised in the *Nambia* case wherein the Court held that the right was applicable to all nations.[55] Subsequently this position was reiterated in the *Western Sahara* case.[56] However, the one case that has drawn a lot of criticism is the Court's advisory opinion on the Unilateral Declaration of Independence of Kosovo.

52. The International Court of Justice [hereinafter the Court] was born out of the United Nations. The United Nations is a political organization that comprises of one hundred and ninety two States. Hence, that the Court would address legal questions of a political nature is inherent in the fact that from its jurisdiction arises the role of the Court to adjudicate upon disputes between *states* that are inherently and predominantly political.

53. Charter of the United Nations, art. 33 ("(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."); Statute of the Court, art. 1 ("The Court established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.").

54. *Id.*

55. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (*South West Africa), Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21) (Advisory Opinion), at ¶ 52 ("Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.").

56. *Western Sahara*, 1975 I.C.J. 121 (separate opinion of Judge Dillard); Frontier Dispute (Burk. Faso v. Mali), I.C.J. 554, 556-57 (1986), at ¶ 52. Here, the Court referred to its opinion in the *Nambia case.*

A. The Advisory Opinion on Kosovo

On 22nd July 2010, the Court gave its advisory opinion on whether the Unilateral Declaration of Independence in respect of Kosovo by the Provincial Institutions of Self-government of Kosovo was in accordance with international law. The Court after going through several aspects[57] finally held that the Unilateral Declaration of Independence was *not* in violation of international law.[58]

The criticism against the advisory opinion in this regard, is varied in nature. For instance, one criticism levied against the Court is that it was wrong in affirming jurisdiction to this matter since it involved the legality of a unilateral declaration of independence by a group that was not a state or international organisation upon which the Court can exercise its jurisdiction.[59] Another criticism points to the fact that the opinion did not specify whether the rules of force were applicable to the authors of a unilateral declaration of independence.[60]

Even as the criticisms have their relative merits, [61] what is relevant to the discussion here, is the refusal of the Court to enter into questions of greater significance and importance, albeit more political in nature than legal. The Court refused to comment upon the issue of self-determination, sovereignty and the legal status of Kosovo as a state. The Court only considered the question whether the unilateral declaration of independence was in accordance with international law. To this effect, it clarified the scope and meaning of the question submitted to it by the United Nations General Assembly.[62] The Court stated that the formulation of the question was limited to whether or not the declaration was in accordance with international law and did not merit an analysis of whether Kosovo had achieved statehood.[63]

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57. The Advisory Opinion is divided into five parts: (I) jurisdiction and discretion; (II) scope and meaning of the question; (III) factual background; (IV) the question whether the declaration of independence is in accordance with international law; and (V) general conclusion.

58. *Kosovo, supra* note 8, at ¶122.

59. Dov Jacobs, *The Kosovo Advisory Opinion: A Voyage by the ICJ into the Twilight Zone of International Law* (12 Oct. 2010), *available at* http://www.haguejusticeportal.net/eCache/DEF/12/131.html (last visited on 5 June 2011).

60. Tarcisio Gazzini, *The Kosovo Advisory Opinion from the Standpoint of General International Law,* (12 Oct. 2010), *available at* http://www.haguejusticeportal.net/eCache/DEF/12/077.html (last visited on 5 June 2011) ("It is unfortunate that the Court failed to distinguish the question of whether the declaration of independence was consistent with international law from the question of whether the rules on the use of force apply to the authors of such declaration.").

61. *The International Court of Justice and Kosovo: Opinion or Non-Opinion? A Discussion of the ICJ's Kosovo (Advisory Opinion) and International Law* (29 Sept. 2010), *available at* http://www.haguejusticeportal.net/eCache/DEF/12/131.html (last visited on 5 June 2011).

62. Hereinafter UNGA.

63. *Kosovo, supra,* note 8, at ¶¶ 49-56.

The Court went on to say that it had "not 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."[64] Further, according to the Court, it was perfectly possible for a unilateral declaration of independence to "not be in violation of international law without necessarily constituting the right conferred by it."[65]

In this context, the Court felt that it was not necessary to immerse itself in a discussion on the legal status of Kosovo. Hence, in this manner the Court completely skirted the vital issue of whether Kosovo was entitled to the right of self-determination. However, the Court submitted its reasoning after considering the factual context which led to the unilateral declaration of independence. This factual context, according to the Court[66], included the relevant framework of Security Council Resolution 1244 (1999) whose object was to end the violence and repression in Kosovo by implementing an interim administration and to initiate "a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA."[67]

At this juncture, it is pertinent to observe that having considered the factual context as being relevant to answering the question before the Court, the latter should have necessarily broached upon the issue of the right to self-determination as forming an essential consideration that led to adoption of the unilateral declaration of independence.

The approach adopted by the Court is perplexing since the Court has not refrained from entering into a political issue before[68] and in fact has stated on record that, "that a question has political aspects does not suffice to deprive it of its character as a legal question."[69] The Court, while discussing its jurisdiction over the particular

64. *Kosovo, supra,* note 8, at ¶ 56.

65. *Id*.

66. *Kosovo, supra,* note 8, at ¶¶ 57-77.

67. Security Council Resolution 1244 (1999) of 10 June 1999, Ann. 1, Sixth principle; Annexure. 2 at ¶ 8.

68. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at 172; *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (9th July 2004), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf (last visited on 5 June 2011).

69. *Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion*, 1948, I.C.J. Reports 1947-1948, at 61; *Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion)*, I.C.J. Reports 1996 (I), at 234.

legal question, made it abundantly clear that it was not fettered by political implications that could follow from the opinion or alternatively, the political motive behind the formulation of the legal question.[70] However as has been pointed out by the Court in its advisory opinion, it is not for the Court to decide whether its opinion shall be useful for the UNGA in the performance of its functions.[71] Hence, this should not deprive the Court of its self-recognised duty to produce an opinion that is equipped in entirety to assist the UNGA in addressing the issue in Kosovo from the perspective of maintaining international peace and security. To this effect, the determination of whether Kosovo has a right to self-determination strikes at the root cause of a unilateral declaration of independence.

Also, there are a number of cases wherein the Court has been approached for the admissibility of cases with a discernibly political character.[72] The most pertinent case in example being the advisory opinion of the Court in the Construction of the Separation Wall in the Occupied Palestinian Territory wherein the Court held that the Separation Wall in West Bank was a violation of international law and the right to self-determination of the peoples of Palestine.[73] Here, in assessing the validity of the Separation Wall, the Court considered principles of right to self-determination as general principles of law which were applicable to such an assessment. The Court pronounced that the Separation Wall did breach right to self-determination of the peoples of Palestine.[74] What is extremely crucial in this regard is that before doing so, "the Court acknowledged the existence of politics in its work, but maintained that politics and many other issues were inherent aspects of international law and did not negate the quality of legal question under consideration."[75] Similarly, in the *Western Sahara* case, the Court held that "jurisdiction could be upheld despite the lack of consent as well as the presence of a bilateral dispute as long as hearing the matter was not "incompatible with the Court's judicial character."[76]

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70. *Kosovo, supra*, note 8, at ¶¶ 18-28.

71. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (9 July 2004), at ¶ 62, *available at* http://www.icj-cij.org/docket/files/131/1671.pdf (last visited on 6 June 2011).

72. The Iranian government, involved in the airbus dispute with the United States, *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1989 I.C.J. 132 (13 Dec. YEAR); *Gabacikovo-Nagymaros Project* (*Hungary/Slovakia*), I.C.J. Communique, No. 93/ 17, (5 July 1993); *Military and Paramilitary Activities In and Against Nicaragua*, 1984 I.C.J. 392.

73. Michelle Burgis, *Discourses of Division: Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2008), *available at* http://chinesejil.oxfordjournals.org/content/7/1/33.full.pdf (last visited on 6 June 2011).

74. *Id. at* 11.

75. *Id.* at 9.

76. *Western Sahara, supra* note 56, at ¶ 47.

In *Kosovo,* there seems to have been no reason why the Court should have desisted from its traditional approach. Instead, the Court refused to confirm or establish whether any right to declare independence or a possible right to self-determination existed under international law.[77] The Court failed to recognise Kosovo's right to self-determination grounded on the claim that it suffered repression and denial of fundamental rights.[78] The effect of the Court's omission in this regard is to have done disservice to the right of self-determination and denied support to various legitimate movements of self-determination around the world.[79] Further, by recognising that unilateral declarations of independence do not violate general international law, the Court has not addressed the right to territorial integrity by giving a blanket validation to even all the illegitimate secessionist movements around the world.[80] The Court should have limited itself to the question of Kosovo in entirety.

It is interesting to note that in an attempt to skirt a "political issue" to maintain an apolitical stand, the Court seems to have acted in a political manner. The dichotomy of law and politics cannot envisage delineation in the treatment of a legal issue which is rife with political character. Further, the opinion of the Court cannot help but be influenced by political ideology. However, at the same time, an activist court that is bound by the principles of the United Nations cannot distance itself from politics when dealing with a legal question that is essential to the functioning of its parent organ-the United Nations. The Court in this situation has tried to separate law and politics in an attempt to be purely judicial in character. It has sought to fight the irresolvable dichotomy. The result is neither the resolution of a very pertinent legal question (the legal status of Kosovo) nor the end of a characteristically political dispute.

B. Beyond *Kosovo* - The Role of the International Court of Justice

The advisory opinion of the Court, as mentioned above, refrained from delving into the legal validity of the statehood of Kosovo. This is indeed disappointing; since if the Court had addressed the issue of whether Kosovo had the right to self-determination, the opinion would have had supreme significance for movements of self-determination across the world. What the Court has done by not adopting such an approach is to have convoluted the relationship between law and politics. I have demonstrated previously that the relationship between law

77. Curtis Doebbler, *The ICJ Kosovo Independence Opinion: Uncertain Precedent* (6 March 2011), *available at* http://webcache.googleusercontent.com/search?q=cache:http://jurist.org/forum/2010/07/the-icj-kosovo-independence-ruling-an-uncertain-precedent.php (last visited on 6 June 2011).

78. *Id*.

79. *Id.* at 8.

80. *Id.* at 8.

and politics, not just jurisprudentially, but also in terms of the right to self-determination is inter-related and cannot be differentiated. Moreover, to try and distinguish the two as separate paradigms , is to not only obfuscate and frustrate one's very conceptual understanding of right of self-determination but also to live in a fool's paradise, expecting the domain of international law to be bereft of international political order of which the former can be considered a progeny of. To deny this is to deny the assertions of the Critical Legal Scholars, the Legal Realists, the Rationalists and the Constructivists.[81]

The Court may play a very important role in the future for supporting self-determination movements such as those in Tibet, Palestine, Chechnya, etc. which may involve far more perplexing questions and realities deeply embedded in social, cultural, religious, ethnic, economic and military precepts. Such movements shall look to an established and credible legal institution to uphold the values enshrined in the United Nations Charter, for promoting "international peace and security."[82] The Court may be looked upon to use its powers as an "instrument of preventive diplomacy and peace keeping virtues, development of international law and the strengthening of peaceful relations between States."[83]

If in such a situation the Court (as seen in the advisory opinion of *Kosovo*) does not appreciate the convergence of law and politics and pits itself against jurisprudential realities that lay down the principles of self-determination, then it is deluding itself into believing that it is being completely apolitical. The point to be underscored here is that an activist court[84] perforce has to appreciate the political nature of facts when rendering a legal decision but at the same time, should not let the politics prevent the Court from rendering a legally sound and just decision. The Court has to accept political realities that are embedded in the letter of the law, and draw relevant insights from those instead of refusing to marry the two and rendering itself as a legal institution that does not appreciate the true nature of law, and hence, render disservice to the comity of nations and the commitment to international

81. *See infra*, part I (A) and I (B).

82. On 30 October 1943, following a conference between China, the USSR, the United Kingdom and the United States, a joint declaration was issued recognizing the necessity "of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security." *Available at* http://www.icj-cij.org/court/index.php?p1=1&p2=1 (last visited on 6 June 2011).

83. *Advisory Jurisdiction*, *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 (last visited on 6 June 2011).

84. Thomas J. Bodie, Politics and the Emergence of an Activist International Court of Justice 57 (1995).

peace and human rights.

Conclusion

The major premise of this paper revolves around the irresolvable dichotomy of law and politics. The two are different sides of a coin and cannot be viewed as mutually exclusive or inseparable. Politics has a direct influence on the structure and content of international law. However, at the same time, international law has a direct bearing on politics that governs international relations. For a judicial institution that is set up as a principal organ of the United Nations to assist the latter in maintaining international peace and security, the dichotomy of law and politics can find its most perfect manifestation in it. To recognise this is to understand that the determination of legal issues necessarily involves the appreciation of political facts; and to uphold the principles of the United Nations Charter it might be worthwhile to use this power of legal determination to *assist* in the resolution of political disputes deeply connected with the normative and positive content of international law *by not refusing to exercise jurisdiction upon significant legal issues with political character*. Unfortunately, in its blanket refusal to determine the right to self-determination of Kosovars, the advisory opinion in *Kosovo* has rendered injustice to the international public order. The dichotomy and irony in the words are apparent, however the idea is simple- law and politics are co-terminus with international order and to function in an either-or in a paradigm without appreciating both, may only be delusional.