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Rethinking the *Lotus Principle*:

New Perspectives on the *Kosovo Advisory Opinion*

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

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Term: Spring 2017

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Summary

Following Kosovo's issuance of a unilateral declaration of independence in 2008, the UN General Assembly requested the International Court of Justice to pronounce itself on the accordance with international law of the declaration of independence. The Court's answer to that request was that the declaration of independence was not in violation of international law. When the Court rephrased the question posed to it, from *accordance with* to *not in violation of* international law, I argue that it resorted to the so-called *Lotus Principle*. The *Principle* entails that the non-prohibition of a certain course of conduct is equal to that conduct being permitted. This assumption is based on a positivist voluntarist approach to international law, where states are free to act as they wish unless they have otherwise agreed.

What is curious about the International Court of Justice's application of the *Lotus Principle* in the *Kosovo Advisory Opinion*, is that it was not used in its original formulation which promotes *states'* freedom to act. In the present case it was used to the benefit of a non-state actor (Kosovo), to the detriment of a sovereign state (Serbia). This indicates an evolution of the *Principle*, no longer solely applicable to states but also to other entities in international law. It is argued that the evolution is a consequence of international law evolving from its state-centric tradition and that competing values to state sovereignty, such as human rights and self-determination, are becoming more influential.

Finally, an alternative approach to the international legal system is presented, an understanding which is beyond the binary nature of the *Lotus Principle* which recognizes only prohibited or permitted conduct. Had the Court disregarded the *Lotus Principle* in the *Kosovo Advisory Opinion*, it could have conducted a fuller review of the legal framework concerning secession, discussing whether acts that were not prohibited could have been characterized as something other than permitted.

Acknowledgements

Thank you, Valentin, for all your support during this process, and for convincing me that the range of emotions one experiences when writing are, in fact, completely normal. Thanks to my father, Bob, for your helpful comments and corrections.

Linus, thank you for always being by, and on, my side, and Elin, for our long talks on high and low. Thanks are also due to the rest of my corridor mates, and the members of Capulus Clava. It would not have been the same without you.

Teresa O'Neill

Lund, May 2017

Abbreviations

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| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| PCIJ | Permanent Court of International Justice |
| UN | United Nations |
| UNGA | United Nations General Assembly |
| UNSC | United Nations Security Council |

1. Introduction

1.1. Background

In February 2008, Kosovo declared its independence from Serbia.¹ Though Kosovo is recognized by 113 states,² Serbia has since persistently disputed Kosovar independence. In January 2017, a train headed from Serbia towards Mitrovica in northern Kosovo was painted in Serbian colors with the text 'Kosovo is Serbia'. The train was denied entry into Kosovar territory by the Kosovar authorities.³

This situation is just one example of multiple conflicts around the world between groups of people and sovereign states. The common nominator is the struggle between a group seeking independence from the state it territorially belongs to, and the territorial state wanting to affirm its sovereignty.

Following the Kosovar declaration of independence of 17 February 2008, the UN General Assembly referred a request for an advisory opinion to the International Court of Justice (hereinafter the ICJ or the Court). The UN General Assembly requested the ICJ to clarify whether the declaration of independence was in accordance with international law. This thesis will assess the Court's answer to that request through an analysis of the Court's application of the *Lotus Principle*,⁴ as well as synthesize academic responses

¹ Kosovar Declaration of Independence, 17 Feb 2008, <www.assembly-kosova.org/?cid=2,128,1635> accessed 15 May 2017.

² Republic of Kosovo, Ministry of Foreign Affairs 'International recognitions of the Republic of Kosovo' <www.mfa-ks.net/?page=2,224> accessed 12 May 2017.

³ BBC, 'Serbia-Kosovo train row escalates to military threat' 15 January 2017 <www.bbc.com/news/world-europe-38630152> accessed 8 May 2017.

⁴ The *Lotus Principle* – derived from *SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10 (1927) – entails that all which is not prohibited for states is permitted.

to the *Kosovo Advisory Opinion*.⁵ It will also discuss and problematize the state-centric focus of the international legal system.

1.2. Aim and research questions

The aim of the thesis is to proffer a proposal for an alternative interpretation of the *Lotus Principle* and the way it operated in the *Kosovo Advisory Opinion*. The *Lotus Principle* essentially entails that as long as a certain course of conduct is not prohibited for states it is permitted, and it promotes a positivist, state-centered and consensualist view of international law. I will argue that the *Principle* has now been detached from its state-centric rationale, and has become applicable to also non-state actors. Possible reasons for the detachment of the *Principle* from its rationale, such as an increased respect for human rights or the right of self-determination, will be assessed.

Apart from examining the *Lotus Principle's* role in the *Kosovo Advisory Opinion*, the thesis also includes a discussion on alternative views of the international legal system, as not consisting only of prohibitions or permissions, but possibly a wider range of categories.

In order to reach the aims presented above, the following questions will be considered:

- What led the Court to conclude that the declaration of independence of Kosovo was not issued in violation of international law?
- What role did state-centrism and the *Lotus Principle* play in the Court's reasoning?
- What would have been the implications of the Court disregarding the *Lotus Principle* and basing its reasoning on a non-binary understanding of international law?

⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (hereinafter *Kosovo Advisory Opinion*).

1.3. Definitions

For the purpose of this thesis, the following meanings of the below concepts are implied if not otherwise stated:

Human rights: The inherent dignity and value of every human being.

Human rights law: The international legal regime geared towards protecting human beings from infringements of their human rights.

Positivism: The idea of law as consisting only of black-letter law created by states or courts, separated from morals and ethics.⁶

Self-determination: The right of a group to determine its own form of governance.⁷

Secession: A type of self-determination entailing the separation of a non-state entity from the sovereign state it was previously part of.⁸

State-centrism: The focus of international law on state's interests as well as the dependency of international law on the consent of states for its creation and function.

State sovereignty: The power of governance within a certain geographic territory.⁹

⁶ Hans J Morgenthau, 'Positivism, functionalism, and international law' (1940) 34 *The American Journal of International Law* 260, p 261.

⁷ Common article 1(1) of the *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 and the *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁸ Marcelo G. Kohen, *Secession: International Law Perspectives* (Cambridge University Press 2006), p 3.

⁹ Daniel Philpott, 'Sovereignty' *The Stanford Encyclopedia of Philosophy* (Summer 2016 edn), Edward N. Zalta (ed), <<https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>> accessed 22 March 2017.

Voluntarism: The idea that the ‘law is equated with the will of the law-maker, who decides upon the content and legal character of a norm.’¹⁰

The *Lotus principle*: A principle of international law entailing that that which is not prohibited for states is permitted.¹¹

1.4. Method and material

The thesis starts off as a review of the Kosovo Advisory Opinion which leads into discussions on the structure and possible evolution of the international legal system.

To provide the background to the issues presented in the thesis, statements and resolutions issued by the UN in relation to the situation in Kosovo between 1999 and 2008 have been relied upon.

Answering the first research question has required a detailed analysis of the Court’s reasoning in the *Kosovo Advisory Opinion*. The wording of the Court, as well as legal scholars’ responses to the *Advisory Opinion* have been considered and synthesized to offer a new interpretation of the motivating factors behind the Court’s reasoning.

The subsequent research question relates to the state-centric tradition behind the *Lotus Principle*. To determine the role of state-centrism and the *Lotus Principle* in the international legal system today, as well as in the *Kosovo Advisory Opinion*, classic legal scholarship (by Lauterpacht, Oppenheim, Stone etc.) has been chosen as the base of my assessment. To show the evolution of international law newer contributions have been relied upon (by Marks, Muharremi, Parlett, Simma etc.).

The final research question is answered through the use of scholarship critical of the international legal system’s construction (Arendt, Koskenniemi) as

¹⁰ Ulrich Fastenrath, 'Relative normativity in international law' (1993) 4 *European Journal of International Law* 305, p 324.

¹¹ Julius Stone, 'Non Liqueet and the Function of Law in the International Community' (1959) 35 *British Yearbook of International Law* 124, p 135.

well as my own reasoning around the limitations of the international legal system as it is perceived today.

1.5. Structure

The thesis consists of three substantive chapters. Chapter 2 provides a brief background to the situation that led to the issuance of the declaration of independence as well as the UN General Assembly's request for an advisory opinion by the ICJ. Chapter 3 focuses on the reasoning of the Court, introducing key concepts such as the *Lotus Principle* and state-centrism. This part also assesses contributions of international legal scholars to the understanding of the *Kosovo Advisory Opinion*. Chapter 4 challenges the Court's use of the *Lotus Principle*, both in terms of problematizing the *Principle* in its original formulation and discussing alternatives to it.

1.6. Delimitations

The *Kosovo Advisory Opinion* raises a number of issues of relevance to international lawyers, among them the implications of a non-state entity as the author of the declaration of independence,¹² the possibility of remedial secession under international law,¹³ and the legality of the declaration of independence under the framework set in place by UN Security Council Resolution 1244.¹⁴ However, due to limitations in time, this thesis will only briefly touch upon these issues and instead focus on the influence of the *Lotus*

¹² See e.g. Andrea Gattini, "You Say You'll Change the Constitution" - The ICJ and Non-State Entities in the Kosovo Advisory Opinion' in Peter Hilpold (ed), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Martinus Nijhoff Publishers 2012).

¹³ See e.g. Alain Pellet, 'Kosovo - The Questions Not Asked: Self-Determination, Secession, and Recognition' in Marko Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015).

¹⁴ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244. See e.g. Christian Pippan, 'The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: An Exercise in the Art of Silence' (2010) 3 *Europäisches Journal für Minderheitenfragen* 145, pp 156-161.

Principle and its underlying rationale state-centrism, on the *Advisory Opinion*.

2. Background to the *Kosovo Advisory Opinion*

2.1. Introduction

As briefly mentioned in the previous chapter, this thesis revolves around the UN General Assembly's request for an advisory opinion concerning the accordance with international law of Kosovo's declaration of independence and the following response from the ICJ. An awareness of the events leading up to the UN General Assembly's request is important in order to understand what was at stake for Serbia, Kosovo and the international community. The following section provides a brief overview of the events leading up to the issuance of the declaration of independence and the subsequent request by the UN General Assembly.

2.2. The issue

On June 10 1999, Kosovo was placed under UN administration through Resolution 1244 of the UN Security Council.¹⁵ This happened in the wake of NATO's so-called humanitarian intervention in Kosovo.¹⁶ The Resolution aimed to establish an 'interim administration for Kosovo' which would 'provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions'.¹⁷ The aim was for the people of Kosovo to 'enjoy substantial autonomy within the Federal Republic of Yugoslavia'.¹⁸

¹⁵ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

¹⁶ The legality of this intervention has been discussed at length by others. See, e.g., Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679, and Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) *The Modern Law Review* 377.

¹⁷ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244, para 10.

¹⁸ *ibid.*

Hopes were high that Kosovo and Serbia under the UN Security Council set-up would reach a working agreement on the territorial status of Kosovo.¹⁹ However, the agreement stalled and in 2005 the UN Secretary-General appointed Martti Ahtisaari as a Special Envoy for the future status process for Kosovo. Ahtisaari oversaw multiple negotiation attempts between Serbia and Kosovo, reporting that the parties were unable to agree on most issues.²⁰ On March 26 2007, Ahtisaari stated that it was clear to him that the parties would not be able to reach an agreement on the future status of Kosovo and that ‘the time ha[d] come to resolve Kosovo’s status’.²¹ He saw independence for Kosovo as the only viable option,²² and proposed that a Constitutional Commission convene to draft a Constitution for Kosovo.²³ Ahtisaari’s conclusions and recommendations were supported by the UN Secretary-General,²⁴ but failed to attract unanimous approval in the Security Council.²⁵ The members of the Assembly of Kosovo were elected later the same year,²⁶ and the Assembly’s inaugural session was held in early 2008.²⁷

¹⁹ Cedric Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Missed Opportunity?' (2010) 57 *Netherlands International Law Review* 481, p 482.

²⁰ Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (5 June 2006) S/2006/361, (1 September 2006) S/2006/707 and (20 November 2006) S/2006/906.

²¹ Letter dated 26 March 2007 March from the Secretary-General addressed to the president of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status (26 March 2007) UN Doc S/2007/168, para 5.

²² *ibid*, paras 3 and 5.

²³ Letter dated 26 March 2007 from the Secretary-General addressed to the president of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, Addendum (26 March 2007) UN Doc S/2007/168/Add.1, article 10(1).

²⁴ Letter dated 26 March 2007 March from the Secretary-General addressed to the president of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status (26 March 2007) UN Doc S/2007/168.

²⁵ See Draft Res sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States (17 July 2007) S/2007/437 Provisional, which was withdrawn 20 July 2007.

²⁶ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (3 January 2008) UN Doc S/2007/768.

²⁷ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (8 March 2008) UN Doc S/2008/211.

On February 17 2008, the Assembly and the Prime Minister of Kosovo adopted the declaration of independence. Its first paragraph reads as follows:

We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state.²⁸

The declaration was immediately denounced by Serbian president Boris Tadić and declared unlawful by the Republic of Serbia.²⁹

Some months later, Serbia was the sole author behind a draft resolution which would later be adopted as Resolution 63/3, requesting the ICJ to declare its position on the accordance with international law of the Kosovar declaration of independence.³⁰

2.3. The question asked

The legal basis of the request for an advisory opinion, as well as the competence of the ICJ, is regulated in the UN Charter³¹ and the ICJ Statute.³² Article 65(1) of the ICJ Statute gives the ICJ the mandate to give advisory opinions on ‘any legal question’ posed by a body authorized to do so by the UN Charter. The UN Charter’s article 96(a) authorizes the UN General Assembly to pose such a request.

It was on these provisions that Serbia based its suggestion to the UN General Assembly for a request for an advisory opinion from the ICJ. Serbia wanted

²⁸ Kosovar Declaration of Independence, 17 Feb 2008, <www.assembly-kosova.org/?cid=2,128,1635> accessed 15 May 2017.

²⁹ UNSC 5839th meeting (18 February 2008) UN Doc S/PV.5839 Provisional, pp 4-6.

³⁰ Draft Res sponsored by Serbia (23 September 2008) UN Doc A/63/L.2, later adopted as UNGA Res 63/3 (8 October 2008) UN Doc A/RES/63/3.

³¹ *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

³² *Statute of the International Court of Justice* (adopted and entered into force 24 October 1945) USTS 993.

the ICJ to respond to ‘whether the unilateral declaration of independence of Kosovo [was] in accordance with international law’.³³

In the discussions leading up to the adoption of the draft resolution, Serbia stressed the need for a non-violent resolution of the issue and expressed hopes of avoiding a ‘deeply problematic precedent’ which the Kosovar declaration of independence might set for other groups harboring ‘secessionist ambitions’.³⁴ Serbia, joined *inter alia* by Romania and the Comoros, was quite certain of what the response to such an ‘amply clear’ question would be. They were expecting the ICJ to affirm their position and condemn the act of the Kosovar parliament as breaching the state sovereignty of Serbia.³⁵

The reactions of other states to Serbia’s proposal were diverse. Some were critical of it, stating that the draft resolution was merely an attempt by Serbia to stall the inevitable process of Kosovar independence.³⁶ Others stressed the inappropriateness of the ICJ pronouncing itself on a question of such a highly political nature, and pointed to the vast number of states already having recognized Kosovo’s statehood.³⁷ Some states instead affirmed the role of the ICJ as the principal judicial organ of the UN and its responsibility to settle legal disputes of international law, as well as the privilege of every state to request advisory opinions on issues of importance to them.³⁸

Despite the diverse reactions, the resolution was adopted by 77 votes to 6, with 74 abstentions,³⁹ and the framing of the question to the ICJ was the same

³³ Draft Res sponsored by Serbia (23 September 2008) UN Doc A/63/L.2.

³⁴ UNGA 22nd plenary meeting (8 October 2008) UN Doc A/63/PV.22, Statement of the Representative of Serbia, p 1.

³⁵ *ibid*, Statements of the Representatives of Serbia, p 2 and Romania and Comoros, pp 9-10.

³⁶ *ibid*, Statement of the Representative of the United Kingdom, p 2.

³⁷ *ibid*, Statements of the Representatives of Albania, p 4 and the United States, p 5.

³⁸ *ibid*, Statements of the Representatives of Egypt, p 7 and Greece, p 8.

³⁹ UN Press Release, ‘Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo’s Independence’ (8 October 2008) UN Doc GA/10764.

as in Serbia's draft: was the 'unilateral declaration of independence of Kosovo (...) in accordance with international law'.⁴⁰

Despite Serbia's conviction that the question was 'amply clear', Serbia and the UN General Assembly have, since the *Advisory Opinion*, been widely criticized in scholarship for the narrowness of the question posed. Theodore Christakis offers an example of a differently phrased question Serbia could have asked:

Did international law give the Provisional Institutions of Self-Government of Kosovo the right to issue a unilateral declaration of independence of Kosovo from Serbia? In this regard, is there a right to self-determination under international law that would give Kosovo the right to unilateral secession from Serbia?⁴¹

This phrasing is similar to what the Canadian Federal Government asked the Supreme Court of Canada with reference to Quebec's secession, to which the Supreme Court replied that there was no legal right to secede unilaterally from a state's territory.⁴² Seeing that it was Serbian territory which was at stake, it is surprising that the question was not drafted more carefully.

⁴⁰ UNGA Res 63/3 (8 October 2008) UN Doc A/RES/63/3.

⁴¹ Theodore Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24 *Leiden Journal of International Law* 73, p 77.

⁴² *Reference by the Governor-General Concerning Certain Questions Relating to the Secession of Quebec from Canada* [1998] 2 SCR 217, para 111.

3. The reasoning of the Court

3.1. Introduction

Chapter 2 has provided the factual background leading to the request from the UN General Assembly, as well as an account of some of the discussions preceding it. It should now be clear to the reader that the stakes were high and hopes were up, especially for the Kosovar people seeking independence and Serbia seeking affirmation of its sovereignty. The following chapter is divided into three sub-sections, each dealing with issues which arguably impacted on the Court's reasoning. First, controversies surrounding the Court's interpretation of the question will be presented, and possible approaches to it. Second, the *Lotus Principle* will be introduced, as well as the state-centric rationale behind it. Finally, the *Lotus Principle's* impact on the Court will be discussed. The aim of this Chapter is to provide an overview of some of the issues raised in relation to the *Kosovo Advisory Opinion*, and in depth present the key considerations behind these issues. This presentation will, in turn, provide the background to alternative approaches to these issues, presented in chapter 4.

3.2. The question answered

3.2.1. Jurisdictional concerns

Some of the initial concerns addressed by the Court in the *Kosovo Advisory Opinion* were of jurisdictional nature. In the drafting of the resolution as well as in the Court proceedings, states had voiced concern about the political nature of the Kosovar situation. The Court affirmed that the question asked was of legal nature since it revolved around the accordancy of an action with international law.⁴³ The argument that its political nature should be decided by domestic law was disregarded since the question referred only to

⁴³ *Kosovo Advisory Opinion*, para 25.

international law.⁴⁴ A question having not just legal, but also political, aspects could not deprive the Court of jurisdiction to advise on the legal matter, and the (possibly political) motives behind the question were not the Court's concern.⁴⁵

Even if the jurisdictional conditions are met the Court is not obliged to give advisory opinions but may exercise discretion.⁴⁶ However, unless there are compelling reasons against it, the Court generally does not refuse to respond to the UN General Assembly's requests for advisory opinions.⁴⁷ Some states argued that the Court's answer in the present case would only come to serve the interests of the state sponsoring the declaration – Serbia – and not the interests of the General Assembly.⁴⁸ However, the Court concluded that an individual state's motives for posing a question were not relevant 'to the Court's exercise of its discretion whether or not to respond', and that it was for the General Assembly to determine whether the request for an advisory opinion from the Court would be of legal value to the General Assembly and useful for 'the proper performance of its functions.'⁴⁹ Consequently, the Court saw no compelling reason to decline answering the question.⁵⁰

After the jurisdictional issues were settled, the Court dove into the more controversial aspects of the Kosovar situation. In the eyes of some, the state sovereignty of Serbia had been breached upon the issuance of the declaration of independence and it was up to the Court to affirm its importance.⁵¹ Others might have been hoping that the time had come for the Court to pronounce itself on the legality of secession, through a human rights-lens focusing on

⁴⁴ *Kosovo Advisory Opinion*, para 26.

⁴⁵ *ibid*, para 27.

⁴⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 44.

⁴⁷ *Kosovo Advisory Opinion*, para 31.

⁴⁸ *ibid*, para 32.

⁴⁹ *ibid*, para 34.

⁵⁰ *ibid*, para 48.

⁵¹ *Kosovo Advisory Opinion* proceedings, Written Statement of Spain, para 55; Written Statement of Russia, paras 76-78 and p 39, para 3.

the Kosovar people.⁵² This and the following chapters will make clear that the Court did not really do either.

3.2.2. The interpretation of the question

One of the disputes surrounding the advisory opinion was over the discrepancy between the question asked and the question answered. The Court started by recalling some previous cases where it had departed from the language of the question asked. It referred to cases where the question was not ‘adequately formulated’, phrased in a way that did not reflect the legal questions really at issue or where it was unclear or vague requiring clarification before answer.⁵³ However, the Court determined the present question to be sufficiently well-formulated and as being clear, narrow and specific enough.⁵⁴

The Court quickly made clear that the legal consequences of the declaration of independence were not asked for. This would exclude the Court from having to comment on Kosovo’s statehood, by arguing that there was a distinction between a declaration of independence and secession.⁵⁵ Instead of discussing the legality of secession, the Court instead focused on the act of declaring independence as a merely declaratory act, that could be considered separately and detached from the declaration’s implications.⁵⁶ In the view of the Court, *declaring independence* from a state was distinct from *seceding* from it.

Legal scholars have placed themselves in two separate camps in the assessment of the Court’s interpretation of the question posed to it. One group criticized the Court’s distinction between declaring independence and secession, arguing that this did not reflect the situation which was referred to

⁵² Thomas Burri, 'The Kosovo opinion and secession: the sounds of silence and missing links' (2010) 11 German Law Journal 881, p 882.

⁵³ *Kosovo Advisory Opinion*, para 50.

⁵⁴ *ibid*, para 51.

⁵⁵ *ibid*.

⁵⁶ *ibid*, para 83.

the Court nor how statehood is usually effected. The other placed the responsibility for the vaguely framed question on the state behind it – Serbia.

The criticism of the first group was aimed both at the Court's interpretation of the question, as well as its application of international law on statehood. This take is exemplified by the following three scholars, all agreeing that the way the Court dealt with the issue of declarations of independence and secession was not in line with either the situation at hand or with international law on the creation of states.

Anne Peters pointed to 'what was really at stake', namely the separation of Kosovo from Serbia's territory and the 'formation of an independent, sovereign state.'⁵⁷ Thomas Burri was of the same opinion, calling the Court's reasoning a defiance of 'common sense' as, in the present case, the declaration of independence was 'the very act that symbolize[d] secession'.⁵⁸ Concerning the creation of states, Robert Muharremi referred to how statehood is usually effected and argued that the Court created an artificial situation where declaring independence constituted an isolated first step to be followed by additional steps to create a new state. This did not reflect how statehood is usually effected and especially not the process of the creation of the state of Kosovo. Muharremi added that the legal question really at issue was whether there existed in international law a prohibition of Kosovo's secession from Serbia.⁵⁹

There were, however, some who argued that the Court answered what it was asked, and instead Serbia was to blame for how the answer to the question turned out. The question should have been framed differently in order to clarify certain issues of international law. Christakis pointed out that it was understandable that the Court chose to limit itself to answering merely what

⁵⁷ Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 *Leiden Journal of International Law* 95, p 96.

⁵⁸ Burri, 'The Kosovo opinion and secession: the sounds of silence and missing links', p 886.

⁵⁹ Robert Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo' (2010) 11 *German Law Journal* 867, pp 873-874.

it was asked and not immerse into questions of secession and statehood.⁶⁰ Jure Vidmar argued along the same lines, if the issues at hand were secession and statehood that should have been reflected in the question.⁶¹ However, despite blaming Serbia for the shortcomings in the Court's reasoning, Vidmar and Christakis seemed to agree with the above mentioned scholars that the really important questions here were, in fact, Kosovo's secession and possible statehood.⁶²

In conclusion of what scholarly opinion has to say on the matter of the interpretation of the question, there seems to be consensus on what the important issues were in relation to Kosovo; secession and statehood. However, opinion differs on who is to blame for the lack of clarification of these issues on behalf of the Court. In my opinion, it is clear that the Court carefully avoided certain questions of politically charged nature by claiming that it was 'not ask[ed] about the legal consequences of that declaration.'⁶³ As Peters, Burri and Muharremi point out, it should have been clear what the legal issue was – the legality of the separation of Kosovo from Serbia. This is in line with the reasoning of Serbia in the Court proceedings, when referring to the possible breach of state sovereignty as a consequence of finding the declaration of independence to be in accordance with international law.⁶⁴ When the Court distinguished between declaring independence and secession, declaring independence became detached from issues of state sovereignty. To me, it seems inconceivable that a declaration of independence should not have implications for the sovereignty of the state from which an entity seeks to declare independence from. If declaring independence were not linked to secession, there would be no sovereignty issue. Perhaps this was

⁶⁰ Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', pp 74-75.

⁶¹ Jure Vidmar, 'The Kosovo Advisory Opinion Scrutinized' (2011) 24 *Leiden Journal of International Law* 355, pp 357, 362.

⁶² Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', pp 75-76; Vidmar, 'The Kosovo Advisory Opinion Scrutinized', pp 357-358.

⁶³ *Kosovo Advisory Opinion*, para 51.

⁶⁴ *Kosovo Advisory Opinion* proceedings, Written Statement of Serbia, para 935.

also clear to the Court, but the risk of entering the politically charged territory of state sovereignty lead it to separate between declaring independence and effecting it. Naturally, Serbia could, and perhaps, should, have phrased the question differently in order to secure the answer it wanted from the Court, or at least an answer discussing the legality of secession. The Court's distinction between declarations of independence and secession did, however, not rhyme well with conventional understandings of the principles of state sovereignty and the creation of statehood.

From the above it can be derived that *how* the Court chose to interpret the question from the UN General Assembly has been met with criticism, and that scholarship is divided in its disapproval of the Court's interpretation. The following will attempt to explain *why* the Court responded as it did.

3.3 The *Lotus Principle* of 1927

In order to explain the Court's reasoning around the question, the *Lotus Principle* must be introduced properly.

The *Lotus Principle* is derived from the *SS Lotus* case, decided in 1927 by the Permanent Court of International Justice (PCIJ).⁶⁵ The case concerned the events following a collision between a French ship – the *SS Lotus*, and the *Boz-Kurt*, a Turkish ship. The French officer of the watch onboard the *SS Lotus* was tried and convicted in criminal proceedings in a Turkish court. France argued that Turkey did not have jurisdiction to arrest and try the French officer and the two states agreed to ask the PCIJ whether international law prohibited Turkey from exercising jurisdiction over the French officer.⁶⁶ The PCIJ found, equally divided but with the President's decisive vote, that since there was no rule in international law precluding Turkish jurisdiction in the matter, Turkey had not violated international law.⁶⁷

⁶⁵ *SS Lotus (France v Turkey)* (Judgment) PCIJ Rep Series A No 10 [1927] (hereinafter *Lotus case*).

⁶⁶ *Lotus case*, pp 10-12.

⁶⁷ *ibid*, p 32.

Although the case was decided 90 years ago, it is still relevant in discussions concerning the content and structure of the international legal system. The most commonly cited part of the *Lotus decision* is the following:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free (...) Restrictions upon the independence of States cannot therefore be presumed (...) Far from laying down a general prohibition (...) [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.⁶⁸

These sentences have been interpreted to imply a presumption of freedom for states to act as they wish, as long as there is no rule prohibiting that act, that is: what is not prohibited is permitted.⁶⁹ This presumption is also called a residual rule, to be applied in the ‘absence of rules or other principles’.⁷⁰ An unregulated issue, a so-called lacuna or legal gap,⁷¹ in the international legal system calls for the application of the residual rule – the *Lotus Principle*. Consequently, under the application of the *Lotus Principle*, an unregulated course of conduct is considered to be not prohibited. And a non-prohibition is an implied permission.

One of the rationales informing the *Lotus Principle* is the idea of the completeness of the law. Hersch Lauterpacht argued that completeness is the ‘positive formulation of the prohibition of *non liquet*’.⁷² *Non liquet* has its origin in Roman law, meaning ‘it is not clear’,⁷³ and its prohibition entails

⁶⁸ *Lotus case*, pp 18-19.

⁶⁹ Stone, 'Non Liqueur and the Function of Law in the International Community', p 135.

⁷⁰ Ole Spiermann, 'Lotus and the Double Structure of International Legal Argument' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999), p 132.

⁷¹ Stone, 'Non Liqueur and the Function of Law in the International Community', p 140-143.

⁷² Hersch Lauterpacht, 'Some Observations on the Prohibition of 'Non Liqueur' and the Completeness of the Law' (1958) *Symbolae Verzijl*, reprinted in Hersch Lauterpacht, *International law: Being the Collected Papers of Hersch Lauterpacht* (E. Lauterpacht (ed), volume 2, Cambridge University Press 1975) p 216.

⁷³ Ulrich Fastenrath and Franziska Knur, 'Non liqueur' Oxford Bibliographies in International Law <www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0130.xml> accessed 4 April 2017.

that courts should not be able to refuse to give a decision due to the absence or vagueness of the law. If a court is prohibited from declining to answer a legal question or situation presented to it with reference to the absence or vagueness of law, the court is forced to develop the law in order to provide an answer or ruling. This makes the legal system complete, according to Lauterpacht, since there will not be an instance where a court declares a situation 'lawless'.⁷⁴ In most domestic legal systems there are rules precluding courts from declaring a *non liquet*,⁷⁵ and instead the courts must find a way to settle the issues before them. It is debated whether there exists a prohibition of *non liquet* in the international legal system. Lauterpacht considered, among other things, article 38 of the Statute of the PCIJ from 1920⁷⁶ (later the Statute of the ICJ⁷⁷) to be indicative of a prohibition of *non liquet*, since its drafters took care to list general principles of law among the sources of international law.⁷⁸ The application of article 38(1)(c) of the ICJ Statute entails that general principles are to be applied by the Court, meaning that areas unregulated in treaties or custom may still be covered by general principles of law. The *Lotus Principle* affirms the idea of the completeness of law, since its application will lead to the absence of a rule being considered a non-prohibition. The absence or vagueness of a rule thus results in a permission to act. Under the *Lotus Principle* an unregulated issue is not a problem since certain conduct being unregulated indicates states' wish to keep that conduct non-prohibited. And non-prohibition, in turn, means permission.

The *Lotus Principle* has been affirmed by the ICJ in its case-law. In 1986, the ICJ stated in the *Nicaragua case* that the only prohibitive rule applicable to a

⁷⁴ Lauterpacht, 'Some Observations on the Prohibition of 'Non Liqueur' and the Completeness of the Law', pp 215-216.

⁷⁵ Fastenrath and Knur, 'Non liquet'.

⁷⁶ *Statute of the PCIJ* (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389.

⁷⁷ *Statute of the ICJ* (adopted and entered into force 24 October 1945) USTS 993.

⁷⁸ Lauterpacht, 'Some Observations on the Prohibition of 'Non Liqueur' and the Completeness of the Law', p 221.

state is that laid down in rules accepted by that state.⁷⁹ In the *Nuclear Weapons Advisory Opinion* something similar was stated in terms of the illegality of a certain conduct being dependent on the formulation of a prohibition.⁸⁰ Whether the Court actually applied the *Lotus Principle* in the latter case is debated,⁸¹ and will be further elaborated on below in chapter 4.

Although the *Lotus Principle* has been readily relied on by the Court, it has also been criticized. Though it seems to confirm Lauterpacht's idea of the international legal system as complete, Lauterpacht criticized the credit given to the *Principle*, claiming it was merely pronounced in dicta by the PCIJ in the *SS Lotus case* and therefore should not be given more weight than it deserved.⁸² The content of the *Principle* has also been discussed. Hugh Handeyside conducted a review in 2007 on the prevalence of the *Lotus Principle* in ICJ jurisprudence and implied that what had actually been taken to be the *Lotus Principle* was a formulation of the majority's opinion in the terms of the dissenters. The dissenters' take on the opinion was that it meant that a state may act as it wishes unless there is a rule under international law precluding that act.⁸³ Handeyside called the dissenters' interpretation of the majority opinion 'somewhat exaggerated' but continued to argue that it had been accepted as the 'accurate expression of the majority position'.⁸⁴ While it might just have been that the *Lotus* majority did not intend to articulate total freedom for states, but instead lifted common aims and co-existence as aims of international law.⁸⁵

⁷⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] Rep 14, para 269.

⁸⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 52.

⁸¹ Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press 2017, pp 89-90.

⁸² Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons 1958), p 361.

⁸³ *Lotus case, Dissenting Opinion of M. Loder*, p 34 and *Dissenting Opinion of M. Weiss*, p 42.

⁸⁴ Hugh Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship ever Afloat?' (2007) 29 Michigan Journal of International Law 71, p 76.

⁸⁵ *ibid.*

The *Lotus decision* has been referred to as a classic example of positivism and voluntarism.⁸⁶ The association of the *Lotus Principle* with positivism relates to the fact that the determination of lawfulness was based only on the absence of prohibitions, presupposing a freedom presumption. Kolb described the rationale behind the *Lotus Principle* as the focus of the international legal order on the primacy of the state and its needs and the idea of the state's unlimited powers which can only be limited by the state's own will.⁸⁷ International law thus only limits states to the extent that they have agreed, voluntarily, to the limitation in the form of a prohibition.

This presentation of the *Lotus Principle* has touched upon two of the rationales that informed it – first, the focus of the international legal system on states and second, the wish to keep the international legal system complete. The following will present the idea of the international legal system as state-centric and how that may have affected the Court's reasoning in the *Kosovo Advisory Opinion*.

3.4. State-centrism

A short introduction to the history of international law as a state-centric legal system will give a background to the *Lotus* reasoning as well as the arguments of several states, including Serbia, concerning the protection of state sovereignty in the *Kosovo Advisory Opinion* proceedings. Following a brief historic overview of state-centric international law, Susan Marks' three different types of criticism of the international legal system as state-centric will be presented and later referred to in chapter 4 when discussing alternative understandings of the *Lotus Principle* and the international legal system.

⁸⁶ Bruno Simma and Andreas L Paulus, 'The responsibility of individuals for human rights abuses in internal conflicts: A positivist view' (1999) 93 *The American Journal of International Law* 302, p 304.

⁸⁷ Robert Kolb, *Theory of International Law* (Hart Publishing 2016), p 217.

3.4.1. Historic overview

In her 2011 monograph, *The Individual in the International Legal System: Continuity and Change in International Law*,⁸⁸ Kate Parlett concisely presents how international law has been described by thinkers from the early 17th century until today and how the state developed to an entity of its own, detached from its rulers or individual members. The following is a condensed version of Parlett's account.

In the early 17th century, Hugo Grotius described a law of nations, or *jus gentium*, applicable between the rulers of states and between rulers and individuals, as well as between individuals.⁸⁹ He did not consider states to have juridical personality under international law.⁹⁰ Martti Koskenniemi called the law of nations an inter-individual law as opposed to inter-state law.⁹¹ The legal basis of the law of nations was natural law, following medieval scholastic thought of natural law applying in all conceivable relations – between individuals as well as rulers.⁹²

A noteworthy change in the conception of international law came some 150 years later, in 1758, when Emer de Vattel separated natural law from the law of nations.⁹³ Vattel conceived of the state as having personality and a will of its own, different from that of its members.⁹⁴ Therefore, the state could be

⁸⁸ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011).

⁸⁹ Hugo Grotius, *The Rights of War and Peace* (first published 1625, Liberty Fund 2005), pp 161-162.

⁹⁰ Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, p 10.

⁹¹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005), p 98.

⁹² Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, p 11.

⁹³ Emer de Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (first published 1758, Liberty Fund 2008), Introduction, p 67.

⁹⁴ Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, pp 11-12.

bound by rules not applicable to the individuals making up the state, rules which regulated the states' rights and obligations. Vattel's idea of state personality had support in writings of Samuel von Pufendorf⁹⁵ and Thomas Hobbes,⁹⁶ although the two latter linked the state's personality to its ruler or sovereign, while Vattel considered the state to *be* that sovereign and its personality not linked to whoever ruled the state at the time.⁹⁷ Consequently, according to Vattel, it was states who created positive international law, not their ruler.⁹⁸ This idea was consistent with the emergence of treaties listing states as their parties.⁹⁹ Though Vattel considered states to be the principal rule-maker, he acknowledged natural law principles to be constantly present, and state-made law as constrained by those principles.¹⁰⁰

In the 19th century, Vattel's conception of the law of nations as state-made but constrained by natural law was replaced by 'an instrumentalist view of the law as servant of the will of states.'¹⁰¹ The law applicable between nations was created strictly by states, following that the only existent rules were those voluntarily agreed to by states. Consequently, natural law was abandoned as a source of law by the most influential writers of the time.¹⁰² The new state focus lead international law to be conceived as applying only to states in their relations to other states and not to, or between, individuals. Obligations towards individuals could only arise in form of obligations to adapt domestic

⁹⁵ Samuel von Pufendorf, *De Jure Naturae et Gentium Libri octo. 2* (transl of the edn of 1688, Clarendon Press 1934), p 1063.

⁹⁶ Thomas Hobbes, *Leviathan* (first published 1651, Cambridge University Press 1996), pp 120-121.

⁹⁷ Vattel, *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Préliminaires, p 1.

⁹⁸ *ibid.*

⁹⁹ Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, p 12.

¹⁰⁰ *ibid.*, p 13.

¹⁰¹ *ibid.*

¹⁰² *ibid.*, pp 13-14.

law to conform with international law.¹⁰³ Rights and duties were, thus, not owed or given to individuals directly under international law.

In the 20th century, the positivist spirit of the 19th century started to be questioned, and it was discussed whether entities other than states could have legal personality in the international legal system. Parlett gives the example of the League of Nations, whose status was never settled but might have been the first non-state entity to be given legal personality.¹⁰⁴ This is exemplified by *Oppenheim's International Law* from 1928 stating that 'international rights and duties can only exist between States, or between the League of Nations and States'.¹⁰⁵

In the late 20th century, the ninth edition of *Oppenheim's International Law* was published.¹⁰⁶ It listed states as the primary subjects of international law but did not exclude that other entities possessing rights, powers and duties under international law may be regarded as subjects possessing international personality.¹⁰⁷ International wrongs were listed as an example, with reference to the Nuremberg trials where individuals were held responsible for crimes against the international community.¹⁰⁸ It was also recognized that individuals could enjoy rights according to international law, but that these rights were most often vested in the state where the individual resided, and it was also that state which could require other states to fulfill the individual's right, not the individual herself.¹⁰⁹

¹⁰³ Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 American Journal of International Law 313, and see Parlett's list of Oppenheim's most relevant points: Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, pp 14-16.

¹⁰⁴ Lassa Oppenheim, *International Law: A Treatise* (4th edn, volume 1: *Peace*, A. McNair (ed), Longmans, Green and Company 1928), p 520.

¹⁰⁵ *ibid.*

¹⁰⁶ Lassa Oppenheim, *Oppenheim's International Law* (9th edn, R. Jennings & A. Watts (eds), Longman 1992) and see Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, pp 27-29 for an overview of relevant points.

¹⁰⁷ Oppenheim, *Oppenheim's International Law* (9th edn), p 16, para 7.

¹⁰⁸ *ibid.*, pp 506-508, para 148.

¹⁰⁹ *ibid.*, pp 846-847, para 374.

This timeline shows the development of international law from being heavily influenced by natural law to the abandonment of the same. The correlating development has been the primacy of the state and its disassociation from the individuals comprising it as well as its current ruler, making way for a state with its own legal personality. Linked to this is the notion of state sovereignty, highly recurrent in discussions on the international legal system and its progression.¹¹⁰ What the historic account shows is that the international legal system is changeable. It becomes clear that the international legal system is not conceived in the same way as it was conceived when the PCIJ issued the *Lotus decision* in 1927. The primacy of the state has come into question by scholars as well as international courts and organizations. Although the focus of the international legal system was for centuries the sovereign state, in the last 100 years a shift can be noticed. International organizations have gained primacy and become influential in the international legal system. The League of Nations might have been the first organization to be recognized as an influential actor in the international legal system, followed by the UN¹¹¹ and the International Committee of the Red Cross.¹¹² In my opinion this indicates a structural shift of the international legal system, and the primacy of states might be coming into question. The knowledge of the changeability of international law is relevant when criticizing the international legal system as being too state-centric, it opens up for alternative interpretations of the aim of the system as well as of principles describing its function – such as the *Lotus Principle*.

¹¹⁰ David W Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 *Transnational Law & Contemporary Problems* 329, p 363; Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, pp 38-39.

¹¹¹ *Reparations for Injuries Suffered in the Services of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, p 179.

¹¹² Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, p 34. For a discussion on the role of the individual in the international legal system, see again Parlett's monograph: Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*.

3.4.2. Arguing state-centrism

The previous section has showed the focus of international law of states. Susan Marks has elaborated on three sets of arguments used to criticize the international legal system as too state-centric.¹¹³ The first criticizes the focus of international law on states as the only subjects in the international legal system. Second brings into question the great influence of state sovereignty in the creation and application of the norms of the international legal system. The third questions international law as a whole, arguing that it is flawed and unable to change into something better. The second and third type of arguments are most relevant for the present thesis topic, in the discussion of the state-centric rationale of the *Lotus Principle*, why they will be briefly presented below.

Marks' second type of state-centrism is linked to state sovereignty as guiding in the making and application of international legal norms.¹¹⁴ Marks exemplifies this type of state-centrism with the search of a balance between human rights and state sovereignty in, for example, humanitarian intervention discourse.¹¹⁵ Marks argues that protection of human rights is being used as an excuse to breach the territorial integrity of a sovereign state, when the true goal is to assert the intervening state's sovereign right to use pre-emptive force. Human rights are used as a false pretext, while the real issue is in fact the pre-emptive protection of the citizens of the own state.¹¹⁶ States thus use international law to avail themselves of the use of the 'supreme expression of sovereign power', which is military force.¹¹⁷

The content and meaning of state sovereignty are debated. An accepted understanding of state sovereignty is requiring 'supreme authority within a

¹¹³ Susan Marks, 'State-centrism, International Law, and the Anxieties of Influence' (2006) 19 *Leiden Journal of International Law* 339.

¹¹⁴ Marks, 'State-centrism, International Law, and the Anxieties of Influence', p 343.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*, p 343-345.

¹¹⁷ *ibid.*, p 345.

territory'.¹¹⁸ Authority entails a right to command and the right to be obeyed, and the rights are derived from a 'mutually acknowledged source of legitimacy', such as a constitution or natural law.¹¹⁹ The authority must also be higher than other authorities of the system, a *supreme* authority. The second part of the definition of sovereignty is territoriality. It is not defined by the identity of those affected but merely by geography. Those within a certain geographic territory make up the sovereign state.¹²⁰

Marks' third discussion revolves around the issues of international law today, and their origin. She asks whether international law could be used to resolve conflicts of legality if only it was adhered to, or, whether the conflicts are instead a *result* of the international legal system. Marks exemplifies this issue with discussing the paradox of a 'system for the constraint of state power which is also a *product* of state power.'¹²¹ The way the United States is distorting human rights law to legitimize Guantánamo prison is an example of that.¹²²

The historic overview above of the state-centric focus of international law has hopefully provided the reader with tools to place the *Lotus decision* in context. The 19th century was marked by positivist ideals and state-focus, and this focus permeated the *Lotus* court. The ideals which prevailed in the *Lotus decision* were those that secured states the freedom to act as they wished, as long as there was no agreement on a prohibition. Although the *Lotus Principle* has been criticized, it has arguably achieved a prominent position in descriptions of the international legal system as well as in case law. According to the accepted reading of the *Lotus Principle*, a state is free to act

¹¹⁸ Daniel Philpott, 'Sovereignty' The Stanford Encyclopedia of Philosophy (Summer 2016 edn), Edward N. Zalta (ed),
<<https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>> accessed 22 March 2017.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ Marks, 'State-centrism, International Law, and the Anxieties of Influence', p 346.

¹²² *ibid.*

as it wishes as long as there is no prohibitive rule,¹²³ and this is the reading which will be discussed in relation to the *Kosovo Advisory Opinion* below.

3.5. The *Lotus Principle* and state-centrism in the *Kosovo Advisory Opinion*

The above Section has attempted to clarify the implications of state-centrism on the international legal system, exemplified by the *Lotus Principle*. The following will relate state-centrism and the *Lotus Principle* to the Court's reasoning in the *Kosovo Advisory Opinion*.

As was discussed in chapter 3.2.2., the Court's interpretation of the question posed to it has been the subject of disagreement. Not only did the Court choose to answer a narrow reading of the question, distinguishing declarations of independence from secession, it also rephrased the question in a manner seemingly coinciding with the *Lotus Principle*. The following excerpt from the advisory opinion serves as an illustration:

[T]he 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** (...) It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law.¹²⁴

The Court seemed to reason that in order to determine whether an act was permitted under international law it had to be determined whether the given course of conduct violated a prohibitive norm of international law. If there was no prohibitive norm to be violated, the conduct was permitted, in line with the *Lotus Principle*.

The Court did not find a prohibitive rule in international law against issuing a unilateral declaration of independence and, thus, determined the declaration

¹²³ Stone, 'Non Liqueur and the Function of Law in the International Community', p 135.

¹²⁴ *Kosovo Advisory Opinion*, para 56 [my emphasis].

of independence not to be in violation of international law.¹²⁵ In my opinion, when the Court held the negative answer – the non-violation of international law – to be an answer corresponding to the positively framed question – the accordance of the declaration of independence with international law – it resorted to the *Lotus Principle*. The Court equated non-violation with accordance. Judge Simma, though part of the majority, argued that the Court’s re-formulation of the question and application of the *Lotus principle* indicated that the Court adopted a traditional positivist approach to international law as essentially consisting of agreed-upon prohibitions on states.¹²⁶ The unregulated areas were, thus, not prohibited and consequently, permitted. According to Simma, the Court’s reasoning ‘reflect[ed] an old, tired view of international law’ geared towards state-centrism, which would have benefitted from a more thorough evaluation of prohibitive and permissive rules regarding declarations of independence and secession.¹²⁷

However, even though the Court might have adopted ‘an old, tired view of international law’ in certain aspects of its reasoning, it can also be argued that the finding to the advantage of the Kosovar non-state entity reflects a modern understanding of the international legal system, heavily influenced by other values than state sovereignty.

To conclude, on the one hand the Court, in its application of the *Lotus Principle*, divided international law into prohibited and non-prohibited acts. This reflects the positivist voluntarist approach to the international legal system, as developed in the 18th century, consisting only of state-constructed prohibitions. On the other hand, the Court found for the people that made up the (then) *non-state* Kosovar entity, a finding which, must have been clear to the Court, could infringe on Serbia’s territory and sovereignty. This does not reflect the strictly state-centric international law as described by scholars. Instead, it indicates that values other than state sovereignty were guiding the Court’s reasoning in this situation. The discrepancy between the Court’s

¹²⁵ *Kosovo Advisory Opinion*, para 84.

¹²⁶ *Kosovo Advisory Opinion, Declaration of Simma*, paras 2-3.

¹²⁷ *ibid.*

method of reasoning around the question posed to it (the application of the *Lotus Principle*) and the finding of the unilateral declaration not being in violation of international law (to the detriment of a sovereign state) will be discussed in more detail in chapter 4.

4. Alternative reasoning

4.1. Introduction

The previous chapters have presented some of the issues raised by the *Kosovo Advisory Opinion*, with focus on the state-centric structure of international law and the application of the *Lotus Principle*. This chapter will further problematize these issues, and offer alternative interpretations of the aim of the international legal system as well as question the binary understanding of international law as embodied in the *Lotus Principle*. It will be argued that international law is evolving from its state-centric focus and that this influenced the Court in its reasoning in the *Kosovo Advisory Opinion* and its application of the *Lotus Principle*.

Chapter 4.2. will interpret the *Lotus Principle* in light of modern day arguments against state-centrism and conclude that the manner in which the Court applied the *Lotus Principle* in the *Kosovo Advisory Opinion* is an example of the evolution of the *Lotus Principle* as well as international law. It will be argued that the Court did apply the *Lotus Principle*, but a version of the *Principle* which had become detached from the state-centric rationale that informed it. Alternative rationales will be introduced in the form of self-determination or human rights.

Chapter 4.3. will discuss the Court's state-centric tendencies in its binary approach to the international legal system as consisting only of prohibited or permitted acts, and discuss an alternative understanding of international law as consisting of a range of acts.

4.2. The *Lotus Principle* post-state-centrism

A majority of scholars agreed on the Court's turn to the *Lotus Principle* in the *Kosovo Advisory Opinion*. As established above, the accepted reading of the

Lotus Principle is the assertion of states' freedom to act as long as there is no prohibitive rule.¹²⁸ This is in line with the state-centric international legal tradition as well as the principle of state sovereignty which entails that 'a state cannot be legally bound without its consent.'¹²⁹ However, there are also scholars arguing that the Court did in fact *not* apply the *Lotus Principle* in the *Kosovo Advisory Opinion*.¹³⁰ The *Lotus Principle* was formulated by the PCIJ during a time when the state was considered to be the only actor in the international legal system why the system was created and applied to uphold the state's primacy. Christakis pointed out that the *Lotus Principle* always protects state sovereignty why the Court could not have applied it in the *Kosovo Advisory Opinion*, since its application there would have been to the detriment of a sovereign state.¹³¹ The *Principle* is only to be used in inter-state relations, and impossibly in favor of a non-state actor. Alternatively, had the Court in the *Kosovo Advisory Opinion* been true to the original formulation and meaning of *the Lotus Principle*, it would have had to consider both the fact that the *Principle* permitted states to act as they wished unless there existed an express prohibition, *as well as* the state-centric context the *Principle* was originally presented in. Agreeing with Christakis, I consider the Court's application of the *Lotus Principle* not to be in line with the original *Principle* formulated by the PCIJ in 1927. However, as opposed to Christakis, I do think the *Principle* was applied by the Court, just not in its original meaning.

What is curious about the Court's application of the *Lotus Principle*, is that the *Principle* had previously been interpreted as promoting *states'* freedom to act as long as they were not prohibited from doing so. But the actor behind the declaration of independence in the case of Kosovo was not yet a state. Despite that, the Court seemingly applied the *Lotus Principle* when

¹²⁸ Stone, 'Non Liqueur and the Function of Law in the International Community', p 135.

¹²⁹ Hans Kelsen, *Principles of International Law* (2nd edn, R. Tucker (ed), Holt, Rinehart and Winston 1966), p 487.

¹³⁰ Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?', pp 79-80.

¹³¹ *ibid*, p 79.

determining the accordance of the declaration of independence with international law in that it searched for a prohibition to determine the prevalence of a permission. This seems to suggest an extended interpretation of the *Lotus Principle*, applying also to non-state entities. Muharremi argued that the *Lotus Principle* might have been extended, applying not only to states but also to ‘states in *statu nascendi*’, and that this application would be based in the exercise of peoples’ right to self-determination or in the principle of effectiveness.¹³² This argument can be positioned in Susan Marks’ second type of arguments, linked to the criticism of the prominent position of state sovereignty in the international legal system. Muharremi seems to suggest that state sovereignty must be weighed against peoples’ right to self-determination, and that the value of state sovereignty might have to give way to other values, namely the self-determination of peoples. To try and position self-determination into the matrix of the *Lotus Principle* would mean replacing the rationale behind it. If state-centrism was previously the driving force of the *Lotus Principle*, a new version of it might take into account self-determination or other values *as well or instead*.

Muharremi’s suggestion is one way of explaining the Court’s pro-non-state entity application of the *Lotus Principle*. Alex Mills also argued that the Court took a step away from state-centrism in the mere allowance of the question to be discussed in an advisory opinion. The question did not concern the act of a state or the statehood of Kosovo, ‘but only the (...) actions of a group of individuals entirely within a single territory’.¹³³ That it was an issue considered to be of relevance to the Court can be an indication of the Court’s view of the international legal system as less state-centric than before.

¹³² Muharremi, ‘A Note on the ICJ Advisory Opinion on Kosovo’, p 876.

¹³³ Alex Mills, ‘The Kosovo Advisory Opinion: If You Don’t Have Anything Constructive to Say...?’ (2011) 70 *The Cambridge Law Journal* 1, p 4.

The following will assess a possible evolution of the *Lotus Principle* away from its state-centric rationale, starting with the *Principle's* formulation in the *Lotus decision* from 1927.

International law governs relations between independent States.¹³⁴

This is clearly still an accurate statement of the function of the international legal system. However, it is arguably not the only function of the international legal system. As presented above in the historic overview, international law has since the *Lotus decision* in the early 20th century evolved. States are no longer considered to be the only subjects of international law. Thus, it must follow that international law governs *not only* relations between independent states. Human rights law has placed upon states duties owed to individuals within the territory of the state. Individuals can come under international criminal liability in international criminal law. The ambit of international law has come to encompass more than the regulation of state conduct in relation to other states.

Apart from pronouncing itself on the function of the international legal system, the PCIJ in the *Lotus decision* continued to assert the voluntary nature of regulations of state conduct, as well as a presumption against prohibitions:

The rules of law binding upon States therefore emanate from their own free will. (...) Restrictions upon the independence of States cannot therefore be presumed (...) Far from laying down a general prohibition (...) [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.¹³⁵

This excerpt from the *Lotus decision* makes quite clear that the PCIJ's motives behind it were geared towards the protection of states and their freedom to act. Again, placing the *Lotus decision* in context takes us back to the peak of a state-centric era with state sovereignty as the means and end of the international legal system. States were detached from the individuals

¹³⁴ *Lotus case*, p 18.

¹³⁵ *ibid*, pp 18-19.

comprising or ruling them, in a Vattelian manner, with legal personality of their own. However, when considering the Court's application of the *Lotus Principle* in the *Kosovo Advisory Opinion* 80 years after the *Lotus decision*, there seems to have been a shift from the state-centric, state-protective rationale.

The following will discuss what values, if not state-centrism, might have guided the Court in the *Kosovo Advisory Opinion*. As Muharremi suggested, briefly presented above, self-determination and the principle of effectiveness prevailed over state sovereignty in the Court's application of the *Lotus Principle*. This could be a correct interpretation of the Court's reasoning, however it is not what the Court expressly purported to do. In fact, the Court clearly stated that the issue before it, the issuance of a declaration of independence, was not necessarily linked to the exercise of a right (such as self-determination).¹³⁶ So, according to the Court, self-determination, or any right derived from it, was not relevant in the present case. But still, the *Lotus Principle* was applied in favor of a non-state entity to the detriment of a sovereign state. It should be noted that this statement presupposes that a state's primary concern and goal is to maintain its stability and sovereign territory. It could, however, also be argued that the primary goal of a state should be the welfare of its inhabitants, and if a group is not treated well (such as the Kosovar people), the state should do everything in its power to make sure that the group of people are treated fairly, even if it means giving up part of its territory. However, this has not been the prevailing understanding of statehood and its goals. Instead, the preservation of power and territory have been the primary concerns of states since the birth of the nation state. Perhaps international law came to govern primarily the relation between states precisely for this reason, to stabilize the fight for power and territory. There are scholars arguing, among them Muharremi, that international law is, or could be, much more than just state-made state-constraint. Howse and Teitel argue along the lines of Marks' first and second critiques of state-centrism in international law, highlighting the importance of individuals, as well as

¹³⁶ *Kosovo Advisory Opinion*, para 56.

peoples, as autonomous actors in the international legal system.¹³⁷ Self-determination, the right of a group not comprising a state, could be an alternative value to state sovereignty in the application of the *Lotus Principle*.

The right of peoples to self-determination developed into a legal norm in the 1960s and 70s. European colonial rule had lost its legitimacy and independence was granted to post-colonies.¹³⁸ Self-determination has various different aspects and most relevant for this thesis is its link to secession. Secession is one form of self-determination.¹³⁹ The international legal community, however, took care to limit secession to situations of decolonization.¹⁴⁰ It was later questioned why comparable situations were treated differently depending on the source of oppression – a foreign ruler (such as the European colonizers) or a ruler within the state (as in Yugoslavia).¹⁴¹ Still today, there is wide opposition against secession,¹⁴² and when a state in certain instances recognizes statehood in a seceding entity it is often referred to as a *sui generis* case, meaning that the circumstances in the specific situation warrant recognition, but that they do not set a precedent for future claims of independence.¹⁴³

Self-determination could be used as an alternative rationale to state sovereignty in instances of application of the *Lotus Principle*. Self-determination has been used before to limit state sovereignty (for example in the decolonization processes of the 60s and 70s) and it challenges the state-

¹³⁷ Robert Howse and Ruti Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo' (2010) 11 *German Law Journal* 841, p 845.

¹³⁸ Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241, pp 241-242.

¹³⁹ Kohen, *Secession: International Law Perspectives*, p 1.

¹⁴⁰ Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', pp 241-242.

¹⁴¹ *ibid*, pp 242-243.

¹⁴² Christian Tomuschat, 'Secession and Self-Determination' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press 2006), pp 29-37.

¹⁴³ Statement of Secretary of State Condoleezza Rice, 'U.S. Recognizes Kosovo as Independent State' 18 February 2008 <2001-2009.state.gov/secretary/rm/2008/02/100973.htm> accessed 9 May 2017.

centric focus of international law. However, claiming self-determination as a basis for secession also feeds into the state-centric understanding of the international legal order. The whole concept of statehood does. Self-determination related to statehood revolves around granting a group of people in a territory the right to be considered a sovereign state. And in a state-centric legal order, that is the ultimate achievement. The issue of self-determination being used against the legal system that it is essentially a part of falls within Marks' third type of criticism of state-centrism. She describes the paradox of using the legal system to constrain state power, when state power is a result of that same legal system. Using self-determination – a product of the legal system – to replace state sovereignty risks feeding into the already state-centered legal system. It might help develop international law into a less state-centric system, but it will hardly revolutionize it.

Another alternative rationale to state sovereignty is human rights. Hannah Arendt noted a shift in the conception of law with the French *Declaration of the Rights of Man and of the Citizen* from 1789,¹⁴⁴ placing man as the source of law instead of God or tradition.¹⁴⁵ To be noted is the basis of human rights in human beings, without the involvement of an authority to assure them.¹⁴⁶ The missing link to an authority is important when discussing human rights as a possible alternative to state sovereignty, the authority being, for example, a state. On the one hand, the fact that human rights evolved without being dependent on state involvement speaks for it being a strong contender to state sovereignty as a guiding value behind the *Lotus Principle*. On the other hand, however, instead of human rights staying away from state-centric international law, it adapted to it. States are now the prime guarantors of human rights. Human rights may be 'natural, unalienable, and sacred'¹⁴⁷ but they are still only enjoyed by persons with a sufficiently strong connection to a state. Arendt identified 'a right to have rights', which is strongly linked to

¹⁴⁴ *Declaration of the Rights of Man and the Citizen*, France 26 August 1789.

¹⁴⁵ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973), p 290.

¹⁴⁶ *ibid*, p 291.

¹⁴⁷ *Declaration of the Rights of Man and the Citizen*, 26 August 1789, Preamble.

belonging to a community which can ensure rights protection.¹⁴⁸ Once an individual loses the tie to that community, as the Jews in Nazi-Germany, she is suddenly deprived of what we know as human rights. Her inherent dignity is not enough to secure her right to life. Perhaps human rights could have developed in a different direction, and really been inalienable and inherent in every human being. But in a state-centric international legal system it is difficult to grasp what an international human rights regime would look like without the state-connection. Even though the French considered the human to be the basis of law, the way the international legal system functions the states are the main duty and rights-bearers.

Returning to the *Lotus Principle*, despite human rights enforcement's strong link to the state, I believe it can be used to tip the scale against state sovereignty in certain situations. Secession could be legal in situations of grave human rights violations, as argued by for example Marc Weller.¹⁴⁹ In such a situation human rights would weigh heavier than state sovereignty, for example leaving a court to declare secession non-prohibited in certain situations. However, as with self-determination, which in some instances – for example secession – is inherently linked to statehood, human rights has also become part of the state-centric international legal system. It is hard to challenge a system (international law) with the tools provided by that same system (human rights).

Giving alternatives to state-centric international law is not difficult. Howse and Teitel stress the normative effect of international law, not just through hard law but also soft law and guidelines which aim to direct the conduct of states in certain directions, many times away from sovereignty values and instead towards principles of human rights.¹⁵⁰ Muharremi cites *jus cogens* norms as indicative of a less state-centric legal system, which states are bound

¹⁴⁸ Arendt, *The Origins of Totalitarianism*, p 297.

¹⁴⁹ Marc Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion' in Marko Milanovic and M. C. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015), p 198.

¹⁵⁰ Howse and Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by Its Ruling on Kosovo' p 844.

by without having consented to.¹⁵¹ He refers to shifts in the structure of the international legal system, giving the example of self-determination which is built up on entitlements and rights, as opposed to the traditional positivist approach which requires a correlating prohibition.¹⁵² However, these arguments are difficult to link to the Court's reasoning in Kosovo. Though it seems that self-determination was in fact a value considered by the Court and weighed against the sovereignty of Serbia, the Court claims that this was not the case. According to the Court, the question concerned the prevalence of a prohibition on the issuance of unilateral declarations of independence, and not the finding of any right to issue such a declaration. It is imaginable that human rights could have played a role in the Court's reasoning around the situation, as the issue was raised by multiple states as a reason for secession both in the proceedings and in relation to the recognition of Kosovar statehood following the *Advisory Opinion*.¹⁵³ However, human rights violations as a basis for the non-prohibition on declarations of independence are not mentioned in the *Advisory Opinion*, so trying to link the Court's reasoning to that is also fruitless.

The Court chose to focus on finding a prohibition against unilateral declarations of independence. It could have focused on finding a permission, in the form of a right, instead, or taken the position that the non-existence of either a prohibition or a permission did not necessarily mean the opposite. The search for a permission, instead of a prohibition, could have lead the Court to discuss the Kosovar peoples' right to self-determination and secession. It is possible that the Court, constrained by state-centric legal tradition, did not want to approach an issue that could have led it having to

¹⁵¹ Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', p 875.

¹⁵² *ibid.*

¹⁵³ See e.g. Written Statements in the *Kosovo Advisory Opinion* proceedings highlighting human rights abuse in Kosovo: Written Statement of the United Kingdom, e.g. p 6, pp 35-41, pp 122 ff. On the possible right to secession in cases of grave human rights violations: Written Statement of Switzerland, e.g. pp 8-9, pp 15-16. See reference to ethnic cleansing and crimes against civilians in Statement of US Secretary of State Condoleezza Rice, 'U.S. Recognizes Kosovo as Independent State' 18 February 2008 <2001-2009.state.gov/secretary/rm/2008/02/100973.htm> accessed 9 May 2017.

take a stand against state sovereignty, for example stating that secession could be legal in instances of grave human rights violations on part of the state from which an entity seeks to secede. Instead, the Court chose to focus only on declarations of independence as something distinct from effecting independence.

In my opinion, the *Kosovo Advisory Opinion* is a good example of how the international legal system is experiencing a structural shift. The positivist legal tradition revolving around states' freedom has become gradually limited by demands for a more encompassing legal system. From international organizations becoming important actors in the field of international law (the League of Nations, UN, ICRC), also individuals have been considered subjects of international law – subjects in the sense of entities with the capabilities to have rights and duties under international law. When subjectivity is extended, the creation and applicability of law must follow. Demands from individuals and groups of individuals, such as in the case of the declaration of independence of Kosovo, must be factored in. In the Kosovo situation, state sovereignty met a demand for independence. And instead of limiting itself to the state-centric legal tradition – reflected in the original meaning of the *Lotus Principle* which would have meant affirming state sovereignty – the Court developed the *Lotus Principle* to encompass the act of a non-state entity.

To conclude, even though the Court arguably pronounced itself against the sovereignty of Serbia, it is unclear what brought it to do so. As I argue above, the findings of the Court indicated a move from state-centrism, however, it was a small one. The Court could have taken the chance to declare its position on secession by holding, for example, that secession could be legal following grave human rights violations, as suggested by Weller.¹⁵⁴ That would have tipped the scale in favor of self-determination over state sovereignty in the present case. In my opinion, the Court could have discussed self-

¹⁵⁴ Weller, 'The Sounds of Silence: Making Sense of the Supposed Gaps in the Kosovo Opinion', p 198.

determination and secession and not merely the non-existence of a prohibition on declarations of independence. The Court did show tendencies towards moving beyond the state-centric tradition of international law in its progressive application of the *Lotus Principle*, however, it could have been even more progressive in a discussion on possible rights related to declarations of independence. But that would have meant answering a different question than the one it was asked.

4.3. Non-binary international law

In the previous section, alternative interpretations of the *Lotus Principle* were presented, not limited to promoting state freedom but considering other values such as self-determination and human rights. The present section will instead question the *Lotus Principle* as affirming the binary nature of international law and argue that there could be other legal classifications of acts that transcend the categories of permitted and prohibited.

Judge Simma, though part of the majority in the *Kosovo Advisory Opinion*, stated in his declaration that the Court failed to take into account the evolution of international law when it applied the *Lotus Principle* and divided international law into prohibited and permitted acts. He questioned the reliance on the binary understanding of international law, stating that the Court in that way excluded a discussion on ‘possible degrees of non-prohibition’.¹⁵⁵ Instead, the Court approached the question ‘in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent.’¹⁵⁶ Simma argued that international law perhaps may not only consist of prohibited and non-prohibited acts, but instead there might be a range of categorizations.¹⁵⁷

As was presented in the historic overview of international law as a state-centric system, the international legal system is built around states. This has

¹⁵⁵ *Kosovo Advisory Opinion, Declaration of Simma*, para 8.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

influenced the development and application of international law. The residual rule – the *Lotus Principle* – traditionally made sure that all non-regulation worked in favor of the state, since non-regulations or non-prohibitions implied a permission for the state to act as it wished. If states had wanted otherwise, that action would have been expressly prohibited by the states. The Court in the *Kosovo Advisory Opinion*, though finding for a non-state entity, thus upheld the state-centric focus of the international legal system when dividing international law into prohibited and permitted acts since that feeds into the freedom presumption for states. An alternative approach, as raised by Simma and others,¹⁵⁸ would not limit international law to a binary positivist system, but instead be open to a variety of classifications.

This approach to international law should not be completely foreign to the Court. In the *Nuclear Weapons Advisory Opinion* from 1996, the Court had to answer whether ‘the threat or use of nuclear weapons [could] in any circumstance [be] permitted under international law’.¹⁵⁹ The Court found that there was no ‘specific prohibition’ against the threat or use of nuclear weapons neither in custom nor in conventional international law.¹⁶⁰ A lack of prohibition would, under an application of the *Lotus Principle*, have meant that the specific conduct was permitted, since an unregulated or non-prohibited course of conduct implies a permission for states to act. However, the Court still went on to declare that the use of such weapons ‘would generally be contrary to the rules of international law applicable in armed conflict’.¹⁶¹ In spite of that, the final conclusion of the Court was that it *could not conclude definitely* on ‘the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.’¹⁶² The reasoning of the Court did seem to

¹⁵⁸ Peters, ‘Does Kosovo Lie in the Lotus-Land of Freedom?’, p 99; Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014), p 265.

¹⁵⁹ *Legality of the Threat or Use of Nuclear Weapons*, para 1.

¹⁶⁰ *ibid*, paras 57 and 105(2)(B).

¹⁶¹ *ibid*, para 105(2)(E).

¹⁶² *ibid*, para 97.

depart from the *Lotus Principle* in that the Court appeared to prefer not limiting itself to prohibitions and permissions. Instead, it presented a conditioned permission, dependent on the survival of the state. This could be viewed as a departure from the *Lotus Principle*, as is the opinion of, for example, Valentin Jeutner.¹⁶³ Jeutner argues that the threat or use of nuclear weapons could have been both illegal and legal at the same time, leading to a conflict of norms he calls a legal dilemma.¹⁶⁴

Koskenniemi exemplifies another aspect of the binary structure of international law and its state-centric focus with what he calls the ‘battle’ of the ‘legal mind’.¹⁶⁵ He argues that the international lawyer is constantly trying to affirm the independence of international law from international politics by ensuring on the one hand the normativity of the law, and on the other hand its concreteness. The normative aspect is derived from a natural morality which distances itself from the will and interest of the state. Concreteness, on the other hand, refers to the rules which correspond to state behavior and are linear to state will.¹⁶⁶ In order to be taken seriously, international law must be both normative and concrete, according to Koskenniemi. Merely concreteness, without normative aspects, transforms law into politics, completely lacking normative aspirations. Normativity without concreteness, however, will result in toothlessness and a lack of justification.¹⁶⁷ International law oscillates between the two, there is no formula providing the perfect blend. The binary understanding of international law speaks against the existence of such a formula since it does not compromise. It will have one or the other.

¹⁶³ Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*, pp 88-90.

¹⁶⁴ Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*.

¹⁶⁵ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, p 17.

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*, p 17-18.

Lauterpacht, as mentioned above, argued for the completeness of the international legal system.¹⁶⁸ There were no gaps in the international legal system since a gap (a non-regulation) would correspond to a non-prohibition, which in turn signaled a permission. The alternative to completeness would be incompleteness, where a gap in the form of an unregulated issue would not need to be filled by a correlating permission. Instead, a gap could signal a deliberate silence by states on a certain matter.¹⁶⁹

To question the binary understanding of the international legal system is to challenge that a non-regulation, a gap, needs to be filled by a correlating permission. The *Lotus Principle* will fill any gaps: a non-regulation, in other words a non-prohibition, implies a permission. An alternative approach would be that a gap in the legal system might be intended or voluntary, and that it can be resolved in an alternative fashion. Simma suggests the existence of a 'concept of toleration'; a degree of non-prohibition.¹⁷⁰ Instead of declaring all which is not prohibited permitted, an unregulated act could come in different shapes. A tolerated act would be one, a neutral act perhaps another.¹⁷¹ A multiplicity of categories would thus disrupt the link between non-prohibition and permission. In the *Nuclear Weapons Advisory Opinion*, instead of the Court finding both a prohibition and a permission – leading to a legal dilemma – it could have found that the threat or use of nuclear weapons was neither prohibited, nor permitted, but something in between.

The *Lotus Principle* has been used to assess the legality or illegality of an act. It simplifies the process of identifying the legality of an act. An unregulated or non-prohibited act is by default permitted with the process ending there, as in the *Kosovo Advisory Opinion*. If, however, a non-prohibition would not automatically entail a permission, the process would require a further

¹⁶⁸ Lauterpacht, 'Some Observations on the Prohibition of 'Non Liquef' and the Completeness of the Law', p 216.

¹⁶⁹ *Kosovo Advisory Opinion, Declaration of Simma*, para 9.

¹⁷⁰ *ibid*, para 8.

¹⁷¹ Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*, p 40.

evaluation of the degree of non-prohibition of an act. There could be degrees of non-prohibition and perhaps degrees of permission, with each categorization requiring individual assessment. This links to Koskenniemi's account of the oscillation of international law between normativity and concreteness and the struggle of finding the perfect formula. Toleration and other classes of acts could provide at least a conceptual tool to transcend the binary nature of international law's struggle between normativity and concreteness.

In my opinion, the *Kosovo Advisory Opinion* contained an element of struggle between two opposing values, state sovereignty on the one hand and self-determination or secession on the other, which the Court did not address. The Court could avoid that struggle by detaching the act of declaring independence from effecting secession. In this way, the Court did not have to discuss possible effects on the sovereignty of Serbia, even though an infringement on Serbia's sovereignty was the logical consequence of the declaration of independence not being prohibited. If the Court had not made the distinction between declaring independence and effecting secession, it would have had to discuss the rights attached to secession, as well as the impact of the enjoyment of those rights on state sovereignty. That, again, collides with the binary nature of international law. Under the prevailing binary understanding of international law there would have been no leeway to weigh human rights against state sovereignty in an attempt to declare secession in the present situation legal. A possible limitation of state sovereignty due to human rights abuse or the enjoyment of rights derived from self-determination would lead to having to find a middle way, or stable ground, between the opposing values, and would detach from the *Lotus-binary*.

Alternatively, had the Court found the declaration of independence to be prohibited under international law, toleration could have been used to soften the effects of the prohibited act. Perhaps the act was prohibited, but tolerated by the international community. As mentioned above, had the Court linked the declaration of independence to secession it might have found that

secession was prohibited, just like Serbia was hoping for when phrasing the question to the Court. Instead, the Court distinguished between declaring independence and effecting it (in form of secession) which lead to the prohibited act – secession – not being commented on. Though the Court did not expressly legitimate Kosovar secession from Serbia, the *Advisory Opinion* had a legitimizing effect on that act as well. Despite international law being unclear on the legality of secession apart from instances of decolonization, 113 states have recognized the independence of Kosovo from Serbia.¹⁷² This indicates that secession might have been prohibited, but that it was still tolerated in this instance. Muharremi links recognition of statehood in cases of prohibited secession to the principle of effectiveness – whether a state has succeeded in reaching statehood in the eyes of the international community.¹⁷³ The mitigating factor could also be the level of human rights abuse which elevate the prohibited act – secession – to a tolerated act.

Perhaps the legal system must not revolve around twos; permission or prohibition, normativity or concreteness, completeness or incompleteness. It can be more fluent and open to adaptation. But this could also involve a risk. Koskenniemi's concern is that international law loses its legitimacy if it adapts too much to the will and interest of states, it becomes too linear to international politics. But the link to states is also what makes the state-dependent international law of today concrete. The introduction of middle ways and ranges of classes of acts might risk the foreseeability provided by states and the established mode of creation and function of the international legal system. In my opinion, introducing various classes of acts lessens foreseeability in that the assessment of an act will always be dependent on the specific circumstances, as it is in every case, but the outcome will not be limited to two – legal or illegal. Instead there might be a multitude of possible outcomes. The legality of an act would be difficult to assess beforehand.

¹⁷² Republic of Kosovo, Ministry of Foreign Affairs 'International Recognitions of the Republic of Kosovo' <www.mfa-ks.net/?page=2,224> accessed 9 May 2017.

¹⁷³ Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', p 880.

5. Concluding remarks

This thesis has attempted to decipher some of the ideas underlying the reasoning of the Court in the *Kosovo Advisory Opinion*, and offer alternative approaches to some of the tasks the Court was faced with.

In chapter 3 it was argued that the Court's answer to the request by the UN General Assembly was informed by the *Lotus Principle*, in that the Court equated a non-prohibition with a permission. However, the reasoning of the Court reflected an evolved approach to the *Lotus Principle*, in that it was not used in favor of state sovereignty, but instead it led to the promotion of Kosovar independence from Serbia.

The new approach to the *Lotus Principle* was further discussed in chapter 4, where I claim that the Court's reasoning might have been informed by the development of the international legal system into a less state-centric system, where individuals and organizations are gaining prominence. Along with individuals becoming actors in the international legal field, calls for human rights and self-determination are increasingly adhered to. Though not stated so by the Court, I believe these were the values behind the Court's application of the *Lotus Principle* to the detriment of a sovereign state.

In the final section of chapter 4, it was argued that the view of the international legal system as binary – consisting of only prohibitions or permissions – is outdated. There may be ranges of classifications of acts which disrupt the *Lotus-link* between non-prohibitions and permissions. The idea of international law containing degrees of prohibitions or permissions could shift the focus of international law from the will of states to a more-encompassing system, where rules have an increasingly normative effect on the acts of states and others. This could have been the outcome of the Court linking the declaration of independence to the act of secession, instead of detaching the two, leading to a discussion on the status of secession in international law.

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