

Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Advisory Opinion of 22 July 2010, General List No. 141

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Introduction

On 22 July 2010, the International Court of Justice (‘ICJ’) gave its Advisory Opinion on the question of the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*. The advisory opinion had been requested by the UN General Assembly on 8 October 2008 following Kosovo’s Declaration of Independence on 17 February 2008. The judgment was narrow in scope, focusing principally on whether the Declaration was prohibited by either general international law, or the *lex specialis* of the UN Security Council (‘UNSC’) Resolution 1244. The Opinion did not address the issue of sovereignty, territorial integrity or declarations of independence in any further detail; in particular the Court remained silent on whether there exists an entitlement to independence when certain conditions are met. In a somewhat controversial move, the Court provided an opinion as to whether the authors of the Declaration were acting in the capacity of members of the Provisional Institutions of Self-Government of Kosovo, as was assumed by the General Assembly, or in some alternative capacity as the representatives of the people of Kosovo.

The Court was of the opinion that Kosovo had not breached any international law; however, the judgement was far from unanimous. There was dissent on both the question of jurisdiction and the final opinion, with four judges dissenting on the substantive elements of the final opinion, and dissenting opinions, separate opinion and declarations from nine of the fourteen judges.

I. Background

On 17 February 2008, Kosovo unilaterally declared its independence from the Republic of Serbia. Under the Yugoslav constitution, Kosovo had been an autonomous province from 1974 until 1989, when it was stripped of its autonomy by then President Slobodan Milosevic. In 1999, violence between Kosovo liberation fighters and Serbian forces escalated, leading to NATO air strikes in Kosovo and Serbia, driving Serbian forces out of the Kosovo region.

In attempting to diffuse the Kosovo crisis, the UNSC passed Resolution 1244, implementing UN control of the Kosovo region through the UN Interim Administration

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in Kosovo ('UNMIK'). The intention was to initiate a political process to establish an interim political framework agreement for providing substantial self government for Kosovo. To that end, UNMIK, under Regulation 1999/1, set up a Constitutional Framework and the Provisional Institutions for the Self-Government of Kosovo ('Provisional Institutions').

The Provisional Institutions have effectively been in control of Kosovo since 1999 and negotiations to reach a settlement have been fruitless. It was against this background that, in 2008, the democratically elected Assembly of Kosovo passed the Declaration of Independence from Serbia.

The Republic of Serbia refused to recognise the Declaration, deeming it to be illegal according to, amongst other laws, the UN Charter, the UNSC Resolution 1244 and the Constitution of Serbia. While more than 60 States have recognised the Republic of Kosovo, the international community remains split on the implications of Kosovo's Declaration.

On 8 October 2008, the UN General Assembly passed Resolution 63/3 requesting an advisory opinion from the ICJ, asking 'is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?' Between October 2008 and December 2009 over forty countries provided written and/or oral statements to the ICJ. The ICJ handed down its opinion on 22 July 2010.

2. Decision

A. Jurisdiction

Under Article 65(1) of the ICJ Statute, the ICJ has the power to give an advisory opinion on any legal matter at the request of a body authorised by the UN Charter, including the General Assembly.¹ While it is clear that the issue at hand has political as well as legal aspects, the existence of such political aspects does not deprive it of its legal nature nor take the issue outside the jurisdiction of the Court.² Similarly the Court is not concerned with the possible political motivations of the request or implications of the opinion provided.³

While the Court did agree that it had jurisdiction over the matter, there was a question as to whether the Court should utilise its discretion under Article 65 of the ICJ Statute and decline to exercise jurisdiction. Kosovo queried the motives of the UN General Assembly and Serbia in requesting the opinion, claiming that it was not made to assist the UN

¹ *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 96 ('UN Charter').

² *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 172 [14].

³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 234 [13].

General Assembly in its work.⁴ The Court held, however, that motives of the requestor are not relevant to the Court's exercise of its discretion; it is for the requestor to decide whether the opinion is necessary for the proper performance of its function.⁵

More pressing, however, was that the UNSC has characterised the situation in Kosovo as a threat to international peace and security, and continues to do so. The majority of the Court held that this does not prevent the UN General Assembly, under Article 12 of the UN Charter, from discussing the issue and thus requesting an opinion to further assist that discussion. Equally, the fact that the ICJ will need to consider the interpretation and legal effects of a UNSC Resolution was not sufficient justification for declining to provide an opinion. Five judges dissented, arguing that the existence of a UNSC Resolution was sufficient reason for the Court to utilise its discretionary power to decline to provide an Advisory Opinion. According to Judge Bennouna, the request is in effect asking the Court to perform the function of the Security Council to pronounce on the option of independence.⁶

B. Scope of the Request

There was significant disagreement before the Court as to the scope of the General Assembly's request. Kosovo argued for a narrow interpretation, pointing out that the Court was only asked to comment on whether the Declaration breached international law.⁷ Serbia's arguments, however, included considerations of the right to declare independence, addressing issues of self determination and the right to remedial secession.⁸ The Court took a narrow approach: focusing on whether the Declaration violated either general international law or the *lex specialis* created by Resolution 1244 (1999). The Court stated that it is not required to consider whether international law conferred a positive right on Kosovo, or any entity within a state, to unilaterally declare independence. The Court was also not required to consider the legal consequences of the Declaration of Independence, or the validity or legal effects of the recognition of Kosovo as an independent state by other states.

The Court went on to state that it would also interpret the question as requesting consideration of the identity of the authors of the Declaration. Despite the fact that the UN request stated explicitly that the authors were the Provisional Institutions, the Court insisted on investigating whether the Assembly of Kosovo was acting in this capacity or

⁴ 'Written Contribution of the Republic of Kosovo', *Accordance with the International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for an Advisory Opinion) [2009] ICJ Pleadings 131.

⁵ Above n 3, [1].

⁶ See *Accordance with the International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Advisory Opinion) (International Court of Justice, General List No. 141, 22 July 2010) (Judges Keith, Bennouna and Skotnikov, and Vice-President Tomka). ('Accordance')

⁷ Above n 4, 133.

⁸ *Ibid*, chap 7.

outside the framework of the UN interim Provisional Institutions and thus outside Kosovo's international obligations under the Resolution.

C. Whether the Declaration of Independence is in Accordance with International Law

Serbia's position is that the Declaration by Kosovo was illegal on two grounds. First, it contradicted the international legal principle of respect for the territorial integrity of states, a principle repeatedly affirmed by the United Nations. Second, it was contrary to the interim administration set up under UN supervision; the administration was imposed by Security Council Resolution 1244 and thus conferred legal obligations on the Kosovo Government. Serbia further argued that international law does not provide either a justification or entitlement for independence: the right to secession does not apply in this situation and the justification of self-determination was strictly limited to certain situations, such as the colonial territories of European Empires. As noted above, the Court restricted its opinion to the two grounds of illegality.

I. Lawfulness of Declarations of Independence under General International Law

The Court found that there was no general rule of international law prohibiting unilateral declarations of independence. In particular:

- Past recognition of declarations of independence indicates a lack of consistent state practice pointing to the emergence of such a prohibition.
- Any prohibition on the threat or use of force against the territorial integrity of a State, implicit in the principle of territorial integrity is confined to relations between States.⁹
- A general prohibition cannot be inferred from previous UNSC Resolutions condemning particular declarations of independence as such declarations have not condemned the unilateral nature of the Declaration, but the fact that they were likely to be connected to other egregious violations of international law connected to the particular situation at the time of the Declaration.

The Court declined to consider whether international law confers a positive right to separate from a State, noting that it was beyond the scope of the question posed by the UN General Assembly.

⁹ This principle is enshrined in the *UN Charter* art 2(4) and *UN General Assembly Resolution 2625(XXV)*: 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', reflecting customary international law as recognised in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgement, ICJ Reports 1986.

2. Security Council Resolution 1244

This Resolution was adopted in 10 June 1999 under Chapter VII of the UN Charter, allowing the UNSC to impose legal obligations to maintain international peace and security. Under the Resolution, UNMIK created certain regulations, including Regulation 2001/9 which formed the Constitutional Framework for the Provisional Institutions for the Self-Government of Kosovo (Provisional Institutions), the institutions included the Assembly of Kosovo. Neither the Resolution nor the Constitutional Framework contains clauses for termination and both were in force at the time of the unilateral Declaration of Independence. The Resolution also imposed obligations on Kosovo and Serbia to negotiate in good faith to reach an agreement on the final status of Kosovo. Serbia submitted that first, Resolution 1244 mandated that a solution could only be reached through negotiation; second, that in reaching an agreement, the territorial sovereignty and integrity of the Federal Republic of Yugoslavia must be safeguarded; and third, that only the Security Council could determine Kosovo's final status.¹⁰ According to Serbia's submission, the specific international obligations imposed by Resolution 1244 did not permit a unilateral Declaration of Independence.

The Court rejected these arguments and stated that Resolution 1244 does not specifically prohibit the authors of the Declaration of Independence from making the said Declaration.

The Court held:

The object and purpose of the Resolution is to establish an interim administration for Kosovo and expressly points to the omission from the Resolution of any definitive determinations on the final status of Kosovo.

The authors of the Declaration of Independence were not acting as one of the Provisional Institutions of Self Government within the constitutional framework, but as representatives of the people of Kosovo outside the interim administration. The Declaration was thus not intended to take effect within the legal order established by the UNMIK regulations. As such the authors of the Declaration were not bound by the powers and responsibilities governing the conduct of the Provisional Institutions of Self Government.

The Resolution, being an interim measure not concerned with the final status of Kosovo, did not preclude the making of a declaration of independence as the two instruments, the Resolution and Declaration, operated on different levels, the Declaration operating to determine finally the status of Kosovo.

¹⁰ 'Written Contribution of the Government of the Republic of Serbia', *Accordance with the International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for an Advisory Opinion) [2009] ICJ Pleadings 278.

- Finally, in the absence of any reference to ‘all concerned’ or other actors, it cannot be assumed the Resolution was intended to impose a prohibition on the authors against making a declaration of independence.

3. Implications

The judgement in this case was by no means unanimous. Four of the ten judges dissented and nine judges, including these four, provided separate opinions, declarations or dissenting opinions. Disagreement existed both as to whether the Court should have exercised its discretion by declining to exercise its jurisdiction and also as to whether or not the universal declaration was contrary to international law.

A. Prohibition and Permissibility in General International Law

The principle fear stemming from such a declaration is that it will set a precedent for other groups in contested areas, prompting similar declarations of independence. Unfortunately the opinion of the ICJ has done little to assuage these fears. While the Court has not said there is a right or entitlement to declare independence, it has not said that there is not a right either; the question has been neatly avoided.

It is a great pity that the Court, in being provided with an opportunity to comment on the issue of statehood in international law, and whether there exists an entitlement to declare independence when certain conditions are met, failed to do so. The narrow construction of the request, limiting it to whether there is a prohibition on such unilateral declarations of independence, *a priori* excluded any possible discussion on the subject. It is clear from the written submission of Serbia¹¹ that they believed that issues such as self determination and remedial secession would be addressed by the Court. A number of Judges, including Judges Simma, Sepulveda, Yusuf and Cançado Trindade,¹² argued not only that the wording of the question did not indicate a narrow focus, but also that the nature of the arguments would be better addressed through a broader approach to the question. Only Judge Cançado Trindade proceeds to actually provide a broader approach, noting the importance of the history of Kosovo and Serbia, the record of international humanitarian and human rights breaches on the part of Serbia, and the central importance of peoples, not just states, in international law.¹³

According to Judge Simma, the only conclusion that can be drawn from such an Advisory Opinion is that what is not prohibited is permissible, that the Opinion of the

¹¹ Ibid.

¹² See *Accordance* (International Court of Justice, General List No. 141, 22 July 2010) (Judges Simma, Sepulveda, Cançado Trindade and Yusuf).

¹³ Ibid (Judge Cançado Trindade).

Court left no room for varying degrees of legality.¹⁴ Without any guidance on rights or entitlements to independence, the law is left somewhat in limbo.

B. On the Interpretation of UNSC Resolution 1244

The ICJ appears to undertake a number of interesting contortions to come to the conclusions it did, both in assessing the identity of the Declaration's authors as being outside the UN imposed interim framework, and in claiming that the Resolution did not intend to prevent unilateral declarations of independence.

I. The Identity of the Authors of the Declaration of Independence

The original question posed by the UN General Assembly specifically referred to the Declaration as made by the Provisional Institutions for the Self-Governance of Kosovo. The ICJ, however, refused to take it as read that the authors of the Declaration were in fact the Provisional Institutions. In some respects, this could be seen as a revision of the original question, to the point that the Court can be seen to be answering a completely different question to the one asked.¹⁵

Once the Court concluded that the authors of the Declaration were not acting in their capacity as the Provisional Institutions, and were acting outside the UN imposed interim framework, the Court addressed the obligations and prohibitions of the Resolution solely in relation to this particular authorship. Given that the Resolution does not contain an explicit reference to 'all parties', the ICJ was able to construe the Resolution so narrowly that it no longer applied to the Assembly of Kosovo in its capacity as spokesperson for the people. This was a very narrow reading of the Resolution that, taken to its logical conclusion would imply that a revolution, coup d'état or leadership change could possibly render UNSC Resolutions inapplicable to the new leadership or regime. As Skotnikov points out, the ICJ fails to differentiate between acting outside the framework and violating it.¹⁶ 'It would be enough to become an outlaw, as it were, in order to escape having to comply with the law.'¹⁷

Should the UN General Assembly refuse to accept that the authors of the Declaration are anything but the Provisional Institutions, the Court has unfortunately failed to provide any guidance as to the legality of the Declaration. The rest of the judgement assumes that the Declaration authors were indeed acting in a different capacity.

¹⁴ Ibid (Judge Simma), 2.

¹⁵ Ibid (Vice-President Tomka, and Judges Sepulveda, Koroma and Bennouna).

¹⁶ Ibid (Judge Skotnikov).

¹⁷ Ibid (Judge Bennouna).

2. Kosovo's Obligations under the Resolution

The Advisory Opinion says very little on the requirements for a negotiated settlement, stating only that Kosovo realised this avenue had been exhausted. The re-characterisation of the authors of the Declaration allowed the Court to ignore the obligation to negotiate. However, as pointed out by Judge Skotnikov, the finding that the political process designed to determine Kosovo's future status, as set out in the Resolution, can be terminated by a unilateral action by the Kosovo Albanian Leadership was tantamount to finding that the Security Council has left a 'giant loophole' in the regime.¹⁸

Conclusion

The opinion of the ICJ that there is no prohibition in international law on declarations of independence per se, without providing any commentary on possible entitlements to such a declaration, unfortunately does very little to further the jurisprudence on sovereignty and statehood, arguably creating more questions than it answers. It would appear at this point in time that the law is of little use in determining disputes over sovereignty, leaving states reliant on principles of effective control and international recognition.

The narrow configuration of the Security Council Resolution, however, to exclude actors, such as the Assembly of Kosovo, when acting in a slightly different capacity, is a controversial move that may well have larger ramifications if the comments of Judges Bennouna and Skotnikov are to be followed.

Meanwhile, the debate over the independence of Kosovo continues. On 9 September 2010, the UN accepted a Resolution by Serbia and the EU. The Resolution affirmed that Serbia does not and shall not recognise the unilateral Declaration of Kosovo's independence; however, Serbia is prepared to enter into a dialogue with Kosovo, facilitated by the EU.¹⁹ At the time of writing these dialogues had yet to commence. The ICJ has passed up a rare opportunity, not only to provide guidance on the status of Kosovo and the effect of their Declaration, but to contribute to the international jurisprudence on statehood and sovereignty.

¹⁸ Ibid (Judge Skotnikov).

¹⁹ *UN General Assembly Resolution A/RES/64/298*, Adopting Consensus Resolution, General Assembly Acknowledges World Court Opinion on Kosovo, Welcomes European Union Readiness to Facilitate Process of Dialogue, 9 September 2010.