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Meeting Summary

Kosovo: The ICJ Opinion - What Next?

Summary of the International Law Discussion Group meeting held at Chatham House on Tuesday, 21 September 2010

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Introduction

The event was organised to discuss the Advisory Opinion of the International Court of Justice (ICJ) and its implications for international law, for Kosovo and for other situations.

Participants included representatives of government, embassies, NGOs, academics, and practising lawyers.

Opening remarks

STEFAN TALMON

This is likely to be the only Advisory Opinion known by at least three different names. The case was originally known as *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, as specified in the ICJ Order of 17 October 2008, the verbatim records of the Public Hearing and all Press Releases up to 14 July 2010. The official name of the Advisory Opinion of 22 July 2010 was *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.* Finally, *in his separate opinion,* Judge Cançado Trindade used the name *Accordance with International Law of Kosovo's Declaration of Independence.* In terms of length, the Kosovo Advisory Opinion is not out of line with other Advisory Opinions. What is remarkable is how little substance it has. Only 14 of the 44 pages deal with substantive legal questions, and only two pages are devoted to the question of whether general international law contains an applicable prohibition of declarations of independence. Conversely, the Advisory Opinion is extremely well referenced, giving the impression the Court is playing for space.

It was noted that the Advisory Opinion is interesting in terms of voting patterns. The widespread but often unsubstantiated view is that judges vote along the lines of their countries' legal and political interests. However, only eight of the ten votes in favour of the decision were from judges whose countries had recognised Kosovo. The Brazilian judge voted in favour despite Brazil having openly come out against the unilateral declaration and having made submissions to the Court supporting the Serbian position, which may explain the 71 page separate opinion justifying his position. Of the four countries voting against the Opinion, one, Judge Koroma of Sierra Leone came from a country that had recognized the independence of Kosovo. It is also of interest to note that only 14 judges signed the Advisory Opinion. Judge Shi from China who had participated in the oral proceedings resigned with effect from 28 May, indicating that the date of the final vote must have been after that date. One may speculate why the Chinese judge retired at that moment; perhaps he did not want to vote against the position taken by his own country.

MARC WELLER

Although the Advisory Opinion was short, it actually said more than expected and contained some important findings. It is not necessary for the Court to provide an overly long decision covering every feasible legal issue. The Advisory Opinion will serve as the starting point of a long process. Sufficient room is left for persuasive interpretation by scholars who may have a significant impact. Moreover, it will serve as a tool to reveal the *opinio juris* on contested issues.

Serbia had had full control over the question put to the Court, having been the sole sponsor of the General Assembly Resolution requesting it. The question that was eventually put was very narrow, presumably because Serbia decided that this phrasing would move the issue onto legal ground where Serbia was confident of winning the argument - the legal authority of the Provisional Institutions of Self-Government in relation to the declaration of independence. This authority was thought to be circumscribed by Security Council Resolution 1244 (1999) and by the Constitutional Framework that had been adopted under its authority. It is difficult to understand why Serbia did not frame the question in a way that would have raised additional issues. The prevailing legal view would hold that it is unnecessary for Kosovo to have a positive right to self-determination in order to obtain statehood. Statehood is a matter of fact, provided it is not brought about in violation of certain obligations, including those of *jus cogens*. However, through the phrasing of the question, Serbia deprived itself of obtaining wider analysis.

As it turned out, the narrow focus of the question addressing only the authority of the PISG implied a serious risk. If the Court were to find that the declaration of independence did not emanate from the PISG, or, even if it did emanate from the PISG, that it was not constrained by resolution 1244 or the Constitutional Framework, that would end the matter. Anything other than a clear finding by the Court that the Declaration was not in accordance with international law would be internationally understood as confirmation of Kosovo's claim to statehood. In other words, unless the declaration was clearly ruled unlawful, all other outcomes would favour Kosovo.

The Court is under attack from claims that the Advisory Opinion represents a wasted opportunity, and that it did not answer certain questions. However, it must be remembered that the Court is not involved in academic or scholarly output, and may not answer questions that weren't put to it.

As to the decision of the Court to respond to the request, rather than deciding not to exercise its discretion to do so, the ICJ has consistently held that any issue brought before it, however political it may be, can be decided as a matter of law. But many of the past cases addressed areas of considerable uncertainty in international law. For example, the Nuclear Weapons Opinion was brought precisely because states had been unable to agree a prohibition in

relation to nuclear weapons, or a universally agreed regime in relation to their use or threat of use. It was difficult for the Court when it was asked to resolve, as a matter of law, a question which the states themselves had been unable to settle.[1] Accordingly, the Court chose to address the Nuclear Weapons affair in a way that confirmed basic universally agreed principles of international law while avoiding a pronouncement on whether or not the threat or use of nuclear weapons would be permitted in any circumstance.

The request for the Kosovo Opinion falls into this category of cases. Serbia was pursuing a political agenda in bringing the action in the United Nations General Assembly. States' policies were divided in relation to the Kosovo issue. But in addition the relevant legal principles are to some extent uncertain or in a state of development, in particular the application of the concept of self-determination outside the colonial context. It would have been unrealistic to expect the Court to resolve this issue, especially if the question posed did not require it. The application of judicial economy in deciding the case through the shortest possible route of legal argument is entirely unsurprising.

The Advisory Opinion and its Consequences

STEFAN TALMON

The Court's starting point is what is referred to as the '*Lotus* principle', namely the notion that in international law everything is allowed that is not expressly prohibited. The Court therefore examined whether there is any prohibition of declarations of independence in international law, either in general international law or in special rules such as Security Council resolution 1244(1999). The Court looked first to general international law, and found that no such prohibition could be derived from State or Security Council practice.[2] It also found that the customary international law principle of territorial integrity in which such a prohibition may be implicit is applicable to States only.[3]

The court then examined the special rules created by Security Council resolution 1244 and the UNMIK constitutional framework created thereunder, but found that:

- Resolution 1244 did not create an obstacle to the declaration; it does not deal with the final status issue;

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[1] A participant in the discussion drew attention to critical remarks of the exercise of the Court's discretion in A. Aust, Advisory Opinions, 1 *Journal of International Dispute Settlement* (2010) 121.

[2] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010. Para 79 and 80.

[3] Ibid. Para 80

- the Security Council did not reserve for itself the final status determination;
- Resolution 1244 only binds States and UN organs, and not other actors;
- the constitutional framework might have created an obstacle but is applicable only to the PISG; and
- the declaration was made by the representatives of the people of Kosovo, who are not subject to the constitutional framework limitations.

What is almost more interesting is to examine what the Court did *not* say. The Court did not focus on the unilateral nature of the declaration but spoke of the 'declaration of independence' in general. Neither did the Court say that the declaration was 'in accordance with international law' as asked in the question. Rather, it said that it did not *violate* international law, thereby indicating that in the case of Kosovo, there is no positive entitlement to declare independence. However, in the Court's view no such positive entitlement is required.

Many States supporting Kosovo such as the US, UK and Germany, consistently emphasised the special nature of the case; but the Court did not make any reference to Kosovo being *sui generis* or a special case. The Court did examine the question of whether there was any special prohibition that applied directly to this declaration. It found that the only special element in the case was resolution 1244, describing it as creating the *lex specialis.*[4]

The Court said that 'the declaration of independence 'must be considered within the factual context which led to its adoption',[5] and set out the background in extensive detail. However, the facts of the case, that there were massive human rights violations by Serbia in Kosovo, the length of time Kosovo had been administered by the UN, and the fact that the parties were unable to reach an agreement on the final status, did not feed into the legal analysis. The two sections, Factual Background (III) and The Questions Whether the Declaration of Independence is in Accordance with International Law (IV), stand independent of each other.

The Court did not address the legal consequences of the declaration of independence. It did not conclude whether Kosovo had achieved statehood, whether the recognition of Kosovo by other States was valid or legal, or what the legal effects of the recognition might be. Nor did it address the question of whether there was a right to separate from Serbia, whether the population of Kosovo has a right to self-determination giving it a right to secede, or whether the population has a right of 'remedial secession' in the face of the factual situation in Kosovo.

The Court's reasoning on the substance can be summarised as being: whatever rules of international law might have prohibited a declaration of independence were not applicable to

[4] Ibid. Para 78 and 83.

[5] Ibid. Para 57.

the authors of the declaration of independence, who were acting as the 'representatives of the people of Kosovo'. The Court said that Security Council resolution 1244 and the constitutional framework created on its basis possess an 'international legal character',[6] and that they functioned as part of 'a special legal order' the purpose of which was to regulate 'matters which would ordinarily be the subject of internal, rather than international law'.[7] The special legal order superseded the previously existing Serbian domestic legal order in the territory, and applied to everybody within that territory, institutions and individuals alike, without any act or incorporation or transformation. It is generally accepted that unilateral declarations of independence violate the domestic legal order of the State from which a territory attempts to secede. In the case of Kosovo, the domestic legal order had been replaced by a new international legal order which was opposed to any unilateral declaration of independence, because any such declaration would have led to the annulment of the existing international legal order. The question that remains unanswered by the Court is how a group of individuals referred to as the 'representatives of the people of Kosovo' and acting within the territory of Kosovo were not bound by the international legal order generally applicable in that territory. This is the basic flaw of the Opinion, and it comes down to the question of who is bound by international law.

The various responses to the Advisory Opinion were also discussed. Kosovo, in various statements and letters to States and international organisations claimed that the ICJ had endorsed Kosovo's independence (rather than merely the declaration), had endorsed the legality and legitimacy of the State of Kosovo, confirmed that Kosovo is *sui generis* and does not set a precedent, and that the declaration was in the interest of peace and stability. The United States has said that the Advisory Opinion supports the US view that Kosovo is an independent state and its territory is inviolable, removes all legal uncertainty regarding the status of Kosovo, is limited to the 'unique facts specific to Kosovo' (so does not apply to Abkhazia or Transnistria), allows States safely to recognise Kosovo, and indicates that KFOR, UNMIK and the Government of Kosovo can lawfully coexist. The UK asserted that the Advisory Opinion confirms that Kosovo is a unique case, that it settles the question of Kosovo's legal status as a State and that it allows other States safely to recognise Kosovo. Lastly, Armenia (possibly in consideration of the situation in Nagorno Karabakh) said that the Advisory Opinion ruled that the right of nations to self-determination is not contrary to the principle of territorial integrity.

The observation was made that although Kosovo may be seen to have 'prevailed' at the ICJ, the immediate benefits for Kosovo may be more limited than first expected. Only Honduras has formally recognised Kosovo since the Advisory Opinion was issued, although more

[6] Ibid. Para 88

[7] Ibid. Para 89

recognitions are likely to be forthcoming over the coming months, and the decision will aid the lobbying efforts of the Kosovo government and its allies. However, in a study carried out after the release of the Advisory Opinion, forty countries were identified as having either confirmed their intention not to recognise Kosovo, or who are unlikely to recognise on the basis of earlier statements or their domestic situation.

The question of Kosovo's status as a sovereign and independent state will continue to be in doubt until there is a political settlement. The supervisory powers of the SRSG under Security Council resolution 1244 continue to remain in force, and under the Ahtisaari Plan, Kosovo's independence is to be supervised for an initial period by the international community. Swedish Prime Minister Fredrik Reinfeldt was quoted as saying that 'Kosovo's path towards independence, as we perceive an independent state, will be long.' 'Kosovo will only gradually come to enjoy the kind of sovereignty that we associate with other sovereign states'. Therefore, it can be argued that Kosovo is neither independent nor sovereign and for that reason, does not qualify as a state.

Kosovo's participation in regional and international forums will be unaffected; obstacles will remain in fora where states opposed to Kosovo's independence can block its participation. There is no short term prospect of membership of the United Nations due to the Russian Security Council veto, and relations with the European Union will remain difficult. Whilst at least one Member State does not recognise Kosovo, the EU cannot, and is thus prevented from acting in any way that might imply recognition.

What does the Advisory Opinion mean for other secessionist entities and movements around the world, such as South Ossetia, Abkhazia, Nagorno Karabakh, Transnistria and Northern Cyprus? The ICJ held that the right of self-determination is today part of customary international law and in the case of peoples of non-self-governing territories and people subject to alien subjugation, domination and exploitation, it creates a right of independence for these peoples.[8] The Court did not expressly pronounce on whether the right of self-determination outside the context of non-self-governing territories and peoples subject to alien subjugation confers upon the population of an existing state a right to separate from that state.[9] It can however be concluded from the Advisory Opinion that such a right does not exist in customary international law. The Court found that there were 'radically different views' on the subject,[10] meaning that there is neither uniform practice nor a settled *opinio juris*. It can also be concluded from the Advisory Opinion that there is no right of remedial secession in customary international law. One can conclude that as a rule there is no positive right of

[8] Ibid. Para 79

[9] Ibid. Para 82

[10] Ibid .Para 82

secessionist entities to have their own independent State based on a right to self determination; however a positive right to make a declaration of independence is not required. All that is needed is that there is no express prohibition.

Can a new State be brought about by force, or can the declaration of independence be backed up by force? According to the Court, the prohibition of the use of force against territorial integrity of a State is confined to the sphere of relations between States.[11] The use of force by secessionist entities without outside involvement is not contrary to the principle of territorial integrity. Therefore, the Court is suggesting that secessionist groups are free to violate the territorial integrity of their own state.

Declarations of independence connected with the unlawful use of force by another state, or egregious violations of general international law, in particular violations of *jus cogens*, violate international law and are thus illegal.[12] The Court expressly mentioned Northern Cyprus as an example of an illegal declaration of independence, and also the Republika Srpska, ending its hopes of lawfully declaring independence. It was also observed that the decision will not be of great help to South Ossetia, Abkhazia, Nagorno Karabakh or Transnistria, as all of them were arguably created by outside intervention involving the illegal use of force. On the other hand, in terms of the legality of their declarations of independence, the decision may be more helpful to Somaliland, Chechnya and various American Indian tribes.

MARC WELLER

One of the key issues to be considered relates to the phrasing of 'in accordance with international law'. Whether an activity has to be permitted by international law, be in accordance with it, or not be prohibited by international law is central to the Court's decision. The Court followed the dominant legal view where the issue of statehood is concerned. The Court framed the issue in terms of a rule of prohibition, confirming that when considering territorial integrity, there is no *a priori* stance against a possible secession in international law. Only States are precluded from violating the territorial integrity and political independence of other states according to the UN Charter. This approach was considered most appropriate in view of the specific construction of international law as it relates to statehood, rather than giving a comprehensive endorsement of the outdated *Lotus* principle. Many scholars contend that the rule of territorial integrity applies only to relations among states. International law is neutral on the issue of possible secession. Statehood is a matter of fact which depends on whether or not the entity in question manages to obtain effectiveness.

[11] Ibid. Para 80

[12] Ibid. Para 81

With regard to whether or not resolution 1244 includes an express prohibition of independence, it is necessary to first ask whether such a prohibition can exist. At one end of the spectrum, the dominant function of the Security Council in relation to international peace and security takes precedence. At the other is the *jus cogens* entitlement of peoples to self-determination. Resolution 1244 and the constitutional framework confirm the authority of the Special Representative of the Secretary-General (SRSG), but also recognise a future status, one that includes the 'will of the people' as being a crucial element.

Resolution 1244 does not meet the threshold of constituting a specific prohibition of statehood addressed to the seceding entity. In fact, the Security Council took a different approach, reaffirming the 'commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region' through resolution 1244. There is no clear injunction against independence addressed at Kosovo, an entity that was not a Member State then or now.

At no point during the Hill, Eide or Ahtisaari negotiations was independence conclusively ruled out. It was also foreseen that none of the parties could unilaterally and continually block a final status outcome. The declaration of independence enacts the result of the final status process carried out under the terms of resolution 1244, fully in accordance with the recommendation of the UN Special Envoy and the Secretary-General. This is reflected by the fact that neither the SRSG nor the Security Council attempted to annul the decision.

With regard to the authors of the Declaration of Independence, the Court acknowledged that a declaration of independence will always and necessarily step out of the legal order from which the declaring entity seeks to separate. The Court stated that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order, but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.[13] The Court has received some criticism over the finding that the authors of the declaration were not acting as members of the Assembly. However, whether or not the freely elected representatives of the people of Kosovo acted through the medium of the Assembly, their action could no longer be evaluated according to the constitutional framework. This important finding disposes of the issue of what capacity the authors acted in.

Of course, even if the declaration of independence had been unlawful by virtue of limited authority enjoyed by the PISG, this would not necessarily mean that Kosovo's statehood would be unlawful as well. However, it was presumably thought that a finding determining the declaration of independence unlawful would necessarily return Kosovo to the status of an entity under international administration—a status that could then only be changed through a

[13] Ibid. Para 105

positive decision of the UN Security Council. Serbia would continue to control that decision by virtue of its political alliance with Russia, a Permanent Member of the Council. Hence, Kosovo would have to resume negotiations on status and continue these until Serbia would be ready to agree a settlement.

After an adverse finding by the Court in relation to Kosovo's claim, the UN General Assembly might be mobilized to call upon the Security Council and the Special Representative of the UN Secretary-General in Kosovo to declare the declaration of independence invalid. While the Security Council would most likely have been able to withstand such pressure, the UN Secretariat would have found itself in a very difficult situation. The Court is the principal judicial organ of the United Nations and the Secretariat would be expected to act according to its pronouncements.

It was known that Kosovo would not disappear, or 'undeclare' its statehood, even if there had been an adverse finding by the Court. Similarly, the 69 states that had recognized Kosovo when the case was argued would have been unlikely to reverse that decision. But few would have expected such a clear finding. The Court has in the past been reluctant to come to views that are not in accordance with realities on the ground, and that are consequently at risk of being ignored in practice. Instead, it was thought that the Court might offer a somewhat ambiguous pronouncement in view of some of the legal uncertainties of the case. But even an ambiguous result would have been widely seen as a victory for Kosovo, and a rejection of Serbia's position, as Kosovo's declaration of independence would not have been declared unambiguously unlawful.

Other secessionist movements around the world are in fact unlikely to be either encouraged or discouraged by the Advisory Opinion; they have their own strong motivational factors driving their campaigns linked to the particular context.

Discussion

Contrasting conclusions were drawn as to whether or not the ICJ had provided sufficient answers to the question put to it, and what the likely consequences of the decision were to be. Statehood is largely a matter of fact. It can be created through the constitutive will of individuals acting together or through their elected representatives, even in the absence of the consent of the previous governing authorities. A declaration of independence necessarily steps outside the previously existing domestic legal context, and cannot be evaluated according to that domestic law. The obligation relating to territorial integrity does not operate in relation to those seeking secession—it applies only at the international level.

In response to a comment that the court had the right not to consider the question due to its overtly political nature, it was noted that an appropriate body (in this case the UN General

Assembly) had requested the decision, and that accordingly the ICJ saw fit to grant such request. It was also suggested that the international community would like to avoid another frozen conflict and therefore voted in the majority in support of the referral during the General Assembly vote.

Although the Court made reference to Security Council resolutions condemning particular declarations on independence, the opinion was expressed that the illegality does not depend on a determination of the Security Council. Rather, a determination by the Security Council just evidences the illegality. It would be easier to argue the illegality of the declaration if there was such a declaration, and secessionist entities along with their allies on the Security Council may thus act cautiously when agreeing any kind of Security Council Resolution dealing with declarations of independence.

The subject of Chechnya was raised as a means of discussing the consequences of the Advisory Opinion and the distinction between different secessionist entities. It was noted that Chechnya is not permitted to take its case to the ICJ under the Court's Statute. However, the use of force during the armed conflict in Chechnya was not considered to have involved external force and therefore any declaration of independence would not be illegal on the basis discussed previously. It was suggested that Chechnya has a right to self-determination, but that the right does not extend to creating a fully independent state. The right applies only to internal self-determination or autonomy. The legality of the Kosovo intervention itself was also questioned following the assertion that the declaration of independence was valid so long as no external assistance was provided during the conflict.

Judge Simma's separate opinion was discussed. His criticism of the *Lotus* approach as being out of step with a more modern view of the international legal order was highlighted. The merits of his argument in finding middle ground between prohibition and a positive right were doubted, with comparisons made to domestic law categories of lawfulness or unlawfulness.

Could the participants in the meeting make a unilateral declaration of independence for Chatham House? It would *not* be 'not in accordance with international law', according to the Court. But that would not have anything to say as to whether it constituted a state.

The meeting concluded by agreeing that what is lacking and urgently required in this process are civilised modalities for creating rules of secession.

Summary by Ben Rutledge