Newsletter

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Editorial:
The ICJ's Advisory Opinion on Kosovo's Declaration of Independence

What the Court did and did not consider...

On 22 July 2010, the International Court of Justice rendered its long-expected Advisory Opinion on Kosovo's unilateral declaration of independence. The Advisory Opinion, which held that the declaration of independence was not in violation of international law, was received with mixed reactions. Some States have welcomed the decision and called upon others to recognize Kosovo as an independent State. Unsurprisingly, territories such as Abkhazia, Nagorno-Karabakh and Transnistria have hailed the Advisory Opinion as an important event which will set a precedent for other entities with secessionist ambitions. Conversely, several States including Serbia have criticized the decision and emphasized that they will never recognize Kosovo's unilaterally proclaimed independence. What is more, scholars have generally taken a critical stance towards the Advisory Opinion, primarily in view of its narrow approach. This editorial aims to shed some light on what the Court did and did not consider.

"We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state." With these words, Kosovo declared itself independent from Serbia on 17 February 2008. Since this declaration, sixty-nine States have recognized Kosovo's claim to sovereign statehood, including the United States and twenty-two EU Member States. The majority of States, however, refused to recognize an independent Kosovo for different reasons. Some States, including Serbia and Russia, explicitly asserted the illegality of Kosovo's declaration of independence. In fact, the Serbian Minister of Foreign Affairs initiated a resolution for the United Nations General Assembly to seek an Advisory Opinion from the ICJ, which led to the following question: is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law? In October 2008, the General Assembly adopted the resolution with a bare majority. Following the request by the General Assembly, the ICJ invited the UN and its Member States to furnish information on the matter. Consequently, no less than thirty-six UN Member States filed written statements on the question before the ICJ and after having held public hearings in December last year, the Court started its deliberations.

The long-awaited Advisory Opinion on the matter was issued on 22 July 2010. By ten votes to four, the Court concluded that Kosovo's declaration of independence "did not violate international law". To arrive to that conclusion, the Court first had to take several jurisdictional hurdles which had been raised by States during the proceedings. It was alleged, for instance, that the request by the General Assembly was beyond the scope of its competences under the UN Charter, since the Security Council was already seized of the situation in Kosovo. After a rather lengthy and formal assessment, the Court unanimously found that it had jurisdiction and that no compelling reasons were present not to respond to the question. The Court subsequently decided to focus on the scope and meaning of the question put before it. According to the Court, "[t]he question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition.

Kosovo by those States which have recognized it as an independent State." Thus, in the Court's reasoning, it was not requested to decide whether a declaration of independence actually leads to the separation from the parent State and creation of a new sovereign State – neither in the specific case of Kosovo, nor in general. The Court likewise left aside the right to self-determination and the concept of remedial secession, as it deemed those issues being beyond the scope of the question posed by the General Assembly.

In addressing the substance of this question, the Court first considered the lawfulness of declarations of independence under general international law. In this context, it found that "the scope of the principle of territorial integrity is confined to the sphere of relations between States". This conclusion may be called conservative, considering the emerging role of non-State actors within contemporary international law. Yet simultaneously, the Court's finding that the acts of sub-State entities are not restricted by the principle of territorial integrity may be labelled as progressive as well, as it appears to lift what has traditionally been regarded as the primary obstacle to unilateral secession. Having concluded that no norm of general international law explicitly prohibits the issuing of a declaration of independence, the Court analysed whether Security Council Resolution 1244 (1999) had created special rules or measures, particularly the UNMIK Constitutional Framework, which affected the lawfulness of Kosovo's declaration of independence. In this connection, the Court examined the identity of the authors of the declaration. It arrived at the conclusion that these authors should not be regarded as the Provisional Institutions of Self-Government as established under the Constitutional Framework, but rather as an assembly of persons acting "as representatives of the people of Kosovo outside the framework of the interim administration". According to the Court, neither can a prohibition of declarations of independence be derived from Security Council Resolution 1244 (1999) or the Constitutional Framework, as these merely determined Kosovo's interim political structures, nor do these documents contain any legal obligations binding upon the authors of Kosovo's declaration of independence.

The Court's approach constitutes a narrow and restrictive reading of the request by the General Assembly, as was also noted by several Judges in their Opinions and Declarations attached to the Advisory Opinion. It may even be said to void the question before it of much of its substance, as Judge Yusuf rightly observed in his Separate Opinion. For in fact, Kosovo's declaration of independence is the expression of a claim to sovereign statehood and part of a process to establish a new State. As such, the issues of (external) self-determination and remedial secession are inextricably bound up with the declaration issued on 17 February 2008. In my opinion, it is regrettable that the Court chose not to take the opportunity to elaborate on these matters and, accordingly, to clarify issues both import and complex in contemporary international law. This is all the more so because there appear to be developments in international law indicating that under certain circumstances, the contemporary law of self-determination may acknowledge a (qualified) right to unilateral secession for entities within a sovereign State.

It is generally accepted that outside the context of decolonization, the right to self-determination is a continuous right, which is to be exercised primarily within the framework of an existing State, in the relationship between the population of a State and its authorities. In contrast to this internal dimension of self-determination, claims to external self-determination beyond decolonization are much more controversial. Yet it is increasingly argued that a right to unilateral secession may arise in case of exceptionally grave circumstances. Catalysts for such a right may be the serious and persistent denial of a people's access to representative government or refusal of autonomous political structures within the State (*i.e.*, lack of internal self-determination), flagrant violations of a people's fundamental human rights, discriminatory treatment of a people by the central authorities due to its racial or ethnic characteristics, or persecution of a people on similar grounds. Further, it is to be emphasized that a qualified right to unilateral secession may only be warranted when all peaceful remedies within the structure of the existing State have been exhausted. In other words, unilateral secession should be regarded as a last resort remedy, an *ultimum remedium*.

Legal doctrine has provided considerable support for such a thesis, starting with the writings of Lee C. Buchheit and Antonio Cassese in particular and followed by many others. Scholars have primarily based their arguments on a progressive and *a contrario* interpretation of Principle V (paragraph 7) of the Friendly Relations Declaration, the so-called 'saving clause'. Nonetheless, whether such a (qualified) right to unilateral secession is actually rooted in positive international law remains disputable. Treaties and conventions lack an explicit reference to either the recognition or the prohibition of such a right. And although judicial decisions and opinions have adduced the issue in some cases, the acceptance of a (qualified) right to unilateral secession has so far remained hypothetical, as no judicial body has actually granted a people a right to secede in view of the circumstances of the specific case at issue. In order to assume customary legal status of such a right, *opinio juris* accompanied by corresponding State practice is required. However, it remains questionable whether today, both elements are sufficiently present when it comes to the concept of remedial secession. Whereas during the Kosovo advisory proceedings several States did adduce the argument, practice shows that, to date, virtually no case has been generally accepted to warrant a (qualified) right to remedial secession. All in all, it seems that the scholarly acknowledgement of such a right – although possibly appealing– is to a large extent motivated by legitimacy considerations.

Be that as it may, it would have been illuminating to read the Court's view on the contentious issues of self-determination and remedial secession, which clearly underlie the General Assembly's question. Given the special context of the events in Kosovo, there was sufficient reason for the Court to examine whether such a customary norm is emerging and, subsequently, whether the situation reflected the type of exceptional circumstances which may warrant a right to secede unilaterally from the parent Sate. As several Judges noted, it is unfortunate that the Court failed to seize this opportunity, particularly in view of the potential contribution of the Advisory Opinion to the development of contemporary international law.

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