WAS KOSOVO'S SPLIT-OFF LEGITIMATE? BACKGROUND, MEANING AND IMPLICATIONS OF THE ICJ'S ADVISORY OPINION

COMMENTARY BY

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Abstract

On 22 July 2010 the International Court of Justice (ICJ) reached a final decision in one of its most momentous cases: Kosovo. The media response was huge and many headlines were plain in pointing out that "Kosovo's independence is legal".[1] But what sounds so clear at first sight arguably becomes an erroneous assumption upon closer examination. Indeed, the ICJ explicitly avoided deciding upon the legality of Kosovo's independence. Finally, there are sound reasons to question the legal significance of the Court's findings.

Keywords: *Kosovo, International Court of Justice, secession, international law*

Introduction

In February 2008 Serbia was confronted with Kosovo's Declaration of Independence. The Community of States was split on how to react on this unilateral act. In all, 69 of 192 UN member-states recognized the declaration. Other countries either refused to acknowledge it, or adopted a neutral position.[2] Faced with the broad recognition of Kosovo, Serbia initiated a request for a non-binding advisory opinion with the ICJ, asking whether the unilateral declaration of independence was in accordance with international law. But this apparently substantial question would turn out to be a quite insubstantial request.

The Explosive Nature of the Request

Serbia presented the ICJ with a dilemma. The judges were indirectly asked to clarify one of the most disputed and politically charged issues in international law today: secession. The ICJ

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[1] See, for instance, "Kosovo's independence is legal, UN court rules," *Guardian*, 22 July 2010; "World court: Kosovo's independence was legal," *AP*, 22 July 2010; "Kosovo independence declaration deemed legal," *Reuters*, 22 July 2010, which concludes, 'Kosovo's unilateral secession from Serbia in 2008 did not violate international law.'

[2] See also Krueger, "Implications of Kosovo, Abkhazia and South Ossetia for International Law," *Caucasian Review of International Affairs*, vol. 3:2 (2009): 121-142.

was about to deal with an issue which the Community of States had for decades explicitly avoided settling. On the one hand, the difficulty lies in how to create clear rules that are suitable for the variety of current and possible future secession conflicts. On the other hand, third countries use secession conflicts as leverage to pursue their own goals, which has always been a crucial obstacle to the general solutions to such conflicts.

In addition to these difficulties, the ICJ was confronted with the tense political peculiarities of the Kosovo case. A rejection of Kosovo's independence would have exposed many western countries that recognized and eagerly fought for the breakaway region (e.g. the US, Great Britain, France and Germany). By contrast, the clear acknowledgement of Kosovo's statehood could have affected many other regions in the world, causing damage difficult to calculate.

The Advisory Opinion

Caught in this dilemma, the ICJ's judges nevertheless found an easy way to close the case. They adopted a narrow interpretation of Serbia's request by considering only its literal wording. The ICJ was literally only asked whether the declaration of independence is in accordance with international law. Since general international law contains no prohibition of declarations of independence and the authors of the given declaration were obviously not bound by Security Council resolution 1244 (1999), the request could quite quickly be answered. The ICJ found that Kosovo's declaration of independence did not violate international law.

The Remains of the Trial

Does that mean that the ICJ recognized the legality of Kosovo's independence? No. Unlike many press reports suggest, the ICJ explicitly made clear that it did not handle the question of the legal consequences of the declaration of independence. But this would have been the crucial question. Without an answer to that question, the ICJ could not clear up Kosovo's legal status.

In fact, declarations of independence may actually be voiced by any group of the population using any kind of procedure. This is not prohibited under international law. The crucial issue is instead whether a certain declaration, or any other reason, changes the given legal status and creates certain rights and obligations under international law. In terms of the Kosovo case this includes the questions: Has Kosovo achieved statehood? Had the Kosovo Albanians the right to secession? Did Serbia indeed lose a part of its territory? And most importantly: Was Kosovo lawfully recognized by numerous states?

The ICJ answered none of these questions and so it did not clarify Kosovo's legal status. Indeed, it left more uncertainty than it brought light to the case. This outcome does not affect just the Kosovo case, but also many other cases of separatist movements around the world, e.g. in Abkhazia, Nagorno-Karabakh and South Ossetia. In view of the remaining uncertainty, conflict parties and third countries are now also enabled to square their interpretation of the ICJ's Kosovo opinion with their own political ends.

Was the ICJ's Decision Inevitable?

It is important to note that the ICJ did not arrive at a legally wrong decision when interpreting the original request narrowly. It is safe to assume that Serbia cautiously chose the wording, so that there might have been no reason to derogate from the literal request and to answer any additional question. A clear statement of Serbia's Minister for Foreign Affairs underlines this perspective. When introducing the request in the UN General Assembly he announced that there is no need for any changes or additions in respect of the request.[3]

Of course, the choice of the request remains a mystery. Apparently Serbian officials hoped that the ICJ would identify the crucial questions anyway. In that case Serbia would not have had to point a finger at many states, which had already assumed Kosovo's statehood and had recognized the region. Such a challenge could have been the knockout blow in the UN's General Assembly, which had to adopt the request before it could be forwarded to the ICJ. As became obvious, even the original request with its less confrontational wording had big problems to pass the Assembly. The above-mentioned statement from Serbia's Minister for Foreign Affairs also emphasizes this perspective.[4] Accordingly, Serbian officials tried to formulate a non-controversial request representing the lowest common denominator of the positions of the UN Member States on the Kosovo question. They supposed that this was the only way to bring the request through the General Assembly.

However, the ICJ must have noticed that the choice of the wording did not really reflect the legal questions in issue. Moreover, the controversial subject was evident in view of both Serbia losing a part of its territory and of the international quarrel over Kosovo's legal status and the possibility to recognize it, which ultimately also influenced the procedure in the UN General Assembly. It could not be excluded that Serbia and the countries which backed the request in the General Assembly (which did not include many of Kosovo's proponents) had these facts still in mind when calling on the ICJ. In the light of these circumstances, the ICJ should have given a broad interpretation to the request, as it did in a previous case[5] and as was even suggested by some of its judges.

Conclusion

Finally, the ICJ's opinion has not provided a better understanding from a legal perspective. This applies to Kosovo's status in particular, and to the issue of secession in general. For this reason the decision has no implications for the normative substance of international law. The legal issue of secession and the questions related to it remain disputable, even though persuasive arguments imply that there is no right to unilateral secession outside the context of decolonization.[6]

What remains is the sad confirmation that international law is a weak means by which to solve secession conflicts. As many other cases indicate, secession conflicts are frequently in the arena of third countries' interests. Legal considerations are quite flexible here, and coincide

[3] See General Assembly, 8 October 2008, A/63/PV.22, p. 2.
[4] See General Assembly, 8 October 2008, A/63/PV.22, p. 2.
[5] See the interpretation of the agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35.
[6] For details see Krueger, "Implications of Kosovo, Abkhazia and South Ossetia for International Law," *Caucasian Review of International Affairs*, vol. 3:2 (2009): 121-142.

with the given interests of foreign affairs, which concern particularly the maintenance or extension of influence in regions of strategic importance. This is shown in the cases of Abkhazia, Nagorno-Karabakh and South Ossetia, but also in the Kosovo case. In the end, a solution is heavily dependent upon the weight of the involved third countries and their interests. With regard to the Kosovo case, several countries tried to maintain this interest-oriented policy by preventing the ICJ from conducting a deeper legal analysis. Remarkable in this regard was particularly the negative attitude of the USA, France and Germany.[7]

Overall, the conduct of a number of states questions not only the significance of international law in the context of conflict resolution but also the current procedure to call on the ICJ for an advisory opinion. At least in highly disputed cases, where even the conduct of a number of powerful countries is challenged, the General Assembly does not appear as an appropriate body to formulate and pass conclusive requests to the ICJ. However, the ICJ had the chance to carry out a deeper analysis and to recapture ground for international law in the context of secession. But it missed the chance, which means a setback for the resolvability of secession conflicts and for the rule of law in general.

In sum, the modest result of Serbia's request is due to a conjunction of several circumstances, which include the conflicting interests of third countries in the Kosovo conflict and a procedure at the UN General Assembly open to interference by these opposing positions. Of course, there was also the misjudgement by Serbia's officials when formulating the request, and the ICJ's constraints in dealing with a matter that is extremely politically charged. Both reasons were also decisively responsible for the outcome of the trial.

In the end, the Kosovo case seems to remain unsettled. Currently, the proponents of Kosovo's independence benefit from a broad misinterpretation of the ICJ's opinion in the press. The misunderstanding is primarily due to the difficulties in understanding the nuances of the ICJ's opinion and the court's insufficient communication policy. Though it tried to avoid a legal substantiation, the ICJ accordingly plays a crucial role in establishing Kosovo's independence.

[7] The USA opposed Serbia's request, while France and Germany abstained from voting. For details about the French and German position during the proceeding, see both countries' written statements at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1 (retrieved 08 August 2010).