CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

And nothing else matters
The ICJ's judicial restraint in its Opinion on Kosovo's independence

by

Giuseppe Bianco

Perspectives on Federalism, Vol. 2, issue 2, 2010

Abstract

The International Court of Justice gave its Advisory Opinion on the "Accordance with international law of the unilateral declaration of independence in respect of Kosovo" few months ago. It found no prohibition in general international law, including state practice, the principle of territorial integrity, Security Council resolutions, the principle of self-determination and the right to remedial secession. Neither Resolution 1244 (1999) nor the Constitutional Framework prevented the authors from declaring independence. The author analyses the Court's approach, its conclusions and the issues which remain open.

Key-words:

Declaration of independence, Kosovo, International Court of Justice, Advisory Opinion, Security Council, General Assembly, legal orders, territorial integrity, self-determination, remedial secession, recognition, Lotus principle.

1. Introduction

On 22 July 2010, the International Court of Justice gave its Advisory Opinion on the "Accordance with international law of the unilateral declaration of independence in respect of Kosovo". In a nutshell, the Court declared that the act was neither contrary to general international law, nor to the *lex specialis* constituted by the UN Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework. Such a finding shows a great deal of judicial restraint, and is worth special attention for the issues approached.

A huge number of deputies of the Assembly of Kosovo, together with its President, signed a declaration on 17 February 2008.[I] It proclaimed Kosovo to be "an independent and sovereign state" and a "democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law".

The Republic of Serbia reacted promptly. It adopted a decision, stating that the declaration constituted a forcible and unilateral secession of a part of the territory of Serbia. It did not produce legal effects either in Serbia or in the international legal order. The following day, the Security Council gathered and the Serbian President Mr. Boris Tadić denounced the document as an unlawful act which had been declared null and void by the National Assembly of Serbia.

The General Assembly of the United Nations met on 8 October 2008. Serbia was the sole sponsor of a resolution, which was eventually adopted with a strikingly high number of abstentions. Resolution 63/3 requested the International Court of Justice to deliver an Advisory Opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".[II]

2. Historical background

It is perhaps useful briefly to examine the historical background, so as to obtain a clearer idea of the context wherein the Advisory Opinion was given. Following the NATO military intervention in the area, on 10 June 1999 the Security Council adopted Resolution 1244, acting under Chapter VII of the United Nations Charter.[III]

The document was a reaction to "the grave humanitarian situation" (fourth preambular paragraph) and authorised the UN Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo…which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10). Resolution 1244 also called for an end of all offensive actions, both on the side of the Federal Republic of Yugoslavia and of the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups. The Kosovo Force (KFOR), a NATO-led peacekeeping force, entered the region on 12 June 1999, under the UN mandate, three days after the signing of the Military Technical Agreement.

The international civil presence was to be known as UNMIK (United Nations Interim Administration Mission in Kosovo). At its head there was the Special Representative of the Secretary-General, appointed by the Secretary-General in consultation with the Security Council, along with four Deputy Special Representatives. UNMIK was in charge of the performance of basic civilian administrative functions, and, most importantly, the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.

3. Jurisdiction and discretion

Let us now focus on the judgement. Firstly, the International Court of Justice assessed whether it had jurisdiction to deliver an advisory opinion. Art. 96 of the UN Charter[IV] and Art. 95 of the ICJ Statute[V] provide the Court with the power to do so when a request is made by the General Assembly, the Security Council, or another body authorised by the Assembly. The articles specify that the question needs to be a "legal" one. Although several participants had argued that Resolution 63/3 contained a political question, the Court noted that it was phrased in legal terms and therefore complied with this requirement.

Moreover, the Court dealt with the issue of whether Art. 12.1 of the UN Charter[VI] prevented the General Assembly from requesting an advisory opinion when the Security

Council was seized of the same matter. The Court recalled that, under Arts. 10[VII] and 11[VIII] of the UN Charter, the Assembly can discuss and make recommendations on a spectrum of subjects, including international peace and security. Art. 12 only restricts the Assembly's power to adopt recommendations when the Council exercises its functions over a dispute or a situation. The request of an advisory opinion is not in itself a recommendation, and thus is not prohibited by the Charter.

Secondly, the judges addressed the discretion issue. According to its own case-law, the Court could refuse to exercise its advisory functions. Since Art. 65 of the Statute maintains that "The Court *may* give an advisory opinion" (emphasis added), there is "a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met".[IX] This is meant to protect the integrity of the judicial function of the Court and its nature as the principal judicial organ of the United Nations.[X] On the other hand, as a matter of principle the judicial function is to be exercised, unless there are compelling reasons not to do so. As a matter of fact, the Court has never refused on the twenty-four occasions it has been requested to give an opinion.[XI]

Several participants in the proceedings argued that the opinion would serve only the interests of Serbia, the sole sponsor of the resolution within the Assembly. The Court responded that the motives were not relevant. It also held that it was for the requesting UN body (in this case, the Assembly) to evaluate what useful legal effect the opinion could have. Moreover, it affirmed it was not concerned with the potential political consequences of its judgement. Finally, the Court interpreted Art. 24.1 of the UN Charter[XII] to vest the Security Council with primary, and not exclusive responsibility for the maintenance of international peace and security. In the present case, it had only discussed but not taken action as regards the situation in Kosovo. Thus, the General Assembly had a legitimate interest and was free to request the opinion. The Court thus found no compelling reason to decline to answer.

4. Accordance with general international law

The fourteen judges (Mr. Shi Jiuyong only participated in the oral proceedings and then resigned[XIII]) operated a narrow interpretation of the question put before them. They

considered that they only had to evaluate whether international law contained a prohibition of declarations of independence. They first looked at general international law and secondly at the *lex specialis*.

In respect of general international law, the Court analysed state practice. Ever since the eighteenth century, there have been declarations of independence. Some of them resulted in the birth of new states, others did not. At any rate, the Court could not infer from state practice the existence of a prohibition on declaring independence.

In the course of the proceedings, it had been contended that the principle of territorial integrity implicitly precluded declarations of independence. The Court noted that this principle is firmly established on the international plane and has been reaffirmed in numerous documents. However, its scope was said to be limited to the sphere of relations amongst States.[XIV] Consequently it was not applicable in the present context.

The judges then proceeded to consider several Security Council resolutions wherein it condemned declarations of independence. In 1965 the condemnation was directed to Rhodesia[XV], in 1983 to northern Cyprus[XVI], in 1992 to Republika Srpska.[XVII] Nevertheless, the Court understood that these documents were aimed at the concrete situation and were not the expression of a general proscription.

Another interesting passage concerns the principle of self-determination and the right to remedial secession. As regards the first, the Court maintains that it developed in the aftermath of the Second World War, with the decolonisation process. Peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation enjoy it. Yet, different views exist on whether part of the population of an existing State is entitled to secession. With respect to remedial secession, the Court remarked that there is not unanimity on the existence of such a right, the definition of the circumstances under which it arises or their occurrence in the case of Kosovo. The judges concluded that the examination of a positive entitlement to declare independence was beyond the scope of the question posed.

5. Accordance with *lex specialis*

Consequently, the Court held that the declaration did not violate general international law. It then went on to consider its accordance with the *lex specialis*. The latter was comprised by resolution 1244 (1999) of the Security Council and the Constitutional Framework for Provisional Government.

The judges deemed it necessary to deal with a preliminary issue, i.e. the identity of the authors of the declaration of independence. According to resolution 63/3, these were "the Provisional Institutions of Self-Government of Kosovo". Nevertheless, several participants in the proceedings contested this view. Since the matter was capable of affecting the Court's overall evaluation, "[i]t would [have] be[en] incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly".[XVIII] The Court thus decided to consider the question in the light of its own findings.[XIX]

To determine the authors' identity, the Court adopted an intent-based approach. It focused on the text and the circumstances of the issue of the declarations and inferred the intention of those who signed it. Others were to censure such a perspective.[XX]

The ICJ remarked that the authors expressed the determination to resolve the status of Kosovo. They did not make any reference to the Assembly of Kosovo established under the UNMIK mandate. Instead, they called themselves "we, the democratically-elected leaders of our people".[XXI] Moreover, the document was signed by all those present (109 out of the 120 deputies and the President of Kosovo, who is not a member of the Assembly). It was not forwarded to the Special Representative of the Secretary-General, nor was it published on the Official Gazette, unlike the legislation voted by the parliament. Furthermore, the Special Representative did not react to the declaration and remained silent, whereas he condemned similar acts in 2003 and 2005 as being beyond the competency of the Provisional Institutions.[XXII] From all this, the judges deduced that the authors did not intend to operate as the Provisional Institutions of Self-Government, but "rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration".[XXIII]

The judges could then proceed to examine the compatibility of the declaration of independence with Security Council resolution 1244 (1299). It did not contain a clause on its termination and it had not been repealed, therefore it was part of the international law applicable on 17 February 2008. It envisaged the establishment of the international civil and security presence as an exceptional measure to address the grave humanitarian situation. Consequently, it put in place an interim and not a permanent régime. Moreover, the Security Council did not reserve for itself the final determination of the situation in Kosovo. The Court then noted that the resolution provided obligations for UN Member States, UN organs, and the Kosovo Liberation Army. On the other hand, the Kosovo Albanian leadership was not an addressee. Thus there was no prohibition on declaring independence for the representatives of the people of Kosovo.

The International Court of Justice finally examined the accordance of the document with the Constitutional Framework for Provisional Government. This was UNMIK regulation 2001/9 of 15 May 2001. It determined the powers of the Provisional Institutions of Self-Government and, *inter alia*, endowed the Special Representative of the Secretary-General with the task of overseeing them. It functioned only within the Kosovo legal order and it had been suggested that it was an act of internal law. Yet, the Court deemed it a piece of international law, since it had been adopted by the Special Representative on the basis of resolution 1244 (1999), and it ultimately derived its legal force from the UN Charter.

On the accordance with the Constitutional Framework the judges spent very few words.[XXIV] They recalled that the declaration of independence was not issued by the Provisional Institutions of Self-Government. Moreover, it was an act intended to take effect or actually taking effect within the legal order designed by the Framework. Therefore, the latter did not bind the authors and their declaration did not violate it.

6. Conclusion

Thus the Court could reach its conclusion. The declaration of independence did not violate general international law. Additionally, it did not infringe the *lex specialis*, either

Security Council resolution 1244 (1999) or the Constitutional Framework. Therefore, "the adoption of that declaration did not violate any applicable rule of international law".[XXV]

It can be noted that the Court took a rather narrow interpretation of the question before it. Such judicial restraint means that numerous issues remain open. First, the Court did not rule on whether the authors had a positive entitlement to declare independence, therefore leaving the right to remedial secession undecided.[XXVI] On this very point, in 1998 the Supreme Court of Canada stated that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession".[XXVII] However, it added that "it remains unclear whether this […] actually reflects an established international law standard".[XXVIII] The ICJ could have shed light on the matter, enucleating the circumstances under which such a right arises.

Second, the Court did not clarify what the consequences of the declaration are. It drew a rather artificial distinction between declaring and effecting independence.[XXIX] Whilst it ruled on the former, the implementation of secession was not assessed with respect to international law. Therefore, it remains governed by politics and not by law. In other words, only state practice and the principle of effectivity will tell us whether Kosovo is to achieve statehood.

This raises the question of the potential risk of premature recognition. Due to the Court's judicial discretion, there is no clarity as to the international legal norms governing the achievement of statehood. Thus, discrepancies will continue among States' reactions. Serbia could then accuse those States which recognized Kosovo of interfering into the internal affairs of a sovereign country.

Finally, a remark on the Court's reasoning: It maintained that whatever is not explicitly forbidden in international law, is in accordance with it. This binary approach dates from the *Lotus* judgment of the Permanent Court of International Justice.[XXX] It derives from the principle that restrictions on states cannot be presumed because of the consensual nature of the international legal order and has been extended to entities within states. Arguably, current international law has attained a more nuanced perspective.[XXXI] The Court could have inspected the wide variety of international hard and soft rules[XXXII] more profoundly so as to give further guidance to the global community.

[I] The text can be found on this page: http://www.assembly-kosova.org/?cid=2,128,1635 (last accessed on 29 September 2010).

[II] A/RES/63/3, *Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law*, 8 October 2008.

[III] S/RES/1244, *On the situation relating Kosovo*, 10 June 1999.

[IV] Art. 96 of the UN Charter reads "a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

[V] Art. 65 of the ICJ Statute reads : "1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question".

[VI] Art. 12.1 of the UN Charter reads: "1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".

[VII] Art. 10 of the UN Charter reads : "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".

[VIII] Art. 11 of the UN Charter reads : "1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10".

[IX] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.

[X] *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, Advisory Opinion, I.C.J., p. 13, para. 29.

[XI] Szewczyk, Bart M. J. *Lawfulness of Kosovo's Declaration of Independence.* ASIL Insight, Vol. 14, Issue 26, 17 August 2010, note 9.

[XII] Art. 24.1 of the UN Charter reads as follow: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".

[XIII] Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo, Advisory Opinion, I.C.J., p. 13, para. 16.

[XIV] See Cirkovic, Elena. *An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence.* German Law Journal, Vol. 11, No. 08, 2010, p. 912.

[XV] S/RES/216 *Question concerning the situation in Southern Rhodesia*, 12 November 1965, and S/RES/217 *Question concerning the situation in Southern Rhodesia*, 20 November 1965.

[XVI] S/RES/541 *Cyprus* (on northern Cyprus), 18 November 1983.

[xvii] S/RES/787 *Bosnia and Herzegovina* (on Republika Srpska), 16 November 1992.
[xviii] *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, Advisory Opinion, I.C.J., p. 13, para. 52.
[xix] Such a move was heavily criticised by one of the judges: see Declaration of Vice-President Tomka, paras. 11 – 21.
[xx] See Dissenting Opinion of Judge Koroma, para. 4.
[xxi] *Kosovo Declaration of Independence*, first operative paragraph.
[xxii] Szewczyk, Bart M. J. *Lawfulness of Kosovo's Declaration of Independence.* ASIL Insight, Vol. 14, Issue 26, 17 August 2010, note 27.
[xxiii] *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, Advisory Opinion, I.C.J., p. 13, para. 109.
[xxiv] Only paragraphs 120 and 121 are dedicated to it.
[xxv] *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*, Advisory Opinion, I.C.J., p. 13, para. 122.
[xxvi] Several aspects worth considering would have been: "the 'required' threshold of abuse, the needed characteristics of a cultural group, the alternatives to be exhausted, the effect of time and democratization of the parent state on a secessionist claim, and not least, the question of *uti possidetis iuris*". See Cismas Ioana. *Secession in Theory and Practice: the Case of Kosovo and Beyond.* Goettingen Journal of International Law, Vol. 2, No. 2, 2010, p. 587.
[xxvii] *Reference re Secession of Quebec*, Supreme Court of Canada, [1998] 2 S.C.R. 217, para. 134.
[xxviii] *Ibidem*, para. 135.
[xxix] Muharremi, Robert. *A Note on the ICJ Advisory Opinion on Kosovo.* German Law Journal, Vol. 11, No. 08, 2010, p. 873.
[xxx] *Lotus*, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18.
[xxxi] See Declaration of Judge Simma, paras. 8 – 9.
[xxxii] Burri, Thomas. *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links.* German Law Journal, Vol. 11, No. 08, 2010, p. 883.

References

- Burri, Thomas. *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links.* German Law Journal, Vol. 11, No. 08, 2010
- Cirkovic, Elena. *An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence.* German Law Journal, Vol. 11, No. 08, 2010
- Cismas Ioana. *Secession in Theory and Practice: the Case of Kosovo and Beyond.* Goettingen Journal of International Law, Vol. 2, No. 2, 2010
- Muharremi, Robert. *A Note on the ICJ Advisory Opinion on Kosovo.* German Law Journal, Vol. 11, No. 08, 2010
- Szewczyk, Bart M. J. *Lawfulness of Kosovo's Declaration of Independence.* ASIL Insight, Vol. 14, Issue 26, 17 August 2010