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THE KOSOVO ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

The author claims that the ICJ issued a very narrow Advisory Opinion regarding the unilateral declaration of independence, in respect of Kosovo finding that the making of the declaration was not in itself an act contrary to international law. He also stresses that, at the same time, the ICJ did not find that Kosovo had a right to secede, that Kosovo's declaration was legally effective, that the attempted secession was successful, or that Kosovo is otherwise an independent state. His opinion is that this finding merely cuts off one possible avenue for arguing that the attempted secession is unlawful, and analyses the manner in which the ICJ navigated through the political morass by recasting the question posed by the UN General Assembly.

Key words: *International Court of Justice. Serbia. Kosovo Independence. Lotus Principle.*

As expected, the International Court of Justice issued a very narrow Advisory Opinion in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. The Court simply found that the making of the declaration was not itself an act contrary to international law. Similarly, if I were to stand in my living room and declare it to be an independent state, I would have violated no rule of international law. Even if I were to broadcast that declaration to the world, it would still not be unlawful. It would also not have any legal effect.

It is essential to clarify what the Court did not find. The Court did not find that Kosovo had a right to secede. It did not find that Kosovo's declaration was legally effective, that the attempted secession was successful, or that Kosovo is otherwise an independent state. It did not find that other states acted lawfully in recognizing Kosovo as an independent

State. Indeed, the Opinion does not in any way support Kosovo statehood. It merely cuts off one possible avenue for arguing that the attempted secession is unlawful.

As for what the Court did find, there are few noteworthy legal points. More interesting is the manner in which the Court navigated through the political morass by recasting the question posed by the General Assembly.

The first section of this article provides an analysis of the Court's noteworthy legal findings. The second section examines the Court's reconstruction of the General Assembly's request for an advisory opinion. The third section analyzes Judge Simma's claim that the Court embraced the so-called *Lotus* principle. The article concludes with observations about the proper role of the Court, and whether the Court abdicated its responsibilities in this instance.

1. NOTEWORTHY LEGAL FINDINGS

After satisfying itself of jurisdiction, and declining to exercise its discretion to refrain from rendering an opinion,¹ the Court turned to the question posed and gave it a narrow read. It interpreted the question as not including an examination of the legal consequences of the declaration, such as the issue of whether Kosovo had achieved statehood or "the validity² or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."

The Court then proceeded to assess whether the making of the declaration was in violation of general international law or of the *lex specialis* of Security Council Resolution 1244 and the Constitutional Framework promulgated pursuant thereto.

1.1. General International Law

In its analysis of general international law, the Court reaffirmed the traditional understanding of the principle of territorial integrity as operating between states. According to the Court, the scope of this principle is "confined to the sphere of relations between States".³ Thus, it does not

¹ This is unsurprising, as the Court has never declined to render an opinion where it has found that a request had been properly made.

² Interestingly, the Court does not refer here to the "legality" of acts of recognition, but merely to their "validity or legal effects."

³ Para. 80.

bind non-state actors, in particular secession seeking groups. According to this line of reasoning, any general legal prohibition on secession arises, if at all, under domestic law.

As there is no general prohibition on declaring independence, the Court opines that there is therefore no need to examine whether there is a right to secede in this case. It thus avoids tackling the issue of self-determination. Given the state of international law on this issue, it was best avoided. More guidance is required from political organs to give this right legal content. At its present stage of development, the Court would likely have found it to be *non liquet*.

1.2. Security Council Resolution 1244 and the Constitutional Framework

Before assessing the legality of the declaration of independence with the *lex specialis* of Resolution 1244 and “measures adopted thereunder”, the Court addresses the issue of the identity of the authors of the declaration. It finds that the authors of the declaration were not, contrary to the apparent assumption underlying the question posed by the General Assembly, the Provisional Institutions of Self-Government (PISG), but rather were “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”.⁴ This of course makes its analysis much simpler.

The Court then concludes that as these “persons” were not legally constrained by Resolution 1244 or measures adopted thereunder, their making of a declaration of independence was not in violation of this *lex specialis*. The Court also points out that Resolution 1244 was focused on process, and not outcome, and that, as such, independence was not precluded by Resolution 1244.

In the course of its analysis, the Court makes a few interesting observations. The first is its affirmation that the Security Council has the power to legally bind non-state actors. The second is its finding that UNMIK Regulations promulgated by the Special Representative of the Secretary General, and the Constitutional Framework in particular, while operating within the internal legal system of Kosovo, have an international character, and thus comprise part of the international law applicable in this context.

⁴ Para. 109.

2. RECASTING THE QUESTION

Perhaps the most interesting facet of the Opinion is the manner in which the Court recasts the question posed by the General Assembly.

After affirming its right to reformulate the scope of questions posed by the General Assembly, the Court expressly declines to do so.⁵ Ironically, the Court then proceeds to do just that.

The question posed by the General Assembly was: “Is the unilateral declaration by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”. It would seem that the one thing the General Assembly did make clear was the lawfulness of whose conduct it sought to be assessed.

Nonetheless, the Court did not consider that “the General Assembly intended to restrict the Court’s freedom to determine this issue [i.e. the identity of the authors of the declaration] for itself”.⁶ That may well be true. But if that was the case, then perhaps the Court’s analysis should have stopped as soon as it determined that the authors were other than those expressly inquired about by the General Assembly.

Further on in the opinion, the Court addresses the question of who authored the declaration. Its analysis is suspect. It finds, essentially, that since the PISG were not empowered to declare independence, they could not have been acting in the capacity of the PISG when they did so. This runs counter to the general principle of law, equally recognized in international law,⁷ that an organ may commit *ultra vires* conduct while still acting in official capacity.

The Court notes that the authors were instead “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”. By what process did they become “representatives of the people of Kosovo”? These representatives identified themselves in the declaration as “democratically-elected

⁵ Para. 51.

⁶ Para. 53. It is also interesting to note that the case caption used by the ICJ changed with the rendering of the opinion. The caption on the opinion is “Accordance with international law of the unilateral declaration of independence in respect of Kosovo”. On all of its previous documentation, including its Order of 17 October 2008, the caption reads, “Accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo”. Indeed, in paragraph 4 of that same order the Court “tak[es] account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion.”

⁷ Indeed, the logic of state responsibility rests upon this notion. See, e.g., article 7 of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts.

leaders”, elected to positions in the PISG pursuant to the legal framework put in place by UNMIK.

It could perhaps be argued that these individual acted simultaneously in more than one capacity, but to say that they were not acting at all in the capacity of the PISG strains logic. Perhaps most unfortunately is that even had the Court acknowledged that the authors were at least partially acting as the PISG, it could still have reached the same result – that the making of the declaration was not unlawful.⁸

3. THE *LOTUS* PRINCIPLE

One other aspect of the Opinion is worth mentioning – the extent to which the Court embraced the *Lotus* principle.

According to the Separate Opinion of Judge Simma, “The Court’s reading of the General Assembly’s question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called Lotus principle”.⁹ However, it is far from clear that the Court applied the *Lotus* principle.

First, in its strict construction, that “restrictions upon the independence of states cannot ... be presumed,” the *Lotus* principle is applicable only to states, and thus is not implicated by the conduct of non-state actors. However, read more broadly, the *Lotus* principle stands for the proposition that the only international law that exists is that which is positively created by states, and that in the absence of a rule to the contrary, conduct is permitted (whether of a state or non-state actor).

Did the Court apply this broader construction of the *Lotus* principle? It is more likely that the Court simply interpreted the General Assembly request as disposing of the issue. The Court read the question of whether the making of the declaration was in accordance with international law as equivalent to the question of whether it was in violation of a rule of international law. This is a reasonable interpretation of the question asked, particularly in light of the Court’s prior practice of avoiding addressing head-on the *Lotus* question. Indeed, this interpretation comports with the presumed intent of the General Assembly. If the General Assembly wanted the Court to address the *Lotus* question, it could have asked the question explicitly. The Court is probably also aware that it is highly unlikely that the General Assembly would want the Court to opine on the *Lotus* issue.

⁸ J. Cerone, “The Legality and Legal Effect of Kosovo’s Purported Secession and Ensuing Acts of Recognition,” *Annals of the Faculty of Law in Belgrade / Belgrade Law Review* 3/2008, 60 71.

⁹ Separate Opinion of Judge Simma, para. 8.

4. CONCLUSION: THE PROPER ROLE OF THE COURT

This highly sensitive case subjected the Court to strong political forces. The process of requesting the opinion was heavily negotiated, and dozens of states made submissions to the Court on the question. Was the question poorly formulated? Presumably states knew that they were asking a very narrow question, and perhaps all states' political interests were ultimately served by this formulation.¹⁰

It is beyond question that the Court is used by states as a policy tool. This is unproblematic as far as it goes. It is up to the Court to ensure the integrity of its process. Its function is adjudication, and the Court must not allow this function to be inappropriately influence by politics. Indeed, the Court goes out of its way to expressly affirm this responsibility. Whether it succeeds in fulfilling this responsibility is a matter of some debate.

Concerns have already been raised about the potential effects of the Opinion on separatist movements around the globe. Should the Opinion have any knock-on effect? No. It states nothing unusual; virtually nothing has changed as a legal matter. Will it have a knock-on effect? That depends on how the decision is spun by the various stake-holders.

If the Opinion simply maintains the legal *status quo* on the question of Kosovo's independence, does this mean that the Court has in some sense abdicated its responsibility? The Court's restrictive interpretation of the question posed, and its preservation of the legal status quo, is appropriate in this area of the law – one which is driven primarily by political reality. If the overwhelming majority of states endorse Kosovo's accession to sovereignty, its factual independence will be given the imprimatur of international law. That is not to say that the Court should eschew matters that are politically sensitive. It has, rightfully, consistently rejected such arguments. But where, as here, the law leaves its conclusions to the political process, the Court should sit back and allow that process to come to resolution.

¹⁰ It is not uncommon for states to have recourse to the ICJ for political cover for decisions that would be politically unpopular with their domestic constituencies.