

Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence

By Michael Bothe^{*}

At a first glance the International Court of Justice (ICJ) has given a clear negative answer to the question submitted to it by the General Assembly. According to the ICJ’s advisory opinion from 22 July 2010, Kosovo’s declaration of independence did not constitute a violation of international law. Yet, reading the reasons the ICJ offered in support of its holding, one soon discovers that many relevant questions have been left open.

The rule that constitutes the core of the ICJ’s holding is old and beyond dispute: Secession is not prohibited by international law. International law does not contain any guarantee against the dissolution of States from within. But neither does international law prohibit States from seeking to prevent secession by using force. If neither secession nor forcefully preventing it is prohibited, then international law is indifferent in this respect. International law simply does not regulate the problem. This is exactly what the ICJ meant when it held: “general international law contains no applicable prohibition of declarations of independence”. This is why Kosovo’s declaration of independence did not violate international law.

Does the right to self-determination grant a better legal justification for secession? If secession constitutes an exercise of the right to self-determination, then a State likely would be prohibited from repressing secessionist attempts by using force. The ICJ leaves that question open. In order to answer the question with which it was presented, the ICJ found it sufficient to say no more than that secession was not prohibited. This judicial restraint has consequences that are of political importance. No secessionist movement can rely on the ICJ’s Kosovo opinion to justify a right of secession. With this, the ICJ laid to rest fears often expressed by opponents of Kosovo’s independence (in Europe in particular Spain, Greece and Cyprus). The ICJ navigated this part of its diplomatic task with aplomb.

But didn’t Kosovo’s declaration of independence violate Security Council Resolution 1244 of 10 June 1999? The provisional order established in Kosovo after NATO’s intervention in the spring of 1999 rests on this resolution. It is the legal basis of the UN administration of Kosovo (UNMIK) and of the presence of troops from NATO and other States (KFOR) in Kosovo. With Resolution 1244, the Security Council prescribes the goal of this provisional

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order in a legally binding way: a final solution that brings “a substantial self-government for Kosovo”, yet at the same time takes “full account ... of the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.” Resolution 1244 is valid for an indeterminate period of time “unless the Security Council decides otherwise” – which the Council has not done so far.

Kosovo’s unilateral declaration of independence *is* incompatible with this goal. This entails two questions. First, is resolution 1244 still valid? Second, was it obligatory for the authors of Kosovo’s declaration? The ICJ’s answer to the first question is a clear “yes.” The answer to the second question is “no.” The ICJ clearly states: Resolution 1244 continues to constitute a legally binding yardstick concerning the determination of the status of Kosovo for all actors bound by it. Thus, Resolution 1244 continues to be obligatory for the member States of the United Nations. They continue to be bound by its terms, also in the future.

But why aren’t Kosovars bound by Resolution 1244? The authors of the declaration of independence did not act as organs or agents of the constitutional order established by the UN administration. Had they acted as such, they would have been bound by the commands of the Security Council. The authors of the declaration, with the exception of one person, were members of the Assembly elected within the framework of the UN administration, but they did not act in that capacity. Being actors outside the UN framework, they did not belong to the addressees of the Security Council’s mandate. For this reason, the ICJ reasoned, they were not bound by it. This may be more or less convincing reasoning. From the point of view of legal logic, it was sufficient as the basis for the ICJ’s holding that the authors of the declaration of independence had not violated Resolution 1244.

Based on this discrete parsing of issues, a restrained assertion of its judicial authority, and its more-or-less convincing reasoning, the ICJ concluded that the authors of the declaration of independence did not commit an internationally wrongful act. According to the ICJ this was the question before it, nothing more.

But has the ICJ, by its reasoning, not done a disservice to the cause of the Albanian Kosovars? The ICJ emphasizes that the authors did not act in the function for which they were elected. What, then, is the basis of their legitimacy? The ICJ’s opinion seems to drive them into a shadowy, non-official area. What is it that distinguishes them from any market assembly? The ICJ was not asked and did not answer this question.

And, based on the ICJ’s reasoning, have the authors of the declaration achieved what they set out to do? The declaration is merely a piece of paper. The declaration is one thing, the successful establishment of an independent State is another. Does a State of Kosovo really exist? Doesn’t the international entity that is Kosovo lack the necessary governmental power to fulfil a fundamental function of a State, namely, namely to ensure the security of the inhabitants of its territory and the peaceful enjoyment of their human rights? So far,

this function is still guaranteed by the foreign administration. To give an answer to this question, it would have been necessary to monitor further developments in Kosovo. But this was not the question put to the ICJ.

Because this more important question remains open, the ICJ's Kosovo opinion does not constitute the last word on the Serbian claim that Kosovo continues to be a part of Serbia. The ICJ's holding that the authors of the declaration of independence did not violate Resolution 1244 does not mean that Serbia is not entitled to rely on the Resolution regarding its claims of territorial integrity.

What is the legal situation of third-party States with respect to Kosovo? This question also was not asked and answered. But the answer is important for the future. Declarations of independence are not prohibited. But States may not recognize a secession before it is effectively established. A premature recognition constitutes a forbidden intervention into the internal affairs of another State. In the case of Kosovo, it is not only this old rule that is at stake, but it is the fact that the Security Council has created a legal regime binding all States by which it has reserved the final word on the Kosovo status for itself, and by which it has excluded the unilateral termination of the territorial integrity of Yugoslavia (now Serbia). The Court says that this regime is still valid. Thus, negotiations must continue.