The Creation of States before the International Court of Justice: Which (Il)Legality?

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Introduction

It is a non-written rule of our epistemic community not to comment upon cases in which you have been involved in capacity as agent or counsel (see CR 2009/28 Public sitting held on Friday 4 December 2009). I shall accordingly try, as much as I can, to live up to this rule and, subject to one exception, limit my comments to some general observations.

I will first recall some salient elements of the context which led to a request for an advisory opinion (1). I shall then say a few words about the hopes for a far-reaching pronouncement vested by those initiating the request for an opinion and the extent to which these hopes contrasted with the traditional judicial economy to which international courts adhere (2). I shall then turn to the formulation of the question by the General Assembly and the way in which Court (re-)interpreted it (3). Two substantive points of the reasoning of the Court will be examined: first, the already much-discussed question of the concept of being in accordance with international law (4); second, the equally controversial question of the identity of the authors of the declaration of independence (5). Without necessarily putting the conclusion reached by the Court into question, I will demonstrate that these two aspects of the opinion are beset by a similar paucity when it comes to the concept of legality embraced by the Court.

1. The context

The backdrop of the advisory procedure is well-known and I do not deem it necessary to dwell upon it here. In a nutshell, the international community, after a controversial military campaign, forcefully obliged Serbia to withdraw its exercise of public authority from the territory of Kosovo and replaced Serbian governmental institutions by a newly built UN
international administration reminiscent of the newly created territorial administration of East Timor. The final status of the territory, designed by virtue of United Nations Security Council Resolution 1244, had always been left in limbo. Kosovo and Serbia never reached any agreement on the final status of the territory. After the recommendation by the special envoy of the UN Secretary General to grant independence to the territory of Kosovo, the Provisional Institutions of Self-Government of Kosovo adopted a declaration of independence on 17 February 2008. On 26 March 2008, in an unusual attempt to instrumentalise the UN advisory mechanism for the fulfillment of its national political agenda, the Government of Serbia announced its plan to call on the International Court of Justice to rule on the declaration of Kosovo's secession. Following the initiative of Serbia, the United Nations General Assembly, adopted this proposal as Resolution 63/3 on 8 October 2008 with 77 votes in favour, 6 votes against and 74 abstentions. The resolution requested the ICJ to give an advisory opinion on a very narrow question: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’

Whilst 48 recognitions (and a recognition by Taiwan) of Kosovo had been issued prior to the General Assembly request, it is noteworthy that 21 new recognitions were issued between the request and the moment the opinion was rendered, thereby totalizing 69 (+ Taiwan) recognitions on the eve of the opinion. The request for an advisory opinion seems not to have slowed the flow of recognitions and States intent on recognising the new entity arguably did not feel deterred by the proceedings initiated by Serbia. This seems underpinned by the fact that, since the opinion was given, only one State (Honduras) recognised the new entity.

2. Judicial economy by international courts

Unsurprisingly, the abovementioned request for an advisory opinion stirred passions across the international community. The international community, for its part, hoped that the Court would take the responsibility to resolve a debate which it had not been in a position to peacefully settle. Serbia, on its side, vested in this procedure all its hopes to recover, in the name of international law, a seceding part of its territory. Serbia’s hopes sharply contrasted with the overarching judicial economy witnessed in international legal proceedings. When these hopes were dampened in the summer of 2010 by the very minimalistic position eventually adopted by the Court, some commentators vented their disappointment as well as their surprise. But, should that decision really have come as a surprise?

Whilst substantive aspects are discussed below, it is fair to say that, leaving aside speculations on the amenability of ICJ judges – who are independent – to the foreign policy position of their national government, the astonishment expressed by some commentators is baffling. How could one have seriously believed that the Court would come with a grand opinion about statehood and self-determination by re-interpreting broadly the very narrow question submitted to it? It ought to be recalled that, in this particular situation, the Court was elevated into the role of the arbitrator of a universal multilateral political dispute that the international community had not been able to settle itself. Whilst it behooves the Court to
settle disputes between a limited number of States, the highest judicial body of the United Nations usually dislikes being turned into the receptacle of universal political disputes that tear the international community as a whole. Moreover, the question was so narrowly phrased – the narrow wording having constituted a manoeuvre by Serbia to both secure enough support at the General Assembly as well as to limit the consequences of a possible adverse opinion – that there was little to be expected from the Court. International tribunals abide by a principle of judicial economy whereby they do not venture into extensive developments about the state of the law beyond what is strictly necessary to settle the dispute brought before them. Indeed, they usually approach cases with a very pragmatic mindset. It is difficult to see how it could be otherwise. International judicial bodies are not consultative organs of the international legal scholarship. They are simply asked to answer pragmatically the question put in front of them and settle the disputes which are submitted to them. This tendency toward judicial economy and pragmatism has been recently reinforced by the decreasing willingness of States to appoint academics and scholars to these bodies and their unabashed will to see former diplomats occupy the highest judicial functions. When it comes to the ICJ, it is therefore no surprise that the time of an active Court purposely embarking in the development of international law through *obiter dicta* is bygone.

The 2010 advisory opinion on Kosovo clearly manifests the abovementioned tendency toward judicial economy and pragmatism. In this particular case, judicial economy and pragmatism could even have led the Court, given the political context of the case, to decline the request. ‘Compelling reasons’ to do so were probably not so hard to identify. Yet, the Court did not depart from its resolution to answer questions brought before it. It can be argued, however, that minimalistic opinions as the one given in this case do not help much settling multilateral disputes. The meandering character of the reasoning on which they rest, the legal mishaps or the space left for implied inductions may well provide appropriate material of studies to international legal scholars and students in international law. Such opinions nonetheless do little to assuage the political disputes in which the requests originate or to enlighten the body requesting the opinion. One may thus wonder, together with judges Bennouna, Skotnikov, Keith, and Tomka, whether this request was not an appropriate opportunity for the Court to voice its reluctance to be the receptacle of multilateral disputes that it cannot solve, to see its advisory jurisdiction being instrumentalised for the sake of the political agenda of a few States, or to be forced into pronouncements which are of no avail for the body requesting it.

3. The question and its re-formulation

As indicated above, the question submitted by the General Assembly to the Court was formulated as follows: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’ The Court claimed that it did not need to reformulate the question despite being endowed with the
power to do so, for it deemed that the question was clear and specific. The question, as interpreted by the Court, was nonetheless different. Indeed, the Court stripped the question from the reference to the ‘Provisional Institutions of Self-Government of Kosovo’. It argued that the matter of the identity of the authors of the declaration of independence had not been settled by the General Assembly and this point was very instrumental in answering to the question as whole. The necessity to disentangle that problem suffices to justify the abovementioned limited reformulation of the question by the Court and the controversy fueled by the Court’s stripping the question from the reference to the ‘Provisional Institutions of Self-Government of Kosovo’ seems slightly overblown.

4. Being in accordance with international law?

The answer provided by the Court to the question submitted to it is well-known. The Court deemed that the declaration of independence did not violate international law. The Court made it very clear that the absence of prohibition did not simultaneously provide any entitlement to the authors of the declaration of Kosovo or to Kosovo as a whole. Yet, the Court’s take on this particular point stirred some unease, for many see it as the expression of an early 20th century understanding of international law embodied in the famous Lotus decision of its predecessor. To Judge Simma, for instance, the formulation ‘in accordance with international law’ should not only be interpreted as a question of whether or not there was a prohibition (see the declaration of Judge Simma appended to the opinion). To him, the question of being in accordance with international law also includes the question whether there was a right to adopt such declaration of independence.

It certainly is true that the Court interpreted the formulation ‘in accordance with international law’ as being only a question of the absence of prohibition. According to that understanding, international law is private law writ large and States and other subjects of international law can do whatever is not prohibited by international law. In other words, they do not need to seek any ‘title’ or ‘authorisation’ from international law before acting and they simply need to ensure that what they do is not prohibited by customary and conventional international law. This conception – often mistakenly dubbed the Lotus conception – has become more contested in the second part of the 20th century. To many international legal scholars nowadays – like Bruno Simma, international law has ceased to be such a private law writ large and has grown into a real public law of the international community. This contemporary conception of international law conveys the idea of completeness of a legal order where all subjects of international law receive their rights and powers from that public law which allegedly delineates the sphere of competence of each actor. This vision of a public law of the international community has obvious constitutionalist overtones and it certainly is no surprise that it is advocated by a lawyer like Bruno Simma.

1 ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 22 July 2010, para. 51.
2 Ibid., para. 52.
3 Ibid., para. 56.
It is not my intention to delve into this question here. First because I am not certain that the Court actually followed a *Lotus* approach. Indeed, *Lotus* was primarily about titles’ domestic criminal jurisdiction. Second, this question would bring us into a discussion about our respective fundamental understanding of international law. In that sense, it is almost a philosophical question. I personally do not think that international law has grown into this public law of mankind and that it distributes titles, entitlements, or competences among states. I have had the opportunity to spell out my rejection of such constitutional understanding of international law in several of my writings.\(^4\) I think that the private law analogy to describe the structure of international law should not necessarily be looked at with a dim view. International Law can still achieve an ambitious agenda even if designed as a private law writ large. Moreover, it seems that the private law analogy corresponds more closely with the reality of international relations. Elevating international law into a super-constitutional structure that distributes spheres of action to each actor, while intellectually very appealing, bears the risk of transforming international law into an utopia which would be restricted to an intellectual playground for international lawyers and students in international law. Be that as it may, as I have indicated above, all this probably boils down to theoretical questions, which falls outside the ambit of this short contribution.

I find it more important to highlight that the problems with the Court’s reasoning is not really whether it takes or not a *Lotus*-type of approach. More problematic is the paucity of the reasoning of the Court as to the concept of legality on which its reasoning rests. The Court says that the declaration of independence did not violate international law. I am ready to believe that international law does not prohibit secession or the adoption of a declaration of independence – however disappointing this may be for those who thought that international law regulates all aspects of the birth of new entities. I think that the Court’s position correctly reflects the current status of positive international law. Yet, the Court does not say a word as to the perspective from which it looks at this question of legality. More precisely, saying that international law does not prohibit (the adoption of) a declaration of independence does not tell us anything as to what question of legality the Court is considering. Indeed, being in accordance with international law, that is being legal, is in itself entirely relative. Is the Court examining the conformity with international law of the *adoption* of the declaration by its author or is it examining the conformity with international law of the *declaration* itself? The question is not without importance in that the target of the control of legality determines the consequences of a possible illegality. Indeed, illegal behaviour triggers a problem of responsibility whereas an illegal act raises a question of validity. In the particular context of its advisory opinion on Kosovo, the Court remained silent on the question whether the (il)legality arose in connection with the declaration as an act (validity) or the behaviour of its authors (responsibility). Whilst most experts will concur with the idea that international law does not prohibit the adoption of a declaration of independence nor the declaration itself, the

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silence of the Court as to how legality should be construed makes the last part of the opinion very intricate and, to some extent, unintelligible.

5. **The authors of the declaration of independence: a question of identity or a question of capacity?**

The question of the identity of the authors of the declaration of independence certainly is one of the most contentious aspects of the opinion. As was mentioned above, it is what justified that the Court partly reformulated the question and stripped it of the reference to the Provisional Institutions of Self-Government of Kosovo. For reasons pertaining to my involvement in the case, this certainly is not a point on which I want to elaborate. The State I represented took a clear stance on that issue when answering the additional questions raised by the Court after the end of the oral proceedings and I do not want the unelaborated thoughts presented here to be conflated with the position of that State. However, I would like to submit that the abovementioned lack of determination of the aspect of legality that the Court was considering ends up severely weakening the intelligibility of the last part of the opinion.

As is well-known, the Court found that the authors of the declaration of independence did not act in their capacity as the Provisional Institutions of Self-Government of Kosovo but ‘as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration’. I acknowledge that the Court’s reasoning on this point could have been slightly more polished and less concise. I am accordingly not surprised that many commentators took issue with it. This being said, I think that the first reactions to that part of the opinion are somewhat overblown. There is much confusion in the literature about the gist of the point made by the Court here. I think there is nothing contradictory in saying that the authors of the declaration of independence were the Provisional Institutions of Self-Government of Kosovo but that they did not act in that capacity. It is an uncontested principle of attribution in international law (and rules about attribution happened to be codified within the framework of the rules on responsibility) that being the organ of a given international legal subject is not sufficient for that subject to incur responsibility for violations of its obligations by that organ. That organ must also be acting in that capacity. There only are a few exceptions (lex specialis) in the context of the law of armed conflict where the requirement of acting in official capacity has been excluded. To me, the crucial question faced by the Court was whether the authors of the declaration of independence acted in their capacity as Provisional Institutions of Self-Government of Kosovo. It is true that I am not convinced by the Court’s use of intention to determine the capacity in which an individual is acting. Indeed, I do not think that capacity hinges on the unfathomable subjective criterion. Yet, a point can be made that the authors of the declaration of independence did not act in their capacity as Provisional Institutions of Self-Government of Kosovo. I have myself argued elsewhere that the high ranking generals of the army

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committing a *coup d'état* were not acting in their capacity of organ of the State whose government they were trying to overthrow.⁶ I think that the situation of the Provisional Institutions of Self-Government of Kosovo is not that different and a good argument can be made in this respect. The Court should have made more effort in making that point.

However, the main problem triggered by that part of the opinion is not the question of the identity/capacity but the way the Court handled, as a result of the above-mentioned finding on the identity of the authors of the declaration of independence, the question whether Resolution 1244 and the Constitutional Framework prescribe an external prohibition of (the adoption of) a declaration of independence. Indeed, *just* after having concluded that the authors of the declaration of independence did not act in their capacity as Provisional Institutions of Self-Government of Kosovo, the Court embarked on verifying whether 1244 and the Constitutional frameworks prohibit (the adoption of) such a declaration. The Court did so because it thought that Resolution 1244 and the Constitutional framework could also create an *external* prohibition to adopt a declaration of independence, that is a prohibition applying to *all* actors and not only Provisional Institutions of Self-Government of Kosovo created and regulated by these two instruments. This is why, in a rather noticeable obiter – probably one of the few *obiter dicta* of doctrinal interest – the Court came to argue that the Security Council can create obligations for non-state actors, irrespective of whether they are – and act in their capacity as – organs of institutions created by the Council.⁷ The Court went on to examine whether resolution 1244 bars the authors of the declaration of independence from adopting a declaration of independence and found that it did not. It then turned to the constitutional framework to see whether it similarly prescribes any prohibition to the authors of the declaration of independence.

It is when turning to the possibility of an external prohibition by the Constitutional Framework that the reasoning of the Court falters. Indeed, confronted with the question whether the Constitutional Framework bars the authors of the declaration seen as ‘persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration’ the Court found that the Constitutional framework did prohibit the adoption of a declaration of independence by the authors as ‘persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.’ This is because they acted as ‘persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration’.⁸ Whilst the question at stake was the existence of an external prohibition by the Constitutional Framework, the Court reverted to an internal perspective by repeating that the authors did not act in their capacity as Provisional Institutions of Self-Government of Kosovo. This circularity is particularly bewildering because it sharply departs

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⁷ ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, 22 July 2010, para. 116-117.
from the reasoning adopted by the Court with the normative content of Resolution 1244 undertaken in paragraphs 113-119.

It is submitted here that the disconcerting differences in the reasoning of the Court and its adoption of diverging perspectives between paragraph 113-119 and paragraphs 120-121 originate in the Court’s lack of determination of what it meant with (il)legality. This inconsistency seems to show that the Court has been oscillating between different conceptions of (il)legality. On the one hand, it has looked at the legality of the behaviour of the authors of the declaration of independence, which raises a question of responsibility. On the other hand, it has looked at the legality of the declaration itself, which rather raises a question of validity. Each of these questions requiring a different kind of reasoning, the Court eventually came to see the question of the creation of an external prohibition by Resolution 1244 and by the Constitutional Framework from diverging angles, thereby producing inconsistencies in its reasoning. In sum, the last paragraphs of the opinion seem to come as a confirmation of the Court’s use of diverging concepts of (il)legality throughout its opinion.

In conclusion, although some of the criticisms of the opinion of the Court formulated by commentators so far are, to a certain extent, overblown, it does not seem unreasonable to expect from a Court of law that it spells out its understanding of what it means to be legal.