



# The *Kosovo* Opinion and General International Law: How Far-reaching and Controversial is the ICJ's Reasoning?

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## I. Introduction

Is the Kosovo Advisory Opinion actually a Non-Opinion?<sup>1</sup> This paper makes an argument that the opinion may well be narrow but it is nevertheless still an opinion. And sometimes it is not narrow but rather far-reaching if the Court's pronouncements are put in the context of general international law. Yet some of the Court's pronouncements are also controversial in this regard.

Why is it far-reaching? This paper makes an argument that some of the issues not addressed by the Court were dealt with implicitly in the Court's reasoning. This does not mean that the Kosovo Opinion in some mysterious way implicitly clarified the legal status of Kosovo. Rather, it is argued that the Court implicitly clarified that an obligation to withhold recognition is not applicable in this situation.

Why is it controversial? This paper takes issue with the Court's identification of the authors of the unilateral declaration of independence. This problematic finding makes it questionable whether the declaration was issued by the competent authority. This has never been questioned, not even by Serbia, but it can be said that the Court's reasoning created a legal mess in this regard.

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<sup>1</sup> Compare J. Cerone, 'The World Court's Non-Opinion', *Opinio Juris* (25 July 2010), at <<http://opiniojuris.org/2010/07/25/the-world-court%e2%80%99s-non-opinion>>.

## II. Far-reaching implicitly on the status of recognitions

Although the Court did not accommodate the absence of a right to declare independence within the question posed to it, the neutrality of international law in relation to unilateral declarations of independence obviously underlies the Kosovo Opinion. Under international law, a declaration of independence cannot be illegal only because it is unilateral. In paragraph 81 the Court held: “[T]he illegality attached to [some other] declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).”<sup>2</sup>

This paragraph has a very far-reaching meaning. The focus will be on two points: (i) the Court adopted the view that a declaration of independence can be illegal under certain circumstances, albeit illegality does not stem from its unilateral character; (ii) in this context the Court mentioned violations of certain norms of international law, *jus cogens* in particular. The first point implies that it is not true that international law is generally not concerned with declarations of independence at all; it is only that it is neutral in respect to the *unilateral character* of such declarations. This may be controversial because the entity issuing a declaration of independence is not (yet) a state. So we have a non-state actor violating international law.

But such a conclusion also follows from Security Council resolutions on Southern Rhodesia, Northern Cyprus and the South African Homelands.<sup>3</sup> Many of these resolutions condemn illegal declarations of independence and not, more broadly, illegal state creations.

Paragraph 81 of the Kosovo Opinion indeed draws heavily on the Security Council’s practice in the mentioned situations. And this brings us to the second point. In response to the illegal declarations of independence of these entities the doctrine of collective non-recognition has emerged under customary international law. The violated norms were the prohibition of illegal use of force, the prohibition of racial discrimination and the right of self-determination. The character of these norms may be said to be that of *jus cogens*, though this may well be debatable in relation to the right of self-determination.<sup>4</sup>

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<sup>2</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Rep 2010 [hereinafter the *Kosovo Opinion*], para 81.

<sup>3</sup> See UN Doc. A/RES/1747 (28 June 1962); UN Doc. S/RES/202 (6 May 1965); UN Doc. A/RES/2022 (5 November 1965); UN Doc. A/RES/2024 (11 November 1965); UN Doc. S/RES/216 (12 November 1965); UN Doc. S/RES/217; UN Doc. S/RES/277 (18 March 1970). For the South African Homelands see: UN Doc. A/RES/2671F (8 December 1970); UN Doc. A/RES/2775 (29 November 1971), UN Doc. S/RES/402 (22 December 1976); UN Doc. S/RES/407 (25 May 1977); UN Doc. A/RES/37/43 (3 December 1982); UN Doc. A/RES/37/69A (9 December 1982) and UN Doc. S/RES/417 (31 October 1977).

<sup>4</sup> See Commentary to Article 40: Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001) [hereinafter The ILC Articles on State Responsibility, with Commentaries], Vol. II, Part II.

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Some writers have thus long suggested that a state creation in violation of *jus cogens* would be illegal. And if an entity tries to emerge as a state in violation of these norms, this triggers an obligation on third states to withhold recognition.<sup>5</sup> Although this theory is not without difficulties, it was accepted in Articles 40 and 41 of the ILC Articles on State Responsibility.<sup>6</sup> It follows from Article 41 that an attempt at state creation in violation of *jus cogens* triggers an obligation opposable *erga omnes* to withhold recognition.<sup>7</sup>

Now let us return to the Kosovo Opinion in general and to paragraph 81 in particular. The Court's reasoning implies that Kosovo did not emerge in violation of *jus cogens*. But this implicitly means that the obligation to withhold recognition in the sense of Article 41 of the ILC Articles on State Responsibility is not triggered. In plain language, recognition of Kosovo is not illegal under international law. The Court did not say that, but this conclusion follows from its reasoning if it is put into the context of general international legal doctrine.

### **III. The authors of the declaration and a legal mess**

While in one respect the Court provided for implicit clarification, in another respect it created a legal mess. Although there is little doubt that independence is the wish of virtually all Kosovo Albanians, which means roughly 90 percent of the population,<sup>8</sup> the Court's identification of the authors of the declaration of independence makes it possible to object that the declaration of independence formally stemmed from the will of the people. Why is this important?

By way of the right of self-determination, international law requires that any alteration of the legal status of a territory must occur in accordance with the will of the people. If a declaration of independence is issued by authorities who are non-representative of the people of the territory in question, the declaration of independence will be considered illegal under international law. This, *inter alia*, follows from the already mentioned practice of the Security Council and from the *Western Sahara Advisory Opinion*, given by the ICJ.<sup>9</sup>

In the Kosovo Opinion, the Court held that "the authors of the declaration of independence ... did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration."<sup>10</sup> Now let us move to the problem.

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<sup>5</sup> See J. Dugard, *Recognition and the United Nations* (1987), especially at 102. See also J. Crawford, *The Recognition of States in International Law* (2006), at 102–5.

<sup>6</sup> See Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (2001), UN Doc. A/RES/56/83 (28 January 2002) [hereinafter The ILC Articles on State Responsibility], Articles 40 and 41.

<sup>7</sup> Ibid.

<sup>8</sup> See, for example, the Ahtisaari Plan. UN Doc. S/2007/168 (16 March 2007).

<sup>9</sup> *Western Sahara Advisory Opinion*, Advisory Opinion of 16 October 1975, ICJ Rep. 1975, para. 55.

<sup>10</sup> *The Kosovo Opinion*, para 109.

What is a ‘unilateral declaration of independence’? This term describes a situation in which an entity tries to emerge as an independent state without the consent of its parent state. As identified by the Supreme Court of Canada in the *Quebec case*, a unilateral declaration of independence can result in a new state creation if it is accepted by the international community of states.<sup>11</sup> It does not by itself change the legal status of a territory but it needs to be regarded as being creative of specific legal and political circumstances in which a new state may well emerge. But can these circumstances be created by just anyone?

No rule of international law prevents me from issuing a declaration of independence of Scotland. But would this declaration mean that Scotland is unilaterally seeking to secede from the United Kingdom? And what if my declaration of independence were universally accepted by the international community of states? Would history celebrate me as the man who – accidentally – recreated an independent Scotland?

This example seems to be a bit extreme. But what is extreme in it? The fact that it is very unlikely I could accidentally create an independent state? Or is it rather that this is not possible, not even in theory. For if something is only very unlikely to happen, this means that, under certain circumstances, it can happen. But can international law allow the circumstances in which my declaration of independence of Scotland creates a new state? The answer is that it cannot.

I am not entitled to speak on behalf of the people of Scotland and do not hold a position which would allow me to exercise an effective control over the territory of Scotland. Thus, I cannot create the legal and political circumstances of Scotland’s attempt at unilateral secession.

Yet the Kosovo Opinion reflects the view that, perhaps, I can do that. Remember, in the Court’s view the authors of the declaration of independence acted as persons outside of the framework of Kosovo’s institutions of self-government.<sup>12</sup> Am I not a person acting outside of the framework of self-governing institutions of Scotland? What is then the difference between them and me?

According to the Court, there is a difference, since they ‘acted together in their capacity as representatives of the people of Kosovo’<sup>13</sup>. Indeed, that declaration was issued by those who occupy posts in the institutions of Kosovo’s self-government and were elected to these posts by the people of Kosovo. But my declaration does not have these qualities.

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<sup>11</sup> *Reference re Secession of Québec* [1998] 2 SCR 217 (Canada), para 126 [Hereinafter: The *Quebec case*], para 155.

<sup>12</sup> See supra n. 10.

<sup>13</sup> See supra n. 10.

So here the Court silently derived the capacity to act on behalf of the people of Kosovo from the institutions of self-government. But in the next step it separated the post-holders from the institutions and treated them as individuals. The Court here tries to ride on two horses. If the individuals acted outside of the framework of self-governing institutions, they did not have the capacity to act. If they had the capacity to act, they acted within the framework of these institutions. There is no third way.

If the identity of the authors of the declaration was informal, the link between the will of the people and the declaration of independence is interrupted. This argument might sound purely legalistic and formalistic. Yet it is settled in international law that a declaration of independence issued by the wrong authorities is illegal.<sup>14</sup> So far this problem has not been invoked. Why? Because before the Court's opinion, there was at least one thing on which unanimous consensus existed: the declaration of independence was issued by Kosovo's institutions of self-government.<sup>15</sup> Now the Court has complicated this matter. Why did the Court do that? Because the informal identity of the authors of the declaration made it easier to argue that there was no prohibition under the *lex specialis* regime of Security Council resolution 1244 and of the Constitutional Framework.

#### **IV. Conclusion**

The Kosovo Opinion is not as narrow as it is sometimes believed to be. It is certainly not a non-opinion. And if scrutinised in light of international legal doctrine, its pronouncements can be both very controversial and very far-reaching. But not controversial and far-reaching enough to tell whether or not Kosovo is a state.

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<sup>14</sup> See *supra* n. 9.

<sup>15</sup> Immediately upon the declaration of Kosovo's independence, in his address to the Security Council the President of Serbia, Boris Tadic, *inter alia*, stated: "We request the Secretary-General, Mr. Ban Ki-moon, to issue, in pursuance of the previous decisions of the Security Council, including resolution 1244 (1999), a clear and unequivocal instruction to his Special Representative for Kosovo, Joachim R  cker, to use his powers within the shortest possible period of time and declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void. We also request that Special Representative R  cker dissolve the Kosovo Assembly, because it declared independence contrary to Security Council resolution 1244 (1999). The Special Representative has binding powers, and they have been used before. I request that he use them again." UN Doc. S/PV.5839 (18 February 2008), at 5.