

No Vision and No Global Assistance: Kosovo and the International Court of Justice

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The Advisory Opinion given yesterday by the International Court of Justice that the unilateral Declaration of Independence by Kosovo was not prohibited by international law was an accurate but very narrow and unsatisfactory opinion. The Court avoided taking any view on the vital issue of the extent of the right of self-determination outside the colonial context and it provided a very restricted and backward looking vision of the international legal system today.

The Court is absolutely correct in its view. The Security Council Resolution 1244 (1999) was designed to protect lives, to put in place an interim international administration, and to suspend Serbia's territorial sovereignty, without reaching any conclusion – or even a direct means to reach a conclusion – as to the final international legal status of Kosovo, whether it was to be independent or not. Because the Declaration was not first declared by the Kosovo provisional institutions themselves but by a group of Kosovar people, then it was not contrary to the constitutional arrangements between Serbia and Kosovo. In addition, there are no explicit restrictions on declarations of independence in general (or customary) international law, other than in specific situations where the Security Council has considered such declarations were part of an unlawful use of force, racially discriminatory or otherwise against a fundamental principle (*jus cogens*) of the international legal system. There is nothing in any of these laws that prohibit such a declaration of independence on the particular facts of this situation.

Yet that is a very narrow reply to a much broader question. The Court was asked by the UN General Assembly whether the Declaration of Independence was 'in accordance with international law'. Simply because international law does not prohibit such a unilateral declaration is not enough to answer the question as to whether it is in 'accordance with' international law. International law is much more than what states may consider legally prohibited. Does international permit it and, if so, in what circumstances?

My particular concern is that the Court deliberately avoided dealing with the key issue of the extent of the right of self-determination. The Court had a real opportunity here to show that it is a 'world court' and so clarify the right for its global audience. Does the right of self-determination outside the colonial context give a people the right to secede? This is a vital issue in many parts of the world, from areas of the former Soviet Union to Africa, and from Europe to Asia. Yet the Court chose not to consider it. This is despite the fact that the Court has repeatedly asserted that the right of self-determination applies worldwide (e.g. in East Timor) and outside the colonial

context (e.g. in Palestine). So the Court could – and should – have determined that *one* of the exercises (though not the only one) of the right of self-determination outside the colonial context is to secede through a declaration of independence. It could then have clarified in what circumstances that exercise is lawful.

In my view, the Court should have made clear that it is only in exceptional circumstances that the people of part of an existing state can exercise their right by external self-determination. The first form of exercise must be by internal self-determination, which involves forms of autonomy within a state, such as seen in the Scottish and Welsh devolution, the different language powers of the Swiss cantons and within parts of federal states. The exceptional circumstances in which an exercise of the right by secession could occur may include the dissolution of a state and possibly where the scale of the on-going violations of the right of self-determination (and other human rights) is such that external self-determination is a 'last resort' as all other means of exercise of the right have been fully tried by all parties and have failed. They could have then shown that, in regard to Kosovo, there was already the dissolution of the state of Yugoslavia and that territorial integrity of Serbia had been diminished by the international territorial administration, and that these, perhaps together with the large scale violations of human rights prior to that administration, were sufficient to consider that there were exceptional circumstances in the situation of Kosovo to make its declaration of independence lawful.

The Court did not do this and so has left an unsatisfactory legal answer. Further, it also demonstrated a very narrow view of the international legal system. It appears to consider that international law is solely created by states and for states, as it ignores the real role of the people of Kosovo. This is, as Judge Simma noted in his Separate Opinion, a very 'mechanical jurisprudence' that is not in keeping with the contemporary view of international law. Indeed, there are many non-state actors who are participants in the creation, development and enforcement of international law. This is seen in the active role of corporations in areas such as international trade law, the role of non-governmental organisations in international environmental law, the signing of international agreements by states with armed opposition groups to conclude civil wars, and, of course, the role of people in the right of self-determination and other human rights. These non-state actors can and do contribute to general international law.

So while the people of Kosovo may delight in this Opinion and hope it leads to further recognitions of its independence, the Court has not given any helpful direction as to the important issue of the application of the right of self-determination in the future. It has also shown an unwillingness to get beyond a blinkered and out-dated view of international law.