

Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?

By Robert Howse & Ruti Teitel*

The most immediately striking aspect of the ICJ's recent ruling on Kosovo's unilateral declaration of independence is the divergence between what the Court actually said and how its decision is being read in the media and by political actors. Typically the Court is said to have found secession by Kosovo to be "legal" or "lawful" under international law. According to Kosovo President Fatmir Sejdiu, "The decision finally removes all doubts that countries which still do not recognize the Republic of Kosovo could have." The angry reaction to the decision by Serbian nationalists likewise supposed that the Court had endorsed a right to secession. In fact, what the Court did was to read literally—and some would say narrowly or pedantically—the question it was asked, and thus to avoid opining on the major legal (and related policy) issues raised by the act of secession, including whether there is a right to proceed with a unilateral act of secession, and to whom such a right may or may not belong. On the literal reading, the Court was not asked, and thus it did not rule on, whether international law requires that the final status of Kosovo protect the group and individual rights of minorities, whether Kosovar Serbs or Roma. Likewise, the Court did not rule on whether Serbia or, indeed, any other State in the world community is required to recognize Kosovo as an independent State. Nor did the Court's decision address the borders of an independent Kosovo, or whether and under what circumstances force could legally be used either to impose independence or to resist it.

The question posed to the Court by the General Assembly was as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" A contextual and certainly a purpose-driven reading of this question might well have led the Court to interpret it as asking whether the *result* or *course of action* implied by the declaration was in accordance with international

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law. Indeed, the written submissions of a number of States before the Court, and the range of issues that they addressed, contemplated or urged such a possible meaning to the question. Instead, the Court considered that the sole measure that it was required to address was the declaratory act itself.

Now one could argue that there are cases where mere words may constitute or contribute to an internationally wrongful act—incitement to genocide, for instance, or a threat of the use of force. Thus, a declaration of independence that was understood as an incitement to genocide or where such conduct could be foreseen as a direct consequence of such a declaration, could be considered an internationally wrongful act. Perhaps, then, the Court moved a little too fast in suggesting (at paragraph 50) that a question about the legality of a declaration of independence need not entail any consideration whatever of the legality of its consequences. Indeed, later in its opinion the Court noted that the Security Council had condemned certain declarations of independence because “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*).”

The Court, in our view, was probably right to find that there is no general prohibition in international law of declarations of independence, i.e. unless they can be connected to violations of other norms of international law. But how could the Court be so sure that the Kosovo declaration was *not* or *would not* be connected to such violations of other norms?

The answer is by “reading down” or reducing the declaration to a statement of hopes and wishes, mere words without obvious effects. So, while the declaration itself says that Kosovo is declared “to be an independent and sovereign state” and that “Kosovo shall be *legally bound* to comply with the provisions contained in this declaration” (emphases added), the *Court* does not consider the declaration as an *act* of secession. Thus, it can interpret the question before it as not asking “whether or not Kosovo has achieved statehood....[n]or ... about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.” From this perspective, there is nothing in the Court’s opinion that in any way contradicts the decision of the Republic of Serbia in 2008 that the declaration “did not produce legal effects either in Serbia or in the international legal order” (this language is the Court’s – from paragraph 76 of the opinion - paraphrase of the Serbian decision). Moreover, there is nothing in the Court’s decision that would place any constraint on a competing declaration of independence of Kosovar Serbs, which would be one route towards the partition of Kosovo. (As we shall now go on to discuss, since the majority of the Court did not consider the declaration an official act of the authorities in Kosovo, it could not be considered to legally preclude such a declaration by Kosovar Serbs).

Further reinforcing the reduction of the Declaration to mere words—such that the Court was not called on to consider the legality of an *act* of secession—is the Court’s interesting holding (from which there are also interesting dissents) that, in making the declaration, the

agents in question were not acting in their capacity as officials of the Kosovo administration but rather “in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.” (paragraph 109). According to the Court, “the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.” (paragraph 105). The implication is clear: the declaration is to be read as having no legal or administrative effect within the existing framework of government in Kosovo. Indeed, it has no legal meaning as long as this framework exists. The intent or wish stated in the declaration concerning the nature of the final political settlement for Kosovo does not contradict the Security Council’s approach, which has not excluded independence as one option for a final settlement. At the same time, the declaration as read by the Court does not unilaterally impose, much less immediately, a legally-valid final settlement in the form of independence. Instead it expresses the *desire* for such a final settlement. (Judge Koroma, in his dissenting opinion, evaluates the declaration based on the view, contrary to the majority finding just described, that it has to be considered as a purported official act of an organ of the provisional institutions of government in Kosovo. Viewed in this way, Judge Koroma makes a plausible case that the declaration violates various provisions of the Security Council framework embodied in resolution 1244 (1999). Judge Bennouna’s dissent also takes issue with the majority’s refusal to consider the declaration to be an official act of the provisional authorities in Kosovo.).

The majority’s position that the declaration is not an act of secession itself, and indeed that it is not at all an official act of a governing authority, actually raises an interesting question concerning the situation of those States that have already recognized Kosovo’s independence based on the declaration. If the declaration is what the majority says it is, can it be on its own an adequate basis for recognition of statehood?

This leads us to the Court’s thinly veiled skepticism as to whether a general unilateral right to secession exists in international law, a question previously considered by the Canadian Supreme Court in the *Quebec Secession Reference* and answered in the negative (though the Canadian Court was open to the possibility that secession might be justified under international law where it is the only available remedy to oppression). The ICJ noted: “Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State, is , ..., a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of ‘remedial secession’ and, if so, in what circumstances.” (paragraph 82). By acknowledging the range and intensity of disagreement among States on a right to secede, the Court seems to have hinted that the necessary consent of the world community does not exist to establish firmly the existence of any such right as a matter of international law at this time.

Here we need to consider Judge Simma's separate declaration, which takes issue in strong terms with the narrow manner in which the majority understood its mandate. First of all, Judge Simma notes that, in reading "in accordance with international law" as meaning exclusively whether the declaration violates any prohibitive rule, the majority adopted an "anachronistic, extremely consensualist view of international law." (paragraph 3). As we have argued in recent work, the mere constraint of State behavior by rules does not capture many of the ways that international law provides normative guidance or direction to global politics.¹ But the ICJ as currently structured may not be well-situated to transcend fully the "anachronistic, extremely consensualist vision" that is really State-centric or -centered because the ICJ as an institution is in many ways a reflection of just that vision. The tension is increasingly apparent as more and more of the controversies that the Court is called upon to decide, have posed challenges to adherence to that simple view, whether on nuclear weapons,² the security fence between Israel and the Territories,³ or violent conflict implicating non-state actors (*Armed Activities in the Congo*).⁴ Ultimately, the question posed to the Court in this case was the product of political and diplomatic negotiation among State representatives; although the authors of the declaration of independence filed a statement with the Court, the pleadings and, thus, the shape of the arguments otherwise were completely dominated by States. National minorities or individuals whose rights and interests are very much at stake had no standing before the ICJ. Consider the contrast with the Canadian Supreme Court. In ruling on the question of secession, albeit under Canadian constitutional law (its ruling under international law is discussed above), the federal Government of Canada invited the Court to take a very narrow view of the question before it: all the Court needed to do was to conclude that the formal amendment procedure in the Canadian constitution did not provide for secession. But the Canadian Court went beyond this narrow approach and examined the relevant principles underlying the Canadian constitutional order that might guide secession, including democracy, federalism, minority rights, and the rule of law.⁵ But the reference to the Canadian Court, while based on questions posed by the Canadian government, actually began as a challenge to the legality of secession raised by Guy

¹ Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, GLOBAL POLICY Vol. 1 No. 2 (2010).

² *Legality of the Threat or Use of Nuclear Weapons* (1996).

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004).

⁴ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*(2005).

⁵ For an extensive jurisprudential argument (made prior to the judgment itself) as to why the Canadian Court should use these principles to provide normative guidance on secession, see Robert Howse & Alissa Malkin, *Canadians Are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CDN. BAR REV. 186 (1997).

Bertrand, a private citizen in Quebec. By making a reference to the Court, the Canadian federal government of the day actually pre-empted Mr. Bertrand's claim. But, as an intervener, he was able to plead his case before the Court, as were aboriginal groups and other affected non-state actors.

The international legal order as it has "evolved" in Bruno Simma's words, "into its present form" cannot fully be taken into account by the ICJ because this evolution reflects a new subjectivity, driven by the claims of persons and peoples and their recognition as autonomous actors in the international legal system⁶ that is no way reflected in the ICJ's State-centrism. The narrowness of the Court's ruling on Kosovo, regrettable against an ideal conception of what a truly *global* court could and should do, may at the same time create the space for other judicial institutions that are open to the claims of persons and peoples, ultimately to provide meaningful normative guidance on the difficult legal issues raised by secession—for example, perhaps eventually, the European Court of Human Rights. The international legal system remains decentralized with multiple sites of interpretation and a more fluid relationship to politics than that suggested by the image of a world court as a final "constitutional" authority on legal normativity.⁷ Given the challenge of difference and diversity at a global level, and the legitimacy questions posed by governance distanced if not detached from classic forms of democratic accountability,⁸ there is wisdom in a world court that eschews the aspiration to interpretive hegemony.⁹

⁶ RUTI TEITEL, *HUMANITY'S LAW* (forthcoming, Oxford University Press, 2011).

⁷ See Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 NYU J. INT'L L. & POL. 959 (2009).

⁸ See generally Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification* (April 21, 2010), available at SSRN: <http://ssrn.com/abstract=1593543>.

⁹ Judge Simma has noted the virtues of horizontal judicial dialogue in international law. See Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2004).