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Self-Determination, Secession, and Dispute Settlement after the Kosovo Advisory Opinion

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Abstract
This piece provides critical analysis of some of the broader consequences of what is potentially suggested by certain findings in the 2010 Advisory Opinion of the International Court of Justice on 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo'. The focus is on consequences for disputes generally, and disputes relating to self-determination and secession in particular, in either case including disputes that have been made subject to a Security Council-imposed settlement process. In the first place, the piece considers the relatively specific suggestion that sub-state groups are free to unilaterally terminate a Security Council-imposed process aimed at enabling the resolution of a dispute concerning their aspirations to external self-determination, without this termination having to comply with the principles of justice and international law. In the second place, the piece considers the relatively broad suggestion that the act of any sub-state group of declaring independence and seceding from the state within which it is located, without the consent of that state or any other international legal sanction, is likewise not regulated by international law.

Key words
Advisory Opinion; dispute settlement; ICJ; Kosovo; secession; self-determination

1. Introduction

This piece provides critical analysis of some of the broader consequences of what is potentially suggested by certain findings in the 2010 Advisory Opinion of the International Court of Justice on 'Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo'.[1]

The focus is on consequences for disputes generally, and disputes relating to self-determination and secession in particular, in either case including disputes that have been made subject to a Security Council-imposed settlement process. In the first place, the piece considers the relatively specific suggestion that sub-state groups are free to unilaterally terminate a Security Council-imposed process aimed at enabling the resolution of a dispute concerning their aspirations to external self-determination, without this termination having to comply with the principles of

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1 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, 2010 ICJ Rep., obtainable from www.icj-cij.org (hereinafter *Kosovo* Advisory Opinion).

justice and international law. In the second place, the piece considers the relatively broad suggestion that the act of any sub-state group of declaring independence and seceding from the state within which it is located, without the consent of that state or any other international legal sanction, is likewise not regulated by international law.

2. The function of the interim regime of UN administration in Kosovo

In 1999, the UN Security Council, through Resolution 1244, imposed in provisions passed under Chapter VII of the UN Charter an interim arrangement whereby the administration of Kosovo would be conducted by the United Nations.[2] In its Advisory Opinion, the Court stated that the regime introduced through Resolution 1244 'must be understood as . . . aimed at addressing the crisis existing' in Kosovo in 1999.[3] The purpose of the regime 'was to establish, organize and oversee the development of local institutions of self-government' and was 'aimed at the stabilization of Kosovo'.[4]

This description ignores the deeper purpose in relation to which stabilization and developing local institutions were merely corollaries.[5] On the one hand, those who had conducted the bombing campaign that preceded the introduction of UNMIK, although having succeeded in their ostensible aim of deterring in the short term the perpetration of Serb atrocities against the Albanian population in Kosovo, did not wish to see the eventual resumption of Serb control over the province in case the risk of atrocities returned. On the other hand, one solution to this, independence for Kosovo, was rejected not only, obviously, by the then Federal Republic of Yugoslavia (Serbia and Montenegro) in general and the Serbs in Kosovo in particular, but also by Russia.

Bearing in mind the foregoing, the ultimate function of UNMIK was a means of freezing the situation on the ground, removing the risk of violations perpetrated against the Albanian population by removing the FRY presence, but with a UN administration rather than Kosovar independence.[6] Resolution 1244 created a breathing space to enable the dispute about the final arrangements in Kosovo to be settled. In the event, the settlement was arrived at unilaterally, that is to say not on the basis of the agreement of both of two main disputants, the Albanian leadership in Kosovo and what was by then Serbia. What is significant for other situations in the future is what the Court said about the law that applied to this unilateral resolution.

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2 Resolution 1244, adopted by the Security Council at its 4011th meeting on 10 June 1999, UN Doc. S/RES/1244 (1999), obtainable from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement (hereinafter Security Council Res. 1244).

3 *Kosovo* Advisory Opinion, *supra* note 1, para. 97.

4 Ibid., paras. 98 and 100.

5 For a detailed consideration of the purposes associated with UNMIK in Kosovo, and how they relate to other arrangements involving international territorial administration, see Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008), Chapters 7 and 8.

6 Ibid., at 194–5, 220, and 241–2.

3. The legality of a unilaterally imposed 'settlement' or termination of the interim regime

Security Council Resolution 1244 created an interim arrangement, via administrative control exercised by UNMIK, and the continued enjoyment of title over the territory by what was then the FRY, 'pending a political settlement'.[7] Clearly, the word 'settlement' is not the same as the word 'agreement', and does not necessarily imply that to be lawful, both 'sides' in the territorial dispute (and/or other actors with a legitimate interest such as the UN Security Council) must agree. But international law does impose a legal test on any settlement, because, in Article 1 of the UN Charter, disputes are to be settled 'in conformity with the principles of justice and international law'.[8]

To be lawful, a non-consensual 'settlement' in this context has to comply with the general international-law framework, which, in turn, requires a consideration of whether or not the Kosovar people had a right of external self-determination, in the light of Serbia's right to territorial integrity.[9] However, in this Opinion, the Court stated that the phrase 'settlement' in Security Council Resolution 1244 had been invoked only with respect to the responsibilities of UNMIK, and was in any case subject to various interpretations, and so cannot be construed to prohibit a unilateral declaration of independence.[10] The broader suggestion potentially made by this determination is that in a situation in which an international legal regime, even one, as here, crafted by the UN Security Council and introduced via mandatory provisions of a resolution passed under Chapter VII of the UN Charter, creates an interim arrangement, to provide the space for a 'settlement' of a dispute, one of the disputants is free to unilaterally terminate this arrangement, without having to account for whether or not the termination constitutes a lawful 'settlement' of the situation, if the disputant is a non-state actor.

Here, it is important to address the argument made by those in favor of the unilateral declaration of independence that in essence, when all attempts have been made to resolve the situation consensually, and where there is also no agreement within the Security Council that would be necessary to vary or terminate the interim regime set up in Resolution 1244, the imperatives of settling disputes, of not letting them remain frozen for too long, justifies, as an exceptional measure of last resort, a unilaterally imposed settlement.[11] However, such a measure should still involve a settlement that is in accordance with the principles of justice and international law. What is striking about the Court's view on this issue is that it seems to suggest that, actually, no consideration of the lawfulness of the settlement as a matter of

7 Security Council Res. 1244, *supra* note 2, para. 11(c).

8 Charter of the United Nations, signed on 26 June 1945, entered into force on 24 October 1945, Art. 1 (obtainable from www.un.org/en/documents/charter/index.shtml).

9 Cf. Ralph Wilde, 'Kosovo 2008: Independence, Recognition and International Law', (2008) V(2) *Soochow Journal of International Law* 50–82; a version of the remarks also available as Ralph Wilde, 'Kosovo: Independence, Recognition and International Law', paper presented at Chatham House (the Royal Institute of International Affairs), London, 22 April 2008, contained in 'Kosovo: International Law and Recognition', Discussion Group Summary, Chatham House, 8–20 (obtainable from www.chathamhouse.org.uk/files/11547_il220408.pdf).

10 *Kosovo* Advisory Opinion, *supra* note 1, para. 118.

11 See the discussion and sources cited in the publications cited *supra* note 9, *passim*.

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general international law is required when an interim regime set up to continue until a settlement is reached is then terminated.

4. Non-state actors and territorial integrity

The broader potential significance of the opinion relates to all situations in which sub-state groups aspire to independence, irrespective of whether or not such situations have been made subject to special international legal regimes relating to their settlement. In the opinion, the Court concluded that the right of territorial integrity, in this case of what was by 2008 Serbia, was opposable to only states, and not also non-state actors, in this case the Kosovo leadership who declared independence.[12] In doing so, the Court, in effect, sanctions as lawful what would be a violation of a state's territorial integrity were it conducted by another state rather than a non-state actor. All sub-state groups in the world are now on notice that, according to this view, there would not appear to be a general international law rule barring them from declaring independence.

For many years, the question of whether and to what extent the legal right of external self-determination applies beyond the colonial context has been hotly contested.[13] But this Advisory Opinion reminds us of the need to think carefully what difference that legal right ultimately makes. It might have been thought that the existence or lack of a right to external self-determination affects, legally, whether or not a declaration of independence violates the territorial integrity of the state whose territory is the object of that declaration. However, the Court's finding is that the state's right to territorial integrity is not opposable to groups within it at all, and so whether or not such groups have a right to self-determination is beside the point: they are not subject to an obligation to respect this territorial integrity in the first place.

As far as the state's territorial integrity is concerned, then, the right of external self-determination is not relevant, legally, to the acts of groups within it who aspire to independence. When this is coupled with the uncertainty as to whether even those groups who *do* have a right to external self-determination actually have a right to unilateral secession in pursuance to this right, it would seem that as far as the international legal rights and wrongs of the acts of groups within states who aspire to independence are concerned, whether or not such groups have a legal right to self-determination actually makes little difference.

5. The legality of recognizing secessionist entities

What is left outside the foregoing analysis is the legal position of states who respond to such declarations of independence, since the Court affirms the opposability of the right of territorial integrity to such states.[14] Even if, then, according to the Court's

12 *Kosovo* Advisory Opinion, note 1, paras. 79–84.
13 The source material on self-determination is voluminous. See the sources cited, and the discussion, in Wilde, *supra* note 5, Chapter 5, note 5 and Sources List, section 5.4.
14 *Kosovo* Advisory Opinion, *supra* note 1, para. 80.

view, a sub-state territorial group appears, legally, to have a free hand in declaring independence as far as its relationship to the host state is concerned, other states do not enjoy such leeway with respect to their response.

The legality of recognition, in circumstances under which the declaration is opposed by the host state, would hinge on not only whether that which is being recognized conforms to the legal criteria of statehood, but also whether or not the recognition was in conformity to, or in violation of, the right of territorial integrity enjoyed by the state whose territory is now claimed by the secessionist entity.[15] It can be argued that a right to external self-determination potentially alters the position here, rendering lawful a recognition that would otherwise be an unlawful violation of the other state's right to territorial integrity.[16]

If one takes the view that the people of Kosovo did not enjoy a legal right to external self-determination in 2008, and speculate that this was the conclusion drawn by at least some of the states who nonetheless encouraged the independence declaration and then recognized it when it was made, then it is necessary to ask what difference, actually, this form of violation of territorial integrity is actually going to make as far as compliance is concerned.[17] It would seem that in some cases, certain states are willing to violate their obligations to another state, in order to bring about the resolution of a long-standing territorial dispute.

Where other sub-state groups who aspire to independence should focus their attention, then, is not so much on what the international-law position is on the legality of declarations of independence, but, rather, on their prospects for enjoying the support of at least the kind of critical mass of other states that will make their claim practically viable. As with so much else, this is a matter on which the Advisory Opinion makes no difference. Again, and now this is to go beyond the scope of the Advisory Opinion's focus, this conclusion is as true for those groups who actually have a legal right to external self-determination as it is for those who do not (cf. the lack of effective international support given to the legitimate claims to external self-determination of the people of East Timor between 1975 and 1999, South West Africa/Namibia from 1966 to 1990, and the Western Sahara since 1975).[18] So, it would seem, the right of external self-determination does not make much difference, since even if groups have it, other states may choose not to offer it much, if any, support, and even if groups lack it, other states may nonetheless wish to support their claims even at the expense of obligations owed to the states within which such groups are located.

15 See, e.g., the discussion in Ralph Wilde, 'Recognition in International Law', paper presented at Chatham House (the Royal Institute of International Affairs), London, 4 February 2010, contained in 'Recognition of States: The Consequences of Recognition or Non-recognition in UK and International Law', International Law Discussion Group Summary, Chatham House (obtainable from www.chathamhouse.org.uk/files/16184_040210il.pdf).

16 See the sources on self-determination indicated *supra* note 13.

17 For the argument that the people of Kosovo did not enjoy a legal right to external self-determination in 2008, see the publications cited above *supra* note 9, *passim*.

18 See Wilde, *supra* note 5, Chapter 5, sections 5.7 (on East Timor), 5.5 (on South West Africa/Namibia), and 5.6 (on the Western Sahara), and sources cited therein.

6. The legal status of secessionist entities

What is also left outside the frame of the Court's analysis is the legal significance of the law of self-determination on the claimant entity's conformity to the criteria for statehood. Here, it has been argued that the criteria will be applied more loosely – the threshold will be lower – if the entity in question has a right to external self-determination compared to a situation in relation to which no such right exists.[19] The people of Kosovo cannot take advantage of this presumption in favour of the legal viability of their state if they lack a right of external self-determination.

7. Conclusion

It is perhaps instructive to imagine if things had been different, with the Court concluding that the right to respect Serbia's territorial integrity was opposable to the people of Kosovo, that the people of Kosovo did not have a right of external self-determination, and that their declaration therefore violated Serbia's right to territorial integrity and was illegal. Equally, the General Assembly could have asked a 'legal-consequences'-type question and this could have led the Court to determine that Kosovo was not a state, and its recognition as such by certain other states was illegal.

Kosovo would still be de facto independent from Serbia, and other non-state groups around the world, whether enjoying or lacking a right of self-determination, would still see that the prospects for their aspirations lie chiefly in the realm of international politics rather than international law, in that the law of self-determination and the law of territorial integrity will be complied with, or not, in a manner that owes little to consistency and even-handedness. One should not lose sight of this when considering the merits of the findings made by the Court in the Advisory Opinion.

19 See the sources on self-determination indicated *supra* note 13, *passim*.

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