



Part (C): Rule of Law

Kosovo decision by the International Court of Justice: a landmark verdict on separatism

Mr. B. K. Sen

On 22 July 2010, the International Court of Justice (ICJ) ruled in a 10-4 decision that the unilateral declaration of independence by Kosovo in February 2008 did not violate international law.¹ Kosovo, a region in the Former Yugoslavia that Serbia considers to be within its sovereign territory, had been under transitional UN administration since 1999. Kosovo was first declared a UN protectorate on the alleged ground that Slovakia perpetrated acts of genocide there, however there are allegations of violations against both sides involved in the conflict in the region throughout the 1990s.²

Following NATO and then UN military interventions, since 2003 the UN encouraged talks about the status of Kosovo. From 2003 onwards, talks about Kosovo's status and political developments within Serbia and Kosovo progressed; as did the progress of the International Criminal Tribunal in the Hague with officials from both sides being indicted for war crimes and crimes against humanity. In 2006-2008, talks and ballots occurred in both Serbia and Kosovo and in late 2007 the Kosovo Assembly (parliament) was elected and held its first session in early 2008. Despite opposition from Serbia and other countries, in February 2008 the Kosovo Assembly declared Kosovo an independent sovereign nation.³ Serbia responded, informing the UN that this represented a 'force-



ful and unilateral secession of a part of the territory of Serbia'.⁴ Various governments supported the declaration and recognized Kosovo as an independent state; but other governments did not. The UN General Assembly asked the ICJ to issue an advisory opinion on the following question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'⁵ The case was argued before the ICJ in late 2009, and submissions and statements were provided to the Court from many countries (including China, Cyprus, Croatia, Russia, the US and UK) in addition to Serbia and the authors of Kosovo's declaration of independence.

The Court, as to be expected, was judicial in its approach. It considered the General Assembly's question and noted the Assembly had only asked for advice on whether the unilateral declaration accorded with international law.⁶ The ICJ specifically noted that it was not being asked 'about the legal consequences of that declaration. In particular [the General Assembly's question] does not ask whether or not Kosovo has achieved statehood'.⁷ And the ICJ accordingly limited its answer⁸ deciding that the Kosovo declaration of independence accorded with international law⁹ but that didn't necessarily mean that independence had been achieved.¹⁰

Despite these caveats, one could argue that the ICJ has taken a clear decision on the issues of self-determination and territorial integrity for the first time in 40 years.

Pandora's box has been opened. There are about 50 Kosovos waiting to happen on the African continent alone. The ruling strengthens the case for separatists around the globe. Cases that have been confronted with very brutal repression may feel that their chances for an independent state have increased. Since the division of Pakistan in the 1970s, Bangladesh has become truly independent despite strong opposition and predictions to the contrary from what was then West Pakistan. The Kosovo ruling will give additional legal ammunition to independence movements in Kashmir, Burma, Iraq, Russia and China, to name but a few. One could also wonder what effect it may have on movements calling for greater indigenous autonomy within states, such as in Australia, Canada, New Zealand and the United States.¹¹



The United States of America has endorsed the ICJ's verdict and has asked all states to recognise Kosovo's statehood. China has reacted strongly and commented critically on the decision. Currently 72 countries, including the US, the United Kingdom and France, have extended recognition to Kosovo. The ICJ's landmark ruling could help Kosovo to cross the magic figure of 100, which would then allow it to qualify for formal membership of the UN. However continued significant opposition from various countries makes this uncertain.¹²

The ruling of the ICJ, though merely advisory, is a very important milestone in the struggle for self-determination. As noted earlier, the caveat on the ruling is that it pertains only to Kosovo's declaration of independence and not to its status as an independent state. But these exceptions do not dilute the high moral level of the struggle of the oppressed people for their right to self-determination. Edwin Baker, an expert on international law, has said that the Karen and Shan conflicts in Burma, the Kurd struggles in Iraq and the Kashmiri conflict were all comparable to the Kosovan situation. In this context, the struggle of the ethnic nationalities in Burma will be reinvigorated. Baker made a special reference to Burma because of the intensity of its ethnic campaigns. Inhabited by several ethnic nationalities in defined geographical areas, the ethnic struggles in Burma have received worldwide attention. Burma was under British rule as a single unit for almost a century, although for the purposes of administration it was split into Burma Proper and the Federated Shan States. There are certainly arguments that some ethnic groups, who have consistently opposed external rule and asserted their autonomy, may find points of support and encouragement from the ICJ ruling.

But the ICJ's decision reinforces that the question of recognition of statehood is also significantly a political question.¹³ One of the majority judges in the ICJ's decision, renowned international law professor Cançado Trindade, issued a separate opinion in which he identified some of the important issues in considering these types of cases.

Meeting the 'criteria of statehood' at international law involves having a permanent population,¹⁴ which is frequently understood as involving an identified 'people'. Judge Trindade noted 'There is in fact no terminological precision as to what constitutes a "people" in international law... despite the large experi-



ence on the matter. ...[T]here is conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people; these are all *factual*, not *legal*, elements, which usually overlap each other'.¹⁵ So one relevant question will be whether those facts exist in relation to those groups asserting independence from Burma.

The Judge also explained that self-determination in international law has progressed from its initial focus simply on decolonization, to now also addressing people who are being oppressed. The Judge stated: 'No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized.'¹⁶ Again, some interesting parallels will be seen here with Burma.

(Footnotes)

¹ The ICJ's majority decision is available at <www.icj-cij.org/docket/files/141/15987.pdf?PHPSESSID=53f9fcf5327dda735b8c0d7a7abf84b4> ('**ICJ Decision**'). Four of the majority judges issued separate opinions, in which one expressed the issue pithily: 'Declarations of the kind are neither authorized nor prohibited by international law': para [227] of Separate Opinion of Judge A. A. Cançado Trindade available <www.icj-cij.org/docket/files/141/16003.pdf>.

² The 'background' you consider in understanding the conflict depends on what perspective you take (eg. is the reaction to the 1998 violence the main issue; or we instead refer back to the 1980s/1990s broader Yugoslavia dynamics; or should we begin with Kosovo as part of Serbia since the first world war; or go earlier again?). The BBC website as a timeline of significant events in Kosovo, from 1300s to 2010: <http://news.bbc.co.uk/2/hi/europe/country_profiles/3550401.stm>.

³ Detail of the events leading to the declaration are contained in the ICJ Decision (see n1 above), para's [64]-[75].

⁴ ICJ Decision, para [77].

⁵ UN General Assembly Resolution 63/3, 8 October 2008. Available <<http://>



/daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/63/3&Lang=E>.

⁶ ICJ Decision para's [49]-[56].

⁷ ICJ Decision para [51].

⁸ The ICJ specifically noted the difference from a question in the 1990s about Quebec independence, which asked for the Canadian Supreme Court to decide whether international law supported a unilateral declaration of independence: para [55]-[56].

⁹ The ICJ Decision on the Kosovo declaration contains three parts: (1) the declaration was permissible under general international law [84], (2) it wasn't prohibited by the UN Security Council's [119], and (3) it was legal within Kosovo's constitutional framework [120]-[121].

¹⁰ '[I]t is entirely possible for a particular act - such as a unilateral declaration of independence - not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second': ICJ Decision para [56].

¹¹ Indigenous claims for greater recognition and rights have been strengthened in recent years by the establishment of the UN Permanent Forum on Indigenous Issues in 2002 which comprises members from UN states but also from indigenous groups; and the UN General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples 2007.

¹² 'The [ICJ's] opinion doesn't change or challenge the geopolitical reality... [Many countries including] China, Russia, India and Serbia have opposed Kosovo's secession [and although the ICJ's decision will result in] a number of countries that ... will recognize Kosovo, but not enough to ensure Kosovo's entry into major international organizations like the UN. And the most important resisters won't change their view... The same political incentives and calculations exist today [after the ICJ's decision] as yesterday [before the decision]': T Waters, Kosovo decision means continued uncertainty, instability in Balkans, 23 Jul 2010. Available <<http://info.law.indiana.edu/news/page/normal/15047.html>>

¹³ Eg. Chiang Huang-chih, 'ICJ's Kosovo decision is vague and very limited', Taipei Times, 28 Jul 2010. Available <www.taipeitimes.com/News/editorials/archives/2010/07/28/2003478995>.

¹⁴ Convention on the Rights and Duties of States (1933), art 1, available <www.oas.org/juridico/english/treaties/a-40.html>.

¹⁵ Separate Opinion of Judge Cançado Trindade (n1 above) para [228].

¹⁶ Separate Opinion of Judge Cançado Trindade, para [176].